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Title: Challenges and possible outcomes under the European Pillar of Social Rights – Case study through the individual and collective labour rights[1]

Main research topic: current directions and perspectives of fundamental labour and social rights in EU law

Introduction to the topic

The focus of this case study are mainly legal, legislative and, to a lesser extent, political events which had emerged earlier but gained greater prominence after the acceptance of the European Pillar of Social Rights (hereinafter: EPSR) of November 2017. In my opinion, the EPSR can make great progress in the field of real, apparent legal actions, but its real merit is, at least for now, that it turns the attention of the Member States (hereinafter: MS) to social and labour market questions. Naturally, the latter is not a new phenomenon, neither is the circumstance that the guarantee of the fundamental social rights of employees requires more intense intervention from the part of the EU than was the case in earlier decades, but at the same time, closer co-operation from the part of the MSs is also necessary. In my opinion, the EPSR – besides its fundamental rights charter-like character – can be new and effective in this field, and so my research covers its spirit and expectations.

Therefore, this paper examines some significant and relevant questions of labour law and social law in EU law. We can observe an intense and serious process regarding the modernisation of social rights in EU law, or at least, some major changes. Although these new directions can lead the social and employment policy of the EU to new places, it is known that a real turning point seems almost impossible in EU law because of the power of Member States in relation to such questions. The paper's approach is partly theory-, regulation- and jurisprudence-driven since the different viewpoints can lead us to possible new solutions or ways of thinking. In my opinion, it is not easy to talk about the fundamental rights of workers in EU law; however, some social factors and changes in the labour market make it a current issue worth covering. In the conclusion, I reflect on the importance of the sub-topics regarding the EPSR and their role in further possible labour law reforms.

Current challenges and possible take-off points in EU labour and social law

The researcher who examines changes in labour law, which, according to a narrow interpretation covers the rights of workers, the new directions of legal protection, and in general, the current stage of fundamental values, which traditionally ensure the essence of employment regulation within the framework of the social rule of law,[2] is in a difficult situation. Furthermore, the planned research definitely focuses on EU law, its labour and social law acquis, and so we can expect to meet more questions than exact answers, since "EU labour law" itself has been facing an important transformation over a longer period of time .[3] As a result, we can say with good reason that the EU social and employment policy is experiencing

[1] This paper was supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences.
[2] György KISS: *Munkajog*. Budapest, Osiris, 2005., 211-213.
[3] Zane RASNAČA: Bridging the gaps or falling short? The European Pillar of Social Rights and what it can bring to EU-level policymaking. *European Trade Union Institute – Working Paper*, 2017/5., 11 August 2018 https://www.etui.org/Publications2/Working-Papers/Bridging-the-gaps-or-falling-short-The-European-Pillar-of-Social-Rights-and-what-it-can-bring-to-EU-level-policymaking, 4., 8-9. and 19-20.

"interesting times"[4] heading towards the common social policy.[5] Taking into consideration all the above I think that with the method of research in such task we can examine the usual, generally used, even traditional values of the labour law in order to put them into the context of the present or even future system, which is useful from the viewpoint of the level of both the regulation and the legal practice and can lead to further results for consideration.[6]

At the same time, this is my aim with the present study, since I sketch out some sore points based on the present state of EU law, which definitely influence and shape the present and future of the legal protection of workers. Furthermore, I attempt give a general picture on the method of considering and answering the raised issues. According to my viewpoint, in the coming years, the fundamental labour law rules may undergo serious changes, and some results and plans are actually available now. I designate as a major step the reform of the Written Statement Directive (Directive 91/533/ECC, hereinafter: WSD) and collective labour rights as fundamental rights. I must add that an analysis of the posting directive 96/71/EC, hereinafter: PWD) principle is missing from the paper due to limitations on length.[7]

The new Written Statement Directive as the traditional ground for individual labour rights in EU law

With the creation of an employment contract the employer's obligation to provide information in written form is such a basic requirement in the employment relationship[8] that it practically defines all sections of the employment relationship between the parties and fundamentally all the important questions of the fulfilment of the contract. Regarding the private-type of relationship between the employer and the employee, which also bears the character of economic and personal subordination,[9] the employer has an increased responsibility to provide in time written information with proper content in order to fulfil the contract, referring to all important circumstances of the employment relationship.[10]

It is important to add that the EU legislator considers this obligation of providing information as such an important legal guarantee[11] that it is regulated in a directive, and nowadays it is regulated with a strengthened social fundamental rights background.[12] However, this regulation has not received enough attention in the past several decades, at least regarding the difficulty in enforcing the right of the employees stated in it, and the high regulative freedom of the MSs

