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19. Labour law and social policy

Frans Pennings

1. INTRODUCTION

The editor's request that I examine enforcement in the field of labour law and social policy led to quite a challenge. Enforcement in this area has never been high on the agenda of either policy makers or researchers (Rasnača et al. 2022b, 521). As a result, there are relatively few enforcement provisions laid down in European Union (EU) social policy instruments and there is not much academic literature on this issue. Labour law and social policy is also a very broad field, ranging from the individual employment contract to collective agreements and employees' participation in decision making; from free movement of workers to combating poverty; and from old age pensions to social assistance. Where to start, and where to end?

Enforcement of labour law and social policy is an even more difficult issue since the theoretical framework proposed by Vervaele (1999, 131) was taken as the starting point for this book. According to this framework, enforcement can be understood as part of a policy cycle, that 'aims to prevent violations and respond to non-compliance via monitoring compliance with laws, investigating suspicious cases of non-compliance with law and sanctioning for violations of laws'. This framework seems to be a better fit with the discipline of Vervaele (criminal law) than with social policy; therefore I had to examine how this cycle fits with social policy and, if it does not, how enforcement has then to be interpreted. However, such a challenge is, of course, a good reason to write this chapter.

Since social policy is a broad field, I had to select the topics to discuss. I decided to focus on two topics. One is that of free movement of workers, which is an area regulated by the Treaty on the Functioning of the European Union (Treaty or TFEU) and regulations, and is by definition a cross-border issue; the other is that of equal treatment in employment, regulated by directives, which are to be implemented in domestic law. Thus, in this study, the two main legal instruments used to develop social policy (regulations and directives) and both cross-border and domestic issues are included.

In section 2.1, I will describe the enforcement instruments for free movement and in section 2.2 for equal treatment. In section 3 an assessment will be made of the state of enforcement and I will identify research questions that follow from this analysis. Section 4 will present the conclusions.

2. ENFORCEMENT OF FREE MOVEMENT AND IN EQUAL TREATMENT PROVISIONS

2.1 Free Movement

2.1.1 The relevant legislation

The Treaty articles on free movement (Articles 45 and 48 of the TFEU) prohibit discrimination on grounds of nationality and obstacles to free movement. To these articles correspond Regulations 492/2011 (free movement of workers) and 883/2004 (coordination of social security), respectively.

In case of enforcement, there is both a macro and an individual level. If, for instance, the European Commission (the Commission) or a national court asks the Court of Justice of the European Union (the Court) to rule that a particular national law is inconsistent with EU law, this is relevant to the Member State concerned, since national law will then have to be revised (section 2.1.2). However, in the national procedure that led to this judgment, the disadvantaged party does not benefit from this decision if EU law does not require this. Individuals therefore have their own interest in enforcement; hence the need to also discuss enforcement by individuals (section 2.1.3).

2.1.2 Enforcement at the macro level

Enforcement by the EU is at stake if Member States themselves hinder free movement, for instance by restricting access to particular jobs to their own nationals, or by introducing social security or tax rules that make movement across the border less attractive (eg Case C-18/95 *Ter Hoeve*). When Member States hinder free movement or do not undertake action in case of obstacles created by employers, the Commission can ask the Member State concerned for more information on the issue (below we will discuss by which means the Commission can become aware of non-compliance). If the response is unsatisfactory, it can start infringement proceedings before the Court of Justice against that State. Some of these proceedings have been successful, such as when the Court of Justice ruled that the rules imposing taxes on workers who were already subject to contributions in another Member State infringed free movement (eg Case C-34/98 *Commission v France*). For an extensive discussion of such case law in social security, see Pennings (2022); in labour law, see Jaspers et al. (2019).

However, Lörcher (2022, 63) remarks that relatively very few cases in which an infringement procedure was started were brought to the Court. According to the figures he presents, in the period from 1995 to 2020, in 292 procedures, the Commission referred only 51 cases to the Court, of which 31 related to labour law. Of these, 40 per cent concerned discrimination (mainly on nationality) and 40 per cent health and safety. Lörcher argues that the Commission should have only a limited margin of appreciation for not bringing a case to the Court after it has started an infringement procedure.

There is no EU national agency commissioned with the task to enforce labour and social policy rules in the area of free movement. Since the Commission needs to have an overview of what is going on in the Member States, it took the initiative to establish a network of experts from all Member States (currently MoveS). By means of this network's reports, the Commission can become aware of potential infringements of the free movement provisions and problems and can undertake action. In addition to this, complaints and letters of individual workers and their representatives that are sent to the Commission are an important informal

information channel to learn about infringements. These may also lead the Commission to undertake action. That such actions are indeed undertaken can be seen, for example, in the *Commission v United Kingdom* judgment (Case C-308/14). In this judgment, it is mentioned that the case started when the Commission received numerous complaints from citizens about the application of benefit conditions applied by the United Kingdom (UK) and decided to ask for clarifications from the UK. This led to the mentioned infringement proceedings. The outcome was not beneficial for the claimants in this case (see Pennings 2022, chapter 10), but it nevertheless shows that problems of non-compliance that may come to the attention of the Commission can have a follow-up.

