

Europeanization of Nordic Labour Law

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1 Issues

EU law is increasingly shaping national law even in areas that are the preserve of national rather than Community competence. The result is a multi-layered system of labour law with EU law as the young and dynamic influence on old and settled national laws.¹

In this article I will analyse the interaction of the Nordic labour relations model² and EU labour law. I will focus both at the impact on the general legal framework, the sources of labour law and the general legal principles and at individual cases involving the intersection between EU and Nordic labour law. As a consequence of the short period of EU membership for other Nordic countries than Denmark³ the majority of such cases concern Denmark. In the judicial dialogue between Nordic courts and the European Court of Justice (ECJ) gender equality and transfer of undertakings have until now been the two major themes.⁴ In this article I will look also into other areas of law.

2 The Goals of EU and Nordic Labour Law

2.1 EU Level

2.1.1 The General Goals of the Community

Under Article 2 EC as worded by the Amsterdam Treaty the Community has as its task to promote (emphasis added):

- 1) a harmonious, balanced and *sustainable development* of economic activities,
- 2) a *high level of employment and of social protection*,
- 3) *equality between men and women*,
- 4) *sustainable* and non-inflationary growth,
- 5) a high degree of competitiveness and convergence of economic performance,

¹ See generally Nielsen, Ruth, *European Labour Law*, DJØF Publishing, Copenhagen 2000.

² See generally Bruun, Niklas, Boel Flodgren, Håkan Hydén, Marit Halvorsen and Ruth Nielsen, *The Nordic Labour Relations Model*, Dartmouth, Aldershot 1992, See also Bruun, Niklas, Boel Flodgren, Marit Halvorsen, Håkan Hydén og Ruth Nielsen, *Den nordiska modellen. Fackföreningarna och arbetsrätten – nu och i framtiden*, Lund 1990; Sigeman, Tore, Arnmundur Backman, Stein Evju, Ole Hasselbalch, Antti Suviranta, *Arbetsrätten i Norden*, Nord 1990:42; Källström, Kent & Tore Sigeman, *Komparativ Nordisk Arbetsrätt i huvuddrag*, Nord 1990:93 and Källström, Kent & Jonas Malmberg (eds), *Arbetsrätt 1999. Anföranden vid en nordisk forskarkurs i arbetsrätt*, Uppsala 1999.

³ Denmark has been a member of EC/EU since 1.1.1973, Finland and Sweden since 1.1.1995. The EEA Agreement which extended most of the EU labour provisions to the EEA area came into force 1.1.1994. Iceland and Norway are bound by this agreement as were Finland and Sweden in 1994.

⁴ The same is true for the EU as a whole, See Sciarra, Silvana (ed), *Labour law in the courts – National judges and the European Court of Justice*, Hart Publishing, Oxford, 2000.

- 6) a high level of protection and improvement of the quality of the environment,
- 7) *the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.*

2.1.2 The Social Provisions of the EC Treaty (art 136-145 EC)

Article 136 EC qualifies the fundamental social rights, as determined by the European Social Charter 1961 and the Community Social Charter 1989, as guidelines for activities of both the Community and the Member States. It states that the Community and the Member States shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combatting of exclusion. In *Zaera v Instituto Nacional de la Seguridad Social*⁵ the ECJ stated that the fact that the objectives laid down in Article 136 [then 117] are in the nature of a programme does not mean that they are deprived of legal effect. They constitute an important aid, in particular for the interpretation of other provisions of the EC Treaty and of secondary legislation.⁶

In 1976 in *Defrenne (2)*,⁷ the ECJ took the view, as regards Article 141 EC in respect of equal pay, that it pursues a twofold purpose, *both economic and social*. It has since become usual to interpret not only equal pay legislation but labour law in general as governed by this double aim of pursuing both economic and social goals. Since the adoption of the Amsterdam Treaty the mixed economic and social purpose of the Community is explicitly provided for in the text of the EC treaty. In 2000, in *Schröder*⁸ the ECJ went a step further than in *Defrenne (2)* and held that the economic goals of Article 141 EC are secondary to the social aims of that provision. In matters of collective labour law the ECJ has similarly held that social aims under certain conditions override the considerations for undistorted competition and result in a restrictive interpretation of Article 81 EC.⁹

⁵ Case 126/86 [1987] ECR 3697, para 14.

⁶ This interpretative role for Article 136 EC was applied in *Defrenne v Sabena* (Case 43/75 [1976] ECR 455, para 15) in order to raise the lower pay of women to the higher male wage. In *Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesmer, der Sloman Neptun Schiffahrts Ag* (Joined Cases C-72/91 and C-73/91 (1993) ECR 887) the ECJ denied direct effect to Article 136 EC.

⁷ Case 43/75 *Defrenne v Sabena* (No 2) [1976] ECR 455 paragraph 8-11.

⁸ Case C-50/96 *Deutsche Telekom AG v Lilli Schröder* [2000] ECR I-743.

⁹ See Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, Joined cases C-115/97 to C-117/97 *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I-6025 and Case C-219/97 *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [1999] ECR I-6121.

2.1.3 European Employment Strategy (art 125-130 EC)

At the initiative of Sweden, Title VIII of the EC Treaty (art 125-130 EC) on employment was included in the Treaty of Amsterdam. This part of the Treaty creates the institutional framework whereby a common employment policy can be implemented. The Lisbon European Council on 23 and 24 March 2000 set a new strategic goal for the European Union to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion.

The European employment strategy provided for in the Amsterdam Treaty is aimed at adapting the European labour market to the information society. Within the framework of the European employment strategy annual employment guidelines are drawn up at EU level.¹⁰ They aim at promoting 4 major goals: employability, entrepreneurship, adaptability and equal opportunities.

2.1.4 Social Policy Agenda 2000-2005

As appears from the above the Community now has a clearly *twofold, both economic and social goal*. This is confirmed in the Social Policy Agenda 2000-2005¹¹ where the aim is described as being (emphasis added):

“... to create a *virtuous circle of economic and social progress* [that] should reflect the interdependence of these policies and aim to maximize their mutual positive reinforcement.”

2.2 *National Level: The Rising Role of Goals and the Declining Role of Preparatory Works in Nordic Labour Law*

The goals set out in Article 136 EC are to be aimed at both by the Community and by the Member States. The EU guidelines within the framework of the European employment strategy are followed up by national action plans which at national level pursue the goals established at EU level.

Before their membership of EU, the Nordic countries did not have explicit statements at legislative level of the goals to be achieved in the labour market. Denmark, Finland and Sweden are now under an obligation to aim at the objectives set out in the EC Treaty, in particular art 136 EC. The EEA Agreement does not contain any provision like art 136 EC and, therefore, Norway and Iceland are – arguably – not bound by these goals.

The styles both of drafting legislation and of interpreting it by the courts are different at EU and Nordic level.

In EU law there are numerous explicit references to the goals aimed at both in the preambles to Community legislation and in case law.¹² Such references are rare in Nordic legislation and case law.

¹⁰ See generally Erika Szyszczak, *The New Paradigm for Social Policy: A Virtuous Circle?* Common Market Law Review 2001 vol 38 at 1125.

¹¹ COM(2000)379 at 8.

On the other hand, references to the preparatory works of legislation have occurred frequently in the traditional Nordic legal method of argumentation, especially in Sweden.¹³ Remarks in the preparatory works can, however, according to the case law of the ECJ not replace explicit statutory provisions as means of implementing EC directives.¹⁴ The traditional Nordic significance of preparatory works as a source of law is therefore declining concurrently with the Europeanization of Nordic labour law.

3 The Actors in Nordic and EU Labour Law

Nordic labour law has traditionally been governed by actors who are *specialists* in this field, in particular the social partners. EU labour law, on the other hand, is by and large created, administered and adjudicated by the same actors as other areas of EU law and *not by labour specialists*. Increasing integration between EU and Nordic labour law therefore tends to reduce the relative importance of the labour market organisations. The role of the social partners at EU level is, however, growing, to a large extent because of determined efforts by Nordic, in particular Swedish, unions. At national level, the duty to implement directives by means of some sources of law rather than others limit the possibility for implementation by means of traditional Nordic collective agreements. Apart from that, it is a matter of domestic political choices what roles different actors should play at national level.¹⁵

3.1 The Social Partners

3.1.1 The Different Roles of the Social Partners at Nordic and EU Level

In the Nordic countries the national labour market organisations serve both as legislators, judges and litigators. The labour market organisations fulfil legislative functions mainly through the adoption of collective agreements. They have adjudicative functions mainly by participating as lay judges in the special

¹² See for example Case 19/83 *Knud Wendelboe et al v L J Music* [1985] ECR 457 and Case 105/84 *Dannmols* [1985] ECR 2639 discussed below in the section on transfer of undertakings.

¹³ Cf. Nyström, Birgitta, *EU och arbetsrätten*, Stockholm 2002 at 65.

¹⁴ Case 143/83, *Commission v Denmark* [1985] ECR 427, where the Court held that Denmark had failed to implement the Equal Pay Directive correctly. The ECJ stated (emphasis added): “The fact that in the preamble to the draft law [in the Danish version of the judgment: *bemærkningerne til lovforslaget*] the government stated that the expression ‘same work’ was interpreted in Denmark in so broad a sense that the addition of the expression ‘work to which equal value is attributed’ would not entail any real extension *is not sufficient to ensure that the persons concerned are adequately informed.*”

¹⁵ After the general election in Denmark 20 November 2001, a new liberal, conservative government came into office. It has announced its intention to propose a number of measures aimed at reducing the power of the Danish trade unions.

labour courts and industrial tribunals. Finally, trade unions are the main litigators in Nordic labour law.

Generally, employers' and workers' organisations have developed a close mutual collaboration in exercising the above functions. When they agree, they exert considerable influence on the Nordic societies as a whole, including on the ordinary parliamentary legislator.

At EU level, the social partner actors enjoy a more modest position than in the Nordic countries. They are almost totally excluded from the adjudicative function. They are not judges and they have standing as litigators at EU level only in the same way as any other natural or legal person who under art 230(4) EC may institute proceedings against a decision addressed to that person or against a decision which is of direct and individual concern to them.¹⁶

The role of the social partners at EU level is, however, growing.¹⁷ Article 138 EC and Article 139 EC provide a basis for including the social partners at EU level in the EU legislative process. Directives may be adopted on the basis of European collective agreements.¹⁸

The role of the European Parliament in the legislative process is restricted in cases where directives are adopted on the basis of a European collective agreement. Generally the most usual decision-making process when adopting directives is joint decision-making by the Council and European Parliament under Article 251 EC. When directives are adopted on the basis of a European collective agreement the decision is under Article 139 EC taken by the EU Council without the Parliament participating in the decision process.

There is therefore a need to ensure that the social partners who replace the European Parliament in the legislative process are sufficiently representative. Representativity is generally a requirement for "Tariffähigkeit" at national level in most continental European countries.¹⁹ This requirement seems to be transferred to EU level.²⁰ In *UEAPME*²¹ the Court of First Instance thus held that the Council and the Commission are obliged to ascertain whether, having regard to the content of the collective agreement in question, the signatories, taken together, are sufficiently representative. Where that degree of representativity is

¹⁶ In Case T-135/96, *Union Européenne de l'artisanat et des petites et moyennes entreprises (UEAPME) v Council of the European Union*, ECR 1998 II-2335 an employers' organisation sued the Council for annulment of the parental leave directive.

