PREFACE

"From Social Competition to Social Dumping” is the title of the collection of papers written on the occasion of the symposium which took place in Antwerp on 20 and 21 November 2014. In this book the phenomenon of social dumping is looked at in the wider context of the liberalized social competition as steered by the European Union. Special attention is paid to the harrowing dumping practices in the road transport sector. Therefore this publication contains a number of testimonies by people who actively fight social dumping. Some of the authors also examine the phenomenon of social dumping in relation to compliance with every worker’s fundamental right to respect for his/her dignity as a human being. In this respect, the underlying question is whether, by tolerating legislation that allows human dignity to be violated by social dumping, the European and national legislators do not infringe on the primary fundamental right…

Marc Rigaux
Jan Buelens
CONTENTS

Preface ................................................................. v

PART I. CONTRIBUTIONS

Chapter 1.
The Right to Human Dignity at Stake
Marc Rigaux ......................................................... 3

1. Introduction – a complex social issue shaped and provoked
by European law .................................................... 3
2. The free labour market and free social competition as the
foundations of labour relations ................................. 7
  2.1. Free market economy, free labour market and free social
       competition ....................................................... 7
       2.1.1. Market economy as a reference system .................. 7
       2.1.2. The free labour market and the commercialization
             of labour ..................................................... 7
       2.1.3. Labour as an object of social competition ............... 8
       2.1.4. Free social competition: concept, types and
             consequences ................................................ 9
  2.2. The free labour market and free social competition: structural
       legal anchoring .................................................. 10
       2.2.1. Free labour market and free social competition:
             cornerstones of a legal order ............................. 10
       2.2.2. Labour relations and free social competition: market
             relations and power relations ............................ 11
       2.2.3. Structural anchoring in law ............................. 12
3. Free social competition, social exploitation and social exclusion ....... 12
  3.1. Social exploitation and social exclusion: inevitable
       consequences of free social competition ..................... 12
  3.2. Social exploitation and social exclusion: proposal of
       typification ....................................................... 13
4. Free social competition and the right to dignity at work:
   the necessity of social corrections of the labour market .............. 15
  4.1. Functions and objectives of social law ........................ 15
  4.2. Content and scope of the corrections ........................ 15
4.3. Conditions necessary for the application of social corrections          . 16
4.4. Limits to the corrections                                         . 16
5. Fair and unfair social competition versus social dumping           . 16
  5.1. Fair and unfair social competition: a legal fact                . 16
  5.2. Unfair social competition and social dumping: congruous legal concepts? . 17
6. Social dumping and the right to dignity at work                    . 19
  6.1. The right to dignity at work: a primary fundamental right       . 19
  6.2. The absolute and relative scope of the right to human dignity   . 19
  6.3. Lack of respect for human dignity, an intrinsic element of social dumping . 20
7. Lack of respect for human dignity (at work): a structural defect of European market law?                      . 20

Chapter 2.
Human Dignity of Workers and Competition
Wolfgang Däubler                                                      . 21
1. Point of departure: the worker treated as an object                . 21
2. Mitigating the situation                                          . 21
  2.1. The indispensable worker                                      . 21
  2.2. Protection by labour law                                       . 22
  2.3. Collective agreements                                          . 22
  2.4. Informal rules                                                 . 23
3. Returning to the market forces                                     . 23
4. Internationalization of the markets                                . 24
5. Using information technology                                       . 25
6. Proposals to improve the situation                                . 26
  6.1. Better trade unions?                                            . 26
  6.2. Mobilizing public opinion                                      . 28
  6.3. Collective action on the Internet                              . 31
7. Perspectives                                                       . 32

Chapter 3.
Social Dumping: A Symptom of the European Construction.
An Exploratory Study of Social Dumping in Road Transport
Jan Buelems and Lies Michielsen                                     . 33
1. Introduction                                                        . 33
2. The European construction                                          . 36
  2.1. Treaty on the Functioning of the European Union                . 36
## Contents

### Chapter 4.  
The Territorial Application of Labour Law in the EU Internal Market. On Legal Rules and Economic Interests  
Herwig Verschueren

1. Introduction ................................................. 63  
2. In principle labour law continues to be a matter of national competence ............................................. 64  
3. The territorial application of labour law in cross-border situations. ...... 66  
   3.1. Principle: free movement of workers ......................... 66  
   3.2. The territorial application of labour law and private international law ................................. 68  
   3.3. The territorial application of labour law under pressure as a result of the free movement of services ............................... 69  
      3.3.1. Free movement of services and the territorial application of labour law ............................... 69  
      3.3.2. The Posted Workers Directive .............................. 70  
         3.3.2.1. Objectives and content .............................. 70  
         3.3.2.2. The Member States' ability to organize efficient control of compliance with the applicable employment provisions .................. 74  
   3.4. The posted workers' position at the crossroads of legal rules and of economic interests .............................. 77  
4. Conclusion ................................................. 82  

### Chapter 5.  
The Tense Relationship Between Labour Market Rights and Respect for Dignity at Work: European Dimension  
Barbara Kresal

1. Labour market as an integral part of a broader concept of the market ................................................. 85  
2. (Neo)liberal model and the precarisation of society .............................. 87  
3. The European Union is following the same neoliberal trends .............................. 88  
4. Freedom of establishment and freedom of services versus dignity at work, fundamental social rights and free movement of workers ...... 94  
5. Human rights approach .............................. 95  
6. Conclusion ................................................. 96
Chapter 6.
Limiting the Role of Public Authorities in the Deployment of Services.
The Tense Relationship between Labour Market Rights and Respect for Dignity at Work, Limiting the Role of Public Authorities in the Deployment of Services
Gian Guido Balandi ................................................................. 99
1. Social services in general ................................................. 99
2. What is the relationship between public and private subjects? .... 102
3. The limitation of the role of public authorities: effects as regards the citizens ........................................... 103
4. Effects of the limitation as regards employees ....................... 104

Chapter 7.
Do we Need a New Conflict-of-Laws Rule for Labour in the European Road Transport Sector? Yes We Do
Fieke van Overbeeke ............................................................... 107
1. Introduction ........................................................................ 107
2. Legal framework .............................................................. 108
   2.1. Freedom of services and freedom of establishment .......... 108
   2.2. Conflict of laws – Article 8 Rome I Regulation ............... 109
      2.2.1. Article 8(1) Rome I Regulation .............................. 109
      2.2.2. Article 8(2), (3) and (4) Rome I Regulation ............ 110
      2.2.3. A difficult regime applicable to a difficult sector ....... 111
3. Case law of Article 8 Rome I Regulation .............................. 111
   3.1. Koelzsch case – broad habitual workplace principle ....... 112
   3.2. Voogsgeerd case – confirmation ................................... 113
   3.3. Provisional review ....................................................... 113
      3.3.1. Broad interpretation desirable to mitigate bold flag out operations ............................................... 113
      3.3.2. Still, not a solution .................................................. 114
      3.3.3. Risk of an incorrect interpretation of the Koelzsch elements – Ryanair case ............................... 116
      3.3.4. Possibilities through the escape clause? .................. 117
      3.3.5. Summary ............................................................. 117
   3.4. Schlecker case – qualification of the reasoning of the Court in Koelzsch ...................................................... 118
      3.4.1. Evaluation – effect on road transport situations? ...... 119
4. Final remarks ....................................................................... 120