A rather recent development is the establishment of the European Labour Authority (ELA). This body is based on Regulation 2019/1149 and started work in October 2019. Its objective is to assist Member States and the Commission in their effective application and enforcement of EU law related to labour mobility across the EU and the coordination of social security systems within the EU. Van Nuffel (2022, 389) describes the ELA negotiation process and how the conflicting interests of the Member States and social partners had to be taken into account. Therefore, the ELA was not designed as an enforcement body of EU labour law, but with the task to inform and support (and not control) the enforcement agencies of the Member States. 'It provides them with opportunities rather than requirements' (Van Nuffel 2022, 405).

The objectives of the ELA are to contribute to ensuring fair labour mobility across the EU and to assist Member States and the Commission in the coordination of social security systems within the EU. It has to facilitate access to information on rights and obligations regarding labour mobility; facilitate and enhance cooperation between Member States; mediate and facilitate a solution in cases of cross-border disputes between Member States; and support cooperation between Member States in tackling undeclared work. Unlike in the case of national labour inspectorates (and other EU agencies: see for instance Chapter 10), the operating area for ELA activities is limited to cross-border work. Its task and powers are restricted to providing services, rather than it having enforcement powers itself. Nor does the regulation on the ELA introduce new rights and obligations for private persons and employers. In other words, the Member States have retained the exclusive powers to examine labour situations, also in cross-border situations.

Member States do not have an obligation to establish a national agency with the task to enforce EU free movement rules, although they have the Treaty obligation to sincerely cooperate with each other to apply EU law in their national order. Instead, enforcement is part of the supervision of the specific area involved. For instance, health and safety is part of the responsibility of the labour inspectorate, and that includes also the EU rules implemented in this field. For free movement there is no specific administration; moreover, the rules concerned are relevant to individual employment relationships, and therefore there is no general overview of the extent to which the rules are complied with.

Enforcement of EU social security rules is done by the regular national administration, this time related to benefits. However, since claims are disputed before a public benefit administration, Member States have better control of the rules' application, and also their own interest in correct application. All in all, it can be expected that most rules are applied correctly; problems occur in particular if Member States disagree with the rules concerned or have their own reasons not to apply them correctly (see section 2.1.4).

2.1.3 Enforcement by individuals

Since there is no general enforcement system of the free movement rules in labour, to a large extent it has been left to the private actors (mostly employees) concerned to enforce their rights. Therefore, it is important to note that some landmark judgments of the Court have facilitated such enforcement. First of all, the Court interpreted (starting with the predecessors of) Article 45 of the TFEU as expressing a fundamental principle, for which reason it has to be broadly interpreted and the restrictions (exceptions) have a narrow meaning only. An example is the *Lawrie Blum* judgment (Case 66/85). Second, very relevant to enforcement is that the Court ruled that, because of this status as fundamental principle, Article 45 of the TFEU has direct and horizontal effect (Case C-281/98 *Angonese*). As a result, individuals can invoke Article 45 in national proceedings against their employers and can ask the national court to apply the free movement rule concerned directly. Therefore, they do not have to rely on the state (for example, by asking for compensation because of state liability in case of non-compliance).

2.1.4 Enforcement across the border: posting certificates

Infringements of free movement rules and discrimination on grounds of nationality occur mainly at the individual level, and therefore they often remain unnoticed unless they lead to cases before the Court. This is different in the case of so-called posting of workers. In such cases, persons sent by their employer to temporarily perform work in another Member State remain, under some conditions, subject to the social security system by which they were covered before they crossed the border (see Pennings 2022, chapter 7). Thus, an exception is made to the general conflict rules of Regulation 883/2004, which provide that the social security system of the state of employment is applicable.