¹⁷ See for example Dølvik, Jon Erik, *Redrawing Boundaries of Solidarity. ETUC, social dialogue and the Europeanization of trade unions in the 1990s*, Oslo 1997. See also Neal, Alan C (ed), *European social policy and the Nordic countries*, Ashgate, Aldershot 2000.

¹⁸ So far, 3 directives have been adopted on the basis of European collective agreements: the parental leave directive (96/34/EC), the part time directive (97/81/EC) and the fixed term directive (1999/70/EC).

¹⁹ See further Nielsen Ruth, *European Labour Law*, Copenhagen 2000 at 84 et seq.

²⁰ Schmidt, Marlene, *Representativity – A Claim Not Satisfied: The Social Partners' Role in the EC Law-Making Procedure for Social Policy*, International Journal of Comparative Labour Law and Industrial Relations 1999, vol 15 at 259 argues that the European social partners' representativity is partial and inadequate.

²¹ Case T-135/96, *Union Européenne de l'artisanat et des petites et moyennes entreprises (UEAPME) v Council of the European Union*, ECR 1998 II-2335.

lacking, the Commission and the Council must refuse to implement the agreement at Community level.

3.1.2 Interaction between EU and National Level

EU law narrows the scope for “legislation” by collective agreement, see below on the changing context of collective agreements, and thereby diminishes the legislative function of the social partners at national level.

Enforcement of EU law at national level is based on procedural autonomy at national level and a private enforcement model.²² The courts can therefore (by and large) remain as they are and trade unions are free to choose whether or not they will assume a litigator role in interaction with EU law. Danish trade unions have – after 10-15 years hesitation – to a considerable extent chosen to do so, while Finnish and Swedish trade unions so far have abstained, see below on courts and litigators.

3.1.3 The Strategic Dilemmas of the Social Partners

There has been considerable concern in the labour market organisations about the disruptive effect EU labour law may have upon the Nordic labour relations model and the strong position the social partners have traditionally enjoyed in this model. At the same time, EU law on a number of issues offers higher standards of workers’ rights than Nordic law has traditionally done. This places the Nordic trade unions in a dilemma as to whether they shall fight for preservation of the traditional Nordic model or strive to improve their members’ position by contributing to the development of EU labour law whereby they will harm their traditional good relationship with the employers’ side and probably reduce their overall influence within the Nordic countries.

Torunn Olsen,²³ who has studied the decision making process and the contribution of central actors in Denmark and Germany in connection with the preparation of 3 employment directive (the written statements directive,²⁴ the pregnancy directive²⁵ and the working time directive²⁶), concluded in the mid 1990s, the Danes were first and foremost trying to hinder that the directives would require changes in Denmark. It was also typical, and different from Germany, that the Danish employers’ and workers’ organisations reached a common position, and that it was this position the Danish government fought for in Brussels.

²² Cf. Kilpatrick, Claire, Tonia Novitz & Paul Skidmore (ed.), *The Future of Remedies in Europe*, Hart Publishing, Oxford 2000 at 2.

²³ Olsen, Torunn, *Destinasjon Brussel. Beslutningsprosessen og sentrale aktørers medvirkning i EF’s arbeidslivspolitik*, Oslo 1996.

²⁴ 91/533/EEC.

²⁵ 92/85/EEC.

²⁶ 93/104/EC.

3.2 *The Ordinary Legislator*

Before the entry into EC/EU the ordinary national legislator (parliament) had within the limits of the constitutions general legislative power in the labour field, including the power to abstain from statutory intervention and leave an issue to be solved by collective agreements between the labour market organisations. By the acts of accession much legislative power was transferred to the Community legislator.

In particular in Denmark, there was before the entry into EC/EU a strong tradition of not legislating on issues such as pay, including equal pay between men and women, and working time. The interaction with EU law has led to increased statutory legislation, very markedly in Denmark, and to a lesser extent also in the other Nordic countries.

The EC Treaty is a framework Treaty. It mainly contains rules providing for the goals to be attained (see above) and rules conferring power. These rules institute the Community legislator and invest it with competence to enact secondary EU legislation (regulations, directives, etc). There are generally few duty-imposing norms in the EC Treaty. In matters of labour law there are only two important ones: Article 39 EC which prohibits hindrances to the free movement of workers and Article 141 EC in regard to equal pay.

There are explicit provisions in the EC Treaty for minimum standard legislation in respect of labour law in Article 137 EC which provides that directives adopted with this legal base do not prevent the Member States from maintaining or introducing more stringent protective measures compatible with the EC Treaty. The national legislator thus still has power to go further in favour of the workers than the Community legislator has gone. So far, this competence has been used to a very limited extent in the Nordic countries.

3.3 *The Courts and Litigators*

3.3.1 *The ECJ*

The ECJ is a court of general jurisdiction across Community law and Union law. It tends to favour general sources of law, eg the ECHR over labour specific rules such as ILO conventions and recommendations.²⁷ The ECJ has contributed considerably to bringing labour law into the mainstream of the evolution of general principles of EU law. The ECJ has used labour law cases as starting points for discovering and developing basic principles of European law, such as for example directly binding effect *viz a viz* private individuals,²⁸ duty to

²⁷ See for a criticism of the ECJ's scant regard for ILO conventions O'Higgins, Paul, *Some problems of enforcement of rights under the Community Charter of Fundamental Social Rights of Workers* in Vogel-Polsky, Eliane (ed), *Quel avenir pour l'Europe sociale: 1992 et après?* Bruxelles 1992 at 73.

²⁸ Case 43/75 *Defrenne v Sabena* (No 2) [1976] ECR 455 and Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139.

interpret national law in conformity with directives²⁹ and state liability.³⁰ Labour law principles concerning free movement of workers³¹ and equality between men and women³² have been elevated into fundamental rights and general principles of law.

3.3.2 National Courts

In the Nordic countries there are special labour courts and industrial tribunals composed of a combination of professional judges and lay judges representing the social partners. In addition, the ordinary courts have jurisdiction in a number of employment cases.

3.3.3 Nordic Cases before the ECJ

Article 234 EC provides for a judicial collaboration to take place between the national courts and the ECJ. It is obvious that the ordinary Nordic courts and the special Labour courts are courts within the meaning of art 234 EC. In *Danfoss*,³³ the ECJ held that a Danish industrial arbitration board³⁴ must also be regarded as a court or tribunal of a Member State within the meaning of Article 234 EC.

Denmark has as the Nordic EU Member State who first joined the Union been involved³⁵ in many more cases before the ECJ, namely 21, than Finland³⁶ and Sweden.³⁷ Norwegian courts have referred questions concerning EU law to the EFTA Court in 4 transfer of undertakings cases³⁸ and in one on the interplay

²⁹ Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

³⁰ Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357.

³¹ See for example Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139.

³² Case 149/77 *Defrenne v Sabena (No 3)* [1978] ECR 1365.

³³ Case C-109/88 *Handels-og-Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Danfoss)* [1989] ECR 3199.

³⁴ In Danish: faglig voldgift.

³⁵ Only cases which have been decided by the end of 2001 are included.

³⁶ Case C-172/99, *Oy Liikenne Ab v Pekka Liskojärvi and Pentti Juntunen*, [2001] ECR I-0745 (on workers' right in connection with transfer of undertakings in tender proceedings). Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale Belge des sociétés de basket-ball ASBL (FRBSB)*, [2000] ECR I-2681 was about a Finnish basket ball player but the question was referred by a Belgian Court.

³⁷ Case C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, [2000] ECR I-5539 (on positive action for women), Case C-236/98, *Jämställdhetsombudsmannen v Örebro läns landsting*, [2000] ECR I-2189 (on equal pay), Case C-321/97, *Ulla-Brith Andersson and Susanne Waakeraas-Andersson v Svenska staten*, [1999] ECR I-3551 (on the employe's insolvency), Case C-387/96, *Criminal proceedings against Anders Sjöberg*, [1998] ECR I-1225 (Social aspects of road transport), Joined cases C-122/99 at and C-125/99 *P, D and Kingdom of Sweden v Council* [2001] ECR I-4319 (discrimination on grounds of sexual orientation) and Case C-441/99, *Riksskatteverket v Soghra Gharehveran*, judgment of 18.10.2001 (on the insolvency of the employer).

³⁸ Case E - 2/95, *Eilert Eidesund v Stavanger Catering A/S*, opinion of 25.9.1996, Case E-2/96 *Jørn Ulstein & Per Otto Røiseng v Asbjørn Møller*, opinion of 19.12.1996, Case E-3/95, *Torgeir Langeland v Norske Fabricom A/S*, opinion of 25.9.1996, Case E-3/96 *Tor Angeir*

between collective agreements and competition law.³⁹ In November 2001, the EFTA Surveillance Authority sent a reasoned opinion to Norway for failure to comply with Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women.

There has been one infringement case against Denmark on equal pay⁴⁰ and Denmark has together with a number of other EU countries been plaintiff in an annulment case concerning a Commission decision to promote the occupational and social integration of workers from third countries.⁴¹

The ECJ has ruled in 19 preliminary cases under art 234 EC referred by Danish Courts or industrial tribunals. Danish questions to the ECJ under art 234 EC concern art 141 EC or other equality provisions (seven cases⁴²), transfer of undertakings (seven references⁴³), collective redundancies (three references⁴⁴),

Ask et al v ABB Offshore Technology AS and Aker Offshore Partner AS, opinion of 14.3.1997.

³⁹ E-8-00, Request for an Advisory Opinion from the EFTA Court by Arbeidsretten of 27 September 2000 in the case of *Landsorganisasjonen i Norge, with Norsk Kommuneforbund v Kommunenes Sentralforbund and Others*.

⁴⁰ Case 143/83, *Commission v Denmark*, [1985] ECR at 427. The ECJ held that Denmark had failed to implement the Equal pay directive correctly following which Denmark amended the Equal Pay Act.

⁴¹ Joined cases 281, 283, 284, 285 og 287/85, *Germany, Holland, Denmark and England v Commission*, [1987] ECR at 3203.

⁴² Case 109/88, *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening for Danfoss A/S*, [1989] ECR at 3199 (equal pay), Case C-400/93, *Specialarbejderforbundet i Danmark v Dansk Industry for Royal Copenhagen A/S*, [1995] ECR I-127 (equal pay), Case 179/88, *Handel- og Kontorfunktionærernes Forbund i Danmark acting for Birte Vibeke Hertz v Dansk Arbejdsgiverforening acting for Aldi Marked K/S*, [1990] ECR I-3979 (pregnancy related illness), Case C-400/95, *Handel- og Kontorfunktionærernes Forbund i Danmark acting for Helle Elisabeth Larsson v Dansk Handel & Service acting for Føtex Supermarked A/S*, [1997] ECR I-2757 (pregnancy related illness), Case C-66/96, *Handel- og Kontorfunktionærernes Forbund i Danmark acting for Berit Høj Pedersen v Fællesforeningen for Danmarks Brugforeninger acting for Kvickly Skive et al*, [1998] ECR I-7327 ((pregnancy related illness and other matters), Case C-109/2000, *Tele Danmark A/S v Marianne Brandt-Nielsen*, judgment of 4.10.2001 (pregnant women on fixed term contracts), Case C-226/98, *Birgitte Jørgensen v Foreningen af Speciallæger, Sygesikringens Forhandlingsudvalg*, [2000] ECR I-2447.

