The impact of austerity measures on social rights in the public sector: the EU does not grant any attention to respect of basic social rights in order to comply with austerity measures

1. Introduction

The aim of this paper is to research the legal impact of modifications in the field where the State acts as Employer. Some major modifications were initiated which as a consequence of the increased budgetary control by the EU on Belgium and the Netherlands on one hand. Some other modifications were a consequence of the financial support which has been asked by Spain and Portugal has to the EU.

As a starting point, this attempt to compare the impact of the increased control of the EU on budgetary matters with the adjustment programmes may be surprising. Belgium and the Netherlands are on not considered to be strongly affected by the crisis.[[1]](#footnote-1) Portugal and Spain were strongly affected by the financial crisis and had to apply (and obtained) financial assistance of the EU, the European Central Bank and the International Monetary Fund. This financial assistance was submitted to specific conditions among which major cuts in the public sector spending. However, the increased control upon the yearly budget for Belgium and the Netherlands also implied important measures in the public sector and in public sector employment matters.

This article will start with a short overview of the conditions which were granted to Spain and Portugal in order to obtain financial support. Afterwards, the conditions which Belgium and the Netherlands had to respect in order to deal with their excessive budget deficit will be indicated. How these conditions were transposed into national regulation will be analyzed for each country. We will specifically focus upon how the Member States studied dealt with social rights issues. Finally, attention will be paid to the role of the ILO and the EU in this perspective. The article will finish with some concluding remarks.

1. General legal framework in order to obtain financial support

Portugal requested on 7 April 2011 financial support from the EU, the European Central Bank and the International Monetary Fund. At that stage, Portugal had to negotiate a Memorandum of Understanding concerning the financial and economic adjustment programme with the so-called Troika of European Union (European Commission), the European Central Bank and the International Monetary Fund. The troika lent Portugal 78 billion euro in May 2011. One third was financed by the IMF while the other thirds were respectively financed by the European Financial Stabilization Mechanism (EFSM) and the European Financial Stability Facility (EFSF). These last two institutions were later replaced by the European Stability Mechanism, after the signing of Treaty on the European Stability Mechanism. This treaty falls outside the scope of the powers of the EU as the Member States involved had not transferred any powers with regard to this competence to the EU.[[2]](#footnote-2) However, the EU Council considered it wise to adapt article 136 TFEU of the European Union. The new third paragraph allowed the Member States participating in the euro zone to install a European Stability Mechanism, which they did with the European Stability Mechanism Treaty.

However, the EFSM and the EFSF still takes care of the money transfers and the control on the economic and financial adjustment programme for Portugal.

The current mechanism is thus a full element of the EU and is founded in article 136, third paragraph of the TFEU.[[3]](#footnote-3) This article provides the following:

“*In order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14), adopt measures specific to those Member States whose currency is the euro:*

*(a) to strengthen the coordination and surveillance of their budgetary discipline;*

*(b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.*

*2. For those measures set out in paragraph 1, only members of the Council representing Member States whose currency is the euro shall take part in the vote.*

*A qualified majority of the said members shall be defined in accordance with Article 238(3)(a).*

*The Member States whose currency is the euro, may establish a mechanism such as the European Stability Mechanism (ESM) so long as that mechanism is only activated when indispensable to safeguarding the stability of the euro area as a whole, and only if the financial assistance is made subject to strict conditionality”*

This third paragraph was originally foreseen to enter into force on 1 January 2013 but it was postponed due to the fact that the Czech Republic completed the ratification of this modification only in April 2013. The original date namely only counted in case all concerned member States had successfully completed the approval taking into account their domestic constitutional requirements. This finally led to the entry into force of this stipulation on 1 May 2013.

However, the Treaty establishing the European Stability Mechanism itself was signed on 2 February 2012 and entered into force on 27 September 2012 after the German ratification, as this ratification (which was considered not to violate the German Basic law, according to the Bundesverfassungsgericht[[4]](#footnote-4)) made that 90% of the subscriptions had ratified the Treaty. This condition was foreseen in article 48 of this Treaty. Due to this ratification, the Treaty establishing the ESM became operational in December 2012.

It leads to a complex legal framework given the fact that Spain applied for external financial assistance on 25 April 2012 under the terms of the Financial Assistance for the Recapitalisation of Financial Institutions by the European Financial Stability Facility (EFSF). However, by the time that the financial sector adjustment programme for Spain was initiated the European Stability Mechanism had taken these tasks over as part of their burden.

The Financial Sector Adjustment Programme for Spain, published in October 2012, states explicitly that:

“*The Heads of State and Government at the Euro Area Summit of 29 June 2012 specified that the assistance will subsequently be taken over by the European Stability Mechanism (ESM), once this institution is fully operational, without gaining seniority status*.”[[5]](#footnote-5)

As said, Portugal applied in 2011 for economic and financial support. Here, the EFSM and the EFSF still takes care of the money transfers and the control on the economic and financial adjustment programme for Portugal. This leads to the conclusion that the framework under which Portugal and Spain requested for support were and are different. However, the aim of this paper is not to research those differences[[6]](#footnote-6) but to research the impact of the conditions, requested in these programmes on the legal framework, on labour law and industrial relations in the public sector.

