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### Newsletter Jean Monnet Project EUSOCP – European Labour Law Perspectives – November/December 2018

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# Newsletter EUSOCP project

## Issues XI & XII – November/December 2018

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UNIVERSITY OF AMSTERDAM

Erasmus+ Jean Monnet Action

### *European Labour Law Perspectives - Enhancing the Social Pillar*

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Within the Jean Monnet action EUSOCP, the Labour Law Departments at the University of Amsterdam and the University Carlos III-Madrid are issuing a monthly newsletter summarizing the development of the EU Pillar of Social Rights and including comments on EU legislation and case law in the field of Labour and Social Security Law. The newsletter is available via the following links:

- <https://aias-hsi.uva.nl/en/projects-a-z/jean-monnet-eusocp/european-labour-law-perspectives.html>

The European Pillar of Social Rights is divided into three main categories in the field of employment and social policies. Each of these categories contains a number of policy domains, to which different principles are attached. The three categories are:

- Equal opportunities and access to the labour market;
- Fair working conditions (adequate and reliable balance of rights and obligations between workers and employers);

- And adequate and sustainable social protection.

For a further description of the pillar see:

EN: [https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights\\_en](https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en)

NL: [https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights\\_nl](https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_nl)

ES: [https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights\\_es](https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_es)

## European Pillar of Social Rights

### **The Platform workers and grassroots unions**

*December 16, 2018*

When platform workers are getting organised they do not always do this through a traditional trade union. While traditional trade unions are increasingly focussing on organising platform workers, they are also organising themselves in more creative ways. Recent research from the European Trade Union Institute indicates that digital platforms have also become sites experimentation in the labour movement with grassroots independent unions becoming more prominent, particularly in the on-demand transport and food sectors of the platform economy. The Fairwork Foundation estimates there are currently over seven million digital platform workers across the world.

Read on: <https://www.opendemocracy.net/en/can-europe-make-it/grassroots-action-prominent-in-platform-economy/>

## European Reports/Studies

### **OECD job strategy report recognizes the importance of collective bargaining**

*December 11, 2018*

The OECD published a new job strategy report, the first one in 12 years. According to the report that is called “Good Jobs for All in a Changing World of Work” collective bargaining is the best way to deliver better quality work. The OECD states that the digital revolution, globalisation and demographic changes are transforming the labour market and says that unions and employers have an important role to play and can work together in educating and training workforce to fit the demands of the changing labour market. Furthermore, the OECD report recognises the important role that collective bargaining plays in both boosting productivity as tackling inequality. Collective bargaining is also linked with higher employment and lower unemployment, young people, women and low-skilled workers are also doing better under coordinated bargaining than under fully decentralised systems.

Read on: <https://www.tuc.org.uk/blogs/oecd-says-collective-bargaining-best-way-deliver-better-work>

### **Formal employee representation and decision making**

*December 5, 2018*

A new CESIFO working paper examines the involvement in decision making of works councils and unions, the quality of the information provided to them by management, the preparedness of the representation body and the role of the work climate and trust. Cross-country data are used to establish perceived shortfalls in employee involvement based on the responses of employee representatives in EU establishments with formal workplace employee representation. Findings include that the desire for greater involvement is smaller where workplace representation is organised via works councils instead of union bodies, a finding that also obtains across country clusters. However, the favourable influence of the works council institution, if not information provision, does not carry over to situations in which management is adjudged uncooperative and untrustworthy.

Read on: [https://www.ifo.de/DocDL/cesifo1\\_wp7399.pdf](https://www.ifo.de/DocDL/cesifo1_wp7399.pdf)

### **Report on Transnational Corporate Agreements**

*November 30, 2018*

ETUC and BusinessEurope developed a report that is the result of a joint project on Transnational Company Agreements (TCA). The debate on TCAs is already going on for some years now and ETUC and BusinessEurope wanted to build on current practices in order to identify solutions that may be of support to bargaining agents. Their final report identifies and outlines key findings from interviews that were conducted with central management and union representatives of eight companies that have already concluded TCAs. They conclude that while differences in social dialogue and collective bargaining practices across Europe are often seen as obstacles, unions and companies can overcome such barriers by applying a pragmatic and inclusive approach.

Read on: <https://www.etuc.org/en/publication/building-experience-win-win-approach-transnational-industrial-relations-multinational>

### **Eurofound report on living wage**

*November 30, 2018*

Living wage campaigns have been launched since the 1990s in an effort to achieve pay increases for the low-paid. These initiatives calculate the income required to achieve a basic standard of living, taking into account existing levels of state transfers. In recent decades, living wage initiatives have emerged in a small number of mainly English-speaking countries, including the UK and Ireland. Eurofound made a report to provide policymakers with a practical guide to the living wage concept. After addressing the background and multiple dimensions of the living wage concept the report ends with summary conclusions and policy pointers.

