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GERMAN AND BRITISH TRADE UNIONS: PROBLEMS AND
OPPORTUNITIES AFTER ENLARGEMENT

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Abstract

This paper examines and compares German and British trade union responses in a European context following the recent European enlargements in 2004 and 2007, enlargements that are unprecedented in the history of the European Union. In particular, the paper undertakes a contextualized comparison of trade union behaviour in responding to the changing regulatory and opportunity structures which present themselves following the enlargements. Account is taken of the role that trade unions adopt within their national legal systems as well as of the effects of the European Union's policy of Europeanisation on national trade unions.

Keywords

Trade unions, German Labour Law, British Labour Law, European Enlargement, Europeanisation.

Introduction

In recent years, trade unions in Germany and the UK have been struggling to react to changing regulatory and opportunity structures occurring within their national legal systems. In addition, the EU's policy of 'europeanising' national labour law systems has added an extra layer of complexity to the context within which trade unions act at a national level. The problems facing trade unions have increased following the recent European enlargements in 2004 and 2007 as a result of the increase in the free movement of workers, services and establishment. This paper examines the problems facing trade unions and argues that European enlargement offers German and British trade unions opportunities of which they have, so far, not taken advantage. In particular, there is scope for each to learn from the other. The paper focuses on Germany and the UK primarily because trade unions in both these countries face similar problems, following the recent European enlargements. Thus, they are both suffering from a decline in membership and a loss of influence in collective relations.

In order to discuss the opportunities offered to British and German trade unions following the recent enlargements, this paper is structured as follows. First, I briefly summarise the national and European context within which trade unions act, in order to contextualise the problems facing trade unions. I elaborate upon these challenges in a second section. Finally, I discuss the opportunities available to trade unions.

National and European Context

a. National Level

The foundations of the modern labour law systems in Germany and the UK were laid down in the middle of the 19th century. The era of industrialisation played an important role in pressing for the liberalisation of legal relations. Much of modern German labour law can be traced back to Hugo Sinzheimer, who was in large part responsible for the theorisation of German labour law during the Weimar Republic. Though the Weimar legislation was repealed by the Nazis during the 1930s, Sinzheimer's ideas were resurrected following the Second World War.¹ Sinzheimer considered labour law a tool to be manipulated to correct the injustices inherent in the capitalist mode of production. As a result, in Germany, "the labour relationship was no longer viewed as based on the personal relationship which had arisen in the days of lord and serf and continued in the institution of master and servant, but under the influence of the civil law it adopted an individual approach. Thus the legal fiction of contractual equality between parties also applied to employment relationships."²

Modern German labour law can be broadly divided into two subject matters: individual and collective labour regulation. Collective labour regulation treats the worker as part of a collective entity normally organised within a trade union. German law lacks a codified system of labour regulation. Collective labour law is thus made up of a variety of laws scattered throughout the legal system, as well as customary norms and precedents set out by the Labour Courts, in particular the Federal Labour Court (Bundesarbeitsgericht – BAG).³ Although judicial precedent does not establish binding legal norms, it has contributed significantly to the development of the law on industrial action and non-discrimination at work. Trade unions have a number of different roles to play within this system. Above all, they are involved in the collective bargaining process and the process of co-determination of the enterprise.⁴ However, as Schroeder and Weßels explain, trade unions also increasingly adopt a political role:

¹ W. Herschel, 'Der Betriebsrat – damals & heute' and T. Ramm, 'Die Arbeitsverfassung der Weimarer Republik' both in F. Gamillscheg (ed.), *In Memoriam Sir Otto Kahn-Freund*, 1980.

² N.G. Foster & S. Sule, *German Legal System and Laws*, Oxford University Press, Oxford, 2002 at p. 523.

³ R. Wörlen & A. Kokemoor, *Arbeitsrecht*, Carl Heymanns Verlag, 7th ed., München, 2005 at p. 194.

⁴ Space precludes a discussion of these processes in any depth. For more information see, for example, W. Schroeder & B. Weßels, 'Das deutsche Gewerkschaftsmodell im Transformationsprozess: Die neue deutsche Gewerkschaftslandschaft'

The function of trade unions should not be seen one-dimensionally. They are, first and foremost organisations of solidarity and mutual security. They appear as an economic organisation vis-à-vis the employer with a view to representing collective interests. However, due to their high membership numbers, they are also political organisations, despite the clear distinction between them and political parties, who play a powerful role in the political system in Germany.⁵

Following European enlargement, the political role of trade unions may become increasingly important in helping trade unions to deal with the problems facing them.

In the UK, the concept of “labour law” has its genesis in the idea of “the subordination of the individual worker to the capitalist enterprise”⁶. It is concerned primarily with the constitution and regulation of the relationship between worker and employer. In the UK, a primary role is accorded to the law of contract in determining the constitution of this relationship; regulation of that relationship is overseen by the common law and social legislation, as well as by “extra-legal” sources such as collective bargaining. This form of labour law characterised traditionally by the absence of legal regulation was first clearly enunciated and commended by Otto Kahn-Freund, a German national and one-time student of Sinzheimer, who came to London as a political refugee in 1933. For Kahn-Freund, the paucity of regulation of collective labour relations ensured the independence of UK trade unions from the state.⁷ The scope of labour law thus ranges from “the individual to the collective, from the contract of employment to relations between the institutions of organised labour and capital, and to the conduct and resolution of conflicts between them.”⁸ Trade unions adopt various functions in the representation and regulation of the employment relationship.⁹ Most importantly, they engage in collective bargaining, one of the main extra-legal sources of British labour law. However, in recent years collective bargaining has receded, due to the dwindling membership figures of trade unions and an increased view by the government that “the role of trade unions in centralised collective bargaining on pay and conditions has declined, reflecting decentralised decision making in many organisations.”¹⁰ The trade unions’ function in regulating the employment relationship is increasingly being achieved indirectly through legislation, which the trade unions play a part in securing. An increased emphasis is therefore placed, similar to the German situation, on the political function of trade unions.