In case the posting rules of Regulation 883/2004 are applicable, a posting certificate can be requested from the competent institution in the sending state to certify that this person is actually insured in that state. Note that posting is beneficial not only for the worker but also for the employer, since he or she has less administrative work to do if there is no change to the worker's social security. Thus, the posting rules contribute to the freedom of providing services for the employer. However, in some situations these rules can also be used to benefit from the differences between contribution rates between countries, such as when persons are sent from countries with low contributions to states with higher rates. For companies that can thus benefit from the lower rates, there is a competitive advantage – which is, it must be stressed, fully legal under the regulation, provided that the conditions for posting are fulfilled. However, the differences in contribution rates may be large: De Wispelaere (forthcoming) mentions a contribution rate for employers of 35.86 per cent in France and 1.47 per cent in Lithuania, and posting means that Lithuanian companies posting workers to France are subject to the latter rate only. The conditions for posting are that the worker concerned must be sent by his or her employer who performs substantial activities in the sending state, must not replace another worker who was posted by the employer and must not be sent for more than 24 months. These conditions are to ensure that the deviation of general state-of-employment-rule remains limited (which is quite generous; note that in tax law the maximum period is 183 days), as otherwise the risk of social dumping increases. Enforcement of the conditions is therefore of paramount importance. Whether the conditions are fulfilled has to be examined by the sending state. When it decides that the conditions are fulfilled, it provides, on request, a posting certificate.

Checking whether the conditions for posting are fulfilled may be a work- and time-intensive job for the sending state, and that can explain why conditions are not always checked. It may,

however, also be the case that the sending state does not give priority to this task, since, after all, in the case of posting it continues to receive the social security contributions involved. Moreover, its 'own' employer is also better off, since he or she has a competitive advantage (on how this works and how often this is estimated to occur, see Jorens and De Coninck 2019; De Wispelaere forthcoming). As will be clear, since both the employer and employee see advantages in posting, enforcement of these rules cannot be expected of individuals.

The Court of Justice was asked whether a Member State can ignore a posting certificate if it considers it has been incorrectly issued. In the *Banks* (Case C-178/97) and *Fitzwilliam* (Case 202/97) judgments, it answered that it is clear that the obligation of sincere co-operation of the Member States (Article 4(3) of the TFEU) would not be fulfilled if the institutions of the host state were to consider that they were not bound by the certificate. Consequently, the certificate is binding on the host state, the Court decided; otherwise legal certainty would be in danger. If the competent institution of the host state expresses doubts as to the correctness of the facts on which the certificate was based, the competent institution of the issuing Member State must reconsider the grounds for its issue and, if necessary, withdraw the certificate. Should the institutions concerned not reach agreement on this issue, they can refer the matter to the Administrative Commission that is established on the basis of Regulation 883/2004. When that is not successful, a Member State may start infringement proceedings before the Court.

Consequently, a long and complicated procedure has to be followed when the certificate is challenged; in other words, it is not easy to have a certificate declared invalid even if it is issued on incorrect grounds.

The Court's approach was maintained in the *Herbosch Kiere* (Case C-2/05) and *A-Rosa Flussschiff* judgments (Case C-620/15). Only when a certificate is presumed to be fraudulently obtained has the Court allowed a different approach. This occurred in the *Altun* judgment (Case C-359/16; see also Verschuere 2020), but also in such cases the host Member State has first to put concrete evidence before the issuing institution that suggests that the certificates were obtained fraudulently. If the latter institution fails to carry out such a review within a reasonable period of time, this evidence can be used in judicial proceedings in the host Member State to decide that the certificates should be disregarded. If these conditions are fulfilled, the Court ruled, a national court may disregard the posting certificates and must determine whether the persons suspected of having used these certificates may be held liable under the applicable national law.

In 2016 the Commission issued a proposal to revise Regulation 883/2004, inter alia to improve enforcement of the posting rules. All chapters of the proposals have been discussed extensively in the Council and Parliament and this has resulted in a compromise in the tri-logue procedure. However, the proposal to improve enforcement of the posting rules appeared problematic, since some countries feared that their companies might lose competitive advantages (see Pennings 2020; Parliamentary Papers First Chamber of Dutch Parliament 2021–2, 21501–31 – since the negotiations are mainly in private, there are few quotable sources). Finally, the proposal for revision was rejected in December 2021. Enforcement is, as can be seen, not always a process that is continually improved by means of policy cycles; it can be seriously hindered by conflicting interests of Member States involved.

2.2 Equal Treatment

A second topic is that of equal treatment in employment.

2.2.1 The relevant legislation

Equal treatment in work is regulated in Article 157 of the TFEU for equal pay for equal work for men and women, in Article 19 of the TFEU for other discrimination grounds, and in the following directives:

- Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (gender equality directive);
- Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (race equality directive);
- Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (equal treatment framework directive). This concerns the grounds of religion or belief, disability, age and sexual orientation.

The gender equality directive has predecessors; in the current one several elements of the case law of the Court of Justice have been codified.

2.2.2 Enforcement at the macro level

There is no body at EU level to enforce equal treatment. As with the free movement provisions, the Commission can initiate infringement procedures against a Member State when it does not comply with EU law. And as also in the case of free movement, there are expert networks reporting on the situation in the Member States: one on gender equality and one on equality on the other grounds (the second and third directive mentioned above); the most recent reports are Böök et al. (2022) and Chopin and Germaine (2021) for the respective networks.

