



For a Social Europe

Report of the Social Democratic Party and the Swedish Trade Union Confederation working group for a strategy to introduce a social protocol in the EU Treaty



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Summary

This report was drawn up by a working group consisting of representatives of the Swedish Trade Union Confederation (LO) and the Swedish Social Democratic Party. It is mainly concerned with how the European Union's social dimension can be strengthened, in particular through the introduction of a social protocol in the EU treaties. The working group proposes a basic approach that should guide the labour movement's action in connection to future changes of the EU treaties.

Three problem areas

The report highlights how the priority given to the social dimension in the EU is far too weak. Three central problem areas have been identified: 1) the imbalance between protection of fundamental trade union freedoms and rights (and the status of collective agreements) and free movement, 2) the inherent bias towards market-making at the expense of social considerations and the risk of social dumping, and 3) the destructive effect of the crisis policy on social protection and the functioning of the labour market (including labour law and collective agreements).

As regards the first problem area, the report finds a possible solution through the introduction of a social protocol in the Treaties. The protocol should clarify that fundamental social rights override the economic freedoms. As regards the two other problems, a discussion is under way concerning the need for common minimum standards as protection against social dumping. This is a difficult but important discussion that should continue, as there are reasons in favour of further strengthening the common rules about this at EU level, while there is at the same time an interest in safeguarding sovereignty and national discretion in these areas.

Several scenarios

The strategies for realising the political solutions identified in the report must be adapted to ambient political developments. Consequently the report describes a number of conceivable scenarios in the near future for developing the EU's institutional set-up. We cannot know for certain which of these is most probable. There is currently a great deal happening within the EU and most changes are taking place in the light of the economic crisis.

In relation to the various scenarios, there is a discussion on how the social protocol requirement can be pursued and the occasions when Swedish ratification of a new Treaty should be conditional on such a protocol. The working group

wants to highlight the importance of the Social Democratic Party and the trade union movement driving the issue of a social protocol.

The report also discusses alternative strategies, including the possibility of seeking support for a European Citizens' Initiative. In addition it raises the issues of enhanced cooperation; in this case there are some legal issues that need to be worked out. Finally a number of strategies that can be applied within the framework of the current treaties are pointed out. These include trying to use the margin created in the context of the Lisbon Treaty to win the "interpretation" of what is contained in the term "social market economy" and how the scope for considering "national identity" can be used.

In addition there is the political route: raising the matter ahead of the 2014 elections to the European Parliament. That the Social Democrat candidate for the post as President of the European Commission in his or her election campaign promises to work for a social protocol and that both the President of the Commission and the Commissioner-designates should promise such an initiative in order to be approved by Parliament.

Need for alliances

In the report the working group wants to stress the strategic necessity to create alliances with actors in the other Member States.¹ Without broader acceptance of this focus there are limited prospects of success. Already today there are signs that there is scope for a political agenda that gives a different focus than that now predominant in Europe. It is a matter of using this in a way that can appeal to the entire EU.

It is important in this context to recognise that since the EU's enlargements in the past 10 years and through the economic crisis, the EU has become increasingly heterogeneous. So it is a matter of finding solutions that recognise differences between Member States. If political proposals and solutions are put forward that can only be accepted by Member States with similar welfare models they will have only a limited effect. For example, it is in this context that proposals for binding minimum levels for social protection set in relation to the level of economic development in the Member States should be seen. One should not just be satisfied with minimum levels. An important part of this process should concern

¹ The proposal for a social protocol discussed in this report was drawn up by the European Trade Union Confederation (ETUC) and is being actively promoted by that organisation. Moreover there are several social democratic parties around the EU that are working actively for this purpose. For example it can be mentioned that the German Social Democrats have an agreement with the trade union movement to actively promote a social protocol and to further strengthen the EU's social dimension. See also "Towards a Social Union: Declaration of the PES Ministers for Social Affairs and Employment"

raising the welfare policy ambitions in all Member States and in that way defending a European model that combines growth with social welfare.

The working group's proposals

Through this report the working group wishes to emphasise the overall objective of the EU living up to being a social union to a greater extent than is now the case, where both growth and equality are promoted. The working group proposes that the Social Democratic Party Executive and the Trade Union Confederation Executive Council assume the following fundamental approach regarding methods and strategies for achieving a changed balance between the EU's social and economic dimensions:

- In the case of a full treaty change, to make clear demands for the introduction of a social protocol. The Social Democratic Party should thus demand a protocol already in the European Convention negotiations and the subsequent intergovernmental conference, and in the Riksdag make a the ratification of a treaty change conditional on the inclusion of a social protocol.
- In the case of a partial treaty change (simplified revision procedure), with a very limited change to the treaties, only aimed at making it possible for the euro countries to manage an acute or future crisis, not to stipulate the introduction of a social protocol. However, other partial changes should be examined on a case-by-case basis, depending on the extent of the partial revision and the degree of "linkage" to the issues that a social protocol is designed to solve. If a revision is sufficiently extensive, however, the Social Democrats should make the ratification conditional in the same way as for a full treaty change.
- In the case of ratification of a Treaty of Accession for new members of the EU, not to stipulate the introduction of a social protocol. In cases where proposals to implement further amendments to the treaties exist at the same time, the matter of a social protocol should, however, be raised for discussion.
- Taking an initiative in the European Council for a decision on legal guarantees for fundamental trade union freedoms and rights and that the provisions in the decision are to be included in a (social) protocol that will be attached to the Treaty at the next review.
- In the case of European integration, to clearly promote a clarification of the boundaries of the internal market, while highlighting common social ambitions. Swedish political parties must join with the social partners to find a common strategy to safeguard national discretion within the framework of EU law.

- Not to contribute to crisis policy in Europe having a detrimental effect on social protection, social security systems, labour law standards or trade union rights.

- To start a discussion on establishing minimum levels for social protection in the EU. In light of the differences between member states in terms of living standards and types of welfare model, there should be a margin for flexibility. The member states must be able to introduce stricter national rules that are more advantageous for workers. The aim should be to avoid competition between member states through low social ambitions.

- When questioning the candidate for President of the European Commission and the candidates for Members of the Commission, to require them to promote a social protocol.

- To intensify the work of creating strategically necessary alliances with actors in other member states for the purpose of realising a more social EU and a social protocol.

1. Introduction

The social dimension of the European Union (EU) has great significance for the attitude of the trade union movement to European cooperation. Ever since the European Court of Justice judgment in the Laval case the question of the status of trade union rights within EU cooperation has been under discussion. The debate has at times been lively within the labour movement. This report describes the position of the social dimension in the EU as well as the question of how a social protocol attached to the EU treaties can change the balance between fundamental trade union rights and freedoms and free movement of services in the EU internal market.

The report first describes how in the EU there is an overall bias towards market creation at the expense of social considerations. In light of this three problems of particular importance are pinpointed:

Firstly attention is drawn to the lack of consideration for fundamental trade union rights and freedoms and collective agreements when they are in conflict with free movement.

Secondly the tendency to asymmetry between market creation and social considerations that exists in the EU as well as the risk of social dumping are mentioned.

Thirdly the destructive effect that crisis policy has on the European welfare states is discussed.

