European Labor Law in Times of Economic Crisis: Testing the Resistance of Workers' Rights at the European Union Level

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Abstract

At a time of economic crisis, the development of a European social policy is being tested. European legal instruments concerned with workers' rights are suspected to prevent a faster recovery of the economy that would rather need more flexibility being granted to businesses than an increased resistance of social rights to protect workers. On the other hand, the need to ensure workers' protection, when their situation becomes more precarious, seems more important than ever. This article examines whether social rights granted to workers at EU level can constitute a rampart against deregulation to the detriment of workers. It contends that the achievements of the European Union in the field of social policy are a source of resistance, as illustrated by the recent case law of the European Court of Justice. The article also defends the hypothesis of an ongoing process of "*constitutionalization*" of social rights at EU level, which would increase the solidity of the concerned rights. It relies on very recent cases, in which the concepts of "general principle" of EU law or "particularly important principle of European Union social law" were used to extend the protection of workers' rights beyond the legislative limits.

Key words: European social policy, European labor law, economic crisis, flexibility, working conditions, equality law, information and consultation of workers, working time, general principles of EU law, *Constitutionalization*.

Ⅰ. Introduction

Europe, as other parts of the world, lives incrisis. Since 2008, the sharp increase of unemployment rates in the European Union (EU), is only one sign of the social and economic unrest, which the EU and its Member States have to face. Another aspect is the vast number of companies that have engaged in reorganization plans, leading to important collective redundancies or, alternatively, a serious downgrading of workers' rights.

As the European Commission recently underlined, the situation is particularly worrying[1]: EU unemployment has remained persistently above 9.5% since early 2010 and escalated to 10.2% in February 2012, then up again to 11.1% in July 2012[2]. Six million job losses have been incurred in the EU since 2008. As the Commission underlined, the deceleration of growth since mid-2011, with a less favorable outlook for 2012, has increased the challenge in terms of employment, social inclusion and combating poverty.Thewidening divergences between Member States and regions were also pointed as a central issue. As a matter of fact, territorial differences and inequalities create tensions between regions of the European open area that need to be addressed. As a matter of law, they make the EU response to the crisis more complicatedas it has to take into account the distinct situations of Member states(let alone, for the moment, the "federalism" issue of EU jurisdiction). Even within the Euro zone (which only includes 17 out of the 27 members of the EU), the gap is tremendous between countries; for instance, the unemployment rate in Austria is just above 4% while in Spain is 20%.

In the context of economic crisis and divergences between European countries, not surprisingly, legal instruments concerned withsocialrights are questioned: whether they helplimit the impact of the crisis on workers' rights, or, on the contrary, prevent a faster recovery that needs more flexibility for businesses to reorganize freely than resistance of social rights to protect workers is an open question. Many will contend that it is one for economists, rather than legal scholars. However, beside the economic assessment of the situation and possible choices, there is plenty of space and need for legal analysis. Not

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1. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a job-rich recovery ("employment package"), COM 173 (Apr. 18, 2012).
2. Eurostat report of 2 July 2012 concerning European unemployment rates.

only is it dangerous, in our view, to leave it to economic theories to decide on workers' rights and social choices, with the risk that the dominant voice of the free-market doctrine, which has largely prevailed since the 1980's, muffles others. However, the current situation is also one in which the so called "European Social Model," which is built, to a large extent, in the fabric of law, is being tested.

To be sure, the very notion of a "European Social Model" is not at all clear[3]. For some, from the comparative perspective, this model consists in the sum of similar choices made in order to ensure social justice, by the European States. By and large, these common features include social welfare, workers' collective rights (right of association and to collective bargaining, in particular), regulation of work contracts to compensate the inequality between employers and employees, and some restrictions to the freedom of firms to dismiss workers[4]. This comparative approach of the "European" situation based on the identification of convergences among European countries, sometimes used to differentiate Europe from other parts of the world (the US, in particular)[5], is not the one we will refer to in this paper. Rather, ourfocuswill be on the policies developed, not by States, but by the European Union itself, in the field of labor and employment law.Whether this mix of policies constitutes a "model", that is, a coherent and original approach, which could be reproduced elsewhere, is not so much our concern than the assessment of the impact of the current crisis on the policies and legal instruments developed at Union levelin the field of labor law, and their enforcement by the European Court of Justice. Our objective is to consider the role and efficiency of a regional integration such as the European Union, and its institutions (the Court of Justice, in particular), in regulating social relations to protect workers, at times of crisis. To be sure, this approach, centered on EU policies, should not ignore the importance of Member states own situations and national policies. On the one hand, the institutional structure of the EUrelies heavily on Mem-

3. On this issue: M. Jepsen & P. Serrano, *Unwrapping the European Social Model* (Policy Press, 2006).

4. *Id*. According to the authors, this approach is mostly favored by political scientists, while legal scholars rather focus on the developments taking place at EU level.

5. For an example of this conception of the adjective "European", *see* V. Schmidt, *The future of European Capitalism*, (Oxford University Press, 2002). *Seealso*, for a comparative analysis of the history of European labor law, *The Making of Labour Law in Europe* (B. Hepple ed., Mansell Publishing, 1986, Hart Publishing, 2010).

ber states intervention to implement European policies. On the other hand, EU policies and law developments have to fit into national legal systems that have maintained a large degree of autonomy.Although this is not the objective of this paper to explore the issues of EU federalism and institutional choices, this dimension of European integration cannot be ignored.

For long, and sometimes still, the EU has been described as a free-trade zone or an economic union.But if it was ever so, the EU has,by now, movedway beyond that kind of integration to become more of a political and social union[6]. On the "social" side, EU law developments have their roots in the early beginnings of European integration[7], but questions remain on the powers that the Union can and should exercise in this field. In the domain of social policy, even though the jurisdiction of the EU has progressively increased[8], States have not surrendered all their powers to the Union. As the Lisbon treaty (2009) has madeclearin a new opening provision, social policy belongs to the sphere of "shared" competences.According to article 4 point 2) b) of the Treaty on the Functioning of the European Union (TFUE),"shared competence" between the Union and the Member States applies in the area of "social policy, for the aspects defined in this Treaty". In such a case of shared competences, not only do States continue to exercise a fair amount of power in the concerned field[9], but EU institutions are bound by the principle of *subsidiarity*, which means that "the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level" (article 5 point 3 TUE). In addition to the limitation of Union powers, in the field of social policy, *subsidiarity* requires any action taken by the EU in that field to be justified in terms of its efficiency, as compared to actions taken at a more decentralized level. Legally, this requirement has not been a serious obstacle[10]. For one thing,the European Court of

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6. On this transformation of the EU, *see*: P. Graig & G. de Burca (ed.), *The Evolution of EU Law*, (Oxford University Press, 1999) and A. Ott & E. Vos (ed.), *Fifty Years of European Integration : Foundations and Perspectives*, (T.M.C. Asser Press, 2009).

7. *See* C. Barnard, *EC Employment Law* 3-8 (Oxford University Press,3rd ed. 2006).

8. *See* below, part II.

9. For a presentation of the powers granted to the Union in the field of social policy by title X of the TFUE, *see below*, part II.