⁴³ Case C-48/94, *Ledernes Hovedorganisation som Mandatar for Ole Rygaard v Dansk Arbejdsgiverforening acting for Strø Mølle Akustik A/S*, [1995] ECR I-2745, Case 209/91, *Anne Watson Rask and Kirsten Christensen v ISS Kantineservice A/S*, [1992] ECR I-5755, Case 101/87, at *Bork International A/S in liquidation v Foreningen af arbejdsledere i Danmark, and Jens E Olsen, Karl Hansen et al, and HK v Junckers Industrier A/S*, [1988] ECR s 3057, Case 324/86, *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S*, [1988] ECR 739, Case 287/86, *Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro*, [1987] ECR 5465, Case 105/84, *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar in liquidation*, [1985] ECR 2639 and Case 19/83, *Knud Wendelboe mfl v L J Music in liquidation*, [1985] ECR 457.

⁴⁴ Sag C-250/97, *Dansk Metalarbejderforbund som mandatar for John Lauge mfl mod Lønmodtagernes Garantifond*, Saml 1998 I-8737, Sag C-449/93, *Rockfon A/S mod Specialarbejderforbundet i Danmark*, Saml 1995 I-4291 og Sag 284/83, *Dansk Metalarbejderforbund og Specialarbejderforbundet i Danmark mod H Nielsen og Søn, Maskinfabrik A/S, under konkurs*, Saml 1985 s 553.

the employer's insolvency (one case⁴⁵) and social provisions on road transport (one case⁴⁶). These issues are also those addressed in the Finnish and Swedish references to the ECJ and in most of the Norwegian labour law references to the EFTA Court.

The above Danish references were made by the Labour Court (one case), industrial tribunals (two cases) and the ordinary courts (16 cases). The first Danish questions referred to the ECJ under art 234 EC concerned the transfer of undertakings directive which is only marginally concerned with traditional collective labour law issues. One of the Swedish references was made by the Labour Court, one by Överklagandenämnden and the rest by the ordinary courts. The Finnish references were made by the Supreme court.

In addition to the direct dialogue between Nordic courts and the ECJ over the interpretation of EU labour law there is a considerable and growing amount of Nordic cases where EU labour law is being applied without questions being put to the ECJ because the Nordic court feels confident that Community law on the point at issue is sufficiently clear to make it unnecessary to refer questions to the ECJ for a preliminary ruling under art 234 EC.⁴⁷

3.3.4 The Litigators

Danish trade unions in the Confederation of Trade Unions (Danish LO) were unwilling to invoke Community law before Danish courts and industrial tribunals until the mid 1980s even though they lost equal pay cases in Danish industrial arbitration tribunals, in particular the Vejle Amts Folkeblad⁴⁸ and the Danfoss-I cases,⁴⁹ on grounds of provisions in collective agreements which were rather obviously in contravention of the underlying Community-rules prohibiting indirect sex discrimination and consequently invalid, had EU law been properly applied.⁵⁰

By the mid 1980s, a trade union with more than 80% women members broke the consensus about abstaining from using Community law and brought the

⁴⁵ Case C-117/96, *Danmarks Aktive Handelsrejsende, for Carina Mosbæk v Lønmodtagernes Garantifond*, [1997] ECR I-5017.

⁴⁶ Case C-326/88, *Anklagemyndigheden v Hansen & Søn I/S*, [1990] ECR 2911.

⁴⁷ A recent example is the judgment of the Danish Supreme Court in U 2001.1993 H in a transfer of undertakings case where it considered the transfer of a cleaning service as coming within the scope of the Danish Transfer of Undertakings Act which implement the Transfer of Undertakings Directive.

⁴⁸ *HK v Dansk Arbejdsgiverforening/Danske Dagblades Forenings Forhandlingsorganisation for Vejle Amts Folkeblad*, Arbitral Award of 11.2.1985, *Arbejdsretligt Tidsskrift* 1985 at 185 and DJØF/DA/Schultz Domssamling *Arbejdsret*. Summary in Danish in Andersen, Agnete, Ruth Nielsen og Kirsten Precht, *Ligestillingslovene med kommentarer*, Kbhvn 2001 at 407.

⁴⁹ *HK v DA for Danfoss A/S*, Arbitral Award of 16.4.1985, *Arbejdsretligt Tidsskrift* 1985 at 197 og DJØF/DA/Schultz Domssamling *Arbejdsret*. Summary in Danish in Andersen, Agnete, Ruth Nielsen og Kirsten Precht, *Ligestillingslovene med kommentarer*, Kbhvn 2001 at 408.

⁵⁰ See for details Nielsen, Ruth, *Equality in Law between Men and Women in the European Community*. Denmark, The Hague, 1995. See also Lynn Roseberry's article in this volume.

Danfoss-case⁵¹ in which it demanded that questions should be referred to the ECJ to test the compatibility of the Danish judicial practice with EU-law. The outcome was that the earlier Danish practice was overturned. This case marked a break-through in trade union attitudes to support claims based on EU law.

Six out of the seven Danish equality cases which have been referred to the ECJ until now were brought by trade unions (5 by HK and one by the General Workers Union, SiD). In two out of three redundancy cases a trade union was acting for its members (Dansk Metal) and one of the transfer of undertakings cases was brought by the Confederation of Danish Trade Unions (Danish LO). Four of the remaining 6 transfer cases were brought by the Danish Association of Managers and Executives (Ledernes Hovedorganisation) which is an atypical trade union outside the main organisations.⁵²

Danish trade unions are thus the litigators behind more than half the Danish references to the ECJ. None of the Swedish or Finnish cases have (yet) been brought by trade unions. This is one of the main comparative differences between the response to EU labour law in the individual Nordic countries. Maybe it is due to the fact that Denmark has been an EU member for nearly 30 years while Finland and Sweden have only been members for about 6 years. The Danish trade unions did not start to use EU labour law actively in litigation until 10-15 years after Denmark's entry into EU. Perhaps the differences between the Nordic collective labour law tradition and EU labour law render a certain adaptation period necessary.

4 Changing Context of Collective Agreements

4.1 *The Concept of a Collective Agreement*

In the report on Industrial Relations in Europe from 2000,⁵³ the Commission defines a collective agreement in the following way:

An agreement reached through collective bargaining⁵⁴ between an employer and one or more trade unions, or between employers' associations and trade union confederations. This agreement regulates the relationships between the parties and the treatment of individual workers, and covers the wages and conditions of the workers affected.

⁵¹ Case 109/88, *Handel- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening for Danfoss A/S*, [1989] ECR at 3199. In the Danish arbitration practice this is the Danfoss-II case, *HK mod DA for Danfoss A/S, Sønderjylland*, Arbitral Award of 22.10.1991. Summary in Danish in Andersen, Agnete, Ruth Nielsen og Kirsten Precht, *Ligestillingslovene med kommentarer*, Kbhvn 2001 at 410.

⁵² Cf. Sundberg, Hans, *Danish Industrial Relations, Community Litigation and the Acquired Rights Directive*, *International Journal of Comparative Labour Law and Industrial Relations* 1999, vol 15 at 269.

⁵³ COM(2000)113 at 8.

⁵⁴ Collective bargaining is said to be the process of negotiation by which collective agreements are reached. Such agreements are compromises which reflect the relative bargaining power of the parties, COM(2000)113 at 8.

In most continental European Member States of the EU collective agreements are defined by legislation as formal, written agreements which do not qualify as collective agreements unless certain formal or structural requirements are met. The Swedish Co-determination Act,⁵⁵ and the Finnish Act on collective agreements⁵⁶ are in line with this general continental European pattern.

Denmark, on the other hand, lacks a statutory definition of a collective agreement. In Danish law it is not required that a collective agreement be in writing, but in practice most collective agreements are written also in Denmark and it is not required that the party on the workers' side is a trade union.⁵⁷ The Danish concept of a collective agreement thereby tends to be broad and imprecise. When national legislation and/or directives are semi-mandatory there is need for a narrower and more precise definition.⁵⁸

4.2 *Semi-Mandatory Directives*

In recent directives at EU level there is some acceptance of derogations by collective agreement. As an example Article 17 of the Working time Directive⁵⁹ may be mentioned. It allows, on a number of detailed conditions, derogations from a number of provisions in the directive to be adopted by means of laws, regulations or administrative provisions or *by means of collective agreements or agreements between the two sides of industry*. The general purpose of the Working Time Directive is to protect the employees and the directive cannot be derogated from by an individual contract of employment.

There is no case law on the interpretation of the term "collective agreement" when used in semi-mandatory EU directives. In my view,⁶⁰ collective agreements within the meaning of a semi-mandatory directive must be interpreted as referring only to collective agreements of the continental European type with mandatory normative effect which implies that they cannot be derogated from to the detriment of the worker by individual contract. If a directive could be derogated from by an ordinary English collective agreement (which is not legally binding) or by a Danish collective agreement in the broad sense accepted in the abovementioned Labour Court case⁶¹ it would be open to derogations controlled by the employer side.

⁵⁵ 1976:580, sections 23-31.

⁵⁶ 436/1946.

⁵⁷ See the Labour Court's judgment in AD 90.007 where an agreement between a group of engineers and the employer they were employed with was regarded as a collective agreement.

⁵⁸ See further Nielsen, Ruth, *Lærebog i Arbejdsret*, Copenhagen 2001 at 116 et seq.

⁵⁹ 93/104/EEC.

⁶⁰ See further Nielsen, Ruth, *European Labour Law*, Copenhagen 2000 Chapter III.

⁶¹ AD 90.007.

4.3 *Implementation of EU Law by Means of Collective Agreements*

4.3.1 The Problem

Implementation of Community directives by means of collective agreements has been a much contested issue in the Nordic countries, in particular in Denmark.

In its report from 2000 on Industrial Relations in Europe⁶² the Commission states on the practise of implementing directives by means of collective agreements that (emphasis added):

This practice, validated over the years by the Court of Justice of the European Communities and enshrined in Article 137(4) of the EC Treaty, is more frequent in those countries with a strong tradition of agreement-based regulation such as Belgium, Denmark or Italy. *Nevertheless, it raises the question of general coverage, continuity and appropriate publicity for agreement-based transposal measures.*

4.3.2 Partial Implementation by Collective Agreement

Member States are free to leave the implementation to collective agreements supplemented by legislation which only applies to workers not covered by the collective agreements. In *Commission v Kingdom of Denmark*⁶³ the Commission brought an infringement action against Denmark for failure to implement the Equal Pay Directive. The ECJ held that Member States may leave the implementation of the principle of equal pay in the first instance to representatives of management and labour. That possibility does not, however, discharge them from the obligation of ensuring, by appropriate legislative and administrative provisions, that all workers in the community are afforded the full protection provided for in the directive. That state guarantee must cover all cases where effective protection is not ensured by other means, for whatever reason, and in particular cases where the workers in question are not union members, where the sector in question is not covered by a collective agreement or where such an agreement does not fully guarantee the principle of equal pay.

In an infringement case against Italy⁶⁴ concerning the transfer of undertakings directive the ECJ held similarly that although the member states may leave the implementation of the social policy objectives pursued by the directive in the first instance to management and labour, that does not discharge them from the obligation of ensuring, by the appropriate laws, regulations and administrative measures, that all workers in the community are afforded the full protection provided for in the directive. The state guarantee must cover all cases where effective protection is not ensured by other means, in particular where collective agreements cover only specific economic sectors and create obligations only

⁶² COM(2000)113 at 37.

⁶³ 143/83 *EC Commission v Denmark* [1985] ECR 427. This case is discussed more fully in Lynn Roseberry's article in this volume.

⁶⁴ Case 235/84 *Commission v Italy* [1986] ECR 2291.

between members of the trade union in question and employers or undertakings bound by the agreements.