There is no obligation following from EU law to establish a general agency to enforce the provisions of the directives. Below we will discuss, however, that as part of the obligations for the Member States to facilitate individual enforcement, collective enforcement is (slowly) increasing, but not enforcement by a general Member State institution.

2.2.3 Enforcement by individuals

Traditionally, enforcement of the EU equal treatment rules is left to individual workers, who have to address their employer in case of non-compliance with the equal treatment rules. Also here, the Court of Justice facilitated – to some extent comparable to the situation with free movement – individual enforcement and introduced some new doctrines, which can be categorized as follows.

2.2.3.1 *The doctrine of the horizontal effect of the equal treatment rules*

First of all, the Court ruled that Article 157 of the TFEU (and its predecessors), on equal pay of men and women for equal work, has direct and horizontal effect (*Case C-43/75 Defrenne II*). As in the case of free movement, this interpretation makes it possible to invoke the equal pay rule against employers before national courts.

Since directives do not have horizontal effect, in order to facilitate individual enforcement of directive provisions the Court developed the doctrine that national law has to be interpreted, where possible, in consistency with the directive concerned. Such interpretation is possible only under some conditions, including that the interpretation is not *contra legem*. An important further step in the case law was, therefore, that the Court argued that certain provisions laid down in the equal treatment directives are an elaboration of an equal treatment principle (on

gender, age, religion and race) being part of the fundamental legal order of the EU and the Member States. As in the case of free movement, such fundamental principle gives the corresponding provision of the directive indirectly horizontal effect.

Initially, principles that can give such indirect horizontal effect had to be found in the fundamental rights underlying the EU legal order and in national constitutions (eg Article 14 of the European Convention on Human Rights in Case C-144/04 *Mangold*). However, since the EU Charter on Fundamental Rights was adopted, Article 21 of this instrument, ensuring non-discrimination, can also fulfil this role (eg Case C-414/16 *Egenberger*).

2.2.3.2 *Measures must ensure real and effective judicial protection*

The Court of Justice also ruled that Member States are obliged to introduce ‘such measures as are necessary’ for individuals to enforce provisions of the gender equality directive. The Court required Member States to ensure that these enforcement measures are effective and equivalent to the mechanisms used for enforcement of similar rights in national law (Case C-33/76 *Rewe*). Moreover, national measures must ‘guarantee real and effective judicial protection and have a real deterrent effect on the employer’ (Case C-271/91 *Marshall*). In line with these principles, Member States were, for instance, not allowed, in a case of sex discrimination, to impose a ceiling to the amount of compensation. The Court required that the national rule ‘must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full’. This was codified in Article 18 of the gender equality directive.

Subsequently, all equal treatment directives codified this effective enforcement case law and provide that sanctions must be effective, proportionate and dissuasive (race equality directive, Article 15; equal treatment framework directive, Article 17; gender equality directive, Article 25).

In the report on equal treatment on grounds of gender (Böök et al. 2022), it is remarked that the variety of remedies found in national law of the Member States is huge. They include a declaration of the rights of a claimant; request for annulment of unlawful provisions; right to reinstatement; compensation; penalty payments; and administrative fines. Still, as the report notes, many national experts believe that their national laws do not fully comply with the criterion of ‘effective, proportionate and dissuasive sanctions’ and give examples of quite low compensation and fine amounts (Böök et al. 2022, 182–5). The report on equal treatment on other grounds supports this finding and adds that ‘As a whole, no single national enforcement system appears to be truly all-encompassing. Essentially, they are mostly based on an individualistic and remedial – rather than a preventative – approach’ (Chopin and Germaine 2021, 100).

2.2.3.3 *Access to the judicial process must be guaranteed*

For individual enforcement it is important that access to the judicial process is guaranteed, as ruled by the Court (eg Case C-222/84 *Johnston*). Subsequently, this rule was laid down in, inter alia, Article 17(1) of the gender equality directive. Still, ‘a widespread general problem remains that overall, the level of gender equality litigation is still (very) low in many states’ (Böök et al. 2022, 187). They mention the following factors as explanations, varying per country: the cost of legal proceedings; overly short time limits for initiating proceedings; the length of proceedings; conditions of entitlement to legal aid; associations cannot initiate legal proceedings; only courts, not equality bodies, can impose compensation; lack of access to information on lower court rulings; lack of skilled experienced advice.

