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## LITHUANIAN LABOUR LAW IN THE CONTEXT OF THE EU CHARTER OF FUNDAMENTAL RIGHTS<sup>1</sup>

### Introduction

In spite of differences of (international) human rights' protection systems in terms of substance of guaranteed rights, their enforceability or supervision systems, the need to (re) examine the relationship between national law and international human rights documents becomes of an utmost importance on mainly two occasions. First of all, the accession of the country to the new human rights instrument makes it always necessary to check upon the compliance of the national law with new system of human rights' standards. Secondly, legal reforms and structural changes in the domestic law may endanger the supposed or (maybe falsely) prejudiced conformity with international human rights provisions. It seems that both conditions are met in case of Lithuanian labour law. European Union Charter of Fundamental Rights (Charter) becomes a binding source of Lithuanian law with its incorporation in the primary law of the European Union. In addition, Lithuania has recently embarked on the path toward overall reform of labour law. The national project called 'Social Model' is the set of legislative initiatives proposed by the group of Lithuanian researchers contracted by the Lithuanian Ministry of Social Security and Labour for the purpose of modernising the social system in the country. The social model consists of more than 40 pieces of legislation in the areas of labour law and social insurance, and aims to increase the competitiveness of the labour market as well as the sustainability of the troubled state welfare system. The key element of the new 'social model' is the proposed Labour Code – a draft of the new and qualitatively different legal act instead of the Labour Code which was adopted in 2002. It is believed that recodification of the labour law would bring legal certainty and transparency into the labour market, where the relationship between employees and employers would become more predictable and balanced, and the flexibility of law would stimulate economic growth and encourage creation of new jobs<sup>2</sup>.

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<sup>2</sup> For more see [www.socmodelis.lt](http://www.socmodelis.lt) (in Lithuanian). The 'social model' was approved by the Government in 2015 and it under discussion in Parliament. The draft Labour Code (*Darbo kodeksas*) is available under [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=1041192&p\\_tr2=2](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=1041192&p_tr2=2), accessed 10 December 2015. The reasons of recodifications were briefly presented in Davulis T. The fifth anniversary of the new Lithuanian labour code: time to change? The modernization of labour law and industrial relations in a comparative perspective / editor: Roger Blanpain. Alphen aan den Rijn: Kluwer Law International, 2009, p. 355–366.

The present article aims to analyse the existing and proposed Lithuanian labour legislation from the perspective of the relatively new human rights instrument – the Charter of Fundamental Rights of European Union. First of all, the article briefly explains the evolution of the social rights at the European level outlining the relevance of Charter in practical terms. The Charter contains a whole set of individual rights which are of some significance to employees and employers. However, the special importance can be attributed to those rights which are incorporated under the title ‘Solidarity’ of the Charter as they directly and specifically target the employment relationship. The current research focuses on the Lithuanian situation with regard to compliance with the the standards of those social rights.

## 1. EU Charter of Fundamental Rights – New Source of Labour Law

*“Fundamental rights must be visible (...) This process includes both civil and social rights”<sup>3</sup>.*

The European Union and European Communities have been struggling for a very long time with the need to identify themselves and to legitimate the autonomous legislative, executive and judicial powers they have received from the Member States. The search for roots of and basis for European integration has led to the acknowledgment of common values as a basis for generic goals and joint actions. Since the early stages of European constitutionalism, the state sovereignty cannot be perceived without human rights perspective. The vital importance of the protection of human rights in the European Communities was first recognised by the Court of Justice (CJEU). Acting as locomotive of European integration the Court has, in an impressive way, introduced fundamental rights into Community legal order by referring also to external sources such as European Convention of Human Rights and internal sources such as constitutional traditions of the Member States<sup>4</sup>. Afterwards, the human rights dimension was inserted in the formal constitutional documents of the Union starting with the 1989 Community Charter of the Fundamental Rights of Workers, although the Charter at that time was not accompanied by the corresponding legislative powers or a general commitment for common social policy<sup>5</sup>. The peak of this development was a creation and promulgation of the Charter of Fundamental rights of the European Union in 2000 and its integration into the Lisbon Treaty (Article 6 (1) of the Treaty on European Union – TEU). The Charter has been legally binding since 1 December 2009. It is binding on European Union institutions when enacting new measures. It binds the Member States when they act within the scope of the Union law.

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<sup>3</sup> Affirming Fundamental Rights in the European Union. Report of the Expert Group on Fundamental Rights led by S.Simitis. European Commission, 1999.

<sup>4</sup> Since the Judgement of the Court in the Case No 29/69 Stauder, ECR 1969. In this context see, for instance, Hirsch G. Die Grundrechte in der Europäischen Union. Recht der Arbeit, 1998, p. 195.

<sup>5</sup> Watson E. The Community Social Charter. Common Market Law Review 28, 1991, p. 67.

Despite some deficiencies and problematic points related to the charter (such as mixture of political goals and fundamental rights, interaction of policy provisions and concrete instruments, horizontal effect of the provisions of the Charter, not coherent relationship with the competences of European Union or the limited scope of application, etc.), the Charter undoubtedly is a big step forward in both developing European integration and promoting human rights. The Charter is an expression of the fact that the Union is based on values, and all powers of the Union shall be exercised respecting these fundamental values.

The remarkable achievement of the Charter is inclusion of the so called social rights in the text of the Charter. J.Schwarze defines it as an acceptable compromise<sup>6</sup>. The fact that they are recognised in the same way as political rights eliminates the perception that the social rights are merely the political goals or non-enforceable illusional expectations. The equal status of political and social rights within the Charter does not only reflect the consciousness that economic and social integration is equally valuable for the success of the European project, but it also demonstrates that fundamental social rights may be used in the same way for the goal of shaping European and national legal systems to create socially just working and social environment for all citizens of the European Union. As indicates G.Sacerdoti, such a commitment serves to distinguish it from the American model which entails little protection, predominately relying on individual undertakings, and from developing nations, where such protection would be utopian<sup>7</sup>.

The duty of observance of the Charter is not limited to the European Union institutions (including the European Parliament and the Council) but also to the Member States when they implement Union law. The Commission can open infringement proceedings if it becomes aware of a breach of the Charter. But also national judges are aware of the Charter as an instrument to ensure compliance with fundamental rights by the Member States. Provisions of European Union law and national law based on Union law must be interpreted in coherence with Charter obligations, so as to give effect to the rights guaranteed under it. Where a national court has doubts as to the applicability of the Charter or the correct interpretation of its provisions, it can – and, in the case of a national court of last instance, must refer to the CJEU for a preliminary ruling.

As pointed out by S.Sciarra, the interdependence of international legal sources is one of characteristics of constructing and consolidating social rights in the European Union<sup>8</sup>. The protection is guaranteed both at national level by the Member States' constitutional systems and at European Union level by the Charter. Moreover, Article 153 TFEU as well as the Preamble of TEU contain the reference to the European Social Charter whilst there was acknowledgement of the European Convention of Human Rights in Article 6 TEU. These references ipso facto were not sufficient to reaching the qualitative level of the

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<sup>6</sup> Schwarze J. Der Grundrechtsschutz for Unternehmen in der Europäischen Grundrechtecharta. Europäische Zeitschrift für Wirtschaftsrecht, 2001, p. 521.

<sup>7</sup> Sacerdoti G. The European Charter of Fundamental Rights: from a nation-state Europe to a Citizens' Europe. Columbia Journal of European Law, Vol. 8, 2002, p. 45.

