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Social Policy and Labour Law during Austerity in the European Union

Abstract

The austerity policy within the European Union during the economic and financial crisis has marked a fundamental shift regarding EU´s basic policy considerations for gender equality and collective bargaining. In case of gender equality, the shift has not been explicit, but rather emerged as an indirect result of a seemingly gender neutral approach to the economic problems. The situation is rather different regarding collective bargaining, where the starting point for the austerity policy has been that institutions and mechanisms for sectoral collective bargaining constitute obstacles to necessary structural reforms. Several crisis measures have been found to violate basic international human rights instruments (adopted within ILO, UN and the European Council), while Member States to the European Union are still bound by their international human rights obligations when implementing those measures. There are also reasons to expect that the EU institutions which are parties to the Troika should respect these obligations when designing crisis measures for individual Member States. The author argues that in the future we need better coordination between gender equality and social policy goals on one hand and economic crisis policy on the other. Otherwise the human rights policy of the European Union will lose its credibility, which may undermine public support and legitimacy for the European project in many Member States.

1 The background[1]

There has been quite an extensive amount of research regarding social policy in the European Union during the economic and financial crisis. It started as a banking crisis in 2008, but within the European Union, it soon became a problem regarding the credibility of the Euro currency, as some Member States were on the edge of financial collapse.

Within the framework of the crisis, the European Union had to act quickly in order to save its currency and the European Monetary Union. Because the needed bailouts were clearly prohibited under the EU Treaties[2], the crisis management became an exercise of improvisation and fast action. Legality and the rule of law was stretched to its limits and beyond when a newborn institution, the Troika (the International Monetary Fund (IMF), the European

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1 The draft report was presented at a SIEPS seminar in Stockholm on 21 October, 2014. The author wishes to thank the commentators at the seminar, as well as the anonymous referees for their valuable input.

2 Article 125 TFEU contains the so-called 'no bail-out' clause. It states that the EU institutions, including the ECB, must not assume liability for the debts of the central, regional, or local governments of the Member States of the Euro Zone, nor must one Member State assume liability for the debts of another. See further Oberndorfer, Lukas, A New Economic Governance through Secondary Legislation? Analysis and Constitutional Assessment: From New Constitutionalism, via Authoritarian Constitutionalism to Progressive Constitutionalism. In "The Economic and Financial Crisis and Collective Labour Law in Europe" (eds. Bruun, N, Lörcher, K and Schömann, I), Hart Publishing 2014. pp. 25-54.

Central Bank (ECB) and the European Commission) started to exercise extensive powers regarding policies, including social policies, in the crisis countries.[3] At the same time, both the European Commission and the Central Bank took up new functions which had not been envisaged by the EU Treaties.

A distinctive feature of the austerity policy was that it was not based on any explicit social policy considerations, but was based on some rough estimations and strong ideological presumptions on how public spending and labour costs should and could be reduced. The main problem with the austerity policy was, in my opinion, not the initial fast decisions, but the fact that no impact evaluation or follow-up mechanism was created in order to assess and correct the possible mistakes or unexpected outcomes of the austerity measures. The whole issue of the relevance of fundamental social rights within the austerity policy has been a taboo within the European Union, and a plethora of arguments have been used in order to avoid dealing with these issues. However, the Lisbon Treaty or the Treaty of the Functioning of the European Union (TFEU) clearly sets out some obligations for the European Union regarding social policy and related areas: Article 8 TFEU states that "in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women". Furthermore, Article 9 states: "In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health". Finally, Article 10 TFEU states 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". Furthermore, the rule of law and respect for human rights are defined as cornerstones for the activities of the European Union. The Treaty of the European Union (TEU) spells out that the Union is founded "on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities". Article 6.4 TEU states that these values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. Furthermore, fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as embodied in the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Without going further into the European Union's many commitments to human rights, both civil and political rights, as well as social rights, we can, at this stage, report that the austerity policies brought about a massive violation of basic social human rights in many EU Member States, both in those directly under the control of the Troika, as well as those in which its influence has been more indirect. This fact has been acknowledged by the European Parliament, by the Council of Europe and by many decisions and views taken by supervisory bodies of different human rights instruments.[4] Therefore, within the European Union of today, we are facing a significant challenge regarding legality and conformity with basic human rights instruments.

This paper will refer to some of the material that has mapped human rights violations within the European Union Member States. Many of the examples are to be

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[3] There has been extensive debate on the extent to which the three Troika institutions are bound by EU law when they are drafting, implementing and monitoring the Memoranda of Understanding (MoUs), because both the Commission and the ECB are, in that instance, primarily acting under powers that have been conferred to them under intergovernmental agreements. On the other hand, it has been argued that primary EU law, such as, for instance, the EU Charter of Fundamental Rights, should be respected within all of the activities of EU institutions. See further regarding the debate, Tuori, Kaarlo and Tuori, Kaius, The Eurozone Crisis. A Constitutional Analysis. Cambridge University Press 2014. pp. 231. Regardless of the position one might take in this debate, it is clear that the main contents of the MoUs have been repeated in Council decisions under Arts. 126 and 136 TFEU, which are clearly covered by the Charter. Furthermore, it is clear that the human rights obligations of the EU Member States remain in place, regardless of the crisis, and also, in respect of decisions taken and legislation adopted in order to implement the MoUs.