10. This does not mean that EU actions were never challenged for that matter. Cf. the (unsuc-

Justice does not apply strict scrutiny in reviewing the respect of that principle[11]. Moreover, harmonization of labor law can be justified not only to fulfill social policy objectives (harmonization of living and working conditions together with their improvement, according to article 151 TFUE) but also to ensure the "good functioning of the market", which allows harmonization of all laws that have an impact on fair competition between companies on the internal market[12]. Eventually, the greatest resistance lies on the political side: no matter how much power the Union is granted to harmonize labor and employment law, it cannot easily exercise these powers, due to Member States and/or EU law-making institutions divergences on social policy choices. As a result, a large part of the matters concerning employment and working conditionscontinue to be regulated at States' level. Nonetheless, as we will show, a number of achievements were made at EU level, and, in a time when workers' rights are threatened in Member States, the existence of those rights, entrenched in EU law, becomes more crucial.

States' resistance to European social policy is not independent from their expectations, as far as the EU activity is concerned. A regional integration as the EU, based on free-market rules, is stretched, particularly in times of crisis, between demands forfree-market achievements and social justice. There are questions, namely,on the role of European integration in limiting or, rather, boostingcompetition based on labor costs. Positively, and very basically, open and free competition between European companies shouldcontribute to economic development in countries were the standard of living is the lowest. Negatively, there is a risk that creation and development of an internal market fosterstheexploitation of labor costs, to the detriment of workers and industries established in countries, which combine a higher level of workers' protection and more regulation of business activity. Thus, genuine convergence of social policies and harmonization of workers' right at European level can be considered necessary to avoid a downward spiral, leading to alignment on the least advanced standard of protection[13]. However, "social

cessful) action taken by the UK against the directive on working time. Case C-84/94,UK v. Council, 1996 E.C.R I-05755.

11. As shown namely by *Id.*

12. For a critical approach of the justification of EU action for market purposes (and "market holism"), *see* A. Somek, *Individualism*: *An Essay on the Authority of the European Union*, chs. 7-8 (Oxford University Press 2008).

13. On this risk, *seenamely*: S. Deakin, *Regulatory competition after Laval*, 10 Cambridge

dumping" and the race to the bottom are difficult to measure: many factors determine changes in each Member state, and the specific impact of regulatory competition can hardly be distinguished.This may explain the nuanced approach thatEU law has followed,which can be described as an attempt to combine the two branches of the alternative: market efficiency to ensure social progress and the need for public intervention to regulate economic activities and protect the most vulnerable members of the society[14].

Keeping in mind the link between market integration and the development of a European social policy, this paper aims at providing a critical analysis of the reactions of the EU to the current economic crisis, in the field of social policy, and assess whether the achieved degree of harmonization resists or bends, and in which ways, under pressures for more flexibility.The objective is to put European social policy to test, and assess its resistance to economic crisis. Although the Union's powers in the field of social policy are limited and so are European social rights, they may still intervene as "shock absorbers", when pressures on social rights' develop both at states' level and at the EU level. First, rights enshrined in EU law may prove more resistant because they are harder to call in to question than national law. This, of course, is connected with the procedure of legislative revision or "constitutional" reforms (considering, as the Court of Justice does, that EU basic treaties are the Constitutional charter of the EU). This resistance is also connected with the role of the European Court of Justice and the interpretation of European social law by that Court. EU social rights, we contend, can play a similar role as national constitutional rights, in the face of legislative changes. In addition, because some of these rights have acquireda higher status, within the European legal system, they may have an even stronger force and resistance capacity.

In the first part of this article, we considerthe consequences of the crisis on social policies inMember States of the EU: this provides an indication not only onsocial issues considered important,at state level,after the crisis began,but also on the demand for more business flexibility that has been taken into account at that level.In comparison with the changes achieved or

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Yearbook of European Legal Studies, 581 (C. Barnard ed. 2008) and C. Barnard, *Social Dumping Revisited: Lessons from Delaware*, 25 E.L. Rev. 57 (2000).

14. As far as social policy is concerned, this « nuanced » approach is expressed by TFUE art 151 § 3.

contemplated at state level, we focus, in a second part, on the achievement of the EU in the field of social policy. In the third part, the paper examinesthe impact of the crisis on workers' rightsguaranteed by EU law. The last part is devoted to the idea of a "*constitutionalization*" of social rights, and the hypothesis that increased resistance to changes may derive from this evolving process.

Ⅱ. Economic Crisis, Labor Reforms, and the Demand for Increased Flexibility in Member States

Although all member States have felt the blow of the economic crisis, their situationsare not homogeneous. To be sure, increased unemployment is a common concern but,since 2008, while some countries have, more or less, recovered from the crisis (Germany, Austria, Sweden…), others are more deeply entrenched than ever in a critical situation (Greece, of course, and Spain, more recently), and another group (including namely France and Italy) is witnessing increasing unemployment and public deficits that put a huge pressure on social and economic policies.

In the face of specific problems, States' reactions are, quite naturally, diversified. Some general trends can nonetheless be identified[15], and they divide between two different periods[16]. In the first period (2008-2010), most states took urgent measures to face a crisis that they considered mostly the result of external factors.In addition to supportingbanks and other industries, social measures included in all countries, but the UK, increased internal flexibility through reduction of working time, using"short time working schemes", flexible working time arrangements or temporary closures.Still on the working time side, some countries have tried to foster part-time employment, making it financially attractive for firms (Greece, Spain and Hungary), and this was more frequent, deregulated the organization of working time (Greece, Hungary, Poland). In certain countries, such as Austria, Italy, Germany and Sweden,

15. On the economic aspects of the situation: European Commission, economic crisis in Europe: Causes, consequences and responses, 35-38 (Luxembourg: Office for Official Publications of the European Communities, 2009).

16. On this approach, *see* S. Laulom, *Les dangereuses évolutions du droit social dans une Europe en crise*, 763 Droit Ouvrier 99 (2012).

reduction of working time was negotiated and led to a reduction of wages, in order to cut costs for companies and maintain jobs.In that transitional period, efforts were made to increase professional training and help workers have-access to new jobs (Belgium, Austria, Spain) while unemployment benefits were extended to previously non-covered situations.

After this first stage, reforms adopted in EU Member States further diversified. However,there was also a wave of converging measures, either planned or achieved.They concernedthe law on dismissaland pursued an objective of increased external flexibility, which necessitates that dismissals be less costly and time-consuming for firms. Such evolutiontoward more flexible standards applying to redundancies has been legitimized by the economic crisis, without any data clearly showing acorrelation between the regulation of workers' dismissal and unemployment rates[17]. Even in the UK, where dismissal is known to be much less regulated than in most other member states, reforms are suggested and supported by the conservative government, to grant an even greater margin of discretion to employers in various fields, including calling in question the rules protecting workers in case of unfair dismissal[18].

Another evolution concerns collective bargaining, which tended to "decentralize", in order to give more legal force to agreements adopted at company level (including when it means derogating from collective agreements concluded at branch level). The idea, again, is to give more flexibility to firmsand allow them to make their own arrangements, as far as working conditions are concerned.So called "concession bargaining" or "give-back" agreementsis a good illustration of the outcome of such decentralization of collective bargaining on workers' rights: in the framework of such agreements, workers agree to give up rights and advantages in exchange for the companies' commitment to maintain jobs.The agreements, concluded at the automobile company FIAT in December 2010, gave a good idea the huge toll that workers sometimes pay, in the process: these agreements degraded, in unheard ways, workers' rights and working conditions[19].

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17. On this absence of correlation, *see*: ILO, World of Work Report 2012, Better Jobs for a Better Economy, *available at* http://www.ilo.org/global/publications/books/world-of-work/WCMS_179453/lang--en/index.htm(visited Aug. 21, 2012).