<sup>8</sup> Sciarra S. Individuals in search of fundamental social rights. Zur Autonomie des Individuums. Liber Amicorum Spiros Simitis, 2000, p. 410.

protection of fundamental rights<sup>9</sup>, however, all the Member States are directly bound by the commitments they have made under the European Convention on Human Rights and the European Social Charter, independent of their obligations under the European Union law. Therefore we can conclude that protection of fundamental rights has gained multiple dimensions in the European Union.

As a young source of law, the Charter has steadily gained legal importance. In 2014, 210 decisions in European Courts quoted the Charter, compared with 43 in 2011, 87 in 2012 and 114 in 2013<sup>10</sup>. Rulings of CJEU provided guidance to the Member States in various contexts, including clarification of the scope of the Charter's application; its relationship to secondary law; and the further clarification of a number of specific Charter rights.

The practical relevance of the Charter for the Member States is confirmed by the each-year-increasing amount of references to the Charter in the applications for preliminary rulings submitted by national judges to the CJEU. Research done by the Fundamental Rights Agency (FRA) confirms that in 2014 Member State high courts continued referring to the Charter for guidance and inspiration, even in cases which fell outside the scope of the EU law. In 2014, 43 of the requests submitted contained a reference to the Charter<sup>11</sup>. The research also identified that national courts are still struggling to identify independent and unique legal value of the Charter when they refer to the Charter alongside with national constitutional provisions or European Convention on Human rights or other international legal documents. However, it is important that the national judges want to play a key role upholding fundamental rights and the rule of law and the Charter may be used in various roles to this end. The Charter becomes not only a source of inspiration but an instrument to be interpreted, observed and applied in domestic legal order.

The Charter contains 54 articles divided into seven titles. The first six titles deal with substantive fundamental rights under the headings dignity, freedoms, equality, solidarity, citizens' rights and justice. The most important provisions for the labour lawyers are incorporated in the Chapter under the Title IV "Solidarity". The Title "Solidarity" contains 12 Articles which cover different areas of social life – from health protection (Article 35) to consumer protection (Article 38), from environmental protection (Article 37) to working conditions (Article 31). Provisions of the chapter are also mixed in their nature: some of them contain purely political declarations (Article 36 (the right of access to services of general economic interest), whilst others can be seen as individual rights (Article 29 (access to a free placement service), Article 30 (the protection against unjustified dismissal), Article 31 (the right to fair and just working conditions), Article 32 (prohibition of child labour). The rights to collective bargaining and industrial action (Article 28) as well as the right to information and consultation are formulated as subjective rights granted to employees and employers as well as their representatives. M.Weiss also rightly reproaches systematic inconsistency if the fundamental rights are confused with the instruments

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<sup>9</sup> Zachert U. Auf den Weg zu europäischen Arbeitnehmergrundrechten? Neue Zeitschrift für das Arbeitsrecht, 2000, p. 623.

<sup>10</sup> Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 2014 report on the application of the EU Charter of Fundamental Rights, COM(2015) 191 final, p. 6.

<sup>11</sup> Fundamental rights: challenges and achievements in 2014. FRA Annual Report 2014, p. 167–168.

necessary to promote the values as expressed by such fundamental rights. This has been the case of Article 31 (1) which expresses the right to working conditions which respect his or her health, safety and dignity whereas Section 2 of the same Article specifies the guarantee with a detailed specification that every worker has the right to limitation of working hours, to daily and weekly rest periods and to an annual period of paid leave. The confusion of this provision with a fundamental right may have an effect of delegitimation of subjective fundamental right<sup>12</sup>.

Not only the rights consolidated in the chapter ‘Solidarity’ are of significance for the participants of employment and industrial relations; such fundamental rights as prohibition of forced labour (Article 5 of the Charter), the protection of personal data (Article 8), the freedom of thought, conscience and religion (Article 10), the freedom of expression and information (Article 11), the freedom of association (Article 12), the right to education and to have access to vocational and continuing training (Article 14), the right to engage in work and to pursue a freely chosen or accepted occupation (Article 15), the prohibition of discrimination (Article 21) and equality of men and women (Article 23), the rights of persons with disabilities (Article 26) or the right to free movement (Article 45) will have an utmost importance for employers and employees as well as their representatives. In other words, the protection of those rights will also be safeguarded in the context of labour law, in employment and industrial relations.

At the national level, the substance and the conditions of implementation of the social rights vary significantly. Therefore, it is inevitable, at least for the time being, to refer to the law of European Union and the practice of implementation of social rights in the framework of the European Social Charter and the European Convention of Human rights when considering the uniform standard of the rights provided by the Charter.

## **2. Provisions of the Lithuanian Collective Labour Law in the Light of the Charter**

Traditionally, the regulative provisions of the national labour law are divided into two major parts – one that deals with the relationship between two parties to the contract of employment (‘Individual Labour Law’) and the second which is focused on the inter-relationship between collective actors – trade unions, works councils and employers’ organisations – who are deemed ‘representatives’ of the individual parties to the contract<sup>13</sup>.

Collective labour law (in some jurisdictions, the notion of ‘industrial relations’ is used) has a special position in every national legal system. The manner in which the state establishes who is entrusted with the mandate of collective representation of workers’, how are the collective bargaining at different levels organised, how restricted the right to strike or lockout is – these questions determine the structure and content of the entire national labour law to a large extent. Because of long lasting traditions, the balanced

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<sup>12</sup> Weiss M. Introduction to European Union Law: European Legal Framework, EU Treaty provisions and Charter of Fundamental Rights. EU Labour Law: a commentary, ed. by M.Schlachter, Kluwer, 2015, p. 14.

<sup>13</sup> See, for instance, Nekrošius, I. (et al). Darbo teisė, 2014, p. 14.

principal provisions of collective labour law are not easily susceptible to reforms and therefore are modified very rarely.

The Chapter ‘Solidarity’ contains two important articles which are clearly linked to the collective labour law – Articles 27 and 28 which are devoted to the right to information and consultation and the right to collective bargaining and industrial action respectively.

### *2.1. Workers’ Right to Information and Consultation within the Undertaking*

Article 27 of the Charter provides that workers or their representatives must, at the appropriate levels, be guaranteed information and consultation, in good time, in the cases and under the conditions provided for by the European Union law and national laws and practices.

The right to information and consultation has already a strong foundation in the Community Charter of the Fundamental Rights of Workers (1989) (points 17–18) and in a revised European Social Charter (Article 21). As F. Dorssemont points out rightly, the Charter seems to ‘constitutionalise’<sup>14</sup> a rich existing *acquis* in this field. The European Union has adopted a number of directives which provide for obligatory involvement of employees’ representatives in the decisions making procedure within employer’s different organisational structures<sup>15</sup> or in cases of ‘sensitive’ decisions<sup>16</sup>. Such involvement is understood as different types of procedural influence on the decisions of an employer: a) the right to receive (information), b) the right to be consulted (consultation) and c) the right to appoint some of the members of the company’s supervisory or management board (participation).

The phenomenon of workers’ involvement is not totally new for Lithuania since there was already a set of rules on participation of the local trade union committees or the collective of employees in the management of Soviet-type enterprises. After the reinstatement of the independence in 1990, the extensive role of trade unions was abolished. For a very long time the Lithuanian law did not envisage any provision on similar duties for the employer. There was also no provision on any form of participation of the employees or their representatives in the management or supervisory boards of state or municipal enterprises or privatized companies.