Before turning to the problems facing trade unions in more depth, the next section considers the European influence on German and British trade unions in order to complete the overview of the context within which trade unions act.

b. European Level

The European Community has enjoyed a limited amount of competence in the field of labour law since the adoption of the Single European Act in 1986. Apart from the provisions contained in the EU Treaties which enable the EU institutions to act in order to facilitate the free movement of workers, article 153 Treaty on the Functioning of the European Union (TFEU) allows for the introduction of directives on working conditions, information and consultation of workers, and equality at work

(Contd.) _____

in W. Schroeder & B. Weßels, *Die Gewerkschaften in Politik und Gesellschaft der Bundesrepublik Deutschland*, Westdeutscher Verlag, Wiesbaden, 2003 or R. Wörlen & A. Kokemoor, *Arbeitsrecht*, 7th ed., Carl Heymanns Verlag, München, 2005.

⁵ W. Schroeder & B. Weßels, ‘Das deutsche Gewerkschaftsmodell im Transformationsprozess: Die neue deutsche Gewerkschaftslandschaft’ in W. Schroeder & B. Weßels, *Die Gewerkschaften in Politik und Gesellschaft der Bundesrepublik Deutschland*, Westdeutscher Verlag, Wiesbaden, 2003 at p. 14.

⁶ B. Hepple (ed.), ‘Introduction’ in *The Making of Labour Law in Europe*, Mansell, London, 1986 at p.11.

⁷ R. Dukes, ‘Constitutionalising Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law’ (2008) 35 *Journal of Law and Society* 341.

⁸ S. Deakin & G. Morris, *Labour Law*, 5th ed., Hart Publishing, Oxford, 2009 at p. 1.

⁹ A detailed discussion of the various functions of trade unions is provided in K.D. Ewing, ‘The Function of Trade Union’ (2005) *Industrial Law Journal* 1.

¹⁰ *Fairness at Work*, Cm 3968 (1998) at para. 4.6.

between men and women. Limitations on legislative competence operate in other areas of labour law and, as an alternative, soft law techniques must be used. This has been most visible with the increased reliance on the Open Method of Coordination (OMC) in the sphere of labour law since 2003.

There is also the option to make rules on matters related to employment law through the 'social dialogue'. This is the main route which allows trade unions to become involved in the legislative process of Europeanisation through a 'bottom-up' approach. Introduced by the Treaty of Maastricht, the social dialogue consists of representatives of the two sides of industry: management and labour. The agreements concluded between the two sides may be given force of law through a Council decision under article 155 TFEU, thereby turning the agreements into a Directive. National trade unions are thus afforded a direct role in the legislative process through their membership in the European trade union confederations. At a national level, the negotiated Directives can either be implemented through legislation or by the social partners. As a result, collective agreements at a national level have been accorded a role in legislation implementing EU standards.

The different techniques such as the OMC, the social dialogue, and legislation which have been adopted by the European Community all attempt to 'Europeanise' national labour law systems. 'Europeanisation' has been defined broadly in the academic literature by various writers. One of the earliest conceptualisations of the term was given by Ladrech who defined 'Europeanisation' as "an incremental process of re-orienting the direction and shape of politics to the extent that EC political and economic dynamics become part of the organisational logic of national politics and policy making."¹¹ A number of authors elaborated upon Ladrech's definition thereby widening it to include the development of political networks at a European level¹² as well as "transnational influences that affect national systems"¹³ within the concept of 'Europeanisation'. Following on from these definitions, "EC political and economic dynamics" can be integrated into a member state's organisational structure through either a 'top-down' or a 'bottom-up' approach. In his most recent work entitled *Europeanization and National Politics*, Ladrech develops his earlier definition of 'Europeanisation'. He explicitly situates his approach to 'Europeanisation' in "the 'top-down' perspective in which domestic change is traced back to EU sources."¹⁴ In doing so, he follows the recommendation of Börzel and Risse¹⁵ to "use the term Europeanisation as focusing on the dimensions, mechanisms, and outcomes by which European processes and institutions affect domestic-level processes and institutions."¹⁶

In certain areas of law, the 'Europeanisation' of national legal systems has been very successful. A typical example often given is that of competition law where the European Union has achieved a near-complete harmonisation of Member States' legal systems. However, harmonisation was not the aim of the process, rather, it was achieved due to a gradual convergence of national laws. Such convergence has not been achieved within the sphere of labour law and particularly, collective relations. This is mainly due to the socio-cultural context within which the labour laws of the individual Member States have developed. It is also a result of the "diversity of national welfare states [which] differ not only in levels of economic development and hence in their ability to pay for social transfers and services, but, even more significantly, in their normative aspirations and institutional

¹¹ R. Ladrech, 'Europeanisation of Domestic Politics and Institutions: The Case of France' (1994) *Journal of Common Market Studies* 69 at p. 69.

¹² T.A. Börzel & T. Risse, 'When Europe hits home: Europeanisation and Domestic Change' (2000) *European Integration Online Papers* 4.

¹³ B. Kohler-Koch, 'Europäisierung: Plädoyer für eine Horizonterweiterung' in M. Knodt & B. Kohler-Koch (eds.), *Deutschland zwischen Europäisierung und Selbstbehauptung*, Campus, Frankfurt, 2000.

¹⁴ R. Ladrech, *Europeanization and National Politics*, Palgrave, Basingstoke, 2010 at p. 15.

¹⁵ T.A. Börzel & T. Risse, 'Europeanization: The Domestic Impact of European Union Politics' in K.E. Jørgensen, M.A. Pollack & B. Rosamund (eds.), *Handbook of European Union Politics*, Sage, London, 2007.