The Court's case law is now codified in Article 137(4) EC. In countries where collective agreements have no or limited *erga omnes* effect such agreements are therefore not sufficient as the sole means of implementing directives establishing rights for all individual workers.

4.3.3 Collective Agreements with Erga Omnes Effect

In the Nordic countries, the starting point is that only parties to collective agreements are bound by them. On the employer side this means that an individual employer who has signed a collective agreement is bound by it. An employer who is member of an employer's organisation who has signed a collective agreement is also bound by the collective agreement.

In order for a collective agreement to bind other employers than those who are parties to it, i.e. to have *erga omnes* effect, legislation or administrative intervention is required. Most EU Member States have a system for extending collective agreements so as to make them binding on employers who are not parties to them. In *Commission v Belgium*⁶⁵ the ECJ accepted that Belgium implemented the directive⁶⁶ on collective redundancies into national law by a collective agreement with *erga omnes* effect. Collective agreements with *erga omnes* effect are thus sufficient to implement directives.

The Nordic implementation problem arises because the possibility for extending collective agreements so as to give them *erga omnes* effect exists only to a limited extent in the Nordic countries.⁶⁷

In Sweden and Denmark, collective agreements can generally (see on part time agreements in Denmark just below) *not* be extended to cover employers who are not parties to them. In Norway there is a limited possibility of extension of the coverage of collective agreements. In Finland there is wider access to give *erga omnes* effect to collective agreements.⁶⁸

The Part Time Directive⁶⁹ was finally implemented in Denmark in the summer 2001.⁷⁰ The Danish Part Time Act implements the Part Time Directive by extending the major Danish collective agreements on the implementation of the Directive so as to cover any employee who is not otherwise covered by a collective agreement ensuring at least the same standard of protection as the Directive. This means that employers' who are not parties to collective

⁶⁵ Case 215/83 *EC Commission v Belgium* [1985] ECR 1039.

⁶⁶ 75/129/EEC, consolidated by 98/59/EC.

⁶⁷ See the overview in the Commission's report on Industrial relations in Europe COM(2000)113 at 41 (which, however, as far as I can see has misunderstood Finnish law).

⁶⁸ See for details Ahlberg, Kerstin and Niklas Bruun, *Kollektivavtal i EU. Om allmängiltiga avtal och social dumping*, Stockholm 1996. Detailed rules are laid down in Act No 56/2001 (Lag om fastställande av kollektivavtals allmänt bindande verkan).

⁶⁹ 97/81/EC.

⁷⁰ Act No 443 of 7 June 2001 on the implementation of the Part Time Directive *and* Act No 444 of 7 June amending the Salaried Employees Act so that the threshold for status as salaried employee is lowered from 15 hours work a week to 8 hours.

agreements implementing the Directive have to obey collective agreements entered into by other employers. Denmark's implementation of the Part Time Directive thus developed a new version of the Danish Model regarding the combination of legislation and collective agreements by extending the major Danish collective agreements on implementation of the Part Time Directive through legislation.

4.3.4 The Danish Resistance to Implementation by Legislation

4.3.4.1 Stoppage of Work for Health and Safety Reasons

In Denmark a standard grievance procedure for the handling of conflicts by industrial arbitration was laid down by collective agreement between the Confederation of Danish Employers and the Confederation of Trade Unions, i.e. the central labour market organisations, in 1908.⁷¹ It contains, in addition to a grievance procedure, a rule providing a right for workers to stop work when it is necessary for the sake of "life, honour or welfare".⁷²

When implementing the Working Environment Framework Directive in 1992,⁷³ Denmark took the view that the above "life, honour or welfare" provision in Normen was sufficient to implement art 8(4) and (5) of the directive and left those provisions out of the implementing legislation. The EU Commission did not agree and regarded it as an infringement of the directive that not all Danish workers were assured the protection required by the directive. In 2001, Denmark gave in and amended the Working Environment Act so that it repeats the disputed provisions of the directive.⁷⁴ The Act does not apply when protection equal to that required by the directive is offered by collective agreement.

The Danish collective agreement Normen from 1908 – which is 81 years older than the Working Environment Framework Directive – has a wording that differs considerably from that of the directive. In order to avoid discussion of whether Normen from 1908 was sufficient implementation in regard to persons covered by it, the central labour market organisations, in 2001, supplemented Normen by a new collective agreement stating that the provision on "life, honour or welfare" in Normen from 1908 should always be interpreted in accordance with the ECJ's interpretation of art 8(4) and (5) of the Working Environment Framework Directive. In view of the traditional sceptical attitude of the Danish social partners towards the ECJ, this is a remarkable variation of implementation by collective agreement.

⁷¹ Normen for behandling af faglig strid. *See further* Hasselbalch's article in this volume.

⁷² "Liv, ære og velfærd" in Danish.

⁷³ 89/391/EEC.

⁷⁴ Working Environment Act §§ 17a-17c.

4.3.4.2 The Working Time Directive

In respect of the Working time Directive,⁷⁵ until recently, Denmark refused to supplement collective agreements with legislation contending that Danish collective agreements should be accepted as the sole instrument for implementing a number of provisions in the Directive, eg the maximum of 48 working hours a week. It was a political, rather than a legal, decision. The harshest opposition to adopting implementing legislation came from some trade unions who preferred open non-compliance rather than adaptation of the Danish industrial relations model to EU law.

The EU Commission – slowly – chose to react at the legal level and finally sent a reasoned opinion to Denmark in September 2001 threatening to start infringement proceedings before the ECJ. In December 2001, the Danish government in agreement with the Employers' Organisation and the Confederation of Trade Unions (Danish LO)⁷⁶ promised to table a proposal for implementing legislation early in 2002.⁷⁷ This probably means that the debate on the possibility to implement directives solely by traditional Danish collective agreements is coming to an end.

4.3.4.3 The Force Majeure Clause for Family Reasons

There is, however, still an example of non-implementation by legislation in respect of the force majeure clause for urgent family reasons in the Parental Leave Directive.⁷⁸ That provision is in Denmark implemented in a number of collective agreements allowing parents to stay home in case of a child's illness but not in legislation covering those employees who are not covered by a collective agreement containing a force majeure clause.

4.4 *Information and Consultation*

4.4.1 Information and Consultation

In December 2001, political agreement was reached on the proposed general directive on information of employees.⁷⁹ It will require legislation in areas that in Denmark and Norway have so far been governed exclusively by collective agreements on works councils.⁸⁰ The European Works Council Directive⁸¹ is

⁷⁵ 93/104/EC.

⁷⁶ There was still some opposition within the LO. The General Workers Union (SiD), which is one of the biggest Danish trade unions, wanted LO and Denmark to refuse to comply with the requirement of legislating in this field.

⁷⁷ On 6 February 2002, the government proposed L 83, Act on the Implementation of Certain Aspects of the Working Time Directive.

⁷⁸ Clause 3 in the framework agreement attached to directive 96/34/EC.

⁷⁹ COM(1998) 612 final - 98/0315(SYN) (Submitted by the Commission on 17 November 1998).

⁸⁰ See further Örjan Edström's article in this volume.

implemented by legislation in all the Nordic countries. In the autumn 2001, the Directive supplementing the Statute for a European company with regard to the involvement of employees was adopted.⁸² It will also require implementing legislation.

4.4.2 Duty to Bargain with a View to Reaching Agreement

In a few specific areas Community law has introduced a duty to bargain with a view to reaching agreement.

Article 2 of the Collective Redundancies Directive⁸³ lays down that an employer who is contemplating collective redundancies must begin consultations with the workers' representatives in good time *with a view to reaching an agreement*. In *Dansk Metalarbejderforbund and Specialarbejderforbundet i Danmark*⁸⁴ the ECJ stated that the sole object of the Collective Redundancy Directive was to provide for consultation with the trade unions and for notification of the competent public authority prior to such dismissals

The Transfer of Undertakings Directive⁸⁵ Article 7(2) similarly provides that where the transferor or the transferee envisages measures in relation to his employees, he shall consult the representatives of the employees in good time on such measures *with a view to reaching an agreement*. In Denmark these provisions are implemented explicitly.⁸⁶ The Swedish Co-Determination Act section 10 requires a Swedish employer to negotiate with the trade unions.⁸⁷

4.5 Collective Agreements and Competition Law

The Nordic competition legislation excludes collective agreements from the scope of application of competition law.⁸⁸

In *Albany*,⁸⁹ the ECJ found that it is beyond question that certain restrictions of competition are inherent in collective agreements between organisations

⁸¹ 94/45/EC.

⁸² 2001/86/EC.

⁸³ 98/59/EC.

⁸⁴ Case 284/83 [1985] ECR 553.

⁸⁵ 2001/23/EC.

⁸⁶ The Act on Collective Redundancies § 5 and the Transfer of Undertakings Act § 6.

⁸⁷ The Swedish duty to negotiate is not a duty to bargain in good faith, *See further* Fahlbeck's article in this volume. The Swedish Co-Determination Act is therefore not sufficient to implement the consultation requirements in the Collective Redundancies and Transfer of Undertakings Directives.

⁸⁸ *See for details* Bruun, Niklas og Jari Hellsteen (eds), *Collective agreement and competition in the EU*, Copenhagen 2001.

⁸⁹ *See* Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, Joined cases C-115/97 to C-117/97 *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I-6025 and Case C-219/97 *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [1999] ECR I-6121. *See also* Stein Evju, *Collective Agreements*

representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 81(1) EC when seeking jointly to adopt measures to improve conditions of work and employment.

In the view of the ECJ, it therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 81(1) EC. The ECJ concluded in *Albany* that:

1. Article 3(g) of the EC Treaty [now, after amendment, Article 3(1)(g) EC], Articles 5 and 85 of the EC Treaty [now Articles 10 EC and 81 EC] do not prohibit a decision by the public authorities to make affiliation to a sectoral pension fund compulsory at the request of organisations representing employers and workers in a given sector.

On 17 November 2000, the Danish Labour Court delivered a ruling⁹⁰ where it directly applied the *Albany* case law. A small employer – a taxicab owner with 7-8 chauffeurs – was bound by a collective agreement containing pension provisions. The employer refused to pay the employers' contribution to the pension scheme and paid the employee contribution directly to the individual workers and not to the pension scheme. He claimed that the pension scheme was invalid as incompatible with both Danish and Community competition law. He requested a reference to the ECJ to clarify the law claiming inter alia that the Danish collective agreement system differs from the Dutch one at issue in *Albany et al* in that Danish collective agreements are only binding on the parties to the agreements and cannot be extended so as to cover all employers in a branch. The *Albany* case and the cases decided on the same date were about collective agreements with *erga omnes* effect but *van der Woude* was not. The Danish Labour court refused to refer questions to the ECJ. It held in its judgement on 17 November 2000 that there was no relevant difference between the *Albany* case (and the other cases decided by the ECJ on the same date) and the Danish case. The Danish collective agreement at issue was therefore considered outside the scope of the competition rules.

A similar Norwegian pension case is pending before the Norwegian Labour Court which has referred questions to the EFTA Court.⁹¹

and Competition Law. The Albany Puzzle, and van der Woude, International Journal of Comparative Labour Law and Industrial Relations, 2001 vol 17 at 165.

⁹⁰ AD 1996.225, *Landsorganisationen i Danmark (LO, The Danish Confederation of Trade Unions) for Specialarbejderforbundet i Danmark (SiD) for Chaufførernes Fagforening v taxicab owner Munir Ali Lanewala*, Intervener Dansk Arbejdsgiverforening (the Danish Employers' Association) in support of LO.