<sup>14</sup> The EU Charter of Fundamental Rights: A Commentary, by Tamara Hervey (Editor), Jeff Kenner (Editor), Steve Peers (Editor), Angela Ward (Editor), Beck-Hart-Nomos, 2014, p. 770.

<sup>15</sup> See, in particular, the Directive 94/45 (Revised Directive 2009/38) on European Works Councils, Directive 2001/86 on workers’ participation in European Companies or in European Cooperative Society (Directive 2003/72) as well as in companies remaining after cross-border mergers of public limited liability companies (Directive 2005/56). Of utmost important for the national companies is a Directive 2002/14 on information and consultation at the level of undertaking and establishment, but also Article 11 of Directive 89/391 (framework directive in health and safety). A considerably more “lenient” obligation by its content and binding character to provide information to the employees’ representatives in enterprises is imposed in the directives regulating work under fixed-term employment contracts (Article 7 of Directive 1999/70) and part-time employment (Article 5 of Directive 97/81).

<sup>16</sup> Art. 2 of the Directive 98/59 (Collective redundancies directive), Art. 7 of the Directive 2001/23 (Transfer of undertakings directive).



The information and consultation rights found their place in the Lithuanian legal system only with the introduction of the new Labour Code in 2002<sup>17</sup>. Inspired by European Union law, the new Lithuanian legislation had declared the right of employees' representatives (i.e. company level trade unions and newly introduced works councils) to information and consultation, but the principles, content and procedural particularities were not sufficiently provided by the statutory law. Before acquiring present content, the legislation, though, was revised in 2005 and 2008 to gradually improve the effectiveness and the compatibility with directives.

The first novelty concerned the 'duty holder' of the right to information and consultation. Initially, Article 47 of the Labour Code 2002 conferred the right "to employees" and "to employees, at appropriate level of social partnership" (version of the Code of 12 May 2005). After the revision of 2008, the Code mentions only "representatives of the employees". This solution, in principle, does not interfere with the Directive – in our opinion, the rights of information and consultation can be effectively invoked only if they are used by strong institutionalised structure, such as works council or trade union organisation. Directive 2002/14 is quite ambiguous on who should be considered the holder of the information and consultation rights – a single employee, a group of employees or an institution of representation of employees. The answer to this question seems to be set out in paragraphs 15 and 16 of the Recitals of Directive 2002/14, which confer discretion to the member states to choose whether to exercise this right through representatives or through direct involvement of employees. F. Dorssemont suggests that despite the title of Article 27 of the Charter or the wording of the Article, the right to information and consultation is a collectively exercised right and the collective nature of the right requires institutional presence for its effective implementation<sup>18</sup>.

Consequently, the amendment of Article 47(1) of the Labour Code should not be held to be a restriction on the exercise of information and consultation rights contrary to the directive. However, when postulating the requirement of the presence of institutionalised employees' representatives, the problematic situations may arise in the companies where there is no such employees' representation. In fact, this is problematical for Lithuania, where only 8,4 per cent of workforce is unionised<sup>19</sup> and the trade unions are present only in 6–8 per cent of all companies whilst the works councils are elected only in 1166 companies (2014)<sup>20</sup>. In order to avoid being criticised for inactivity in protecting "unorganised" employees or breach of European Union law<sup>21</sup>, the legislator has also introduced a new provision – communication of information to employees directly or at a general staff meeting about future changes when they are likely to have most heavy implications on their interests (Article 47(10) of the Labour Code).

<sup>17</sup> State Gazette, 2002, No. 64–2569.

<sup>18</sup> The EU Charter of Fundamental Rights: A Commentary, by Tamara Hervey (Editor), Jeff Kenner (Editor), Steve Peers (Editor), Angela Ward (Editor), Beck-Hart-Nomos, 2014.

<sup>19</sup> Lithuania: Working life country profile. European Observatory of Working Life, Available at <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/lithuania/lithuania-working-life-country-profile>, accessed 11 March 2016.

<sup>20</sup> Data provided by the State Labour Inspectorate, based on data from inspected workplaces.

<sup>21</sup> See, EUCJ cases C–382/92 and 383/92 Commission/United Kingdom.

The most significant change, however, is the fact that the legislator sets out a rather clear system of cases when information and consultation is obligatory: a) regular information at least once a year; b) information and consultation prior to taking a decision on redundancies; c) information and consultation in case of transfer of undertaking or any other threat to jobs and employment relations; d) cross-border information and consultation in accordance with special laws on European Works Councils, European Companies<sup>22</sup> etc.

Following the provisions of paragraphs 3 and 4 of Article 4 of Directive 2002/14, the legislator establishes also the main principles of processes: information shall be provided in writing, consultations at the competent level of management shall be organized timely<sup>23</sup>, the procedure shall be aimed at reaching a consensus on the matter<sup>24</sup>.

It should be stated in summary that European legislation on information and consultation has been implemented rather well at the level of law in Lithuania. After the 2008 revision, the legislation not only provides for the concepts of information and consultation, the procedural principles and rules but also indicates the relevant employees' representatives and specific cases when the decision making powers of the employer are restricted with information and consultation duties. The major deficiency pertains to the fact that the legislator does not envisage any special sanctions for employers for breaches of these rules<sup>25</sup>.

It should be noted that, in Lithuania, information and consultation has not yet become a significant form of social partnership as it is the case in many Western European states. The reasons are related not to the legal obstacles but rather to the absence of organised

<sup>22</sup> The transposition of directives on European Works Councils, European Company, European Co-operative Society and the Cross-Border Mergers' Directives was rather formal in Lithuania – there are no deviations from the minimum mandatory provisions of the directives and no additional rights of employees' representatives have been established. A distinctive feature of the national regulation is that a Lithuanian representative of employees always needs to be appointed by institutionalized employees' representatives (i.e. the local trade union or works council) or by their agreement (if there are several enterprises or several trade unions in one enterprise) (see, for example, Article 16 of the Law on European Works Councils). Only if there are no institutionalized employees' representatives or they cannot reach consensus, all employees' delegates of concerned group or undertaking have to vote on their representative from Lithuania. The phenomenon of employee' participation has not been recognized in Lithuania yet therefore transposition of the Directive 2005/56 is relevant only for those cases when this form exists in foreign merging companies.

<sup>23</sup> Inevitably the question arises what the right 'timing' procedure shall be. Following EUCJ judgments in *Junk* (C-188/03) and *Fujitsu Siemens* (C-44/08) the Article 130-1 of the Labour Code tries to concretize this for the case of collective dismissals – the procedure of information and consultation has to be taken before the written individual notice handed out to employees to be dismissed. The form and the quality of information has not been the matter of judicial investigation in national courts so far.

<sup>24</sup> Article 47(7) of the Labour Code indicates *expressis verbis* that the results of consultations should be recorded in the minutes. It remains unclear whether such minutes should be considered an agreement or only a precondition for a future agreement, and what consequences can derive from the failure to fulfil the commitments specified in the minutes. For the agreement to acquire a tangible power and impact on individual employment relations, it should be formalized by a collective agreement.