[4] Frank HENDRICKX: Editorial: The European pillar of social rights: Interesting times ahead. *European Labour Law Journal*, 2017/3, 192.
[5] Rolf BIRK: Általános áttekintés. In: György KISS (ed.): Az Európai Unió Munkajog. Budapest, Osiris, 2003. 19-22.
[6] Regrding this part of the research see in details: Márton Leó ZACCARIA: A 91/533/EGK irányelv reformja – elméleti megfontolások és európai bírósági tanulságok. *Közjogi Szemle*, 2019 (under publication).
[7] See the new directive: Directive 2018/957/EU of the European Parliament and the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.
[8] Tamás GYULAVÁRI: IV. fejezet – Munkaviszony létesítése. In: Tamás GYULAVÁRI (ed.): *Munkajog* (Third, revised edition). Budapest, ELTE Eötvös Kiadó, 2016., 144-145.
[9] KISS: *Munkajog*, 21-22.
[10] According to paragraph (1) of article 42. § of the Hungarian Labour Code the employer shall inform the employee in writing within fifteen days from the date of commencement of the employment relationship.
[11] Gyula BERKE: A munkáltató tájékoztatási kötelezettsége a foglalkoztatási feltételekről. In: KISS (ed.): ibid. 317-319.
[12] See article 27 (right to consultation and information) and 31 (right to fair and just working conditions) of the Charter of Fundamental Rights of the European Union (hereinafter: CFREU).

referring to the field of the labour law regulation disclose such deficiencies from time to time[13] which cannot be explained simply by the passage of time. It is clear that to review the WSD is necessary because of the need to modernise – mainly because of the changing structure of employment relationships[14] – but contradictory situations emerging in legal practice and the system of social guarantees that should be strengthened by the EPSR also make it necessary. The new WSD is completed,[15] though its introduction to a wider circle and entry into force have not been performed, but it's supposed positive effect cannot be questioned, mainly because of the new norms which are more like a definite legal protection. However, it is still an open question whether the new regulation can serve as a prominent, standard-bearer sample of legal protection among the reform proceedings envisioned by the EPSR,[16] but it is clear now that the WSD seems to be an important step regarding the intent of the legislator, the intention of strengthening the rights of the workers, the co-operation between the social partners, and the reflections of the experiences in jurisprudence.

In my opinion in the reform of the WSD there are three key areas which, on the one hand, specifically in connection to the modernization of the original WSD, and on the other hand, generally – as a catalyst – may have a great effect on the approach to all EU labour and social legal protection.

Firstly, it is important that the WSD is based on the principle of providing information promptly, that is, by developing the typical practice of the MSs the WSD intends to reduce the employees' vulnerability in relation to the employer to the minimum length of time. Furthermore, concerning the aspect of guarantee this would be important for both parties, namely, adequate and prompt information would be preferable for the employer from the point of the performance of the employee, so the interest of the parties – at least indirectly – is common. It is not an indifferent question, either on a regulative or practical level, as to the performance of which conditions can the employer's obligation to provide information be regarded as adequately corresponding to the WSD. Adequate and prompt notification is a crucial requirement in the effective regulation as well as in the new standards. If the employer performs this obligation only formally, but in fact, does not provide adequate information to the employee, the employee's performance and enforcement become difficult, and the norms of the WSD cannot be fulfilled. A good example of this is the insufficiently detailed information regarding working time and its organisation. Written form is important, as well as what information should be covered, but urgent immediacy is also a key both for jurisprudence and the new regulation, so that an unjustified long period of time should not pass between establishing the employment relationship and the necessary employer's provision of information. In fact, right at the establishment the employer should provide this information, but in case of delay it should be made in such a short time that neither the interest of the employee nor the possibility of enforcement of claims of the employee can be injured, and cannot have a negative effect on the employee's performance. It is important that the new WSD is empowering this issue.

[13] Stefano GUIBBONI: Social Rights and Market Freedom in the European Constitution: A Re-Appraisal. *European Labour Law Journal*, 2010/2, 164-169.

[14] Nóra JAKAB – Henriett RAB: A munkajogi szabályozás foglalkoztatási viszonyokra gyakorolt hatása a szociális jogok és a munkaerőpiac kapcsolatának függvényében. *Pro Futuro*, 2017/1, 27–29.

[15] Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union. Brüsszel, 2017.12.21. COM(2017) 797 final.

