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European Employment Policies: Current Challenges



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Introduction

The idea for this book followed a conference that was held at the Faculty of Law at the Humboldt University in Berlin in September 2016 and based on a Marie Curie Project funded by the EU Commission.

The conference focused on the current challenges the EU faces in the field of employment policy. The topic was delimited to the legal architecture of the EU and to the role played by soft law, together with domestic cases in active and passive labour market policies. The discussion between attendees of the conference was both stimulating and characterized by an authentic spirit of contributing to the quest to find new possibilities. It took place right in the middle of the period in which the idea of a Pillar of Social Rights was the subject of intensive discussion.

The conference outcomes motivated the authors to propose a special issue for the *European Labour Law Journal*, which was published as the first issue of 2017. After that, the willingness to work together on this topic developed towards a more specific goal, which required a different kind of effort to be realized. We decided to ask the authors to focus more on proposals, new ideas and directions in the search for solutions to effectively improve social security protection in cases of unemployment, as well as activation initiatives to improve the possibility of being placed in a job and of participating in society. A further important question concerns the difficulties in providing new jobs in the gig- and collaborative economy – two different definitions which might illustrate intersecting areas – with adequate protections, difficulties in re-orienting the EU economy, and difficulties in dismantling the marketization orientation of the EU.

With these goals in mind, one of the most demanding aims of this publication is to provide useful recommendations, addressed not only to the academic community, but also to labour market actors, and to EU Institutions. Although this is a very ambitious aim, we believe it is possible to find new ideas and legal approaches that can help with the development of new national and EU policies so that they can focus on: tangible improvements in the protection net for the unemployed; possibilities to increase social participation opportunities, as well as to create new jobs with adequate protections; and re-orientating the EU economic system towards a less mar-

ket-based approach, taking into consideration the detrimental effects on the European social system that are associated with this.

Also interesting is the timing of the development of the idea of writing this book. The launch of the consultation on COM(2016) 127 final in March 2016 was extremely challenging, noting that “the future success of the euro area depends, in no small measure, on the effectiveness of national labour markets and welfare systems, and on the capacity of the economy to absorb and adjust to shocks”. In April of this year, after a process of consultation with different actors and scholars, the EU Commission presented key principles and rights in support of the fair and proper functioning of the labour markets and welfare systems by establishing a European Pillar of Social Rights COM(2017) 250 final. At the same time, the pillar aims at delivering on the Treaties’ promise of a highly competitive social market economy, based on full employment and social progress.

In some cases, as is pointed out by the Commission Communication of April 2017, the main problem often concerns a lack of effectiveness of legislation, while in other cases what is needed is the formulation of new rights to address the challenges and the changing nature of the world of work, i.e. the social consequences of the crisis, the emerging digital labour market, demographic developments, and economic divergence across Member States. The EU Commission provides implementation indications for the EU, the Member States, and the social partners, by emphasising the shared commitment and responsibility of these actors in successfully implementing the Social Pillar: several pending issues may be dealt with via completion of the proposed program and planning with innovative approaches, ideas and proposals.

Within this picture, the book provides an analysis of some aspects of European employment policies, highlighting issues stemming from these, as well as offering some recommendations as to how best to realise the greatest benefits for citizens. In particular, the book is divided into three parts: the first part focuses on the difficulties that the social dimension of the EU faces in order to be effective and to achieve new successes, by suggesting approaches aimed towards its strengthening; the second focuses on the new forms of work in the gig- and collaborative economy and the possible ways to provide protections that are now lacking for workers; the third part uses the outcomes of a comparative analysis on LM policies to provide foundations upon which proposals are made in order, ideally, to gain legitimacy for the EU in the eyes of citizens.

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In the first part, Manfred Weiss points out the need for improving the “European social dimension” and provides a clear picture of the achievements in this field from 1957 until now, highlighting relevant advances in the field. At the same time, he notes that “legislation on social minimum standards is unsystematic and fragmentary” and that the financial crisis diminished the level of social rights, especially in Southern Europe, by reducing standards of dismissal protection and minimum wages, and by dismantling the collective bargaining system. After explaining what the obstacles to further legislation in the area of labour law are, such as the heterogeneous Member States interests and an excessive emphasis on the subsidiarity and proportionality principles, he suggests alternative strategies, such as the potential for social dialogue, the agreements concluded with European Works Councils, and the Open Method of Coordination. In so doing, he underlines not only the potentialities of the aforementioned tools, but also their real complexity and limitations. Then, in looking for further alternative strategies, the author proposes taking into consideration the role that the Court of Justice of the European Union could play in increasing the level of transparency of the decision-making process, and in strengthening efforts to build its judgements upon the framework of the Charter of Fundamental Rights and, more generally, upon “the sound basis of fundamental rights on Community level”. But the role of the CJEU “cannot substitute missing legislation”. Thus, he proposes further options, such as enhancing cooperation, extending EU competences, and reconstructing the legislative procedure.