There are also examples of good practice where low threshold access was established, which are worthy of study. In Denmark,

the Board of Equal Treatment is a first instance complaints mechanism, that assesses individual complaints of all aspects of equal treatment and non-discrimination, both in employment and in the society as a whole. Access is free, and the complaint can be submitted by means of an easy on-line complaints form. The Board also assesses complaints of a general nature submitted by the Institute of Human Rights. In addition, the Board of Equal Treatment undertakes ex officio investigations based on complaints. The cases are decided on the basis of all available information and documentation. The Board has the power to issue sanctions, ie payment of compensations in situations of violations and its rulings are publicly available. It rules on hundreds of complaints every year. Each party may decide to have a ruling re-assessed in the ordinary court system. (Böök et al. 2022, 192)

2.2.3.4 *Measures against victimization*

A way to facilitate individual enforcement is to give protection to the plaintiffs against ‘dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment’ (gender equality directive, Article 24; race equality directive, Article 9; equal treatment framework directive, Article 11).

2.2.3.5 *Reversal of the burden of proof*

Individual enforcement in cases of discrimination is often difficult: how to prove that one is discriminated against and that the experienced disadvantage is not due to other reasons? Often the relevant data are not easily available or are not accessible at all, such as figures on wage differences between men and women, information on other candidates applying for the job, policy documents or algorithms used for selecting or rewarding employees.

Also in this area, the Court of Justice reinforced the possibilities for individual enforcement by developing the doctrine of shifting the burden of proof: if a pay system lacks transparency, but there is evidence of a disparity in the pay awarded to male and female workers, the burden of proof shifts to the employer to establish a non-discriminatory reason for the pay inequality (eg Case C-109/88 *Danfoss*).

This doctrine was codified in the directives, via Directive 97/80 on the burden of proof (1997), in Article 19(1) of the gender equality directive, Article 8(1) of the race equality directive and Article 10(1) of the equal treatment framework directive. For the purpose of shifting the burden of proof, the claimant must provide evidence from which a presumption of discrimination could arise. It is, finally, left to the national court to decide whether the claimant has submitted sufficient evidence for the shift of burden of proof.

Böök et al. (2022, 176 ff) mention that problems have remained with the actual effect of these provisions. It appears that the ‘rules pertaining to the burden of proof establish high evidentiary thresholds that represent obstacles to victims of discrimination seeking redress’. It also happens that the directive is not consistently implemented in all relevant national acts; that is, sometimes it is implemented in the material acts but not in the procedural ones. Also, Chopin and Germaine (2021, 96) mention states where the burden of proof provisions have not been implemented correctly.

The reports mention facilities that go further than EU law to help claimants to obtain the relevant materials, such as the obligation for companies of a certain extent to draw up bi-annual reports on workers’ situations as regards recruitment, professional training, career

opportunities, remuneration, dismissal and retirement (Böök et al. 2022, 178). This may be good practice in order to facilitate enforcement further.

The recent Proposal for a directive to strengthen the application of the principle of equal pay (COM(2021)93) includes several new instruments to help applicants to obtain the relevant information for procedures and elaborates on these experiences. This may be a welcome addition to the instruments. However, it is restricted to equal pay for men and women only.

2.2.4 Enforcement by organizations representing individuals

The equal treatment directives provide that Member States shall ensure that associations, organizations or other legal entities, which have a legitimate interest in ensuring that the provisions of this directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under that directive (race equality directive, Article 7(2); equal treatment framework directive, Article 9(2); gender equality directive, Article 17(2)). Consequently, the directives do not require State agencies for collective enforcement, but set out an obligation to give non-governmental organizations (NGOs) instruments for enforcement.

However, there are still quite a number of restrictions for such organizations, as Böök et al. (2022, 191) reveal. In some countries, only specific non-governmental organizations acting in the field of anti-discrimination can participate in proceedings; in others NGOs can represent victims only before regular courts, not before the constitutional court. Sometimes entities may not be entitled to bring legal action on behalf of the claimant, as claimants must bring their own case and may only be supported by counsel or financially, or they can only be supported in administrative proceedings, not in court proceedings.

2.2.5 Bodies for the promotion of equal treatment

Alongside promotion of NGOs supporting individuals, the equality directives oblige Member States to establish equality bodies. The racial equality directive introduced, for instance, the obligation for Member States to ‘designate a body or bodies for the promotion of equal treatment’. This could be a specialized organization or be part of existing national agencies for ‘the defence of human rights or the safeguard of individuals’ rights’. Such body must ‘provide independent assistance to victims of discrimination in pursuing their complaints about discrimination’. In addition, it must ‘conduct independent surveys concerning discrimination; publish independent reports and make recommendations on any issue relating to such discrimination’. The gender equality directive obliges Member States to create an equality body that has, inter alia, to ‘exchange available information with corresponding European bodies’. Such provision is lacking in the employment equality framework directive; there is no explanation for this absence.

