1. Introduction

Studying European social law[1] can be a bewildering experience for someone who is well acquainted with social law on the national level. The EU does not have a coherent approach to questions of labour law and social security law, but rather singles out "burning issues", for which the divergence of domestic law in the member states (MSs) seems particularly problematic. A brief historical overview should give more insight into the EU's social policy, which "turns much of the conventional understanding of social policy on its head."[2]

1.1. Development of European social law

The history of European social policy has been described as "more a story of failure than great success".[3] Originally, the **treaties** establishing the predecessors of what is now the European Union did not contain any explicit provisions in the area of social law. Quite obviously, these treaties (the 1951 Treaty establishing the European Coal and Steel Community and the 1957 Treaty establishing the European Economic Community [TEEC]) intended to facilitate **economic cooperation**, which consisted in the creation of an internal market without barriers between the individual MSs. Accordingly, "workers" figured in these treaties only as beneficiaries of an *economic freedom* – the free movement of persons, which will be treated in more detail in section 4.1.

Against this backdrop, it was actually the **European Court of Justice** (CJEU) which first gave the EEC treaty a "social meaning". For one thing, this concerned the mentioned provisions of the free movement of workers, which the Court eventually regarded as aiming not exclusively at the financially most efficient allocation of the workforce across Europe. For another thing, the Court started to apply a "social" reasoning for the interpretation of what is now Art. 157 of the Treaty on the Functioning of the European Union (TFEU). This somewhat atypical provision, which was present already in the original version of the TEEC, prescribed **equal pay for men and women** within the Community. In a landmark decision (*Defrenne*), the CJEU ruled that its purpose was not restricted to regulating questions of competition among the MSs.[4] Much rather, according to the Court, it was meant to give an individual right to equal treatment regarding pay to every person in dependent em-

1 The term "social law" as used in the EU context is a broad concept, covering labour law as well as social security law.

2 *Daly*, Whither EU Social Policy? An Account and Assessment of Developments in the Lisbon Social Inclusion Process, Journal of Social Policy 37/2007, 1.

3 *Pochet*, Social Europe: Still binding regulations? Paper prepared for the EUSA Tenth Biennial International Conference, Montreal, Canada 17-19 May 2007, 2.

4 Initially, France had pressed for the inclusion of this clause in order to protect itself from competitive disadvantages: since none of the other MSs had a comparable provision in national law at that date, France had the reasonable fear that enterprises in the other MSs could work at lower costs by benefitting from cheap female labour. Cf. *Burri/Prechal*, EU Gender Equality Law (2008) 4.

ployment subject to the law of the Community. The importance of this ruling can hardly be overestimated, since it gave individual women direct access to the European Court, and a possibility to enforce their rights even vis-à-vis an individual employer.

The *Defrenne* ruling was rendered at a time which today is sometimes referred to as the "golden era" of European social law. In this period, which is roughly equivalent with the **1970s**, widely conceptualised projects of achieving a harmonisation of social law provisions emerged in the European context.[5] Against the background of the severe consequences of the global oil crisis and concrete indications of an ever-intensifying "race to the bottom" in the social field, the European Commission drafted its first **Social Action Programme**. This document, which was established in cooperation with the European social partners, was based on endeavours of gradually introducing a common set of minimum standards of social law. These should prevent economic competition from stimulating or even forcing the individual states to lower their original national standards. The legal bases used for legislative action were, on the one hand, the mentioned equal pay clause, on the other hand the provisions on "approximation of laws" with a view to the EC internal market (now Art. 115 of the TFEU).

In the end, only a marginal share of the proposals envisaged by the Programme was actually adopted.[6] The harmonisation track thereby commenced soon came to a halt on grounds of the political realities of the **1980s**. This period was characterised by a certain revival of **market liberalism**, a concept most prominently advocated by the Thatcher administration in the UK. In practice, that government vetoed any further pursuit of harmonisation in the social field,[7] so that the only legal acts of a social law nature stemming from that period are located in the (largely uncontroversial) area of OSH (see section 9.1).