Also in the first part, Edoardo Ales highlights the ambitious “Soft law Guide” provided by the EU Pillar of Social Rights (EPSR) towards the goal of achieving efficient employment and social outcomes. In the first part of his contribution, the author focuses on the political and legal background of the EPSR, underlining that nothing in the Pillar “shall be interpreted as restricting or adversely affecting rights and principles” as already recognised by EU and international law and agreements. At the same time, he reminds us that the Pillar has no binding effects. He then describes the different perspectives – in terms of subjects and target groups – that are adopted by the EPSR when defining beneficiaries, and highlights the interesting profiles and implications of such perspectives. At the same time, he notes the difference between rights and commitments in the EPSR, especially in terms of enjoying a direct entitlement or not. In conclusion, the author recognises the EPSR as a “valuable effort to provide EU Institutions and Member

States with an up-to-date guide for the further development of the European social dimension”, confirming in this way an holistic approach at the EU level to the social commitment.

In the second part, Jeremias Prassl and Martin Risak focus on crowdwork in the gig-economy, highlighting the varied experiences, “ranging from successful entrepreneurs to those stuck with monotonous tasks and long hours, remunerated significantly below minimum wage rates”. These new forms of employment, located in the grey territory between employers and employees, require the introduction of new legislative categories or even gig-economy specific legislation.

The advantages of crowdwork are several: it can improve flexibility for employers when the platform is large enough to count on the full availability of workers; similar flexibility can also be attained by crowdworkers themselves, since they can decide when and where to work and which kinds of tasks to accept. Moreover, customers can receive a wide range of services conveniently and at competitive prices. Yet, at the same time, one should take into consideration the impact of this form of work on crowdworkers’ rights: on the one hand, crowdsourcers and platforms rely on digital reputation mechanisms and in this way they select crowdworkers, actually commanding and controlling them, while on the other hand, crowdworkers’ working conditions are usually poor. Accordingly, in order to deal with the regulatory challenges that these forms of work provide, the authors consider four main approaches: (i) focusing on who the employer is, according to a functional conception, i.e. considering the specific role different elements play in context; (ii) widening the notion of the employee; (iii) introducing an intermediate category to be applied to crowdworkers; and (iv) providing special statutory regulation of crowdwork inspired by the regulation on temporary agency work. In the authors’ opinions, the different hypotheses can be understood as complementary of each other, and should have the goal of avoiding the dilution of workers rights.

By providing a specific proposal on this matter, Bernd Waas deals with the topic of the position of workers in the collaborative economy. First of all, he focuses on several definitions of “collaborative economy” at the European level, by looking at both the factual and conceptual bases. Then, he focuses on possible legal approaches, highlighting the position of the European Commission on the matter, according to which it depends on the nature of the activities that are involved. In particular, one might understand whether the collaborative platforms offer a service “normally provided for

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remuneration”, or “other services in addition to the information society services”. However, this could be “normally established on a case-by-case basis”. The Commission also underlines the new employment opportunities that can be generated by the collaborative economy. Thus, the EU believes Member States should provide guidance on the applicability of national labour law regulation and the definition of “worker” within the context of the collaborative economy. In this context, Bernd Waas deals with the German case and its domestic intermediate category – between worker and self-employed – which is called “employee-like person”. The author suggests this category could be useful in providing the guidance that was requested by the Commission. Indeed, such a category relates to economic dependence rather than other dependences, which are traditionally linked to the concept of worker, such as subservience to instructions or organisational dependence.

In the final part of the book, Tania Bazzani adopts a comparative approach towards active and passive labour market policies in three Member States – Italy, Denmark, and Germany – in order to highlight possible commonalities and differences. Her analysis shows a common attempt to improve activation: in some cases, a reduction in unemployment benefit payments, in terms of both amount and length; a shift from insurance to assistance; and specific pending domestic issues and ultimate strong points of these systems. At the same time, the contribution considers whether EU guidance in the field is showing positive outcomes, and how these eventually can be improved. In this regard, the author highlights that the aforementioned outcomes strengthen the need for EU legitimacy, if the EPSR is to prove effective. A new approach towards looking at labour law and the economy is suggested on two levels: the Member States/EU level – related both to the political dimension and to the relationship between hard and soft law – and the territorial level.

Thus, by providing an analysis of both general and specific aspects of employment policies, at the European and domestic levels, this book seeks to link pieces of the same puzzle, to draw a large (and complex) picture in order to help illustrate current EU employment policies, and to envisage their potential future directions, with a view to improving the unemployment protection standards of citizens.

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