The purpose of this report is to present conceivable solutions to the three problems. The question of a social protocol is given most attention. Further, an argument is put forward concerning various scenarios concerning the EU that will be available in the near future. In connection with these scenarios various strategies that may be applied both to introduce a social protocol into the EU Treaties but also on how the EU in general can be developed in a more social direction are discussed. In this context the issue of how to act in the event of no treaty change is raised.

2. The work of the group

The European Court of Justice judgment in the Laval case and the effects of austerity policy in the euro crisis have undermined the EU social dimension. Fundamental trade union rights are in danger. To achieve greater consensus on methods and strategies to change the balance between the EU's social and

economic dimensions the LO Executive Council and the Social Democratic Party's Executive Committee decided in spring 2012 to set up a joint working group.

The working group, led by Member of the Riksdag Marie Granlund, consisted of LO's Negotiating Secretary Torbjörn Johansson, Claes-Mikael Jonsson and Johan Danielsson from LO and Ylva Johansson and Olle Ludvigsson from the Social Democratic Party. The working group met about ten times in the course of the work. In November 2012 a hearing was also arranged in the Riksdag concerning the balance between social and economic rights. Göran von Sydow and Andrine Winther acted as secretaries to the working group.

Parts of the working group visited trade union and Social Democratic sister organisations in Germany and the United Kingdom in the course of the work to discuss joint European strategies on the adoption of a social protocol.

3. Background

3.1 Free movement – a cornerstone of EU cooperation

The European partnership is an endeavour for peace and prosperity on the European continent. A central method for bringing European countries closer to each other is to lower the boundaries that previously defined nation-states. The European system of nation-states was characterised by the boundaries defining them *overlapped*. Within territorial boundaries the national state endeavoured to exercise authority over economic, political, administrative, military, social and cultural activities.² In its ultimate application the nation-state logic had a destructive effect in Europe. European integration can be seen as an attempt to lower boundaries internally within Europe, which should entail a higher degree of movement between member states.

The plans for an internal market already existed in the 1957 Treaty of Rome, but not until the White Paper on the internal market in 1985 was there any real progress. However, it is important to note that the case law developed by the European Court of Justice in the 1960s and 1970s in many respects lay the foundation for the principles that govern free movement and the internal market.

Free movement is a cornerstone of the European project and aims at minimising the barriers to goods, services, capital and people moving across borders. According to one way of looking at the European integration process, one

² Bartolini, Stefano (2005), *Restructuring Europe*, Oxford: Oxford University Press

reason for not having progressed further with the internal market in the 1980s was that the crucial decisions were made unanimously in the Council and it was therefore constantly blocked by national vetoes.³ On the other hand during this period very strong legal integration was in progress. The legal cases adjudicated by the European Court of Justice developed very strong case law over time. From the early cases in the 1960s that established principles of the “direct effect” of EU law⁴ and the supremacy of EU law in relation to the law of the member states⁵, to the crucial cases in which principles of harmonisation and non-discrimination were established in the 1970s⁶ there was modest political attention paid to what the consequences might be of this legal integration.⁷ In somewhat simplified terms it could be said that this whole legal development is aimed at removing national barriers to the creation of a European market. The early market concentrated mainly on removing barriers to the free movement of goods.

In the early 1990s a case in the European Court of Justice concerning French farmers' actions against imports of cheaper strawberries from Spain attracted attention.⁸ In its judgment of 1997 the Court stated that social conflicts can obstruct the functioning of the internal market and that the Member States have an obligation to ensure that the actions of private individuals do not obstruct free movement (in this case of agricultural products).

Trade union organisations assessed that the judgment could also have consequences for collective measures and therefore pressed the European Commission to incorporate protection for the right to take industrial action into its already presented proposed regulation on free movement of goods, whose purpose included removing obstacles set up by individuals.⁹ Article 2 of the Regulation was consequently worded as follows: “This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States.”¹⁰

This was the first time that the right and freedom to take industrial action was mentioned in an EU legal act and according to some commentators meant a clear delineation of EU competence. Others were of the opposite opinion that

³ Scharpf, Fritz V (1999), *Governing in Europe: effective and democratic?*, Oxford: Oxford University Press

⁴ Van Gend & Loos, C-26/62 (1963).

⁵ Costa v. Enel, C-6/64 (1964).

⁶ Cassis de Dijon C-120/79 (1979), Dassonville C-8/74 (1974).

⁷ However, please refer to Weiler who argues that this development took place with the consent of the politicians. Weiler, Joseph (2001), *The Constitution of Europe*, Cambridge: Cambridge University Press.

⁸ Commission of the European Communities v French Republic, C-265/95 (1997).

⁹ See Ryan, B. The Charter and Collective Labour Law, in *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (2003).

¹⁰ European Council Regulation (EC) no. 2679/98 of 7 December 1998.

freedom of movement for goods through the judgment and subsequent legislation, has set up barriers to the right to take industrial action.¹¹ Regardless of which, the "Monti Clause" demonstrates the problematic co-existence of economic freedoms and fundamental trade union rights and freedoms in the EU internal market.¹²

As a result of the direct effect and supremacy of EU law the internal market has a type of "constitutional" status that in conflict with other values means that very few compensating factors can be taken into account. Thus it can be interpreted that the European Court of Justice was able to find that trade union industrial action such as in the Laval case¹³ has been possible to regard as an obstacle to free movement (in this case of services).¹⁴ Hence the Court has undervalued other rights in favour of free movement, despite "guarantees" in secondary legislation (the Monti Clause) and the fact that the Treaty excludes European legislation regarding pay, right of association, right to strike and right to impose lockouts (Article 153.5 TFEU).

The rights acknowledged in the internal market are individual by nature. The member states can take other things into account in the case of industrial policy, education, labour market and social policy, but at the same time they must take individual rights as defined in the Treaties and in practice into consideration.

3.2 "Negative" and "positive" integration

In the study of EU development a distinction is usually made between "negative" and "positive" integration. By negative integration is meant measures aimed at creating markets by removing obstacles to free and unbiased competition that may exist. By positive integration is meant instead the creation of common rules that can direct (regulatory or deregulatory) common policy.¹⁵ In a similar vein, we can differentiate between policies that is market-making or market-correcting. By stressing individual rights in relation to national restrictions the EU case law seems principally only to create negative integration. Thus the EU has been very successful in this process. There are two main problems with this form of (negative) integration:

Firstly integration of this kind can have effects that go beyond the area originally intended. Free movement of goods, with the exception of the court cases mentioned above, has by and large been uncontroversial as such, but

¹¹ See Iossa, A. (2012), "Monti rules": immunising collective action from market dynamics (or vice versa?), University of Lund.

¹² The Monti Clause was also the model for similar "protection clauses" in later legislation, namely the Services Directive (2006/123, Article 1.7) and the Regulation on the prevention and correction of macroeconomic imbalances (1176/2011, Article 1.3), and in the proposed "Monti II Regulation" (COM (2012)130, Article 1.2) and Implementation Directive (COM (2012)131, Article 1.2).

¹³ The central judgments are: Viking, C-483/05 (2007), Laval, C-341/05 (2007), Rueffert, C 346/06 (2008).

¹⁴ See Petterson, Lars Olof (2012), White Paper Laval – Vad hände egentligen i Vaxholm?, Building Workers' Union.