18. *See* the « Beecroft » report on Employment Law, 24 Oct. 2011, *available at* http://news.bis.gov.uk/Press-Releases/Business-Secretary-Vince-Cable-statement-on-the-publication-of-the-Beecroft-report-67a55.aspx (visited Aug. 21, 2012).

19. On the FIAT agreements *see*,*Bargaining in the Shadow of Free Movement of Capital*, 8

Another source of flexibility, throughout the period, was found in the use of fixed-term contracts, which continued to be very common:as the European Commission noted, "most of the new jobs created in recent years (even before the crisis) were based on temporary contracts and other non-standard forms of employment."[20]Recourse to such contracts was considered by the Commissionas a way to increase the fluidity in the labor market, and made it easier for firms to adapt "labor input" to new forms of production and work organization. Positively, it contributed to flexibility, a demand very high on the agenda of European companies, even before the crisis started.

This rapid overview of the situation in Member States shows that the impact of the crisis on labor and employment law has been dealt with, at States level, through granting more flexibility to firms, both in terms of working time (internal flexibility) and possibilities to dismiss workers (external flexibility).These attempts to boost flexibility has sometimes gone hand and hand withfacilitated access to social security benefits or other financial support to workers affected by the economic slowdown, andin some countries, it has facilitated a focus on vocational training as a means to prevent workers from falling in"the trap of unemployment".

This pattern more or less corresponds to the doctrine of "*flexicurity*", borrowed from Denmark and the Netherlands, has become the dogma in many Member States, and at the Union level. Recently, the European Commission defined"*flexicurity*" as a concept that "brings together a number of labor market policies (contractual arrangements, active labor market measures, lifelong learning, and social protection systems), in an integrated and consistent way, to boost both flexibility and security and make labour markets more resilient to the processes of economic adjustment."[21]But it is far from evident that the EU has the power to develop and enforce this model of "*flexicurity*"relying on both flexibility granted to firms and social protection guaranteed to workers. Rather, because it lacks powers in the field of social security and social assistance, the Union's influence consists mostly in disseminating "*flexicurity*" as a "good practice" for States to share, through soft law instruments. But this does not mean that EU law cannot impact, at the present time, on some of the social issues deriving from the crisis and policies contemplated in

European Review of Contract Law 167 (2012).

20. Communication of the Commission, Toward a job-rich recovery, cited *supra* at note 1.

21. *Id.*

Member States. As we mentioned in the introduction, the EUdetains substantial powers in the field of social policy and adopts, on this basis, a number of legal instruments to protect workers' rights.

Ⅲ. The Development of European Powers and Legal Instruments Protecting Social Rights

Full employment, social progress, social justice and social cohesion belong to the objectives of the EU mentioned in the treaty on European Union (article 3). This social dimension has always been entrenchedin the project of European integration, but the powers of EU in the field of labor and employment law have increased extensively since the Treaty of Rome creating that created the European Economic Community (EEC, 1957). To be sure, the central idea, at the inception of the EEC, was that social and economic progress would result primarily from the equitable and efficient redistributive mechanism of the common market (which has become, since the Single European Act of 1986, the "internal market"[22]). As stated by Article 117(2) of the Treaty of Rome "the functioning of the Common Market . . . will favor the harmonization of social systems."When the Treaty of Rome was signed in 1957, it was not oriented towards much supranational social regulation, butprimarily concerned with the establishment of a functioning, undistorted, and free market, based on free movement of workers, capital, services, and on freedom of establishment[23].

The idea that social progress would result from the functioning of the market is still referred to and expressed in the TFUE adopted in Lisbon in

22. The notion of « internal market » can be considered to be only a new version of the common market: it is defined, in SEA in terms very close to those used by the European Court of Justice for the common market, before the SEA was adopted (for a definition of the Common market by the Court of Justice, *see namely* ECJ, Case 26/76 Metro, 1977 E.C.R. 1875 and Case 15/81 Schul, 1982 E.C.R. 1408. Nonetheless, the internal market can also be considered a more limited concept, as it includes only the four freedoms (free movement of goods, services, persons and capital), and leaves aside the idea of a positive integration through common policies, including social policy (on that distinction and for a critique of the evolution, *see namely* P. Pescatore, *Some Critical Remarks on the Single European Act*, 24 CMLR 9-18 (1987).

23. N. Contouris, *European Social Law as an Autonomous Legal Discipline*, 28 Yearbook of European Law 2009 98 (2010).

2009 (article 151 § 3), but it goes together, and that has not changed since the beginnings of the European integration, with the belief that public intervention is also necessary to ensure social progress[24]. The balance, between market-driven social progress, and the development of social and economic rights resulting from legislative intervention, has evolved in the course of the Union's evolution, but both dimensions were always part of the EU model. As the European Court of Justice explained, the European Union "is not merely an economic union but is at the same time intended, by common action, to ensure social progress and seek constant improvement of the living and working conditions of the peoples of Europe."[25] More recently, this language was only slightly amended when the Court insisted that « the activities of the Community are to include not only an "internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital", but also "a policy in the social sphere."[26]

The Amsterdam Treaty (1997) has been a major step forward in the direction of the Union's intervention in social matters. First, a new title on Employment policy was created (currently title IX TFEU). Employment has thus become an objective of Unions' policies, but with a specific status: the treaty only allows "coordination" of national policies in that field, and excludes harmonization of these policies[27]. As a consequence, neither directive forcing Member States to bring their laws closer together, nor *a fortiori* regulation *uniformizing* national laws can be adopted in that field, while these instruments remain essential basis of EU social policy. In addition, the Treaty of Amsterdam beefed up the title of the treaty devoted to social policy (currently title X TFEU) by the adjunctionof the provisions contained in the "social protocol", whichwas attached to the treaty since its revision at Maastricht in 1992[28].

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24. On the relationship between market achievement and social rights, *see* : O . de Schutter & S. Deakin (ed.), *Social Rights and Market forces*, (Bruylant, 2005) and S. Guibboni, *Social Rights and Market Freedom in the European Constitution : a Labor Law Perspective.* (Cambridge University Press, 2006).

25. ECJ, Case C-270/97 Deutsche Post AG v Elisabeth Sievers there is need of year E,C,R, and number I-xxx; Case 271/97, Brunhilde Schrage, 2000 E.C.RI-929.

26. ECJ, Case C-438/05, Viking Line, 2007 E.C.R I-10779.

27. TFEU art, 149 § 2 .

28. The system of a protocol, rather than inclusion in the treaty, was used, in 1992, in order to

To nuance, one must admit that the revision of the treaty in 1997, and the vastextension of Union's powers that it achieved, has not led to general competence for social policy issues being put in the hands of EU institutions.Nor did it suppress the requirement for a unanimity vote at the Council of ministers, in some fields in which the Union has been granted powers to adopt directives harmonizing the laws of Member states. This concerns "social security and social protection of workers"; "protection of workers where their employment contract is terminated"; "representation and collective defense of the interests of workers and employers" and"conditions of employment for third-country nationals legally residing in Union territory"[29].In addition, there remains, in a few domains, a prohibition for the Union to harmonize the laws of Member states: "pay, the right of association, the right to strike and the right to impose lock-outs"[30]were leftwithin the exclusive competence of Member states. Even after Amsterdam, as the European Court of Justice indicated « in choosing the measures capable of achieving the aims of their social and employment policy, the Member States have a broad margin of discretion. »[31]

In spite of these formal limitations, which have not been erased by the more recent revisions of the treaties at Nice (2001) and Lisbon (2009),substantial legislative developments took placeat the EU level in the field of labor and employment law, long before the Union was granted larger powers in that field.These developments have their origin back in the early 1970's, when states decided to move on with a social agenda[32], in relation to

allow the UK to remain unbound by the new powers granted to the Union in that field.