The report on the economic and financial adjustment programme for Portugal (which was signed by the European Commission on 20 May 2011 and by the IMF on 30 May 2011) indicated that the public sector was too big and that cuts in spending of the public sector had to be undertaken.[[7]](#footnote-7)

The query from Spain only included a financial sector adjustment programme. However, the Memorandum of Understanding strongly focuses on the growing level of Spanish state debt. It increased from 60% in 2010 to alms 90% in 2012. Spain indicated explicitly that reforms in the public sector to improve efficiency and the quality of public expenditure. Spain had already organised some reforms of the public sector,[[8]](#footnote-8) although specific measures had to be more detailed outlined. Spain had already started significant reform of the employment conditions of its staff.

Belgium and the Netherlands did not request any financial support from the EU and/or the ECB and/or the IMF. However, the economic and financial crisis led to strengthening by the EU of the control on the budget of its Member States. It implies that the EU publishes a yearly analysis of the situation in any Member State in order to comply with the conditions which were enacted in the Treaty of Maastricht.

Since the Treaty of Maastricht, EU Member States need to avoid excessive budgetary deficits, according to article 104 c of the original text of the Treaty. The text of the Treaty gave the Commission the task to monitor the the development of the budgetary situation and of the stock of government debt in the Member States with a view to identifying gross errors. Two elements are crucial: the state deficit may not be above 3% of the BGP and the state debt should remain below the 60%.

Article 104 c of the Treaty of Maastricht has become article 126 of the Treaty on the functioning of the European Union (hereafter TFEU). The Grow and Stability Pact procedure, which is established a based upon this article and based upon the Council Regulation 1466/97 and 1467/97 made that a monitoring report of the Commission was prepared on Belgium and the Netherlands on 7 October 2009.[[9]](#footnote-9) The procedure should guarantee that development of the Stability and Growth Pact of the EU. The Commission has to launch a report on the short and medium term prospects in order to return to a sound budgetary position.

Belgium and the Netherlands had their own specific problems. Belgium knows historically a very high state depth which lies around 100% while the Netherlands had difficulties to keep their budget deficit under the 3% of the GNP. This implies that, even if the financial crisis may not have hit them as hard as Spain and Portugal, both countries received clear indications how these requirements need to be fulfilled.

1. Conditions for Portugal, Spain and Belgium and the Netherlands with regard to the public sector

Portugal got very strong conditions that the public sector was oversized and that it should be reduced as a part of the conditions which had to be fulfilled in order to obtain support. Wage cuts in the public sector were envisaged in order to guarantee economic and financial recovery.[[10]](#footnote-10)

Spain had to undergo some major changes including a reform of the public sector. However, the main focus remained on the Spanish banking system. It may be important tot stress that the most significant wage cuts were already taking place as from 2011. These wage cuts were enacted in a Royal decree Act 8/2010 of 20 May 2010. It implies that Spain, due to the huge impact of the financial crisis on this country, had already introduced proper measures in order to reduce the state deficit with measures having a large impact on employment law in the public sector. Spanish government explicitly indicated that such an urgent measure was necessary for economic recovery.[[11]](#footnote-11)

The report for Belgium indicated that the country had a budget deficit of 3,4% in 2009 while the general government gross debt laid around 93%.[[12]](#footnote-12) The Commission indicated in its report that the the deficit may reach 4,5% in 2009 and even 6,1% in 2010. The Commission was afraid that the government deficit would turn out much higher in 2010 and thus not anymore close to the reference value. Furthermore, Belgium has a high level of state debt which was supposed to increase to about 100 % in 2010.[[13]](#footnote-13) This high public depth is due to large public investments in the seventies.[[14]](#footnote-14) The EU Commission indicates that further pension reforms remain necessary in order to prevent further potential difficulties with the budget stability. For Belgium, given the large impact of the state debt (which may exceed 100%), the Commission put forward a deadline at the end of 2012.

The report on the Netherlands did not provide similar very bad figures. The budget deficit of the Netherlands was limited to 3,3 % according to the planning in 2009, but the Commission indicated that the deficit may grow till 6,1% of the of the GDP in 2010. The state debt could grow between 2009 and 2010 from 57% to 63 % which is a small excess of the 60% provided by the provisions of the Treaty. The Commission put forward a deadline by 2013 for the Netherlands to reduce the budgetary deficit and to reduce the state debt ratio while the excessive state debt.

1. The national reforms in order to realize the objectives

The handling by the EU of the financial crisis led to the obligation for each of the countries studied to cut in public spending. We will analyze how the mandatory cuts with regard to the legal framework of all countries.

1. Portugal

The Directorate-General for Economic and Financial Affairs published a first report on *the Economic Adjustment Program for Portugal* in June 2011. This report provided important changes in the public sector and to the pensions in the public sector. Portuguese government proposed to cut harshly in the public sector. Public sector reductions had to be executed as a consequence of this report. Portuguese government proposed to cut in 2011 wages in the public sector with five percent. From 2012 on, the wages and pensions were frozen in the public sector and a special contribution on pensions in the public sector above 1500 euro were to be introduced in the public sector. These were the plans of the Portuguese government in the Memorandum of Understanding.

It may be important to indicate that Portugal had already undergone an important reform on 29 December 2005, which brought the pension regime of officials within the scope of the Act on Pension Reform nr. 60/2005 of the Portuguese Parliament.[[15]](#footnote-15) The age for a penalty free pension in the public sector was lifted from 60 years to 65 years of age, while the career length was prolonged from 36 years to 40 years. This means that the historically better pension regulation for officials (which was a consequence of the idea that officials historically received a better pension because they had served for public interest) was at least partially hampered.

