RETHINKING SCOPE AND PURPOSE OF NATIONAL LABOUR LAW BECAUSE OF DEVELOPMENTS IN EU LABOUR LAW?

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1. Introduction

In the beginning of the European Economic Community in 1958 labour law did not figure prominently in the basic Treaty. In 2012 labour law is not only included in the multi-level legal order the EU is becoming, it also takes a somewhat peculiar place among the branches of law in this respect. The process of legal finding of the EU Court of Justice in Luxembourg (ECJ) is somewhat different in this branch of the law. According to Rebhahn the systematic method of interpretation is underdeveloped in this branch because labour law is hardly harmonized at EU-level[1]. This brings forward the question to potential non-intended influences of the EU legal system on national labour laws. The economic freedoms of the internal market have had a deep influence on labour law. Micklitz talks about a 'non-solidaristic logic' that has crept into areas of national law that were hitherto well protected[2].

One consequence of the influence of EU labour law on the labour laws of the member states is that the three relevant economic freedoms: free movement of workers, freedom of establishment of independents and workers posted within the framework of provision of services of their employer, are separated forcefully and somewhat artificially in the case law of the ECJ. In practice there is a growing overlap between these categories, not only subsequently but even at the same time. In the Netherlands the development of the hybrid independent without personnel is known; the person is a part-time worker but at the same time for the other half an independent. What are the consequences of this forceful separation of the economic freedoms for national labour law? Is national labour law able to solve the inherent tensions in the EU economic constitution on its own? This is the first case study of this contribution. How can we safeguard the scope and purpose of (national) labour law in this changing EU-law context? In some respects the effectiveness of national labour law will have to be strengthened in the internal market.

Moreover, there seems to be an 'in-built' tendency from the part of the ECJ, to give priority to individual (fundamental) rights above collective (fundamental) rights. It seems also that member states as important actors in the EU structure ('Herren der Verträge') and responsible for the implementation of EU law, have a higher standing than non-state actors such as works councils and trade unions. Since the seminal cases in *Viking*[3] and *Laval*[4] collective rights such as the right to freedom of association, collective bargaining

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[1] Rebhahn, R. 2006. "Europäisches Arbeitsrecht", in: K. Riesenhuber (hrsg.), *Europäische Methodenlehre. Handbuch für Ausbildung und Praxis*, Berlin: De Gruyter Recht, at p. 446.
[2] H.-W. Micklitz, "The ECJ between the individual citizen and the member states – a plea for a Judge-made European Law on Remedies", in: H.-W. Micklitz and B. De Witte (eds.), *The European Court of Justice and the Autonomy of the Member States*, Intersentia, Cambridge, Antwerp, Portland, 2012, at page 379.
[3] Case C-438/05 *International Transport Workers' Federation and others versus Viking Line*, [2007] ECR I-10779
[4] Case C-341/05 *Laval versus Svenska Byggnadsarbetareförbundet*, [2007] ECR I-11767

and collective action may be 'balanced' against economic freedoms containing especially individual rights. The Charter of Fundamental Rights of the EU has strengthened this development by giving collective fundamental rights a less prominent place than individual fundamental rights. A result is an increasing economization or commodification of society. This presumed shift from collective to individual is the second case study of this paper. Is there still sufficient space for autonomous as well as heteronomous national labour law? It will be argued, that under certain conditions, there is sufficient space.

The structure of this contribution is as follows. First I will pay attention to the general framework in which EU law and national labour law are operative. Is there a one-sided, asymmetrical or a mutual influence of both fields of the law? In what different ways do both fields influence each other? In the second part I will focus on individual labour law and the overlapping of the three relevant economic freedoms and in the third one on collective labour law and the hierarchy between categories of fundamental rights. The final part will pay attention to some (partial) solutions for the problems the clash between the two fields of law brings about. Is national labour law able to solve these problems on its own? Or do we need to look at a higher level, the level of social and economic law?

2. The general framework of the clash between EU law and (national) labour law

In what ways do EU law and national labour law interact and what is the nature of their interaction? There are many kinds of positive and negative interaction. The most important one is the (potential) clash between fundamental rights. At least in European labour law there are many fundamental rights, such as the right to strike and the right to collective bargaining. In case fundamental rights collide, courts have a tendency to 'balance' these rights. Exceptions to these rights in a democratic society are generally possible. The EU now has a Charter of Fundamental Rights and there is a clear hierarchy between these rights. The respective chapters of the Charter are called dignity, freedoms, equality, solidarity and citizenship. Most fundamental labour laws are to be found in the category of solidarity, apart from the right to non-discrimination that belongs to the category of equality. The fundamental rights mentioned in the chapter on dignity are framed in the most absolute way; examples of such rights are the prohibition of slavery and forced labour. The fundamental rights mentioned in the category of solidarity seem to be the most relative. Article 28 concerning the right to collective negotiations and collective action provides that these rights must be exercised 'in accordance with Community law'[5]. We have seen the consequences of this provision in the seminal case law of the ECJ in the cases of *Laval* and *Viking*. Important basic rules and principles of law such as the economic freedoms and the general principle of equal treatment almost always prevail. They may be considered as hard core EU law.

