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### Column 5

*With this column, I would like to give you an insight into the fundamental freedoms and social rights using the example of the development of European labor law as part of a gradually emerging European social model, and at the same time show the connections that are effective in the design of a corresponding social policy that includes labor law at the Community level and its efforts to achieve corresponding harmonization in the member states.*

Based on its original goals, the **European Community** was *primarily* intended as a political project for the *pacification* and *political integration of Europe*. Economic integration served this purpose primarily. The *social dimension of the Community* played only a subordinate role, with the "social costs" of companies in the competition of the common market being seen as just one cost factor among many.

This renunciation of comprehensive regulation of social policy issues in the EEC Treaty and in particular the rejection of comprehensive social harmonization, which corresponded to the concept of the "social market economy" at the time based on the model of Germany's economic policy, stood in the way of a standardization of labor and social law in the member states from the outset. Social security was only achieved in a few areas, insofar as the internal market absolutely required it. This applied to the **principle of equal treatment**, which found expression in the principle of *equal pay for men and women for equal work*, as well as to necessary measures in the field of **social security** in connection with the **cross-border freedom of movement of workers** as one of the fundamental freedoms, which was originally seen primarily as one of the basic requirements of freedom of competition for entrepreneurs (Art. 49 EEC and Art. 45 TFEU / ex-Art. 39 EC).

To this day, these two provisions of *primary* Community law - Article 141 EC Treaty, consolidated version 1997 / ex-119 EC Treaty and Article 42 EC Treaty, consolidated version 1997 / ex-Article 51 EC Treaty - occupy a prominent position because they transfer competences to the Community and thus enable regulations with direct legal effect in the areas of competition and social security.

In the 1970s and 1980s, European legislation initially stalled. However, in response to the oil crisis, economic downturn and mass unemployment, the European Community began to introduce *minimum protection for employees*. In addition to the competition function, **European labour law also had a social objective**, which was expressed in the **Social Policy Action Programme of 1974** adopted by the Council of the EC. First, **Directives** were issued on the mass dismissal of employees, on the continuation of the employment relationship in the event of a transfer of a business and on the protection of employees in the event of the employer's insolvency. In the 1980s, as already mentioned, regulations followed to improve occupational safety and health protection in the workplace and to ensure equal rights for men and women in employment.

Since the **Single European Act** came into force in 1986 and later with the **Maastricht Treaty** in 1992, occupational **health and safety law** has been added as a "third pillar", today regulated in Art. 140 EC Treaty, consolidated version 1997 / ex-Art. 118c EC Treaty and as a result of the *Protocol on Social Policy* in the **Agreement on Social Policy**. This mainly concerns minimum requirements for improving the working environment in the areas of safety and health of workers. New responsibilities and previously unknown forms of labour law legislation have been added, in particular the so-called **social dialogue**, according to which the *European Commission*, before submitting proposals in the area of Social policy must consult the European social partners (Article 138 paragraphs 2 - 4 EC Treaty, consolidated version 1997 / Article 154 paragraphs 2 - 4 TFEU). A Member State can also leave **the implementation of Directives** issued on the basis of the allocation of competences under Article 137 paragraph 4 EC Treaty, consolidated version 1997 / Article 153 paragraph 3 TFEU to the national social partners at their joint request.

According to the case law of the **European Court of Justice**, the general objective of promoting an accelerated increase in the standard of living in the Community within the meaning of

Article 2 EC Treaty, consolidated version 1997 / ex-Article 2 EC Treaty, however, does not give rise to legal obligations for the Member States or rights for individual Union citizens (ECJ, Case 126/86 - Zaera). The same applies to Title XI, entitled Social Policy, General and Vocational Education and Youth, and the social provisions of Article 136 of the EC Treaty, consolidated version 1997 / ex-Article 117 of the EC Treaty (Chapter 1, Social Provisions). This also only formulates **social objectives of a programmatic nature** in the expectation that economic integration will improve and harmonize the living and working conditions of the workforce in a self-fulfilling manner. According to the case law of the ECJ, however, the realization of the objectives is the subject of a social policy, the determination of which is exclusively the responsibility of the competent authorities, i.e. in particular the member states. However, the objectives provide important guidance for the interpretation of other provisions of the Treaty and of secondary Community law in the social field.

The **European Commission** is also subject to this limitation of competence. Article 140 of the EC Treaty, consolidated version 1997 / ex-Article Article 118c of the EC Treaty only gives it the task of promoting close cooperation between the Member States on social issues and in this context empowers it only to carry out studies, give opinions and prepare consultations, apart from the areas of labour and social law already mentioned and which are part of primary law, which concern equal pay, freedom of movement for workers and occupational safety.

The **Community Charter of Fundamental Social Rights**, adopted in Strasbourg in 1989, also has only the significance of a legally non-binding social policy declaration. The Directive on informing employees about working conditions and the Directive on the organisation of working time were issued on its basis.

The primary responsibility for social policy therefore remains with the individual **Member States**. Only where primary powers have been transferred to the **European Union** in accordance with the principle of limited individual empowerment (Article 5 of the EC Treaty, consolidated version 1997 / ex-Article 3b of the EC Treaty) has the Community created **European labour and social law** through **Regulations** and **Directives** that takes precedence over national law. In the other areas of social policy, the Community bodies, the European Commission, the Council and Parliament must limit themselves to legally non-binding recommendations, opinions and communications, i.e. to **soft law**. This will not change in the future - especially under the auspices of the Community law principle of subsidiarity.

On the other hand, it should be noted that the **competence** of the Community and the Member States (Article 136 of the EC Treaty, consolidated version 1997 / ex-Article 117, paragraph 1 of the EC Treaty) in social policy is designed as a joint matter and includes the following social policy objectives:

- promoting employment,
- improving living and working conditions,
- adequate social protection,
- social dialogue
- developing the workforce potential with a view to a permanently high level of employment and
- combating exclusion.

In the contribution for which the European Community is responsible and which is limited to support and supplementation, the **principle of qualified majority** applies in some areas for decision-making in the Council, but the **principle of unanimity** continues to apply in the core area of social security, which is sensitive in domestic policy. Important matters, such as questions of **wage determination** and **industrial action law**, are in any case beyond the competence of the Community.

Furthermore, in accordance with the Agreement on Social Policy, the **social partners** – trade unions and employers' associations – now have the possibility to take action in the areas covered by Article 137 of the EC Treaty, consolidated version 1997 / ex-Article 118 of the EC Treaty and to make independent agreements in a prescribed procedure (Article 139 of the EC Treaty, consolidated version 1997 / ex-Article 118 b of the EC Treaty), which are then put into effect by the Council with the required majority. This is the basis for the framework agreement on parental leave (Directive 96/34), the fixed-term work directive (Directive 90/70), the part-time work directive (Directive 97/81) and the directive on the establishment of a European Works Council and the procedure for consulting employees in Community-scale undertakings and groups of undertakings (Directive 2009/38/EC - recast).

The employers' and employees' associations are now each represented at European level by their own organisations (ETUC, CEEP and UNICE).

In the **Community Charter of Fundamental Social Rights** of 1989, **freedom of movement for workers** is a **fundamental freedom** at the top of the social policy priorities of the European Community formulated as "fundamental social rights", i.e. ahead of the areas of employment and pay, improvement of living and working conditions, social protection, freedom of association and collective bargaining, vocational training, equal treatment of men and women, information, consultation and participation of workers, health and safety in the working environment, protection of children and young people, protection of the elderly and the disabled.