[4] See the European Parliament resolution of 13 March 2014 on employment and the social aspects of the role and operations of the Troika (ECB, Commission and IMF) with regard to euro area programme countries (2014/2007(INI)). See also several decisions from the ILO supervisory bodies, the European Social Committee, the UN-CEDAW Committee (see, for instance, Concluding observations on the seventh periodic report of Greece adopted by the Committee at its fifty-fourth session (11 February – 1 March 2013)).

found in the crisis countries in southern Europe. Greece, Spain and Portugal are, therefore, discussed in this paper, but similar examples can also be found in other Member States of the European Union.[5] Because these violations have already been documented, and ongoing research is providing further documentation of them, I will not go into any detailed evaluation of this kind. In this paper, my intention is to document the fundamental policy shifts which have taken place within the European Union within the context of the austerity policy. I am claiming that there has been, in fact, a radical shift in the EU policy with regard to equality or the equal treatment of men and women, as well as towards collective bargaining. In both areas, the European Union has had a strong position as one of the leading policy makers for many years. One can even claim that some of the fundaments of the European Social Model have now been abandoned.

Regarding gender equality, the European Union has a strong tradition as a promoter of non-discrimination and equal treatment, but also of supporting gender mainstreaming, reconcilliation of family and working life, child benefits and public services in order to facilitate female employment.

Within the context of the policy of the Troika, the European Gender Equality agenda has not been openly contested. Within a rather unclear rhetoric of structural reform, reduction of labour market rigidities and reduction of public expenditures, a policy of increased flexibility has however, been introduced. These measures have had a detrimental effect on women and women´s rights, and have, in fact, more or less totally undermined the proclaimed policies. In this paper, I will document this development.

Another more openly declared policy goal, which the Troika has been pursuing, is the fight against sectoral or multi-employer collective bargaining.[6] Collective bargaining, and even social dialogue, have been seen as obstacles to the necessary internal devaluation within the crisis countries. Many crisis measures have formed part of an attack against collective bargaining as such. This development will also be documented in this paper. These measures mark a U-turn in the policy of the European Union, which, at least until the enlargement in 2004, strongly promoted social dialogue and collective bargaining in accordance with ILO principles, as formulated in the basic Conventions that have been ratified by all European Union Member States.[7]

2 Gender equality and the crisis

2.1 General background

Especially during the initial phase of the crisis, there was a strong perception that the crisis was severely impacting male-dominated branches such as manufacturing, construction and some parts of the financial sector. This perception was valid only for the initial phase of the crisis, but it was persistent among policymakers for several years. Very soon, the crisis was also felt in the female service and retail sectors, and furthermore, the cutbacks were focused on female-dominated sectors, such as education, health and social work. Therefore, female unemployment soon increased more than male unemployment, although it is known that female unemployment partly remained undocumented and unregistered.

Cutbacks in public care and health services have led to the reprivatisation of care and a return to traditional gender roles. Limited availability of childcare, growing childcare fees, reduced services for the elderly and the disabled, and even closed hospitals transfer the responsibility for care from society to households, i.e. mostly women.[8] At the same time, governments did save on instruments that encourage the equal division of care between women and men, such as paid paternity leave.

Cutbacks in services and benefits have compromised women´s economic independence, as benefits often constitute an important source of their income, and as they use public services more than men. We can state that, in reality, single mothers and retired female persons living on their own have generally faced the most substantial

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5 Ireland, Cyprus, Lithuania, Romania, Hungary, etc.

6 The removal of legal support for multi-employer bargaining has been seen as an element in the policies of necessary structural reform and "internal devaluation". See further Deakin, Simon and Koukiadaki, Aristea, The Sovereign Debt Crisis and Labour Law. In "Resocialising Europe in a Time of Crisis" (eds. Countouris, Nicola and Freedland, Mark), Cambridge University Press 2013. pp. 163-188.

7 ILO Convention 87 - Freedom of Association and Protection of the Right to Organise Convention, 1948 and Convention 98 - Right to Organise and Collective Bargaining Convention, 1949 and Convention 154 - Collective Bargaining Convention, 1981. See also European Union TFEU 152, Treaty provision on social dialogue.

8 See European Women´s Lobby: The Price of Austerity – The Impact on Women´s Rights and Gender Equality in Europe. Brussels 2012. p. 8.

cumulative economic losses as a consequence of the austerity policies.

The current recession, together with austerity policies, have deeply hit the labour market in the crisis countries and have increased unemployment, inequality and poverty. Four years of crisis and gender-blind political responses have, in some countries, led to a downward convergence in gender gaps in employment and unemployment, although this is not because of better conditions for women, but because of a worse situation for men. As researchers from southern Europe have pointed out, women still continue to be worse off as regards the main indicators of the labour market. The effects of unemployment and policy adjustments, including on their welfare systems, have raised poverty rates. In 2011, Eurostat data showed an increase in poverty of 6.5% in Italy and 11.7% in Spain, compared to 2009, with women always predominant among the poor.[9]

2.2 Unemployment and unpaid work

The anti-crisis measures were, by and large, concerned with the direct impact of the economic crisis on employment. Because the fall in employment and the increase in unemployment were initially larger for men than for women, most of the measures were focused on support for either male employment or income. Much of the policy effort to promote consumer demand and protect jobs in 2009-2010 was focused on a narrow range of sectors, particularly construction and automobiles, thereby supporting male employment. Also, the promotion of short-term working arrangements, a key part of the European strategy to limit the rise in unemployment and to maintain contact between workers and jobs, supported male income. As a result of the segregation of employment, men tended to benefit from short-term working schemes. Such schemes created two groups of involuntary part-timers: compensated involuntary part-timers in sectors affected by the crisis (mostly men) and uncompensated involuntary part-timers who could not find full-time work (mostly women).