A second important area that leads to clashes between EU law and national labour law is the existence of the four economic freedoms. These freedoms, the free movement of goods, persons, services and capital are treated by the ECJ as the very basis of the EU legal order. Not only discriminations between nationals of different member states are prohibited, also mere inhibitions to the integration of the internal market without frontiers (article 26, paragraph 2 TFEU) have to be objectively justified. Justifications consist of a legitimate aim, and the strictest version of a proportionality test. If there is another measure possible, that intervenes less intensively in one of the economic freedoms, this measure will have to be given priority above the originally considered one. In the area of free movement of workers the rule of non-discrimination on the basis of nationality is strongly upheld. In the area of free movement of services where workers are posted from one to another member state on a temporary basis, there seems not to be such a rule any more. Service providers from other member states may profit from their comparative advantage in the form of lower wages and labour conditions to some extent. Only the minimum-wages in the host state may be imposed. The four freedoms 'compete' with fundamental social rights, such as the right to collective action and collective bargaining. Some scholars in the field of labour law see the whole

[5] Manfred Weiss calls this a 'dramatic inconsistency', see his "The politics of the EU Charter of Fundamental Rights", in: B. Hepple (ed.), *Social and Labour Rights in a Global Context. International and Comparative Perspectives*, Cambridge University Press, 2007, at page 85

area of labour law as 'infralaw' in relation to the four economic freedoms[6]. It is certainly true that parts of labour law are reinterpreted and reframed within the perspective of the economic freedoms. This may imply that labour law is 'economized' to some extent: intra-European economic arguments become more important than national social arguments. Labour law, originally created to limit the one-sided focus on economic efficiency, will have to deal with this economically driven construction of the EU.

Another consequence of the seminal role of the four economic freedoms in the EU internal market is their sometimes artificial separation. The difference between free movement of workers and free movement of independents is thin; the element of hierarchy or control by the employer is often the only distinguishing characteristic. But is the presumed 'independence' of the independent real?[7] The difference between free movement of workers and workers who are posted within the free movement of services is also thin. Only the 'temporary' nature of the service fulfilled in the host country is the determining factor. The borderline between these three categories of economically active persons, workers, independents and posted workers, is problematic but strictly upheld by the ECJ. The nature of the relationships is changing. Increasingly in the actual circumstances, there are examples of workers who implement their job in an independent manner, although they are formally still under the 'control' of their employer. And temporariness may be a criterion of free movement of 'services', it is increasingly also a criterion of labour contracts as well. Only a limited number of workers have contracts for unlimited duration and these contracts are not the model any more as they were in 1958, the date of the creation of the European Economic Community with its common market provisions.

A third problem is derived from the above-mentioned. What is abuse or misuse of law in this respect? Use of free movement is not misuse. Misuse will have to be proven by the host member state. Misuse and exploitation of workers is important in the EU and is linked to human trafficking as well. How should labour inspectorates, Chambers of Commerce, customs and tax authorities and police deal with misuse in an EU-context? Many institutions in the Netherlands feel insecure. Is there a violation of EU law or is it only a legitimate use of one of the four freedoms? State institutions are often underfunded because of government cuts in order to stay within the EMU criteria for public debts. Although the tasks of the Dutch labour inspectorate become more important because of open borders within the EU, the Dutch government decided recently to diminish the number of posts in the inspectorate. More intense and important work has to be done with fewer personnel. In its case law, the ECJ occasionally takes the weaker position of the worker into account. See for example the cases of *Allonby*[8] concerning a former teacher who does more or less the same work now as an independent for less money and *Danosa*[9] concerning a pregnant member of a Board of Directors of a company who is put out of function mainly because of her pregnancy. Concerning these two examples, the Court simply does away with qualifications under national law. When these persons are in a dependent position, they have to be considered as workers even if they are not considered as workers under their national law. This outcome of the case is for the national court, which asked the preliminary question to the ECJ, to confirm. The problem is that these cases are not related to the economic freedoms, but to the field of equal pay and protection during maternity respectively. In relation to the economic freedoms and the protection of (posted) workers, it remains difficult to decide between use and misuse of law. Misuse will have to be proven and shown; this is a difficult task for administrative organs or labour inspectorates which are sometimes not effective[10].