According to its wording, *every worker of the European Community ... has the right to **freedom of movement** throughout the territory of the Community, subject to restrictions justified on grounds of public policy, public security and public health (Article 1)*. The right to freedom of movement also guarantees *every worker the right to pursue any profession or employment in the Community, whereby the principle of equal treatment applies with regard to access to employment, working conditions and social protection in the host country (Article 2)*. This right also includes *the harmonization of residence conditions in all Member States, in particular for family reunification, the removal of obstacles resulting from the non-recognition of diplomas or equivalent professional qualifications, and the improvement of living and working conditions for frontier workers (Article 3)*.

According to Article 14 of the EC Treaty, consolidated version 1997 / ex-Article 7a of the EC Treaty (formerly: Article 8a of the EEC Treaty), the **internal market** comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty. The **freedom to provide services** (Article 49 of the EC Treaty, consolidated version 1997 / ex-Article 59 of the EC Treaty) only came into the focus of both the Community institutions and the public relatively late – after the **free movement of goods and capital** and the **free movement of persons** (freedom of movement for workers, Article 39 of the EC Treaty, consolidated version 1997 / ex-Article 48 of the EC Treaty and **freedom of establishment for the self-employed**, Article 43 of the EC Treaty, consolidated version 1997 / ex-Article 52 of the EC Treaty). The Community has addressed the labour law and social imbalances caused by the posting of workers to other member states in particular with the **Posting of Workers Directive** (*Directive 96/71/EC*).

*This summary overview should suffice for now. A detailed presentation of the general principles of European labour law can be found in **Martin Henssler's** article in **Dictionary of European Private Law***

[https://max-eup2012.mpipriv.de/index.php/European\\_Labour\\_Law](https://max-eup2012.mpipriv.de/index.php/European_Labour_Law)

## **Dictionary of European Private Law**

### **European Labour Law**

By **Martin Henssler**

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- 2. Evolution of European Labour Law
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The current state of **European labour law** from a labour law and in particular a legal policy perspective is shown in the following **presentation by Prof. Dr. Claudia Schubert** (University of Hamburg), given at the **European Law Symposium 2024** on the occasion of the *ceremony to mark 70 years of the Federal Labour Court* in Erfurt, 6 to 7 June 2024.

<https://www.bundesarbeitsgericht.de/aktuelles-und-veranstaltungen/europarechtliches-symposium/>

<https://www.bundesarbeitsgericht.de/wp-content/uploads/2024/07/referat-schubert.pdf>

In the **summary** at the end of her presentation, the speaker states in particular:

- *European labour law* is now an essential part of the social market economy in the European Union, even if there is **no uniform European social model**.
- The *European Pillar of Social Rights* is a **commitment to a social Europe** and serves to overcome a lack of political legitimacy and objectives.

- A **proactive social policy** has replaced the previously more reactive development of European labour law as a result of the internal market.
- The limited legitimacy of the European Union's actions and its **limited individual empowerment** are, however, obstacles to the Union's implementation of a **common social policy**.

I am reproducing the presentation below in an English version.

*(Unauthorized) English version, without a list of sources*

## **European Law Symposium 2024**

### **Ceremony to mark 70 years of the Federal Labor Court**

Erfurt, 6 to 7 June 2024

Presentation by

**Professor Dr. Claudia Schubert**

University of Hamburg

On the topic

**“European labor law as part of an economic, monetary and values union –  
between harmonization and subsidiarity”**

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## **I. Introduction**

The development of *European labour law* was neither linear nor continuous, but followed the development of the European internal market for a long time. The *European Economic Community* began in 1957 with only the free movement of workers and equal pay for men and women, but without its own social policy. The creation of the internal market gave rise to protection deficits, which were initially reduced on the basis of the internal market competences. In 1985, the *Single European Act* added the competence to improve living and working conditions, which in particular enabled European labor protection law. A political signal was the *Community Charter of the Fundamental Social Rights of Workers of 1989*. However, a separate social policy was only made possible by the *Protocol on Social Policy of 1992*, which was incorporated into the *Treaty of Amsterdam in 1997*. This was followed by a reform of the existing set of directives. New emphasis was placed on the protection of atypical and often precarious employment relationships (fixed-term employment contracts, part-time and temporary work) and on employee participation.

The *Treaty of Lisbon*, which declared the social market economy to be the goal of the *European Union* in 2007 (Article 3, Paragraph 3 of the EU Treaty), and the *proclamation of the Charter of Fundamental Rights of the European Union* were important steps towards a social Europe. Almost at the same time, the ECJ's decisions on freedom of establishment and freedom to

provide services in 2007 and 2008 and the fiscal policy in the sovereign debt crisis from 2010, which were accompanied by serious interventions in labor law in Greece, Spain, Portugal, Ireland and Cyprus, massively shattered hopes for a social European Union. It was only the *proclamation of the European Pillar of Social Rights in 2017* that was seen as a new start, some even as the beginning of the "Roaring 20s" of European social policy and as an expression of the European social model or even a European social union.

However, an analysis of the development of *European labour law* is incomplete if one only lists competences and legal acts or examines the case law of the ECJ. The *European Union* as a supranational organisation is part of a regional global governance for the member states. From a political science perspective, the development of the *European Union* and also that of *European labour law* depends on the legitimacy of its actions. Unlike in a nation state, no closed concept of (European) labour law has therefore emerged. Rather, three central areas can be identified: identify areas in which *European labour law* is still developing and which I would like to use for the following presentation:

(1) The core area of an originally *European labour law* in the internal market is transnational labour law, which primarily includes the free movement of workers.

(2) The protection of social rights in the *European Union* initially emerged reactively. This happened above all when the company-related fundamental freedoms within the framework of the economic union intervened in the national welfare states in a deregulating or disruptive manner, so that a European reaction was required. In this respect, *European labour law* is accessory to the internal market. The same applies to regulation in the *Monetary Union*.

(3) A proactive social policy has developed only hesitantly. Most recently, the *European Pillar of Social Rights in 2017* strengthened the genuine social policy profile of the *European Union* and gave the *European Commission* an agenda, so to speak. Its implementation - like the internal market - leads to interactions and conflicts between the *European Union* and the Member States (between Union law and national law).

In these three fields, legitimization narratives can be identified that are essential for the further development of the *European Union*. Their effect also depends on how intense the conflicts are

between Union law and the law of the Member States. In this respect, this analysis also provides arguments for a more specific definition of the principle of subsidiarity.

*European labour law* does not exist as an independent law, but its significance and dynamics only become clear when the interactions with the national welfare states - with national labour law - are taken into account. The influence of Union law on national legal systems is usually intensive due to the priority of application and the direct third-party effect of fundamental freedoms and fundamental rights. The protective shields of national legal systems are limited individual authorization, subsidiarity and proportionality. They are part of the governance of the *European Union*, which also in *European labour law*. In social policy, conflicts with the member states prevent agreement on legal acts or shape their content. However, majority decisions can lead to subsequent attacks on the legal act. This is demonstrated by the Danish action for annulment against the *Minimum Wage Directive*.

Against this background, the question must be answered as to what stage *European labour law* has reached and how it should develop further. The *European Union* is not yet a comprehensive community of solidarity, but a social market economy made up of 27 member states whose social model, social history and social policy differ considerably. This diversity must be taken into account when developing a common idea of a social market economy. The following analysis focuses on labour law.