<sup>25</sup> The only exception is the Article 130-1 of the Labour Code which provides for the sanction of illegality of the dismissal if the procedural rules on collective dismissals were not observed. In this regard see Davulis T. Transposition of European community legislation into Lithuanian labour law: a case study of directive on collective dismissals. *Studia zakresu prawa pracy*. 2009, p. 151–160.



structures of representation and the lack of mutual interest in this form of social dialogue. Both employers and representatives of employees do not perceive fully the goals and benefits of such information. It is also confirmed by the overview of the content of concluded collective agreements – there are no provisions on information and consultation. Employers tend to act unrestrictedly and do not see the benefit in interaction with employees. On the other hand, leaders of trade unions either waive their right to obtain such information or submit demands beyond what is necessary.

The Draft Labour Code intends not to reorganise but to elaborate and to strengthen existing system of information and consultation. There are four fundamental changes to be mentioned. First of all, the Draft Labour Code intends to put the obligation for employees employing more than 20 workers to set the works council obligatory; and the rights to information and consultation will be reserved to works councils. Secondly, the Draft extends the information and consultation rights to the additional important decisions of employer (adoption of work rules, the introduction of the local rules on new technologies, the data protection, protection of employees' private life and new protective measures etc.) (Article 209 of the Draft Labour Code). The draft suggests that works council shall be informed about these forthcoming decisions one month before their adoption. They shall have the right to submit comments and proposals and to initiate consultations with the view of reaching an agreement. Thirdly, the Draft Labour Code introduces general rules on (possible) participation of employees' representatives in the management and supervisory boards of the companies (Article 213 of the Draft Labour Code). The provisions of the Code on participation are of conditional nature yet – the mechanism on appointment by the works council of the members of the employer's managerial or supervisory body) shall be triggered by special laws on different legal entities. In the course of preparation of 'social model', the proposal for introduction of participation rights in the private companies was refused but it is proposed to experiment with this form in state-owned and municipal enterprises, etc.). Finally, the Draft contains a clear system of sanctions against for violation of collective rights of employees' representatives in addition to reinforced system on collective disputes over rights.

## *2.2. Right of Collective Bargaining and Collective Action*

Article 28 of the Charter provides that workers and employers, or their respective organisations, have, in accordance with the EU law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

The right to collective bargaining and collective action has a special status among other fundamental rights of the Charter. Despite the fact that these social rights have a long lasting history and high level of sophisticated protection within the number of systems of other international organisations<sup>26</sup>, they lack the corresponding stipulation at the

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<sup>26</sup> ILO Conventions No 87 and No 98, Article 11 of the European Convention on Human Rights, Article 6 of the European Social Charter including corresponding systems of their supervision.

level of (at least) secondary legislation in the European Union. Despite the fact that the primary legislation recognises the importance of the social dialogue<sup>27</sup> and politically accepts it as fundamental part of European social model<sup>28</sup>, the freedom of associations, the right to call strikes or lockouts, collective bargaining or collective agreements are beyond the scope of permitted social harmonisation by the European Union (Article 153 TFEU). Limited regulatory competence of the Union has, in principle, left this matter within the *domain réservé* of the Member States, and only conflicts between those collective rights and fundamental freedoms of the common market<sup>29</sup> may become the subject for more sophisticated investigation. In this respect, we can only support C.Barnard's assessment of a rather 'symbolic' value of Article 28 of the Charter in this regard<sup>30</sup>. There is no specific secondary legislation on the exercise of these rights at national level. The Member States remain, however, bound by the provisions of the Charter, including the right to strike, in instances where they implement the law of European Union.

The right to collective bargaining and action has much richer history than its 'brother' institute of the information and consultation in Lithuania. This shall not be surprising since the consolidation of trade unions' rights and liberties was seen as crucial element for development of the national labour law system at the early stage of transformation after collapse of the Soviet regime in 1990. The freedom to organise and the right to operate independently were guaranteed by the one of the first new laws – the Law on Trade Unions of 21 November 1991<sup>31</sup>.

Just after the reinstatement of its independence, Lithuania kept experimenting with the question on who has the power to represent employees at the level of enterprise or undertaking. Initially, the powers of such representation were also conferred to trade unions and to *ad hoc* representatives of employees until, by the amendments to the Law made in 1994, it was declared that the sole representative of employees was the enterprise-level trade union. The amendments, which consolidated the monopolist position of trade unions at that time, aimed at strengthening union organisations and the formation of unions by workers. However, it led to the situation that, in the absence of a trade union at the level of company or workplace, the employees in that company are left without any possibility to collective agreement or any other type of collective representation. As the number of members in trade unions did not keep increasing, a large number of enterprises

<sup>27</sup> Article 153 (3) TFEU allows national social partners to implement European directives, under certain preconditions and Article 155 TFEU specifically mentions possibility of contractual relationships between European-level social partners which may even result in adoption of European Union secondary legislation. See, for instance, Directives 97/81 (part time), 1999/70 (fixed-term contracts) and many others.

<sup>28</sup> Weiss M. Grundrechte-Charta der EU auch für Arbeitnehmer? Arbeit und Recht 2001, p. 374.

<sup>29</sup> In particular, CJEU Judgment of the Court (Grand Chamber) of 18 December 2007 in Case C-431/05, *Laval un Partneri*, Judgment of the Court (Grand Chamber) of 11 December 2007 in Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*. See reports on evaluation of the impact on national legal systems in Blanpain R./ Świątkowski A.M. (ed.), *The Laval and Viking Cases: Freedom of Services and Establishment v Industrial Conflict in the European Economic Area and Russia* (Wolters Kluwer, 2009).

<sup>30</sup> The EU Charter of Fundamental Rights: A Commentary, by Tamara Hervey (Editor), Jeff Kenner (Editor), Steve Peers (Editor), Angela Ward (Editor), Beck-Hart-Nomos, 2014, p. 794.

<sup>31</sup> State Gazette, 1991, No. 34–933

felt the vacuum of collective representation. The Labour Code of 2002, substantially modified the model of representation of employees on the enterprise level. Although the local trade unions in an enterprise retained the role of a primary channel of representation of employees, where they did not exist, it became possible to choose among two alternatives – to authorise the branch level trade union to represent the employees of the given enterprise or to elect the works council (Article 19 of the Labour Code). The prerequisites and procedure for electing works councils were regulated by the Law on Works Councils<sup>32</sup> adopted on 26 October 2004.

Consequently, the Labour Code does not use the terms ‘trade unions’ or ‘works councils’ any more – a body representing employees is merely referred to as an ‘employees’ representative’ and it acquires universal rather than special rights to represent *all* employees<sup>33</sup>. These rights cover all aspects of representation in collective labour relations – collective bargaining, collective disputes as well as provision of information and consultation.

The legal framework of collective bargaining and conclusion of the collective agreements is established by the Labour Code<sup>34</sup>. The Code distinguishes between two types of collective agreements concluded on those levels: enterprise-level and higher-than-enterprise-level (sectoral, regional or national) agreements. The parties to sectoral, regional or national agreement determine procedural questions like bargaining, signing, amending a collective agreement freely. But the law is more imperative and detailed in describing the procedure of conclusion of the collective agreement of an enterprise. The main requirement is that employees’ representatives and the employer shall sign the agreement only if the meeting (conference) of the employees approves the agreement (Article 62 (4) of the Labour Code). The Labour Code gives the non-obligatory list of conditions to be specified in collective agreements with the restriction that they may regulate the position of employees only *in favorem*.