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[6] M. Rigaux and J. Buelens, "Can a Stronger Anchoring of European Labour Law and Social Security Law to Community Law Guarantee a Sustainable European Social Model?", in: F. Pennings et.al. (eds.), *Social Responsibility in Labour Relations. European and Comparative Perspectives. Liber Amicorum for Teun Jaspers, 2008, at page 26.*

[7] See an interesting contribution by M. Westerveld, The 'New' Self-Employed: An Issue for Social Policy?", in: *European Journal of Social Security*, volume 14, no. 3, 2012, pp. 156-173.

[8] Case C-256/01, *Allonby* [2004] ECR I-6451

[9] Case C-232/09, *Danosa versus LKB Lizings CIA* [2010] ECR I-000

[10] See for the Italian case Patrick Actis Perinetto, "*Viking* and *Laval*: An Italian Perspective. A Case of No Impact", in: *European Labour Law Journal*, volume 3 (2012), No. 4, at page 299

At least, member states may take measures to uphold the public order. But even here the ECJ guards the use of this term by national authorities. It is submitted that combatting slave trade, forced labour and human trafficking are elements of the public order governments may uphold, even within a European internal market. This also fits in the case *Commission versus Luxembourg*[11], where the concept of public order of the host country, the Grand-Duchy of Luxembourg, was severely limited by the ECJ. Some controls by Luxembourg are superfluous, according to the Court, because European directives on working time etcetera have to be implemented by the Central and Eastern-European home states of the posted workers too. One of the exceptions mentioned in the proceedings of this case that is allowed to the host state is to combat slave trade! But what is slave trade or human trafficking within an internal European market consisting of countries with very unequal stadia of economic development? I will come back to this issue in chapter 5.

Increasing harmonization or partial harmonization also has a potentially deep impact on national labour laws. Above, the examples of equal pay and maternity protection were already mentioned. 'Partial' harmonization may lead to uncertainty in the application of national labour laws when it is not clear whether the harmonized 'part' of an EU-directive is affected. An example of this is to be found in the area of the directive protection of workers during transfer of an undertaking. The workers concerned are protected in case there is a causal link with the transfer. For the rest national labour law applies unrestricted. This occasional lack of clarity is inherent in every multi-level system of law, but may hinder the proper application of national labour law. Increasing harmonization also implies that more specific areas of labour law are now under the influence of EU-law. This may lead to doubts concerning the application of national labour law. An example is the growing non-discrimination legislation in European labour law. Directive 2000/78 harmonized new areas in EU law such as age discrimination and discrimination of handicapped workers. The social partners have to take into account these new rules and their interpretation by the ECJ. If not, the product of their negotiation, the collective labour agreement, may become null and void when it discriminates[12]. Like free movement, non-discrimination belongs to the core of the activities of the EU and seems to be on a hierarchically higher level than other areas of law, because these two fields are largely dealt with on an EU-level and EU law is supreme within its substantive scope in relation to national law. The term general principles of law is used by the ECJ in this respect, an important source of law in a not yet fully developed legal system. The general principle of law of non-discrimination (on the basis of age) even seems to override individual legislative products such as directives. The Court sometimes reiterates that the directive 2000/78 is only one example of a concretization of the general principle of law[13].

Let us now have a look at individual and collective labour law in greater detail. What is the room national labour law still has, and how can it be used effectively?

3. Individual labour law

The cardinal element in this respect is that the EU internal market makes a stark distinction between the fundamental economic freedoms. For labour law the free movement of workers, freedom of establishment (of independents) and free movement of services are of importance. The distinction between these fundamental freedoms is upheld by the ECJ in a somewhat artificial way. The most famous example in this respect is *Rush Portuguesa*[14], in which the Court strengthened the right of employers to travel with their own employees from the home state to a host state where they provide a 'temporary' service. In order to make a distinction between the free movement of workers and the free movement of services the ECJ had to make this choice. The option preferred by the Advocate-General Van Gerven to only include 'main' personnel of the service-provider in the provision of services was deemed to be a too difficult

[11] Case C-445/03, *Commission versus Luxembourg* [2005] ECR I-10191
[12] See section 16b of the directive 2000/78
[13] See for example case C-555/07 *Kücükdeveci versus Swedex GmbH and Co. KG* [2010] ECR I-000 where the Court explicitly made this distinction between the general principle and a directive.
[14] Case C-113/89, *Rush Portuguesa* [1990] ECR I-1417

option in practice. It would bring about many conflicts on delimitation issues concerning those who belong to the category of 'main' personnel of the service-provider. Moreover, the comparative advantage of a domestic employer who uses his own personnel would have become too large in comparison with a provider from another member-state who only may bring his 'main' personnel over.