## **II. Free movement of workers - *European labour law* as part of the internal market**

The nucleus of *European labour law* is the *free movement of workers*, which was part of the common internal market from the outset. The freedom of movement of workers is an expression of the freedom to work on an equal basis anywhere in the *European (economic) community*, today in the *European Union*. The fact that this freedom is used by less than 5 percent of workers, especially cross-border commuters, seasonal workers and highly qualified workers, does not detract from the importance of the freedom of movement of workers, but is merely the consequence of the fact that we humans are social beings and only become migrant workers under certain conditions. This is why the freedom of movement of workers has only partially led to competition over labor costs. This was rather forced by the posting of workers by companies (see III.1).

When the freedom of movement of workers was implemented, access to the labor market in the member states and the equal treatment of migrant workers - whether in the host country or after returning to their home country - was defined by regulations and directives. Access to social benefits and tax benefits is included. The further development of the transition from a ban on discrimination to a ban on restrictions, which binds the Member States and the social partners, supports its effective enforcement. Even employers are directly bound by the ban on discrimination in Article 45 TFEU. The *Angonese case from 2000*, which concerned an employer's discriminatory requirement for a language certificate issued only in the Bolzano region, was initially seen by observers as an outlier. However, the decision is a systematic further development of Union law in order to remove serious obstacles to the free movement of workers. The decisions that followed also concerned barriers to market access that were relevant for a large number of workers.

Basically, the free movement of workers is the nucleus of *European labor law*. It is a transnational labor law, as is necessary in the *European Union* with a common internal market. National law is adapted to cross-border situations without changing it for domestic cases. However, the technocratic legitimacy of a supranational organization to create transnational law has not had a comprehensive effect. The lack of interest or resistance of the social partners with regard to transnational collective agreements has hindered the expansion of transnational *European labor law*. Wage policy remains a national matter - regardless of the *Minimum Wage Directive (Directive [EU] 2023/2041)*. This lack of interest in coordinating wage policy is based on the national orientation of the organizations. Nevertheless, in a *European Union* with companies operating across borders, transnational labor law should be further developed in order to open up regulatory options for the social or company partners.

### III. *European labor law* to limit the effects of the internal market on national labor law

A second group of regulations of *European labor law* has emerged as a reaction to the internal market. In part, as *Birk* put it, it is a matter of harmonization motivated by competition policy, in order to create a *Level playing field* for companies, particularly in occupational health and safety law, and to prevent a *race to the bottom* at the expense of employee protection. In addition, the company-related fundamental freedoms (freedom of establishment, freedom to provide services and freedom of movement of capital) and their exercise by companies have a deregulating effect on national welfare states. The resulting conflict with national labor law had to be

pacified by European regulations. The law of the member states needed to be supplemented in order to prevent impairment of national welfare states.

I would like to illustrate this with three examples:

### **1. Employee protection to seal off national markets - protection against social dumping**

This finding applies first of all to the law on posting workers. The competition between high-wage and low-wage countries, which increased with the accession of Spain and Portugal after the end of the fascist dictatorships in 1986, made it necessary to regulate the working conditions of posted workers. The original version of the *Posting of Workers Directive* (Directive 96/71/EC) only limited undercutting competition by making minimum working conditions, in particular the minimum wage, binding for posted workers in the destination countries. The enormous increase in competitive pressure following the EU's eastern enlargement in 2004 led to a *reform of the Posting of Workers Directive* (Directive (EU) 2018/957) in 2018, which now provides for an *Equal Pay Principle* from the first day of work in the host country. It is supplemented for the transport industry by Directive (EU) 2020/1057 in order to regulate its specific circumstances. Both directives significantly reduce the benefits of the internal market for the Central European Member States.

From the internal market perspective, the law on posting of workers is a market closure to protect high-wage countries. At the same time, it protects companies and employees from social dumping and abuse. In sectors where competition is not won through technical innovation but through low personnel costs, the *Equal Pay Principle* prevents social distortions in the high-wage countries and ultimately contributes to cohesion in the *European Union*, even if the legal act was not based on it.

### **2. The ECJ's so-called *Laval Quartet* and its consequences**

The ECJ has massively increased the impact of the *Fundamental Freedoms relating to companies* (freedom of establishment, freedom to provide services and freedom of movement of capital) on national labour law through its decisions. In the four decisions known as the *Laval Quartet* in the *Viking*, *Laval*, *Rüffert* and *Commission/Luxembourg cases*, the fundamental freedoms of collective bargaining, industrial action and the award of public contracts were set limits if companies from other EU countries were discriminated against or unreasonably restricted.

Collective measures to maintain working conditions when companies relocate their headquarters across borders must therefore pursue the social interests of employees within the limits of proportionality. In addition, the admissibility of minimum working conditions under procurement law when awarding public contracts was restricted.

The outcry following these decisions was particularly loud because the ECJ did not allow the historically evolved national collective labor law to remain in place. The deregulating power of these decisions has been partly overtaken by subsequent legal developments. This has been the case for the posting of workers since the introduction of the *Equal Pay Principle* in Article 3 (1) of *Directive (EU) 2018/957*. The *EU-Procurement Directives* and the case law of the ECJ now allow social criteria to be taken into account when awarding contracts. Even if the specific design of a minimum wage must comply with the requirements of the *Posting of Workers Directive*.

A similar development was excluded for industrial action law due to a lack of EU law-making powers (see Article 153 (5) TFEU). The *Monti II Regulation* hastily proposed by the *European Commission* to protect industrial action in the internal market was therefore withdrawn during the legislative process. However, this does not make national industrial action law unprotected in relation to the freedom of establishment and the freedom to provide services. The ECJ draws the fundamental freedoms are limited by the fundamental social right to collective action within the framework of proportionality. In this connection, he referred to Article 28 of the *Charter of Fundamental Rights*, which had not yet entered into force at the time, to Article 6 No. 4 of the *ESC* and the *ILO Convention No. 87*, as well as to No. 13 of the *Community Charter of Fundamental Social Rights*, to which Article 151 of the TFEU refers.

This clear commitment to a fundamental social right was not appreciated at the time, especially because not all member states had a limitation on industrial action based on the principle of proportionality. However, the restriction of human rights is not excluded per se even under the ECHR. Even in a social market economy, conflicts of objectives such as those that arise between fundamental rights and fundamental freedoms as rights of equal rank (Article 6 Paragraph 1 of the TEU) must be resolved. Proportionality is a recognized standard for fundamental rights.

Some criticism following the *Viking* and *Laval cases* is also rooted in mistrust of the ECJ, which was not known at the time as a guardian of (social) fundamental rights. The consideration of fundamental rights gradually intensified after the *Charter of Fundamental Rights* came into force. Later decisions - I am reminded of the holiday and working time law as examples - show the ECJ's awareness of the relevance of (social) fundamental rights and the need to enforce them.

### **3. Freedom of establishment and national company codetermination**

*Freedom of establishment* also had a significant impact on national company codetermination, at least in Germany, where employee participation in the supervisory board is the most intensive compared to the member states. To implement freedom of establishment, the *European Union* relies on competition between national legal systems in company law on the one hand, and on genuinely European, transnational company forms such as the SE on the other. For the SE - also due to Germany's political intervention - there is no separate European co-determination model. The extension of national co-determination law to foreign companies is, according to the prevailing opinion, the freedom of establishment. At most, negotiated co-determination with a statutory fallback regulation would be permissible so that there is no disproportionate interference with the *Freedom of establishment*. Something different applies at most to fictitious foreign companies whose administrative headquarters and branches are in Germany.

For cross-border conversions (change of legal form, merger, division) and transnational corporate forms, Union law provides for so-called negotiated co-determination. It is limited only to preserving existing employee rights (cf. *Directive 2001/86/EC*, *Directive 2005/56/EC*, *Directive [EU] 2019/2121*). A timely cross-border conversion before the thresholds for company co-determination are reached allows an escape from employee participation. An abuse control, as created in the implementation of the SE and the *Conversion Directive*, will not always prevent companies from avoiding corporate co-determination.