¹⁵ See Holke, D. and Jonsson, C-M, Negativ och positiv integration på den kollektiva arbetsrättens område, Commemorative volume for Ronny Eklund (2010).

when freedom of movement for services (which in their performance often include workers' temporary stay in another EU country) is included we are approaching areas where national tradition and perceived need for democratically rooted solutions is greater. The internal market's expansive logic may come into conflict with arrangements of various kinds that are considered important in the member states. It is this type of conflict that arose in the Laval case where the Swedish Building Workers' Union blockaded a construction site with posted workers from Latvia. The European Court of Justice was of the opinion that demands for equal treatment and collective agreements constitute an unacceptable obstacle to the free movement of service companies.

The second problem concerns positive integration being relatively less successful. In line with the description of how successfully the internal market in the EU has been created, which strives to lower boundaries and create uniformity between national systems, and that this development in some sense is automatic, active decisions are needed to take other things into consideration or to go further in imposing restrictions on the market. Positive integration of this kind cannot be achieved through jurisprudence but needs to be achieved through political decisions.

The standard explanation for the EU being less successful in creating a political or social union is that it is more difficult for member states to agree to create more extensive European regulations through political decisions.¹⁶ Besides, there is also a lack of common identity that many regard as necessary to be able to make majority decisions concerning issues of a redistributive nature. The member states are trapped in not being able to agree on controversial issues and even if there is continuous movement towards an increasing number of areas being subject to qualified majority voting, they will nevertheless not achieve agreement and decisions.¹⁷

This also strengthens the position of the European Court of Justice in the integration process, as its power is in opposition to the probability of a political majority in the EU legislative institutions introducing legal instruments to cancel the judgment. In other words the difficulty of EU's political institutions to agree on politically sensitive issues means that the Court is given increased influence. This leads to a strengthening of the juridification of the EU system and deregulatory tendencies.

3.3 Joint projects with national discretion

One way of dealing with the tension that has existed between the pull towards a more firm amalgamation of member states, mainly through market integration, and the interest of member states in retaining their sovereignty and right of

¹⁶Scharpf 2010

¹⁷Scharpf 1999

self-determination, particularly over areas of major national interest where there may be special reason to take into account member states' traditions, has been to observe some degree of caution in the application of common rules. Accordingly a form of cooperation based on mutual trust must be found, which has been described as an “informal pact of confidence”, meaning that the supranational institutions have known where the line is to be drawn for what can be accepted by the member states for the purpose of creating the community.¹⁸

For many people, the outcome of the Laval case was a bewildering awakening when the European Court of Justice did not take into account how crucial Sweden regards trade union rights, such as the right to strike and collective agreements.¹⁹ The Court stated in its decision that the Building Workers' Union did not have the right to take industrial action and blockade the construction site. Apart from interpretations regarding what applies to posted workers providing services, there was also a conflict of a more fundamental nature: what possibilities of taking industrial action exist to force a collective agreement?

The judgment was a breach of the pact of confidence. It has been shown that one cannot rely on officials and judges in the supranational structure to have the sound judgement necessary to safeguard this historical compromise. The need to clarify the limits of the EU's and the member states' respective competences thus becomes apparent.

3.4 An asymmetry

The description above aims to identify a tension that exists in European integration. This tension consists both in how the balance between the national and the supranational is to be drawn but also in the bias that gears Community action towards market-making.

How is it possible to remove this bias towards free movement at any price and create an EU that takes more social consideration? One obvious method is to strive to have more joint regulation in the form of market regulation that sets limits on the expansive logic of the internal market. The problem, as described above, is that this requires political decisions and legislation. Member states tend to be doubtful about more European regulation on matters concerning the labour market, social policy and education. Within these areas there are both strong national systems, such as the conditions that apply in the labour market, and there are (clearer) distributive aspects.

¹⁸ Gustavsson, Sverker (2006) *Hundra år efter Versailles*, in Christer Jönsson & Magnus Jerneck (ed) *I ledande ställning*, Lund: Studentlitteratur.

¹⁹ See for example Danielsson, Johan (2012) *Demokrati som hinder för EU:s fria rörlighet – är fri rörlighet för tjänster förenligt med den svenska arbetsmarknadsmodellen?* Stockholm: LO.

When direct distributive policies are handled politically there is a wide perception that this requires robust democratic endorsement. This is most reasonably achieved at the level where conditions exist for representation and accountability, namely the national level. Even if there is redistribution to some extent within the EU system, it is not based on individual redistribution but on such things as support to regions or sectors. To achieve redistribution between individuals a common identity or strong sense of solidarity is regarded as a precondition. This type of stronger common identity does not exist in the EU.

Another method is to establish a limit to EU competence through legislation. Inspired by the previously mentioned Monti Clause in the Regulation on Free Movement of Goods in 2012 the European Commission proposed the “Monti II Regulation”. The aim of the proposal was to clarify how to assign priorities between workers’ right to strike and companies’ right to freedom of movement of services. However, the proposal met with considerable criticism from the labour movement since it would entail a restriction on the right to strike at EU level and a breach of the subsidiarity principle. When considering the proposal, twelve national parliaments, including the Swedish Riksdag, found that the proposal was in breach of the subsidiarity principle. There was also strong opposition to the proposal in the Council. The Commission therefore decided to withdraw its proposal.

The proposed Monti II regulation showed not only that the question of the relation between free movement and fundamental rights is politically controversial, it also showed that it is not possible in secondary legislation to create a point of balance between them, since the European Court of Justice case law, which has led to a curtailment of the autonomy of the parties and the right of association and negotiation, is part of primary law. This again demonstrates the need to incorporate a demarcation in the EU Treaties.

3.5 A dilemma

Hence a dilemma exists for those who advocate a more social Europe. At the same time as wishing that stronger social considerations were mainstreamed in the common political project, there is opposition to the delegation of social or labour market policy powers to the EU level. This has to do with the structural shortcomings in democratic decision-making at EU level, the absence of a common identity and the fact that these policy areas are intimately linked to national self-determination. The way a solution to this dilemma has been sought is by inventing new forms of cooperation and governance.

An early sign of the new forms of governance came with the Amsterdam Treaty, when labour market issues were included. A wide number of areas and a new method were introduced into the Lisbon Strategy: the open method of coordination.

The purpose was to enhance cooperation in a series of areas within which the member states were reluctant to give up their sovereignty. Learning processes, *benchmarking* and *naming and shaming* would lead to group pressure after which member states would seek to align themselves with "*best practices*".²⁰ The intention behind this softer form of governance was to try to correct the tendency to "race to the bottom", by which is meant that member states start to compete with each other, reducing taxes, social protection or labour market regulation in order to attract companies and thus create employment. The method does not include any sanctions as the aim is rather that meaningful exchange of experience will lead to the desired results.

In 2010 the Lisbon Strategy was succeeded by the Europe 2020 Strategy that contains the same forms of method. Research findings vary concerning the effectiveness of the method, but there is often criticism of the lack of sanctions resulting in many countries not achieving the targets set.²¹

The working group believes that the EU should have a stronger social dimension, but at the same time we do not want to give up sovereignty in areas that constitute the core of national democracy. In areas where the member states are to continue to be sovereign, the alternative way becomes seeking to safeguard the integrity of national systems and the sustainability of national solutions. The threat is that member states with a higher living standard and higher ambitions in the social area may be exposed to competition through "social dumping", which means a return to the downward spiral.