The ECJ picked the intriguing formula that employees from a service-provider do not 'access' or 'enter the labour market' of the host state, because these workers are only temporarily posted in the host state and after the service is finished will go back to their home-state. This is nothing less than a legal fiction and an extremely formalized argument. Now that the social security regulation 883/2004 of the EU allows a posting of workers for the maximum period of two years (with a special possibility to prolong it in the interest of the workers even for five years), how is it possible to uphold the argument that posted workers do not enter the labour market of the host state? The idea that free movement of services is temporary and free movement of workers is for a longer period is simply not true. The 'problem', because this is what we may call it, is due to the forceful separation between the economic freedoms in the TFEU. On the one hand the Court makes an explicit distinction between the economic freedoms, but on the other hand there is nothing that prohibits persons to switch from one freedom to the other. Even a kind of 'traffic-light situation' seems to be perfectly possible. One week you are a worker (red), the next week you are hired by a manpower office and become posted worker (orange), the third weak you decide to become an independent (green) and that in the same economic sector. How must labour law deal with this inherent tension between the economic freedoms of the internal market? Globalization and the economic crisis as well make the social-economic world go faster. The old categories of the 1950s are not yet extinct but the delimitation between the categories is porous, to say the least.

Since the seminal cases in *Viking*, *Laval*, *Rüffert*[15] and *Commission versus Luxembourg* it has become very important to establish which freedom is at stake in a case. Is there still some freedom for the individual member state to decide whether someone is a worker, an independent or a posted worker within the framework of free movement of services or to combat fraud and misuse of law in this context? This is difficult, although the directive 96/71 on posting of workers starts from the position that the host member state applies the definition of worker of its national law (article 2, paragraph 2). This provision implies in my opinion that the host state is allowed to intervene in case people are posted, which are not considered to be workers according to the law of the host state. Van Peijpe has criticized the ECJ for not leaving the member states enough freedom to decide the applicability of kinds of rules of labour law[16]. His most interesting points of criticism are the following. The Court makes a too sharp distinction between employed and self-employed and room for intermediate categories is not there; in this context the focus of the Court is too much on the element of subordination and not on the other elements: remuneration and the nature of the service provided[17]. The reason for this neglect may be the wide interpretation the ECJ gives to the scope and substance of the four economic freedoms. These are of fundamental value for the EU and the benefits should go to as many migrant workers as possible. This means that the conditions concerning remuneration and the nature of the work provided must not become too strict. This implies that the only remaining criterion of delimitation between free movement of workers and freedom of establishment is the criterion of hierarchy or control. Because it is impossible that both or all three economic freedoms are applicable at the same time or case, the Court has to be strict in its delimitation. That the labour market is very dynamic and changes in nature does not seem to be a problem. The Court sticks to its earlier case law and hardly changes its opinion.

Borderline cases concerning workers, independents and posted workers relate to Central and East-European economic actors and concern interpretations by the ECJ of the Accession Agreements with those states and the transitory stages after their entrance into the EU. Concerning the borderline between

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[15] Case C-446/06, *Rüffert versus Land Niedersachsen* [2008] ECR I-1167
[16] T. Van Peijpe, "EU Limits for the Personal Scope of Employment Law", *European Labour Law Journal*, volume 3, nr. 4, april 2011 at page 45.
[17] T. Van Peijpe, ibidem, at page 45.

workers and independents two cases are interesting. The *Barkoci and Malik* case (C-257/99)[18] is about Czech gypsies who tried to stay in the UK on the basis of a provision of the Association Agreement that allows Czech citizens to fulfill activities as independent. Both Barkoci and Malik acted as independents within the UK with small activities as gardener and cleaning. One of them submitted having set up a company to deal with some of these activities. Both of them did not apply for a permit in the Czech Republic before entering the UK, what they should have done. The Agreement presumes that a substantive check whether there are activities as independent are best to be done on the territory of the original home state. Interpretation of the provisions concerning freedom of establishment within the EU are not 100% the same as those on establishment in an Association Agreement. So, UK immigration rules were upheld in this case. It is interesting that the Court mentions in point 46 of the case the decisions of the immigration authorities in which it was stated that the activities the two executed in the UK were not 'marginal or ancillary'. Exactly the same two terms are also used in the case law on free movement of workers[19]. Marginal and ancillary activities do not fall under the substantive scope of this freedom. This is, again, a proof that the economic activities concerning both the freedom of establishment and the free movement of workers are looked at through the same lens by the ECJ. The *Jany*[20] case concerns independent Polish prostitutes working in the Netherlands. In this case the European Court tried to clarify the concept of subordination in order to protect dependent people and see whether the persons concerned were really in a not-subordinate position. The national judge in applying European law must check that there is no subordination "concerning the choice of that activity (prostitution HV), working conditions and conditions of remuneration", that the independent prostitute fulfills tasks under her own responsibility and that the payment is done to that person "directly and in full". These new criteria are quite detailed and certainly of help to national authorities. But the case is limited to the sector of prostitution.