The political deadlock basically continued also during the early 1990s, when, however, the increasingly pressing call for social measures by the EU led to a solution of "two-speed" integration – which essentially amounted to giving the UK the option of opting out of the harmonisation steps taken by the other member states.[8] This process was initiated by the proclamation of the **1989 Charter of Fundamental Social Rights of Workers** as a non-binding set of principles in the social sphere, followed by the **1992 Agreement on Social Policy**, which was annexed as a protocol to the Maastricht Treaty. In essence, this agreement already contained the competence provisions that can now be found in the Social Chapter of the TFEU: it gave the Council of the EU – under exclusion of the UK – a legislative competence for a range of social law issues.

5 Cf. *Von Maydell* et al, Enabling Social Europe (2006) 24 et seq.
6 Cf. *Daly*, Whither EU Social Policy? 3 et seq.
7 Cf. *Pochet*, Social Europe 3.
8 Cf. *Addison*, In the Beginning, There Was Social Policy: Developments in Social Policy in the European Union from 1972 through 2008 (2008) 4.

After a change of government in the UK, the provisions of the protocol could finally be inserted into the TEC by the **Treaty of Amsterdam** in 1997. Since then, no notable extension of the powers of the EU in this area of legislation has taken place. However, primary law (see section 1.4) has developed significantly with a view to fundamental social rights, with the **2001 EU Charter of Fundamental Rights** becoming binding with the entry into force of the Treaty of Lisbon in 2010. Moreover, the stated political programme of the EU has increasingly focused on presenting social aims on an equal footing with economic ones in recent years. A prominent example is the **2000 Lisbon Strategy** with its aim of making the EU "the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion", and the follow-up **Europe 2020 Strategy** under the heading of "smart, sustainable, inclusive growth".[9]

In late 2017, the **European Pillar of Social Rights (EPSR)** was proclaimed by the European Parliament, the Council and the European Commission at the Social Summit for Fair Jobs and Growth in Gothenburg. Rather than a "hard law" basis for specific rights, the EPSR represents a shared commitment of the EU's core institutions to be guided in all their actions by **20 principles** in the areas of equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion. Since its adoption, the EPSR has been extensively referred to in legislative measures in the social field – such as the foundation of the European Labour Authority (see chapter 12) and various directives relating to the posting of workers (subsection 4.3.1.3), transparent and predictable working conditions (section 9.1), OSH (section 9.2), or work-life balance (section 9.5).

As of today, **minimum standards** agreed on the EU level extend to wide areas of national labour law. In many aspects, these standards are barely "felt" by some MSs whose domestic systems already depart from more advanced or stricter rules. Having said that, notably EU standards of equal treatment have certainly necessitated substantial changes in the legal orders of all MSs[10]. What's more, as will become evident in the chapters to follow, the activist approach of the Court of Justice has at times turned vague and seemingly weak provisions into demanding standards for the systems in place.

1.2. Overview of social policy provisions in current EU primary law

A glance at the EU founding treaties in their present form illustrates that current EU law is actually full of **commitments to social development** and social protection. The increasing prominence of such values in declaratory treaty provisions can be ex-

9 For details see http://ec.europa.eu/europe2020/index_en.htm.

10 Cf. *De Witte*, From a "Common Principle of Equality" to "European Antidiscrimination", American Behavioral Scientist 53/12 (2010), 1720.

emplified by a reference to Art. 3(3) of the Treaty on European Union (TEU), which declares as a central aims of the Union to establish a "highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment", for which it will amongst others "combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child". Although the importance of statements of this kind for the **interpretation** of the treaties (and, ultimately, EU law in its entirety) should not be underestimated, it is telling that the development of EU social issues in the course of primary law amendments since the Treaty of Maastricht was largely restricted to the continuous introduction of such declaratory norms.