¹⁶ R. Ladrech, *Europeanization and National Politics*, Palgrave, Basingstoke, 2010 at p. 22 citing T.A. Börzel & T. Risse, 'Europeanization: The Domestic Impact of European Union Politics' in K.E. Jørgensen, M.A. Pollack & B. Rosamund (eds.), *Handbook of European Union Politics*, Sage, London, 2007 at p. 485.

structures.”¹⁷ As a result, a ‘top-down’ approach has often resulted in fruitless attempts at approximation of laws and practices. Alternatively, a ‘bottom-up’ approach is sometimes attempted in order to approximate labour standards across the EU. However, for similar reasons to those mentioned in the context of the ‘top-down’ approach, one equally struggles to implement a ‘bottom-up’ approach across the European Union as a whole as transnational influences are often difficult to reconcile with the socio-cultural context of labour relations systems. As Weiss points out, “at best there is a chance to approximate the systems in a functional sense, thereby eliminating distortions of competition arising from existing differences.”¹⁸ Other attempts, like the social dialogue, avail themselves of a mixed approach. It combines a ‘top-down’ approach with the European umbrella organisations negotiating framework agreements, while the national affiliates, in a ‘bottom-up’ approach, should ideally have a strong input in those negotiations. However, despite the lack of success of the top-down and bottom-up approaches, any definition of ‘Europeanisation’ must take into account the two-way process that takes place in the ‘Europeanisation’ of national labour law systems. As Börzel points out, “approaching Europeanisation exclusively from a top-down rather than bottom-up perspective may in the end fail to recognise the more complex two-way causality of European integration.”¹⁹ For the purposes of this paper, the following definition of ‘Europeanisation’ is therefore employed. Europeanisation is, very broadly, a process of domestic change that can be attributed to European integration. This process of change can originate from the European and the national level. Europeanisation is, therefore, a two-way process.

In the area of labour law the Europeanisation of national systems has largely been attempted under the banner of a so-called European Social Model²⁰ since the early 1990s.²¹ There has been a long-standing debate in the academic literature as to whether the European Social Model exists and, if so, what its role is. The former EU Commissioner for Employment, Social Affairs and Equal Opportunities, Vladimír Špidla, describes the European Social Model as “an integrated strategy where social politics are perceived as an investment in human capital and therefore contribute to productivity.” Its objective is to “reconcile economic performance with worker well-being.”²² This description of the European Social Model as an arbitrator between economic interests and social protection is, however, not unproblematic. There has been a long-standing debate over whether the European Social Model exists and, if so, what its role is. It is often stated, for example, that the European Social Model “is not really a model, it is not only social, and it is not particularly European.”²³ In contrast, Vaughan-Whitehead recognises the existence of a European Social Model but lists countless criteria that it must fulfil in order to count as such.²⁴ A number of more general arguments are also often put forward when discussing the existence or lack of a European Social Model. First, it is impossible to define a Europe-wide social model. Every Member State has its own system which has developed varying standards, institutions and structures.²⁵ It is thus difficult to define a European norm and Social Model. Second, even where European standards exist these are

¹⁷ F.W. Scharpf, ‘The European Social Model: Coping with the Challenges of Diversity’ *MPIfG Working Paper* 02/8, July 2002 at p. 16.

¹⁸ M. Weiss, ‘Workers’ Participation: Its Development in the European Union’ (2000) *Industrial Law Journal* 737 at p. 738.

¹⁹ T.A. Börzel, ‘Towards Convergence in Europe? Institutional Adaptation to Europeanisation in Germany and Spain’ (1999) *Journal of Common Market Studies* 573 at p. 574.

²⁰ This is the collective name given to the European Union’s involvement in social policy which was seen as a necessary component in the economic integration project. For more information see J. Shaw, J. Hunt & C. Wallace, *Economic and Social Law of the European Union*, Palgrave, 2007 at pp. 341 – 367.

²¹ J. Bischoff & R. Detje, ‘Das Europäische Sozialmodell und die Gewerkschaften’, *Suppl. Zeitschrift Sozialismus* 1/2007.

²² Vladimír Špidla, *Une nouvelle Europe sociale*, Speech 05/598, PES Conference *A new social Europe*, Brussels, 11/10/2005 at p. 5.

²³ A. Diamantopolou, *The European Social Model – myth or reality?* Address at the fringe meeting organised by the European Commission’s Representation in the UK within the framework of the Labour Party Conference, 29/9/2003.

²⁴ D. Vaughan-Whitehead, *EU Enlargement versus Social Europe?* Elgar, London, 2003.

²⁵ J. Alber, ‘Das “europäische Sozialmodell” und die USA’ (2006) *Leviathan*, Heft 2.

often implemented to varying degrees and in different ways in the Member States. It is therefore difficult to speak of a clearly defined 'European Social Model'.

However, the problem may not only lie with the availability of EU norms which may or may not make up a European Social Model. Rather, the difficulty in definition may be due to the criteria used. It is often argued that the European Social Model cannot be compared with national social models which regulate a vast array of social matters.²⁶ Instead, the European Social Model should be seen as a political tool that enables the EU to create minimum standards in those areas which fall within its competence. These minimum standards, which are meant to reduce competition between Member States and thus lead to further European integration, are created through hard and soft law mechanisms as well as through the case law of the European Court of Justice (ECJ). The hope of the EU is that by combining economic and social welfare the EU will achieve "stronger, lasting growth and the creation of more and better jobs."²⁷ By accepting that a European Social Model can only set minimum standards in certain areas one recognises the existence of a so-called European Social Model that can complement rather than replace national structures and institutions. As Giddens points out, the European Social Model is "a mix of values, achievements and hopes which differ in their form and in the extent of their development in the individual Member States."²⁸ While this recognises the existence of a European Social Model it does not create expectations of a model akin to national social welfare systems.

The European Social Model in turn affects trade unions acting at a national level. Ladrech explains that "the policy output of the European Union has the potential to trigger responses from domestic interest groups and social movements because they are either threatened by the proposed policy or else they perceive opportunities for advancing the goals."²⁹ For trade unions this means that they must take account of case law, policies and legal instruments that originate from a European level. However, they can also influence the process of Europeanisation at a national level through an active involvement in the drafting and implementation of EU legislation and soft law mechanisms as well as a strong involvement in social dialogue through the European Trade Union Confederation (ETUC).