Though, the economic and financial adjustment programme for Portugal requested new and more profound reforms of spending in the public sector. These new provisions were very often submitted to review by the Constitutional Court. The Portuguese Constitutional Court has delivered three decisions since the reform which may have an important influence on the pension system of the officials.

The first important decision concerned decision 353/2012 where the Constitutional Court decided that the suspension of the Christmas pay (13th month) and holiday-month (14th month) for certain officials and retired officials was unconstitutional given the fact that some (lower) pensions and wages did not have to reduce their income while others (above 1500 relatively 1100 euro) had to. The Constitutional Court considered this decision a violation of the principle of equality and indicated that the specific circumstances (the crisis) were not sufficient to allow such a difference.[[16]](#footnote-16)

A major reform of the public sector was submitted to preventive control by the Portuguese Constitutional Court. In decision 474/2013 of 29 August 2013, the Constitutional Court rendered a judgment which introduced the possibility to terminate the employment relationship with an official (even those not having a status but employed with employment contracts)[[17]](#footnote-17) more easily than before. The termination could be introduced due to the fact that special sorts of mobility could lead to the termination of the employment relationship notwithstanding the functioning and the evaluations of those officials. The Constitutional Court considered these modifications to be a violation of article 18, second paragraph which provides the principle of legitimate expectations, as mentioned (concerning the limitations of freedoms and rights) in article 18, second paragraph of the Constitution and of article 53 which provides that job security should be guaranteed for workers.

This second decision had important consequences as a part of the reform of the public sector which was considered to be crucial for the financial recovery of Portugal did, apparently, not fit with the constitutional and legal framework of Portugal.

Similarly, the Constitutional Court denied in its decision 862/2013 on 19 December 2013 to grant constitutional permission for an Act which cut the pensions of officials with 10% due to the crisis. The Court stated that the constitutional principle of legitimate expectations was again violated. The officials were entitled to trust that they would be protected against age and/or invalidity and that the specific The Constitutional Court considered the cuts to be in breach of article 2 of the Portuguese Constitution which provides the principle of the Rule of Law under Portuguese legislation.[[18]](#footnote-18)

The reaction in the annual Reports on the financial situation of the European Commission does not seem to take into account the legal impact of these rulings of the Constitutional Court. The European Commission observes and stresses the important economic and financial need for reforms. It seems that similar measures can be undertaken (on wages cuts, reform of the employment conditions in the public sector and pension reforms) as before without really analysing profoundly the decisions of the Constitutional Court.[[19]](#footnote-19) The report indicates that in 2014 “*in addition, a medium to long-term measure on the pensions’ systems will be developed during 2014, in line with the Constitutional Court ruling. Stock tacking on this process will be made during the [eleventh review]*.”[[20]](#footnote-20)

However, no strict legal analysis is made in order to identify how the constitutional and legal framework needs to be respected in the future. The European Commission keeps on stressing the importance of austerity measures in order to obtain the economic and financial requirements which are linked to the original economic adjustment program. It seems that the legal barriers may not be taken into consideration. Executing the requirements of the economic adjustment program need profound measures which rise, unavoidably many legal queries.

It seems that the European Commission (and the IMF) do not take into account the legal framework of the Member States in which they need to elaborate their reforms. It shows again that it seems that two networks (rather than two levels) of case law seem to exist. Principles as the principle of legitimate expectations and the Rule of Law play an important role in the case law of the European Court of Justice.[[21]](#footnote-21) It seems that the EU does not realize the impact of its demands. While the ECJ accepts that private persons invoke the principle of legitimate expectations with regard to acts of EU institutions, the European Commission does not pay any further attention to the role this principle may play in Portuguese law.

Obviously, the case law of the ECJ decides that the principle of legitimate expectations cannot be invoked against the obligations of the Member States to transpose EU-regulation.[[22]](#footnote-22) However, given the impact of the principle of trust in many Member States within the legal and constitutional framework of many Member States, it should take into account the specific legal weight of such a principle.

It seems therefore crucial to keep an eye on the new proposals on reforming the public sector regime and pensions of officials in Portugal. Constitutional principles will namely continue to play an important role on the development of the austerity measures which Portugal needs to carry out.

1. Spain

Spain had to ask for financial assistance of the European Union, the European Central Bank and the International Monetary Fund due to the impact of the financial crisis on Spain. Spain had to take measures to make its public sector more efficient. The financial and economic crisis hit Spain so severely that internal measures were necessary. The Spanish government enacted on a Royal Decree-Act on 20 May 2010 including a five percent cut of wages of the officials in the public sector. This Royal decree was later validated by Spanish Parliament. It concerns a specific procedure which is allowed by article 86 of the Constitution.