Concerning the borderline between workers and posting of workers within the framework of the provision of services there is also one promising case. In the joined cases of *Vicoplus*, *BAM Vermeer* and *Olbek*[21] all three companies got a fine from a Dutch institution, because they used posted Polish workers without being in the possession of a work permit for those workers. These cases were dealt with in the transitory period when free movement of workers was not available yet for subjects of the new member state of the EU, Poland, but free movement of services was available and a work permit for those activities at least was therefore not necessary. In this case the Court had to make a clear distinction between the two freedoms. When do Polish workers 'enter' the labour market of a host state? Interpreting the notion of temporariness of the activities is not enough to delimit both freedoms in this case. Most of the activities concerned were temporary. The nature of the activities fulfilled by the Polish persons had to be taken in account as well. When 'the very purpose' of the provision of services is the movement of the worker to the host member state where he fulfills activities under the control and direction of a user undertaking, this hiring-out may be made subject to a work permit. Although these cases operated during the transitory stage, the outcome in *Vicoplus* is relevant for in future cases as well. The Court makes a clear distinction between the making available of workers on the one hand and the temporary movement of posted workers to the host state to 'carry out work there as part of a provision of services' by their employer. The Court is of the same opinion as Advocate-General Bot, who opined that the posting of workers should be ancillary to the provision of services. Where moving workers is the 'very purpose of a transnational provision of services' the work is not done within the framework of free movement of services. This outcome is in line with the sensitive nature of the work done by manpower offices, on which the views in the member states still differ widely.

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[18] Case C-257/99 *Barkoci and Malik* [] ECR I-

[19] See case 53/81 *Levin* [1982] ECR 1035 where the Court decided that activities have to be effective and genuine and not of such a small scale that these are marginal and ancillary.

[20] Case C-268/99, *Jany versus Staatssecretaris van Justitie* [2001] ECR I-8615

[21] Joined cases C-307/09 *Vicoplus versus Minister van Sociale Zaken en Werkgelegenheid,* C-308/09 *BAM Vermeer* and C-309/09 *Olbek* [2011] ECR I-000

It is doubtful, however, whether these joined cases will solve all delimitation problems between free movement of workers and posting of workers within the framework of free movement of services, because this concerns only the situation of manpower-offices. In construction and in other sectors there are still many problems. The ECJ has decided that it is not possible to protect the domestic (labour) market of the host state, because this is an economic argument and this kind of arguments may never be invoked to hinder the freedom to provide services[22]. A valid argument to restrict the freedom to provide services is the protection of workers. Human trafficking, slave trade, forced labour and the exploitation of these workers should be combatted. The dignity of these posted workers is involved. National labour law should do everything to be effective in combatting these tendencies. The EU internal market should not be 'misused' to increase such practices, illicit under the first chapter of the EU Charter of Fundamental Rights.

4. Collective labour law

Isn't there an inherent focus in EU law on the protection of the individual against (public) power? Individual rights have always been important in the case law of the ECJ since the seminal cases of *Van Gend & Loos* and *Costa ENEL*. There the Court focused on the preliminary procedure for domestic courts to ask questions to the ECJ about the interpretation of the basic Treaties, to reach out to the citizens. Poiares Maduro thinks that the legitimacy of European law is derived from the protection of the individual[23]. In a recent work Micklitz also argues that collective rights are missing and that economic rights have prevalence over social rights[24]. These economic rights are at the benefit of individuals and individual companies. The ECJ leaves these (collective) social rights to the prerogative of the member states. I submit therefore that the question stated at the beginning of this chapter can be answered in the affirmative and that the individual is not only protected from public power, but also from power coming from collectivities such as trade unions and organizations in the field of sport[25]. There is therefore an inherent preference in EU law for the position of the individual. When we study the issue of the validity of provisions in collective labour agreements, on their turn the outcome of the fundamental rights to freedom of association and collective bargaining, we see a tendency for provisions in these agreements to be declared null and void, because they violate the economic freedoms of the EU and the non-discrimination principle. The opinions in the literature are divided on the issue whether EU (labour) law hinders or stimulates collective labour agreements. Kilpatrick for example argues that the ECJ in its case law concerning directive 2000/78 on equal treatment in the area of labour law is leaving enough discretionary room of manoeuver for trade unions in collective negotiations. It is as if these agreements are touched by the Court with gloves[26]. Indeed, in some cases the Court is explicitly mentioning the advantage of flexibility through collective bargaining. It is flexible to leave negotiations to the social partners, especially in those areas in which difficult trade-offs will have to be made in a member state. This is for example the case concerning the pensionable age. This topic is treated by the Court with great care, article 6 of the directive leaves this issue to the decision of the member states and the social partners can fulfill a role here if that is the practice in the member state concerned.