The ECJ has massively expanded the escape routes from German co-determination with its decision of May 16, 2024 in the *case of Group Works Council/O Holding SE*. When activating a shelf SE, which is initially founded without negotiations on employee participation in the supervisory board, there is no need to catch up on these negotiations. This means that such an SE remains free from co-determination, even if it later has employees. At present, the only

option is to expand the abuse control, which can only provide limited protection. In line with the implementation of the *Conversion Directive*, the prohibition of abuse could be supplemented by a registry court control (see Section 324 Para. 3 Sentence 1 of the Conversion Act).

The deregulating effect of *Freedom of establishment* can only be effectively countered if a separate, European codetermination model is agreed. The demand of the *European Trade Union Confederation* and the related proposal of the *European Parliament* regarding the introduction of an original European co-determination in companies have so far had no consequences. They demand equal co-determination of employees on the supervisory board for Companies with 1,000 or more employees. In a *European Union* whose member states have either no or a maximum of one-third participation, such maximum demands are unlikely to be successful. In terms of legal policy, less is ultimately more. But this first requires German politics, which in the past has prevented compromises at the European level, to campaign for negotiated co-determination with a one-third participation. The fact that information and consultation with employee representatives is one of the principles of the *European Union* is also enshrined in Article 27 of the *Charter of Fundamental Rights* and requires further development. The further development of Union law is, however, hampered by the fact that the deregulating effect of Union law primarily affects Germany and therefore majorities for legislation are not easy to find.

#### **4. Interim conclusion**

*European labor law* developed primarily from the conflict between fundamental freedoms and national legal systems and is a product of repeated crises that have forced European integration. The basic social rights and *European labour law* add a social dimension to the internal market, which is, however, supplementary to the national regulations. The compromises that have been made shape the national labour law systems, especially in cross-border situations, and thus affect the original area of European legal development, in which the legitimacy of the *European Union's* actions arises from the nature of the situation. The associated restrictions on fundamental freedoms were also necessary in order to maintain the acceptance of the *European Union* in the member states.

The social policy of the *European Union* has gone beyond this and has initiated harmonisation in areas where there was a common practical need for regulation. Overall, harmonisation up to 2007 has concentrated heavily on health protection and protection against discrimination, thus

only covering a manageable part of labour law and leaving the member states considerable scope for the design of their welfare state. These are partly by the ECJ, which thereby triggers new conflicts with the member states (see VI on holiday rights).

#### **IV. Limiting the effects of the *Monetary Union* on national labour law**

Serious changes to national labour law have occurred as a result of the financial and economic crisis of 2008 and the subsequent sovereign debt crisis since 2010. There was no master plan for rescuing public finances on this scale. In the *Memoranda of Understanding*, Greece, Spain, Portugal, Ireland and Cyprus each committed to radical labour market reforms in order to obtain loans for their national budgets. These reforms included, among other things, the downsizing of the public service, significant wage cuts and reduced severance payments in the event of dismissals. The minimum wage was reduced and its increase was more strictly linked to productivity and thus to the marginal costs of labour. In addition, collective bargaining was decentralised and thus there was a massive intervention in the established structures of the social partnership. These measures have proven *ex post* to be unnecessary or not necessary to the extent that they were. Many people saw them as the end of a social Europe and the institutions involved also gave cause for self-criticism.

The financial and sovereign debt crisis was a threatening challenge for the *European Union* as a supranational organization - not only economically, but also because of the social consequences, some of which are still visible today in the countries affected. However, it ultimately led to an intensification of integration because the *Economic and Monetary Union* was important enough for the member states to accept restrictions on their national policies without leaving the *European Union*. For all euro countries, what was missed when the common currency was introduced was made up for: a stability and growth pact that introduced the *European stability mechanism* and budgetary control in the form of the *European Semester* with monitoring for macroeconomic risks. In 2017, the *European Semester* was also supplemented by a so-called *Social Scoreboard*, which records the development of the national welfare state. This monitoring is not limited to the costs of the welfare state, but also covers its condition and shows areas where improvements are needed (e.g. too high youth unemployment, too high number of young people without school qualifications, too wide a pay gap). This means that fiscal policy is now linked to the goals of a social market economy and is therefore more comprehensive, so that the *Monetary Union* is not reduced to its economic dimension. In addition, the

recommendations are less drastic if they are made early and allow the member states room for maneuver.

The *Corona pandemic* was already a first test for the improved fiscal policy. It was shown that the *European Semester* as a monitoring tool in such crises - which are still recurring today - has elasticity and adapts dynamically to the changing situation. The country-specific recommendations are now more moderate and take the social situation into account, so that the member states can also develop their own policies, even against the recommendations of the *Commission*. In the *Corona pandemic*, budgetary policy was also linked to support for the member states in dealing with the consequences and developing robustness for such crises.

Legally, the country-specific recommendations of the *European Commission* are non-binding, but have a guiding effect and, above all, lead to voluntary commitments by the member states. The sanctions that are possible in the event of macroeconomic imbalances allow the associated restrictions on social rights to be attributed to the *European Union* - at least since the insertion of Article 136 (3) TFEU in 2016. In this respect, it is not consistent if the ECJ does not bind the institutions of the *European Union* to the *Charter of Fundamental Rights* in this respect. The *fundamental social rights* do not prevent the restriction of employee protection per se, but they impose protective obligations and, in the event of an intervention, bind to the principle of proportionality (Article 52 paragraph 1 of the Charter).

## **V. *European labour law* as a design of a social market economy**

### **1. European social market economy – European social model**

A third strand of European labour law emerged as a proactive social policy. It was often a form of legislation based on the economic situation with a view to what was politically feasible. This approach achieved pragmatic and often effective results, but had only a limited impact.

As early as the 1990s, the *European Commission* assumed that a European social model existed. This creates the impression of a uniform European idea or even realisation of the welfare state and is in contrast to the actual situation. The member states have designed their historically developed welfare states very differently and are not in the same situation (e.g. in terms of wage structure, the role of the social partners, the design of social insurance and social assistance).

There is no European social model in the sense of a coherent concept for living together in relation to labour relations, social security and public services. This cannot be achieved with partial harmonization and open coordination in social law. In addition, the *European Union* lacks the competence to harmonize key areas of labor law (e.g. termination rights, wages and continued payment of wages). The strong standardization of health protection and anti-discrimination law alone is not a European social model in the true sense of the word. Anti-discrimination law has developed into a separate policy area anyway (see Article 19 TFEU), but it has had a particularly intensive impact on labor law.

Since the *Treaty of Lisbon* in 2007, the *European Union* has aimed for a social market economy - an internal market with sustainable development, balanced economic growth and price stability, with full employment with sufficient earned income and social progress (Article 3 Paragraph 3 TEU). This objective goes beyond the social policy regulations that have existed since 1997 (cf. Articles 8 and 9 TFEU, Articles 19 and 151 ff. TFEU) and is supplemented by the *fundamental social rights* in the *Charter of Fundamental Rights*. Due to the so-called *Laval Quartet* and the sovereign debt crisis that occurred in 2010 with serious interventions in labor law in Greece, Spain, Portugal, Ireland and Cyprus, hopes for a social Europe were massively shattered.