Although youth unemployment is a pressing problem, present statistics clearly show that there is a significant gender dimension in unemployment, especially in the crisis countries. In Greece, the official 2013 figures recorded 24.3 % unemployment among men, and 31.3 % among women. These figures do not give an adequate picture of the current situation; experts agree that there is significant hidden unemployment among women in Greece, and they estimate that the real figures are nearly 50 %. The corresponding figures in Spain are 25.6 % for men and 26.7 % for women. Even the average figures for unemployment for the whole European Union show slightly higher unemployment figures for women (10.8 %) than men (10.6 %).

Unemployment has high social costs. The Greek police report that, when the economy began to collapse in 2009, they observed an alarming increase in cases of domestic violence. In comparison with previous years, domestic violence was up 53.9 % in 2011 and 22.2 % in 2012. Ten women were murdered by an intimate partner in 2011, five in 2012, and eight in 2013.[10]

The European Parliament, in a resolution from March 2014, generally expressed its concern regarding low paying jobs, which are often performed by women. The Parliament was concerned about the fact that, in some cases and sectors, there is, along with job losses, a decline in job quality, an increase in precarious forms of employment and a deterioration of basic labour standards. Furthermore, it stressed that Member States need to make dedicated efforts to address the increase in involuntary part-time employment and temporary contracts, payless internships and apprenticeships, and bogus self-employment, as well as the activities of the black economy. Finally, it noted that, although the setting of wages does not fall within the competences of the EU, those programmes have had an impact on minimum wages. In Ireland, it became necessary to reduce the minimum wage by nearly 12 % (a decision which, however, was later changed), and in Greece, a radical cut of 22 % was decreed.[11]

Furthermore, it should be noted that cuts in public spending not only have a direct negative impact on the quantity and quality of female-dominated public sector

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9 Gálvez-Muñoz, Lina, Rodríguez- Modroño, Paula and Addabbo, Tindara, The Impact of European Union Austerity Policy on Women's Work in Southern Europe, CAPPaper n. 108, October 2013, http://www.capp.unimore.it/pubbl/cappapers/Capp_p108.pdf.

10 http://thewip.net/2014/05/29/financial-crisis-and-domestic-violence-the-case-of-greece/.

11 European Parliament resolution of 13 March 2014 on employment and social aspects of the role and operations of the Troika (ECB, Commission and IMF) with regard to euro area programme countries (2014/2007(INI)) p. 12.

jobs, but such cuts also have indirect effects on gender inequalities in the household. Austerity measures reduce the availability and affordability of services and have inevitable repercussions on unpaid work.

2.3 Family and work reconcilliation

There has been a pattern of reductions in maternity and family benefits during the crisis, as well as a pattern of either reduced or infringed rights of pregnant women to take maternity leave and benefits, or to resume their jobs after maternity.[12] For instance, the Greek Ombudsman for gender equality has reported several cases of discrimination against female employees, including arbitrary dismissals and refusals of employers to fulfil their duties, as well as forced acceptance of changes in employment status, from full-time to part-time, before and after the return from maternity leave.[13] Part-time employment has risen during the recession in most crisis countries.

Austerity has radically reduced access to childcare services. In Portugal and Greece, public kindergartens have been closing down. Childcare is also becoming increasingly expensive in many countries as the result of privatisation.

Temporary employment disproportionately affects younger workers. Temporary employment may bring some advantages to young workers, including more opportunities to seek better jobs; however, the crisis has added higher cyclical sensitivity to the list of disadvantages for this type of labour relations. The average young worker with temporary employment in the EU experienced a wage decrease of 14.4% in 2012 in comparison with a worker on a standard contract in similar characteristics. [14]

This has an important gender twist. Temporary contracts may preclude access to full maternity benefits, for example, if a woman becomes pregnant during a period of unemployment. Moreover, uncertainty about the timing and conditions of the next (sequence of temporary) jobs creates a specific disadvantage for young women. It has been found that maternity is delayed when labour market prospects are unclear.[15]

2.4 Poverty

The European Parliament conducted an assessment in March 2014 as noted above and was concerned about the fact that, in some cases and sectors, there is, along with job losses, a decline in employment quality, an increase in precarious forms of employment and a deterioration of basic labour standards and minimum wages.

Pensions have been reduced. Due to the fact that women often have very small pensions, an overall reduction of pensions might hit them harder, pushing them below the poverty threshold regarding income. In relation to this issue, the European Committee of Social Rights, in five separate decisions, considered that, even if some restrictions to benefits were not in themselves in breach of the Social Charter of the Council of Europe, the cumulative effect of the restrictions introduced as "austerity measures", as well as the procedures adopted to put them into place, which were introduced by the Greek Government in May 2010 and onwards, and which modified both public and private pension schemes, constituted a violation of Article 12 §3 of the 1961 Charter guaranteeing the right to social security.[16]

The European Parliament also noted that the most vulnerable groups in the labour market – the long-term unemployed, women, migrant workers and persons with disabilities – have suffered the most and are experiencing higher unemployment rates than the national averages. It also noted the severe rise in the long-term unemployment rate of women and senior workers, and the additional difficulties these workers will face when seeking to re-enter the labour market once the economy eventually recovers.[17]

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12 Bettio, Francesca, European Gender Equality Law Review No. 2/2012. p. 8 reports that such policies are documented, at least, for Greece, Portugal, Italy and the Czech Republic.