On the other hand, there are cases in which provisions in collective agreements are null and void because these are contrary to the directive (article 16b) or to the principle of free movement of workers (article 6,

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[22] See case C-164/99 *Portugaia Construções Lda* [2002] ECR I-787
[23] Miguel Poiares Maduro, *We, the court. The European Court of Justice & the European Economic Constitution*, Hart Publishing, Oxford, 1998, at page 128.
[24] H.-W. Micklitz, "The ECJ between the individual citizen and the member states – a plea for a Judge-made European Law on Remedies", in: H.-W. Micklitz and B. De Witte (eds.), *The European Court of Justice and the Autonomy of the Member States*, Intersentia, Cambridge, Antwerp, Portland, 2012, at page 277 and 280.
[25] Case 36/74, *Walrave and Koch versus Union Cycliste Internationale* [1974] ECR 1405 concerning sporting organizations and cases *Viking* and *Laval* concerning trade unions
[26] See for example C. Kilpatrick, "The Court of Justice and Labour Law in 2010: A New EU Discrimination Law Architecture", in: *Industrial Law Journal*, 2011, pp. 280-301.

paragraph 4 of Regulation 492/2011. In many countries there are specialized labour courts that leave room for the social partners. German labour courts have traditionally left discretionary competencies to the social partners and in preliminary questions to the ECJ those courts are hesitant to intervene in these competencies. An example is the case *Prigge a.o.*[27] in which the labour contracts of pilots of Lufthansa of over 60 years of age ended, because the age limit was set in a collective agreement. The Court uses the famous proportionality test. This consists generally among others of an 'appropriateness' test and a 'necessity' test. While it could be 'appropriate' to leave certain decisions to the social partners[28], the solutions chosen in the collective agreement might still not pass the 'necessity' test. In *Prigge a.o.* the European Court referred to a document of the IATA in Geneva in which the possibility was mentioned to let the pilots between the age of 60 and 65 continue their work in case a pilot younger than 60 was accompanying them in the cockpit. The clause in the German collective agreement was deemed to be contrary to the directive 2000/78, because it was not 'necessary'. The option described in the IATA document was less intrusive of the rights of aged pilots.

This case and related case law may be interpreted in the following way. When the member state has a large discretionary freedom to balance rights of pensioners and younger generations, collective partners will have this freedom as well. Discrimination apart from the pensionable age needs a stronger justification. When this is so for the member state which has to implement the directive, the same will be so for the social partners. The social partners will not have more rights than the member states already have in implementing a directive. This fact may lead to intrusions into areas where the social partners traditionally had a large room of maneuver.

It is difficult, however, not to see a clear hierarchy between the right to equal treatment (individual) and the right to freedom of association and collective bargaining (collective) in this respect. It is only up to a certain level that these two fundamental rights can be balanced. Is there not an instinctive distrust of collective agreements in EU law? Because of increasing harmonization at the EU-level the social partners, which in some member states were used to wide margins of freedom, now have to take into account a growing number of EU rules and directives. Because of this, some provisions in Dutch labour law, for example, that allow social partners to set rules on the number of prolongations of labour contracts for limited duration in deviation of legal rules, are already clearly contrary to EU law. How should labour law adapt as a consequence of these developments in individual and collective labour law? If there are too many substantive limits to the right of collective negotiations, the content of this fundamental labour right will become marginalized.

5. Solutions?

According to some academics, Europe is now in 2013 simply too big and heterogeneous to have one-size-fits-all social or labour legislation. Majone even goes as far as making a reappraisal of negative integration. Negative integration, this is the free movement principles and some oversight of the European Commission, might work while positive integration, that is further harmonization of laws on the social field, is going too far[29]. The different member states are simply too divergent in their social and economic model to sustain EU-wide labour law harmonization. Harmonization will in that case only lead to suboptimal outcomes. As Weiss already submitted, labour law is deeply embedded in the cultures of the countries and these cultures are rather very different within the EU[30]. The social and economic level of development of the member states is also quite different. How is it possible to deal with threats to the full effectiveness of national labour laws in such an EU? Giubboni in his famous work on social rights and

[27] Case C-447/09, *Prigge versus Deutsche Lufthansa* [2011] ECR I-000
[28] See for example case C-45/09, *Rosenbladt versus Oellerking Gebäudereinigungsges.mbH* [2010] ECR I-000
[29] Majone, Giandomenico, *Europe as the Would-be World Power. The EU at Fifty*. Cambridge University Press, 2009, at p.190.
[30] Weiss, Manfred, "Re-Inventing Labour Law?", in: Guy Davidov and Brian Langille (eds.), *The Idea of Labour Law*, Oxford University Press, 2011, at page 44 and 45.

market freedom in Europe leaves us at least three options or ideal-types, of which he himself admits that in reality a mixture of all three will be present[31].