The *European Pillar of Social Rights*, developed by the *European Commission* under the leadership of *Jean-Claude Juncker*, marks a new start for a social Europe. Its solemn *Inter-institutional Proclamation* by the *European Commission*, the *European Parliament* and the *Council* took place in 2017 on the occasion of the 60th anniversary of the *Treaties of Rome*. At its core, it was a restatement, a self-affirmation of the *European Union* with regard to its social values and goals. The *European Pillar of Social Rights* consists of a three-part catalogue of 20 rights - these concern (1) access to the labour market, (2) fair working conditions, (3) social protection and inclusion. It does not target the transnational dimension of the *European Union*, but the welfare state of the Union and its Member States as a whole. The vast majority of these rights were already contained in the *Charter of Fundamental Rights*, the *Community Charter of the Social Rights of Workers* and the *European Social Charter*, but they have been consolidated and in some cases made more specific and supplemented. The additions include the right to a fair minimum wage (No. 6), the obligation to provide reasons for dismissals (No. 7b) and social protection for the self-employed (No. 12).

This *European Pillar of Social Rights* had an enormous political catalytic effect on social policy. In addition to the recommendations on access to social protection for employees and the self-employed and the establishment of the *European Employment Agency*, there are now a number of directives, even if the causality of the *European Pillar of Social Rights* cannot be precisely determined. From a *Governance Perspective*, the legitimacy of the *European Union's* actions arises primarily from the fact that the regulatory proposal either (1) concerned the already harmonized area of labor law (proof directive, pay transparency directive) or (2) was a reaction to a crisis that is better overcome jointly in the *European Union* (see measures on the corona pandemic) or (3) the member states were unanimously confronted with a new regulatory subject or need for reform (work-life balance *Directive*, platform work *Directive*).

The necessity or - from a political science perspective - the legitimacy is the lowest for the last group of measures. The *European Pillar social rights* is intended to establish the narrative of a Europe that protects social rights, but if the measures come into too much conflict with national law, there must be a conviction that the *European Union* can regulate better than the Member States. The fact that this does not automatically go hand in hand with the *European Pillar of Social Rights* is also documented by the difficult negotiations on the draft directive on platform work. The conflict over the criteria for a rebuttable presumption of worker status meant that in the end it was only possible to agree that such a presumption regulation should exist as an instrument.

Measures outside of such legitimation mechanisms, such as the *Minimum Wage Directive*, were passed by a majority decision. However, their design and the lower legitimacy of European action cause conflicts with individual national welfare states. The Danish action for annulment is symptomatic of this due to the lack of competence of the *Council* and the *European Parliament*. Regardless of the outcome of the proceedings, the lawsuit documents that the conflict with the national welfare states leads to resistance against the *European Union* not only in the implementation of the internal market, but also in social policy measures.

A European social market economy - and *European labor law* - has therefore only ever developed with consideration for decentralized development in the multi-level system. The member states have a nationally shaped welfare state, so that the *European Union* needs specific political legitimacy to take further measures. In this respect, a narrative legitimizing the *European Union*, namely the protection of social rights, can certainly develop. However, this is a process

that requires many small steps. If such measures cause intensive conflicts with the national welfare state, especially in the case of conflicts of competence or subsidiarity, they can have a disintegrating effect. This does not necessarily mean an exit from the *European Union*, but also the blocking of legislative projects or the prevention of concrete standards for social protection.

The *European Union* will continue to develop its social dimension in the future in the diversity of welfare states. This is not a disadvantage. The legal systems will thus retain their established structures, they will not be dependent on the somewhat slower lawmaking in the *European Union* when rapid adjustments are required and can also pursue the objectives of the *European Union* in a decentralized manner. However, this unity in diversity requires an adequate design and interpretation of secondary law. Framework specifications and guidelines are therefore often more effective than detailed specifications (e.g. *Directive 1999/70/EC*, *Directive 97/81/EC*; *Directive [EU] 2022/2041*). In this context, the *European Pillar of Social Rights* also has a (limited) legal effect (see V.2). This development of a social Europe is additionally reinforced by the *fundamental social rights* (see V.3). The ECJ has repeatedly strengthened Union law through its case law, so that a complete picture only emerges when its legal impact on social policy is also taken into account.

## **2. *European Pillar of Social Rights* - its impact on labor law.**

### a) Non-binding recommendation and source of legal knowledge

The political impact of the *European Pillar of Social Rights* should not be underestimated - legally, however, it is a non-binding recommendation, so it does not grant any rights. This initially applied to the first version of the Pillar, which was proclaimed by the *European Commission* (Article 288 paragraph 5 TFEU). The inter-institutional cooperation, which ultimately led to the *Joint Proclamation of the European Commission, the European Parliament and the Council* in 2017, allows for more extensive agreements according to Article 295 sentence 2 TFEU, but the text on the *European Pillar of Social Rights* contains no statement on its binding nature. The *Commission's* justification for the proposal does not suggest otherwise, according to which the *European Pillar* is intended to grant more rights. At the same time, it is stated that it must be implemented by the *European Union* or the Member States. In this respect, despite the name, it is *Soft law*.

However, the non-binding nature of the *European Pillar of Social Rights* does not make it legally meaningless. It specifies the objectives of the *European Union* as set out in Article 3(3) TEU, it influences the purpose of secondary legislation and thereby influences their interpretation. In addition, the ECJ has already used recommendations in other contexts to interpret Union law. This also includes national legislation that serves to transform secondary law. The decisive factor here is that the *European Pillar*, as a non-binding recommendation, is only to be "taken into account" in the interpretation if the legislation itself refers to it. Otherwise, the recommendation would become binding through the back door.

In addition, national legislation that directly serves to implement the *European Pillar of Social Rights* - without the intermediate step of a secondary legislation - must be interpreted with regard to its statements. However, this requires a substantive reference by the national legislator. Unlike the implementation of *Directives*, which is mandatory for the Member State, there is no comparable obligation to implement the *European Pillar of Social Rights*. In this respect, existing national employee protection laws - unlike new *Directives* - cannot be interpreted in the future in accordance with the *European Pillar*.

#### b) No substantive loading of *fundamental social rights*

For the Member States of the *European Union*, several orders of social human rights already existed before the *European Pillar of Social Rights*: the *International Covenant for Economic and Social Rights*, the *European Social Charter* and *Charter of Fundamental Rights*, and the non-binding *Community Charter of Social Rights for Workers*. The institutions did not fully clarify their relationship to the *European Pillar of Social Rights* when it was proclaimed. For *European labor law*, however, the non-binding *European Pillar of Social Rights* only provides impetus for legislation; it cannot influence the interpretation of the *Charter of Fundamental Rights*. This can be illustrated by two examples:

According to the prevailing opinion, the *Charter of Fundamental Rights* – unlike the *European Social Charter* – does not contain a right to a fair minimum wage. Article 31 paragraph 1 of the Charter refers in its heading to “fair working conditions”, but this is not reflected in the actual text of the standard, which guarantees “healthy, safe and dignified working conditions” and is therefore intended above all to ensure the physical and psychological integrity and personal protection of employees. The *Convention Presidium’s* explanations on Article 31 paragraph 1

of the *Charter* do not refer to the right to a fair minimum wage in Article 4 no. 1 of the ESC as a template. The *European Pillar of Social Rights*, as a non-binding part of Union secondary law, cannot ignore this. An interpretation of Article 31 paragraph 1 of the Charter based on this would contradict the hierarchy of legal sources. As a recommendation, the *European Pillar* can provide political impetus even in areas where there are no fundamental social rights or even where there is a lack of competence. It articulates a desirable convergence without being able to enforce it.

