OLD PROBLEMS AND NEW SOLUTIONS? SOME CURRENT QUESTIONS OF LABOUR AND SOCIAL RIGHTS REGARDING THE EUROPEAN PILLAR OF SOCIAL RIGHTS AND THE ACTUAL CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

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Abstract

The present paper analyses some current issues of the social policy of the European Union (EU). Employment policy is also present in the research but both aspects are focused around the labour and social rights that workers are entitled to. The methodology is both based on the hypothetical context and the relevant case law of the Court of Justice of the European Union (CJEU). The paper examines the relevant issues regarding the fundamental social rights in EU law and the latest steps of their development materialised in the European Pillar of Social Rights (EPSR). The relevant connection between the already existing labour and social rights and their regulation and the reforms of the EPSR is emphasised – among others – with the help of the Charter of Fundamental Rights of the European Union (CFREU). The analysis of some current judgments of the CJEU show the contradictions and questions regarding the social and the economic approach but both need to be considered regarding the changing environment in the labour market. That is the main reason the paper aims to conclude some ideas concerning the recent past and the future of these rights and regulations in EU law. The focus is on the EPSR and the practical approach of the CJEU"s case law in the context of labour and social rights in EU law.

Keywords: *EU law, EU social policy, European Pillar of Social Rights, social protection, workers" rights.*

1. Introduction

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,[1] is in a difficult situation. Furthermore, the planned research definitely focuses on European Union (hereinafter: 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 experiencing an important transformation over a longer period of time.[2] As a result, we

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[1] György Kiss, *Munkajog*, Osiris Kiadó, Budapest, 2005, p. 211-213.

[2] Zane Rasnača, "*Bridging the gaps or falling short? The European Pillar of Social Rights and what it can bring to EU-level policymaking"*, published in *"European Trade Union Institute – Working Paper"*, Issue 5, (2017), p. 4, 8-9. and 19-20; this document is available online at: https://www.etui.org/Publications2/Working-Papers/Bridging-

can say with good reason that the EU social and employment policy is experiencing "interesting times"[3] heading towards the common social policy.[4] 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 labour law in order to put them into the context of the present or even future system. It is useful from the viewpoint of the level of both the regulation and the legal practice and can lead to further results for consideration.[5]

In the present paper I undertake this task: as an important component of a larger research topic[6] I sketch out some sore points on the basis of the present state of EU law which definitely influence and form the present and future of the protection of the employees; what is more, I am trying to give a general picture of the method of considering and reflecting on the raised issues. However, I have already referred to fundamental labour law rules being seriously changed in the following years,[7] and the already achieved results cannot be left without attention. However, I think that the main starting point of this study must be the norms in force now, but through a segment of the actual legal practice of the Court of Justice of the European Union (hereinafter: CJEU) the current content keystones of the above mentioned values that are general and transforming at the same time also can be observed. On the following pages the greater subjects of the chapters are linked to each other without exception, however, the relationship can be simplified to general questions of social policy and labour law, but I think that these current issues truly reflect the basic rights of the "worker" status and the level of their guarantee.[8]

The above mentioned difficulties and contradictions are proved by the subjects processed in detail below, since regarding the legal protection of the employees to discuss such questions of fundamental right, case law and questions of which one part exists only as proposals and concepts is very important. Naturally, to make a single system regarding the mainly different fields of labour law is difficult, but in my opinion this multi-layering issue represents the (potential) socio-political changes

the-gaps-or-falling-short-The-European-Pillar-of-Social-Rights-and-what-it-can-bring-to-EU-level-policymaking (last access: 02.09.2019).

[3] Frank Hendrickx, "*Editorial: The European pillar of social rights: Interesting times ahead"*, *European Labour Law Journal*, Vol. 8. Issue 3, (2017), p. 192.

[4] Rolf Birk, *Általános áttekintés*, in: György Kiss, *Az Európai Unió munkajoga*, Osiris Kiadó, Budapest, 2003, p. 19-22.

[5] Regarding 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*, Vol. 12. Issue 1, (2019), p. 59-68.

[6] The aim of the indicated research is the thematic analysis of the actual state of the most significant areas of the legal (social) protection of the workers in Hungarian and EU law.

[7] The already accepted laws of the reform under the flag of the European Pillar of Social Rights are the following: Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority and Directive (EU) 2018/957 of the European Parliament and of 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] Here I only refer to that clarification on the concept of "employee" requires another research, but in the present study I use the broadening interpretation made by the Court, refraining from mentioning the differences between basic dogmatism and the regulation of the Member States. See in: Martin Risak and Thomas Dullinger, *The concept of „worker" in EU law. Status quo and potential for change (Report 140)*, ETUI aisbl, Brussels, 2018, p. 18. and 40-41.; this document is available online at: https://www.etui.org/Publications2/Reports/The-concept-of-worker-in-EU-law-status-quo-and-potential-for-change (last access: 28.10.2019).

emphasizing such regulative questions of labour law which in given cases also can be on the agenda in the member states (e.g. issues of working time or social security). Altogether, the present, non-exhaustive research provides a snapshot of the above actual questions of labour law and looks to the future in order to make the particular legislative processes more transparent, and consequently, the questions raised are answered.