The exercise of the right to strike is closely linked to the power of representation of all employees. In 2010, the legislator has eased the conditions to call the strike at the sectoral level – the trade union does not need the support of the majority of employees to call the sectoral strike. However, the secret ballot and support of majority of all employees employed by the employer (including the non-members of the trade union) is still needed for industrial actions at the level of enterprise (Article 77 (1) of the Labour Code). This is very often seen as an obstacle for effective utilisation of the industrial action instrument in achieving the success in the collective bargaining.

The national regulation of the right to collective bargaining and the right to strike at the level of enterprise is based on the principle of single and universal representation

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<sup>32</sup> State Gazette, 2004, No. 164–5972.

<sup>33</sup> See Davulis, T. Litauen: das Konzept der „universellen Arbeitnehmervertretung“. Das erweiterte Europa: Arbeitnehmerbeteiligung an der Entscheidungsfindung im Unternehmen. Bern, 2009, p. 299–343; Davulis T. Die Arbeitnehmervertretung in den Unternehmen und Betrieben Litauens. La représentation des salariés dans les entreprises et établissements de la Lituanie. Collection Allemand juridique langues et cultures juridiques et politiques. No. 11. Paris, 2008. 89 p.

<sup>34</sup> See, in particular, Davulis, T. Kollektivverträge in postsowjetischem Raum: eine Untersuchung am Beispiel Litauens. Tarifrecht in Europa. Hekimler A., Ring G. (Hrsg.). Nomos, 2010, p. 185–210.

of all employees. Various historical reasons are behind this solution, but following that concept, the legislator requires the employees' representative (trade union or the works council) to have the support of the majority of the employees (including non-members) when concluding the collective agreement or calling the strike at the level of enterprise. In this regard, there could be situations where the (minority) trade union will be not allowed to enter into agreement with an employer or will be deprived from the right to take industrial action, if the (majority) trade union or (in case of elected works council – works council) will have a stronger support of all employees within the enterprise. The situation cannot be seen in line with the established principle of the freedom of collective bargaining which shall be enjoyed by each association.

The willingness to increase the role of collective agreements was the primary target of the reform of Labour law in 2002<sup>35</sup>. The Labour Code proclaimed the liberty of collective bargaining but the procedure of conclusion of the agreement and conditions of the right to call the strike were not eased. The prohibition to negotiate in pies was also not lifted – only few provisions were introduced to make collective agreements more attractive (for example, the collective agreements were allowed to provide for possibilities to conclude fixed-term contract of employment or to increase the individual liability of the worker etc). However, the collective bargaining did not gain more importance – the basic employment terms and conditions traditionally remain shaped by the individual agreements or by the state (e.g., in the public sector and by stipulating minimal wage).

The new proposal in the Draft Labour Code tries to redesign the existing system of industrial relations in Lithuania. It suggests introducing the dual channel of employees' representation instead of an existing single channel where one body (trade union or works council) enjoys all the rights of collective representation of employees at the level of company. Based on the example of Western European countries, the dual model would allow the existence at the workplace of the two autonomous bodies (trade union or works council) with separated competences. The trade union would be responsible for collective bargaining whilst works council would take over the information and consultation procedures. Following this approach, the law prescribes the obligation to elect the works councils in each company or enterprise where the average number of employees is 20 or more. The functional duality also means that the works council is prohibited to engage in collective bargaining (an exclusive right reserved for trade unions) and consequently the right to strike.

The fundamental rights to collective bargaining and industrial action will be strengthened in the way of plurality of trade union and their enhanced freedom to take action. Firstly, a trade union will have the right to make decisions by itself about the conclusion of a collective agreement and the support of a staff general meeting (conference) is not necessary anymore. Secondly, the application of a collective agreement is strictly related to the membership of the organisations which concluded it: the collective agreement applies merely to the members of the trade unions and employers' organisations that concluded it. This concept justifies the idea that solely the direct representative of employees

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<sup>35</sup> Nekrošius I. *Lietuvos Respublikos darbo kodekso rengimo ir įgyvendinimo problemos in Darbo teisė suvienytoje Europoje*. Vilnius, 2003. p. 155–156.

(a trade union) may agree on employees' working conditions *in favorem* or *in peius*. It is stipulated that a collective agreement applies generally to the employees—members of the trade union that conclude it, however, the other party, the employer, has the right to apply the conditions *in favorem* also to other members of the staff, if the agreement provides so. The possibility to combine *in favorem* and *in peius* principles is established by stating that the norms of collective agreements at higher level may contain derogations from the conditions laid down in the Code, naturally, with exceptions (e.g. maximum work time and minimum rest time), provided such collective agreements achieve the balance of the employee and employer interests.

It is believed that, when adopted, the new Labour Code will introduce the system which is more favourable for all trade unions – all organisations will be entitled with the right to bargaining and industrial action regardless the number of their members. It shall boost the collective bargaining and eliminate the possible points of non-compliance with international labour standards in areas of collective bargaining and industrial action. With the introduction of lock-outs, the employers' organisation will get the right to take the collective action for the first time, as it is also required by the Charter.

### 3. Fundamental Rights in the Area of Individual Labour Law

The need for protection of fundamental rights is reaffirmed in different aspects of individual employment relationship. The Charter contains a great number of applicable fundamental rights provisions but we here will limit ourselves to three fundamental rights from the Title 'Solidarity' – the protection of employees against unjustified dismissal, the right to fair and just working conditions, the right to reconciliation of work and family life.

#### 3.1. Protection in the Event of Unjustified Dismissal

According to Article 30 of the Charter, every worker has the right to protection against unjustified dismissal, in accordance with the Union law and national laws and practices. Since the instruments at the level of the European Union are essentially limited (see, in particular, directives cited in the Explanatory Note on Article 30<sup>36</sup> as well as relevant provisions in the Directives 92/85 (Pregnancy Protection Directive), 2010/18 (Parental Leave Directive) or other non-discrimination directives<sup>37</sup>) the right to protection against

<sup>36</sup> These are Directives 2001/23, 2008/94 (ex Directive 80/987), but not Collective Dismissals Directive 98/59 which has procedural objectives of dismissal but not the substantive reasons of termination of the individual contract of employment. The issue is also covered by the Article 24 of the revised European Social Charter and the ILO Convention No. 158.

<sup>37</sup> Surprisingly, the explanatory note makes no reference to the Directive 98/59 (Collective dismissals). J. Kenner explains this omission by the essentially procedural objectives of the Directive, which is not directly concerned with the substantive employment rights of the workers. He is rather willing to support the approach that by 'providing fairness in the process' and the 'substance of dismissal' the Article 30 have the primary purpose to protect the dignity of the person (Article 3 of the Charter). The EU Charter of Fundamental Rights: A Commentary, by Tamara Hervey (Editor), Jeff Kenner (Editor), Steve Peers (Editor), Angela Ward (Editor), Beck – Hart – Nomos, 2014, p. 809–810.

unjust dismissal is an essentially defensive right to protect the worker against the abuse of managerial power<sup>38</sup>.

It should be stated at the outset that the Soviet Labour Code provided an exhaustive list of eight grounds for the termination of the employment contract on the initiative of the administration of the enterprise. The Labour Code of 2002 followed another pattern: to reduce the number of grounds, thus, to make them wide-ranging, in particular, with regard to a serious violations of employment contract on the part of employee and to economic, technological grounds on the part of the employer. The abstract nature in describing significant reasons which related to the economic, technological grounds to some degree was compensated by identifying, on the example provided by Articles 5–6 of ILO Convention no. 158, a list of grounds which do not constitute a valid reason to terminate employment relationship. Among those grounds, one can find membership in a trade union, performance of the functions of an employees' representative at present or in the past, participation in the proceedings against the employer, etc. Besides, there are numerous procedural requirements of imperative nature (prohibition of the dismissal of the person during the leave period) as well as statutory guarantees for certain groups of employees (pregnant workers, employees raising children, employees on sick leave).