It seems that the Constitutional Court of Spain did not consider the unilateral decision that the modification of the collective agreement in the public sector were to be considered a breach of the Constitution.[[23]](#footnote-23)

The Spanish Constitutional Court rendered a decision on 7 June 2011 that article 86 of the Spanish Constitution allowed the Spanish Government to enact Decree-legislation (later confirmed by Parliament). Article 86, first paragraph allows the Government to issue temporary legislation in case of extraordinary and urgent need. The issues need to be ratified by Parliament afterwards and they may not affect the rights and duties set out in the first title of the Constitution. This last element was invoked as a major problem given the fact that article 28 of the Constitution (freedom of to form a trade union) and article 37 of the Constitution (legal texts consolidate the principle of collective bargaining), which both constitute a part of Title I, might be affected by the Royal Decree of 20 May 2010, consolidated by Parliament on 27 May 2010. However, the Constitutional Court decided that the basic freedoms were not affected by the Royal Decree which suspended the result of the collective negotiations (which provided an increase of the wages with 0.3%) by a decrease of the wages with 5% not a violation of the rights and duties in article 28 and 37 of the Spanish Constitution.[[24]](#footnote-24)

The Spanish government had motivated its choice by indicating that the strong economic and financial crisis required important and profound measures in order to reestablish the Spanish position on economic and financial level.[[25]](#footnote-25) The government clearly indicates the safeguard of the euro and the stability of the euro zone implied a sense of urgency which called for immediate action. In order to allow economic recovery, management of public sector employees needs to be adapted. The Spanish government indicates that they tried to reconcile both as much as possible within the existing framework.[[26]](#footnote-26)

The stability programme 2011-2014 from the Spanish government clearly indicates that the wage cuts and the freezing of wages are an important element of the economic and financial recovery of the Spanish state.[[27]](#footnote-27) It is explicitly indicated that these measures will lead to a recovery of 1.5 % of the GDP in order to overcome the crisis.

The economic advantages of the measures are considered and stressed, which seems understandable given the Memorandum of Understanding where important measures were put forward. It seems obvious that Spain does every effort it can to overcome its crisis. However, the legal framework wherein Spain has to be deliver these efforts is not mentioned at all. The constitutional validity and the qualification of these measures in the light of the international obligations of Spain are not considered.

However, the later ILO-report indicates that, from an ILO-perspective, the decision to put collective bargaining aside raises some legal queries (read title 5).

1. Belgium

In Belgium, pensions of officials are still considered to be allowances for the performances of officials during their career. However, the costs of those public pensions was often considered to be one of the major threats of public spending in Belgium.[[28]](#footnote-28) It is a consequence of the fact that Belgium has not yet undergone a major reform holding a full “normalisation” of the social security status of the officials.

Given the decision of the EU Council of Ministers on 2 December 2009, Belgium needed to find a solution to cut public spending. As pensions of the officials were considered to be one of the major threats of public spending, it was obvious that a reform of the pension of officials would be considered.

The governmental agreement of 1 December 2011 starts with a clear indication that Belgium needs to rationalize its budget deficit in 2012 to 2.8% and to have a financial balance in 2015. One of the major elements to develop a major cut in public spending was to modify regulations dealing with pensions in the public sector. The Act of 28 December 2011 modified the calculation of the pension of Belgian officials with numerous important elements. Until that date, the pension was calculated based on the average income of the last five years of the career. Several officials had furthermore the advantage of not having to work a full career of 35 years in order to obtain a full pension. From 1 January 2012 (the reform took place within a period of one month), the pension will be calculated on the average income of the last ten years. Furthermore, the number of years which were necessary for a full career as official were lifted from 35 years till 40 years and the preferential career systems (for judges, priests and university professors) were amended. The EU Commission staff working document indicates that the pension reform does stabilize the budgetary equivalence of Belgium. The budgetary deficit has now decreased under 3% of the GBP.

However, the bill of the Act of 28 December 2011 which lifted the minimal pension age from 60 years to 62 years (and later on step by step to 65 years) has not been properly negotiated with the representative trade unions although that the Act of 19 December 1974 obliges the Belgian State has to negotiate concerning the essential elements of the administrative and pecuniary status of the officials. Belgian federal government found a solution to this obstacle by modifying the original proposal (which is submitted to the stipulations of the Act of 19 December 1974) with an parliamentary amendment (which are not submitted to this legislation). It indicates how Belgian government, by using a trick, avoided the legislative obligation to negotiate with representative trade unions concerning this issue.[[29]](#footnote-29) The Belgium stability program (2012-2015) however does not mention this legal issues and just indicates that Belgium has reduced the pensions of officials.[[30]](#footnote-30)

Although constitutional issues against this new regulations were raised in front of the Constitutional Court, it was not mentioned that the action of government stood at odds with the provisions of the Act of 19 December 1974, which is based upon the constitutional freedom of association. Procedural reasons may be the evident explanation here fore.

The Constitutional Court had to deal with queries of equality and the arbitrary character of the modification of the pension age. It dismissed the requests in two separate decisions where it did not deal with the content of the reform.

In the first decision, the Court considered that the modification of the pension regulation did not violate the principle of equality. Parliament has the power to modify the pension age and and the calculation method whenever it considers it necessary for economical and social security reasons. The Constitutional Court refused to put itself in the chair of the Parliament.[[31]](#footnote-31)

In the second decision, Belgian Parliament used a corrective trick by modifying some specific provisions in the Act of 28 December 2011 concerning preferential regulations. Due to this modification, the original request has become void.[[32]](#footnote-32)

It remains bizarre that the action of Belgian government to avoid to apply the Act of 19 December 1974 properly was not envisaged. As said, the Belgian government has used a trick (by introducing the modifications by amendment) to avoid the mandatory negotiations. However, one could have tried to check whether this action was conform with article 27 of the Constitution which founds the freedom of association. The article could be linked with the principle of legitimate expectations. Article 27 of the Belgian Constitution could also be linked to the case law of the European Court of Human Rights with regard to the application of article 11 of the European Convention of Human Rights. In the *Demir and Baykara v. Turkey* case, the European Court of Human Rights explicitly stated the following:

“*As to the practice of European States, it can be observed that, in the vast majority of them, the right for public servants to bargain collectively with the authorities has been recognised, subject to various exceptions so as to exclude certain areas (disciplinary procedures, pensions, medical insurance, wages of senior civil servants) or certain categories of civil servants who hold exclusive powers of the State (members of the armed forces and of the police, judges, diplomats, career civil servants at federal level). The right of public servants working for local authorities and not holding State powers to engage in collective bargaining in order to determine their wages and working conditions has been recognised in the vast majority of Contracting States. The remaining exceptions can be justified by particular circumstances.”[[33]](#footnote-33)*

The Belgian government has to indicate specifically why the obligations to enter into formal collective negotiations, as provided by the Act of 19 December 1974, were not respected. Furthermore, there exists a commitment which has been taken by the Belgian authorities in article 6 of the European Social Charter.

Parliamentary documents indicate that the Minister had contacted the trade unions once the texts were ready. He organised some negotiations indicating that the texts could not be modified anymore. However, this has to be done (when it is a governmental initiative) before the initiative is initiated in Parliament in order to organise a material collective bargaining procedure. The Minister stressed the sense of urgency and defends therefore his choice to avoid preliminary negotiations. He indicates that the specific economic circumstances justify his behaviour.[[34]](#footnote-34)

The EU does never mention the obligations of Belgium under international treaties. The paper of the Commission of 29 May 2013 e.g. clearly mentions that the recent pension reform was an important step.[[35]](#footnote-35) Nothing is said about respecting social regulations in the internal framework and in the international legal framework. Article 28 of the Charter of the Fundamental Rights of the European Union however explicitly states that collective negotiations and collective agreements are basic rights within the framework of the EU. It remains to be seen how the EU looks at these general social rights in the difficult financial and economic environment.

1. The Netherlands

The first governmental agreement after the launch of the report on the excessive budgetary deficit of the Netherlands in 2009, included important elements on downsizing the State. The number of officials at central level had to be reduced by passing tasks to decentralized entities (municipalities and provinces).[[36]](#footnote-36)

Rather quickly after the governmental agreement of 2010, the government decided not to focus on the reduction of the number of officials as such, but to focus on the freezing the wages of officials. Minister of Home Affairs Piet Hein Donner announced in July 2011 that he desired to keep the wages of the State officials frozen for a period of two years.[[37]](#footnote-37)

The impact of this decision on the procedure of collective bargaining in the Dutch public sector may not be underestimated. Article 105, 3rd paragraph of the General Decree of officials in the public sector enacts that it is mandatory to negotiate over all topics of general interest as long as the rights and duties of individual officials are concerned. Each proposal has to be agreed upon by the Sector Commission.[[38]](#footnote-38) It may be worth to recapitulate that most of the social security regulations in the public and in the private sector have been made identical in the Netherlands.[[39]](#footnote-39) During the nineties, major regulations of the private sector were made applicable to the public sector such as the Act on unemployment, the Act on Sickness leave and the Act on Enterprise Councils.

Collective negotiations with the trade unions of the State officials became very complex when no space was left to increase in the wages of the officials. The Minister (and Dutch government) kept stating that a zero line (for budgetary reasons) has to be respected. Obviously, this political statement undermined the possibility to enter into real negotiations.

The new governmental agreement of the government Rutte II explicitly indicated to keep this specific zero line for the period 2012 and 2013. The negotiations with the trade unions have been difficult until 11 April 2013. On that date, government announced that the budgetary predictions for the coming years were improved which included that the wages of officials could be defrozen in a new social agreement.

The indication of the so-called zero line, which means that there is absolutely no room for wage increases, can only be done after collective negotiations have taken place. Negotiations are mandatory under Dutch law and the State as Employer needs to find an agreement with the representative trade unions, according to article 105, 3rd paragraph of the General Decree on Public Servants, in execution of article 125 of the Act on Public Servants. This means that the Dutch government cannot unilateral declare that there exists no room for negotiations.

The so-called zero line may be the consequence of an agreement with the trade unions after collective negotiations. However, the zero line was announced before the negotiations with the trade unions had started. The Commission for Advice and Arbitration, which can be consulted in case difficulties rise during the State as Employer and the trade unions in the negotiation process clearly indicated that the outcome of negotiations has to be open. It cannot be clear that a 0% increase of the wages is certain before the negotiations have started.[[40]](#footnote-40)

The Dutch State understood that its original announcement went quite far. Thus, this led to a correction where the strong zero line was not kept but the pecuniary improvement forward could only be realized through improvements of the secondary labour conditions. However, even as a consequence of this more moderate position of the State, the negotiations with the trade unions were suspended for two years. It finally even led until 17 September 2013 before the zero line was withdrawn by the Dutch government.[[41]](#footnote-41)

It is evident that the austerity reports of the EU have influenced the normal collective bargaining procedure which provides that each modification of a collective regulation (which includes the negotiations on wages) is strongly affected by the EU austerity measures. The international obligations of the Dutch authorities are the same as for the Belgian and the Spanish authorities. It may not surprise that the Dutch government invoked reasons linked to the financial and economic crisis to motivate their choice not to enter into negotiations on wage increases for officials in the Netherlands.[[42]](#footnote-42)