As Böök et al. (2022, 192) remark, ‘these bodies differ in terms of purpose, competence and the discrimination grounds they can deal with’. Sometimes they may have an informative and/or research function only; sometimes they may also investigate complaints, give legal advice and assistance, issue (non-binding) opinions, recommendations and warnings, try to obtain out-of-court settlements, bring cases to court, and so on. In some countries there are restrictions; for example, they have no access to courts, or no recourse to courts against private actors. The Danish Board of Equal Treatment, mentioned in section 2.2.3, is an example of an

equality body that is mentioned as a good example of lowering the threshold for enforcement, both at the individual and the collective level.

In June 2018, a Recommendation on standards for equality bodies encouraged Member States to ensure greater independence, extended competences and adequate resources for these bodies (C/2018/3850), but this is a recommendation only.

3. ASSESSMENT OF THE ENFORCEMENT INSTRUMENTS IN SOCIAL POLICY: ISSUES FOR FURTHER RESEARCH

3.1 The 'Success' of Enforcement

3.1.1 General

It is hard to assess the 'success' of enforcement in labour law and social policy. Overall, it can be said that in the past 60 years, enormous progress has been made as regards equal employment conditions for men and women, and discrimination in other areas has also been put on the agenda. Before the gender equal treatment directive was adopted, in many Member States the differences in employment conditions between men and women were huge, and, moreover, seen as natural. Moreover, the prohibition of discrimination on grounds of religion, disability, sexual orientation and age was quite new in many Member States. In the area of discrimination 'the enforcement regime has been progressively reconfigured' (Rasnača et al. 2022b, 527), and 'the regulatory framework for enforcement of equality rights can be characterised as the most progressive in EU labour law' (ibid). Still, there are significant areas in which discrimination has not disappeared, not even as regards the already quite old problem of the pay gap between men and women (Boll and Lagemann 2018).

Also, in the numerous situations of cross-border movement, where the coordination rules provide that contributions and benefit entitlement belong to the competence of one state only, the system works well.

Problems with the private enforcement model become more visible in cases where two or more Member States are involved and they have different interests. The competing values of free movement of services and proper application of the free movement of workers rules (meant to prevent social dumping) were apparently obstacles to the Court's requirement of stricter compliance with the rules on posting certificates. Because of the conflicting interests of Member States, the EU legislature has not solved this problem yet.

Consequently, we can conclude that although overall EU law has gradually been implemented in national law and has had an enormous impact, when it comes to enforcement, that is, making sure that the law is complied with in case actors or states do not obey the rules, the system is still rather weak. Overall, it has been left to individuals to enforce their rights, although supported by the case law and a couple of provisions in directives. There is no all-encompassing system of enforcement of the rules.

3.1.2 The division between the levels of enforcement

A more in-depth analysis of enforcement of labour law and social policy rules focuses on the relation between individual and collective enforcement. These approaches are not separate; for instance, where during the monitoring it appears that an employer does not comply with the

rules, the public authority concerned, or the individual (and/or the body representing him or her), can take the matter to court.

The distinct levels of enforcement have different outcomes in terms of effectiveness (Malmberg 2004, 223). The individual approach means that, in case of success, compliance is realized for the person concerned, but this often does not have an impact on other situations. Ideally, enforcement is effective at both the individual and collective levels. It is obvious that, even though it has been made easier for women to claim equal pay before court, if there is still an important pay gap between men and women in society equal pay is not fully enforced. Collective enforcement may require a specific enforcement instrument, such as an agency.

Malmberg (2004, 225) observes that from a comparative study of *national* regulation of enforcement of labour law, it appears that the main focus has traditionally been on enforcement at a collective level, where the individual approach has been somewhat neglected. At the EU level, this situation is reversed: traditionally, it has been left to individuals to enforce labour and social policy rights. As we have seen, the EU instruments did initially not give much support in adjudication procedures, but the Court of Justice has facilitated enforcement by individuals, although this was restricted to almost exclusively judicial procedures. It developed doctrines, such as effective enforcement, interpretation of national law in conformity with the directive, indirect horizontal effect of directives, state liability and conditions on remedies, in order to facilitate individual judicial enforcement.

Still, the thresholds for access to justice for individuals are high. Elements mentioned are the lack of experienced legal aid, the high costs of the proceedings when the case is lost, the limitations on possible compensation and the long procedures. The network reports also mention good practices, in particular those of specialized bodies that deal with all grounds, have low costs, can award compensation and can undertake actions *ex officio*.

The Court has not contributed to reinforcing the role of representing organizations in equal treatment proceedings. The earlier versions of the equal treatment on gender directive did not address these either, but the directives adopted after 2000 (all three mentioned in section 2.2.1) have rules on these organizations. These representing bodies experience restrictions, however, as it appears from Böök et al. (2022) and Chopin and Germaine (2021).