Today, in Lithuania, there are basically two main groups of grounds for the termination of the employment relationship on the initiative of an employer. The distinction between these two groups depends on existence of fault on the part of an employee. Dismissal on disciplinary grounds (without notice) is allowed in case of gross breach of work duties (a qualified breach of labour discipline) or repeated negligence in the performance of the work duties or the violation of the work discipline if the disciplinary sanction was already imposed on an employee during the last 12 months (Article 136 of the Labour Code). Dismissal on the grounds which are not related to any misconduct on the part of the employee (with notice) is allowed if justified by significant reasons related to the economic, technological grounds such as the restructuring of the workplace, as well as for other similar reasons attributed to the employer (Article 129 of the Labour Code).

Not surprisingly, the general tendency shows that in Eastern Europe the idea of flexibility brought on the reformist agendas in recent years starts to be implemented with the measure specifically devoted to the reduction of the dismissal costs<sup>39</sup>. The trend was already visible when the anti-crisis measures were introduced just after crisis in 2008, as observed by ETUI experts<sup>40</sup>.

The new Draft Labour Code of Lithuania also addresses this question. In fact, it seeks the changes in terms of grounds for dismissal, formalisation of dismissal procedure and reductions of layoffs costs by lowering severance payments as well as diminishing the special protection for certain groups of employees.

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<sup>38</sup> The EU Charter of Fundamental Rights: A Commentary, by Tamara Hervey (Editor), Jeff Kenner (Editor), Steve Peers (Editor), Angela Ward (Editor), Beck – Hart – Nomos, 2014, p. 806.

<sup>39</sup> Gyulavári T., Kártyás G. Effects of the new Hungarian Labour Code: the most flexible Labour market in the world? *The Lawyer Quarterly. International Journal for Legal Research*, 2015, No. 4, p. 239.

<sup>40</sup> Clauwaert S., Schömann I. The crisis and national labour law reforms: a mapping exercise, ETUI, 2012, p. 12–13.



In case there is no fault on the part of the employee, an employment contract is terminated by giving notice to the employee one month in advance, and if the employment relationship has continued for less than one year – by giving notice two weeks in advance. The notice period was proposed to be reduced in comparison with current situation where they vary from 2 to 4 months dependant on length of service. A dismissed employee must be paid severance pay in the amount of one average monthly salary, and in case employment relationship has continued for less than one year – in the amount of half of the monthly wage which is again a significant reduction compared with current payments from 1 to 6 monthly wages depending on the length of service.

It is also proposed to link the protection of pregnant women not with the pregnancy and maternity leave but with the age of the baby (4 months). Employees raising one or more children under three years of age will retain their protection; however, the protection will be limited to the right of priority to be transferred to another work when the activities carried out by the employee become superfluous. The Draft Law intends to erode some parts of very strict and rigid protection of pregnant women and young parents, but the Parliamentary debate shows that this not necessarily will be accepted by the Parliament.

The right to protect the worker against unjust dismissal is an essentially defensive right to protect the worker against the abuse of managerial powers, concludes J. Kenner<sup>41</sup>. Therefore, the preventive measures, instead of compensatory mechanisms, shall be scrutinised in the light of the Charter. In this regard, the Lithuanian Draft foresees some novelties aimed at minimising the managerial power of the employer. Few examples may be provided. In case of redundancy, the law will require the criteria for the selection of employees to be approved by the employer, upon agreement with the employees' representatives. In this case, selection is carried out by the commission formed by the employer which must include at least one employees' representative. In case of performance related dismissal, the deficiencies of the employee's work and the personal results have to be indicated to the employee in writing, the plan for improvement of the results comprising a period of at least two months have to be jointly made up by both parties. An employee's refusal to work under the changed essential conditions of an employment contract may constitute a reason to terminate the employment relationship when the employer's proposal is based on significant reasons of economic, organisational or production necessity. As at present, a reason to terminate an employment contract may be a gross breach of employee's work duties or the second breach of employee's duties committed during the last twelve months. As a novelty, only a repeated breach that is of the same kind, but not a repeated breach of any kind, may be considered a reason to terminate an employment contract through the fault of the employee.<sup>42</sup>

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<sup>41</sup> The EU Charter of Fundamental Rights: A Commentary, by Tamara Hervey (Editor), Jeff Kenner (Editor), Steve Peers (Editor), Angela Ward (Editor), Beck – Hart – Nomos, 2014, p. 807.

<sup>42</sup> There are also few new other provisions proposed which put some limits to the currently unrestricted in terms of time entitlements for the workers, such as, for instance, the paid time of litigation period in case of successful action. The Individual Labour Grievances Commission will be primary institution to deal with the cases of unfair dismissals instead of ordinary courts. The latter solution will make the litigation more quick and less costly for both parties of the dispute.

Lithuania does not see such difficulties in the area of dismissal protections as other countries which introduce the restrictive minimum requirements (for instance, number of employees or the number of months employed by the employer<sup>43</sup>) for the commencing of the protection. However, Lithuanian Draft Labour Code may face a problem related to adequacy of protection of pregnant women or young parents. There is also fundamental problem of compliance of the new provisions on possibility to dismiss the employee ‘on the will of the employer’ – the new ground for dismissal justified by ‘other reasons not mentioned by the legislation’. It is suggested that this ‘flexibility’ shall be compensated by more generous financial satisfaction (the severance payment equal to 6 monthly average wages). In practice, the described possibility may expand beyond the limits of allowed reasonable managerial discretion, and the tight control by judicial system will be essential for conformity with the Charter in light of ILO Convention No. 158 and Article 24 of the European Social Charter. The dismissal without cause strikes at the very personal integrity of the individual that is the root of Article 3 of the Charter, concludes J.Kenner<sup>44</sup>.

### 3.2. Fair and Just Working Conditions

Article 31 of the Charter guarantees that every worker has the right to working conditions which respect his/her health, safety and dignity. Every worker has the right to a limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

Despite the fact that the Article intends to cover all conditions insofar as they can affect human dignity,<sup>45</sup> only working time and rest time periods will be dealt here with.

A substantial body of the European Union law in this area has been adopted and it concerns, in particular, health and safety at work. There are many legislative rules in the European Union focusing on the technical safety of employees (Directive 89/391 and a large number of directive adopted on its basis) or regulating specific aspects of work and rest time (Directive 2003/88 and a large number of directives for specific sectors), or defining the protection of specific most vulnerable employee groups (Directive 94/33 on the protection of young people at work).

As far as the transposition of the European rules is concerned, it should be borne in mind that Lithuania has inherited a detailed and stringent regulation of work and rest time from the Soviet times, which was, in principle, designated for large enterprises. For example, the Labour Code of 2002 did not allow a maximum working longer than 48 hours per week<sup>46</sup>, including overtime; overtime was allowed only in very special cases and only

<sup>43</sup> See, for instance, Marhold F. Bedeutung der Grundrechtecharta und EMRK für das österreichische Arbeitsrecht. Europäische Zeitschrift für Arbeitsrecht, 2013, p. 159

<sup>44</sup> The EU Charter of Fundamental Rights: A Commentary, by Tamara Hervey (Editor), Jeff Kenner (Editor), Steve Peers (Editor), Angela Ward (Editor), Beck – Hart – Nomos, 2014, p. 811.