The same applies to the right to protection against unjustified dismissals. Article 30 of the *Charter of Fundamental Rights* is a subjective right from which a duty of protection on the part of the state can be derived. However, the further design is left to the competent legislative bodies. The *European Pillar of Social Rights*, which provides for the right of employees to receive a reason for dismissal, cannot in any case establish this in a binding manner with the quality of primary law. Nor does it legitimize a corresponding interpretation of Article 30 of the *Charter of Fundamental Rights*. Therefore, on February 20, 2024, the ECJ rightly resorted not to Article 30 of the *Charter of Fundamental Rights*, but to Article 47 of the *Charter of Fundamental Rights* to derive an obligation to provide reasons for dismissal. However, such a duty to provide reasons can only ever exist within the scope of the *Charter of Fundamental Rights* and does not in any way lead to the introduction of a general duty to provide reasons. As a result, the *European Pillar of Social Rights* remains only a goal for the *European Union's* future political action.

Finally, it should be noted that, in addition to the *Charter of Fundamental Rights*, primary Union law contains general principles (Article 6(3) TEU). The fundamental rights were anchored in this until the *Charter of Fundamental Rights* came into force. Today, they have a complementary function and primarily cover principles of the rule of law such as the Protection of legitimate expectations. In this respect, it is fundamentally possible to supplement the fundamental social rights of the Charter with general legal principles. However, a statement marked as a right in the non-binding *Pillar of Social Rights* is not sufficient for this. The situation is different if all member states are unanimously bound to social rights by international conventions or recognize such a social right. In order for the latter to become a general legal principle, however, the agreement of ordinary law is not sufficient; it must be unanimously recognized as a fundamental or human right. This is not the case, for example, with the right to an adequate minimum wage, because not all member states have ratified No. 1 of Art. 4 ESC.

### c) Competence for secondary legal acts

The text of the *European Pillar of Social Rights* does not contain any statements on the competences of the *European Union* to implement it. However, the recitals, the preamble and the *Commission's statement* of reasons assume that the Union institutions and the Member States must act within the scope of their competences. Therefore, the limited individual powers in the TFEU cannot be interpreted in accordance with the pillar. In addition, not every measure serves to implement the pillar of cohesion and convergence in the *European Union*. Articles 174 and 175(3) TFEU therefore do not provide any "reserve competence" for implementing acts. The same applies to Article 122 TFEU.

The *European Pillar of Social Rights* has demonstrated an understanding of the welfare state under Union law without generally aiming to reduce the lag of the most disadvantaged regions. Such measures can be taken to implement the pillar. This applies in particular to the *Next Generation EU Fund* for reconstruction and resilience measures. However, not every measure to implement the Pillar can be classified in this way, as shown by the *Minimum Wage Directive*, for which some refer to Article 175(3) TFEU due to doubts about the competence of the *Council* and the *European Parliament*. However, the Directive aims to develop a general minimum standard, not to bring Member States with very low wages closer to those with high wages. Article 5(4) of *Directive (EU) 2022/2041* only requires orientation towards the reference values of the respective Member State.

As a result, the *European Union* remains characterized by a constitutional asymmetry. Its objectives and its description as a community of values through the *Charter of Fundamental Rights* or the *European Pillar of Social Rights* go beyond its competences. It remains dependent on the Member States pursuing the common objectives or creating additional competence titles even without binding Union legal acts. The *Minimum Wage Directive* documents that the existence of the *European Pillar of Social Rights* provokes action in the border areas of Union legal competences and thus triggers actions for annulment that assert not only the lack of competence but also the disregard of subsidiarity. It is symptomatic of this that the *Porto Declaration* on the strategic implementation of the *European Pillar of Social Rights* in 2021 does not address the questions of competence, so that conflicts of competence are to be expected to arise again.

Ultimately, the Member States must decide whether they want to pursue greater integration. To do this, the *European Union* must demonstrate that it can regulate the issue better than the Member States. The driving force behind the deepening of social policy cooperation was repeated crises that affected several Member States.

### **3. Fundamental social rights - labor law as a human right**

#### a) Strengthening *Directives* through *fundamental social rights*

Even before the *European Pillar of Social Rights*, the *Charter of Fundamental Rights* in particular strengthened the social dimension in the *European Union* through fundamental social rights. Since their entry into force, it has been characteristic of the case law of the ECJ that labour law guarantees of the *Directives* – such as the right to daily rest or the right to vacation – are very generally equated with the fundamental rights guarantees under Article 31 paragraph 1 or 2 of the *Charter of Fundamental Rights*, without making a precise distinction in the determination of whether they relate to the fundamental right or the *Directive*. Examples of this are the well-known *CCOO*, *King*, *Bauer* or *Max Planck Society* cases.

This approach by the Court of Justice primarily intensifies the effective implementation of *Directives* without generally recognizing a horizontal *Third-Party-Effect of the Directives*. *Directives* are binding at most on the state employer if they are sufficiently clear and precise. This weakness of the *Directives* compensates for the simultaneous application of the fundamental right. Its priority of application makes the conflicting national law inapplicable if an interpretation in accordance with the *Directive* or fundamental rights is impossible. The fundamental right therefore has a negative *Direct-Third-Party-Effect* in the relationship between the parties to the employment contract. If one also derives a claim against the employer from the social fundamental right, a positive *Direct-Third-Party-Effect* is even achieved.

In the hands of the ECJ, fundamental rights therefore have the potential to intensify the harmonizing effect of the *Directive* and thus partially override the quality of the legal source. This fundamental issue of Union law has been the subject of many academic discussions and will not be taken up again here. In the meantime, the first nuances are becoming apparent in the case law of the ECJ. In the *Fraport* and *Keolis Agen* cases from 2022 and 2023 respectively, which concerned the forfeiture of holiday entitlements or holiday compensation claims, the ECJ

distinguished between the fundamental right under Article 31(2) of the *Charter*, which "enshrines" the entitlement, and Article 7 of *Directive* 2003/88/EC, which "specifies" the entitlement. In addition, it is made clearer that the forfeiture is or must be a restriction of fundamental rights justified under Article 52(1) of the *Charter*.

This distinction means that the *Directive* is not used to add content to the fundamental right. For example, Article 31(2) of the *Charter* does not specify how long the minimum paid holiday for employees is. Such a specification is not possible either on the basis of the legal sources of international law (Article 2 No. 3 RESC - four weeks per year, Article 3 No. 3 *ILO Convention* No. 132 - three weeks per year) or on the basis of Article 7 of *Directive* 2003/88/EC. This lack of specification also applies to other fundamental social rights insofar as they guarantee rights to benefits.

Article 31(2) of the *Charter* therefore only takes precedence if there is not only a violation of the *Directive* but also of the fundamental right. This means that three groups of cases must be separated when seeking legal protection before the ECJ: Firstly, there are national provisions which are related to the implementation of the *Directive* but concern rules which the *Directive* did not intend to harmonize from the outset (e.g. whether the granting of leave is made by the employer as in accordance with Section 7(1) of the *Federal Holiday Act* or by agreement as in Austrian holiday law under Section 4(1) of the *Holiday Act*), so that a request for a preliminary ruling is inadmissible because it does not concern the interpretation of Union law. Secondly, there are national provisions which may inadequately implement the *Directive* but do not violate the fundamental right (e.g. statutory minimum holiday of less than four weeks), so that only the conflict with the *Directive* can be established. Thirdly, there are those regulations that not only violate the *Directive* but also the fundamental right and thus lead to the inapplicability of national law if it cannot be interpreted in accordance with fundamental rights (e.g. forfeiture of the right to paid vacation without sufficient justification within the meaning of Article 52 paragraph 1 of the *Charter*). These gradations can now also be found in the decisions of the ECJ.