2. The role of ”solidarity” rights in the legal protection of workers

The function of the Charter of Fundamental Rights of the EU (hereinafter: CFREU) and its real legal strength is not a new question regarding the legal protection of employees,[9] that is, to the question whether the reference to the fundamental rights law laid down in the CFREU can ensure real and effective legal protection to the workers, is ”no”.[10] However, it is important to add that this negative answer on the one hand does not result in the rights laid down in Chapter IV of the CFREU being worthless, which cannot be used in practice, and on the other hand, it would not be correct to think that the changing case law of the CJEU could not lead to new directions of legal interpretation. Furthermore, the CFREU and the European Pillar of Social Rights (hereinafter: EPSR) do not have direct theoretical or legislative connection to each other, but it is possible that the protection of fundamental social rights laid down in the CFREU can get a new interpretation in relation to the constant development of the EPSR.[11]

In my opinion, the above-mentioned Chapter IV of the CFREU – entitled Solidarity – can be interpreted from two aspects regarding the legal protection of workers. Firstly, I mention the “material” legal side, that is, the rights summed up in the CFREU make such a new unconventional catalogue that is unprecedented regarding the protection of employees in the history of EU law,[12] and the importance of which cannot be questioned even referring to the limited applicability of the CFREU.[13] It is important to add that to elevate the most important rights of the employees – or at least the majority of them – to the level of fundamental rights was such an important step in developing social protection which has its effect on legislature even to this day,

[9] See: Sara Iglesias Sánchez, *“The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ”s Approach to Fundamental Rights”, Common Market Law Review*, Vol. 49. Issue 5, (2012), p. 2565-2611.; Veronica Papa, *“The Dark Side of Fundamental Rights Adjudication? The Court, the Charter and the Asymmetric Interpretation of Fundamental Rights in the AMS Case and Beyond”, “European Labour Law Journal”*, Vol. 6. Issue 3, (2015), p. 190-199. and Massimiliano Delfino, *“The Court and the Charter – A “Consistent” Interpretation of Fundamental Social Rights and Principles”, European Labour Law Journal*, Vol. 6. Issue 1, (2015), pp. 86-99.

[10] Brian Bercusson, *“Horizontal” Provisions – Title VII General Provisions Governing the Interpretation and Application of the Charter (Articles 51-54)*, in: Brian Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights*, Nomos Verlag, Baden-Baden, 2006, pp. 404-414.

[11] See for example, article 30 of the CFREU that ensures protection for the workers against unjustified dismissal. In labour law, the question of the protection against unfair dismissal is such a typical and important field that it would be wise to emphasise its harmonization in the sphere of problems of labour market and social questions, which the EPSR attend to.

[12] It is necessary to mention the legal charter of the employees of 1989 (Community Charter of the Fundamental Social Rights of Workers) which is of high importance but it never entered into force, and regarding its legal nature and content it cannot be regarded equal to the CFREU in force, but it has become a proper theoretical ground for the legal protection of workers EU law.

[13] CFREU, articles pp.52-53.

since the comprehensive endeavours of the EPSR, which inspire real changes, also refer to them. According to my opinion, the rights of ”solidarity” try to compensate the deficiencies of EU law – even if on a theoretical level – that regards the employees as actors of the single market like providers of services but not people with social rights, there were possibilities for the protection of the rights of the employees between these extremities. Consequently, summing up these rights, elevating them to the level of the catalogue of fundamental rights, and clearing up their content have a great effect on the legal status of the employees, and I think, although this progress is complicated, that several solutions in the case law of the CJEU can be regarded consistent.

3. Fundamental labour and social rights in motion – recent examples from the case law of the CJEU

The other approach to the rights in the CFREU is the ”action” side, about which it is rather difficult to define in a definitely positive manner, [14] It is a recurring question in the practice of the CJEU – it will be discussed in detail below – that is, how it is possible to refer directly to the CFREU before regarding the fundamental rights included in it.

This question mainly emerges in connection to those fundamental rights that are not connected to secondary legislation, since referring only to the CFREU effectively is not possible. However, a part of the fundamental labour and social rights in Chapter IV are such rights,[15] consequently, direct enforcement of these rights for the employees is difficult, and unproductive in most of the cases. This consideration is a pure result of the legal protective mechanism of the CFREU,[16] but in many cases, this situation makes legal interpretation – which would strengthen the legal protection of the employees – more difficult. In my opinion concerning this question, the legal practice of the CFREU is mainly uniform; however, we can see some actual examples where the CJEU seems to move forward from the above-mentioned crystallised legal practice.[17]

In the lack of CJEU”s detailed analysis,[18] I only refer to judgment no. C-574/16.[19] in which the guarantees of equal treatment of the CFREU are referred to when examining the different working conditions of workers with fixed-term employment relationships. The national court wanted to know in connection to the CFREU if the fixed-term employment relationship can be terminated in an unjustified way under different conditions, and could the fundamental rights of the CFREU ensure legal protection to the employees in the lack of the concrete order of Directive

[14] Bob Hepple, “Fundamental Social Rights since the Lisbon Treaty”, European Labour Law Journal, Vol. 2. Issue 2, (2011), pp. 152-154.

[15] A typical example of it is the right to protection against unjustified dismissal declared in article 30 of the CFREU, but the following, article 31 on the right to fair and just working conditions is not an example of that.

[16] CFREU, article 52 paragraph (5).

[17] It is worth mentioning point 47, 49-50 and 76-77 of judgment no. C-414/16. Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. [ECLI:EU:C:2018:257] of the CJEU announced on 17.04.2018, in which the CJEU stresses the fundamental right character of article 21 of the CFREU.

[18] The CJEU did not examine the question referred by the national court regarding article 20 and 21 of the CFREU, because based on the earlier questions it was unnecessary.

[19] Judgment no. C-574/16. Grupo Norte Facility SA v Angel Manuel Moreira Gómez [ECLI:EU:C:2018:390] of the CJEU announced on 05.06.2018.

1990/70/EC.[20] Finally, the opinion of the advocate general answered to the hypothetical question that the regulations referred to equal employment do not conclude that the different situations should be handled the same way[21] that ensures the content of article 20 and 21 of the CFREU, similarly to the earlier points. Importantly, Advocate General Kokott refers to the problem of horizontal direct effect of the CFREU as a highly debated question, but she does not offer any legal solution. At the same time, she mentions that the CJEU has examined this question several times,[22] and regarding that articles 20 and 21 of the CFREU neither can lead to any other result in the concrete case than the above-mentioned rule of the Directive, judging this question is irrelevant.