Once again, the report of the EU Commission on the Dutch national reform programme does not mention any problems with collective negotiations.[[43]](#footnote-43)

1. Affections in the light of the evolutions at ILO-level: the report of ILO-Committee on Spain

The weak position of the basic rights of collective negotiations in the public sector in Spain, Belgium and the Netherlands creates even more queries when article 7 of the ILO-Convention number 151 Labour Relations Public Service Convention of 1978 is taken into consideration. This article states the following:

“*Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters”*

All countries studied have ratified this Convention but it seems that important cuts in wages and/or pensions did not lead to a strong application of this stipulation. Only for Spain, a report of the ILO Committee has been issued with the following conclusions:

“(*a) While noting that the Government refers to economic circumstances of extraordinary gravity, which necessitated urgent action, the Committee regrets the absence of a genuine consultation process with the trade unions on Royal Decree-Law No. 8/2010 despite the importance of the wage cuts it contained, and stresses the importance of the principles on consultations referred to in the conclusions.*

*(b) The Committee invites the Government to, in the future, consider, within the framework of social dialogue, the principles set forth in the conclusions regarding collective bargaining in the event of economic difficulty or crisis.”*

Obviously, a similar report could have been made for Belgium where no real collective negotiations were held although it is mandatory under the Act of 19 December 1974 were held. As said, the government used a legal trick in order not to have to negotiate on the content which stands in a very difficult balance with its obligations under article 7 of the ILO-Convention nr. 151.

In the Netherlands, similarly, full development and utilisation of the mechanism of collective negotiations was blocked by the declaration of the government to freeze the wages before real negotiations were started. In the Netherlands, as in Belgium and Spain, it seems that the EU accepts that important economic and financial reasons allowed governments to cut not just in the budget but also in a normal application of the collective bargaining model. However, given the fact that all three countries ratified ILO nr. 151, it seems important to stress that similar remarks could be plausible for Belgium and the Netherlands. It would be a good idea if the EU includes such an analysis in its control reports.

A report of the ILO is, as we all know, legally not strong enough to change the current ignorance of social rights. Pressing economic issues seem to prevail.

1. The role of the EU in this debate

The review of the recovery programmes concerning Spain and Portugal does not include any indication how these economic and financial measures need to be reconciled with the legal framework wherein the Member States need to act. The reports on Belgium and the Netherlands do not mention the legal obligations of these Member States with regard to collective negotiations either.

This evolution seems to indicate that the European Commission does not intervene in how the different EU-Member States need to reconcile budgetary obligations, under pressure of the EU, with the existing (internal) legal framework. However, article 28 of the Charter of Fundamental Rights of the EU states explicitly that collective bargaining is considered a fundamental right in the framework of the EU. From a legal perspective, it seems evident that control on respect of these fundamental rights constitutes an important element in the reports of the European Commission with regard to adjustment programmes for Spain and Portugal and with regard to reports dealing with excessive state deficits. In reality, the reports are limited to an analysis of the conditions which were provided by the Memoranda of Understanding.

The case law of the European Court of Justice could bring the European Commission a better comprehension of its task. Obviously, no case has been started before the ECJ concerning this topic. The (potential) violations of regulations all concern national provisions or international provisions which constitute a part of other international treaties. It does not concern the application of EU regulations.

However, it should be considered important to stress the role of some general principles in the case law of the ECJ. The principle of legitimate expectations is considered to be a basic principle of the EU legal order. The principle of legitimate expectations played a role for the retired Portuguese officials, when they were faced with a major cut in their pensions. The Court of Justice recognises the legal weight of this principle with regard to the correct application of EU legislation. Individuals can invoke the principle of legitimate expectations before the Court of Justice in case the institutions of the EU have provoked such an expectations for individuals. Legal scholarship even indicates that the Civil Service Tribunal judges the most frequently that the principle of legitimate expectations has been violated.[[44]](#footnote-44) The da Silva judgment in 2007 can be quoted as an example that an EU-official may be entitled to have legitimate expectations on a certain career perspective, which includes that a higher salary and a higher pension may be expected.[[45]](#footnote-45) However, a similar principle is not taken into account by the European Commission with regard to the analysis of the mandatory modifications which have to executed in the Member States concerned. The European Commission, in its reviews of the economic and financial adjustment programme for Portugal, does not address this issue. It shows the partial blindness of the EU with regard to the transition of its economic policies in national regulations.

Similarly, with regard to collective negotiations, the European Court of Justice has judged that the basic principles of collective action (which are linked to the freedom of association) were considered to be basic rights which may be invoked to found exceptions to the basic freedoms of the EU. The ECJ stated this in the Viking and Laval case law. However, the Viking and Laval cases have invoked a very large reaction.[[46]](#footnote-46) The major analysis was that the right on collective action was considered to be an exception to fundamental freedoms. It was not considered to be leveled with the fundamental freedoms of the EU. Quite on the contrary, the right on collective action is more and more considered to be an integrated element within the framework of the European Court of Human Rights. This different approaches lead to a major distinction between how collective action is evaluated in the case law of the European Court of Human Rights and in the case law of the Court of Justice.[[47]](#footnote-47) It seems that economic freedoms are more important in the case law of the ECJ than the right of collective action for trade unions.