[16] Sára HUNGLER: Nemzeti érdekek és szociális integráció az Európai Unióban: az Európai Jogok Szociális Pillérének kísérlete az integrációra. *Állam- és Jogtudomány*, 2018/2, 39-42.

Secondly, Article 15 of the new WSD itself sets out the right to legal remedy, also with regards to those employees whose employment relationship is terminated: however, the greatest new element is Article 17, which deals with the workers' special, advantageous burden of proof concerning labour law legal disputes that emerge as a consequence of incorrect information provided by the employer. At the same time, this article ensures the worker's legal protection against dismissal in case the employee protests against illegal provision of information from the employer's side, and this is the reason for the termination of the employment relationship. At first sight, it seems strange to read about protection against unfair dismissal in such a context when a possible common EU regulation on this issue is so far,[17] even though to incorporate this idea into regulation within the framework of the EPSR would not be gratuitous.[18] However, the importance of the new regulation is definitely the right to legal remedy, since the WSD can be regarded as a kind of "rights catalogue" for the workers, at least regarding the important interests in EU law,[19] consequently, protection against dismissal can be regarded as quasi common ground in regulation. In the future attention should be paid to of how it would effect in general the effective judicial protection of the workers' rights ensured in the CFREU.[20]

Thirdly, the new WSD attempts to solve a current general labour law regulative dilemma when it tries to take leave of the traditional concept of employee based on the economic rationality.[21] Important labour law and employment trends have emerged in the nearly three decades since the original regulation, and it justifies the rationality of creating a unified concept. Consequently, the role of the earlier atypical employment relationships[22] is followed nowadays by such new, modern "employment relationships", even following each other fast, which also emphasises the need for modernised regulation. Basically, it is an important question concerning the new regulation as to what kind of legal relationships the compulsory norms of employer's notification should be applied within the above mentioned changing framework of the labour market. In my opinion, it should not be debated as to what concept of worker should be incorporated into the new WSD regulation, since the concept clarified by the CJEU has existed for a long time,[23] but it rather seems to be a solid starting point than a good solution for the new controversies regarding employment relationships. Naturally, the EPSR can play an important role in this process in the future. It can be stated that referring to the WSD, the problem of legal subjectivity is closely connected to the controversial concept of worker in EU law, mainly applied in the case law of the CJEU.[24]

Collective labour rights as the next necessary level in workers' legal protection

[17] Guus Heerma VAN VOSS – Beryl TER HAAR: Common Ground in European Dismissal Law. *European Labour Law Journal*, 2012/3. 215-229.
[18] Frank HENDRICKX: The European Social Pillar: A first evaluation. *European Labour Law Journal*, 2018/1, 4-5.
[19] Attila KUN: Munkajogviszony és a digitalizáció – rendszerszintű kihívások és kezdetleges Európai Uniós reakciók. In: Lajos PÁL – Zoltán PETROVICS (ed.): *Visegrád 15.0. A XV. Magyar Munkajogi Konferencia szerkesztett előadásai*. Budapest, Wolters Kluwer, 2018. 413-415.
[20] See: Article 30 and 31 of the CFREU.
[21] Valerio DE STEFANO – Antonio ALOISI: Fundamental Labour Rights, Platform Work and Human-Rights Protection of Non-Standard Workers. *Bocconi Legal Studies Research Paper Series*, 2018/1, 18 February 2018. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3125866 (17 August 2018), 3-6.
[22] Regarding the changes in concerning the labour market and labour law: Zoltán BANKÓ: Az atipikus munkajogviszonyok. Pécs – Budapest, Dialóg Campus, 2010. 46-74.
[23] Martin RISAK – Thomas DULLINGER: The concept of „worker" in EU law. Status quo and potential for change (Report 140). ETUI aisbl., Brussels 2018. 5., 11., 18. és 28-30. o. https://www.etui.org/Publications2/Reports/The-concept-of-worker-in-EU-law-status-quo-and-potential-for-change (9 January 2019).
[24] Despite the usually arising controversies regarding this concept. See: RISAK – DULLINGER: ibid. 57. and 4-46.