Judgment no. C-472/16.[23] is also worth mentioning, though the case does not exclusively deal with labour law, but regarding the interpretation of article 47 of the CFREU it is interesting. This article of the CFREU contains the right to effective legal remedy, and in the present case, a legal dilemma has emerged in connection to it because of the transfer of the given undertaking. It is a question in the case of collective redundancies which was due to the transfer of the economic unit regarding that the subject of collective labour law took legal initiative, whether the resolution has binding force for individual employees. This questioning is justified since the collective labour law subjectivity is not equal with the joint subjectivity of the individual employees, however, the employees" private autonomy is not restricted,[24] even if its intention is to make it possible for the employees to act in order to protect their interests.[25]

In wider sense, it is another question whether in case of a standoff from the legal debates of the individual employees as consequence of the performance of the collective labour law subject the national court has the right – while respecting the fundamental rights of the CFREU – to decide on the merit of legal debates referring to individual employees, too. The workers necessarily referred to – besides the CFREU – their rights insured in the relevant directive[26] directly,[27] but it is a question whether we can speak about res iudicata in case of the performance of the organization representing the employees, and if the answer is "yes" , whether it is a violation of

[20] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

[21] Point 81-84 of opinion of Advocate General Kokott in judgment no. C-574/16.

[22] These problems were highlighted mostly by the following cases: judgment no. C-144/04. Werner Mangold v Rüdiger Helm [EU:C:2005:709] of the CJEU announced on 22.11.2005 and judgment no. C-555/07. Seda Kücükdeveci v Swedex GmbH & Co. KG. [EU:C:2010:21] of the CJEU announced on 19.01.2010. See further judgments from the recent past: judgment no. C-282/10. Maribel Dominguez v Centre informatique du Centre Ouest Atlantique és Préfet de la région Centre [EU:C:2012:33] of the CJEU announced on 24.01.2012; judgment no. C-176/12. Association de médiation sociale v Union locale des syndicats CGT and Others [EU:C:2014:2] of the CJEU announced on 24.01.2015 and judgment no. C-441/14. Dansk Industri (DI), agissant pour Ajos A/S v Sucession Karsten Eigil Rasmussen [EU:C:2016:278] of the CJEU announced on 19.04.2016.

[23] Judgment no. C-472/16. Jorge Luís Colino Sigüenza v Ayuntamiento de Valladolid and Others [ECLI:EU:C:2018:646] of the CJEU announced on 16.04.2014.

[24] Kiss (2005), op. cit., pp. 313-314. and 325-326.

[25] Tamás Prugberger and György Nádas, *Európai és magyar összehasonlító munka- és közszolgálati jog*, Wolters Kluwer Hungary Kft., Budapest, 2014, pp. 506-507.

[26] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees" rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

[27] Point 101 of opinion of Advocate General Tanchev in judgment no. C-472/16.

the fundamental right in the sense that these employees de facto cannot practice their right to the possibility of the legal remedy according to the Directive.

According to Advocate General Tanchev, "Article 47 of the CFREU is to be interpreted as not precluding national legislation which prohibits a court from ruling on the substance of the claims of an employee who challenges in an individual action his dismissal, as part of a collective dismissal, in order to defend the rights deriving from Directive 2001/23 and Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, where final judgment has already been given on the collective dismissal in proceedings to which the employee was unable to be a party, although the unions established in the undertaking and all the collective statutory representatives were or were able to be parties, where under the national law, the binding force of that collective judgment does not exceed the boundaries of the subject matter of the proceedings and that subject matter differs from the one at issue in the individual proceedings."[28] Consequently, the possibility of the presence of the organization of the employees in the proceeding before the competent court deciding on the legal debate expresses the legality of the domestic regulation, but locus standi of the workers cannot be restricted even in such cases if the legal debates have different objects, this way ensuring the above mentioned directive guarantees. I regard this case as important, since the basic question of the guarantee of the rights of the employees is their enforcement, mainly, if the given legal dispute is linked to fundamental rights.

The decision in the joint cases no. C-680/15. and C-681/15.[29] contain important statements in relation to article 16 of the CFREU. Since the Alemo Herron judgment[30] it is regarded as clear what kind of means of fundamental rights are available for the enterprises in such cases when the organizations of the employees "abusing" their rights ensured in article 28 of the CFREU[31] make such contract referring to article 3 of Directive 2001/23/EC from which the receiving party is left out.[32]

However, it is still a question whether EU law protects the right to collective bargaining without abusing article 16 of the CFREU if all social partners take part in this process. The CJEU states if according to the national law the parties agree before the transfer the effect of the collective agreement after the transfer as well as its possibilities of correction, these legal issues are protected by article 3 of the Directive and do not restrict disproportionately article 16. Apparently, the interests of the new employer can be abused, seemingly restricting the freedom of contract, but the essentialia negotii of the original collective agreement is not affected supposing that otherwise the negotiations are carried out legally. It is clear that article 16 of the CFREU is not abused in this case if the new employer has real legal possibility a posteriori to enter the negotiation or it is

[28] Point 3 of conclusions of the opinion of Advocate General Tanchev in judgment no. C-472/16.

[29] Judgment no. C-680/15. and no. C-681/15. Asklepios Kliniken Langen-Seligenstadt GmbH and Asklepios Dienstleistungsgesellschaft mbH v Ivan Felja and Vittoria Graf [ECLI:EU:C:2017:317] of the CJEU announced on 27.04.2017.

[30] Judgment no. C-426/11. Mark Alemo-Herron and Others v Parkwood Leisure Ltd [ECLI:EU:C:2013:521] of the CJEU announced on 18.07.2013.

[31] Right of collective bargaining and action.