In addition, as pointed out above, the internal market has an expansive logic. When principles of free movement come into conflict with other considerations, there is a bias towards giving precedence to free movement.²² When services are also to be fully open to free movement conflicts tend to increase. This also has a connection to the fact that living conditions, labour law regulation, pay models, social security etc. vary considerably between member states. Even if there is an aspiration towards (upward) convergence between member states, this will take a very long time. This means that some of the tensions arising in the meeting between different systems will remain in the foreseeable future.

The dilemma thus consists of whether there is a desire to: 1) influence other member states to move in a direction towards a welfare model with a high level of ambition? Or 2) seek to guarantee protection for higher national social requirements in any conflicts with EU law? The given answer is that solutions can be sought through both alternatives, depending on the specific issue.

²⁰ See for example contributions to Europaperspektiv 2005 *Lissabonstrategien i halvtid*.

²¹ Radaelli, Claudio & Borras, Susana (2011), *Recalibrating the Open Method of Co-ordination*, Sieps

²² Scharpf 2010

3.6 The destructive effect of crisis policy

In the past five years Europe has suffered an extensive economic crisis. What started as a financial crisis in the USA in 2008 has had a lingering and tangible effect on European economies. In the most crisis-torn countries growth has been negative for many years. In other countries recovery has been somewhat faster. In the wake of the crisis, sweeping policies emphasising austerity have made the crisis worse.

Unemployment is still a very great concern and not least among young people the situation is very serious. After five years of crisis there are now large parts of a whole generation that have still not entered the labour market.

At the same time austerity policy has had a powerful effect on social protection systems. In particular in the very worst hit countries there are cuts in pensions, social security systems, education and other public sector areas that are very extensive. The crisis policy prescribed by lenders in the Troika (the European Commission, the European Central Bank and the International Monetary Fund) was highly insensitive to this and in some cases the outcome of the policy has been that those outside the labour market or pensioners have had their living standard cut to below the poverty line. This is alarming.

At the same time we see how other member states, in their own eagerness to cut in public spending, are also reducing the level of unemployment insurance to deal with growing budget deficits or as a part of a political programme aiming to cut the minimum wage. Moreover, there are tendencies towards a continuing downward spiral when member states compete with each other by reducing corporate taxation for example.

Under the cover of a misguided crisis policy and under the banner of needing structural reform there have been several cases of measures being taken to loosen up labour law regulations and a suspension of the social dialogue or restriction of the right to strike.²³ It is unacceptable even in a difficult economic situation to have these consequences. In a speech to the European Parliament on 14 September 2011, the Director-General of the International Labour Organization (ILO) Juan Somavia said: "Respect for fundamental principles and rights at work is non-negotiable; not even in times of crisis when questions of fairness abound. This is particularly important in countries having to adopt austerity measures. We cannot use the crisis as an excuse to disregard internationally agreed labour standards."

²³ Stefan Clauwaert & Isabelle Schömann (2012) *The crisis and national labour law reforms: a mapping exercise*, Working Paper 2012:04, European Trade Union Institute

A manifesto signed by 440 labour and social lawyers points out how the crisis seems to have been used as a pretext for limiting social and trade union rights in Europe.²⁴ These rights are enshrined in treaties and international agreements (such as the Declaration of Philadelphia adopted by the ILO in 1944) and therefore must be respected. The manifesto notes how "the current financial and economic crisis is putting workers and workers' rights in many countries under severe pressure" and that "not only are collective bargaining practices being undermined; a systematic attack on collective bargaining has also been launched. Basic principles of collective bargaining are threatened."

In the manifesto the lawyers address the European Council, stating that "in particular, the fundamental rights of workers and their representatives should be subordinated neither to internal market freedoms and competition law nor to austerity measures whether these be based on fiscal policy or on financial aid; these fundamental social rights should, on the contrary, be fully recognised as necessary pre-conditions for the sound and sustainable economic and social development and progress of the European Union and its Member States."²⁵

All in all this points to the existence of an evident problem in how the crisis is used as a pretext for setting aside established rules and rights. This makes it even more urgent to address the question of how social and trade union rights can be guaranteed in Europe.

²⁴<http://www.etui.org/Networks/The-Transnational-Trade-Union-Rights-Experts-Network-TTUR>

²⁵Manifesto in which labour and social lawyers in Europe call on the European Union to respect and promote fundamental social rights in particular in respect of all crisis-related measures. Available via <http://www.etui.org/News/Labour-lawyers-manifesto-urges-EU-leaders-to-respect-fundamental-social-rights>

4. Three central problems

What is described in the previous sections is an expression of three central problems with EU cooperation. A brief description of these problems is given below.

4.1 Fundamental trade union rights subordinated to free movement

Legal developments in the EU show a lack of respect for the fundamental rights of workers and trade union organisations. The outcome of legal disputes in which social and trade union rights have stood against the internal market principles of free movement have shown that there is a strong bias towards valuing free competition on the internal market higher than fundamental social rights. Both trade union organisations and international bodies such as the ILO have reacted against the undermining of fundamental rights, such as the right to take industrial action, by the interpretations of the European Court of Justice.

Even if the conflicts themselves have concerned different, but associated, themes, it is fundamentally and deeply problematical that fundamental rights are subordinate to the principle of free movement of services.

In these conflicts many have perceived the “pact of confidence” between the European and the national level as being compromised. The previous assumption that the European level would proceed cautiously in cases where strong national considerations were put forward was overthrown by the Swedish Laval case. The Swedish collective agreement model, affording a strong position to the social partners, was called into question in a way that was in stark contrast to the pact of confidence.

4.2 Law as the engine of EU integration

A second theme concerns the bias in European integration where social considerations are less in evidence than market creation. The negative integration intended to remove obstacles to free movement has (to date) been considerably more effective than attempts to determine limits for the market and raise common social ambitions through joint political efforts. In this context the tension between collectively increasing ambitions or seeking to ensure national discretion and defining areas that can be excluded from common regulations has been highlighted.

4.3 Effect of crisis policy on fundamental rights

Thirdly - and there is clearly an overlap here with the previous theme - crisis policy as pursued in Europe has proved to have highly detrimental effects on social protection, labour law standards, trade union rights etc. Crisis policy has been strongly biased towards austerity and reforms aimed at increasing competition by reducing wage share, reducing public sector expenditure, reducing benefit levels and reducing pensions. This was most apparent in countries worst hit by the crisis and where the organisations behind the rescuepackages have imposed very extensive requirements for deregulation, changes in labour law, deterioration in social security systems, weakening of the social partners etc.

The trend is of significance for the other member states as well, partly because fundamental rights are subject to international conventions but also because there is a downward slope where the changes are at risk of spreading to other member states (in line with the logic of the downward spiral). Moreover a considerable strengthening of economic-political cooperation in the eurozone is in progress. The euro crisis has shown the weaknesses of a structure based on common monetary policy but national fiscal policy. Within the framework of the shift that is taking place it can be noted both that more power is transferring to the supranational level, particularly in the eurozone, and that the EU is being influenced in the direction of becoming increasingly a union moving at different speeds, in which the euro countries are working ever more closely together.