Another instrument introduced for enforcement at a collective level in the post 2000 equality directives is that of the equality bodies. In this respect, it is remarkable that there is no obligation under the Framework equal treatment directive to establish such bodies. The requirement in the other directives that ‘Member States shall ensure that these bodies have to provide independent assistance to victims of discrimination in pursuing their complaints about discrimination’ still leaves room for only very limited support and does not give a general obligation to empower such body, unlike in the case of such bodies as the Danish Board of Equal Treatment, which can impose compensations and fines.

3.1.3 Enforcement in cross-border situations

Enforcement of free movement provisions can be problematic, since these are cross-border situations. This need not always be the case; in the majority of cases the rules will be observed. After all, workers and employers often themselves have a sizeable interest in correct application of the rules. However, if Member States have different interests, it is not easy to solve their disputes, even though procedures have been developed. In section 2.1.4, the example of posting in social security was examined and we noted that states are not always willing to enforce the posting rules, as this could affect their labour market and the competitive powers

of their companies. In labour and price-intensive sectors, such as the construction, agricultural and care sectors, the effects of this form of competition are significant (De Wispelaere forthcoming).

The administrative approach at the macro level to enforcement in cross-border situations is relatively weak. The ELA has not yet been provided substantial powers for enforcing the rules.

Posting is now relatively well researched (Jorens and De Coninck 2019; De Wispelaere, De Smedt and Pacolet 2019) from the point of view of EU law; there is still a need to examine the national provisions and the discrepancies between national and EU law, and possibly bilateral solutions, in order to try to find a compromise.

3.2 Areas for Further Research

3.2.1 Promoting access to adjudication

It appeared in the previous sections that persons complaining about discrimination do not have sufficient support in adjudication proceedings. It is therefore important for further research to examine where gaps in access to adjudication occur, and how these can be filled, while respecting the essential principles of systems of Member States.

For this purpose, countries' best practices to improve access may be useful to examine. From these best practices, different options for improvement can be distilled, which can be laid down in revisions of the directives. These will enable Member States to choose the option which best suits them; for each option, more specific rules will have to be given in order to ensure better implementation.

Among the possible best practices, a low-threshold adjudication body with sufficient competences to enforce the rules is a serious candidate. Such body could be an answer to the current problems with access to adjudication, such as high costs for the plaintiffs, long time limits and restrictions in possibilities to address courts. There should be investigation of the extent to which the low-threshold adjudication bodies of the various Member States differ, of the factors (for example, the organization of the labour market) that can explain the differences. What is the impact of the various powers of the bodies on individual and collective enforcement? What are the possibilities for prevention of discrimination, for example by the obligation to regularly publish data relevant to equal treatment?

From an EU law perspective it must be examined how such instruments can be laid down in the directives. How can they fit with the subsidiarity principle, which on the one hand leaves the Member States the power to organize their labour law system, but on the other hand gives the EU legislature the competence to make legislation if the objectives concerned cannot be reached at the national level?

3.2.2 Promoting institutional collective enforcement

The equal treatment body mentioned in the preceding section facilitates individual enforcement and, in some systems, has also a collective enforcement function, in that it can investigate and report situations and impose fines. However, this is still a limited way of collective enforcement, left to a NGO.

It is worthwhile to investigate whether, and if so how, Member State responsibility for compliance with the rules can be increased. After all, the gaps mentioned in the network reports are still considerable. Is there room for an obligation of Member States to report on a regular basis how they realize enforcement of the instruments concerned? Can they be required to

give their labour inspectorate, NGOs or equality bodies the task to monitor non-compliance and impose fines?

Another element that can be investigated in order to facilitate collective enforcement includes the introduction of preventative measures. An example is the obligation for larger companies to disclose the factors relevant to equal treatment and equal opportunities; such information makes it easier to identify cases of non-compliance with the rules. The proposed pay gap directive (section 2.2.3) seems to be a useful instrument for this purpose.

For cross-border disputes between Member States an adjudication body, other than the Court of Justice, is missing. For Member States it is not realistic to approach this Court for individual infringements of the rules; one of the reasons is that proceedings take a very long time and another may be that they do not wish to address conflicts in cases of minor importance. Since the Member States have deliberately not chosen a common adjudication body and have even rejected proposals for tightening the supervision rules for posting, it is not easy to have such proposals adopted. However, how the rules are applied in practice could be investigated, in order to identify enforcement rules that are acceptable for the actors concerned. One approach could be to investigate whether progress can be made on a bilateral basis between Member States. Such approaches have been successfully undertaken in the past – for example between the UK and the Netherlands, when, in the view of the latter state, in the aftermath of the *Banks* judgment (see section 2.1.4) the UK too easily issued posting certificates for the self-employed. Another example is the Memorandum of Understanding concerning cooperation for the application and enforcement of the rules on social security of the Netherlands and Poland, concerning in particular the export of unemployment benefits (Parliamentary Papers Second Chamber of Dutch Parliament, 2021–2, 21 501–31, nr 646).