It seems that the European Union has not yet found a good balance between the social rights dialogue (which is considered to be fundamental in the private and in the public sector in all Member States) and pressing economic issues. Given the stipulations of the EU Charter, some more openness should be considered. Respecting its own European Charter of Fundamental Rights needs to be controlled.

1. Concluding remarks

A comparative analysis of the reforms in public sector with regard to their staff indicates that the reforms in four countries (Portugal, Spain, Belgium and the Netherlands) all provoke queries with regard to social rights in the public sector.

In all four the countries, Parliament and/or government indicated that the financial and economic crisis had to be considered as a pressing need to the derogate from basic social rights and from common collective bargaining procedures.

In Portugal, the Constitutional Court intervened three times in order to indicate violations of constitutional principles such as the principle of legitimate expectations and the principle of equality. For Spain, the ILO Committee rendered a report which indicates that Spain (even taking into account the specific framework which was invoked by the Spanish authorities). For Belgium and the Netherlands, no legal proceedings were initiated. It remained limited to a parliamentary debate in Belgium and to difficulties between trade unions and the State as Employer during two years in the Netherlands which were analyzed in an advisory opinion.

However, it seems that the European Commission remains blind for respect of basic social rights. It seems necessary that the EU institutions include a control of article 28 of the EU Charter of Fundamental Rights in their reviews of the adjustment programmes and of their reports on excessive state deficits.

Building up an EU where real social rights play a significant role would automatically imply that the EU institutions obtain a reflex to check whether the promulgated social rights are affectively respected. Derogations to fundamental rights need to be prescribed by law, necessary in a democratic society, proportionate and aiming for a legitimate goal. The EU institutions should check whether this was the case for all of the Member States concerned when they put some of their social regulations aside due to pressing economic needs.

A shift in the attitude of the European Commission would be an important step to overcome to so-called democratic deficit. Controlling the respect of social rights implies that the EU evolves towards a full and democratic supranational institution.