In recent years the EU has moved away from the development of hard law and, as a consequence, soft law mechanisms such as the Open Method of Coordination (OMC) have been used to Europeanise national labour law systems.³⁰ Soft law mechanisms are often criticised as inadequate in Europeanising national labour law systems due to the absence of time constraints on implementation or enforcement mechanisms to ensure compliance.³¹ However, the OMC could give trade unions the potential to influence policymaking at a European level if it were effectively implemented. As Barnard writes, there is provision for the social partners to play a significant role in "modernising the European

²⁶ V. Špidla, *Une nouvelle Europe sociale*, Speech 05/598, PES Conference *A new social Europe*, Brussels, 11/10/2005.

²⁷ European Commission Communication to the Spring European Council, *Working together for growth and jobs: A new start for the Lisbon Strategy* COM (2005) 24.

²⁸ A. Giddens, *Zukunft des europäischen Sozialmodells*, Friedrich Ebert Stiftung Politikanalyse, Bonn, 2006 at p.1.

²⁹ R. Ladrech, *Europeanization and National Politics*, Palgrave, Basingstoke, 2010 at p. 151.

³⁰ Various Directives were issued in the sphere of social policy between 1994 and 2002. In particular, the Maastricht Treaty marked the turn towards the pursuit of a social policy by the European Commission as well as an active involvement of the social partners. The first Directives following the Maastricht Treaty were issued in 1994. Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation, marked the culmination of an eight year period of active legislating in the area of social policy by the Commission and the social partners. Even though Directives on social policy are still sporadically negotiated (for up to date information see http://ec.europa.eu/employment_social/social_dialogue/index_en.htm), soft law mechanisms have, since 2002, taken over as the preferred method for achieving an approximation of labour standards across the EU. The OMC originated under the EU's Employment Strategy and "combines processes of common target setting by member states, cross-country benchmarking and periodic review." See P. Marginson, 'Europeanisation and Regime Competition: Industrial Relations and EU Enlargement' *Industrielle Beziehungen*, 2006 at p. 103.

³¹ For examples see V. Hatzopoulos, 'Why the Open Method of Coordination is Bad For You: A letter to the EU' (2007) *European Law Journal* 309.

social model [and to be] actively involved in this OMC, especially benchmarking practices, using variable forms of partnership.”³² Involving trade unions in the active exchange of ideas between Member States could give them a role to play at a national level in the two-way process of Europeanisation. Yet trade unions often report a lack of involvement in and knowledge of the workings of the OMC. Thus, the OMC is not a useful tool, at present, for trade unions responding to the recent European enlargements and the new Member State workers. However, the OMC could be beneficial for trade unions if there were a formalised structure at a European and national level which involved national trade unions.

The ECJ’s jurisdiction in labour law offers the prospect that it could play a major role in europeanising national labour law systems through the preliminary rulings procedure³³ which allows a national court to stop domestic legal proceedings and send a question to the ECJ for interpretation. The ECJ has used this mechanism “to ensure that states respect their European legal obligations.”³⁴ However, the recent interpretation of Directive 96/71 on the posting of workers as a minimum standard which cannot be improved upon by the ECJ in *Laval* and *Rüffert*³⁵ adds to the difficulties facing trade unions. The Directive prescribes minimum standards of core working conditions which should apply equally to national and posted workers. Posted workers are those workers who are sent temporarily to work in another Member State by their employer. Particularly following the recent European enlargements, large numbers of workers have been sent from new to old Member States as posted workers. In *Laval* and *Rüffert* the ECJ had the opportunity to provide clarity on whether old Member States could apply collective agreements which set out higher standards than the minimum to posted workers sent under the Directive. By only allowing collective agreements to apply if they are declared universally applicable, a mechanism which does not exist in a number of old Member States, the ECJ applied a strict interpretation of its case law³⁶ in this area. As a result, the interpretation of the Directive by the ECJ has raised concerns about the future shape and form of a ‘social Europe’.³⁷

In the UK, the Lindsey oil refinery dispute on ‘British Jobs for British Workers’ which took place in January and June 2009 highlighted trade union concern about the application of Directive 96/71 following the ECJ’s judgments in the UK. The Lindsey oil refinery dispute provided the catalyst to this debate. In January 2009 workers at Lindsey oil refinery began unofficial strike action in protest against perceived discrimination against British workers. The owners of the refinery had awarded construction of a new unit at the plant to an American company that had sub-contracted part of the work to an Italian company. Workers at Lindsey oil refinery commenced unofficial strike action after learning that the sub-contractor would post its own permanent workforce of foreign nationals (Italians) to the refinery to complete the project rather than employ British workers. This illustrates the feeling, as evidenced by many of the placards bearing Gordon Brown’s pledge of ‘British Jobs for British Workers’, that British workers should be accorded preference over foreign nationals, in this case EU workers, in the allocation of employment contracts. The position of all British trade unions on the strike action was one of solidarity with the workers at the oil refinery even though they emphasised

³² C. Barnard, ‘The Social Partners and the Governance Agenda’ (2002) *European Law Journal* 80 at p. 84.

³³ Article 267 TFEU.

³⁴ K. J. Alter, *Establishing the Supremacy of European Law – The Making of an International Rule of Law in Europe*, Oxford University Press, Oxford, 2001 at p. 1.

³⁵ C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767; Case C-346/06 *Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen* [2008] ECR I-01989. For a more detailed discussion see, for example, T. Blanke, ‘Die Entscheidung des EuGH in den Fällen *Viking*, *Laval* und *Rüffert* – Domestizierung des Streikrechts und europaweite Nivellierung des industriellen Beziehungen’ *Oldenburger Studien zur Europäisierung und zur transnationalen Regulierung* 18/2008 or P. Davies, ‘Case C-346/06 *Rüffert v Land Niedersachsen* (2008) IRLR 467 (ECJ)’ (2008) *Industrial Law Journal* 293 at p. 293.

³⁶ Case 143/83 *Commission of the European Communities v Kingdom of Denmark* [1985] ECR 427.