29. TFEU art, 153 point 1.

30. *Id*. point 5.

31. ECJ, Case C-167/97, Seymour-Smith, 1999 E.C.R I-623.

32. The first Social Action Program was worked out by the European Commission in 1974 in response to a mandate issued by the Heads of States meeting in Paris at the Summit of October 1972. The final communiqué of that Summit had declared that the Member States "attached as much importance to vigorous action in the social field as to the achievement of economic union... (and considered) it essential to ensure the increasing involvement of labour and management in the economic and social decisions of the Community". By a Resolution adopted on 21 January 1974, the Council of Ministers approved the Social Action Programme prepared by the Commission, which involved more than 30 measures over an initial period of three to four years. The three main objectives were: the attainment of full and better employment in the Community, the improvement of living and working conditions, and the increased involvement of management and labour in the economic and social decisions of the Community and of workers in companies.

the early signs of economic crisis that affected European economies. Inthe 1970's, legislation was adopted in some important domains, which would remain core parts of EU social policy: battling sexdiscriminations,[33]information and consultation of workers in cases of company restructuring (company reorganization, closures, mergers and acquisitions, downsizing, outsourcing, relocation etc.)[34]This first series of directives found its legal basis either on the equal pay provision of the social policy title (for sex equality directives) or on the provision of the treaty allowing harmonization of laws to ensure the good functioning of the market (article 100 of the EEC treaty).

In the 1980's and 1990's, legislative activity at Union's levelEU social policy extended to other central issues of labor law: health and safety at the work place[35], including the regulation of working time[36] and the protection of pregnant women (in relation with sex discrimination)[37] on the one hand; and on the other hand, the regulation of work contracts, flexible ones, especially in order to deal with the problem of labor market segmentation[38]. Throughout

33. The first directives on gender equality was adopted in 1975: Directive 75/117, of the European Economic Community of 10 Feb. 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, 19/02 EEC, 1975 O.J. (L 45) 19.

34. Two directives were adopted on that matter in the 1970's: Directive 75/129 of the European Economic Community of 17 Feb. 1975 on Collective Redundancies, 22/02 EEC, 1975 O.J. (L 48) 29 and Directive 77/187 of the European Economic Community of 14 Feb. 1977 on the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of Businesses, 05/03 EEC, 1977O.J. (L 61) 26.

35. More than 35 directives were adopted in that field, including two major ones: Framework-directive 89/391 of the European Economic Community of 12 June 1989 on the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers at Work, 29/6 EEC, 1989 O.J. (L 183) 1.

36. Council Directive (EC) No. 104/93 of 23 Nov. 1993 Concerning Certain Aspects of the Organization of Working Time, 13/12, 1993 O.J. (L 307) 18.

37. Council Directive 92/85 of the European Economic Community 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, 28/11 E.E.C, 1992 O.J (L 348) 1.

38. Council Directive 91/533 of EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, 18/10 ECC, 1991 O.J. (L 288) 32; Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, 20/1 ECC, 1998 O.J. (L 14) 9; Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE

the last decades, information and consultation of workers and anti-discrimination law continued to be major sectors of EU law developments. On workers' involvement,a very innovative instrument was adopted in 1994, during the establishment of the European Works Council in Community - scale companies for the purposes of informing and consulting employees,[39]andin 2002, a new framework directive on information and consultation of workers entered in force[40]. In addition to texts concerning sex discriminations[42], two directives were adopted in 2000. The first one addressed discrimination based on race and ethnic origin[43]; and the second one, based on religion or belief, disability, age or sexual orientation[44]. These new achievements in the area of anti-discrimination law were based on the new powers granted to the Union to combat discriminations by the treaty of Amsterdam[41].

Since the crisis occurred, in 2008, little progress was made, if any, on the legislative side of law developments. Harmonization of national legislations was stalled, it seemed, except for some acts that had been negotiated before the crisis occurred, and constituted the continuation of a deep-rooted policy at Union level.Among them: a revised directive on European Works councils (adopted in May 2009)[42], a directive on agency work (Nov. 2008)[43], and a

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and CEEP, 10/07 EC, 1999 O.J. (L 175) 43. On health and safety for workers employed under fixed-term contracts: Council 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, 29/07 ECC, 1991 O.J. (L 206) 19.

39. Council Directive 94/45/EC of 22 Sept. 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, 30/09 EC, 1994 O.J. (L 254) 64.

40. 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, Eur. Parl. Deb. (080) 29 (March 23, 2002).

41. Currently mentioned at TFEU art. 19.

42. Directive 2009/38/EC of the European Parliament and of the Council 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 (Recast), Eur. Parl. Deb. (122) 28 (May 16, 2009),This directive is a revision of the first directive adopted in 1994 (cited above).

43. Directive 2008/104/EC of the European Parliament and of the Council of 19 Nov. 2008 on temporary agency work, Eur. Parl. Deb. (327) 9 (May 12, 2008). The negotiations on the issues addressed by that directive started in the 1980's, when flexible works contracts became a core topic on the European Commission agenda.

directive on parental leave (March 2010)[44].Obviously, the years of crisis have not, so far,been a fertile ground for European social policy. However, the correlation should not lead to hasty conclusions. Even if the economic crisis had an impact, it would be excessive to attribute the whole responsibility for the legislative lethargyto the economic situation: the last two enlargements of the European Union, in 2004 and 2007, that led to 12 new members joining, mostly from central and eastern Europe, havemade it harder to adopt measures concerninglabor and employment law, in recent times.Increased divergences among Member states, in terms of economic and social situations, added to different expectations, as far as European integration is concerned, havecontributed to hinder further developments of EU social policy. However, if progress was limited in terms of adoption of new acts, this would not mean that EU previous achievements have been useless to workers employed on the EU territory. On the contrary, case law shows that some basic rights guaranteed at EU level, which emanated from the framework created by the legislation progressively adopted in the social field[45], were effective barriers, if not very numerous, against flexibility measures affecting workers.

Ⅳ. Resistance of European Social Rights in Times of Crisis

In recent years, while social legislation did not evolve much, the solidity of the European social "*acquis*" has been tested in courts. As usual, all sorts of pressures, needs, and demandswere brought forward in courts by economic actors, and European judgescould not ignore them. But it was also quite clear thatjudgeshad not decided to systematically adjust their interpretation tofit in with the changes affecting theireconomic environment. Rather, they felt free to continue on their previous lines of interpretation, at least until the law they had to interpret wouldevolve. Inmost cases decided, since the crisis started,

44. Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC, Council Directive 2010/03, 2010 O.J. (L 68) 13. The agreement implemented by the directive was concluded by social partners on June 18, 2009 to amend a former agreement concluded in 1995.

45. On this idea of a frame of reference created by directive adopted in the field of social policy for the development of social fundamental rights, *see* M.-A. Moreau, loc. cit. 309.

in the field of social policy,the European Court of Justice has preferred continuity to reactivity. As illustrated in a number of important fields, the Court has made use of EU social rights as a powerful resource against national attempts to make labor markets more flexible. Indeed, according to the principle of supremacy, whenever national law conflicts with EU law, it cannot be enforced and has to be set aside. Supremacy of EU law has this effect that the defective piece of national law is deprived of all legal force, once its contradiction with EU law has been affirmed. Only in some very recent cases did judges seem to step back, and adopt a less favorable approach to workers' protection than they used to, allowing national choices in favor of flexibility to be upheld. This is well illustrated in the recent development that took place in the four major domains of European social policy: equality law (A), the regulation of flexible labor contracts(B), working time(C) and workers' involvement in the process of firms' restructuring (D).