#### b) Constitutionalization of labor law

Today, *fundamental social rights* are an essential part of many national legal systems as well as of Union law and international law. In Europe, their content cannot be enhanced by secondary legal acts without violating the hierarchy of legal sources. In the discussion, the aim is to

strengthen the protection of workers' rights in part by postulating their character as a human right. Fundamental rights of employees are human rights, which are set out in the *Charter of Fundamental Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the ECHR and the *European Social Charter*. However, this does not make all labour law an expression of human rights. The constitutionalisation of labour law cannot per se protect the hard-won successes of social policy against deterioration. This also led to a petrification of standards, which makes the necessary adjustment more difficult in crisis situations. The goal of "social progress" does not exclude crises that make (temporary) changes necessary.

According to the understanding of fundamental rights in the *Charter of Fundamental Rights* and the ECHR, fundamental rights can be restricted within the limits of proportionality for legitimate reasons. This also applies to the social rights under the *European Social Charter*, even if the relevant *Committee at the Council of Europe* generally decides without recourse to the reservation of limitations contained in the *Charter*. For the future of *fundamental social rights*, it is crucial that the assessment of these fundamental rights between the relevant bodies becomes more similar. The existing divergence is reflected in the ECHR's statement in its decision on the admissibility of the ban on strikes for German civil servants that it is making its decision in accordance with the ECHR and the principle of proportionality. In the past, the Court has taken into account other international legal sources and the case law of the relevant committees in its evolutionary-dynamic interpretation of Article 11 of the ECHR, thereby gaining more extensive protection of fundamental rights - but only insofar as they demonstrate consensus. Such dissonance between the committees gives rise to conflicts that ultimately harm fundamental rights and their guarantee.

In order to achieve the overarching goal of preventing social regression due to crises, it is necessary to regulate economic activities with the aim of preventing serious crises - such as the financial crisis that began in 2008. The regulations required for this are not part of labor law, but of commercial law. In addition, the resilience of the Member States must be strengthened. This is currently also being done using funds from the *European Union (Next Generation EU Fund)*, but in the long term it must be done using the Member States' own funds. This is supported by the *Social Scoreboard* as part of the *European Semester*. Furthermore, as in other areas, a target could be developed to ensure that a certain proportion of GDP is earmarked for social welfare measures.

### c) Interaction with *Fundamental Freedoms* and *Entrepreneurial Freedom*

The *Charter of Fundamental Rights* not only strengthens workers' rights, but also sets limits on them, particularly through Article 16 of the *Charter of Fundamental Rights*, to protect companies. The first decision on this was the *Alemo Herron case*, which concerned the dynamic binding of the purchaser of a leisure facility to the collective agreement of the seller, even though he could not join the relevant employers' association. The ECJ saw this as a violation of the essence of *Entrepreneurial Freedom*. Criticism of the decision has not always taken into account that the Court of Justice - like the *Convention on Fundamental Rights* - uses a so-called relative essence, which is no different from the principle of proportionality. The recourse to Article 16 of the *Charter of Fundamental Rights* was consistent. A *Charter of Fundamental Rights* that guarantees freedoms and covers all economic actors also protects companies. In terms of international law, the *European Social Charter* was indeed a template for some of the fundamental social rights of the *Charter of Fundamental Rights*, but its focus on social rights does not rule out the possibility that a fundamental rights document that pursues a more holistic approach - such as the *Charter of Fundamental Rights* - also guarantees conflicting fundamental rights.

The ECJ's recourse to *fundamental social rights* and the use of *Fundamental Freedoms* and the *Fundamental Right to Freedom of Enterprise* from Article 16 of the *Charter of Fundamental Rights* - despite all justified criticism of the individual decisions - form a whole. With the entry into force of the *Charter of Fundamental Rights*, the *European Union* has become a community of values that, unlike the Basic Law, recognizes not only civil liberties but also fundamental social rights. Both can be restricted in accordance with Article 52 paragraph 1 of the *Charter of Fundamental Rights*, which brings about the necessary balance between conflicting interests. The Court must therefore take into account the fundamental rights of both parties to the employment contract, which has not always been successful in its decisions in the past.

#### **4. Interim conclusion**

As a result, it can be stated that the areas of development of *European labour law* postulated here can be demonstrated. They are based on different legitimacy narratives: the common internal market and the associated Transnationality requires regulations that can be created better

by the *European Union* as a supranational entity than by the member states. A narrative is only gradually developing for social policy that the *European Union* is the guarantor of social rights. In this respect, there is competition with the national welfare states, which prevents major steps in development. This does not make the *European Union* any less social; rather, it is the sum of Union law and national law. Further harmonization within the framework of social policy requires a convincing reason for the member states.

## **VI. *European labor law* and its transformation - interaction in the European judicial system**

This interplay between Union law and member state law is being particularly promoted by another actor: the ECJ. The effectiveness of harmonization is often decisively determined by the ECJ, which at the same time limits special national paths. Central development steps that have an impact on all of Union law have also affected labor law and will only be listed here: (1) the priority of application of Union law, (2) the further development of fundamental freedoms from the prohibition of discrimination to the prohibition of obstruction and (3) the direct application of fundamental freedoms to so-called intermediary powers, which also include the social partners.

Characteristic lines of conflict between the *European Union* and the member states arise when there is a significant difference between the *Employee protection law* established in the member state and the *Directive* law. In this respect, the ECJ must support harmonization and the member states should self-critically question their national law. Avoidable conflicts arise, however, from the type of cooperation in the European court system. Both are explained here using examples.

### **1. Strengthening convergence through *Directive* interpretation**

The interpretation of *Directives*, which is central to *European labor law*, is primarily based on the purpose of the *Directive*. This determines a minimum level of harmonization and thus leaves room for national peculiarities. However, the *Directives* generally use terms originally from EU law; the driving terms of *European labour law* include, for example, the European definition of employee, which is (allegedly) applied by the ECJ even when the directives expressly refer to the national definition of employee or the national understanding of the employment contract (e.g. fixed-term work *Directive*, part-time work *Directive*, temporary agency work *Directive*, maternity protection *Directive*). For *German labour law*, this meant that external managers and

club members who act like employees in particular had to be included in employee protection. In addition, judges, civil servants and soldiers are to be treated the same as employees. This case law has always been criticized and was considered to exceed the scope of competence. The Union legislature is now glossing over this conflict by adding - as in Article 1(2) of the *Evidence Directive* (Directive [EU] 2019/1152) and Article 2 of the *Work-Life Balance Directive* (Directive [EU] 2019/1158) - when describing the personal scope of application to the reference to the national understanding of the employment contract, that "the case law of the Court of Justice must also be taken into account".

Even if the *Directive* refers to national law, the member state does not have comprehensive sovereignty over the definition of the employment contract. The member states are required to implement the requirements of the *Directive* in national law with regard to the *Directive's* objective. To do this, they are allowed to resort to the national understanding of the employment contract or employment relationship. However, this leads to implementation deficits if a member state does not treat people as employees, even though the *Directive's* objective is equally relevant for them and no other equivalent regulation exists. For example, there is a risk of atypical part-time workers being disadvantaged not only for employees, but also for civil servants and judges. If the national understanding of the term were to remain the same, the aim of the *Directive* would only be partially achieved due to national peculiarities, without there being any objective reason for the different treatment. This contradicts the principle of equality in Article 20 of the *Charter*, which prevents not only the Union institutions, but also the Member States, when transforming the *Directive*, from treating people who work in a comparable manner unequally without an objective reason.