The first model is a neoliberal 'competitive federalism' one: here the focus will remain on negative integration as Majone also prefers. The establishment and operation of an open and free internal market is the main goal the EU should strive for, the rest can be left to the discretion of the member states. In this model there is a separation between the European market and the nation-state. This co-existence of market and state will ultimately have to lead to a possibility for the member state to safeguard the proper functioning of its national labour law. More focus on this proper functioning of national labour law is inevitable. Otherwise, the legitimacy of the European project might become in danger. Giubboni thinks the principle of mutual recognition to be at the heart of this model. It is still unclear in how far this principle is operative for the area of labour law. There is an inherent tension between market logic that focusses on efficiency and the ratio of labour law, which is exactly trying to limit or balance efficiency. A full realization of market logic might lead to the creation of more employment, albeit at a lower price. In an internal market with member states with as diverse an economic development as in the EU, pressures and incentives will always lead to employment-seekers who are prepared to work below a minimum-wage. This is especially so in a severe economic crises like the one from after 2008. Nevertheless, while protection of workers is a legitimate objective justification to justify a limitation of free movement, saving the 'national' construction industry or the 'national' labour market is not[32]. Protection against the exploitation of posted workers within the framework to provide services is therefore perfectly possible. The member states authorities and labour inspectorates should not be too reluctant in this.

The second model of Giubboni is the neo-social-democratic 'solidaristic federalism' model. Because of the operation of the internal market, leading to a loss of sovereignty for social issues at the nation-state level, a transfer of social policy to the EU-level is deemed to be necessary in this option. Full positive integration at the EU-level and the guarantee of a minimum level of income should be tasks for the EU. An EU 'social model' will have to be created in this respect. On paper this model already exists, although this consists only of a handful of vague compromises[33]. According to the Treaties a creation of a European-wide minimum wage is not yet a legal possibility (article 153, paragraph 5 TFEU)[34]. It is extremely doubtful whether there is sufficient political will in the EU to opt for this model. The economic crisis led the European Commission to propose plans somewhat in this direction[35]. Is there sufficient solidarity in the EU of 27/28 states? Some academics argue that it is not possible[36]. The protection of dignity of human beings, including workers, is essential. Solidarity, on the other hand, is a difficult term to some extent within the EU. The difference between the first and the fourth chapter of the EU Charter of Fundamental Rights is huge.

The last option Giubboni mentions is a cooperative federalism model, with elements of both the preceding models. In this model the social autonomy of member states is guaranteed up to a point. A collection of fundamental social rights is needed at EU-level that protects social rights at the national level[37]. There is no hierarchy between the two levels in this respect, but something called reciprocal subsidiarity. On paper

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[31] Giubboni, Stefano, *Social Rights and Market Freedom in the European Constitution. A Labour Law Perspective*, Cambridge University Press, Studies in European Law and Policy, 2006, at p. 252.
[32] Case C-164/99, *Portugaia Construções Lda* [2002] ECR I-787
[33] *A European social model for the future.* Resolution of the European Parliament on a European social model for the future (2005/2248 (INI)).
[34] In case 268/06, *Impact*, [2008] ECR I-2483 the ECJ explicitly stated that determining this could be the prerogative of the social partners!
[35] President of the Commission José Manuel Barroso pleads for example for a fund of 2.5 billion euro to support the very poor in the EU. On the other hand, a European-wide minimum wage is still far away
[36] See the already mentioned argument of Majone. See also Scharpf, Fritz W. 2010. "The Asymmetry of European Integration, or Why the EU Cannot Be a 'Social Market Economy", in: *Socio-Economic Review*, 8:2, pp. 211-250
[37] Giubboni, *ibidem*, at page 267

this looks to be an interesting model. In reality it is difficult if the ECJ continues to give systematic preference to the internal market rules. The subsidiarity is one-sided and a-symmetric, and not yet reciprocal. In order to build a European Union, a one-sided subsidiarity might be necessary at an initial stage. Now after more than 60 years of European treaties, however, member states should be allowed to uphold the core elements of their national labour law. The EU Charter of Fundamental Rights is not yet there to protect national labour law, as Giubboni maintains in his third option. The ECJ should take into account that social and economic law is to a certain extent related. In an economic union which such diverse countries, economic integration should go step by step. Member states have an essential role to play in the European construction. They carry two hats. They should not only implement EU law if it were the law of the land, they should also uphold their national labour law as effectively as possible. Sufficient controls and inspections are inevitable in this respect.