⁹¹ E-8-00, Request for an Advisory Opinion from the EFTA Court by Arbeidsretten of 27 September 2000 in the case of *Landsorganisasjonen i Norge, with Norsk Kommuneforbund v Kommunenes Sentralforbund and Others*. See for a presentation of the case Johansen, Atle Sønsteli, *Competition Law and Collective Agreements – the Municipal Pension Scheme Presented for the EFTA Court*, International Journal of Comparative Labour Law and Industrial Relations, 2001 vol 17 at 93.

5 Equality and Discrimination

Gender discrimination law is one of the oldest and most developed parts of EU labour law. In 2000 it was complemented by directives on discrimination on race and ethnic origin and various other grounds than sex. The implementation in the Nordic countries of Community legislation in this field is discussed in Lynn Roseberry's article in this volume.

Gender equality law has served as the basis for the ECJ's development of a number of important principles and strategies such as the principle of proportionality in relation to indirect discrimination, the principle of effectiveness and transparency, the principle of effective judicial protection and the mainstreaming strategy.⁹² It is also one of the areas where the judicial dialogue between Nordic courts and the ECJ has been most intense⁹³ and where a number of the general principles of EU law has been put into practice in Nordic case law. This interaction between EU equality law and Nordic law will be discussed in the following.

5.1 *Freedom of Collective Bargaining in Matters of Equal Pay*

In the Nordic countries it has been a contested issue as to whether the labour market organisations have discretion (power/competence) to decide by collective agreement what is to be regarded as equal pay. The ECJ has clearly stated, in *Royal Copenhagen*,⁹⁴ that the EU law equal pay principle applies also where the elements of the pay are determined by collective bargaining or by negotiation at local level. The national court may, however, take that fact into account in its assessment of whether differences between the average pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex.

In *Jämställdhetsombudsmannen v Örebro Läns Landsting*,⁹⁵ the Advocate General noted about the relevance of the collective bargaining framework (emphasis added):

⁹² See for a critical analysis in a comparative perspective of the law in this field Roseberry, Lynn, *The Limits of Employment Discrimination Law in the United States and European Community*, Copenhagen 1999.

⁹³ Though not as intense as in England and Germany. Kilpatrick, Claire, *Gender Equality: A Fundamental Dialogue* in Sciarra, Silvana (ed), *Labour law in the courts - National judges and the European Court of Justice*, Hart Publishing, Oxford, 2001, contains a comparative analysis of the judicial dialogue which over the years has been conducted between the ECJ and the courts in 6 EU Member States: Denmark, France, Germany, Italy, Spain and the United Kingdom on gender equality law. She divides the 6 Member States under examination into three couples according to their level of preliminary reference activity. The most active couple is Germany and the UK, followed by France and Denmark who referred later, less and on fewer issues. Spain and Italy make up an inactive couple with no decided references on January 1, 2001.

⁹⁴ Case C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri for Royal Copenhagen A/S*, [1995] ECR I-1275.

⁹⁵ Case C-236/98 *Jämställdhetsombudsmannen v Örebro Läns Landsting* [2000] ECR I-2189. The quotation is from the Opinion of Advocate General Jacobs of 16 december 1999, paragraph 21.

21. At the hearing, the Ombudsman suggested that in Sweden collective bargaining agreements are regarded as immune from Community law, in the sense, presumably, that it is considered to be a defence to a claim of unequal pay that the salary was agreed by collective bargaining. *Such a view is manifestly not in conformity with Community law...*⁹⁶

5.2 *The Principle of Effectiveness*

5.2.1 Lack of Transparency – Reversal of the Burden of Proof

In *Danfoss*,⁹⁷ the ECJ ruled that where an undertaking applies a pay system which is characterised by a total lack of transparency, the burden of proof is on the employer to show that his wage practice is not discriminatory where a female worker establishes, by comparison with a relatively large number of employees, that the average pay of female workers is lower than that of male workers. Sophisticated statistical calculations are thus unnecessary to shift the burden of proof. A calculation of average pay is sufficient.

5.2.2 Point for Point Comparisons

In *Jämställdhetsombudsmannen v Örebro Läns Landsting*⁹⁸ the Swedish Labour Court asked whether an inconvenient-hours supplement and the reduction in working time awarded in respect of work performed according to a three-shift roster as compared to normal working time for day-work, or the value of that reduction, are to be taken into consideration in calculating the salary which serves as the basis for a pay comparison for the purpose of Article 141 EC and the Equal Pay Directive.

The answer is no. The fact that midwives who are predominantly female often do work at inconvenient hours or shift work and thereby, when they add their basic wages and the supplements they receive to compensate for inconveniences, obtain the same average wages as clinical technicians who are predominantly male and only do day work, does not preclude pay discrimination.

Under EU law the basic wages must be compared without increments for inconvenient hours and shift work being taken into account. The reason is that if the national courts were under an obligation to make an assessment and a comparison of all the various types of consideration granted, according to the circumstances, to men and women, judicial review would be difficult and the effectiveness of Article 141 EC would be diminished as a result. As the Court stated in *Barber*,⁹⁹ genuine transparency, permitting effective review, is assured

⁹⁶ The Advocate General referred to the Royal Copenhagen ruling in support of his view.

⁹⁷ Case C-109/88 *Handels-og-Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Danfoss)* [1989] ECR 3199.

⁹⁸ Case C-236/98 *Jämställdhetsombudsmannen v Örebro Läns Landsting* [2000] ECR I-2189. The quotation is from the Opinion of Advocate General Jacobs of 16 december 1999, paragraph 21.

⁹⁹ See paragraph 43 of the *JämO* case with reference to Case C-262/88, *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.

only if the principle of equal pay applies to each of the elements of remuneration granted to men or women.

The *Jørgensen* case¹⁰⁰ was basically about the same problem as the *JämO* case but not in an equal pay case but in a dispute in the independent professions between a female practising doctor (a rheumatologist), on the one hand, and the Danish Association of Specialized Medical Practitioners and the National Health Insurance Negotiations Committee, on the other hand, concerning the application of a negotiated scheme for the reorganization of medical practices in Denmark.

The Østre Landsret¹⁰¹ asked the ECJ to clarify how an assessment as to whether there is indirect discrimination on grounds of sex should be undertaken in a case concerning equal treatment.¹⁰² The Danish Court considered it settled case-law on equal pay that a point-for-point comparison should be made, and asked the ECJ to clarify whether the comparison of occupational conditions to be undertaken in an equal treatment case in the independent professions should be also made by way of a point-for-point comparison as in equal pay cases or could be made by way of an overall assessment of all the surrounding factors. It informed the ECJ that it could be assumed in answering the question that the negotiated reorganisation scheme, assessed as a whole, is gender-neutral in both its effect and purpose. It could further be assumed that the negotiated reorganisation scheme contained provisions which, viewed in isolation, result in a sex bias, inasmuch as it appeared that some provisions predominantly affected female specialised medical practitioners whilst other provisions predominantly affected male specialised medical practitioners.

The ECJ referred to its judgment in *Barber* where it relied on the principle of effectiveness and transparency, see above, and stated that the same finding applies to all aspects of the principle of equal treatment and not only to those which have a bearing on equal pay.

5.3 *Minimum Standard Protection and Positive Action*

To the difference from directives adopted pursuant to art 137 EC which, as mentioned earlier, only lay down minimum standards, equality law adopted under art 141 EC is not generally minimum standard legislation. Better pay for one sex would for example normally mean unequal pay for the other sex which is prohibited.

Article 141(4) EC does, however, under certain conditions allow positive action. The interpretation of this provision was addressed by the ECJ in the *Abrahamsson*¹⁰³ case. The ECJ confirmed that positive action aiming to promote

¹⁰⁰ Case C-226/98 *Birgitte Jørgensen v Foreningen af Speciallæger, Sygesikringens Forhandlingsudvalg* [2000] ECR I-2447.

¹⁰¹ The High Court, Eastern Division, i.e. an ordinary court at the second highest level in the Danish judicial system.

¹⁰² Under Directive 76/207/EEC and Directive 86/613/EEC.

¹⁰³ Case C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* [2000] ECR I-5539.

women in those sectors of the public service where they are under-represented has to be considered as compatible with European law. It clarified the conditions in which positive action can be applied and stated that the male and the female candidates must be of equal or almost equal merit. The automatic and absolute preference of a candidate of the underrepresented sex who has a sufficient but lower qualification is by contrast incompatible with the principle of equal treatment.

On 28 November 2001, the EFTA Surveillance Authority sent a reasoned opinion to Norway for failure to comply with the Equal Treatment Directive.¹⁰⁴

The case was initiated on the basis of a complaint raised against Norway in August 2000, alleging that by reserving a number of scholarly positions at the University of Oslo for women only, Norway was in breach of the EEA Agreement. On 13 February 2002, the Norwegian Government maintained its position that it is not inconsistent with the Equal Treatment Directive to reserve a number of university positions for women in areas where they are manifestly under represented.

5.4 ECJ Case Law as an Unstable Source of Law

In the period from the beginning of pregnancy to the end of maternity leave,¹⁰⁵ women enjoy a special protection both as compared with male employees and female employees who are not pregnant or have recently given birth. That is now settled case law but it has developed through a complicated judicial dialogue involving among other countries Denmark. In 1997, in *Larsson*, the ECJ¹⁰⁶ stated that account could be taken of a woman's absence from work between the beginning of her pregnancy and the beginning of her maternity leave when calculating the period providing grounds for her dismissal under national law. A year later on 30 June 1998 it overturned this judgment in the *Mary Brown*¹⁰⁷ case where it delivered the opposite rule. It explicitly stated that (emphasis added):

¹⁰⁴ 76/207/EEC. A press release setting out ESA's point of view can be found at <http://www.efta.int/structure/SURV/efta-srv.asp>. ESA builds its view on the case law of the ECJ in *Kalanke* (C-450/93), *Marschall* (C-409/95), *Badeck* (C-158/97) and *Abrahamsson* (C-407/98). It does not include Case C-79/99, *Julia Schnorbus v Land Hessen*, [2000] ECR I-0000 (nyr, judgment of 1 December 2000) where the ECJ accepted as compatible with the equal treatment provisions rules that automatically gave men who had completed military service preferential admission to temporary jobs as "Referendar" (a training position which is a step in a German legal education/career).

¹⁰⁵ How long that is vary from Member State to Member State. Under the Pregnancy directive (92/85/EEC) there must be a period of at least 14 weeks before or after confinement in accordance with national traditions.

¹⁰⁶ Case C-400/95 *Handels- og Kontorfunktionærernes Forbund i Danmark acting for Helle Elisabeth Larsson v Dansk Handel & Service acting for for Føtex Supermarked A/S* [1997] ECR I-2757.

¹⁰⁷ Case C-394/96 *Mary Brown v Rentokil Ltd* [1998] ECR I-4185.

27. It is also clear from all the foregoing considerations that, *contrary to the Court's ruling in Case C-400/95 Larsson v Føtex Supermarked* [1997] ECR I-2757, paragraph 23),... her absence not only during maternity leave but also during the period extending from the start of her pregnancy to the start of her maternity leave cannot be taken into account for computation of the period justifying her dismissal under national law.