Attention should be paid to the collective rights of employees, since their functions form the essence of the legal protection of the employees to a large degree. The Treaty on the Functioning of the European Union (hereinafter: TFEU) also emphasises the importance of social dialogue and consultation,[25] and these rights can be found in Chapter IV Solidarity in the CFREU. Their appearance and application in practice is a more difficult question, since the enforcement of collective rights is often complex even within the MSs' laws. In judgment C-176/12.[26] Article 27 – the right of the employees to the information and consultation within the enterprise – of the CFREU is analysed, and this entitlement, regarding the legal status of the employees against the employer, can be stated as one of the most fundamental norms safeguarding workers' rights in general.[27]

Article 28 of the CFREU guarantees the employees' right to collective bargaining and to take collective action, and is the source for the right to pressure an employer during negotiations. Its main importance is that in many cases the discussion of the parties can assure working conditions more effectively than legislation. Therefore, the CFREU takes into consideration this fundamental right of the employees that is mentioned in point 22 of the judgment C-149/10.[28] referring to the content of Article 155 of the TFEU. Referring to the essence of this right we can conclude that in questions of social policy, the social parties have a fundamental right to make conditions consensually, and the employees have a right to it also on the basis of contractual freedom.[29] However, the content of Article 155 cannot be exceeded by this authorisation of the CFREU. Regarding the right to collective action and discussion in the case law, it would be useful to clarify what these rights mean exactly in the interpretation of the CJEU, since the right to collective action emerged in narrower circle in the earlier decisions, than typically in the law of the MSs.[30] However, it is still a question as to whether the right to enforce collective negotiations or the right to pressure the employer can bear united content in the social policy of the EU.

Altogether, it is clear that the workers' right to take collective action as regards further collective rights play a significant role in workers' fundamental right protection, but their interpretation in the case law does not go beyond the declaration of the CFREU. Primarily, I mean that CJEU restricts the fundamental nature of these rights when they collide with basic economic rights (e.g. Article 16 of the CFREU), even though the CJEU also declares that the collective rights of the employees should be ensured within and across the MSs. On interpreting the relevant decisions and laws, we can conclude that the CJEU does not yet have a clear concept on how to protect the fundamental right nature of collective rights , principally, legal mechanisms beyond the fundamental guarantees. This way, the social side of the right to take collective action can become meaningless, since, even in labour law regulation it can be seen that the institutions of collective labour law greatly influence the operation of the national labour market, and in this respect, more definite action of the MSs is improbable on the EU level.[31]

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[25] Regarding the role of social dialogue in the social policy of the EU see: Claudia SCHUBERT: Collective Autonomy as Part of the European Economic System. *European Labour Law Journal*, 2013/3. 146-153.
[26] C-176/12. Association de Médiation Sociale v Union Locale des Syndicats CGT and others.
[27] KISS: *Munkajog*, 313-314. and 474.
[28] C-149/10. Zoi Chatzi v Ypourgos Oikonomikon.
[29] Article 28 of the CFREU.
[30] See in details: György KISS: *Alapjogok kollíziója a munkajogban*. Pécs, JUSTIS, 2010. 446-453.
[31] See in details concerning the collective labour rights: Márton Leó ZACCARIA: Szociálisan védett vagy gazdaságilag veszélyeztetett? Munkavállalói alapjogok az Európai Unió Bíróságának joggyakorlatában. *Állam- és Jogtudomány*, 2017/3, 94-96.

Conclusion

As far as I am concerned, in EU law the system of labour and social rights and its present dynamics is a structure, which on the one hand, is still developing, mainly because of the young fundamental right connection, and on the other hand, its several institutions are outdated, so that at the same time some deficiencies from the past decades should be corrected. Therefore, progression towards modern labour market regulation is necessary.[32] In my opinion in this regard the interpretation of fundamental social rights according to the traditional meaning and their guarantee are indispensable, but a priori it should be asked as to what kind of legal framework the mechanism of legal protection can best serve the interests of workers. It can be stated that there is contrast between the fundamental rights of the CFREU – of which efficiency can be questioned in practice even though they bear serious values of legal protection – and the concept of the EPSR and its results so far, and the actual trends of labour law. Since the starting point of the former is strengthening the legal protection and the necessity of high-level safeguard of workers' rights, while the structure of the labour market and the new forms of work – consequently, labour law – are not moving in this direction. In my opinion in EU law the difficulties of the labour market and the social sphere stand in the background of these processes as a kind of coercion, but the social conceptions in recent years can (also) react to the European and international economic and market processes.

[32] It is an actual question that how the employment relationships of '"platform workers" can be regulated nowadays. See some possibilities in details: Martin RISAK: Fair Working Conditions for Platform Workers. Possible Regulatory Approaches at the EU Level. Berlin, Friedrich Ebert Stiftung, 2018. 17 August 2018. http://library.fes.de/pdf-files/id/ipa/14055.pdf, 8-18.