Read on: <https://www.eurofound.europa.eu/publications/report/2018/concept-and-practice-of-a-living-wage>

### **Relationship between workplace representation and strikes**

*November 27, 2018*

The Center of Economic Studies (CES) published a research report 'Strikes, Employee Workplace Representation, Unionism, and Industrial Relations Quality in European Establishments'. Using cross-country data the relationship between workplace representation and strikes is investigated. Key findings include that workplaces with high union representation score higher on three additional strike measures, namely strike duration, strike

frequency, and strike duration. Also workplaces with union dominated work councils see more strikes than establishments with union workplace representation where union members are in a minority.

Read on: [https://www.ifo.de/DocDL/cesifo1\\_wp7360.pdf](https://www.ifo.de/DocDL/cesifo1_wp7360.pdf)

### **Future of social protection for self-employed workers**

*November 7, 2018*

Non-standard work and self-employment, in particular, are not recent phenomena. Social protection systems are often still designed for the archetypical full-time dependent employee. Work patterns deviating from this model can lead to gaps in social protection coverage. A new OECD report takes a closer look at existing programmes in OECD countries that provide social protection to non-standard workers. This in order to learn from the practical experiences with such approaches. The report provides seven case studies that shed light on different aspects of the social protection of non-standard workers (the self-employed, those at the border between self- and dependent employment, temporary workers, and workers on flexible or on-call contracts). At the end of the report some policy options are presented to help provide social protection for non-standard workers, and increase the income security of on-call workers and those on flexible hour contracts.

Read on: [https://www.oecd-ilibrary.org/social-issues-migration-health/the-future-of-social-protection\\_9789264306943-en](https://www.oecd-ilibrary.org/social-issues-migration-health/the-future-of-social-protection_9789264306943-en)

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## **EU Case Law**

### **Social policy - Right to paid annual leave - Directive 2003/88/EC**

*November 6, 2018*

Judgment of the Court of Justice of 6 november 2018 (C-684/16) Shimizu

#### **Facts**

Mr Tetsuji Shimizu was employed by the Max-Planck-Gesellschaft zur Förderung der Wissenschaften (Max-Planck). Max-Planck sent Shimizu a letter, inviting him to take his leave before the employment relationship was terminated, without forcing him to take it on the days it had set. Shimizu took two days' leave. Around the end of his employment relationship, Shimizu sought payment of an allowance corresponding to 52 days' paid annual leave, which Max-Planck refused. The entitlements to paid annual leave had lapsed under German law, since they were not taken during the year for which the leave had been granted, while the worker was able to take his leave in that year. As a result of the loss of that right, it may no longer be converted into an entitlement to an allowance. Shimizu then brought proceedings before the German labour courts. The German courts are uncertain whether EU law precludes national legislation providing for the loss of paid annual leave which is not taken, and the loss of an allowance in lieu of that leave, where the worker did not apply for leave before the employment relationship ended. They ask in particular whether EU law obliges the employer to determine unilaterally the dates of leave and whether this applies even where the employment relationship is between two private persons.

### **Considerations of the European Court of Justice**

The Court recalls that every worker's right to paid annual leave must be regarded as a particularly important principle of EU social law from which there may be no derogations and which is expressly laid down in Article 31(2) of the Charter of Fundamental Rights of the European Union. Article 7(2) of Directive 2003/88 (Working Time Directive) lays down no conditions for entitlement to an allowance in lieu of paid annual leave not taken. It is apparent from the case-law of the Court that article 7 precludes national legislation or practices which provide that no allowance is to be paid to a worker who has not been able to take all the annual leave to which he was entitled before the end of that employment relationship. The worker must be regarded as the weaker party in the employment relationship, and it is therefore necessary to prevent the employer from being in a position to impose upon him a restriction of his rights. Incentives not to take annual leave or encouraging employees not to do so are incompatible with the objectives of the right to paid annual leave, relating in particular to the need to ensure that workers enjoy a period of actual rest. In those circumstances, it is important to avoid a situation in which the burden of ensuring that the right to paid annual leave is actually exercised rests fully on the worker. The Court emphasizes that the directive does not require employers to force their workers to actually exercise their right to paid annual leave, however, they should ensure that workers are in a position to exercise such a right. The employer is in particular required to ensure, specifically and transparently, that the worker is actually in a position to take the paid annual leave to which he is entitled. The employer should encourage the worker (formally if necessary) to take the annual leave, while informing him, accurately and in good time so as to ensure that that leave is still capable of ensuring for the person concerned the rest and relaxation to which it is supposed to contribute, that, if he does not take it, it will be lost at the end of the reference period or authorised carry-over period. The burden of proof in that respect is on the employer.