A. Equality Law

Equality law is probably the domain, in which European Union law plays the mostdecisive role for workers employed on the territory of Member States,at a time when their rights are called in question.In periods of crisis, there are great chances, indeed, that the most vulnerable workers have to pay a higher price, as they are not in a position to resist the increased pressure, and may be targeted as the first victims of firms downsizing policies. In that risky period for the weakest workers, the right to equality and non-discrimination continued to stand as a central pillar of European case law developments. As previously mentioned, EU law does not only require equal treatment of men and women in the workplace but also the elimination of discriminations based on race and ethnic origin, religion or belief, disability, age or sexual orientation.In the recent period, case law has mostly concerned gender issues and age discrimination.

As far as gender equality in the workplace is concerned, the Court, in spite of the economic downturn, has persistently pursued the European objective of a balanced participation of men and women to economic activities. In the same line, the regulation protecting pregnant[46] women has been strictly applied to meet the objective of both protection and equality.For instance, when

46. Directive 92/85, cited above.

the Court had to address the question of the evolution of a woman's pay, in caseshe is transferred to another position for health and safety reasons in the course of her pregnancy, the reasoningrelied on the objective of gender equality and the need to ensure, as much as possible, that changes happening for reasons related to sex differences, such as pregnancy, do affect as little of possible women's careers. The Court decided that a « pregnant worker temporarily transferred to another job (…) remains, during that transfer, entitled to the pay components or supplementary allowances which relate to her professional status such as, in particular, her seniority, her length of service and her professional qualifications. »[47]. A woman may be deprived of « the pay components or supplementary allowances which (…) are dependent on the performance by the worker concerned of specific functions in particular circumstances and which are intended essentially to compensate for the disadvantages related to that performance »[48], but this possibility still limits the losses that may occur after a transfer to another position.

Similarly, in the interpretation of the rights granted to workers by the directive on parental leave[49], the Court of Justice relied on the objective of gender equality to develop an extensive conception of these rights. Because most workers on parental leave are women, this approach corresponds, according to the Court, to the European prohibition of « indirect discriminations »[50].According to the directive, « rights acquired or in the process of being acquired by the worker on the date on which parental leave starts shall be maintained as they stand until the end of parental leave. At the end of parental leave, these rights, including any changes arising from national law, collective agreements or practice, shall apply.»The Court considers that « rights acquired or in the process of being acquired"cover all the rights and benefits, whether in cash or in kind, derived directly or indirectly from the employment relationship, which the worker is entitled to claim from the employer at the date on which parental leave starts. Thus, the right of a full-time worker on part-time parental leave to a period of notice in the event of the employer's unilateral termination of thecontract must be included. The same reason-

47. ECJ, Case C-471/08 Parviainen v. Finnair Oyi (2010) E.C.R. I-6533 , point 60.

48. Point 61.

49. Council 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.

50. ECJ, Case C-116/08 Meerts (2009) E.C.R. I-10063.

ing applied,concerning the right to benefit from a paid leave acquired before the parental leave started: workers exercising their right to a parental leave of two years cannot lose, following that leave, their right to paid annual leave accumulated during the year preceding the birth of their child, the Court decided[51].

Just as in the field of gender equality, there is a long series of cases concerning age discrimination in the recent case law of the European Court of Justice. The flow did not seem to slow down at allin the aftermaths of the crisis[52].In most cases, the Court had to decide whether the justification brought forward by a national government, or a private entity, to maintain or introduce a distinction based on age was legitimate and, if so, evaluate the proportionality of the contested measure to reach the legitimate aim pursued. To be sure, the open conception of legitimate aims, able to justify distinctions based on age, is a limit to the protective nature of anti-discrimination law in that field: all kinds of social policy objectives can be invoked, such as the creation of new opportunities for younger people on the labor market[53], ensuring a mix of generation in the workforce[54], and rewarding experience[55]. However, the case law shows that, even if the Court does not always sanction distinctions based on age as a violation of the prohibition to discriminate on that basis, it does exercise a certain level of scrutiny. European judges have, for instance, opposed the prohibition, which was deemed legal under national

51. ECJ, Case C-486/08, Zentralbetriebsrat der Landeskankenhaüser Tirols, 2010 E.C.R. I-03527, point 56.

52. Since 2009, the following cases were decided by the ECJ: Case C-388/07, Age Concern England, 2009 E.C.R. I-01569; Case C-88/08, Hütter, 2009 E.C.R. I-05325; Case C-341/08, Petersen, 2010 E.C.R. I-47; Case C-229/08, Wolf, 2010 E.C.R. I-1; Case C-555/07, Kucükdeveci, 2010 E.C.R. I-00365; Case C-45/09, Rosenbladt, 2010 E.C.R. I-09391 and Case C-499/08, Andersen, 2010 E.C.R. I-09343; Case C-250/09, Georgiev, 2010 E.C.R. I-11869, Case C-159/10, Fuchs, 2011, not yet published; Case C-297/10 and 298/10, Hennigs, 2011, not yet published; Case C-447/09, Prigge, 2011, not yet pubished. On recent developpements of the case law concerning age discriminations, *see namely* C. O'Cinneide, *Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age*, 2 Law and European Affairs 253 (2009); M. Mercat-Bruns, *Un point d'actualité sur la discrimination fondée sur l'âge après l'arrêt Bartsch*, Revue de Droit du Travail 62 (2009).

53. ECJ, Rosenbladt, cited above.

54. ECJ, Georgiev, cited above.

55. ECJ, Hennigs, cited above.

law, for pilots to work after the age of 60[56] or for dentists to practice after 68[57], because none of these limits were consistent with the policy objective invoked in their defense[58].The determination ofwages by reference to age was also considered a violation of EU anti-discrimination law[59], and so was the exclusion of periods of employment completed by an employee before reaching the age of 25 from the calculation of the notice period for dismissal[60].

To be sure, in a period of crisis, the Court could have opposed more efficiently to measures having an exclusionary effect, such as compulsory retirement after a certain age, when a pension can be claimed, a decision that clearly throws older workers out of the labor market[61]. In reviewing the contested measures, the Court mentioned the need to avoid exclusion of older workers from the labor market, but this did not lead to a prohibition of such schemes, a large margin of discretion being left in the hands of states[62] or social partners[63]. In a case in which the Court decided that a measure allowing dismissal at a certain age passed the proportionality test, the solutionwas justified by the fact that the termination by law of the employment contract at a certain age did not have the effect of forcing the person concerned to withdraw definitively from the labor market[64]: the measure, the Court contended, "does not prevent a worker who wishes to do so, for example, for financial reasons, from continuing to work beyond retirement age », and « it does not deprive employees who have reached retirement age of protection from discrimination on grounds of age, where they wish to continue to work and seek a new job ».Although the solution itself did not go in the direction of workers' protection andthe merits of the case are very doubtful, the language shows (that is indeed a very thin compensation) that the Court grants

56. ECJ, Prigge, cited above.
57. ECJ, Petersen, cited above.
58. On the contrary, the Court agreed on compulsory retirement for judges and university professors at age 68 (ECJ, Fuchs and Georgiev, cited above), because the limit was based on legitimate objectives consistent with the aim pursued.
59. ECJ,Hennigs, cited above.
60. ECJ, Kucükdeveci, cited above.
61. Many cases concern compulsory retirement after a certain age: ECJ, Fuchs, Georgiev, Prigge and Petersen, cited above.
62. ECJ, Age Concern England, cited above.
63. ECJ, Rosenbladt, cited above.
64. *Id.*, at point 75.

importance to the fact that no discrimination should bar workers from participating to the labor market. To nuance this decision, it must be noted that, in another case decided the very same day, the Court applied its doctrine more consistently and opposed a measure according to which "workers who satisfy the criteria for eligibility for a pension from their employer yet wish to waive their right to their pension temporarily and to continue with their career will not be able to claim the severance allowance"[65]. Because the measure at issue "actually deprives workers who have been made redundant and who wish to remain in the labor market of entitlement to the severance allowance merely because they could, inter alia because of their age, draw such a pension", it is considered to conflict with EU law requirements.