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1. Read on this issue I. LEBRUN, *What has been the damage of the financial crisis to the Belgian GDP?,* Brussels, Federal Planning Bureau, 2011, 17p. Although Belgium was very often cited as one of the countries which was threatened to be affected by the crisis during the long term government negotiations in 2010-2011 for the formation of a federal government. However, in the end, Belgium never suffered as Portugal, Italy, Greece and Spain. For the Netherlands, read M. BIJLSMA, A. VAN DER HORST and S. KOK, “De kredietcrisis – oorzaken, gevolgen en beleid”, TPEDigitaal (3)1, 48-67. [↑](#footnote-ref-1)
2. ECJ, C- 370/12, Pringle v. Ireland to be consulted on [www.curia.int](http://www.curia.int) [↑](#footnote-ref-2)
3. European Council Decision 2011/199, 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, *Official Journal of the EU*, 6 April 2011, 91/1-91/2. [↑](#footnote-ref-3)
4. Bundesverfassungsgericht, 12 September 2012, 2 BvR 1390/12 to be consulted at [www.bfverg.de](http://www.bfverg.de) [↑](#footnote-ref-4)
5. European Commission, Financial Sector Adjustment Programme for Spain, October 2012 to be consulted at <http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp118_en.pdf> . It may be worth to note that Spain has achieved its goals, set out in the Financial Sector Adjustment Programme after 18 months. Vice-President of the European Commission Olli Rehn concluded that the programme had worked in a statement on 22 January 2014. This statement can be read at European Commission - MEMO/14/51   22/01/2014. [↑](#footnote-ref-5)
6. On this topic, one may read P.-A. VAN MALLEGHEM, “Pringle: a paradigm shift in the European Union’s Monetary Constitution”, *German Law Journal*, 2013, 141-168. [↑](#footnote-ref-6)
7. European Commission, Directorate-General for Economic and Financial Affairs, *The Economic Adjustment Programme for Portugal*, June 2011, 12 and 17. [↑](#footnote-ref-7)
8. European Commission, *Financial Sector Adjustment Programme for Spain*, October 2012, 47. [↑](#footnote-ref-8)
9. Report from The Commission in accordance with article 104 (3) of the Treaty on 7 October 2009 on Belgium and Report from The Commission in accordance with article 104 (3) of the Treaty on 7 October 2009 on the Netherlands. [↑](#footnote-ref-9)
10. European Commission, Directorate-General for Economic and Financial Affairs, *The Economic Adjustment Programme for Portugal*, June 2011, 17. [↑](#footnote-ref-10)
11. Real Decreto- Ley 8/2010, 20 May 2010, BOE, 24 May 2010, 45072. [↑](#footnote-ref-11)
12. Report from The Commission in accordance with article 104 (3) of the Treaty on 7 October 2009 on Belgium, 2. [↑](#footnote-ref-12)
13. Report from The Commission in accordance with article 104 (3) of the Treaty on 7 October 2009 on Belgium, 6. [↑](#footnote-ref-13)
14. Report from The Commission in accordance with article 104 (3) of the Treaty on 7 October 2009 on Belgium, 6. [↑](#footnote-ref-14)
15. Read on this topic M. MANUEL CAMPOS and M. COUTINHO PEREIRA, “Impact of the recent reform of the Portuguese public employees’ pension system”, Banco de Portugal Working Paper, 2008, 44p. [↑](#footnote-ref-15)
16. Constitutional Court (Portugal), decision 353/2012, 5 July 2012 to be consulted on [www.tribunalconstitucional.pt](http://www.tribunalconstitucional.pt) [↑](#footnote-ref-16)
17. It may be important to add that a specific status for civil servants historically led to better pension conditions in most of the EU-Member States. Read on this topic A. DE BECKER, “The Legal Status of Public Employees or Public Servants: Comparing the Regulatory Frameworks in the UK, Belgium, France and the Netherlands”, *CLLPJ*, 2011/3, 949-990. [↑](#footnote-ref-17)
18. Constitutional Court (Portugal), decision nr. 862/13, 19 December 2013 to be consulted on [www.tribunalconstitutcional.pt](http://www.tribunalconstitutcional.pt) [↑](#footnote-ref-18)
19. Tenth Review of the European Commission, Directorate-General for Economic and Financial Affairs, *The Economic Adjustment Programme for Portugal*, February 2014, 21, 23 and 55. [↑](#footnote-ref-19)
20. Tenth Review of the European Commission, Directorate-General for Economic and Financial Affairs, *The Economic Adjustment Programme for Portugal*, February 2014, 78. [↑](#footnote-ref-20)
21. See a.o. ECJ, Töpfer/Commission, C- 112/77, 3 May 1978, *Jur.,* 1978, 1019; ECJ, Driessen C-13/92, 5 October 1993; ECJ, Elmeka, C-181/04, 14 September 2006. [↑](#footnote-ref-21)
22. ECJ, Comm/the Netherlands, C-523/04, 24 April 2007. [↑](#footnote-ref-22)
23. Constitutional Court (Spain), nr. 85/2011, 7 June 2011 to be consulted at [www.tribunalconstitucional.es](http://www.tribunalconstitucional.es) [↑](#footnote-ref-23)
24. Constitutional Court (Spain), nr. 85/2011, 7 June 2011 to be consulted at [www.tribunalconstitucional.es](http://www.tribunalconstitucional.es) [↑](#footnote-ref-24)
25. Report of the Spanish government (dispociones generales), SOE, 7 July 2011, 71548. [↑](#footnote-ref-25)
26. Report of the Spanish government (dispociones generales), SOE, 7 July 2011, 71550. [↑](#footnote-ref-26)
27. Spain, stability programme 2011-2014, 16 to be consulted at <http://ec.europa.eu/europe2020/pdf/nrp/sp_spain_en.pdf> [↑](#footnote-ref-27)
28. Read the Report of Court of Audit (Rekenhof) on the expenses for pensions of officials in 2008 to Belgian Parliament. This report can be consulted at www.ccrek.be [↑](#footnote-ref-28)
29. *Parl. Doc*., Senate, nr. 5-1408/3, session, 2011-2012. [↑](#footnote-ref-29)
30. Belgium, Stability Program 2012-2015, 23 to be consulted at <http://ec.europa.eu/europe2020/pdf/nd/sp2012_belgium_en.pdf> [↑](#footnote-ref-30)
31. Constitutional Court (Belgium), nr. 2/2013, 17 January 2013 to be consulted on [www.const-court.be](http://www.const-court.be) [↑](#footnote-ref-31)
32. Constitutional Court (Belgium), nr. 81/2013, 6 June 2013 to be consulted on [www.const-court.be](http://www.const-court.be) [↑](#footnote-ref-32)
33. ECHR, Demir and Baykara v. Turkey, 12 November 2008. [↑](#footnote-ref-33)
34. *Parl. Doc*., Senate, nr. 5-1408/3, session, 2011-2012. [↑](#footnote-ref-34)
35. EU Commission Staff Working Document Analysis by the Commission services of the budgetary situation in Belgium following the adoption of the Council Recommendation to Belgium of 2 December 2009 with a view to bringing an end to the situation of an excessive government deficit, 29 May 2013 [↑](#footnote-ref-35)
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37. Declaration of Piet Hein Donner on 31 May 2011 to be consulted [www.nu.nl](http://www.nu.nl) [↑](#footnote-ref-37)
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39. Read on this topic B.B.B. LANTING, *Sociale zekerheid van ambtenaren en overheidswerknemers: Een onderzoek naar het proces van normalisering van het sociale zekerheidsrecht in de sectoren Rijk, Gemeenten en Onderwijs*, Antwerpen, Maklu, 2009, 556p. [↑](#footnote-ref-39)
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41. Announcement of the Dutch government on 17 September 2013 by Minister Dijsselbloem. [↑](#footnote-ref-41)
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43. EU Commission Staff Working Document Analysis by the Commission services on the national reform programme and programme and stability programme for the Netherlands, 29 May 2013 [↑](#footnote-ref-43)
44. T. TRIMIDAS, *The General Principles of EU Law*, Oxford, OUP, 2006, 251. [↑](#footnote-ref-44)
45. Civil Service Tribunal, F-21/06, da Silva v. European Commission, 28 June 2007. [↑](#footnote-ref-45)
46. Read among others A. DAVIES, “One step forward, two steps back? The Viking and Laval Cases in the ECJ”, *Industrial Law Journal,* 2008, 126-148; A. HINAREJOS, “Viking and Laval: the right to collective action versus EU fundamental freedoms”, *Human Rights Law Review,* 2008, 729; N. REICH, “Free movement versus social rights in an enlarged Union”, *German Law Journal*, 2008, 125 [↑](#footnote-ref-46)
47. F. DORSSEMONT, “A judicial pathway to overcome Laval and Viking”, Ose Paper, 2011, 20p. [↑](#footnote-ref-47)