By contrast, the **competences** that the Union has been bestowed with in the social law area have remained unchanged since that Treaty. They are currently spread over four chapters of the TFEU: provisions on free movement can be found in Art. 18 et seq. (for citizens in general) and 45 et seq. (for workers). Their relevance in the area of social law will be dealt with in more detail in chapter 4. What's more, the Employment Chapter (Art. 145 et seq.) provides for a certain degree of cooperation in questions of employment policy (see chapter 2), whereas the Social Chapter (Art. 151 et seq.) contains what could be called the heart of the social dimension of the EU, enlisting a number of competences as they will be referred to *infra* in the next section.

Finally, it needs to be recalled that EU primary law is by no means restricted to the founding treaties, but contains notably *general principles* (see Art. 6 of the TEU) and the EU Charter of Fundamental Rights (CFR) – both of which provide a basis for **fundamental social rights** to become a benchmark for the application and implementation of EU law (see chapter 3).

1.3. The EU's competences in the social policy field

As a preliminary note, reference needs to be made to the general limits applicable to any legislative action by the European institutions. As a point of departure, the **principle of conferral** (Art. 5(2) TEU) restricts such legislative action to those fields where competence is explicitly attributed to the Union by the TFEU. For the area of social policy, the EU is bestowed with a **shared competence** according to Art. 2(2) and Art. 4(2)a-c TFEU. This means that, in all the areas mentioned in the preceding section, the MSs are free to regulate any issue as far as it has not yet been dealt with by binding provisions passed by the EU. Finally, the possibilities of the EU legislator to regulate such issues of shared competence is – at least in principle – restrained by the **principles of subsidiarity and proportionality** (Art. 5(3-4) TEU), which essentially allow for regulation by the Union only as far as the same aims could not sufficiently be realised by individual measures of the MSs. Never must the EU enact regulation that goes beyond what is necessary to reach the aim of the legislative initiative.

A first look at **Art. 153 TFEU** evidences that, basically, wide areas of national social law are open to (partial) harmonisation by the EU lawmaker within the boundaries

of subsidiarity and proportionality. However, it warrants attention that not all the items enlisted in Art. 153(1) are of "equal strength", which has to do with the procedures required for passing legislation in the individual areas. These are determined by Par. 2 et seq. of the same Article. From that, it can be inferred that the **ordinary legislative procedure** is applicable only to issues of

- the improvement of the **working environment, OSH**
- **working conditions**
- **information and consultation** of workers
- the integration of **persons excluded from the labour market** and
- **equality** between men and women.

Apart from the involvement of the European Parliament as legislator on equal footing with the Council, the applicability of the ordinary legislative procedure notably means that the Council can decide by *qualified majority*. This makes action in these areas far more likely than in the following areas, which can be regulated only by **unanimous decision in the Council**:

- **social security** and social protection of workers
- **termination of employment**
- the **representation** of workers and employers, including **co-determination** and
- conditions of employment for **third-country nationals.**

Needless to say, unanimity between 27 national governments becomes increasingly difficult to achieve. This practical difference is illustrated vividly e.g. in the area of collective representation of employees: whereas the *information and consultation* of works councils and similar bodies (Art. 153(1)e TFEU) is prescribed by a number of directive in different areas, rights to *co-determination* by such bodies (Art. 153(1)f) are virtually absent from EU legislation (see chapter 10).

Finally, the areas of **combating social exclusion** and **modernising social protection systems** are not open to the adoption of common minimum standards by means of a directive: Art. 153(2)a TFEU restricts legislative action to "measures designed to encourage cooperation" and expressly excludes any harmonisation of the MSs' laws.