In the Danish part of the *Larsson* case, the Maritime and Commercial Court based its judgment on the interpretation given by the ECJ in the *Mary Brown* case and disregarded the answer given to itself in its own case (the *Larsson* case). The employer side wanted a new referral to the ECJ in order to clarify/limit the temporal effect of the *Mary Brown* ruling but the Maritime and Commercial Court dismissed this request and applied the *Mary Brown* ruling. The Danish Maritime and Commercial Court expressed some criticism of the ECJ's changing interpretation and held (my translation, emphasis added):

“... ECJ has abandoned the view it took when answering the Maritime and Commercial Court's question in the present case.... *It may cause various difficulties in legal practice, both for private parties and for public authorities, which may damage the relationship between national courts and the European Court of Justice* that the interpretation of the Equal Treatment Directive in the *Mary Brown* judgment appears shortly after the delivery of another judgment (the *Larsson* judgment) which puts a more narrow interpretation upon the Directive.”

The Maritime and Commercial Court found that the dismissal of *Larsson* was unjustified and she was awarded compensation equivalent to 39 weeks salary. This ruling was appealed to the Danish Supreme Court which upheld it.¹⁰⁸

5.5 Direct Effect, Supremacy of Community Law and Interpretation in Conformity with Community Law

In *Pedersen*,¹⁰⁹ the ECJ struck down the pregnancy provisions of the Danish Salaried Employees Act and the Danish practice of granting only benefit (and not full pay) as compensation for absence from work due to pregnancy related illness in situations when absence from work due to other illness resulted in an entitlement to full pay. It also found that it is contrary to the Equal treatment Directive¹¹⁰ and the Pregnancy Directive¹¹¹ for national legislation to provide that an employer may send home a woman who is pregnant, although not unfit for work, without paying her salary in full when he considers that he cannot provide work for her. Following this judgment the Danish Salaried Employees Act was amended in 1999 thus changing the legal position for the future.

¹⁰⁸ U 2000.2249 H.

¹⁰⁹ Case C-66/96 *Høj Pedersen and others v Fællesforening for Danmarks Brugforeninger (FDB) and others* [1998] ECR I-7327.

¹¹⁰ 76/207/EEC.

¹¹¹ 92/85/EEC.

5.5.1 Supremacy and Direct Effect of art 141 EC

The consequences of the Pedersen judgment for claims of back-pay because a woman at some time in the past had received only benefit and not full pay when absent from work because of pregnancy related illness have been at issue in cases brought before Danish courts or industrial arbitration boards. The Vestre Landsret¹¹² handed down a ruling on 16 March 2000¹¹³ allowing a woman to claim back pay for a period of absence due to pregnancy related illness in September and November 1996.

The Danish court thus used Community law directly with supremacy over the Danish Salaried Employees Act as it was at the time of the facts of the case.

5.5.2 The Effect in Time of the Pedersen Judgment

The ECJ did not limit the effect in time of its ruling in the Pedersen case which was delivered 19 November 1998. In the award of 10 February 2000 the chairman of an industrial arbitration tribunal¹¹⁴ awarded back-pay to the date of the commencement of the pregnancy related illness with reference to the Pedersen judgment.

5.5.3 Dangerous Working Environments and the Pedersen Case

In an arbitral award in the Glasfiber case,¹¹⁵ the chairman used the ruling in the Pedersen case in a Danish case where pregnant workers working in a dangerous working environment were sent home. The employer operated an industrial plant producing mill wings while using dangerous chemical substances including carcinogens. It was the practice of the employer to send pregnant workers home once it became known they were pregnant. It was undisputed that the pregnant workers were not unfit for work but their working environment was unsuitable for pregnant workers. The employer did not try to adjust the working conditions or to move the workers to alternative non-dangerous work. The workers received no wages from the employer but benefit from the municipality under the Benefit Act.

It follows from Article 5 of the pregnancy directive that, when there is a risk to the safety or health of a pregnant worker, the employer shall take the necessary measures to ensure that, by temporarily adjusting the working conditions and/or the working hours of the worker concerned, the exposure of that worker to such risks is avoided. If the adjustment of her working conditions and/or working hours is not technically and/or objectively feasible, or cannot reasonably be required on duly substantiated grounds, the employer shall take

¹¹² The High Court, Western Division, i.e. an ordinary court at the second highest level in the Danish judicial system.

¹¹³ Case B-0836-98, *FM Maskiner Aps v HK acting for Else Knudsen*, the judgment is not reported and will probably never be published.

¹¹⁴ Arbitral Award of 10.2.2000, *CO-industry for Kvindeligt Arbejderforbund i Danmark v Dansk Industry for Viking Life-Saving Equipment A/S*.

¹¹⁵ Arbitral Award of 21.10.1999, *CO-industry for SID v DI for LM Glasfiber A/S*.

the necessary measures to move the worker concerned to another job. If moving her to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the worker concerned shall be granted leave in accordance with national legislation and/or national practice for the whole of the period necessary to protect her safety or health.

The pregnancy directive is implemented in Denmark by a statutory instrument on the performance of work. There are no precise rules as to when a worker who is not unfit for work can be sent home. The employer's decision to send a pregnant worker home thus depends on the employer's own discretion.

The chairman in the Glasfiber industrial arbitration case held that since there were no provisions on the sending home and payment of pregnant workers in a situation as that with which the case was concerned in the collective agreement nor in national legislation, *the interpretation of the underlying directives should be applied to the individual employment contracts*. Since the sending home was caused by the dangerous character of the place of work and the assessment of the situation exercised by the employer, it followed in the view of the arbitration chairman from the interpretation of the ECJ in the Pedersen case that an employer who sent home pregnant workers who were not unfit for work had to pay them full wages. The Pedersen ruling has also been relied upon in another Danish arbitral award.¹¹⁶

5.6 *Fixed Term Work and Pregnant Women*

There is very free access to use fixed term contracts in Denmark and it has been a contested issue – both in Danish case law and in doctrinal writing – whether a pregnant woman employed or seeking employment on a time limited contract of such short duration that she, due to her pregnancy, would not be able to work for a significant part of the contracted period is protected against discrimination on grounds of pregnancy by the Danish Equal Treatment Act which implements the Equal Treatment and the Pregnancy Directives. That question has now been settled.

In the *Tele Danmark* case¹¹⁷ the Danish Supreme Court referred preliminary questions to the ECJ as to whether Article 5(1) of the Equal Treatment Directive and/or Article 10 of the pregnancy Directive, or other provisions in those directives or elsewhere in Community law preclude a worker from being dismissed on the ground of pregnancy in the case where her pregnancy meant that she was unable to work for a significant portion of her period of employment. The answer was yes.

To the difference of the Advocate General, the ECJ did not refer to the Directive on Fixed Term Work¹¹⁸ in support of its interpretation. The ECJ stated, however, in paragraph 32 that the duration of an employment relationship is a particularly uncertain element of the relationship in that, even if the worker is

¹¹⁶ Arbitral Award of 6.11.2000 *Malerforbundet i Danmark mod Danske Malermestre*.

¹¹⁷ C-109/00 *TeleDanmark*, Judgment of 04/10/2001.

¹¹⁸ 1999/70/EC.

recruited under a fixed-term contract, such a relationship may be for a longer or shorter period, and is moreover liable to be renewed or extended.

6 Employment Protection

6.1 *Transfer of Undertakings*

In 1998 the Council adopted a Directive¹¹⁹ amending the original Transfer of Undertakings Directive.¹²⁰ In 2001, the Transfer of Undertakings Directive was codified.¹²¹ The ECJ has taken different approaches¹²² to interpretation of EU labour law in different fields. In cases concerning transfer of undertakings it has used a more narrow and cautious approach than in discrimination and equality cases. EU law in this field is fragmentary and creates only partial harmonisation.

6.1.1 The Early Danish Transfer of Undertakings Cases

Denmark was the first country in the EU to refer questions to the ECJ for preliminary rulings in a transfer of undertakings case. It happened in 1983 in the *Wendelboe* case.¹²³ During the 1980s all references on the Transfer of Undertakings Directive came from Denmark and Holland.¹²⁴

The Transfer of Undertakings directive established the rule that there is automatic and compulsory continuation of the employment relationship with the transferee in the event of a change of employer as a result of a transfer of an undertaking. That rule was before the adoption of the directive in 1977 well known law in some EU countries, notably France and Germany who could continue without changing anything. In Denmark, it was the opposite of the pre-existing law.¹²⁵ Denmark therefore had to adopt legislation which changed the law radically and all actors had to learn new rules. That situation created some uncertainty as to the precise content of the law. That uncertainty was increased by the fact that the different language versions of the directive are not totally identical. The *Wendelboe* and *Danmols*¹²⁶ cases are concerned with problems related to the different language versions. The language problems were

¹¹⁹ 98/50/EC.

¹²⁰ 77/187/EEC.

¹²¹ 2001/23/EC.

¹²² See further Nielsen, Ruth, *Employers' Prerogatives – in a European and Nordic Perspective*, Copenhagen 1996.

¹²³ Case 19/83 *Knud Wendelboe et al v L J Music* [1985] ECR 457.

¹²⁴ Cf. Transfers of Undertakings. Part I. *The European Court of Justice in the dialogue on transfers of undertakings: A fallible interlocutor?* By Sylvaine Laulom in Sciarra, Silvana (ed), *Labour law in the courts – National judges and the European Court of Justice*, Hart Publishing, Oxford, 2001 at 145.

¹²⁵ In Sweden, the situation was the same when Sweden joined the EEA Agreement in 1994, while the rule in the Transfer of Undertakings Directive is in accordance with Finnish law from before the EEA Agreement.

¹²⁶ Case 105/84 *Danmols* [1985] ECR 2639.

aggravated by the way Denmark had chosen to implement the directive. The Danish implementing law deviated in important respects from the text of the Danish version of the directive. The early Danish questions essentially sought clarification of whether the directive meant the same as the Danish implementing legislation.

The Directive is mandatory. In *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S*¹²⁷ the ECJ held – in line with its case law on equal pay, see above – that the Directive is mandatory on each point so that it cannot be derogated from on one point to the disadvantage of the employee even if the contract seen as a whole is in the favour of the employee.

6.1.2 Concept of a Transfer

The single most litigated issue before the ECJ concerning transfer of undertakings is the proper interpretation of the concept of a transfer.¹²⁸ Before the adoption of the directive there were two different approaches to this concept in national law requiring compulsory transfer. French law took a broad view and regarded a transfer of an activity, eg cleaning activity as covered by the concept. German law, on the other hand, took a more narrow view, and required there to be an organised entity. The directive was adopted with unanimity under art 94 EC (then art 100). Points on which there were different views were not clarified in the text of the directive but left to later developments. The ECJ has over the years repeatedly been confronted with questions as to whether the concept of a transfer should be construed broadly as covering the mere transfer of an activity or narrowly as requiring an organised entity which has retained its identity. The responses of the Court have been somewhat ambiguous and varying. This kind of questions have been raised by Nordic courts as well as by courts from other parts of EU.

The requirement that the undertaking must have preserved its economic identity was dealt with in *Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro*.¹²⁹ In that case the Court held that the Directive:

“envisages the case in which the business retains its identity inasmuch as it is transferred as a going concern, which may be indicated in particular by the fact that its operation is actually continued or resumed by the new employer, with the same or similar activities”.

In *P Bork International A/S in liquidation v Foreningen af arbejdsledere i Danmark, and Jens E Olsen, Karl Hansen m fl samt HK v Junckers Industrier A/S*¹³⁰ the ECJ held that the fact that the transfer is effected in two stages does not prevent the Directive from applying, provided that the undertaking in

¹²⁷ Case 324/86 *Daddy's Dance Hall* [1988] ECR 739.

¹²⁸ Cf. Transfers of Undertakings. Part I *preliminary Remarks* by Paul Davies in Sciarra, Silvana (ed), *Labour law in the courts – National judges and the European Court of Justice*, Hart Publishing, Oxford, 2001 at 131.