[32] Gyula Berke, "*Az Európai Unió Alapjogi Chartájának alkalmazása munkajogi (szociálpolitikai) ügyekben"*, *HR & Munkajog*, Vol. 5. Issue 11, (2014), pp. 10-14.

possible to correct the conditions of the contract by mutual consent (at least to initiate modification).

The CJEU confirms in judgment no. C-174/16.[33] relating articles 23 and 33 of the CFREU the fundamental right character of gender equality,[34] especially, in the field of employment, referring textually to the right to parental leave as one of the solidarity rights. Although several regulations of the CFREU did not have basic importance in the decision of the basic case, in my opinion this kind of focus on one of the most important rights of workers have high importance from the viewpoint of legal protection.

Finally, it is worth mentioning judgment no. C-306/16.[35] in which important statements can be found in connection to article 31 of the CFREU. The right to fair and just working conditions can be regarded as one of the most fundamental rights of the employees,[36] considering that rules of – among other important ones – working time and rest periods belong to this article, the legal disputes in connection to them are usual and what is more, the interpretation of the regulations of the directives[37] are not always unambiguous. However, in the judgment, it would be unnecessary to make a decision about it, but the CFREU is a kind of reference to strengthen the norms of the directive in the present case in relation with the issue of the compulsory weekly rest period for the employees. Namely, the CJEU decided on the basis of Directive 2003/88/EC stating that the requirement is not that the 24-hour minimal weekly rest period without break should be issued to the employee at the latest time on the day right after six workdays running, but it is stated that it should be issued within each period of seven days.

At the same time, the CJEU interprets shortly paragraph (2) of article 31 of the CFREU referring to the Community Charter of the Fundamental Social Rights of Workers of 1989 and the European Social Charter as well as to the relevant directives.[38] In my opinion, it is important regarding the protection of workers" fundamental rights, since this way the CJEU strongly emphasises the real content of the given fundamental right even if without the regulations of the directive it would not establish an argument to protect the employees effectively.

Regarding the legal status of workers it is advisable to mention judgment no. C-190/16.[39] from the latest case law in which the CJEU makes important statements regarding articles 20, 21, and 15. In connection to the prohibition of age discrimination, the judgment states that the fundamental right to equal employment is a primary principle of EU law[40] emphasising that the content of the CFREU should be interpreted together with the regulations stated in the relevant directions. Concerning the fundamental freedom of right to work the CJEU examined in merit how the regulation

[33] Judgment no. C-174/16. H. v Land Berlin [ECLI:EU:C:2017:637] of the CJEU announced on 07.09.2017.

[34] Point 31-32 of judgment no. C-174/16.

[35] Jugdgment no. C-306/16. António Fernando Maio Marques da Rosa v Varzim Sol – Turismo, Jogo e Animação, SA [ECLI:EU:C:2017:844] of the CJEU announced on 09.11.2017.

[36] György Kiss, *Alapjogok kollíziója a munkajogban*, Justis, Pécs, 2010, pp. 229-231.

[37] See typically: Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time and Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

[38] Point 50 of judgment no. C-306/16.

[39] Judgment no. C-190/16. Werner Fries v Lufthansa CityLine GmbH [ECLI:EU:C:2017:513] of the CJEU announced on 05.07.2017.

[40] Point 29 of judgment no. C-190/16.

of a member state constrains it when over a certain age employment of pilots referring to public safety is prohibited in civil air transport.[41] On examining, the above-mentioned fundamental rights the CJEU took into consideration the aspects of labour market and in relation to legal constraint, the CJEU considered every option and examined how the essence of the basic law would be influenced, as well as how it would restrict the chances/possibilities of the group(s) of the employees in the labour market.

It can be stated that the CJEU – mainly in relation to article 15 of the CFREU – abstains from a broadening interpretation which would enforce the social interests of the employees and prefers emphasising the economic side of work and states that reasonable, proportional and justified restriction of fundamental rights included in the CFREU in given cases can solve the interests of the labour market. Besides, the real, essential examination of the content and restrictions of article 15 are missing from the judgment.

Besides the above-mentioned aspects, I would like to mention in short judgment no. C-482/16. of the CJEU[42] in which the CJEU refers to the connection between article 21 of the CFREU and article 45 of the Treaty on the Functioning of the European Union (hereinafter: TFEU), which is an important statement concerning the fundamental rights interpretation of the principle of equal treatment, but since it is not explained in merit, we can only conclude its importance. According to the decision the regulation which takes into account in a professional carrier the periods of paid work performed only after the age of 18,[43] is not contradictory to either the prohibition of age discrimination or to the fundamental freedom of free movement, this way those employees who have periods of paid work under 18 should be treated differently based on age. The regulation with retroactive effect deleted this restriction referring to every employee, but referred only to the given economic sector, this way the basic right of the employees is not injured.

Finally, I would like to mention judgment no. C-89/16.[44] in which referring to article 34 of the CFREU guaranteeing the fundamental right to social security the CJEU stated since in that case the object of the legal dispute was the application and interpretation of the social coordination regulation,[45] consequently, the main question is whether the application of the article 34 of the CFREU would conclude the rejection and restriction of the edictal regulations. According to the CJEU the answer is ”no”,[46] since the function of the coordination, among others, is to ensure this fundamental right laid down in the CFREU. It is – on the one hand – an important guarantee referring the movement of the employees between the member states, but in this regard, article 34 practically did not have role in the decision of the legal dispute, consequently, its analysis failed.

[41] Point 72-77 of judgment no. C-190/16.

[42] Judgment no. C-482/16. Georg Stollwitzer v ÖBB Personenverkehr AG [ECLI:EU:C:2018:180] of the CJEU announced on 14.03.2018.

[43] Conclusions of judgment no. C-482/16.

[44] Judgment no. C-89/16. Radosław Szoja v Sociálna poisťovňa and WEBUNG, s.r.o. [ECLI:EU:C:2017:538] of the CJEU announced on 13.07.2017.

[45] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, pp. 1-43.