B. Regulation of Flexible Labor Contracts

Not unrelated with the objective of equality among workers, protecting workers employed under flexible labor contracts has been a major concern for the Court in the last couple years[66]. As previously mentioned, European legislation concerning flexible contracts has its roots in the early 1990's: directives adopted at that time tried to address the issue of labor market segmentation through regulating « non-standard » work contractssuch as fixed term or part time contracts[67].An effort was made to combine two different objectives: allowing firms to respond swiftly to changes on the market, and granting the « flexible » and more vulnerable part of the workforce a minimum level of protection[68].As the European Commission noted in its recent "Employment package"[69], there is currently a pronounced preference on the part of employers for non-standard contractual relationships. This may be due, the Commission suggests, to the much higher severance costs for open-

65. ECJ, Andersen, cited above, point 44.

66. Recent decisions include: ECJ, Case C-378/07, Angelidaki, 2009 E.C.R. I-03071; Case Zentralbetriebsrat der Landeskankenhaüser Tirols, cited above; Case C-395/08, Bruno and Pettini, 2010 E.C.R. I-5119; Case C-98/09, Sorge, 2010 E.C.R. I-5837.

67. On this issue, *see* European Commission, Green Paper, Modernising labour law to meet the challenges of the 21st century, Eur. Parl. Doc. (COM 708) 7 (2006).

68. On the mixed objectives of EU legislation, *see namely* M. Bell, *Between Flexicurity and Fundamental Social Rights: the EU Directives on Atypical Work*, 37 European Law Review 31-48 (2012).

69. *See* the European Commission Communication of 2012, cited above.

ended/standard contracts. This situation makes it all the more important that the limitations to the use of flexible contracts introduced by EU law and the rights guaranteed to workers under European directives be strictly enforced, notwithstanding the increased pressure towards more flexibility in a period of economic slowdown[70].Looking at the cases decided by the European Court of Justice since the beginning of the crisis, one may be satisfied that the European Court of Justice remained quite determined to avoid the abuse of flexible forms of employment and protect workers' rights.

Concerning the control of abuses, the Court decided, namely, that EU law precludes the law of a Member State to allow renewal of successive fixed-term employment contracts in the public sector, when these contracts were used, in fact, to meet fixed and permanent needs[71].More recently, the Court condemnedsocial policy measures adopted by a Member State in order to fight unemploymentamong seniors through allowing, for all workers aged over 58, the conclusion of an unlimited number of successive fixed-term contracts[72].

However, very recent developments have made it doubtful that the Court remained unmoved by the economic crisis, and consecutive higher demand for business flexibility in Member States. In a case decided in January 2012[73], the Court was asked to assess the conformity with European rules of a national law, under which an employee could, for 11 years, be employed by the same employer, for the same job, under a total of 13 fixed-term employment contracts. In such a situation, the abuse seemed so blatant that a sanction of the contested law was highly expected. But the Court, relying on the black letter of the directive rather than on the goal pursued(as it used to), decided that no violation of the European directive occurred:it was considered sufficient that each contract corresponded to an objective need for temporary staff to replace workers on leave. However, in that instance, if the Court did not wantto question globally,the legislative choice made by a member State and entrenched into its national system, it nonetheless suggested, in a form of

70. On the crisis impact on fixed-term employment, *see*M. Bell, *The principle of non-discrimination within the Fixed-Term Work Directive*, in M-A Moreau, *Before and After the Economic Crisis: What Implications for the 'European Social Model'?* 155-169 (Edward Elgar, 2011).

71. ECJ, Angelidaki, cited above.

72. ECJ C-109/09, Deutsche Lufthansa, 2011, not yet published.

73. ECJ Case C-586/10, 2012 Kücük 2012, not yet published.

compensation, that the particular situation of the worker in the casecould be considered abusive. Thiswill have to be determined, at a national level, by the court, which referred to the Court of Justice for a preliminary ruling in that case.

Although that very decision casts doubts on the remaining determination of the Court to limit flexibility to the detriment of workers, recent case law has continued to ensure minimum guarantees to non-standard workers' rights. As far as part-time work is concerned, the Court has been keen to reconcile the two objectives of protecting part-time workers and fostering a type of flexibility that can fulfill both companies and their employees' needs. For instance, the Court opposed a reduction of annual paid leave following the shift to part-time work.[74]

A more important and more visible strand of the case law concerns equal treatment of part-time or fixed-time workers with full-time or permanent employees. European directives impose, as their core requirement, the obligation for employers not to discriminate against part-time workers or workers employed under fixed term contracts. To be sure, the exact outcome of the application of principle of equal treatment isalways uncertain: European directives allow distinctions both when workers' situations are objectively different, and when there is a legitimate justification to distinguish. In exercising its control over measures adopted in Member States, the European Court of Justice has nonetheless tried to avoid that these possible grounds for distinctions deprive the equal treatment rule of all substance. The Court rejected, for instance, the difference made between part-time and full-time employees for deciding on the period of service required to qualify for a retirement pension, when only for part-time workers was the period not worked disregarded in the calculation of the period.[75]In another decision, the Court insisted thatthe notion of "objective reason" that conditions a different treatment of workers "requires the unequal treatment at issue to respond to a genuine need, be appropriate for achieving the objective pursued and be necessary for that purpose."[76]The test applied by the European Court is not passed when the difference in treatment issimply justified on the basis that the difference is provided for by « a

74. ECJ Zentralbetriebsrat der Landeskankenhaüser Tirols, cited above.

75. ECJ Bruno and Pettini, cited above.

76. ECJ Zentralbetriebsrat der Landeskankenhaüser Tirols, cited above.

general, abstract national norm »[77].For instance, when seniority is a condition for awarding a length-of-service increment, it does not allow the global exclusion of a category of workers on the basis of the temporary nature of the employment relationship[78]. Again, the Court requires that the unequal treatment at issue be justified « by the existence of precise and concrete factors, characterizing the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria in order to ensure that that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose »[79].Similarly, when seniority is invoked to apply a different treatment to workers employed for afixed term as compared to the treatment reserved to permanent employees, the Court reviews the conditions under which seniority is used to exclude the former from an internal promotion, and requires evidence that the condition of seniority requested, in order to be promoted,is actually able to satisfy the objectives pursued by the system of internal promotion[80].