5. Conceivable solutions

5.1 Introduce a social protocol in the EU Treaties

A concrete way of overcoming the first problem, the balance between fundamental trade union rights and free movement, is to add a social protocol to the EU Treaties. A proposal for a social protocol has been drawn up by ETUC (see appendix).²⁶ The basic idea of a social protocol is to get to grips with the bias towards giving free movement precedence in conflicts with fundamental trade union rights.

The European Court of Justice has shown evidence of a proportionality view of fundamental rights, which entails actions based on setting defence of inalienable rights in proportion to the effects the action may have on a third party. The meaning of fundamental rights should instead be precisely that they cannot be allowed to be restricted by other considerations. That is why social rights need to be written into the Treaties. The case concerning Laval took place before the Lisbon Treaty came into force. In view of the new Treaty there are a number of aspects to take note of that could change the legal position. It has been written into the EU Treaties (Article 3 of the TEU) that the Union is based on a “social market economy”. In addition the Charter of Fundamental Rights has been added. Nevertheless there are still signs that in similar cases the Court has followed the same logic as in the Laval case.²⁷ A central issue is how to interpret what is *ordre public*. In cases that have been heard the scope of action for a broader interpretation of what is meant by *ordre public* has proved to be limited.²⁸

This again shows the great value of incorporating a social protocol into the Treaties. A protocol has the same legal status as other primary law instruments. It would mean that in any disputes the Court would have to take into account the contents of the protocol. A central issue in this context is whether the fundamental social rights that would be protected by a social protocol have primacy over economic freedoms or equal status with them. According to the ETUC proposal there is much to indicate that social rights should have primacy since they are fundamental by their nature (and systemically important). In this context reference can also be made to the Charter of Fundamental Rights of the European Union (the

²⁶ ETUC Protocol on the relation between economic freedoms and fundamental social rights in the light of social progress, <http://www.etuc.org/a/5175>

²⁷ See Professor Bucker's presentation at the hearing on a social protocol, Swedish Riksdag, November 2012

²⁸ Ahlberg, Kerstin (2008), Vad är "bestämmelser som rör ordre public"? A commentary on the judgment in case C-319/06 Commission v Luxembourg, *Europarättslig Tidskrift*.

application of which, however, has been restricted in Poland and the United Kingdom through a special protocol) and to the ILO Convention (signed by all member states). In legal cases that have been heard in this area the European Court of Justice should really already have taken other judicial systems (both national and international) more into consideration but as this has not been done there is even more reason to attach a protocol.

5.2 Define “social market economy” and “national identity”

The inbuilt bias towards creating a free market can thus lead to a form of downward spiral in which the member states converge on a deregulated model. For many observers there are only a few possibilities of creating a European welfare model governed from the European level.²⁹ This builds on the fact that so far EU cannot be regarded as a state; there is no common model for organising welfare and there are insufficient democratic structures that could legitimise decisions on welfare issues at European level.³⁰ When issues in the welfare area reach European level it is not infrequently because they have a link with the market; for example patients’ rights to seek care in another EU country. When on the other hand it is a matter of collective rights or special national characteristics, they come into conflict with EU law as obstacles to free movement.³¹ In these cases it is thus again a matter of individual rights.³²

Unlike the Lisbon Strategy the Europe 2020 Strategy has focused increasingly on competitiveness.³³ Naturally it is quite crucial to Europe to maintain high competitiveness. But this must not be at the cost of worse conditions on the labour market, more insecure employment and poorer social security. These things rather belong together. In the past decade we have seen how active measures in labour market policy have drastically decreased.³⁴ As researchers point out, there is a risk that when the social dimension in the EU is increasingly closely linked to economic policy coordination (as part of the European semester) it leads to a one-sided focus on financial management and consequently no “progressive social vision” is formulated.³⁵ Hence it is crucial that the EU focuses on a social investment perspective. Not least in light of extensive youth unemployment, demographic challenges and our future welfare it is quite central that investments are made in the right way.

²⁹ Scharpf, Fritz (2010), *The Socio-Economic Asymmetries of European Integration or Why the EU cannot be a Social Market Economy*, Sieps

³⁰ Ferrara, Maurizio (2005), *The Boundaries of Welfare*, Oxford: Oxford University Press

³¹ Scharpf 2010, Danielsson 2012

³² Martinsen Sindbjerg, Dorte (2007), *EU for the Patients: Developments, Impacts, Challenges*, Sieps.

³³ Michalski, Anna (2013), Europa 2020: EU:s samhällsekonomiska ramverk på gott och ont, in Europaperspektiv 2013

³⁴ Bengtsson, Mattias and Kerstin Jacobsson (2013), Europas låga arbetskraftsinvesteringar – ett högt pris att betala?, in Europaperspektiv 2013

³⁵ Armstrong, Kenneth A (2012), EU social policy and the governance architecture of Europe 2020, *Transfer* 2012: 285-300

At European level the German labour movement has put forward demands for example that a “social pact” should be appended to the fiscal pact in order to reduce socio-economic heterogeneity and limit the possibility of social dumping. Proposals for the compact include a common consolidated level for corporate taxation, as well as a binding commitment for member states to remain within a given interval – as a percentage of GDP - for social expenditure.³⁶

As pointed out earlier, a tension exists in the regulation of social questions at EU level. In some member states, however, there is increasing discussion about strengthening the social dimension of the economic frameworks. One point of departure for this work could be trying to define in more precise terms what is meant by “social market economy”. Given the heterogeneity of the member states, there are certainly different interpretations of what this means. But to be able to use the term as a tool in both political and legal terms we need to find some form of common interpretation. This should reasonably include the balance between social rights and the market. A more solid interpretation of the term is also needed so that it can be of use in future legal disputes in the European Court of Justice.³⁷

One possibility of creating, like in the social protocol, clarification around the demarcation between the EU and its member states' jurisdictions is to use the provision of the Lisbon Treaty on “national identity” (Article 4.2 TEU). The Treaty makes no direct reference to the EU social policy jurisdiction, but it is up to the member states themselves to define their own identity, which could reasonably include labour market and collective agreement models. If a member state defines its national identity/model it should be possible to maintain that it is to be protected against legal or political development in the EU that risks undermining the identity.

5.3 Create more minimum regulations at EU level

Moreover there should be an opening for a discussion about putting a lock in substantiveterms on what are the minimum acceptable levels of social protection. There is always a risk that minimum rules will adapt to the lowest level. Due to the differences between member states in terms of living standards and types of welfare model, there should be a margin for flexibility. The member states must be able to introduce stricter national rules that are more advantageous for workers. The aim should be to avoid competition between member states through low social ambitions.

³⁶ Ibid

³⁷ Hettne, Jörgen (2010), *Kan Lissabonfördraget minska EU:s sociala underskott?*, Sieps

The crisis is hitting European countries hard and people are being thrown into unemployment and poverty. After a long-term one-sided focus on austerity people are now starting to talk about Europe's need for a social investment plan. Discussions are currently ongoing in several member states about how forms of “lowest guaranteed social protection” can be secured. The arguments for such European regulation are that other considerations should be included within the framework of contractual arrangements concerning national budgets.³⁸ Even in this context there is reason to further raise questions concerning both general social considerations and workers' rights.

The opposition to making binding agreements at supranational level still stems from the lack of full democracy at EU level as well as the fact that decisions concerning the issues mentioned above are close to the core of member states' sovereignty. And then a central issue, as always in EU contexts, concerns the legal basis on which a policy area rests. The member states may have well-founded reasons to be hesitant towards creating new common policy areas, in accordance with the subsidiarity principle.