[46] Point 43 of judgment no. C-89/16.

4. The European Pillar of Social Rights as a potential major opener to improve labour and social rights

As I referred to the CFREU several times, though the – mainly principal – importance of the EPSR cannot be contested, but the difficulties of the present means of the social protection of workers can emerge exponentially in the future on the old-new fields affected by the EPSR. Naturally, the EPSR cannot take a change of workers" legal protection, but the general expectations[47] and the EPSR"s seriousness and volume of the political decision in the EU let us come to the conclusion that regarding the labour market and social questions important changes in employees" fundamental rights are expected. At present, it is uncertain whether these changes will appear on the level of legislation effectively or rather on the level of soft law, but we will see later that practically, on the level of legislation we can speak now about effective changes.

At the same time, it is worth reviewing in short the spirit and the potential role of the EPSR in EU social policy,[48] since stripped off the context one can come to false conclusion regarding its role performed in the employees" rights. Although the EPSR would change the image of several areas of social policy,[49] I think that its most important idea can be that it would not try to take a complete turnabout regarding the protection of the interests and the rights of the employees respected and guaranteed so far. What is more, practically it develops the achievements of social policy until now in a way, which can be remedy for the social crises and crises of the labour market[50] on EU level nowadays.[51] It cannot be left without attention that the present main challenges of EU are only partly of an economic nature, since social factors which will be required by the member states to pay attention to for the further development and stabilisation of EU are as important.[52]

It can be stated that the EPSR does not intend to settle concrete disputed matters exclusively in order to achieve the balance of the labour market – even if such intention also can be seen – it rather tries to find remedies comprehensively to enable the lagging sectors of the society to catch up to ensure equal possibilities or to guarantee a higher level of social rights.[53] Although, it is clear from the above listed aims that this holistic approach can result in the slow development of the EPSR, or in worse case, inefficiency, but I think that workers do not need more spectacular possibilities in order for their rights and legal protection to gain great legislative focus and political interest. Three key areas of the EPSR, which should

[47] Hendrickx (2017), op. cit., pp. 191-192.

[48] Klaus Lörcher and Isabelle Schömann, *The European pillar of social rights: critical legal analysis and proposals (Report 139)*, ETUI aisbl, Brussels, 2018, p. 5-7.; this document is available online at https://www.etui.org/Publications2/Reports/The-European-pillar-of-social-rights-critical-legal-analysis-and-proposals (last access: 28.10.2019).

[49] Zane Rasnača and Sotiria Theodoropoulou, *"Strengthening the EU"s social dimension: using the EMU to make the most out of the Social Pillar"*, *ETUI Policy Brief – European Economic, Employment and Social Policy*, Issue 5, (2017), p. 2-3; this document is available online at: https://www.etui.org/News/Using-the-EMU-to-make-the-most-out-of-the-Social-Pillar 2018 (last access: 29.10.2019).

[50] Lörcher and Schömann, op. cit., pp. 21-22.

[51] Hendrickx (2017), op. cit., p. 191.

[52] Frank Hendrickx, *"The European Social Pillar: A first evaluation"*, *European Labour Law Journal*, Vol. 7. Issue 1, (2018), pp. 5-6.

[53] *Reflection Paper on the Social Dimension of Europe*, COM(2017) 206 (26.04.2017), pp. 6-7., 12. and 21.; available online at: https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-social-dimension-europe_hu.pdf (last access: 29.10.2019).

be improved by the EU decision-making bodies in the following years, are to establish equal possibilities in the labour market, to address the social problems, and to develop the availability of just working conditions for every worker.[54] The latter should be emphasised, though the right to fair and just working conditions is an already crystallised fundamental right in article 31 of the CFREU, but its real essence and practical enforcement is still dubious. It should be added that referring to equality in the labour market and just working conditions the EPSR specifically mentions several more modern, complex forms of work of the 21st century.[55] These working activities formally do not necessarily match with the present conceptual structure of labour law, but they may have real importance in the labour market in the near future (platform work,[56] sharing economy,[57] etc.).

Altogether, the real complex approach concentrates not necessarily on the current social and labour market problems, and those problems being on the agenda from time to time,[58] but definitely designates new directions for the reality of the labour market and for the legal protective stability of the employees as a new requirement. The new directions are only partly new;[59] they can rather be defined as new, modern versions.[60]At this point it is worth wondering whether the twenty rights of the three key areas of the EPSR[61] can be regarded as a kind of legal catalogue of the real interests and rights[62] of workers, in other words, can the listed and supported areas be traced back to direct, real interests, labour and social rights.

Posing this hypothetical question is justified because the EPSR seems to be a declaration regarding its text, structure, content of preamble, and general nature,[63] which – because of its importance – designates serious and definite aims and concrete rights that can be referred to. In case of a positive response to the above question, the main problem – clarification of the legal catalogue of the employees and its legal nature – can largely be solved. The circumstance, that though the legal nature of the EPSR can be debated,[64] the aim is that compulsory legal norms would come out in the mentioned areas[65] based on the EPSR should be taken into consideration. According to my standpoint, this duality has an effect on the legal nature of the EPSR even today, but the above-mentioned purpose can play an important role in the circle of the forecast reforms of social policy, and labour law. Furthermore, it is obvious that the EPSR is not realised as a

[54] Chapter I (Equal opportunities and access to the labour market), Chapter II (Fair working conditions) and Chapter III (Social protection and inclusion) of the EPSR.

[55] Preamble, point 9 and article 9 of the EPSR regarding the opportunities for real work-life balance.

[56] Erika Kovács, *"Regulatory Techniques for "Virtual Wokers"*, *Magyar Munkajog/Hungarian Labour Law Journal*, Vol. 4. Issue 2, (2017), pp. 1-2.

[57] Ildikó Rácz, *"Munkavállaló vagy nem munkavállaló?: A gig-economy főbb munkajogi dilemmái"*, *Pécsi Munkajogi Közlemények*, Vol. 10. Issue 1, (2017), pp. 82-85.