C. Working Time Regulation

Working time regulation is another field in which basic social rights are protected under European Law. In that field, recent cases have shown very neatlythat EU law constitutes a significant source of resistance to measures limiting the right to annual paid leave[81] or weekly rest[82], in particular. The Court decided, for instance, that workers could not be deprived of the right to an annual paid leave for the reason that they have not achieved a minimum period of actual work during the reference period, due to sick leave[83]. According to the Court, the particular importance of that right precludes any restrictive condition barring access to its benefit. That solution is justified by the fact that, according to the Court, the annual paid leave is not only meant

77. *Id.*

78. ECJ Cases C-444/09 and C-456/09, Gavieiro Gavieiro, 2010 E.C.R. I-14031.

79. Point 55.

80. ECJ, Case C-177/10, Rosado Santana, 2011, not yet published.

81. ECJ, Case C-282/10, Dominguez, 2012, not yet published.

82. ECJ, Case C-243/09, Fuß, 2010 E.C.R. I-9849; Case C-429/09, Fuß, 2010 E.C.R I-12167.

83. ECJ, Dominguez, cited above.

to enable workers to rest from carrying out the work they are required to do under their contract of employment, but also to allow them to enjoy a period of relaxation and leisure[84].

As far as remuneration to be paid to workers during the annual leave is concerned, the Court has also adopted a rather extensive conception of workers' rights[85].Remuneration during paid leave should include the various components of the worker's total remuneration, and not only to the maintenance of his basic salary: all the components intrinsically linked to the performance of the tasks, which the worker is required to carry out under his contract of employment should be included and, in addition, all the elements relating to his personal and professional status.The Court confirmed that the purpose of the requirement of payment for that leave is to put the worker, during such leave, which is considered a period of rest and relaxation, in a position which is, as regards remuneration, comparable to periods of work[86].

D. Workers' Involvement in the Process of Firms Restructuring

Last but not least, workers' involvement in the process of firms restructuring has also been an issue on which, quite expectedly, the Court had to deal with since the crisis began[87]. When restructuring becomes more frequent and involves important changes in workers' situations, including a possible breach of their work contract, information and consultation of workers on the company's strategic decisions becomes more important than ever. In one of the recent cases, the central issue of the moment when consultation of workers should take place, in a case of restructuring was addressed[88]. According to the court, « the consultation procedure must be started by the employer once a strategic or commercial decision compelling him to contemplate or

84. *See* ECJ, Case C-350/06 and C-520/06, Schultz-Hoff and Others, 2009 E.C.R. I-00179, point 25 and, more recently, ECJ Case C-214/10, KHS, 2011, not yet published, point 31.

85. ECJ, Case C-155/10, Williams, 2011, not yet published.

86. *Id.*

87. Among recent decisions: ECJ, Case C-405/08, Holst, 2010 E.C.R. I-985; Case C-12/08 Mono Car Styling (2009) E.C.R. I-06653; Case C-44/08, Akavan Erityisalojen Keskusliitto AEK e.a. (Fujitsu), 2009 E.C.R. I-8163; Case C-323/08, Rodriguez Mayor, 2009 E.C.R. I-11621.

88. ECJ, Fujitsu, cited supra.

to plan for collective redundancies has been taken »: that is to say, not too early, when there is nothing concrete to discuss (« the *raison d'être* and effectiveness of consultations with the workers' representatives presuppose that the factors to be taken into account in the course of those consultations have been determined »), but not too late, when there is no point to consult workers because collective redundancies have already been decided (« consultation which began when a decision making such collective redundancies necessary had already been taken could not usefully involve any examination of conceivable alternatives with the aim of avoiding them »)[89].

In relation with the case law developed by the Court of Justice, the recently amended directive on European works councils (in force since 1994)[90]also focused on the modality of workers information and consultation[91]. Major amendments to the previous directive concern the inclusion of a definition of the notion of information and a more demanding concept of consultation, with the objectives of "reinforcing the effectiveness of dialogue at transnational level, permitting suitable linkage between the national and transnational levels of dialogue and ensuring the legal certainty required for the application of this Directive"[92]. The definition of "information" takes into account the goal of allowing employees representatives to carry out an appropriate examination, which implies that the information be provided at such time, in such fashion and with such content as are appropriate without slowing down the decision-making process in undertakings[93]. The definition of "consultation" pursues "the goal of allowing for the expression of an opinion which will be useful to the decision-making process, which implies that the consultation must take place at such time, in such fashion and with such content as are appropriate"[94]. It remains to be seen how the Court will apply these notions in future cases, but the orientation chosen by the directive stands in line with the case law, which should strengthen European judges determination to enforce workers' collective rights to information and consul-

89. Point 46.

90. Cited above.

91. Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council, cited above.

92. Point 21 of the preamble.

93. Point 22 of the preamble.

94. Point 23 of the preamble.

tation. But of course, this combination of case law and legislation in favor of workers rights may not apply in all cases and at all times. Pressure to make European legislation less burdensome for businesses may prove efficient, in the longer run. The current renegotiation of the working time directive could, for instance, lead to a less protective European framework. In such a case, resistance of workers' rights could still find salvation in a process of "*constitutionalization*".

Ⅴ. The « Constitutionalization » of European Social Rights

The concept of "*constitutionalization*" is not, admittedly, one that is easy to embrace. Nonetheless, it can be defined as a processthrough which some legal rules or principlesare granted a higher status in the hierarchy of norms[95]. Different consequences can result from this process, some of them being of particular interest in a time when the rights concerned, social rights, are threatened by a growing pressure on labor costs: the rules concerned become more difficult to amend or repeal and, in case of conflict with other legal norms, they should prevail or at least be granted greater weight.

*Constitutionalization*usually proceeds through the proclamation or adoption of legal texts that are given a constitutional status: either a proper Constitution or another text,which, although not called a Constitution, receives a hierarchically superior status. In the European Union, although the attempt to adopt a Constitution failed, different sources of "constitutional" rights exist.First of all, the founding Treaties have a constitutional function in the Union's legal order:the Court of Justice has, long ago, described the Treaties as a "constitutional Charter"[96]. The Court has also played an important role in recognizing the existence, within EU law, of unwritten general principles,

95. On that theme, *see namely*: H. Arthurs, *The Constitutionalization of Employment relations: Multiple models, Pernicious problems*, 19 Social and Legal Studies 403 (2010). On the notion of constitutionalization, *see also* A. Somek, *Constitutionalization and the Common Good* (May 12, 2010), University of Iowa Legal Studies Research Paper No. 10-23, *available at* SSRN: http://ssrn.com/abstract=1605354 (visited Aug. 22, 2012).

96. *See* Opinion 1/91 on the draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area (1991).

including fundamental rights, which were granted a superior status.

These two factors, the treaty and the Court's case law, have made it possible forcertain social rights enshrined in the treaty or derived from it to be effectively '*constitutionalized'*[97]. This occurred forequal treatment between men and women,a principle, which is considered to have direct effect and that the European Court of Justiceincludes in the category of general principles of Community law[98]. Since the Amsterdam treaty, the "constitutional charter" of the EU mentions explicitly the Union's attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers[99].

Admittedly, the court recognized no new fundamental social right on that basis (that is: not a list of fundamental social rights, but a reference to legal instruments protecting those rights, included in the treaty). And even after the Charter of fundamental rights of the European Unionwas proclaimed, in December 2000, which includes a long catalogue of « social » rights, the Court of Justice did not rush into recognizing new rights of that nature. The only major step forward was achieved in 2007, with two very famous decisions, in which the Court recognized the existence of the fundamental right, for workers, to take collective action[100].