So, for the moment, the first option is in my opinion still prevailing. This option focuses on national labour law. The European Commission can help support the member states to enforce their labour laws. The proposal for a directive on the enforcement of the posting of workers directive 96/71 is an example in this respect[38]. Fines for violation of the standards of the directive implemented in national law should be paid throughout the whole EU. So the EU-level can help in enforcing national implementation of a Directive. This is perfectly possible with full respect of the autonomy of the enforcement systems in each member state. Enforcement is important, in the actual economic climate member states have the inclination to cut spending of enforcement institutions. Lack of public resources leads to 'privatization of enforcement' and Bop Hepple in 2002 paints a gloomy picture of the situation in the UK[39]. In the Netherlands the situation is not always negative. There, parties to a collective agreement have created a foundation to who they delegated the power to implement the collective agreement. This 'cao-police' (police concerning collective labour agreements) collects contributions for social insurance and wages if these have not been paid by the employer. The foundation is successful in combatting mala fide manpower offices. Collecting fines outside the territory of the Netherlands is more difficult. In this respect the enforcement of the posting of workers directive might change something for the better.

6. Final words

The main question in this paper is whether the scope and purpose of labour law should be adapted because of developments in EU labour law. It has become clear that EU law has had potential non-intended influences on national labour law. Economization or commodification has become more important. EU law is supreme within its substantive scope. The scope has been widened ever since 1958. This development has had dangerous consequences. Nevertheless, the answer to the question stated at the beginning of this chapter is basically negative. National authorities should not hesitate in order to apply and enforce their national labour law. Misuse or abuse of the economic freedoms of the EU should be taken care of. Abuse must be proven. Helpful in this respect is the creation of catalogues of best practices and worst practices. The role of chapter 1 of the EU Charter of Fundamental Rights concerning the topic (human) dignity should be strengthened in case law of the ECJ and of national courts. Rights in this chapter are framed in more absolute terms then the chapter on solidarity, in which many (collective) labour rights are to be found. There is no inevitable trend for labour law to become 'infralaw'.

We focused on developments in individual labour law and in collective labour law. In individual labour law possibilities for exploitation and misuse are existent. The sharp delimitation between the economic freedoms of the internal market, as interpreted by the ECJ, is difficult to uphold in practice. Enforcement, private or public, will have to be strengthened in this respect. The whole idea of the internal market

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[38] Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. Brussels, 21.3.2012 COM (2012) 131 final.

[39] Hepple, B. "Enforcement: the law and politics of cooperation and compliance", in: B. Hepple (ed.), *Social and Labour Rights in a Global Context. International and Comparative Perspectives*, Cambridge University Press, 2002, at page 250.

supports a quick change from worker to independent or posted worker within the framework of the provision of services. Arguments of social justice are simply not powerful enough to counter these developments.

Should the scope of labour law change because of these developments? Weiss warns to not use labour law for everybody and everything[40]: applying all labour law to economically dependent people might lead to de-legitimacy of labour law. Hepple supports the change from labour law to social law, in order to become effective. In line with the development within the ILO towards 'decent work' it should be stressed that social rights of labour are universal[41]. These German and British views seem contradictory at first hand. It is possible, though, to reserve a part of labour law for all those who work. Decent minimum conditions should be maintained within and throughout the EU. Labour law should be connected to the broader areas of social AND economic law.

What about the purpose of labour law? Labour law has been created to have at least a level-playing field between employers and employees with their representatives. These collective elements are somewhat under pressure from developments at the EU-level. Should the purpose of labour law be changed because of developments in the EU and in European labour law? Fundamental and universal human rights have a role to play here as well[42]. Again, linkage between chapters 1 and 4 of the EU Charter is of importance. Human dignity and solidarity rights are sometimes connected. Personal dependency of individuals is also a factor to take into account in any (legal) decision to be taken concerning labour law. Human rights are important as even in a topic such as combating trafficking in human beings the labour situation of the exploited is mentioned[43].

[40] Weiss, ibid., at page 48
[41] Hepple, ibid., at page 256
[42] Arthurs prefers to embed labour law in these rights, see Arthurs, Harry. 2011. "Labour Law After Labour", in: Guy Davidov and Brian Langille (eds.), *The Idea of Labour Law*, Oxford University Press, at page 27
[43] See the proposal for a Directive on preventing and combating trafficking in human beings and protecting victims, repealing Framework Decision 2002/629/JHA, Memo/10/108.