¹²⁹ Case 287/86 [1987] ECR 5465.

¹³⁰ Case 101/87 [1988] ECR 3057.

question retains its identity. In order to determine whether those conditions are met, it is necessary to consider all the circumstances surrounding the transaction in question, including, in particular, whether or not the undertaking's tangible and intangible assets and the majority of its employees are taken over, the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities ceased in connection with the transfer.

In *Oy Liikenne*¹³¹ the ECJ held that the taking over by an undertaking of non-maritime public transport activities – such as the operation of scheduled local bus routes – previously operated by another undertaking, following a procedure for the award of a public service contract¹³² may fall within the material scope of the Transfer of Undertakings Directive.

In the case at issue no assets (busses and other material) were transferred, only manpower. The Commission submitted, referring to *Süzen*,¹³³ that the absence of a transfer of assets between the old and new holders of the contract for bus transport is of no importance, whereas the fact that the new contractor took on an essential part of the employees of the old contractor is decisive. The ECJ remarked that it has indeed held that an economic entity may, in certain sectors, be able to function without any significant tangible or intangible assets, so that the maintenance of the identity of such an entity cannot, logically, depend on the transfer of such assets. The ECJ ruled, however, in *Oy Liikenne*, that bus transport cannot be regarded as an activity based essentially on manpower, as it requires substantial plant and equipment. The fact that the tangible assets used for operating the bus routes were not transferred from the old to the new contractor therefore constitutes a circumstance to be taken into account. In a sector such as scheduled public transport by bus, where the tangible assets contribute significantly to the performance of the activity, the absence of a transfer to a significant extent from the old to the new contractor of such assets, which are necessary for the proper functioning of the entity, must lead to the conclusion that the entity does not retain its identity. In the Finnish part¹³⁴ of the *Oy Liikenne* case the Finnish Supreme Court followed the ECJ.

Contracting out situations have been dealt with by the ECJ in *ISS* (canteen services)¹³⁵ where the ECJ ruled in favour of there being a transfer within the meaning of the Directive in a contracting out situation. Both the ECJ and the EFTA Court have delivered a number of rulings on this issue.¹³⁶

¹³¹ Case C-172/99, *Oy Liikenne Ab v Pekka Liskojärvi and Pentti Juntunen*, [2001] ECR I-0745.

¹³² Under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts.

¹³³ Case C-13/95 *Ayşe Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] ECR I-1259.

¹³⁴ HD 2001:44.

¹³⁵ Case 209/91 *Anne Watson Rask og Kirsten Christensen v ISS Kantineservice A/S* [1992] ECR I-5755.

¹³⁶ See from the EFTA Court: Case 2/95 *Eilert Eidesund v Stavanger Catering A/S* advisory opinion of 25.9.1996, Case E-2/96, *Jørn Ulstein and Per Otto Røiseng v Asbjørn Møller*, advisory opinion of 19 December 1996 and Case E-3/96, *Tor Angeir Ask and Others v ABB Offshore Technology AS and Aker Offshore Partner A/S*, advisory opinion of 14 March

6.1.3 Collective and Individual Rights

In *Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro*¹³⁷ the ECJ was asked by the Danish Labour Court:

(4) Must Article 3(2) of the Directive be interpreted as meaning that the transferee must continue to observe the terms of a collective agreement binding the transferor regarding pay and working conditions notwithstanding the fact that at the time of the transfer no employees were employed by the undertaking?

The ECJ reformulated the question as meaning that the Arbejdsretten (the Labour Court) essentially asked whether Article 3(2) of the Transfer of Undertakings Directive must be interpreted as obliging the transferee to continue to observe the terms and conditions agreed in any collective agreement in respect of workers who were not employed by the undertaking at the time of its transfer.

According to *Landsorganisationen i Danmark* (the Danish Confederation of Trade Unions) that question should be answered in the affirmative. On the other hand, *Dansk Arbejdsgiverforening* (the Danish Confederation of Employers), the United Kingdom and the Commission emphasized that only persons who are employed by the undertaking at the time of the transfer may take advantage of the Directive, and not persons who are engaged after the transfer.

The Court held, as it had previously stated, in its judgment in *Foreningen af Arbejdsledere i Danmark v Danmols Inventar*,¹³⁸ that the purpose of the Directive is to ensure, as far as possible, that the contract of employment or employment relationship continues unchanged with the transferee, in order to prevent the workers concerned from being placed in a less favourable position solely as a result of the transfer. It is therefore consistent with the scheme of the Directive to interpret it as meaning that unless otherwise expressly provided, it may be relied on solely by workers whose contract of employment or employment relationship is in existence at the time of the transfer subject, however, to compliance with the mandatory provisions of the Directive concerning protection of employees from dismissal as a result of the transfer.

It followed that Article 3(2) of the Directive is intended to ensure the continued observance by the transferee of the terms and conditions of employment agreed in a collective agreement only in respect of workers who were already employed by the undertaking at the date of the transfer, and not as regards persons who were engaged after that date.

For those reasons the reply to the fourth question was that Article 3(2) of the Transfer of Undertakings Directive, properly construed, does not oblige the

1997 and from the ECJ: Case C-13/95 *Ayşe Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] ECR I-1259, Joined cases C-173/96 and C-247/96 *Francisca Sánchez Hidalgo e.a. v Asociación de Servicios Aser and Sociedad Cooperativa Minerva (C-173/96)*, and *Horst Ziemann v Ziemann Sicherheit GmbH and Horst Bohn Sicherheitsdienst (C-247/96)* [1998] ECR I-8237.

¹³⁷ Case 287/86 [1987] ECR 5465.

¹³⁸ Case 105/84 [1985] ECR 2639.

transferee to continue to observe the terms and conditions agreed in a collective agreement in respect of workers who were not employed by the undertaking at the time of the transfer.

6.2 Collective Redundancies

In *Dansk Metalarbejderforbund, acting on behalf of John Lauge and Others v Lønmodtagernes Garantifond*¹³⁹ the ECJ held that the derogations provided for in the Directive on Collective Redundancies¹⁴⁰ do not apply to collective redundancies occurring on the same day as that on which the employer files a winding-up petition and terminates the undertaking's activities, and the competent court subsequently, and without any deferment other than that resulting from the date which it sets for the hearing, issues a winding-up order pursuant to the winding-up petition, that order taking effect for a number of purposes from the date on which the petition was filed.

The scope of the original Collective Redundancies Directive in respect of insolvency situations was at issue in *Dansk Metalarbejderforbund and Specialarbejderforbundet i Danmark v H Nielsen & Søn, Maskinfabrik A/S*, in liquidation.¹⁴¹

In *Rockfon A/S v Specialarbejderforbundet i Danmark*¹⁴² the ECJ held that Article 1(1)(a) of the Directive is to be interpreted as meaning that it does not preclude two or more interrelated undertakings in a group, neither or none of which has decisive influence over the other or others, from establishing a joint recruitment and dismissal department so that, in particular, dismissals on grounds of redundancy in one of the undertakings can take place only with that department's approval. The sole purpose of the Directive is partial harmonization of collective redundancy procedures and its aim is not to restrict the freedom of undertakings to organize their activities and arrange their personnel departments in the way which they think best suits their needs.

6.3 Employer's Insolvency

In *Riksskatteverket v Soghra Gharehveran*,¹⁴³ the ECJ found part of the Swedish legislation on the insolvency of the employer inconsistent with the directive on the protection of employees in case of the employer's insolvency¹⁴⁴ and held that:

¹³⁹ Case C-250/97 *Dansk Metalarbejderforbund, acting on behalf of John Lauge and Others v Lønmodtagernes Garantifond* [1998] ECR I-8737.

¹⁴⁰ 75/117/EEC as amended by 92/56/EC, now consolidated in 98/59/EC.

¹⁴¹ Case 284/83 *Dansk Metalarbejderforbund and Specialarbejderforbundet i Danmark v H Nielsen & Søn, Maskinfabrik A/S* [1985] ECR 553.

¹⁴² Case C-449/93 *Rockfon A/S v Specialarbejderforbundet i Danmark* [1995] ECR I-4291.

¹⁴³ Case C-441/99, *Riksskatteverket v Soghra Gharehveran*, judgment of 18.10.2001.

¹⁴⁴ 80/987/EEC.

2. Where a Member State has designated itself as liable to fulfil the obligation to meet wage and salary claims guaranteed under Directive, an employee whose spouse was owner of the company employing her is entitled to rely on the right to claim pay against the Member State concerned before a national court, notwithstanding the fact that, in breach of the Directive, the legislation of that Member State expressly excludes from the group of persons covered by the guarantee employees whose close relative was owner of at least 20% of the shares of the company but who did not themselves have any share in the capital of that company.

An aggrieved individual can thus rely on the direct effect and supremacy of Community law to strike down the contested Swedish legislation.

This ruling is particularly interesting in a Nordic context because earlier Danish case law refused to refer questions on a similar point to the ECJ and – with reference to Danish reservations during the preparation of the Directive – reached a result which seems inconsistent with the ECJ’s interpretation.¹⁴⁵

6.4 *Written Statements*

The employer has a duty to notify the employee of the essential elements of the contract of employment or employment relationship under the Written Statements Directive.¹⁴⁶ The duty in Article 2(1) of the Directive to notify the employee of all the essential aspects of the employment contract or employment relationship is the key provision of the Directive. This information shall cover at least 10 elements listed in Article 2(2) of the directive. That list is not exhaustive. In the Danish implementing Act and the Swedish Employment Protection Act Denmark and Sweden have, however, limited themselves to list the 10 examples in article 2(2) of the directive and have thus failed to implement the main rule explicitly. In the German *Lange* case,¹⁴⁷ the ECJ stated explicitly that Article 2(2) of the directive is to be interpreted as a non-exhaustive list. With reference to the *Lange* ruling, in December 2001, Denmark tabled a Bill amending the Act on Written Statements so as to implement the main rule requiring the employer to notify the employee of all the essential aspects of the employment contract explicitly.

7 **Free Movement**

*Angonese*¹⁴⁸ was about a dispute between an Italian national whose mother tongue was German and who was resident in the mainly German speaking

¹⁴⁵ See U 1998.1767. See also E-9/97, judgment of the EFTA Court in an Icelandic case on 80/987/EEC.

¹⁴⁶ Council Directive 533/91/EEC on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ L 288/91.

¹⁴⁷ Case C-350/99, *Wolfgang Lange v Georg Schünemann GmbH*, [2001] ECR I-1061.

¹⁴⁸ Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139.

province of Bolzano, Italy and an Italian employer who required applicants to have high skills in the German language and to prove it by means of a certificate which could only be obtained in Bolzano. The requirement for the Certificate imposed by the employer was founded on an article of the National Collective Agreement for Savings Banks. Angonese whose proficiency in German was uncontested but who did not possess the required certificate claimed that the employer violated his rights under art 39 EC on free movement of workers. The national asked the ECJ whether Article 39 EC and Articles 3 and 7 of the Regulation on Free Movement of Workers¹⁴⁹ preclude an employer from requiring persons applying to take part in a recruitment competition to provide evidence of their linguistic knowledge solely by means of one particular diploma, such as the Certificate, issued in a single province of a Member State.

The ECJ held Article 39 EC to be directly applicable against the private Italian employer and considered the requirement of a specific certificate in violation of art 39 EC. The judgment is remarkable in several respects. It is the first judgment that states clearly that an individual, private employer is bound by art 39 EC.