[58] See a typical example through the battle against poverty and social exclusion (preamble point 9, point b) of article 6 and article 12-14 of the EPSR).

[59] Hendrickx (2017) op. cit., p. 191.

[60] Hendrickx (2018) op. cit., pp. 3-4.

[61] Article 1-20 of the EPSR.

[62] Hendrickx (2018) op. cit., p. 5.

[63] Lörcher – Schömann, op. cit., pp. 5-8.

[64] Hendrickx (2018), op. cit., p. 5.

[65] Hendrickx (2018), op. cit., p. 5.

"pillar"[66] of "labour law" or "the workers"",[67] but mutatis mutandis – e.g. like the European Social Charter – the "social" nature mostly refers to the questions in relation to the employees, even if not exclusively. Otherwise, social focus truly reflects the concept of "solidarity" involved in Chapter 4 of the CFREU which also should be interpreted in all-social context, not exclusively as a special solidarity of labour market, and labour law.[68]

At the same time, the special situation in which the catalogue of social rights and interests naturally contains issues which are connected to the law of the labour market, or free movement as a fundamental freedom,[69] or issues which are closer to the participation of the employees in market activity than to the strictly interpreted relation between the employer and the employee,[70] should be mentioned. Firstly, regarding this quasi-social legal catalogue it should be examined that in social context – with extensive legal interpretation[71] – it really lists the rights of the employees, their families, further actors of the labour market – mostly unemployed people – without mentioning the side of the employer. This approach reflects the "solidarity" and "social" nature,[72] that is, it reflects the basic, original paradigm of labour law, even if its real starting point is a kind of necessity of the (labour) market.

Consequently, the social nature is given, and in the following I am going to analyse how the authorities in close connection to the status of the employee contain the so-called "typical" rights of the workers.[73] In my opinion in this regard the EPSR correctly reflects the real requirements of the labour market, since the EPSR contains the most important "labour laws", although, not in detail or broadly. Regarding the interpretation of the legal environment of the EPSR it will be important how the stated rights of the employees will be concrete and how they will be realised on the scene of legislation. Naturally, to connect legislative action to each authority is not possible, but it is true that the EPSR contains the most important social rights "like a charter"[74] regarding that their development can be enforced through legislation. Of course, it is difficult to forecast the issues of the following years regarding either the content concrete facts or the method of legislation, but on the level of secondary law certain changes can be taken

[66] In order to make clear the concepts, it should be added that the importance of using the term "pillar" itself is rather symbolic, than practical, so I think it is very special that in Union law we can speak about "pillar" in connection to social rights. See: Hendrickx (2017), op. cit., pp. 191-192.

[67] Contrary to the above mentioned socially motivated Charter of 1989 on the rights of the employees.

[68] In any case, "solidarity" reflects the original values and approach of labour law at least as faithfully as the attribute "social", mainly it appears as the protection of the human dignity of the employees. See: Bruno Veneziani, *11. Right of collective bargaining and action (Article 28)*, in: Bercusson (ed.), op. cit., pp. 293.

[69] Article 45 of the TFEU.

[70] For example: article 19 (Housing and assistance for the homeless) and 20 (Access to essential services) of the EPSR.

[71] Rasnača, op. cit., p. 5. and pp.10-15.

[72] György Kiss, "*Foglalkoztatás gazdasági válság idején – a munkajogban rejlő lehetőségek a munkaviszony tartalmának alakítására (jogdogmatikai alapok és jogpolitikai indokok)*", *Állam- és Jogtudomány*, Vol. 55. Issue 1, (2014), p. 50-51. and 58-59.

[73] In my opinion to compile such a catalogue is almost impossible, but the minimal rights in connection to the concept of employee in the traditional sense can be a starting point. See: Tamás Gyulavári, "*A gazdaságilag függő munkavégzés szabályozása. Kényszer vagy lehetőség?"*, *Magyar Munkajog/Hungarian Labour Law Journal*, Vol. 1. Issue 1, (2014), p. 10-12. Further base can be the above mentioned title of IV of the Charter on "solidarity"-like fundamental rights.

[74] Hendrickx (2018) op. cit., p. 5.

into account even according to the most pessimistic approach.[75]

The main cause of pessimism is that the EPSR cannot create new competences or areas for EU in the field of employment policy and social policy, but in my opinion, on the basis of Title IX and X of the TFEU then real legislative intervention is not impossible either. Especially, if the present labour and social regulations are assumed even with all their difficulties and criticism.[76] Altogether, though the EPSR cannot be regarded as an effective legal catalogue, but it is standard anyway, which typically, beyond concrete initiatives, can be conceptual background of the labour law environment in the future, which can be directive for both the side of the employer and the side employees (with the co-operation of the member states). It is worth examining the reform processes of the EPSR in the future, whether new inventions appear concerning the twenty rights, and altogether how the legislators will insist on the three key areas.

4. Conclusion

Altogether, it can be stated that the CJEU cannot find legal cause for the direct application of the fundamental rights declared in the CFREU (only under the general conditions), and typically, does not assume the advantages guaranteed for workers, but assumes their restriction based on the market. Naturally, there are fundamental rights – e.g. the right to social security – that indicate the direct application unnecessary because of the relevant secondary legislation, but we can still ask the question: can the CFREU guarantee the most fundamental workers" rights on a higher level or any other way than previously?