³⁷ ETUC, *ETUC presents its position on the Laval and Viking cases at the hearing of the European Parliament*, 26/2/08 available at <http://www.etuc.org/a/4627>.

that “the issue for them is not foreign workers, but access to jobs and fair pay for all workers.”³⁸ In response, the trade unions called on the EU and Governments to “end the unfairness of the Posted Workers’ Directive.”³⁹ However, the trade unions were unable to suggest solutions for their inability to counteract the negative effects of Europeanisation. They did not recognise that the problems in the dispute stem in part from a lack of successful Europeanisation of the British labour law system. Trade unions, at a national level, could play an active part in europeanising British labour law by using the mechanisms that Europeanisation has to offer. This is discussed in more detail below.

In Germany, the outcome of the *Rüffert* case led to similar calls for a revision of the Directive, even though an explosive situation like that of the Lindsey oil refinery dispute has not occurred there. In the absence of a national minimum wage, the majority of workers in Germany are covered by collective agreements which, if they are not declared universally applicable, fall foul of the ECJ’s interpretation of the Directive. The lack of Europeanisation of the German labour law system therefore leads to difficulties for the trade unions. Following the judgment in *Rüffert*, the German system of collective bargaining which is the backbone of German trade unions must be altered or it will be undermined by the ECJ’s interpretation of the Directive. Alternatively, a statutory minimum wage could be introduced. Neither of these options has been implemented so far, even though the law implementing Directive 96/71 has been amended.⁴⁰ In addition, some German trade unions have begun to actively campaign for a statutory minimum wage. Whether this solves the problems highlighted by the judgment remains to be seen. The public services union Ver.di, for example, has responded to the judgment by stating that “it will refuse such a Europe”⁴¹ and that it “says no to a European Union which steers such a course.”⁴² Yet apart from its campaign for a minimum wage, it did not call for a revision of the German labour law system, nor did it develop strategies to alleviate the negative effects of Europeanisation. At present, therefore, German trade unions, like their British counterparts, are badly placed to counteract developments at a European level such as the outcome in the *Rüffert* case.

Overall, German and British trade unions are struggling to adapt to the effects of Europeanisation on their national labour law systems. While trade unions in Germany and the UK are sometimes involved in the implementation and drafting of European legislation, the extent and level of their involvement varies. There is also a potential role for trade unions in the OMC, but again the practical results seem to be limited. The case law of the ECJ has increased the difficulties facing trade unions, rather than supporting them in their attempts to respond to the challenges of European enlargement. As the reactions to the Lindsey oil refinery dispute and the *Rüffert* case illustrate, trade unions are failing to adequately respond to such developments. However, while the effects of Europeanisation may not always be positive for trade unions, they provide unions with mechanisms to act within, across and around national and European legal frameworks.

Problems facing trade unions

Prior to the European enlargements in 2004 and 2007, trade unions faced a number of problems. As Mückenberger et al. point out, “far-reaching technical, economic and socio-cultural changes have been threatening the foundations of all European trade unions since the 1970s.”⁴³ According to trade unions, this has led to increasingly individualistic societies.⁴⁴ Yet Mückenberger et al. argue that this is merely

³⁸ G. Thomson, *United Kingdom: A Total dispute*, 15/2/2009, UNISON.

³⁹ *Ibid.*

⁴⁰ Arbeitnehmerentendegesetz (AentG) BGBI. I 2009, S. 799.

⁴¹ M. Kniesburges, ‘Europa ja. Aber nicht so!’, *ver.di-Publik*, May 2008.

⁴² Ver.di, *Letter by Frank Bsirske (General Secretary of ver.di) to the German chancellor*, 16/6/2008 available at https://international.verdi.de/europapolitik/eugh/ver.di-vorsitzender_fordert_bundeskanzlerin_zum_handeln_auf/data/briefanmerkmal19052008.pdf.

⁴³ U. Mückenberger, C. Stroh & R. Zoll, ‘Einleitung: Die Modernisierung der Gewerkschaften in der Europäischen Union’ in U. Mückenberger, E. Schmidt & R. Zoll (eds.), *Die Modernisierung der Gewerkschaften in Europa*, Verlag Westfälisches Dampfboot, Münster, 1996 at p. 9.

⁴⁴ D. Esslinger, ‘Teilzeit und Leiharbeit fressen Demokratie auf’ *Süddeutsche Zeitung* 14/4/2010.

“an excuse”⁴⁵. In their opinion, trade unions should focus on the wider problems of societal change. For them, “the nature of work and lifestyle as well as the generational and gender make-up of society are undergoing a process of change.”⁴⁶ Traditional trade union structures no longer appeal to members and trade unions who often do not know how to react to “explosive questions on work and identity, the environment, occupational skills, health and safety at work, and migration.”⁴⁷

For trade unions in Germany and the UK, these developments are reflected in a strong decline in membership figures, which has far-reaching consequences. As membership is a strong indicator of workers’ capacity for collective action⁴⁸, a fall in membership points to a decline in union strength. Membership levels are obviously not the only means by which union strength or weakness can be measured. One could also, for example, look at the coverage of collective agreements. However, “union density – membership as a proportion of all wage and salary earners – is the most readily available indicator for measuring the strength of a union movement.”⁴⁹ In both Germany and the UK this has declined starkly over the last two decades and trade unions in both countries are concerned about the implications of this decline. In addition, “the transition from an industrial to a service economy erodes the basis for union organisation.”⁵⁰ Thus, trade unions in Germany and the UK are threatened by the increasing “privatisation, down-sizing and outsourcing of the labour market.”⁵¹ This has been partly driven by government reforms in Germany and the UK to change the structure of the traditional welfare state, of which trade unions in both countries were an integral part, in order to improve the competitiveness of their respective economies. The traditional employer-employee relationship, which was characterised as being “permanent, continuous and full-time in a medium-sized or large enterprise”⁵² and which was at the heart of trade union policy, has also slowly been eroded. Trade unions have often failed to adapt their structures to these changing employment relationships. According to Mückenberger et al, trade union structures in Europe are traditionally characterised by a certain amount of “democratic centralism: trade union leaders had broad competencies whereas the members who showed a high degree of willingness to comply, delegated representation of their interests to the trade union structures.”⁵³ These structures are no longer able to effectively respond to first, “the new work patterns which have replaced dying industries” and, second, “workers who have become economically specialised and culturally differentiated.”⁵⁴