The second question was whether, in the event that it is impossible to interpret national legislation conform Article 7 of Directive 2003/88 and Article 31(2) of the Charter, national courts must disapply the national legislation, if it concerns a dispute between the worker and his former employer who is a private individual. The Court explains that it is clear from settled case-law that a provision of a directive has direct effect when that provision is unconditional and sufficiently precise and if the State has failed to implement the directive in domestic law by the end of the implementation period. According to the settled case-law of the Court, a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. Accordingly, although Article 7(1) and (2) of Directive 2003/88 fulfilled the criteria of unconditionality and sufficient precision, those provisions cannot be invoked in a dispute between individuals in order to ensure the full effect of the right to paid annual leave and to set aside any contrary provision of national law. As regards Article 31(2) of the Charter, it should be recalled that the right to paid annual leave constitutes an essential principle of EU social law. The right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter, is both mandatory and unconditional in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law. It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter. Article 31(2) of the Charter therefore entails that the national court must disapply national legislation negating the principle that a worker cannot be deprived of an acquired right to paid annual leave at the end of the leave year and/or of a carry-over period fixed by national law when the worker has been unable to take his leave, or correspondingly, of the entitlement

to the allowance in lieu thereof upon termination of the employment relationship. With respect to the effect of Article 31(2) of the Charter on an employer who is a private individual, it should be noted that, although Article 51(1) of the Charter states that the provisions thereof are addressed to the institutions, bodies, offices and agencies of the European Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law, Article 51(1) does not address the question whether those individuals may be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility. Therefore, Article 31(2) of the Charter has direct, horizontal effect.

### **Ruling**

The Court rules that Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation under which, in the event that the worker did not ask to exercise his right to paid annual leave during the reference period concerned, that worker loses, at the end of that period — automatically and without prior verification of whether the employer had in fact enabled him to exercise that right, in particular through the provision of sufficient information — the days of paid annual leave acquired and, accordingly, his right to an allowance in lieu of paid annual leave not taken in the event that the employment relationship is terminated.

Secondly, the Court rules that, in the event that it is impossible to interpret national legislation conform Article 7 of Directive 2003/88 and Article 31(2) of the Charter, it follows from the latter provision that a national court hearing a dispute between a worker and his former employer who is a private individual must disapply the national legislation and ensure that, should the employer not be able to show that it has exercised all due diligence in enabling the worker actually to take the paid annual leave to which he is entitled under EU law, the worker cannot be deprived of his acquired rights to that paid annual leave or, correspondingly, and in the event of the termination of the employment relationship, to the allowance in lieu of leave not taken which must be paid, in that case, directly by the employer concerned.

Read the full judgment on:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=065B2C227F5DB9E5C38EBE99E6ED834C?text=&docid=207328&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=735008>

## **Events of the Project**

- **The seminar: *European Labour Law Perspectives – Enhancing the Social Pillar***, took place at the University Carlos III-Madrid on 18 & 19 January 2018, Madrid, Spain.

The recordings of the presentations at this Jean Monet Seminar are available at the following links:

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1. [https://arcamm.uc3m.es/arcamm\\_3/item/show/5fd5d75416103ff3185db4aab0b7c357](https://arcamm.uc3m.es/arcamm_3/item/show/5fd5d75416103ff3185db4aab0b7c357)
  2. [https://arcamm.uc3m.es/arcamm\\_3/item/show/a7262a469e9bff226605a8bc26a9b6b0](https://arcamm.uc3m.es/arcamm_3/item/show/a7262a469e9bff226605a8bc26a9b6b0)
  3. [https://arcamm.uc3m.es/arcamm\\_3/item/show/ea080356e304ed054ce60a231b0d7006](https://arcamm.uc3m.es/arcamm_3/item/show/ea080356e304ed054ce60a231b0d7006)
  4. [https://arcamm.uc3m.es/arcamm\\_3/item/show/fb3050d315154d8ffe923d28d8107e18](https://arcamm.uc3m.es/arcamm_3/item/show/fb3050d315154d8ffe923d28d8107e18)
  5. [https://arcamm.uc3m.es/arcamm\\_3/item/show/6220166b54f76e83283bdfd1985bdc04](https://arcamm.uc3m.es/arcamm_3/item/show/6220166b54f76e83283bdfd1985bdc04)
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- **The summer Course: *European Labour Law Perspectives – Enhancing the Social Pillar***, was held on 20-22 June 2018 at the Law Faculty - University of Amsterdam, the Netherlands. Venue: Nieuwe Achtergracht 166, 1018 WV, Amsterdam.

This course aimed at keeping employment specialists and labour law practitioners up-to-date by providing an overview of the latest policy developments, legislative initiatives and case law in the field of EU labour law.

**Key topics discussed**

The European Pillar of Social Rights

Workers protection in insolvency proceedings

Labour law and the on-demand economy

EU social security law

Update on the revision of the Posting of Workers legislation

Temporary agency work and flexible employment

Working time Directive

Workers involvement in the undertaking

EU Antidiscrimination Law and protection of atypical workers (fixed-term contracts, part-time workers), discrimination on grounds of gender, religion and age at work, etc.

Other recent legislative and policy developments at EU level: work-life balance and proposal on a Directive on transparent and predictable working conditions.

This conference is aimed at academics, lawyers specialised in employment and labour law, and other legal practitioners.

**Keynote speakers**

Prof. dr. Catherine Barnard

Prof. dr. Anthony Kerr

Prof. dr. Frank Hendrickx

Prof. dr. Manfred Weiss

Prof. dr. Jaap van Slooten

Prof. dr. Evert Verhulp

Prof. dr. Mies Westerveld

Prof. dr. Auke van Hoek

The recordings of the presentations at this Jean Monnet Summer School are available at the following link: <https://aias-hsi.uva.nl/en/projects-a-z/jean-monnet-eusocp/multimedia/multimedia.html>

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