Curiously, Art. 153(5) also contains a negative delimitation of these competences, by stating explicitly the fields in which legislation by the EU should be impossible even by unanimous decision. This concerns questions of **pay**, the **right of association**, and **industrial action** – i.e. issues of central importance in the social law area. In order to prevent these restrictions from depriving the bases of competence referred to above of their effectiveness, the CJEU has adopted a **narrow interpretation** of these exceptions. The most remarkable example in this respect is the constant jurisdiction stating that a prohibition of discrimination of certain categories of employees may include the stipulation of equal pay. By contrast, the Commission has in the past rejected repeated requests by the EP to initiate legislative action for a common European minimum wage,[11] relying on the lack of EU competence for any such action. In

11 Cf. the EP's Resolution of 15 November 2011 on the European Platform against Poverty and Social Exclusion, 2011/2052(INI).

a change of heart, the current Commission is expressly committed to "developing a legal instrument to ensure workers in the EU have a fair minimum wage".[12]

It should be stressed that the meaningfulness of Art. 153(5) is ultimately called into question with a view to the broadly formulated legal basis in Art. 115 (approximation of laws) and 352 TFEU (necessary action in one of the EU policy areas), both of which require unanimity in the Council. More than anything, this became obvious when the Commission based itself on Art. 352 TFEU for its (now withdrawn) proposal for a regulation on the right to take collective action.[13]

Lastly, a particularity of Art. 153 TFEU is that the MSs can **transpose** EU legislation based on this article not only by national statutory law, but may leave it to the social partners to implement it by means of a **collective agreement**. Self-evidently, the responsibility for proper implementation remains with the MSs (Art. 153(3)).

1.4. Application of EU law

In the hierarchy of legal sources, EU **primary law** (founding treaties, general principles, fundamental rights) comes on top, followed by **secondary law**, which is adopted by the EU's legislative bodies (essentially regulations and directives – see Art. 288 TFEU). The MSs, obligation to ensure the compliance of national law with EU law binds not only the legislative but also the executive and judicial branches. Therefore, when national courts apply domestic law, they must interpret it, so far as possible, in line with all applicable sources of EU law (cases *Dominguez*, *Bauer*). Where necessary, they need to overthrow even longstanding consistent interpretation of national provisions (case *Egenberger*).

Where no recognised interpretative method could resolve a conflict with EU law, courts are not required to engage in an interpretation *contra legem*. However, in some cases, they are obliged to set national law aside and apply EU law directly. According to the long-standing jurisprudence of the CJEU, a provisions of EU law must be given **direct effect** if it is **unconditional and sufficiently precise** to be relied upon before national courts. If this is the case, individuals can rely on the provision in all cases that are directed against a State and/or its institutions. This includes lawsuits against a public employer (cases *Pfeiffer, Dominguez*). National law must ensure that courts and tribunals ruling on relevant cases have the power to disapply a provision that contradicts directly applicable EU law (cases *An Garda Síochána, Leitner).* Although EU law recognises the principles of legal certainty and the protection of legitimate expectations, those cannot be relied on to uphold rules and practices that are contrary to unconditional and sufficiently precise provisions of EU law (case *Dansk Industri*).

12 See President von der Leyen's mission letter to Nicolas Schmit, https://ec.europa.eu/commission/commissioners/sites/comm-cwt2019/files/commissioner_mission_letters/mission-letter-nicolas-schmit_en.pdf.

13 Proposal for a Council Regulation on the Exercise of the Right to Take Collective Action Within the Context of the Freedom of Establishment and the Freedom to Provide Services (COM(2012)130 final). Yet, the national parliaments finally rejected the proposal by a "yellow card", *inter alia* referring to a violation of Art. 153(5).

By contrast, private employers are at least partially protected in their expectation that national rules with which they are complying will not suddenly be disapplied when it turns out that those are contrary to EU law. Only EU primary law and regulations are addressed to individuals and thus **horizontally applicable** between two private parties. By contrast, directives (which are the most prevalent legal source in the labour law field) bind only the MSs, so that courts cannot set aside national law to the detriment of a private party in a dispute. Also, EU law respects the principle of *res judicata*. Accordingly, where a court has failed to apply EU law correctly, MSs need not overturn their procedural law to "correct" a final judgment (case *Târşia*).

Breaches of EU law must be addressed in accordance with two principles. First, remedies for such breaches must not be weaker than those applied in similar domestic cases (**principle of equivalence**). Second, the exercise of rights conferred by EU law must not be rendered impossible in practice or excessively difficult (**principle of effectiveness**). Thus, EU law usually does not prescribe the type of sanction for breaches (e.g. reinstatement of a dismissed employee vs. financial compensation), as long as the sanction applied is not less strict than in similar cases and can be considered an overall effective remedy.