<sup>45</sup> Bercusson B. (Ed.) European Labour Law and the EU Charter of Fundamental Rights, ETUI, 2002, p. 71.

<sup>46</sup> The lawmaker does not use the word ‘average’ here therefore the deviations from 48 hours are not possible.

4 hours over two days or 120 hours over a year; it also made it more difficult to change flexibly the standard 8 hours per day and five working days per week, apply reference periods only for uninterrupted production, etc. In this way, the duration of working time and its spreading over a day or a week was regulated in a detailed manner. The European Union legal acts which were mostly designated for the regulation of rest time were merely rewritten into the Labour Code without any revisions of the earlier legal rules. Hence, the “jungle” of double regulation was created where it is difficult to avoid infringements and where it is impossible to respond to labour demand variations flexibly.

In the Labour Code, working time and rest period are regulated separately. A short universal definition of working time is worded, according to which the working time shall be any time during which an employee is under the employer’s command and performs duties under the employment contract. In addition, the periods which must be attributed to working time are specified (e.g. time spent travelling from the employment place to the place of temporary performance of a work function specified by the employer, the duration of on-call duty, time spent improving qualification under the employer’s authorisation, etc.).

In the Draft Labour Code, a concept of rate of working time is introduced which is distinct from the concept of work time regime. Rate of working time is the average time during which an employee must perform work for the employer over a certain period of time, fulfil duties under the employment contract and receive remuneration accordingly. This rate of working time is defined in the employment contract or a default rate of working time of 40 hours per week is applied. Whereas work time regime is the actual distribution of the rate of working time in a working day (shift), week, month or other recording period which may not exceed four consecutive months.

Further, in the Draft Labour Code, new concepts of requirements for the maximum working time and requirements for the minimum period of rest which comprise the requirements for the working time under the directive 2003/88 are introduced. For example, it is provided that the average working time for each seven-day period, including overtime, but excluding the time of additional work, must not exceed 48 hours, and working time during a working day (shift), including overtime and work under the agreement on additional work, may not exceed 12 hours, excluding a lunch break. These requirements are of a mandatory nature and may not be derogated from by any agreement.

The working time of employees working at night is newly regulated in accordance with the requirements of the above-mentioned directive, whereas the institute of on-call duty has undergone substantial changes. The following types of on-call duty are distinguished: active on-call duty regarding occupations and jobs where an employee performs his/her work function serving on-call duty; passive on-call duty when an employee must be at the place specified by the employer, ready to perform his/her functions when necessary; and passive on-call duty served at home when an employee is ready to perform certain actions or to arrive at the place of employment when necessary during the usual period of rest. In the latter case, an additional pay must be paid, and the actually performed actions must be paid for as the working time.

The employer may assign an employee to do overtime work not exceeding one hour during the working day (shift) only with the consent of the employee. During the period

of 7 consecutive calendar days, an employee may not work more than 8 hours of overtime, unless the employee expresses his/her consent in writing to working up to 12 hours of overtime during a week. When working overtime, the requirements for the maximum working time and minimum rest period may not be violated.

As for working time recording, it is proposed to abandon the formal recording of the working time of each employee; instead, it is required to record the working time only where there are deviations from the work time regime: the overtime, working time during public holidays and working time during rest days if it has not been provided for in the work schedule.

The regulation of working time is based on the fundamental principles specified in the directive 2003/88. The duration of uninterrupted rest period between working days (shifts) may not be shorter than 11 consecutive hours, and per each seven-day period the employee is entitled to an uninterrupted rest period of at least 35 hours. A rest day is a day on which work is not performed according to the working time regime. Employees may be assigned to work on rest days only with their consent.

The Labour Code regulates the procedure of granting annual leave in greater detail. Annual leave for the second and subsequent working years may be granted at any time of the working year in accordance with the annual leave schedule. The annual leave schedule for the calendar year must be made not later than by 1st of May by the joint committee of the employer and the representatives appointed by the employees' representatives. In case there are no representatives, annual leave is granted by the employer taking into account preferences of the following employees (in the order of priority): pregnant women and employees raising at least one child under 12 months of age, employees raising at least one child under six years of age or a disabled child, employees raising two or more children, employees who had taken annual leave for less than 10 working days in the previous calendar year, employees who have an unused annual leave from the past working year. The Code also sets the categories of employees whose request for a leave must be satisfied by the employer: women and parents before or after a maternity leave or a paternity leave, employees who are studying without interruption of their employment, etc.

The types of special-purpose leave (maternity, paternity, parental, educational, unpaid) remain essentially unchanged, however, a new horizontal provision is established according to which an employer shall ensure the right of employees to return to the same or an equivalent job (position) after a special-purpose leave on conditions which are no less favourable than the former working conditions, as well as to benefit from any improvement in work conditions, including his/her right to the pay rise, to which they would have been entitled if they had been working at that time<sup>47</sup>.

An important provision is introduced in the regulation of educational leave with the aim to develop a policy of competitive and competent labour market. According to this provision, employees whose employment relationship with the employer has continued for more than one year shall retain wages for the educational leave lasting up to five working days a year, and half of the wages for the educational leave lasting up to twenty

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<sup>47</sup> See in this regard clause 5 of the Directive 2010/18 (parental leave directive), Article 15 of the Directive 2006/54 (recast directive gender equality).

working days a year, unless labour law norms or their employment contract provide otherwise. As a novelty, a provision concerning unpaid leave and providing flexibility for employees has been introduced. According to the provision, at the request of the employee and with the consent of the employer, the employee may be granted unpaid free time during the working time for his/her own personal needs.

### *3.3. Family and Professional Life*

Article 33 stipulates that the family shall enjoy legal, economic and social protection. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Lithuanian legislation contains several types of guarantees related to reconciliation of work, private and family life. First set of legal provision concerns working time arrangements. The only stipulation that allows employee to request the reduction of normal working time is related to part-time. Since the part-time regime generally shall be agreed by the parties, legislator imposes on employers the obligation to grant part-time work to some groups of employees. Pursuant to Article 146 (1) p. 3 Labour Code, the employer shall agree to set the part-time work at the request of a pregnant woman, a mother who has given birth, and who raises or breast-feeds a child until it reaches one year of age, an employee raising a child until it reaches three years of age or an employee who alone raises a child until it reaches fourteen years of age or a child with limited functional capacity until it reaches sixteen years of age, or an employee nursing a sick member of his family, according to the conclusions of a health care institution. As far as part-time work is concerned, there are two problematic issues to discuss. Firstly, the Code contains no provision on employer's obligation to consider the reverse request of concerned employee, i.e. to extend the working time. The Law does not consolidate the right of employee who has taken part-time works because of the reasons stated above, to return to previous number of working hours. Following the logic of law, the consent of an employer resulting in changing the contract of employment is needed. The Labour Code does not regulate the employee's right to request the temporary working time reduction. Therefore, the consent of an employer is required for any reduction of working time. The Code does not address explicitly the new for soft employment such as job-sharing, flexible working time schedules or other types of flexible working time arrangements.