However, in this context it should be noted that integration of economic-political cooperation in the eurozone is currently moving forward rapidly. If this cooperation is substantially enhanced without the existence of other considerations than increasing productivity, squeezing social safety nets and weakening the status of collective agreements, then parts of the European left assess that this must be compensated for by more in-depth cooperation on social questions. It is these signals that are coming from the French President Francois Hollande, for example. For the German trade union movement, for example, the crisis has resulted in demands for “safeguard clauses” for social rights/social protection, which was not thought necessary before the crisis.

³⁸ See Häcker, Björn (2012), *The Fiscal Treaty Needs a Protocol Extension to Include Economic Growth, Employment and Social Cohesion*, Friedrich Ebert Stiftung.

6. Scenarios in the near future

An overall impression of what is happening in today's EU is that the euro countries are enhancing their cooperation more and more while some non-euro countries show scepticism towards the proposals for deeper (economic) integration being introduced. In the United Kingdom discussions aimed at reviewing major parts of British membership are currently in progress. A second observation concerns the fact that the intensity with which new proposals and agreements are presented is very high. In recent years alone phenomena have emerged, without a new treaty, that are both outside and inside the EU's decision-making framework: The European Stability Mechanism (ESM), the Euro Plus Pact, The Treaty on Stability, Coordination and Governance in the EMU ("The Fiscal Stability Treaty" – intergovernmental agreement), the "two-pack" and "six-pack", enhanced cooperation on a financial transaction tax and a path towards a banking union. More of these initiatives are already ongoing while others are in their infancy. A central question in the future will be whether this development will lead to a full-scale Treaty revision or if it will stop at just being patched up (and in some respects going beyond the Treaties). It is possible to draw up a number of scenarios.

1) Full treaty change (ordinary revision procedure) as a response to the crisis, but also other deficiencies in the EU. After sending out strong signals about the need for a treaty change, leading representatives of important member states have toned down the necessity. Partly they have made the assessment that the most acute phase of the financial crisis has abated and the ECB has given guarantees to "save the euro at any price", and partly opinions differ, above all in Germany and France, about what the change would include. In the medium term this question will most likely be opened again. An ordinary procedure in accordance with the Lisbon Treaty would then include broader preparation in the form of a European convention before the start of the intergovernmental conference.

2) A partial amendment (simplified revision procedure) affecting the eurozone was made when the ESM was introduced. In the Communication from the Commission "A blueprint for a deep and genuine economic and monetary union. Launching a European Debate" measures are mentioned that will require a Treaty revision (for example to tighten up sanctions in the two-pack, which is not possible in the framework of the current Treaty).³⁹ Also the proposals that aim to strengthen democratic controls in the longer term assume a treaty change. However, it is not clear which of these changes could take place as a partial

³⁹ http://europa.eu/rapid/press-release_IP-12-1272_en.htm

amendment in the framework of the simplified revision procedure and which would be too extensive. There are also uncertainties as to which of the proposed amendments are intended to be made within the eurozone framework and which affect all member states. It should not in any case be ruled out that adjustments that only affect the eurozone may be made in the not too distant future. Thus there are several alternatives in this scenario: changes that only concern the eurozone and those that affect all member states.

3) Accession of new member states Further amendments affecting Treaties are those that take place on the accession of new member states. Accession treaties need to be ratified by all member states.

4) Agreements outside treaties such as the Fiscal Stability Treaty may be repeated. In that the United Kingdom exercised a historic veto against the plans to include the Fiscal Stability Treaty within the EU framework the solution was to draw it up as an intergovernmental agreement. This is a unique construction, but nevertheless it cannot be ruled out that more ad hoc solutions of this kind could take place in the future.

5) Europe à la carte – more and looser forms of cooperation. When David Cameron held his long-awaited speech in February 2013 he opened up for a renegotiation of the British EU membership and a future referendum. In the Netherlands too there is currently an extensive examination in progress of the country's relation to the EU.

6) Enhanced cooperation – this scenario has points of contact both with the step-by-step intensification within the eurozone and the fact that some countries are seeking more exemptions from the common rules. What we are witnessing here is a further strengthening of an EU moving at different speeds. Since the Lisbon Treaty (Article 20 TEU) there is scope for “enhanced cooperation” for the member states that want to move forward and cooperate on issues that not everyone can agree on.

This requires at least nine member states together and that it is accepted by the others. There must be legal grounds for the cooperation and it may not distort the functioning of the internal market. Enhanced cooperation may not take place in areas where the EU has exclusive jurisdiction, such as competition policy and trade policy. Two examples of enhanced cooperation concern a European patent and, more recently, the 11 member states that want to introduce a tax on financial transactions.

7) Muddling through without any treaty change. According to this scenario the political leadership assesses that either it is not necessary or not possible/far too risky to open an entirely new treaty revision process

and try instead to muddle through under the existing Treaties. One problem with this scenario is that if power is transferred to the supranational level and/or sufficiently major changes in cooperation take place without this making a permanent mark on the treaties that govern the cooperation, too great a discrepancy could arise between the written and the living constitution. This is anyway a scenario that should not be ruled out.

7. How should the labour movement act in different scenarios?

Based on the different scenarios sketched out above the report concludes with considerations of a more strategic nature and mainly focuses on how to introduce a social protocol into the Treaties and how the social dimension in the EU can otherwise be strengthened.

7.1 If there is a treaty change

In the **first** scenario, a full treaty change (ordinary revision procedure), a clear demand for the introduction of a social protocol is to be made. The Social Democratic Party should thus demand a protocol already in the European Convention negotiations and the subsequent intergovernmental conference, and in the Riksdag make a ratification of a treaty change conditional on the inclusion of a social protocol.

In the **second** scenario, partial change of the treaty (simplified revision procedure), there is reason to make a distinction between in the first place, limited amendments that ultimately aim to resolve problems in the eurozone and that have a remote or non-existent link to questions of labour market regulation or social protection systems. And in the second place, such changes that directly affect all member states or, despite being directed at the eurozone will affect other member states or have a close link to the labour market.

In the latter case an assessment must be made as to whether the Swedish Riksdag should make ratification conditional on the introduction of a social protocol. If it is a very limited change in line with the first scenario it is doubtful if it should be made conditional. Fundamentally, European cooperation rests on the existence of solidarity between the member states. If a non-euro country such as Sweden were to impose conditions on ratification of an agreement that does not affect Sweden directly or indirectly it would show a lack of solidarity in preventing countries with the single currency from solving their problems.

Thus the Social Democratic strategy should be not to set conditions concerning the introduction of a social protocol when there is a very limited change of the Treaties aimed at enabling the euro countries to deal with an acute crisis. However, there is reason to consider on a case-by-case basis, depending on the extent of the partial revision and the degree of “linkage” to the issues that a social protocol is designed to solve.

In the **third** scenario, ratification of accession treaties for new members, these treaties only concern enlargement as such. Sometimes proposals are made to add further amendments to the Treaties at the same time. Member states could therefore impose conditions for ratification. Given the Swedish tradition of supporting enlargement it would be inappropriate on such an occasion for the Social Democrats to make ratification conditional. This does not, however, prevent the issue from being raised in political discussion.