In my opinion the CFREU, in spite of the above mentioned contradictions, deals with this dilemma in more and more judgments, but has not constituted a precedent solution so far. Importantly – citing to the merit of judgment no. C-306/16. – referring to article 31 of the CFREU the given right eo ipso does not conclude from the text of the CFREU,[77] but at the same time because a directive exists connected with the article 31, we can come to the conclusion that the CJEU implies the greater importance of the factual regulations of the CFREU, so the cause of setting aside the independent application can be questioned. From another viewpoint, it is not excluded that in such cases the CJEU simply "includes" the directive to the relevant article of the CFREU. However, in this case it can cause an even greater legal dilemma in the future for example article 31 – there are no including rules – but in general we have to face the "deficiencies" of the fundamental rights guaranteed in the CFREU, which bears great risk in the labour market regarding the need for effective social protection.

In summary, the system of workers" rights EU law can be regarded as a structure, which, on the one hand, is in the period of development, mainly because of its relatively young fundamental law relevance, and on the other hand, which several institutions are out of time, consequently, some old deficiencies have to be corrected. At the same time, further improvement along the guidelines of modern labour law and employment is required.[78] In my opinion in

[75] Rasnača, op. cit., pp. 16-18. and pp.37-38.
[76] Rasnača, op. cit., pp. 6-7.
[77] Point 50 of judgment no. C-306/16.
[78] It is justified by the significant, actual endeavours which examine the possibilities of regulating the legal relations of the platform workers. See: Martin Risak, *Fair Working Conditions for Platform Workers. Possible*

this circle traditional interpretation and guarantee of the fundamental social rights is inevitable, but a priori it is a question as to what kind of legal catalogue and legal mechanism can solve the best the interests of the employees.

It also can be observed that there is a contradiction between the fundamental rights of the Charter – though in practice their efficiency is uncertain, but they represent serious legal protection value – and the ideas and the so far achieved results of the EPSR and the current trends of labour law, since the former assumes the strengthening social policy and the need of guarantee of the rights of the employee on high level. On the contrary, the structures of labour market and organisation of work, and consequently labour law, are not going into this direction. I think that the difficulties of labour market and social difficulties in EU are a special kind of coercion in the background of these phenomena, but it seems that the social ideas of the latest years (also) reacts to the European, international economic, and market mechanisms.

As a final remark, let me add that these old-new thoughts should assume the fundamental right of free movement of workers, but should be completed with such legal protective means, mainly with new directives, which more strongly concentrate on the social interests of workers than in the past. In my opinion, even the changes in the labour market, labour law, and society cannot override the essential paradigm of labour law regulation, and it is possible that the EU – partly differently from the old method – have to take more definite steps in order to define and guarantee these rights, or else we cannot speak about a really free labour market. Reflecting on the problems raised in the first part of the paper we can state that the legal protection of workers employees stagnates, changes, and develops at the same time, but the latest ideas of the reform definitely go into the direction of development, even if it often seems only to be a simple change or a very long road ahead.

References

- Advocate General Kokott"s opinion in judgment no. C-574/16.
- Advocate General Tanchev"s opinion in judgment no. C-472/16.
- Brian Bercusson, *"Horizontal" Provisions – Title VII General Provisions Governing the Interpretation and Application of the Charter (Articles 51-54)*, in: Brian Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights*, Nomos Verlag, Baden-Baden, 2006, pp. 401-421.
- Gyula Berke, *"Az Európai Unió Alapjogi Chartájának alkalmazása munkajogi (szociálpolitikai) ügyekben"*, *HR & Munkajog*, Vol. 5. Issue 11, (2014), pp. 8-14.
- Rolf Birk, *Általános áttekintés*, in: György Kiss, *Az Európai Unió munkajoga*, Osiris Kiadó, Budapest, 2003, pp. 19-54.
- Charter of Fundamental Rights of the European Union.
- Community Charter of the Fundamental Social Rights of Workers.
- Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees" rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

Regulatory Approaches at the EU Level, Friedrich Ebert Stiftung, Berlin, 2018, pp. 8-18; this document is available online at: http://library.fes.de/pdf-files/id/ipa/14055.pdf (last access: 28.10.2019).

- Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.
- Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.
- Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.
- Massimiliano Delfino, "*The Court and the Charter – A "Consistent" Interpretation of Fundamental Social Rights and Principles*", *European Labour Law Journal*, Vol. 6. Issue 1, (2015), pp. 86-99.
- Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.
- Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.
- Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.
- Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.
- European Pillar of Social Rights.
- European Social Charter.
- Tamás Gyulavári, "*A gazdaságilag függő munkavégzés szabályozása. Kényszer vagy lehetőség?"*, *Magyar Munkajog/Hungarian Labour Law Journal*, Vol. 1. Issue 1, (2014), pp. 1-25.
- Frank Hendrickx, "*The European Social Pillar: A first evaluation*", *European Labour Law Journal*, Vol. 7. Issue 1, (2018), pp. 3-6.
- Frank Hendrickx, "*Editorial: The European pillar of social rights: Interesting times ahead*", *European Labour Law Journal*, Vol. 8. Issue 3, (2017), pp. 191-192.
- Bob Hepple, "*Fundamental Social Rights since the Lisbon Treaty*", *European Labour Law Journal*, Vol. 2. Issue 2, (2011), pp. 150-154.
- Judgment no. C-414/16. Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. [ECLI:EU:C:2018:257] of the CJEU announced on 17.04.2018
- Judgment no. C-574/16. Grupo Norte Facility SA v Angel Manuel Moreira Gómez [ECLI:EU:C:2018:390] of the CJEU announced on 05.06.2018.
- Judgment no. C-144/04. Werner Mangold v Rüdiger Helm [EU:C:2005:709] of the CJEU announced on 22.11.2005.
- Judgment no. C-555/07. Seda Kücükdeveci v Swedex GmbH & Co. KG. [EU:C:2010:21] of the CJEU announced on 19.01.2010.
- Judgment no. C-282/10. Maribel Dominguez v Centre informatique du Centre Ouest Atlantique és Préfet de la région Centre [EU:C:2012:33] of the CJEU announced on 24.01.2012.
- Judgment no. C-176/12. Association de médiation sociale v Union locale des syndicats CGT and Others [EU:C:2014:2] of the CJEU announced on 24.01.2015.
- Judgment no. C-441/14. Dansk Industri (DI), agissant pour Ajos A/S v Sucession Karsten Eigil Rasmussen [EU:C:2016:278] of the CJEU announced on 19.04.2016.
- Judgment no. C-472/16. Jorge Luís Colino Sigüenza v Ayuntamiento de Valladolid and Others [ECLI:EU:C:2018:646] of the CJEU announced on 16.04.2014.
- Judgment no. C-680/15. and no. C-681/15. Asklepios Kliniken Langen-Seligenstadt GmbH and Asklepios Dienstleistungsgesellschaft mbH v Ivan Felja and Vittoria Graf [ECLI:EU:C:2017:317] of the CJEU announced on 27.04.2017.