The limited impact of the Charter, in the first years following its achievement, could be attributed to the fact that the Charter was only supposed to lay down and make visible such rights, which were already recognized at the EU level. If so, no major change could indeed be expected (although, as the Court of Justice made clear, the Charter could be used to strengthen the protection of fundamental rights[101]). More important was the initial doubt onthe legal force of the Charter: although it was solemnly proclaimed by the European Commission, the Council and the European Parliament, the Charter was

97. N. Contouris, *loc. cit.*108

98. ECJ, Case 43/75, Defrenne v Sabena, 1976 E.C.R. 455. On this issue, *see* E. Ellis, *EU Anti-discrimination Law* (Oxford University Press, 2005); M Bell, *Equality and the European Constitution*, 33 Industrial Law Journal 242 (2004).

99. Cf. TFUE art. 151.

100. ECJ, Cases C-438/05, Viking Line, 2007, E.C.R. I-10779, C-341/05, *Laval Laval un Partneri*, 2007 E.C.R. I-11767.

101. ECJ, Case C-540/03, European Parliament v Council of the European Union, 2006 E.C.R. I-05769.

not,to begin with,abinding instrument of EU law. The adoption of the Lisbon treaty, in 2009, that granted the Charter the same legal value as the treaties[102] could have been a factor of transformation of the Court's attitude. But no such thing happened, so far. Rather, the Court seemed to shy away from enlarging the category of social fundamental rights[103].

Instead, the Courtcontinued to use a notion it has forged in 2001: the notion of "particularly important principle of European Union social law", which it sometimes rephrases, using the concept of "rule of EU social law of particular importance". This notion was first applied tothe right to an annual paid leave[104]. The inclusion of a right in the category of "particularly important principle of European Union social law"has two major consequences: no derogation is acceptedand no restrictive interpretation of that right is considered acceptable.Thus, it seems reasonable to contend thatthe rights concerned have acceded to a quasi-constitutional status, not formally, but substantially, for the reason thatthey are harder to question and have a greater legal weight when challenged and opposed to other rights or interests.Progressively, although on a rather slow pace, the Court of Justice has enlarged that category of rights to include the 48-hour upper limit on average weekly working time[105] and the principle of non-discrimination between workers engaged in fixed-term employmentrelationships and permanent workers[106]. As a result, EU law ensures that there are some limits,although not very numerous yet, to the *flexibilization* of working time, and exploitation of workers employed under non-standards contracts. Although the definition of the category of "particularly important principle of European Union social law" lacks objective criteria, its existenceshould draw attention, in a time of economic crisis, when pressure exists in favor of *flexibilization* ofworking conditions. "Particularly important principles of European Union social law" are a resource for workers to resist some of the changes that might occur otherwise, affecting their basic social rights.

There is another important dimension to the "*constitutionalization*" of so-

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102. Treaty on European Union art. 6.

103. Cf. ECJ, Dominguez, cited above: the Court was requested (and expected) to enshrine the right to annual paid leave in the category of social fundamental rights, but did not.

104. ECJ, Case C-173/99, BECTU, 2001) E.C.R. I-4881, point 43; Case Schultz-Hoff and Others, cited above, point 22 and Dominguez, cited above, point 16.

105. ECJ, Case C-403/01, Pfeiffer, 2004 E.C.R. E.C.R. I-8835.

106. ECJ, Case C-307/05, Del Cerro Alonso, 2007 E.C.R. I-7109.

cial rights in the recent period, which serves an extension of the force and scope of the rights concerned. It could be observed for the first time in a case,in which the Court considered that the prohibition of discriminations based on age was a general principle of EU law[107]. The case concerned a provision of German law permitting employers to use fixed-term contracts when employing workers over the age of 52, without the usual requirement to provide objective justification for using temporary, rather than indefinite, contracts. The Court deemed this to be contrary to the directive on equal treatment adopted in 2000[108] because the situation amounted to direct discrimination on grounds of age.The application of the directive to the facts of the dispute was, however, legally complicated. On the one hand, the litigation was between two private parties and the Court has consistently affirmed that European directives cannot give rise to horizontal direct effect, which means that their provisions cannot be directly enforced in national courts against a private party. On the other hand, the facts arose during the extended period granted to Germany for transposition of the age provisions of the Employment Equality Directive. Thus, direct effect of the directive was also barred by the non-expiry of the time limit for implementation. In such a situation, referring to a general principle of EU law was a way for the Court of Justice to circumvent the fact that the directive was not applicable (which would have resulted in the concerned worker being recognized no right under EU law).

The same method was used again, more recently, in a caseconcerning the protection of pregnant women and, especially, their protection against discriminations based on pregnancy, which is tantamount to a discrimination based on sex, according to the Court of Justice[109]. In the name of the principle of equality between men and women, the Court set aside the difficult question of the existence of an applicable legislative act covering the situation of a pregnant woman who was not an ordinary employee but a member of the Board of Directors of a capital company. Whichever directive applies, the Court decided “it is important to ensure, for the person concerned, the protection granted under EU law to pregnant women in cases where the legal relationship linking her to another person has been severed on account of her

107. ECJ, Case C-144/04, Mangold, 2005 E.C.R. I-9981.

108. Directive 2000/78, cited above.

109. ECJ, Case C-232/09, Danosa, 2010 E.C.R. I-11405.

pregnancy"[110]. To buttress the solution, the Courtreferred to the "principle of equality between men and women"enshrined in Article 23 of the Charter of Fundamental Rights of the European Union, in accordance with which that equality must be ensured in all areas, including employment, work and pay[111]. This method, appealing to the Charter of Fundamental rights without actually applying it or drawing fundamental rights out of it, allows an extension of EU legislation beyond the limits determined by the legislator. The specific status granted to gender equality allows the right to apply more extensively. Although this solution raises questions about the field of application of the principles concerned, there is no doubt that such a mechanism increases the protection of workers beyond the limits of legislative instruments.A form of "*constitutionalization*" of rights is on its way, in the European Union, which role in the defense of workers' rights is particularly important in times when there are little chance that progressive legislation is adopted to extend the field of social rights.

Ⅵ. Conclusion

In times of economic crisis, social rights protected by EU law can provide a degree of stability of workers' protection that may be missing in nation States. When Europeanized social rights are indeed more difficult to question because the transformation requires amendments to the European law, a complicated process has arisen in recent times where there is lack of consensus between both States and law making-institutions. To be sure, changes in the European social legislation, to the detriment of workers, could happen in the future. And they could also result from an evolution in the construction of European law by the Court of Justice. Nothing prevents the Court from developing an interpretation of the social provisions of EU lawthat better satisfies the current demand for more flexibility, as some (still rare) recent cases have shown. There is no certainty that the Court will not eventually be more sensitive to arguments put before it by private economic actors or national governments in favor of a deregulation of labor relations. However, the dominant line in therecent case law indicates that there are strong values that

110. Point 70.

111. Point 71.

the Court itself has identified as legal references with a specific legal status, through the concepts of general principles of EU law or "particularly important principles of European social law". These concepts serve the resistance andextension of the core elements of the European social policy. Because there are not, for the moment, so many social rights that belong to this category, this resistance may indeed appear a bittrivial, as compared to the vast reforms of labor markets that are planned or achieved in Member states, as a response to the economic crisis. We believe that the near future lies in the hands of the Court of Justice, which has the abilityto make use of the legal value recently granted to the Charter of fundamental rights of the European Union to extend the Constitutional resistance of European social rights.

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Manuscript received: July 9, 2012; *review completed:* August 23, 2012;
accepted: September 14, 2012