One of the inaccuracies of this case law is that the reference to the principle of equality, which was recognized as a general legal principle even before the *Charter* came into force, is regularly missing, and it is therefore not clear that this is not just a teleological interpretation of the *Directive*, but also an interpretation that conforms to the system with regard to primary law. The conflict with national law therefore results from the fact that the Member States do not always design social protection consistently. This does not force national labor law to be extended to these groups of employees, but to create a comparable legal standard for these people. Where the legislature is inactive, however, the courts, which are obliged to be loyal to the Union, have no choice but to interpret the *Directive* in accordance with the *Directive*, insofar as this is permissible.

## 2. Interpretation of the *Directive* in the European court system

The *Working Time Directive* is exemplary and at the same time symptomatic of another problem. It only recognizes the categories of working time and rest time, which makes it necessary to classify on-call and standby duties. After the first decisions on standby duty in the *Simap*, *Jaeger* and *Pfeiffer* cases, the classification of on-call duty, during which the employee is not at the place of work, remained controversial. This is not about the outcome of the individual decisions, but about the actions of the ECJ in the European judicial system. In general, the Court always points out that the application of EU law to individual cases is a matter for the national courts. However, when it ruled in the *Matzak* case that a firefighter's on-call duty, who has to be at the base within eight minutes in the event of an emergency, is working time, it was clear that a large number of other individual cases would be submitted to the ECJ.

Working in the judicial system means sharing work (and "power"). It is the ECJ's job to decide on the interpretation of EU law (Article 19(3)(b) TEU). If abstract legal concepts require specification, case groups should be formed at a medium level of specification, which should work out the standards of value and leave the assessment of the individual case to the national courts. Such case group formation is not unfamiliar to courts. The ECJ has also on March 9, 2021, two decisions of the Grand Chamber in working time law (*case Radiotelevizija Slovenija*, *case Offenbach am Main*). According to this, on-call duty is only fully working time "if an overall assessment of all the circumstances of the individual case (...) shows that the restrictions imposed on the employee during on-call time are of such a nature that they objectively significantly impair his ability to (...) freely organize his time (...)." This standard will lead to different, and in borderline cases even to contradictory, decisions. However, this unity in diversity is unavoidable and practicable for cooperation in the Union, provided that the decision-making standard includes the relevant assessment criteria. The need to supplement or refine this standard with knowledge of the cases does not speak against this method.

The case law on employees' holiday entitlement under Article 7 of *Directive* 2003/88/EC would also have benefited from a little more sense of action in the court system. Since 2009, the ECJ has issued 38 decisions on this straightforward regulation. It feels like hardly a stone has been left unturned. The following key questions could have been extracted:

1.) Is paid vacation just an occupational health and safety measure or also an independent entitlement to remuneration that exists independently of the implementation of occupational health and safety?

2.) Under what circumstances is the expiration or refusal of the entitlement to vacation or vacation compensation an impermissible denial of the entitlement to vacation?

It would have been an enormous relief for the courts and the parties to the employment contract if, as part of the interpretation of Union law, the understanding of the entitlement to vacation had been quickly clarified and assessment criteria had been developed for the necessary case groups. The crucial question is: How do you achieve the approach preferred here?

The interpretation of Union law is the actual task of the ECJ according to Article 19 paragraph 1 sentence 2 TEU and Article 267 paragraph 1 TFEU. The question of the compatibility of national law with Union law, which is often (covertly) asked by national courts, is not in itself a permissible subject of a request for a preliminary ruling. Moreover, it is only a continuation of the national legal dispute, which is not the actual aim of the request for a preliminary ruling. The Court of Justice responds (too) generously to this by deciding whether a norm, such as the one at issue in the reference procedure, meets the requirements of Union law. This results in decisions that are very case-specific. This is partly due to the hermeneutic approach that is inherent in every legal finding. It arises in the face of the facts. But this does not exclude the elaboration of fundamental questions. When making a request for a preliminary ruling, such an approach places demands on the ECJ and the national courts. The national courts must work out the core of the legal question in such a way that it becomes clear which statement of Union law is essential for the application of national law. The question of whether Union law conflicts with a national norm is not ideal for this purpose. Firstly, the legal question is not worked out in sufficient detail, and secondly, the Member States thus provoke decisions that are specific to individual cases and can therefore severely restrict the scope for action. Follow-up questions are also not apparent.

In addition, there is a risk that the Court will not recognize the rule and the exception. Examples include the *King* and *Max Planck Society* cases on the employer's obligation to cooperate in granting vacation. In both cases, the employer did not treat the employee as an employee, so that the uncertainty about the existence of employee rights hindered their assertion. This does

not apply in the same way to an employee who is also classified as such by the employer and who receives proof of the essential working conditions after the conclusion of the employment contract. An obligation to cooperate for all employment relationships makes the exception the rule and is therefore disproportionate.

The identification of key issues that are crucial for understanding Union law requires not only knowledge of Union law, but also of the national legal system. This need arises more in a partially harmonized area of Union law - such as labor law - than in areas of full harmonization such as competition law. When presenting national law, it is not enough to look only at statutory law and not at the case law that has developed from it, even if the continental European legal systems are not *case law* with binding precedents. It is only through the interpretation of the norm that its regulatory content becomes apparent.

In order to improve case law in requests for a preliminary ruling, the dialogue between the ECJ and the national courts must be further strengthened. In the last three to four years, the Court of Justice has started to submit specific questions for oral hearings to the Member States that have participated in the proceedings. This can be an important step. In addition, since 2000, it has been possible to ask the referring court for clarification in the case of requests for a preliminary ruling under Article 101 of the ECJ's Rules of Procedure. In practice, this instrument is rarely used. However, it can prevent misunderstandings and allows the central legal question to be worked out for judicial interpretation.

In addition, it could be helpful if, at least in proceedings that concern partially harmonized law, the judge of the Member State concerned is always involved in the proceedings - even if he or she is only granted an advisory vote. This approach has proven helpful at the ECHR. The different approach at the ECJ was intended to safeguard the Court's purely EU law approach and to block special national paths. However, this does not fully do justice to action within the court system.

## **VII. Summary**

*European labor law* is now an essential part of the social market economy in the *European Union*, even if there is no uniform European social model. The *European Pillar of Social Rights*

is a commitment to a social Europe and served to overcome a lack of political legitimacy and objectives and to push forward regulatory practice. In addition to the rather reactive emergence of *European labor law* as a result of the internal market, a proactive social policy has now emerged. The limited legitimacy of the *European Union's* actions and its limited individual authorization are, however, obstacles to its implementation.

The *European Union* will have to continue to shape its law in coordination with the national welfare states in the future. Politically, it must prove that its measures are necessary because it can regulate the issue better than the member states. Crises that affect several member states are often the main driving force for deepening social policy cooperation. In addition, new actual developments can give member states reason to proceed in a uniform manner from the outset. In social policy, the *European Union* should act primarily when it comes to social standards, for which all member states have already ratified international conventions without reservation and thus agreed on a uniform standard.

*European labour law* as a unity of Union legal acts and their implementation in the member states is and remains characterized by diversity with common objectives. This must be taken into account in legislation as well as in case law. This does not advocate national special paths, but calls for a concentration on the essentials without losing sight of the goal of creating a social market economy.

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*In the next column, I would like to turn to the legislative process within the Union and give you an overview of it. One of the main focuses will be how the law enacted by the Union - in particular the regulations and directives - affects national law, and the important role played by the case law of the ECJ and its interpretation practice in the application of the law.*

*(signed)* Dr. Kammerer