Individual working time schedule, flexible working time schedule or time-credit scheme may be agreed individually with an employer with one general reservation – the parties may not establish working conditions, which are less favourable to the employee than those provided by this Code, laws, other regulatory acts and the collective agreement (Article 95 Labour Code). In practice, only individually agreed working time schedule is considered as appropriate way to adapt working time to the personal of family needs.

In addition, the Law grants a priority to employees raising children under fourteen years of age to choose their shift, if the work in an enterprise is organised in a shifts manner, unless serious reasons preclude this (Article 147 (5) Labour Code). Further, the law prohibits employer to assign a pregnant women, women who have recently given birth or

breast-feeding women to work overtime, to work at night, to work on days off or on public holidays, or to send them on business trips (posting) without their consent (Article 278 (9)–278 (10) Labour Code). Important and widely accepted guarantee for the employees raising a child with disabilities before he has reached the age of sixteen or two children before they reach the age of twelve is provided by Article 214 Labour Code – they shall be granted an additional day of rest per month or their weekly working time shall be shortened by two hours; the employees who are raising three or more children before they reach the age of twelve shall be entitled to two additional days of rest per month or their weekly working time shall be shortened by four hours and shall be paid the average wage.

There is no direct provision prohibiting the dismissal on the grounds of an application for, or the taking of, parental leave, but Section 131 (1) of the Labour Code entails the general prohibition of the dismissal of employee during his leave, except on the grounds of absolute nature which are listed in Section 136 (1), such as a judgment from a court, disqualification from certain types of work, liquidation, etc. This means that the guarantee of non-dismissal is applicable to employees being on all types of leave including the maternity leave, parental leave until the child reaches the age of 3. Besides, the employment contracts with employees raising a child (children) under three years of age may not be terminated without any fault on the part of the employee concerned (Article 132 (2) of the Labour Code).

In addition, Lithuanian labour law provides a number of procedural requirements and guarantees applicable to workers with childcare responsibilities, such as prohibition to dismiss employees raising children under 14 years of age unless in extraordinary cases only where the retention of an employee would substantially violate the interests of the employer (Article 129 (4) Labour Code). These employees shall be notified before 4 months (the general rule is 2 months) and they also enjoy the priority in the event of reduction in the number of employees on economic or technological grounds or due to the restructuring (Article 135 (1) of the Labour Code).

One of the proclaimed objectives of the reform of labour law is a new proper balance between work and family responsibilities. Therefore, the Draft Labour Code entails a set of different provisions which directly address the reconciliation.

First of all, the Draft Labour Code consolidates the principle of respect of employee's family commitments. It supposes to oblige the employer to take measures to help the employee fulfil his or her family commitments, except for the cases when it is impossible due to specific features of the work function or the employer's activities. The employer must consider and give a reasonable response to the requests of the employees. Employee's actions at work must be considered in order to fully and effectively implement the principle of work-life balance. The Draft Code sets forth that, at the employee's request and with the employer's consent, during the working day (shift), the employee may be granted unpaid time off for the employee's personal needs. The parties may agree to move working time to another working day (shift) without violating the requirements for the maximum working time and the minimum rest period.

The Draft Labour Code gives better opportunities for specific groups of employees to work on part-time basis as well as use teleworking as a form of work organisation. It is stipulated that both upon the conclusion of an employment contract and during the per-



formance, thereof, an agreement on part-time work can be made. An important novelty is the introduction of the possibility to return to work on full-time basis. An employee, who has made an agreement on part-time work, is entitled to request to change the condition of part-time work not more often than once every six months. However, this term is not applied when the employee's request is based on the employee's disability or the need to nurse a family member, as well as on the request of a pregnant employee, an employee who has recently given birth, a breast-feeding employee, an employee raising a child under three years of age, and an employee who is alone raising a child under fourteen years of age or a disabled child under eighteen years of age. The said persons may return to full-time work upon a written notification of the employer two weeks in advance, except in the cases when the employer agrees to depart from this time limit.

In addition, teleworking shall be assigned at the request or subject to the consent of the employee. Unless the employer proves that it would cause excessive costs due to production necessity or peculiarities of organization of work, he/she must accept the employee's request to opt for teleworking for at least one fifth of the whole rate of working time in the cases that it is requested by a pregnant employee, an employee who has recently given birth, a breast-feeding employee, an employee raising a child under three years of age, and an employee who is alone raising a child under fourteen years of age or a disabled child under eighteen years of age.

The Draft Labour Code introduces a job-sharing employment contract under which two employees may agree with the employer on sharing one position. An agreement on a job-sharing contract may be made both by conclusion of a new employment contract and by temporarily changing the existing employment contract of another type. The employer shall be obliged to consider and, in case there is an organisational and industrial possibility, satisfy the application of the employee raising a child (adopted child) under seven years of age for temporary replacement of the existing employment contract of another type with a job-sharing contract for a period until the child reaches seven years of age. The said employee may return to work under another type of employment contract, which was valid before his or her job-sharing contract, upon a written notification of the employer two weeks in advance, except in the cases when the employer agrees to depart from this time limit.

The regulation of flexible work time regimes should allow employees to adjust their working time to their family (personal) life. The Draft stipulates flexible work schedule whereby an employee must be present at the employment place during the core hours of the working day (shift) and may work the rest of the hours of that day (shift) before or after these core hours. Also, it is possible to work on individual working time regime, e.g. agreed according to the needs of an employee and his or her family.

## **Conclusions**

The Charter of Fundamental Rights does not contain the exhaustive list of fundamental rights for the field of labour law. On contrary, the number of rights that are found in the Charter under Title 'Solidarity' is rather modest. Those rights quite fragmentally cover various aspects of employment with different degrees of precision and wide dis-

cretion for the Member States. As case-law of the CJEU confirms, the content of those rights will largely depend on the existing secondary legislation of the European Union. However, the multiple dimension of protection of human rights in Europe suggests that the labour standards elaborated in the legal frameworks of the European Convention of Human Rights, International Labour Organisation and European Social Charter may fill the content of the provisions of the Charter.

The conflicts between social rights of the Charter and Lithuanian labour law are not easy to detect not just because of vague or broadly formulated provisions in the Charter. The new Draft Lithuanian Labour Code, whilst introducing more flexibility and less degree of protection in some points does not necessarily oversteps in peius the standards imposed by the Charter. On contrary, together with the elaboration of the new rights for workers and their representatives we may also observe the improvements in the quality of transposition. There are efforts in making the labour law provisions to be effectively observed and implemented. Together we may recognise a legislator's greater attention to the new needs on the labour market such as reconciliation of family and work or workers' participation rights. Those novelties suggest that the Draft Labour Code of Lithuania will become more appropriate and more balanced instrument regulating work today and tomorrow.

### Summary

The Charter of Fundamental Rights does not contain the exhaustive list of fundamental rights for the field of labour law. On contrary, the number of rights that are found in the Charter under Title 'Solidarity' is rather modest. Those rights quite fragmentally cover various aspects of employment with different degrees of precision and wide discretion for the Member States. As case-law of the CJEU confirms, the content of those rights will largely depend on the existing secondary legislation of the European Union. However, the multiple dimension of protection of human rights in Europe suggests that the labour standards elaborated in the legal frameworks of the European Convention of Human Rights, International Labour Organisation and European Social Charter may fill the content of the provisions of the Charter.

**Keywords:** European Union, Charter of Fundamental Rights, labour law