- Judgment no. C-426/11. Mark Alemo-Herron and Others v Parkwood Leisure Ltd [ECLI:EU:C:2013:521] of the CJEU announced on 18.07.2013.
- Judgment no. C-190/16. Werner Fries v Lufthansa CityLine GmbH [ECLI:EU:C:2017:513] of the CJEU announced on 05.07.2017.
- Judgment no. C-482/16. Georg Stollwitzer v ÖBB Personenverkehr AG [ECLI:EU:C:2018:180] of the CJEU announced on 14.03.2018.
- Judgment no. C-174/16. H. v Land Berlin [ECLI:EU:C:2017:637] of the CJEU announced on 07.09.2017.
- Judgment no. C-306/16. António Fernando Maio Marques da Rosa v Varzim Sol – Turismo, Jogo e Animação, SA [ECLI:EU:C:2017:844] of the CJEU announced on 09.11.2017.
- Judgment no. C-89/16. Radosław Szoja v Sociálna poisťovňa and WEBUNG, s.r.o. [ECLI:EU:C:2017:538] of the CJEU announced on 13.07.2017.
- Erika Kovács, *"Regulatory Techniques for "Virtual Wokers"*, *Magyar Munkajog/Hungarian Labour Law Journal*, Vol. 4. Issue 2, (2017), pp. 1-15.
- György Kiss, *"Foglalkoztatás gazdasági válság idején – a munkajogban rejlő lehetőségek a munkaviszony tartalmának alakítására (jogdogmatikai alapok és jogpolitikai indokok)"*, *Állam- és Jogtudomány*, Vol. 55. Issue 1, (2014), pp. 36-76.
- György Kiss, *Alapjogok kollíziója a munkajogban*, Justis, Pécs, 2010.
- György Kiss, *Munkajog*, Osiris Kiadó, Budapest, 2005.
- Klaus Lörcher and Isabelle Schömann, *The European pillar of social rights: critical legal analysis and proposals (Report 139)*, ETUI aisbl, Brussels, 2018; this document is available online at https://www.etui.org/Publications2/Reports/The-European-pillar-of-social-rights-critical-legal-analysis-and-proposals (last access: 28.10.2019).
- Veronica Papa, *"The Dark Side of Fundamental Rights Adjudication? The Court, the Charter and the Asymmetric Interpretation of Fundamental Rights in the AMS Case and Beyond"*, *"European Labour Law Journal"*, Vol. 6. Issue 3, (2015), pp. 190-199.
- Tamás Prugberger and György Nádas, *Európai és magyar összehasonlító munka- és közszolgálati jog*, Wolters Kluwer Hungary Kft., Budapest, 2014.
- Ildikó Rácz, *"Munkavállaló vagy nem munkavállaló?: A gig-economy főbb munkajogi dilemmái"*, *Pécsi Munkajogi Közlemények*, Vol. 10. Issue 1, (2017), pp. 82-97.
- Zane Rasnača, "*Bridging the gaps or falling short? The European Pillar of Social Rights and what it can bring to EU-level policymaking"*, published in "*European Trade Union Institute – Working Paper"*, Issue 5, (2017), this document is available online at: 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 (last access: 02.09.2019).
- Zane Rasnača and Sotiria Theodoropoulou, *"Strengthening the EU"s social dimension: using the EMU to make the most out of the Social Pillar"*, *ETUI Policy Brief – European Economic, Employment and Social Policy*, Issue 5, (2017); this document is available online at: https://www.etui.org/News/Using-the-EMU-to-make-the-most-out-of-the-Social-Pillar 2018 (last access: 29.10.2019).
- Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority.
- Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.
- *Reflection Paper on the Social Dimension of Europe*, COM(2017) 206 (26.04.2017), pp. 6-7., 12. and 21.; available online at:

https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-social-dimension-europe_hu.pdf (last access: 29.10.2019).

- Martin Risak and Thomas Dullinger, *The concept of „worker" in EU law. Status quo and potential for change (Report 140)*, ETUI aisbl, Brussels, 2018.; this document is available online at: https://www.etui.org/Publications2/Reports/The-concept-of-worker-in-EU-law-status-quo-and-potential-for-change (last access: 28.10.2019).
- Martin Risak, *Fair Working Conditions for Platform Workers. Possible Regulatory Approaches at the EU Level*, Friedrich Ebert Stiftung, Berlin, 2018; this document is available online at: http://library.fes.de/pdf-files/id/ipa/14055.pdf (last access: 28.10.2019).
- Sara Iglesias Sánchez, "*The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ"s Approach to Fundamental Rights"*, *Common Market Law Review*, Vol. 49. Issue 5, (2012), pp. 2565-2611.
- Treaty on the Functioning of the European Union.
- Bruno Veneziani, *11. Right of collective bargaining and action (Article 28)*, in: Bercusson (ed.), op. cit., pp. 291-336.
- Márton Leó Zaccaria, "*A 91/533/EGK irányelv reformja – elméleti megfontolások és európai bírósági tanulságok"*, *Közjogi Szemle*, Vol. 12. Issue 1, (2019), pp. 59-68.