13 See Kambouri, Nelli, Gender Equality in the Greek Labour Market. The Gaps Narrow, Inequalities Persist. Friedrich Ebert Stiftung 2013. p. 6.

14 Corsi, Marcella, Economic Independence and the Position of Women on the Labour Market in the European Union. In "A New Strategy for Gender Equality Post 2015 Compilation of In-depth Analyses", Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Gender Equality. European Parliament 2014.

15 Ibid.

16 See Complaint No. 76/2012, Decision on the Merits 7.12.2012, Federation of Employed Pensioners of Greece (IKA-ETAM).

17 European Parliament resolution of 13 March 2014 on employment and social aspects of the role and operations of the Troika (ECB, Commission and IMF) with regard to euro area programme countries (2014/2007(INI)) p. 26.

The dramatic cuts in the health care system and the massive movement of medical experts out of the crisis countries have also caused serious problems. In March 2013, the European Parliament expressed its regret over the fact that, for Greece, Ireland and Portugal the programmes have included a number of detailed prescriptions on health system reform and expenditure cuts that have had an impact on the quality and universal accessibility of social services, especially in health and social care, despite the fact that Article 168(7) TFEU establishes that the EU will respect the competences of the Member States.[18] The Parliament expressed its concern about the fact that this has, in some cases, led to a number of people being denied health insurance coverage or access to social protection, thereby increasing the risk of extreme poverty and social exclusion, as reflected in the growing number of destitute and homeless people and their lack of access to basic goods and services.

2.5 Summing up

Paradoxically, the policy pursued by the Troika was in sharp contrast to EU obligations under the Treaty, as well as the international obligations of the Member States.[19] Furthermore, it was, more or less, an unwritten rule that no gender mainstreaming or analysis of gender specific consequences should be undertaken.

Moreover, the efforts to handle the crisis in the crisis countries involved changes in government spending and many subsequent cuts in public spending which were not gender neutral. As a matter of fact, the debt crisis led to downward pressure in several areas of public policy, with negative implications for women. The segregation of women into public sector jobs – in public administration, education and health–exposed women to the impact of cuts in public spending. Furthermore, the changes in employment opportunities in the public sector affected women's overall employment, directly and negatively, in the context of cuts to services. The radical changes in public-sector spending impacted women negatively in several ways: "Firstly, the majority of public-sector workers are women and thus subject to pay freezes, job cuts and reduced pension entitlement. Secondly, women use public services more intensely than men to meet their own needs and to help manage care responsibilities. Thirdly, women are more likely than men to pick up the extra unpaid work resulting from cuts in public services. Finally, women have a higher dependency on benefits due to their higher participation in unpaid care work and their lower earnings."[20]

3 Collective bargaining and the crisis[21]

Within its management of the crisis, the Troika consistently focused on collective bargaining in the crisis countries. The Troika did not focus only on cutting wage costs, however, but also on the mechanisms and institutions for wage-setting, which will be described below. Mechanisms for the extension of collective bargaining were especially targeted, as well as sectoral bargaining at the national branch level and multi-employer bargaining. In the following sections, we map some of the measures frequently undertaken to dismantle collective bargaining in the crisis countries. The main source used here is material from the supervisory bodies in the ILO and other human rights treaty bodies. We map both the measures and the reactions from human rights bodies in order to show how problematic some of the measures undertaken were from a human rights point of view. Within the ILO, the Committee of Experts (CEARC) is in charge of supervising the national implementation of ratified ILO Conventions, while the Freedom of Association Committee (CFA) handles individual complaints from trade unions or employers' associations. Several complaints were made to the ILO from national trade union organisations.

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18 Ibid p. 23.

19 See the above-mentioned CEDAW report on Greece, March 2013 (footnote 4).

20 Villa, Paolo and Smith, Mark, Towards a Gender-Equitable Macroeconomic Framework for Europe. Paper for the seminar "Beyond Austerity, Towards Employment: A Gender Aware Framework", Brussels 11th and 12th February 2014, http://www.feps-europe.eu/assets/f46fc56c-4c37-4969-acf8-7f229c042176/2013-11-21-beyond-austerity-brussels-programme-final-version-public.pdf. See also Corsi, Marcella, Economic Independence and the Position of Women on the Labour Market in the European Union. In "A New Strategy for Gender Equality Post 2015 Compilation of In-depth Analyses", Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Gender Equality. European Parliament 2014.

21 This chapter is based on my chapter "Legal and Judicial International Avenues: the ILO" in Bruun, N, Lörcher, K, and Schömann, I, "The Economic and Financial Crisis and Collective Labour Law in Europe." Hart Publishing 2014.