7.2 If there are no treaty negotiations

In the **fourth** scenario, more intergovernmental agreements outside the Treaties, this is nothing that anyone really wants. A strong reason for wishing to avoid these agreements is that the legal status becomes unclear. It would, however, be possible to take one's own initiative for a social protocol, drawn up as an intergovernmental agreement. From the Swedish horizon, such an initiative could be taken in the hope of getting most other member states to agree.

However, the problem is that the very point of a social protocol is for it to have a clear legal status *within* the Treaties. It is highly unlikely that the European Court of Justice would take such an agreement into account in any dispute. In addition, the fact is that a lot of criticism has already been directed at the Court for having disregarded other international agreements that regulate rights (the Charter and the ILO Convention) in the Laval case, for example. That greater regard would be afforded to an intergovernmental agreement would hardly seem probable. It would also be possible, as is being discussed in the German trade union movement, to propose a “Social Treaty”, which would lie outside the Treaties in the same way as the Fiscal Stability Treaty. This can at most, however, be seen as a supplementary strategy and can never replace the demand for an amendment to the Treaty.

In the **fifth** scenario, an EU à la carte, one alternative could be to seek to renegotiate the agreements with the EU and obtain legal exemptions that would acknowledge the Swedish labour market model as exempt from overall principles of free movement. The problem with this strategy, apart from the potential harm to cooperation as a whole that attempts to back out of agreements entail, is that there will be difficulties in legal terms. That is the conflict that arose in the Laval case. In order to avoid this type of conflict it would probably be necessary to back out of the entire internal market, which in the opinion of the working group is not relevant.

In the **sixth** scenario, more flexible integration through extending enhanced cooperation, it would be possible, for the purpose of introducing higher political ambitions, to seek deeper cooperation with member states that want to go

further. In this strategy at least nine other member states would be sought that wish to strengthen the social dimension and/or join together to try and introduce a social protocol.

The problem with this strategy is that there may certainly be other member states that share the opinion that in conflicts between free movement and trade union rights the latter should take precedence, *but* that any conflicts, such as how collective agreements are to be interpreted or issues around posting of workers also (and probably more likely) can arise between member states that are not part of the enhanced cooperation and those that are.

The question then returns to the legal effects of such enhanced cooperation and how the Court would regard the protocol in any dispute. In addition, enhanced cooperation must be said to fall within the Union's non-exclusive competences.⁴⁰ Enhanced cooperation under the Lisbon Treaty is established by means of the Council deciding with a qualified majority with the consent of the European Parliament (Article 20 TEU and Article 329 TFEU). In this scenario no comprehensive strategy for the Social Democrats can be proposed by the working group.

In the **seventh** scenario, which involves muddling through without any treaty change, there are still a couple of things the Social Democrats can do and a couple of strategies that should be used pending a revision of the Treaty. Political action should be taken because:

a) The European Court of Justice must take more heed of both other international judicial systems such as the ILO Convention and also have a better understanding of national identities and social models.

In this context it may be worth noting that in February 2013 the ILO criticised the Swedish legislation made as a consequence of the problems that arose after the Laval judgment, including the issue of the right to take industrial action.⁴¹ This should be pointed out and adjusted. The Swedish Government should therefore be active in proceedings in the European Court of Justice that concern cases of a principle nature in matters of concerning respect for different labour market and collective agreement models. In addition the provision in the Lisbon Treaty concerning “national identity” (Article 4.2 TEU) should be used when Sweden maintains that the collective agreement model is part of a national

⁴⁰ Article 20.1 TEU Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 326 to 334 of the Treaty on the Functioning of the European Union. The enhanced cooperation is to aim to further the objectives of the Union, protect its interests and reinforce its integration process.

⁴¹ See Report of the Committee of Experts on the Application of Conventions and Recommendations, www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_205472.pdf

identity. This should be possible to adduce in any new disputes. However, it may need to be weighed against the principle of sincere cooperation (Article 4.3 TEU). In this context it should also be mentioned that an agreement between the EU and the Council of Europe on accession to the ECHR and additional protocols has in principle been entered into. The practical consequences of this are as yet not clear.

b) The Lisbon Treaty mentions in its introduction that the Union rests on a “social market economy”. Active endeavours should be made to find a common definition of what is meant by the term and the European Court of Justice should be guided by the possibility that the internal market can be balanced by social considerations.

c) Citizens' initiative: after the Lisbon Treaty a European Citizens' Initiative is possible within the framework of the EU. Legislation on this came into force in April 2012. An initiative requires one million signatures, electronic or written on paper, spread among at least seven member states under a system in which the minimum number of signatories per country is stipulated.

The initiators must set up a citizens' committee with representatives from at least seven countries. The initiative is then to be registered on the European Commission's official Citizens' Initiative website. The Commission then gives a formal reply to the organisers of the initiative within two months. When the registration of the initiative has been confirmed by the Commission there is a set term of one year to collect signatures.⁴² It would thus be possible to launch such an initiative concerning the introduction of a social protocol. What may be problematical is that the Commission does not accept lists of signatures calling for changes of the treaties. The collection would therefore need to be formulated in a technically innovative way to be accepted. To create political pressure on an issue it would, however, be possible to collect at least one million signatures for an amendment to the Treaty without Commission approval.

d) The political route: ahead of the 2014 election to the European Parliament the European parties will put forward joint candidates for President of the European Commission. The candidate put forward by the Party of European Socialists should promise initiatives to introduce a social protocol.

Social Democratic members of the European Parliament can also make this demand of the European Commission presidential candidate, regardless of party, when voting on the nomination. At hearings with the various commissioner candidates, particularly the one to be responsible for employment and social policy, members

⁴² Detailed descriptions of the rules and procedures for initiatives can be found here <http://ec.europa.eu/citizens-initiative/public/welcome>. See here for ongoing initiatives; EU Citizens' Initiatives, Official Register, <http://ec.europa.eu/citizens-initiative/public/initiatives/ongoing>.

should also demand that they promote a social protocol. In addition, the possibilities that the European Parliament, as well as individual member states, have to initiate treaty amendments should be investigated. Another possible political initiative is for the Swedish Government to put forward a proposal for a decision in the European Council on legal guarantees for fundamental trade union rights and freedoms and that the provisions of the decision be included in a (social) protocol to be attached to the Treaty at the next revision (that is, regardless of when the revision takes place and whether it is subject to ordinary or simplified procedure or the accession of a new member state).⁴³

e) Continual legislative work in which the various problem areas identified are kept in view. The Social Democrats should continue to pursue the demand for a revision of the Posting of Workers Directive. In addition, demands should be put forward that each new legal act within the framework of the internal market and economic governance should include a “Monti Clause”, similar to the one in the Regulation on the Free Movement of Goods and the Regulation on the prevention and correction of macroeconomic imbalances.

Finally, of course a precondition for implementing an aimed-for policy or reforms in the EU is to build strategic alliances with those of a similar opinion, as well as the ability to influence other actors to assume similar positions. An obvious condition for then bringing about a change is that political ambition in Europe takes the desired direction. This means that elections need to be won. Of course this applies to the 2014 election to the European Parliament, but also that national elections have the outcomes that move in the right direction. Since central parts of decision-making in the EU are of an intergovernmental nature, the member states' governments must have a positive attitude to the issue of a social protocol as well as a strengthening of the EU's social dimension.