Where, as a result of the above, an individual has been deprived of their rights under EU law (either because non-complying national rules could not be set aside, or because a non-complying decision of an institution or court has become final), there is eventually the possibility of holding the State liable. The individual must thus be given the option of suing the state before national courts for compensation of the damage they suffered as a result of any "sufficiently serious" failure to implement EU law (**state liability**: cases *Francovich I, Târşia*).

The CJEU is ultimately in charge of giving an authoritative interpretation of EU law. Among the possible routes of bringing a question before that Court, the relevant ones are **infringements procedures** brought by the Commission against a MS (Art. 258 TFEU) and **preliminary requests** by national courts for interpretation of provisions they need to apply in a case (Art. 267 TFEU).

2. Employment policy

2.1. Cooperation on the EU level

EU law in general knows varying degrees of intensity of its influence on national law. Apart from **harmonisation** (setting of mandatory minimum standards) as envisaged in Art. 153 TFEU, there are areas in which Union action is restricted to the **coordination** of national legal orders (e.g. in the area of social security: see chapter 11). A subtler form of influence is aimed at in Art. 148 et seq. TFEU, which calls for (mere) **cooperation** in the field of employment policy. In other words, in this area, the EU was not bestowed with any prescriptive (hard law) powers vis-à-vis its member state, but can only *encourage* national measures in line with the goals of EU policy making ("**soft law**").

The procedure applied for this aim has been baptised the **Open Method of Coordination (OMC)**. It is closely related to the broader coordination of economic policy (see Art. 121 TFEU). In a nutshell, the method seeks to stimulate the exchange and possible alignment of national strategies with the central aim of achieving a **high level of employment** (Art. 147). The **procedure** set out in Art. 148 and involves all important actors of the EU: departing from an *Annual report* (by the Council and the Commission), the European Council drafts (general) *Conclusions* as a basis for the (more concrete *Guidelines* of the Council. In this process, the Council has to engage into consultations with various actors. The MSs are expected to design their national employment policy with a view to these common guidelines and, after expiry of one year, draft *Reports* on its implementation. The Council reviews the received reports and may address individual recommendations to the MSs. The circle is finalised by a new Annual report, which takes into account current developments as evident from the national Reports.

Importantly, there are **no legal obligations** of compliance or sanctions that could be imposed upon the member states. The system relies on the effects of **mutual learning** and **peer pressure**. The only area in which legislation based on the ordinary legislative procedure is possible is Art. 149, which allows for regulation on incentives for exchange of information, the development of procedures and the assessment of experience. The OMC has functioned as a vehicle for the diffusion of concepts such as active ageing, lifelong learning, gender mainstreaming, or "making work pay".[14] The most notable strategy consciously embraced and promoted by the EU institutions is that of **flexicurity** – a concept aiming to eliminate the traditional conflict between *flexibility* as a typical interest of employers (notably regarding the ease of hiring and firing) and *security* in the interest of protecting employees.

14 Cf. *Heidenreich/Bischoff*, The Open Method of Co-ordination: A Way to the Europeanization of Social and Employment Policies?, Journal of Common Market Studies 46/3 (2008), 524.

Since 2011, the COM has been issuing economic policy recommendations to all MS as part of the "European Semester". A central part of the Semester is the Joint Employment Report, which is drawn up according to the aforementioned procedure in accordance with Art. 148 TFEU. Since the introduction of the EPSR (see Section 1.1), the MS have been "graded" in this context on the basis of a "Social Scoreboard" in relation to various socio-economic indicators compared to the EU average. The conclusions of the Joint Employment Report feed into the overall assessment of the economic and social situation of a MS and the country-specific recommendations of the Commission based thereon.[15]