Apart from developments at a national level, such as the privatisation or decline of industries, unions are also facing the threat of businesses outsourcing work to countries with lower production costs. Thus, globalisation has played a role in the demise of traditional trade union structures. Moreover, “changes in social values and expectations of workers towards unions”⁵⁵ have forced unions to reassess their traditional role as worker associations. It was argued even before the recent European enlargements that trade unions needed to modernise their organisational structures and their political interests in order to survive. In light of the increasing influence of the European Union and globalisation on national labour law systems, they need to “bridge the gap between supranational economic spheres and national politics.”⁵⁶ However, this can only be done through “a decentralisation

⁴⁵ Mückenberger et al. note 43 above at p. 9.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ B. Ebbinghaus and J. Visser, ‘When Institutions Matter – Union Growth and Decline in Western Europe’ (1999) *European Sociological Review* 135.

⁴⁹ *Ibid* at p. 135.

⁵⁰ *Ibid* at p. 141.

⁵¹ *Ibid* at p. 141.

⁵² Mückenberger et al. note 43 above at p. 11.

⁵³ *Ibid* at p. 12.

⁵⁴ *Ibid* at p. 17.

⁵⁵ Ebbinghaus and Visser note 48 above at p. 143.

⁵⁶ Mückenberger et al. note 43 above at p. 24.

of their organisational structures thus linking the trade union to the world of its (actual and potential) members.”⁵⁷

Some of the problems facing trade unions have been aggravated since the European enlargements in 2004 and 2007. For example, the provisions in the Treaty on the Functioning of the European Union providing for free movement of workers and services allowed new Member State workers and businesses to move to Germany and the UK, thus increasing the existing problems for trade unions in both countries. Germany and the UK have responded to the European enlargements in different ways. The UK granted access to its labour market to workers from those Member States that joined in 2004, from the date of accession. However, this right of access was coupled with a mandatory Worker Registration Scheme (WRS) for all new Member State workers, with the exception of those from Cyprus and Malta.⁵⁸ This scheme will continue to operate until May 2011. A different regime applies to workers from Romania and Bulgaria. Romanians and Bulgarians wishing to work in the UK need to apply for permission from the Home Office before starting work.⁵⁹ Germany enacted national measures which severely restrict the right of new Member State workers to move freely between their home country and Germany. German trade unions in particular lobbied extensively⁶⁰ for the imposition of such measures as they feared that the arrival of new Member State workers would result in a reduction in wages and a rise in the already high unemployment rate in Germany. Under German law, most workers from the new Member States which joined in 2004 and 2007 require a work permit in order to take up a job in Germany.⁶¹ Special provisions also apply to workers who enter the country as seasonal or posted workers.⁶²

Following the enlargement in 2004 and the imposition of strict national measures restricting access to the labour market, Germany and Austria were replaced by the UK and Ireland as the main destination of migrants from the new Member States. Approximately 70% of migrants from the new Member States travelled to the UK and Ireland. By the end of 2007, they made up about 1% of the population in the UK.⁶³ It has been suggested that these figures under-estimate the true position due to limited data availability.⁶⁴ For the most part, new Member State workers have been positively received in the UK. In particular, employers have praised their “strong work ethic”⁶⁵. However, research by Anderson and Rogaly found that some new Member State workers are subject to such levels of

⁵⁷ *Ibid* at p. 24.

⁵⁸ For an overview of the scheme see UK Border Agency, *Worker Registration Scheme* available at <http://www.ukba.homeoffice.gov.uk/workingintheuk/eea/wrs/> or S. Currie, *Migration, Work and Citizenship in the Enlarged European Union*, Ashgate, Surrey, 2008.

⁵⁹ For more information see UK Border Agency, *Living and working in the United Kingdom – Bulgarian and Romanian nationals* available at <http://www.ukba.homeoffice.gov.uk/workingintheuk/eea/bulgariaromania/liveworkuk/>.

⁶⁰ E. Jileva, ‘Visa and Free Movement of Labour: The Uneven Imposition of the EU *Acquis* on the Accession States’ (2002) *Journal of Ethnic and Migration Studies* 683 at p. 694.

⁶¹ Bundesministerium für Arbeit und Soziales, *Fragen und Antworten zur Beschäftigung ausländischer Arbeitnehmer in Deutschland* available at http://www.bmas.de/portal/31660/property=pdf/2009__03__11__faq__beschaeftigung__auslaendischer.pdf

⁶² For a detailed overview see T. Faist, K. Sieveking, U. Reim, & S. Sandbrink, *Ausland im Inland: Die Beschäftigung von Werkvertragsarbeitnehmern in der Bundesrepublik Deutschland – Rechtliche Regulierung und politische Konflikte*, Nomos, Baden-Baden, 1999 and Bundesagentur für Arbeit, *Beschäftigung ausländischer Arbeitnehmer aus den neuen Mitgliedsstaaten der EU im Rahmen von Werkverträgen in der Bundesrepublik Deutschland*, October 2009 available at <http://www.arbeitsagentur.de/zentraler-Content/Veroeffentlichungen/Merkblatt-Sammlung/MB-16a-Beschaeftigung-auslaendischer-AN.pdf>.

⁶³ European Integration Consortium, *Labour Mobility within the EU in the context of enlargement and the functioning of the transitional arrangements*, Nuremberg, 2009 at p. 23.

⁶⁴ *Ibid* at p. 17.

⁶⁵ Equality and Human Rights Commission, *The UK’s new Europeans: Progress and challenges five years after accession*, January 2010 above at p. 6.

exploitation that they fall within the international legal definition of “forced labour”⁶⁶. A Report by the Equality and Human Rights Commission states that “in many cases the new migrants have precarious employment and housing arrangements, are vulnerable to exploitation, or lack support networks and access to information.”⁶⁷ There have also been allegations of ‘social dumping’ in some industries,⁶⁸ and the arrival of large numbers of workers availing themselves of their rights under European law sparked the above-mentioned debates on the provision of ‘British Jobs for British Workers’.