⁴³ This procedure was used for example in the introduction of a protocol on the concerns of the Irish people on the Treaty of Lisbon.

8. Conclusion

This report has tried to identify three central problems of EU cooperation:

- 1) the setting aside of fundamental trade union rights and freedoms in conflicts with free movement of services
- 2) the inherent bias towards market promotion within the EU and the risk of social dumping
- 3) the destructive effect of crisis policy through pressure on social protection, labour law and collective agreements

To solve the first problem a social protocol should be appended to the EU Treaties. The protocol should clarify that fundamental social rights override the economic freedoms.

The solution to the second problem requires a decision on the extent to which minimum levels are to be regulated at EU level. It is also a matter of the initiatives coming into the area of the internal market including considerations of social protection and workers' rights. However, this has limited significance in new treaty negotiations, but is a matter of continually ensuring that new legislative initiatives do not conflict with own interests.

As regards the destructive effect of crisis policy, in many respects one can agree with the manifesto of the labour and social lawyers pointing out that the crisis cannot be an excuse to cut protection and thus violate the agreements and contracts on which cooperation is based. The euro crisis has entailed ever increasing economic-political cooperation, mainly affecting the eurozone. When national budget processes become woven into a European context (such as the European Semester) the core of national discretion is increasingly affected by the common factors. This means that many people who are striving for a more social Europe also think that the EU should make more common decisions in this area as well.

The working group proposes that the Social Democratic Party Executive and the Trade Union Confederation Executive Council assume the following fundamental approach regarding methods and strategies for achieving a changed balance between the EU's social and economic dimensions:

- In the case of a full treaty revision, to make clear demands for the introduction of a social protocol. The Social Democratic Party should thus demand a protocol already in the European Convention negotiations and the subsequent intergovernmental conference, and in the Riksdag make the ratification of a treaty change conditional on the inclusion of a social protocol.
- In the case of a partial treaty change (simplified revision procedure), with a very limited change to the treaties, only aimed at making it possible for the euro countries to manage an acute or future crisis, not to stipulate the introduction of a social protocol. However, other partial changes should be examined on a case-by-case basis, depending on the extent of the partial revision and the degree of “linkage” to the issues that a social protocol is designed to solve. If an amendment is sufficiently extensive, however, the Social Democrats should make the ratification conditional in the same way as for a full treaty revision.
- In the case of ratification of a Treaty of Accession for new members of the EU, not to stipulate the introduction of a social protocol. In cases where proposals to implement further amendments to the treaties exist at the same time, the matter of a social protocol should, however, be raised for discussion.
- Taking an initiative in the European Council for a decision on legal guarantees for fundamental trade union freedoms and rights and that the provisions in the decision are to be included in a (social) protocol that will be attached to the Treaty at the next review.
- In the case of European integration, to clearly promote a clarification of the boundaries of the internal market, while highlighting common social ambitions. Swedish political parties must join with the social partners to find a common strategy to protect national discretion in the framework of obligations under community law.
- Not to contribute to crisis policy in Europe having a detrimental effect on social protection, social security systems, labour law standards or trade union rights.
- To start a discussion on establishing the lowest acceptable levels for social protection in the EU. In light of the differences between member states in terms of living standards and types of welfare model, there should be a margin for flexibility. The member states must be able to introduce stricter national rules that are more advantageous for workers. The aim should be to avoid competition between member states through low social ambitions.

- When questioning the candidate for President of the European Commission and candidates for members of the Commission, to require them to promote a social protocol.
-
- To intensify the work of creating strategically necessary alliances with actors in other member states for the purpose of realising a more social EU and a social protocol.

APPENDIX: ETUC proposal for a Social Progress Protocol

Protocol on the relation between economic freedoms and fundamental social rights in the light of social progress

THE HIGH CONTRACTING PARTIES,

HAVING REGARD to Article 3(3) of the Treaty on the European Union,

CONFIRMING their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers,

RECALLING that the Union shall work for a highly competitive social market economy, aiming at full employment and social progress, (*Article 3(3) sub par. 1 of the TEU*)

RECALLING that the single market is a fundamental aspect of Union construction but that it is not an end in itself, as it should be used to serve the welfare of all, in accordance with the tradition of social progress established in the history of Europe;

WHEREAS, in accordance with Article 6(1) of the Treaty on the European Union, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights and in particular the fundamental social rights enshrined in this Charter,

BEARING IN MIND that, according to Article 9 (*new horizontal social clause*) of the Treaty on the Functioning of the EU, in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health,

HAVING IN MIND that the Union and the Member States shall have as their objectives the improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained (*Article 136 (1) EC Treaty = Article 151(1) TF EU*),

RECALLING that the Union recognises and promotes the role of social partners, taking into account the diversity of national systems, and will facilitate dialogue between the social partners, respecting their autonomy (*Article 136a new = Article 152 TF EU*),

WISHING to emphasise the fundamental importance of social progress for obtaining and keeping the support of European citizens and workers for the European project,

DESIRING to lay down more precise provisions on the principle of social progress and its application;

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union:

Article 1 [Principles]

The European social model is characterised by the indissoluble link between economic performance and social progress, in which a highly competitive social market economy is not an end in itself, but should be used to serve the welfare of all, in accordance with the tradition of social progress rooted in the history of Europe and confirmed in the Treaties.

Article 2 [Definition of social progress and its application]

Social progress and its application means in particular:

The Union

improves the living and working conditions of its population as well as any other social condition,

ensures the effective exercise of the fundamental social rights and principles, and in particular the right to negotiate, conclude and enforce collective agreements and to take collective action,

in particular protects workers by recognizing the right of workers and trade unions to strive for the protection of existing standards as well as for the improvement of the living and working conditions of workers in the Union also beyond existing (minimum) standards, in particular to fight unfair competition on wages and working conditions, and to demand equal treatment of workers regardless of nationality or any other ground,

ensures that improvements are being maintained, and avoids any regression in respect of its already existing secondary legislation.

The Member States, and/or the Social Partners,

are not prevented from maintaining or introducing more stringent protective measures compatible with the Treaties,

when implementing Union secondary legislation, avoid any regression in respect of their national law, without prejudice to the right of Member States to develop, in the light of changing circumstances, different legislative, regulatory or contractual provisions that respect Union law and the aim of social progress.

Article 3 [The relation between fundamental rights and economic freedoms]

Nothing in the Treaties, and in particular neither economic freedoms nor competition rules shall have priority over fundamental social rights and social progress as defined in Article 2. In case of conflict fundamental social rights shall take precedence.

Economic freedoms cannot be interpreted as granting undertakings the right to exercise them for the purpose or with the effect of evading or circumventing national social and employment laws and practices or for social dumping.

Economic freedoms, as established in the Treaties, shall be interpreted in such a way as not infringing upon the exercise of fundamental social rights as recognised in the Member States and by Union law, including the right to negotiate, conclude and enforce collective agreements and to take collective action, and as not infringing upon the autonomy of social partners when exercising these fundamental rights in pursuit of social interests and the protection of workers.

Article 4 [Competences]

To the end of ensuring social progress, the Union shall, if necessary, take action under the provisions of the Treaties, including under (*Article 308 EC Treaty*=) Article 352 of the Treaty on the Functioning of the European Union.

(See a similar provision in the Protocol on the internal market and competition)



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