3.1 Principle of voluntary collective bargaining

3.1.1 Restriction of or interference with the principle of free and voluntary collective bargaining

The typical form of interference with or intervention in collective bargaining, in the context of an austerity policy, has been State intervention into the material content of valid (collective) agreements that are in force. Typically, this would take the form of cuts in agreed levels of pay and pay-related benefits, especially in the public, but also, in the private, sectors. These would also be accompanied by other restrictions on the principle of free and voluntary negotiation. Here, the fact that collective bargaining might be protected by a national Constitution, as in Greece, where Art 22 (2) of the Constitution provides that "[g]eneral 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".[22]

Examples of wage cuts violating existing collective agreements can be found in several crisis states. In the case of Spain (CFA No. 2918), the Committee pointed out that the negotiated increase in question adopted and improved previous wages and that the decree, which suspended it, led to a wage cut greater than 5 %. The Committee recalled that collective bargaining is a fundamental right, and, in the context of economic stabilisation, priority should be given to it as means of determining the employment conditions of public servants, rather than adopting legislation to restrain wages in the public sector. The Committee also recalled that, if, as part of its stabilisation policy, a government considers that wage rates cannot be settled freely through collective bargaining, restrictions should be imposed as an exceptional measure and only to the extent that is necessary, without exceeding a reasonable period, and they should be accompanied by adequate safeguards to protect workers' living standards. In addition, in previous cases, the Committee considered that, if a government wishes to bring the clauses of a collective agreement into line with the economic policy of the country, it should attempt to persuade the parties involved to take account of such considerations voluntarily, without mandating the renegotiation of collective agreements that are in force. The Committee has highlighted the importance of maintaining permanent and intensive dialogue with the most representative workers and employers' organisations and that adequate mechanisms for dealing with exceptional economic situations can be developed within the framework of the public sector collective bargaining system.

In its 2012 report on Greece, the Committee of Experts found a clear violation of Article 4 of Convention No. 98 regarding the National General Collective Agreement ("NGCA") and other collective agreements. The Greek General Confederation of Labour ("GSEE") had indicated that the Government had reduced the minimum daily and monthly wages established by the NGCA by 22 %, compared to the level of 1 January 2012. A further reduction was made for young workers (15–25 years' old) amounting to 32 %. While aware of the grave and exceptional circumstances experienced in the country, the Committee of Experts deeply regretted the numerous interventions in voluntarily concluded agreements, including the NGCA, for which the social partners, cognisant of the financial and economic challenges, had declared their continuing support in February 2012.

In the case of Portugal, the Committee of Experts noted the statement by the General Confederation of Portuguese Workers ("CGTP") in connection with the impact of the financial crisis on trade unions, and that Act No. 23/2012 of 25 June 2012 had amended a number of sections of the Labour Code. The latter entered into force on 1 August 2012, and it cut pay and cash benefits in state enterprises, even when they had been applied under a collective agreement. The Government explained that the reduction applied to salaries exceeding €1,500 and was an attempt to consolidate the state finances given the prevailing economic crisis; it was, in any event, approved by the Constitutional Court. The Committee stressed the importance it attached to full compliance with collective agreements and referred to its general principles regarding free and voluntary negotiations, even in times of economic crisis.

Interventions into existing collective agreements have not been limited only to Member States, where direct intervention into national policies has taken place through MoUs. During the economic crises, a key trend in several EU countries has been that public sector pay cuts and freezes have been introduced unilaterally by the state. Even in countries with an established tradition of free

[22] See Ewing, Keith D and Hendy, John, Reconstruction After the Crisis: A Manifesto for Collective Bargaining. Liverpool 2013. p. 3.

collective bargaining in the public sector, such as Ireland, Italy and the UK, public sector collective bargaining procedures have been by-passed; the same applies to countries with weaker traditions in this regard, such as Hungary, Latvia, Lithuania and Romania.

3.1.2 Restriction of personal coverage of collective agreements that are in force

Another way of limiting the effects of collective agreements is to restrict their personal coverage. For instance, young persons under certain age limits can be excluded. A clear example of this can be found in Greece, where young unemployed persons up to 24 years of age appear to be exempted from the scope of relevant collective agreements through apprenticeship contracts that provide for extended probationary periods and remuneration at 80 % of the minimum basic wage.

Subsequently, in Greece, Law 3863/2010 abolished the general applicability of the mandatory national minimum wage with respect to young workers of up to 25 years of age, who, if entering the job market for the first time, would be remunerated with 84 % of the minimum wage; minors, 15 to 18 years of age, under apprenticeship contracts, would be remunerated at 70 % of the minimum wage with reduced social security coverage and would be excluded from the protective framework of the NGCA and national legislation as regards working hours, rest periods, paid annual leave and time off for school work. The Greek government argued that these measures were necessary to restructure the labour market and fight against youth unemployment. They also affirmed that these provisions constituted necessary employment policy measures to combat youth unemployment and did not contravene the freedom of collective bargaining or infringe fundamental trade union rights.

The CFA disagreed and observed that the special wage remuneration for young workers was similar to systems of special job offers that it had examined in the past, and which introduced a new set of rules for determining the wages of a particular category of employees under the pretext that they would otherwise face long-term unemployment due to their unfamiliarity with the labour market. Consistently with its previous considerations, the CFA expected such measures to be restricted to a limited period of time and to not restrict the collective bargaining rights of these workers as regards their remuneration for a period longer than 12 months. The CFA further expected that, in all other aspects, these workers' freedom of association rights were fully guaranteed and requested the Government to review the use and impact of these measures with the workers and employers' organisations concerned. Here, it can be noted that, in the context of the principles of freedom of association, the CFA did not assess the level of minimum income, which is an issue that the European Committee of Social Rights has addressed.

3.1.3 The principle of favourability

The common foundations of different collective bargaining systems have been the mandatory effect of collective agreements on the individual level and the favourability principle, which requires, for instance, that an industry-level agreement cannot be undermined by local or individual agreements, although more favourable terms and conditions for employees on lower levels might be possible. The Austerity policy designed by the Troika has attacked and partly abolished this principle in some of the crisis countries. This has led to a radical decentralisation of collective bargaining in Greece and Spain, where company agreements were given general priority over sectoral agreements, which clearly undermined sectoral standards and the role of sectoral bargaining. The effect of this becomes even stronger if the competence to deviate from the sectoral standard is given to individual employees or groups of employees, regardless of their trade-union affiliation and relationship to the union which is part of the sectoral agreement. The CFA stated very clearly in case of Greece that the abolition of the principle of favourability is a violation of the freedom of association.

A similarly radical shift in policy took place through the 2012 reforms in Spain. Before 2012, a multi-level bargaining system, in which sectoral collective agreements monitor the process of decentralisation, was a strategy shared by trade unions and employer organisations in order to deal with the risks posed by decentralisation. However, the 2012 reform not only enhanced the regulatory capacity of company-level agreements, but also transferred more regulatory power to employers, while reducing the regulatory capacity of sectoral agreements.

In the case of Italy and Portugal, the decentralisation of collective bargaining was also strongly encouraged, but there were still some restrictions and controls for parties in the sectoral collective agreement if a local agreement did not respect the favourability principle.

As part of the decentralisation process, there is a trend that is clearly evident in Greece, Portugal and Spain

to facilitate the conditions for non-union employee representatives to conclude collective agreements, in particular, in small and non-unionised companies. It is therefore important to note that the CFA has pointed out that the Workers' Representatives Convention No. 135 of 1971 and the Collective Bargaining Convention No. 154 of 1981 "contain explicit provisions guaranteeing that, where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures are to be taken to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned". The starting point for the CFA and the ILO instruments regulating collective bargaining has clearly been that collective bargaining and the conclusion of collective agreements must remain the exclusive prerogative of trade unions. Workers' representatives should only engage in collective bargaining with the employer and conclude collective agreements if there are no trade unions present at the enterprise, and they are, in any event, duly elected and authorised by the employees.

3.1.4 The so-called "after effect" abolished or reduced by law

It has been a general feature of the Troika's crisis policy that the so-called "after effect" of collective agreements should be limited. Traditionally, the "after effect" has been an essential part of collective bargaining systems in most European countries. Such rule normally prescribes that the terms and conditions in the collective agreement should also apply after the expiration of the agreement and until the entering into force of a new agreement. The purpose of such a regulatory regime has been, on the one hand, to avoid disputes and individual claims during the period of negotiation for the new agreement, and also to protect, in the framework of fair and bona fide collective negotiations, the standards for pay and conditions of work included in the previous collective agreement (the so-called "grace" period). Traditionally, the discussion during such period has been about how much wages should increase. In the context of the economic crisis, this legal regime has been regarded as an obstacle to wage reductions, which explains why the Troika has targeted legislation prescribing the "after effect" of collective agreements. The result was that, in Greece, the prescribed length of the "after effect" was shortened from six to three months, in Spain, the maximum period of such an "after effect" was reduced to one year, and in Portugal, the MoU contains a clause requiring the shortening of the "after effect".

In the CFA case on Greece, No. 2820, the Committee was asked to address the shortening of the "after effect" of the collective agreement in question. The CFA did not consider this to be a "violation of the principle of free collective bargaining" as such, but it did observe that it comes in an overall context in which imposed decentralisation and weakening of the broader framework of collective bargaining are likely to leave workers with no minimum safety net for their terms and conditions of work, even beyond the wages issue.

3.1.5 Restrictions on existing extension mechanisms (erga omnes)

In several countries, measures have been taken to intervene in existing collective agreement extension (erga omnes) mechanisms. Such mechanisms are common in many European countries, and they typically extend the effect of collective agreements to non-organised employers in the sector concerned in order to achieve full coverage of the collective agreements. This has been a useful tool for legislators to promote the collective bargaining system and to link a minimum sectoral wage level to collective bargaining. The extension system can actually set minimum wages in many cases, and thereby, reduce the need for other mechanisms in this regard.

However, the introduction of restrictions in extension mechanisms has seriously affected the coverage and impact of collective bargaining. In fact, the Troika has, in several cases, requested restrictions for extensions of collective agreements in the criteria applied. Greece has suspended the extension procedures through which agreements concluded between one or more employer organisations and trade unions were made binding for an entire sector or region. In Portugal, for example, until recently, almost all important industry-level collective agreements were extended to the whole industry on a quasi-automatic basis. Under pressure from the Troika, Portugal has now raised the barriers to extensions, so that, in the future, only a very small number of collective agreements are likely to be extended. Initially, Portuguese extension procedures were suspended, but the government subsequently introduced a reform according to which the signing parties must represent at least 50 % of the workers in the sector to justify an extension procedure. Similar changes were introduced in Romania and Hungary.

In the ILO system, there is no detailed Convention that addresses the issue of extensions. The ILO Conventions define the general principles regarding freedom of

association and collective bargaining, and they also provide a framework in accordance with which the operation of an extension of collective bargaining must operate.

In accordance with its earlier practice, the CFA only noted in Case No. 2820 concerning Greece that, while there is no duty to extend collective agreements from the perspective of freedom of association principles, any extension should be subject to a tripartite analysis of the consequences it would have on the sector to which it is applied. The Committee, therefore, only expressed its expectations that, in the overall discussions about the most appropriate measures to be taken in respect of the broader framework for collective bargaining, the Government and social partners will fully consider the various effects on social and economic policy that may be achieved through an extension.

There is, however, clear evidence from at least Portugal and Spain which suggests that restrictions of extensions have had a dramatic impact on the coverage of collective agreements. The number of workers covered by collective agreements in 2012 was only 327,662, which amounts to 26.5 % of the number of workers covered in 2011. This was the result not only of the decrease in collective agreements, but also of government suspensions of agreement extensions in 2012.

The dramatic decline in 2012 reflected the employers' reticence to negotiate, particularly at the sector level. The suspension of collective agreement extensions in 2011 and 2012 played a key role in the refusal of employer associations to sign agreements. Employer associations at the branch level may have feared that the non-extension of agreements would create more favourable business conditions for employers not bound by any collective agreement, and as a result, increase competition in the respective sectors.

In Portugal, the extension of collective agreements has played a major role in giving a majority of workers the benefit of collective agreement regulations. In 2012, only 12 extension ordinances were published, compared to 2008, when 137 were adopted.

Accordingly, there is strong evidence suggesting that restrictions on the extension system of collective agreements in Portugal are actually undermining the whole collective bargaining system, as well as the system for voluntary bargaining. There is, therefore, an obligation for Portugal, under Article 4 of the ILO Convention No. 98, to address this issue in order to restore and further develop a well-functioning bargaining system.

More generally, the restrictions on the extensions of collective agreements, in the context of measures undertaken to weaken collective bargaining, might constitute a violation of Convention No. 98.

3.1.6 Institutional permanent interventions into the structural framework for collective bargaining

The most serious violations of the freedom of association are to be found when fundamental structures or institutions for collective bargaining are demolished or disturbed. We find several examples of such measures in the structure and heart of collective bargaining. These measures are having an impact on the institutional framework of collective bargaining and social dialogue which a pay freeze or wage reduction do not normally have, and they also constitute grave violations of the principles of freedom of association.

It is not possible here to comprehensively analyse the different measures which can be labelled as structural interventions into collective bargaining. Only a few examples will be discussed here, but some of them are clearly designed to get rid of multi-employer bargaining institutions.

In its CFA Greece Case No. 2820, the Greek General Confederation of Labour (GSEE) argued that the State Party had interfered with and obstructed the work and competence of the independent arbitrator. The GSEE further maintained that a new radical change was introduced in the procedures and content of the mediation and arbitration services provided by OMED which drastically curtailed the workers' right of access to an effective and fair resolution process for collective disputes when negotiating collective agreements. Together with the far-reaching weakening of the mediation process, the right of workers – and employers – to recourse to independent arbitration for the resolution of collective disputes related to collective agreements was abolished. Requests for arbitration were consequently allowed "only if both parties consent".

Another GSEE accusation which was addressed by the CFA concerned the closing down of the Workers' Housing Organization (OEK) and the Workers' Social Fund (OEE). According to the relevant Troika MoU,

they fell within the category of "non-priority social expenditures" and "small earmarked funds" which should be eliminated by "legislation enacted with a transition period not to exceed six months". According to GSEE, this requirement caused indignation, as both bodies provide an indispensable social function and do not burden the state budget. Both OEK and OEE were autonomous organisations funded by workers' and employers' contributions. Their mandate was directly linked to vital parameters of living, such as housing, familial welfare, and cultural and recreational activities for workers. Their activities had a highly developmental impact, as they concerned important sectors of the real economy, such as tourism and construction. Both organisations were governed transparently by an administrative board on which workers and employers were equitably represented, and they were supervised by the Ministry of Labour and Social Security, which also appoints the chairperson of the board.

The CFA dealt with these arguments and took note of the numerous allegations related to the modifications to the functioning and constitution of OMED. As regards the amendments to the law, which now only permit recourse to binding arbitration when both parties agree, the Committee recognised that this measure was introduced in an effort to align the law and practice with its principles relating to compulsory arbitration and did not consider this measure to be in violation of freedom of association principles. As regards the additional restrictions on the arbitrator's mandate, the Committee considered that, as a general rule, arbitrators should be free to make a determination on a voluntarily requested arbitration without government interference. Furthermore, the CFA argued as follows:

"Observing that these restrictions were introduced within the framework of the proposed stabilisation program, the Committee expects that these restrictions will be regularly reviewed by the social partners with a view to ensuring their elimination at the earliest possible moment. Moreover, the Committee requests the Government, in consultation with the workers' and employers' organisations to review without delay the impact on basic minimum standards other than wages of the elimination of the arbitrator's authority to uphold retainability clauses in collective agreements so that these elements may further inform the review of the overall labour relations system."

The CFA took a very clear position on the closing of the Workers' Housing Organisation ("OEK") and the Workers' Social Fund ("OEE"). The CFA noted the complainants' allegation that these bodies were crucial to trade union social work, funding and workers' housing and that they provided an indispensable social function and did not burden the state budget. The Committee further noted with concern that one of the OEE functions was to secure minimum financing for trade unions in order to support their operating needs and that it had been the main source of OMED financing, enabling it to preserve its autonomy vis-à-vis the State to provide independent mediation and arbitration services for the resolution of collective labour disputes. The CFA requested the Government to provide detailed observations on this matter, including indications of measures taken to ensure that the closing of OEE had not led to a grave interference in the functioning of GSEE or OMED.