Despite the restrictions on access to its labour markets, Germany remains an attractive destination for new Member State workers. However, allegations of wage dumping resulting in the loss of local jobs emerged in sectors like the German meat industry, where there is evidence that service providers from the new Member States often pay their workers wages which are well below the rates paid to Germans.⁶⁹ More recently, a German newspaper reported that the German national train company (Deutsche Bahn) was using workers from the new Member States to clear stations and tracks of snow while paying them below the industry standard.⁷⁰ This development is part of broader allegations that new Member State workers circumvent the transitional measures by being sent to work in Germany as posted workers. In addition to allegations of ‘social dumping’ through posted workers, Germany has reported rapidly growing numbers of new Member State citizens who have registered as self-employed service providers, which has been interpreted as a means of circumventing the transitional arrangements.⁷¹ There are fears that, following the lifting of the transitional arrangements in May 2011, large numbers of new Member State workers will arrive. Even though these fears are often rejected as unfounded⁷², trade unions are looking to developments in the UK in order to prepare themselves for the lifting of the restrictions on access to the labour market. Thus, both the British and the German labour markets have been affected by the recent European enlargements and both are struggling to accommodate the developments following the enlargements, despite restrictions (to varying degrees) on access to their labour markets.

What is the way forward?

Recently, German and British trade unions have focused much of their reaction to the effects of Europeanisation on calling for a more ‘social Europe’. Ladrech writes that “Europeanisation involves interest groups’ response to a perception that the EU level is or will generate potential changes in their specific operating environment.”⁷³ The calls by the unions for a more ‘social Europe’ are an example of such a perception. As trade unions in Germany and the UK struggle to maintain their influence in the social sphere in their national legal systems, they call for the involvement of the European Union in order to secure social rights. This development is not new. Historically, German trade unions were in favour of the European project, as European integration opened up new opportunities for German

⁶⁶ B. Anderson & B. Rogaly, *Forced Labour and Migration to the UK*, Study prepared by COMPAS in collaboration with the Trades Union Congress, Oxford, 2005 at p. 7.

⁶⁷ Equality and Human Rights Commission note 65 above at p. 6.

⁶⁸ See, for example, the Report of the *Inquiry into recruitment and employment in the meat and poultry processing sector* published by the Equality and Human Rights Commission in March 2010 which examines the preferences of employers for either British or migrant workers. This practice often leads to tensions in the local community.

⁶⁹ L. Czommer and G. Worthmann, *Von der Baustelle auf den Schlachthof. Zur Übertragbarkeit des Arbeitnehmer-Entsendegesetzes auf die Deutsche Fleischbranche*, IAT-Report 2005/3, Institut Arbeit und Technik, Gelsenkirchen.

⁷⁰ U. Ritter, ‘Unsaubere Winterdienste – Osteuropäer schippen für Hungerlöhne auf Bahnhöfen Schnee und reinigen Züge der Deutschen Bahn’ *Süddeutsche Zeitung*, 16th and 17th January 2010.

⁷¹ *Ibid.*

⁷² M. Heinen & A. Pegels, *EU Expansions and the Free Movement of Workers: Do Continued Restrictions Make Sense for Germany?*, focus Migration Policy Brief, July 2006.

⁷³ R. Ladrech, *Europeanization and National Politics*, Palgrave, Basingstoke, 2010 at p. 154.

unions that were losing influence in their national political field.⁷⁴ Similarly, British trade unions, which, for a long time, had an ambivalent outlook on the EU, only decided to support the UK's membership of the EU once they began to lose influence in their domestic labour law system. As Hyman writes, "the 'social dimension' of the EU became far preferable to the market liberalism of the Thatcher government."⁷⁵

However, reacting to what one perceives the EU may change, is not the most effective way of dealing with the consequences of Europeanisation. The recent judgments of the ECJ demonstrate that a European social contract (europäischer Sozialvertrag)⁷⁶ which the German trade union confederation (DGB) has repeatedly called for, is not a realistic prospect. According to the General Secretary of the DGB, Michael Sommer, a European social contract would allow trade unions to "socially regulate capitalism"⁷⁷ in the European Union. European integration necessitates a "change in lifestyles and labour markets"⁷⁸. In order for workers to benefit from this change, "European trade unions need to ensure that information and consultation in enterprises, as well as autonomous collective bargaining, become one of the pillars of a democratic and social European Union."⁷⁹ The development of the process of Europeanisation so far, especially the recent lack of hard law mechanisms in the regulation of European Labour Law, indicates that an institutionalised European social contract is a European trade union dream that is unlikely to be realised in the near future. Trade unions should instead concentrate on strengthening their continuous involvement in the process of the Europeanisation of national labour law systems. This can be done through engagement at a national and a European level.

The DGB seemed to recognise this when it called for trade unions to 'Europeanise' their policies.⁸⁰ This is defined as according a more central role to European and cross-border issues. If the definition of Europeanisation used in this paper is applied to the DGB's suggestion to 'Europeanise' policies, then it follows that trade unions must find ways to act within a process of domestic change due to European integration. As Europeanisation is a two-way process, there are opportunities for trade unions to play a role at a national level through consultation on and implementation of European legislation, and at a European level through involvement in the OMC and with the help of the ETUC. To date, this is not sufficiently utilised. Kriesi et al. observe that "the salience and accessibility of the decision-making process of the EU is much lower than that at the national level, which explains why they [domestic actors] are still predominantly focused on influencing the national political process."⁸¹ This is the case, even though they could play a much more active role in the European process of decision making. The necessity of this is recognised by Rödl when he writes that "there are two opposing models: either labour relations will continue to be a national matter or they will become a matter to be developed and structured in a European context."⁸² However, this can only be achieved if trade unions leave behind "the period of vague suggestions."⁸³ How should national trade unions conduct themselves in responding to the recent European enlargements and the new Member State workers?