4. CONCLUSIONS

Enforcement can be defined as ‘the bringing into effect of particular rules’ (Chapter 1, section 2.1), and this is, obviously, also very important for labour law and social policy. Enforcement in this area is, however, not an easy phenomenon to research. This is due to the nature of this field, where to a large extent Member States have retained the powers to legislate. It also has to do with the fact that labour and social protection are relatively old areas that have been developed in the various member states according to their cultural traditions. As a result, differences have developed with regard to, for instance, the role of the state in the labour market, the role of social partners and collective labour agreements. It also has to do with the large economic differences between Member States, which influence the movement of workers and create differences in interests between the Member States.

Labour law and social policy belong to the domains that Member States can still organize themselves, and the EU has only limited competences in these areas. Moreover, directives are instruments that, by their very nature, leave it in principle to Member States to implement them. However, this is not a good reason not to propose a better enforcement of the rules. After all, the principles and values at stake are of high importance and, from the huge gaps in how they are observed, it follows that enforcement should be high on the agenda.

Enforcement in labour law and social policy is to a large extent left to individuals. This explains why the area is not well researched and makes it difficult to get a grip on it. We have also seen that individual enforcement of discrimination provisions has gradually been better

facilitated, but still leaves room for huge differences in the ways in which the relevant provisions are implemented. We also saw restrictions in how the Member States have implemented these rules.

An important factor is that sometimes Member States have conflicting interests and may therefore oppose rules for better enforcement. In addition, whereas enforcement of labour law is left to the national level, the enforcement structures at this level are sometimes not adequate to deal with transnational problems.

Moreover, the enforcement provisions differ from instrument to instrument. Why should the proposed instrument to create more transparency in cases of pay of men and women not be extended to, for instance, suspicion of race discrimination cases? Others have proposed a broader and more structural enforcement directive, and even made a proposal (Rasnača et al. 2022a).

The findings in this chapter show that in some areas of EU law, enforcement is more complicated than a policy cycle that ‘aims to prevent violations and respond to non-compliance via monitoring compliance with laws, investigating suspicious cases of non-compliance with law and sanctioning for violations of laws’ (Vervaele 1999, 131). Such a cycle may be suitable where there is a clearly defined rule laid down in EU legislation, when there are clear violations and there is an actor that organizes and supervises the cycle. Examples are criminal or competition law, where there are clear Treaty provisions, violations can in principle be unambiguously identified and there is a clear competence for the EU to set the rules and to supervise them.

In the area of labour law and social policy, and probably also in some other fields, policy cycles are less appropriate to explain enforcement. Although the principles – free movement and non-discrimination – are as such clear, the rules to be applied or implemented offer ample room for adjustment to the local situations. Sometimes the problem is that national legislation is adopted to implement a particular EU instrument, but in practice does not ensure full enforcement of the objective of that instrument – various such examples may be seen in the reports of the national experts. In such case it can often not be simply decided that this is a form of non-compliance that can be sanctioned. Moreover, it is not always clear who has the task and competence to monitor and to sanction non-compliance. Hence, the policy cycle is inappropriate to assess enforcement in all areas of law.

The lack of a full realization of EU labour law and social policy rules has to do with the system, culture and choices made by the Member State involved. These factors have to be identified for the purpose of proposing better enforcement. After all, in a context of conflicting interests, Member States do not necessarily ensure compliance. They may prefer to give priority to maintaining their own competences against supranational powers and protect particular actors in society that may be negatively affected by compliance of the rules. They may also have differing priorities for spending money and means on enforcing particular rules and be unwilling to adopt measures for better enforcement.

Whereas the policy cycle can be seen as a top–bottom approach, the approach necessary to enforce EU rules when there are various ways to implement them should connect more with the national systems. It requires examining gaps in enforcement at the national level; further, it requires an explanation of the rules and the gaps in enforcement in the context of the national systems; and finally, it requires defining more specifically the Member States’ options for implementing the instrument.

Thus, instead of a policy cycle, the development of enforcement is a more linear process, in which steps are taken to facilitate individual enforcement and improve the collective approach, which requires close examination of the legal instruments involved and their implementation by the Member States. It is very well possible that this approach to enforcement is also relevant to other areas than labour law and social policy. An example may be the concept of EU citizenship.

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