2.2. National employment policy: conflicts with EU competition law

It needs to be noted that, despite the EU's supportive approach to active national labour market policies, certain typical elements of such policies are actually highly problematic with a view to EU competition law. Notably, any form of **financial advantage granted to specific enterprises** with the aim of a preservation or creation of employment basically constitutes a **distortion of competition** incompatible with Art. 107 TFEU. In order not to stifle measures viewed as crucial to address imbalances in national labour markets, secondary law adopted on the basis of Art. 107(3) allows for a range of exceptions to the prohibition of state aid, such as notably those contained in the **Block Exemption** Regulation 651/2014/EU.[16] The latter sets out broad possibilities of state subsidies supporting SMEs, regional development, and disadvantaged categories of persons (e.g. disabled employees). Aid which remains below EUR 200,000 for a single undertaking within three years is likely to come under the **de minimis exemption** set out in Regulation 1407/2013/EU. Additionally more leeway was given to governments to grant advantages in order to address the consequences of the 2008 **economic crisis**.[17] Similarly, a specific Temporary Framework allows for extraordinary measures of state aid to support the economy in the context of the coronavirus outbreak.[18]

15 For details, see https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/european-semester-timeline/autumn-package-explained_en#employmentguidelines.

16 A Commission Regulation based on the Enabling Regulation 2015/1588/EU, which allows for the Commission to enact block exemptions for i.a. employment and training.

17 Cf. the Communication of the Commission — Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis, 2011/C 6/05.

18 For details see the continuously updated information at https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html.

3. Fundamental Social Rights

On the international level, a distinction is commonly drawn between fundamental (human) rights of the so-called **first** and **second generation**. The former group of rights is of a *civil/political* nature and protects individuals from harm caused to them by the state (or by third parties, with the state failing to intervene). This includes e.g. the right to life, the freedom from persecution, freedom of speech and of association. By contrast, the second generation – *social (or socio-economic) rights* – refers to standards which a state must actively provide to ensure a decent living to any human being, including for instance the provision of social protection and health care.[19]

For EU law, fundamental rights in general have been playing an increasing role in recent years. As of today, a comprehensive reference to fundamental rights as general principles of the Union's legal order can be found in Art. 6 TEU, which constitutes essentially a codification of CJEU case law from the late 1960s onward (starting with *Stauder*).[20] That case law had already identified the **European Convention of Human Rights (ECHR)** and the **constitutional traditions** of the MS as the source of fundamental rights, which had to bind also the EU in its area of competence. However, the ECHR, just as the constitutional foundation of some MSs, could hardly be seen as a genuine source of fundamental *social rights*.

Importantly therefore, **Art. 6 TEU** now additionally invokes the **EU Charter of Fundamental Rights (CFR)** as the Union's proper fundamental rights catalogue. As opposed to the ECHR, the CFR covers fundamental rights of both generations in an extensive manner, with social rights to be found notably in Title IV – "Solidarity", but also Title III on Equality. The addressees of the obligations set out in the charter as identified in its Art. 51 are not only the **institutions of the EU**, but also the **MSs' authorities when implementing EU law** (see case *TJ*). This corresponds to the scope the CJEU gives to general principles and creates important uncertainties, which will be dealt with in section 6.3.

This provision was in fact the main reason for the disputes surrounding the transposition of the CFR into a **binding source of primary law**. The continued opposition of certain MSs finally led to the attachment of a **protocol to the Lisbon Treaty**[21], which limited the applicability of the charter to the UK and Poland. It excludes the possibility of courts finding a violation of the CFR by (after Brexit only) Poland; moreover, it stipulates that the Solidarity Chapter does not create justiciable rights applicable to that MS. Despite this seemingly severe restriction of the applicability of

19 Cf. *Tushnet*, Reflections on Judicial Enforcement of Social And Economic Rights in the Twenty-First Century, NUJS Law Review 4 (2011), 177 et seq.

20 For an overview of the development see *Morano-Foadi/Andreadakis*, Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights. European Law Journal 17/5 5 (2011), 595 et seq.

21 Protocol 30 to the Lisbon Treaty on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom.