

“Implementation of the European Social Pillar – Preparing the Action Plan”

Consultation on the European Pillar of Social Rights Action Plan in Portugal with N. Schmit, European Commissioner for Jobs and Social Rights

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I want to thank the European Commission in Lisbon for inviting me and allowing me the privilege to take part in this debate.

With this I answer the second question put: consider this a first input of the Faculty of Law of the University of Porto that I expect may continue on future initiatives.

As for the substantial issues relating to fair working conditions, I would like to share the following ideas.

The first of time I was invited to speak about the Social Pillar initiative, in September 2016, I was very sceptical. I must say the work done until now surpassed my expectations. Besides being a motto for action, the 20 principles announced in 2017 are a framework that articulates existing and proposed rules and programmes (cf. Staff Working document, 13/3/2018). Because of this more consistency is to be expected through the “Social Fairness Package” and I would like to underlign the inclusion of social benchmarks in the European Semester process in 2020. Besides the need for measurable bechmarks, the next step is to think about a possible “conditionality” regime.

Yet, the taste is sour-sweet.

There are two kinds of fundamental constraints in this field, (1) political and (2) legal:

1 – Diverse political options are undeniable among Member States and stakeholders and there is a deep divide concerning the relation between the freedom to provide services in the internal market and the protection of workers and fair competition. This became absolutely clear in the Viking and Laval cases and remains vivid in the judicial review of

the Directive (2018/957) on posting of workers that is pending before the ECJ (Cases C-620/18 and C-626/18). The discussion over the meaning of concepts did not end with harmonization.

2 – Legal limits in force: the principle of conferral with express ban of legal harmonisation for instance of wages enshrined in the treaties (article 153/5 TFEU) and the respect for the diverse national traditions.

These constraints give the tone for the initiative on “fair minimum wages”, under discussion here. Nevertheless, this is a paramount step to European citizens.

In my view, the European Union can take full advantage of the venues enshrined in the treaties: the objective of improved and harmonised living and working conditions is stated in article 151.^o TFEU. This encompasses a minimum wage that puts an end to in-work poverty and allows a decent life – “making work pay” (Commission Communication “Strong Social Europe”, January 2020). If the minimum wages are not to be harmonised, nor even the models for determining minimum wages, the establishment of substantive, clear and harmonised parameters to frame national or sectorial minimum wages is necessary (reference budgets; purchasing power index; essential services provision, direct and indirect taxation, etc). Directives imposing minimum requirements are possible according to article 153/2. The Union may promote European agreements between labour and management organisations (article 155.^o TFEU). And we cannot forget Article 352, though unanimity may be a problem.

Also article 145 relating to the European Employment Strategy and even article 136/1/b concerning the monitoring of labour costs in the euro area are possible legal basis for action.

This “creativity” should be extended to the protection of the unemployed.

I would like to stress two special and intertwined challenges: the digital one and the “pandemic” one.

The digital economy and society are revolutionising working conditions. I must point some critical issues: the “uberification” of labour relations demands a special attention from the European legislator; otherwise it rests in the hands of the courts at the risk of

discrimination and uncertainty and casuistic solutions for clashes between contradictory principles (the ECJ jurisprudence on posting of workers proves this point).

The new pandemic reinforced the move towards digitalisation and unveiled hidden problems with telework. Besides the issues raised by the Commission Communication, some doubts came to my mind: telework is frequently a way to provide services across borders: isn't this another form of posting, at a distance? Telework is also a new venue for potential undeclared work. Telework was thought as a way to improve the balance between personal life and work but in the end it may have the opposite result as the pandemic revealed. This should be included in the agenda, especially because we know new pandemics will come.

But the critical problem with digital transition is the fact that the European Union is not a leader but a battle field for the leadership of the digital economy.

3 - Finally, again the European Union followed the path of "Agency governance" with the creation of ELA. The new ELA joins a multitude of European and national agencies. The challenge is to make this network efficient and surpass the constraints put by fragmented territorial surveillance authorities in a transnational internal market. The first concerted inspection coordinated by ELA with the participation of national authorities of Portugal, Belgium and Lithuania took place 3 days ago. The need for extending the mandate of ELA and the strengthening of enforcement mechanisms was already put forward, namely in regard of abuses related to the "Services Directive", including amendments, as we see in competition.

Thank you!