Angonese is also far-reaching in applying art 39 EC to an internal conflict in a Member State. The dispute was between an Italian worker (job applicant) and an Italian employer. A similar dispute could arise, eg in Finland between a Finnish worker and a Finnish employer who requires knowledge of either Finnish or Swedish. In such a case the Finnish worker would, relying on *Angonese* be able to invoke art 39 EC against a Finnish employer in a purely Finnish case. The issue of whether “reverse discrimination”, i.e. a Member State’s unfavourable treatment of its own nationals, is covered by art 39 EC has been much discussed¹⁵⁰ and the consequences of the *Angones* judgment in this respects seem unclear. If it is accepted that art 39 EC can be invoked in internal matters it will provide a strengthened legal base for incorporating EU fundamental rights into the national systems, see on fundamental rights just below.

In *D and Kingdom of Sweden v Council*,¹⁵¹ Sweden and D argued, in a case concerning discrimination on grounds of homosexuality in the Council’s staff regulation, that the fact that Swedish nationals are subjected to less favourable treatment when they take up employment with the Council than when they stay in Sweden is an infringement of the principle of free movement. The ECJ considered that plea inadmissible for procedural reasons because it was only introduced at the stage of appeal. It should have been brought forward before the Court of First Instance. It is probably true that migrant workers can claim protection of their fundamental rights as included in the principle of free movement but it hardly follows from the principle of free movement that any

¹⁴⁹ EEC/1612/68.

¹⁵⁰ See for example Miguel Poiars Maduro, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination* in Kilpatrick, Claire, Tonia Novitz & Paul Skidmore (ed.), *The Future of Remedies in Europe*, Hart Publishing, Oxford 2000 at 117.

¹⁵¹ Joined cases C-122/99 P and C-125/99 P, *D and Kingdom of Sweden v Council* [2001] ECR I-4319.

difference in employment protection between the Member States can be regarded as an unlawful obstacle to the free movement of workers.

8 Fundamental Rights Protection

All courts both at EU and national level, acting within the field of Community law, must respect the fundamental rights which the EU is based upon. That includes the Council of Europe Convention on the Protection of Human Rights (ECHR), which all the Member States of the EU adhere to. EU law has developed as a framework which incorporates the human rights protection developed in the ECHR, see now Article 6 EU. In the ERTA case,¹⁵² the ECJ stated that the Community cannot accept measures which are incompatible with observance of the human rights recognized and guaranteed in the ECHR. In the Bosphorus case,¹⁵³ Advocate General Jacobs stated:

“... For practical purposes the Convention [ie ECHR] can be regarded as Community law and can be invoked as such both in this court [ie ECJ] and in national courts where Community laws are in issue.

The role of the ECJ in fundamental rights protection has to some extent been contested by the Nordic social partners. In the contribution from June 2000 of the Swedish trade unions to the (then) Draft Charter of Fundamental Rights¹⁵⁴ the Swedish trade unions suggested that the EU Member States and the EU institutions should be obliged to follow the ECHR¹⁵⁵ and the fundamental ILO conventions on the right of association, the right to strike, the right to bargain collectively and the prohibition of child labour and enforced labour. They added, however, that the ECJ should be precluded from controlling Member States' compliance with basic labour rights.

8.1 Enforcement

In EU law, it is settled case-law¹⁵⁶ that, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than

¹⁵² Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*. *European* [1991] ECR I-2925, paragraph 41.

¹⁵³ Case C-84/95 [1996] ECR I-3953.

¹⁵⁴ LO's, TCO's and SACO's demands for changes to the EU Treaty, Brussels 13.6.2000, Charte 4355/00, Contribution 219. Available at the Internet at the EU Council's web-site.

¹⁵⁵ That has been Community law at least since the ERTA judgment from 1991, *See above*.

¹⁵⁶ *See Nielsen, Ruth, European Labour Law*, DJØF Publishing, Copenhagen 2000 at 423 with further references.

those governing similar domestic actions and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law. There is thus procedural autonomy at national level subject to two limitations:

First, by virtue of the “principle of equivalence”, procedural rules governing actions enabling individuals to exercise rights conferred by the EU legal order may not be less favourable than those governing similar actions of a domestic nature.

Second, by virtue of the “principle of effectiveness”, the procedural rules governing domestic actions may not be such as to render virtually impossible or excessively difficult the exercise of rights conferred by the EU legal order.

8.1.1 Impartial Courts within the Meaning of Article 6 ECHR

The courts and tribunals having jurisdiction under national law to enforce Community law must fulfil the minimum requirements laid down in Article 6 ECHR concerning independence and impartiality.¹⁵⁷ The Danish Act on the Labour Court was amended in 1997 in response to criticism¹⁵⁸ that its (then) composition which gave the main labour market organisations control over the court, also in cases concerning trade unions or employers outside of the main organizations, resulted in it not being an independent and impartial court within the meaning of Article 6 ECHR.

8.1.2 Individual Access to Judicial Control

Under Article 6 ECHR *everyone* is entitled to a fair and public hearing. When Community legislation confers rights upon individual workers and employees this means that they have a right of individual access to courts. In Denmark individual workers cannot be parties in cases before the Labour Court and industrial tribunals and there is only limited possibility for this in Norway and Finland. It therefore follows from Community law that some cases which would normally fall under the jurisdiction of the Labour Courts¹⁵⁹ and industrial tribunals can be brought before the ordinary courts by aggrieved individuals claiming their fundamental right of judicial protection under Article 6 ECHR.

8.1.3 Public Hearings

Article 6 ECHR entitles everyone to a fair and *public hearing*. In Denmark the hearing before an industrial tribunal is *not* public and the arbitral awards are in principle not public but belong to the parties which may choose to publish them

¹⁵⁷ Article 6 ECHR with the heading Right to a fair trial stipulates: 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an *independent and impartial tribunal established by law*.

¹⁵⁸ See on the corresponding criticism against the Swedish Labour court Fahlbeck’s article in this volume.

¹⁵⁹ See on that issue Fahlbeck’s article in this volume.

or otherwise circulate them to interested persons. The Nordic Labour courts fulfil the publicity requirements in Article 6 ECHR.

8.1.4 The Principle *Nulla Poena Sine Culpa* and Strict Criminal Liability

*Hansen & Søn*¹⁶⁰ concerned punishment in Denmark of a Danish employer for an infringement of the Regulation on the harmonization of certain social legislation relating to road transport¹⁶¹ where Denmark applied strict criminal liability.

The Advocate General discussed at length the principle *Nulla poena sine culpa* and especially the question as to whether this principle amounts to a fundamental principle of EU law which must be respected when enforcing EU Regulations at national level. He found it impossible to deduce from the constitutional tradition common to the Member States the existence of an absolute prohibition on the introduction in certain specified circumstances of a system of strict criminal liability.

The Advocate General then went on to look at Article 6(2) ECHR according to which, everyone charged with a criminal offence is presumed innocent until proved guilty according to law. On the basis of the case law of the European Court of Human Rights¹⁶² the Advocate General concluded that a system of strict criminal liability can pass as compatible with ECHR where it is apparent that the system is aimed at important interests, such as the promotion of road safety and the improvement of working conditions for employees, and that its application does not involve the imposition of excessively severe penalties.

The ECJ held that the answer to the question submitted was that neither the specific Regulation at issue nor *the general principles of Community law* preclude the application of national provisions under which an employer may be the subject of a criminal penalty notwithstanding the fact that the infringement cannot be imputed to an intentional wrongful act or to negligence on the employer's part, on condition that the penalty provided for is similar to those imposed in the event of infringement of provisions of national law of similar nature and importance and is proportionate to the seriousness of the infringement committed.

In the Danish part of the *Hansen & Søn* case¹⁶³ the Danish Vestre Landsret, in addition to basing its judgment on the ruling of the ECJ, quoted the following finding from the European Court of Human Rights' *Salabiaku* Case (to which the Advocate General had referred before the ECJ): "In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it resulted from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States." On that background the Vestre Landsret found that the

¹⁶⁰ Case C-326/88 *Anklagemyndigheden v Hansen & Søn I/S* [1990] ECR I-2911.

¹⁶¹ EEC/543/69.

¹⁶² See the judgment of 7 October 1988 in *Salabiaku*, published in Series A, Vol. 141-A, in particular paragraph 28.

¹⁶³ U 1995.9 H.

Danish law at issue was neither in contravention of EU law nor the ECHR. On appeal, the Supreme Court upheld this judgment

8.2 *Workers' Privacy: Informational Self-Determination*¹⁶⁴

The protection of private life is provided for in Article 8 ECHR and the Data Protection Directive.¹⁶⁵ The main principle laid down in Article 6 of the Directive is that data can only be collected and processed for *specific, explicit and legitimate* purposes. In Finland there is a specific Act on Privacy in Working Life while data protection is covered by general legislation covering (nearly) all fields of society in the other Nordic countries.¹⁶⁶

The data protection rules require the employer to pursue *specific, explicit and legitimate* purposes in all data processing covered by the rules. These rules – which are not specific to labour law – thus strengthen the objectivity standard¹⁶⁷ an employer must comply with by mainstreaming¹⁶⁸ the law on workers' privacy into general data protection law.

9 Conclusion

EU law is young and dynamic and is developing a framework within which a multi-layered interaction between different actors takes place.

In the Nordic countries, labour law has often been regarded as a semi-autonomous legal discipline in which specific considerations apply rather than as an integral part of main-stream law. Nordic labour law has traditionally relied heavily upon collective labour law. In comparison, EU labour law is more based on legislation and general principles of law and offers higher protection to individuals than Nordic law has traditionally done. Its implementation in Nordic law generally favours *a shift in the balance between legislation and collective agreements* – a fact that has aroused criticism that EU labour law is a threat to the Nordic model for labour market regulation. This criticism has been particularly strong in Denmark and underlay the unwillingness from the mid 1990s to the end of 2001 of the Danish governments to implement the Working Time Directive correctly.

EU law has a strong court at EU level – the ECJ – and includes, at the initiative of the national courts, a *judicial dialogue* between those courts and the ECJ under art 234 EC. That dialogue is increasingly developing also at the

¹⁶⁴ See generally Craig, John D R, *Privacy and Employment Law*, Oxford, 1999 and Simitis, Spiros, *Reconsidering the premises of labour law – prolegomena to an EU regulation on the protection of employees' personal data*, *European Law Journal*, 1999 at 45.

¹⁶⁵ 95/46/EC.

¹⁶⁶ See for details Anders von Koskull's article in this volume.

¹⁶⁷ Cf. Nielsen, Ruth, *Arbejdsgiverens ledelsesret i EF-retlig belysning, Studier i EF-rettens integration i dansk ret*, Kbhvn 1992.

¹⁶⁸ See on the mainstreaming perspective in EU labour law Nielsen, Ruth, *European Labour Law*, Copenhagen 2000.

request of Nordic courts in the field of labour law, even though it started slowly partly due to some reluctance on the part of the trade unions who are the traditional litigators for the plaintiffs in Nordic labour law. In particular in the field of equality law there have been a number of cases involving general principles, for example the Danfoss case,¹⁶⁹ which is a landmark case in Community law on the burden of proof, and the Pedersen case¹⁷⁰ which struck down part of the Salaried Employees Act.

¹⁶⁹ Case C-109/88 *Handels-og-Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Danfoss)* [1989] ECR 3199.

¹⁷⁰ Case C-66/96, *Handels- og Kontorfunktionærernes Forbund i Danmark acting for Berit Høj Pedersen v Fællesforeningen for Danmarks Brugsforeninger acting for Kvickly Skive et al.*, [1998] ECR I-7327.