In Ireland, the competition authorities had restricted the effects of certain collective agreements. The Committee of Experts examined a decision by the Competition Authority that the provisions of the Competition Act 2002 overruled the provisions of the Industrial Relations Act. This Authority had declared a collective agreement between Equity, SITP and the Institute of Advertising Practitioners that fixes rates of pay and conditions of employment for workers within radio, television, cinema and the visual arts to be unlawful. The Irish Congress of Trade Unions ("ICTU") argued that this constituted a violation of Convention No. 98.

The Committee of Experts noted the Government's indication that, during the course of the social partnership talks in 2008, it committed itself to introducing legislation amending section 4 of the Competition Act to the effect that certain categories of vulnerable workers, formerly or currently covered by collective agreements when engaging in collective bargaining, would be excluded from the section 4 prohibition. According to the Government, this commitment took into account the anticipated negligible negative impact on the economy or the level of competition, and it gave consideration to the specific attributes and nature of the work involved, subject to compliance with EU competition rules. Three categories of workers had been proposed to be covered by the exclusion: freelance journalists, session musicians and voice-over actors. The Government indicated that since the social partnership talks had taken place, the Program of Financial Support for Ireland had been approved by the "Troika" and the authorities had committed themselves to ensuring that no further exemptions to the competition law framework would be granted unless they were entirely

consistent with the goals of the EU and IMF Program and the needs of the economy. The Government indicated that this commitment required further consideration in the context of the EU and IMF Program. The Committee of Experts requested the Government to pursue its review of the Act with the social partners in accordance with its previous commitment and requested it to provide information on progress made in this regard.

3.2 Summing up

The systemic violations of international labour standards in the context of European Union austerity is a remarkable story. We have had a long history of strengthening human rights policies, and we have adopted the EU Charter of Fundamental Rights covering social rights. However, the European Union established a special institution, a Troika, which includes two central European Union institutions, but still seems to be able to operate, more or less, in a legal vacuum, outside of all forms of legal control. Most cases that have been dealt with by different human right bodies have been against the States which have fulfilled their obligations in the MoUs in order to receive financial support. Furthermore, the policy adopted has clearly been undermining the European Union commitments to collective bargaining and social dialogue which are enshrined in the Treaty[23] and many policy documents.

4 Conclusions

We have examined two different policy areas, namely, collective bargaining and gender equality. In both areas, the austerity policy and measures in the crisis countries have led to massive human rights violations and to tacit policy changes contrary to those forming part of the EU Treaty obligations.

In spite of European guidance on gender mainstreaming and the explicit requirement under the Lisbon Treaty (TFEU Art. 8), anti-crisis measures regarding policy and legislation, as well as fiscal consolidation, were planned and implemented with the absence of an integrated gender dimension, and even more, with an absence of a social dimension.

In spite of the similarities between these areas, there are also important differences. It seems that the gender blindness was less the result of a clear intentional policy, and more the disastrous consequence of a formally gender-neutral and gender-blind policy. As summed up above, the radical changes in public-sector spending have had a negative impact upon women in several ways. Public-sector workers are predominantly female, and they were subject to pay freezes, job cuts and reduced pension entitlements. Women also use public services more intensely than men to meet their own needs and to help manage care responsibilities, and they are often dependent on benefits that were significantly reduced during the crisis.

The common feature of these policies is that they build on a policy approach that is entirely and exclusively based on economic considerations. During the time of the Open Method of Co-ordination for employment policy, there was still an effort in place to integrate social aspects, as well as equality and gender policy aspects into economic policies. The austerity marked a shift towards the exclusive relevance of economic considerations. The results of these exercises give a clear indication that this approach is not sustainable.

The dismantling of collective bargaining and the weakening of trade unions form part of a policy that follows the ideological pattern which was previously outlined by Ms. Margaret Thatcher in the UK in the 80s, and which has had new proponents within the European Union following the enlargement, although, until now, there has been no general support for a shift in policy.[24]

This new policy implies that Europe is abandoning the post-Second World War heritage, in which the fight for social justice, and against poverty and exclusion, was seen as a key cornerstone for sustainable peace. Collective bargaining was, at that time, regarded as an efficient and democratic method of wage setting. It also indicates that the vision of the architect for a Social Europe, Mr. Delors, who outlined the building blocks for the social dimension of the EU, is seriously endangered.

Today, the European Union seems to be at a crossroads when it comes to social rights. One option is to return to and restore respect for the basic Treaty provisions, and for human rights, international conventions and principles of legality. This includes a respect for social rights, including free collective bargaining and the principles of equality and non-discrimination. The other option is to openly abandon social rights as a part of the European project

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[23] See Article 152 TFEU and Articles 27 and 28 of the European Charter of Fundamental Rights.

[24] Some authors see the CJEU judgments in the famous *Viking* and *Laval* cases as an indication of such a policy. In fact, the CJEU also expresses explicit support for collective bargaining as a legitimate tool for wage setting in its judgments.

and to focus on establishing an economic neoliberal internal market. This seems to be something in line with the preferences of, for example, the present British prime minister, who wants to renegotiate the EU treaties. How the governance of such a European Union can be exercised in a climate of nationalism and populism, is another issue. Furthermore, the fragmentation of the European Union into a two-speed Europe, with the "Eurozone" and its own problems with democracy and accountability, on the one hand, and the heterogenous outsiders group, on the other, is not a very good base for the resocialisation of Europe. Only one thing is clear: There is no easy way forward. It is, however, important for us to be aware of what is going on and what is at stake.

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