First, trade unions could adopt an active role in the process of Europeanisation. At a national level, a strengthening of the political role of trade unions could secure a voice for trade unions in the

⁷⁴ T. Schulten, 'Gewerkschaften und europäische Integration – Aktuelle Facetten eines ambivalenten Verhältnisses' in J. Beerhorst & H.-J. Urban (eds.), *Handlungsfeld europäischer Integration*, VSA-Verlag, Hamburg, 2005 at p. 23.

⁷⁵ R. Hyman, 'Trade Unions and "Europe": Are the Members out of Step?' *LEQS Paper* No 14/2009, November 2009 at p. 26.

⁷⁶ *Ein europäischer Sozialvertrag für das 21. Jahrhundert*, Sechs Thesen von Michael Sommer, Berlin 7/4/2005.

⁷⁷ *Ibid* at p. 1.

⁷⁸ *Ibid*.

⁷⁹ *Ibid*.

⁸⁰ *Ibid* at p. 4.

⁸¹ H. Kriesi, A. Tresch & M. Jochum, 'Going Public in the European Union: Action Repertoires of Western European Collective Political Actors' (2007) *Comparative Political Studies* 48 at p. 69.

⁸² F. Rödl, 'Bleierne Zeiten für die Arbeitsbeziehungen', *Mitbestimmung* 3/2009 at p. 10.

⁸³ *Ibid* at p. 14.

implementation process of Directives. This would allow trade unions to influence the process of Europeanisation in order to produce legislative measures which match their aims and goals. However, there has been a lack of Europeanisation through hard law mechanisms in the sphere of labour law in recent years. Therefore, an interest and involvement in the OMC seems necessary if trade unions are to secure a role in the process of Europeanisation. Without time constraints on implementation or enforcement mechanisms to ensure compliance, the OMC may not be as successful at Europeanising national labour law systems as Directives which must be complied with. Nonetheless, an exchange of best practice between trade unions in different Member States could provide answers to similar problems. An initiative such as the German/British ver.di/UNISON Memorandum of Understanding signed in 2004 is a first, formalised step in this direction. However, there still seems to be confusion as to what each union is doing, and despite regional cooperation between the unions on certain issues, a systematic exchange of information is not taking place.

Apart from the example of the Memorandum of Understanding, there is a general lack of cross-border engagement between European trade unions. As a result of this lack of communication, trade unions are struggling to react to the effects of Europeanisation. This could change if knowledge exchange on, for example, techniques for integrating new Member State workers, were to take place systematically. Increased cooperation between European trade unions could not only facilitate the integration of new Member State workers, it could also lead to transnational labour market coordination within the EU. The OMC could lay the groundwork for such coordination and this would enable trade unions to effectively respond to the challenges of the European enlargement by acting within, around and across national and European legal frameworks. As Rödl explains,

transnational labour market coordination would be the way in which trade unions could facilitate an opening of national labour markets. This way, cross-border competition which leads to a lowering of labour standards could be effectively combated. In addition, it could enable trade unions to strengthen their political role at a European level.⁸⁴

Trade unions could also strengthen their political role at a European level through an active involvement in the ETUC. The difficulty that often arises is that trade unions, particularly in the UK, lack the strength at a national level to influence policymaking. There is thus limited scope for their involvement in the European decision-making process if they rely solely on their national strength. Yet this could be resolved if the ETUC were to take on a stronger role. There is evidence that national trade unions would welcome it if the ETUC were to take on a stronger negotiating and coordinating role, as it would provide them with a voice at a European level. As German and British trade unions are unsure about how to react to the process of Europeanisation, the ETUC could serve as the medium through which the unions influence the formulation of European policies and legislation. This role for the ETUC has been recognised in the literature by Mückenberger et al. who encourage European trade unions to “become organisations for discourse and communication in order to find general subjects of interest”⁸⁵ which would, for them, be a positive development to ensure the survival of trade unions.

However, to date, the ETUC is often not able to coordinate national trade unions. While there are situations such as the negotiation of the Parental Leave Directive where the ETUC has effectively consulted its affiliates, there is scope for more to be done. In particular, the regular and on-going consultation of national affiliates has been criticised for lacking depth and scope. However, the European enlargements and the influx of new Member State workers are prime examples of situations where the ETUC could play an effective role in supporting national trade unions in their efforts to integrate new Member State workers into the labour market. The ETUC has begun to develop initiatives such as an exchange of good practice for the recruitment of new Member State workers, yet there is room for improvement on the part of the affiliates and the ETUC. Large cultural differences between members makes communication between the unions difficult. Small-scale cooperation such as the Memorandum of Understanding between ver.di and UNISON, which could lead to regular and

⁸⁴ *Ibid* at p. 15.

⁸⁵ Mückenberger et al. note 43 above at p. 24.

structured cooperation, may help to bridge the cultural differences between unions and, in turn, enhance the role of the ETUC.

Conclusion

German and British trade unions have been faced with a number of problems in recent years. Apart from developments at a national level, trade unions are struggling to react to the European Union's policy of europeanising national labour law systems. The recent European enlargements which took place in 2004 and 2007 have increased the problems facing trade unions. However, Europeanisation also provides trade unions with opportunities to strengthen their role at a European and national level. There is a strong argument in favour of more consultation within and a stronger role for the ETUC. However, the effectiveness of the ETUC does not just depend on it consulting its affiliates; national trade unions must recognise the importance of trade union representation at a European level. The ETUC cannot be effective if it does not receive the active cooperation of its affiliates. Yet trade unions still seem to focus too much of their attention on the national level. Trade unions need to accord a central position to European affairs if they are to react effectively to the changes of Europeanisation. To date, European matters are dealt with by most German and British trade unions as a sub-category of 'International affairs', even though the unions have the potential to play a much stronger role within the EU than at an international level. If trade unions were to accord greater importance to European and cross-border issues, they could work to strengthen their role, not only in the implementation process of European law at a national level, but also in their national labour markets as a whole. As the effects of Europeanisation are unlikely to disappear, trade unions would benefit from a reorientation of their policies and strategies in order not only to take account of the process of Europeanisation, but also to play an active role in determining its outcomes.

