HUNGARIAN LABOUR LAW
E - J O U R N A L

Legal methodology issues in EU law in the area of labour law cases - With special emphasis on transfer of undertakings and discrimination[a]

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Introduction

Methodology of EU law concerns mainly three issues: establishing the substantive content of EU law, the application of law by organs of Member States (precedence and conformity with EU law by interpretation) and the substantive coordination of EU law and domestic law. In this paper I examine only the first issue, namely the exploration and settling of the content.

Twenty years ago, in Austria and Germany we would often hear that there is no need to discuss methodology, as everyone knows it and everybody applies it. This statement was, already at that time, not correct, albeit not really dangerous. On the contrary, nowadays it is common to ask, whether there is a methodology in/of EU law.

If we understand *every kind of proceedings to find/identify/determine the content of law* as methodology, EU law as any legal order indeed has one. Even the determination of the contents by courts is in itself a methodology. A comment of *Lenaerts*, vice-president of the ECJ, points in this direction: As the Treaties contain no provision listing or giving an order of precedence to the methods of interpretation that the ECJ must follow, 'the ECJ is, in principle, free to choose which of the methods of interpretation at its disposal best serves the EU legal order.'[1] This means, the ECJ is free to choose the method of interpretation – literal, grammatical or systematic interpretation, historical approach, or exploring the aim and practical effectiveness

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[1] *Lenaerts/Gutiérrez-Fons*, To say what the law of the EU is: methods of interpretation and the European Court of Justice (EUI Working Paper AEL 2013/9), 4.

(effet utile) – to 'find' the content of law, furthermore to establish new contents if the Court deems this appropriate.

In some Member States (MS), however, methodology is understood in a different way, namely, as an *effort to recognise the substantive content of law* according to rules that give guidance and limits to the activity of courts. This methodology has two preconditions: first the efforts of all participants – legislator, courts and observers – to create a coherent, systematic legal order without contradictions; and secondly the belief that the content of law shall be 'found' according to certain rules that are set explicitly or implicitly by the legislator and not 'invented' by the courts, especially as far as the legislator has enacted written law (statutes). In many, if not most, Western jurisdictions this belief was and is given in relation to national law, even if the details of the rules are different. In the case of EU law, however, such a deep-rooted belief is usually still (/yet) missing.

Nevertheless, rules of finding the law by courts are necessary also in the context of EU law. They incorporate questions about the constitution of a legal community. The Treaties and consequently the 'Constitution' of the Union establish the principle of the rule of law on the one hand (Art. 2 TEC); on the other they envisage the regulatory framework of the Union on a statutory basis and not through the free finding of law by courts. Even the ECJ is obliged by the Union's constitution to give due respect to written Union law. Let me turn to the next point of this paper, namely to the analyses of case law. According to the topic of the conference, the cases chosen deal with questions of Labour Law, especially the transfer of an undertaking and discrimination.

Transfer of an undertaking

The *Alemo-Herron* judgement[2] from 2013 dealt with the question whether the transferee is bound by the collective agreement formerly binding the transferor. In the United Kingdom (UK) collective agreements are only normative if this is agreed upon in the individual contract, which is often affirmed through an implied term. The contract of Mr. Alemo with his first employer, the municipality of Lewisham, explicitly stated that the collective agreement should apply. 'During your employment with [Lewisham], your terms and conditions of employment will be in accordance with collective agreements negotiated from time to time by the [NJC] ...' According to a UK statute, the transferee is bound by such an obligation. Lewisham transferred

[2] C-426/11 *Alemo-Herron and Others v. Parkwood Leisure Ltd.* [2013] ECR not reported ECLI:EU:C:2013:521.

the undertaking to C and C transferred it later to Parkwood, a private company. Parkwood did not want to comply with the obligation of pay rise defined in one of the amendments of the NJC collective agreement concluded after the second transfer.

Frist of all, judgements of the ECJ have to be read in a different light than decisions of high courts of some Member States, which are oriented on a systematic view of the law. On the contrary, ECJ judgements use a more specific view based on the facts of the case and are usually not engaged in a systematic approach. It is not always easy to recognise the binding content of the decision.

The ruling of the judgement reads as follows: 'Article 3 of the Transfer Directive must be interpreted as precluding a Member State from providing, in the event of a transfer of an undertaking, that dynamic clauses referring to collective agreements negotiated and adopted after the date of transfer are enforceable against the transferee, where that transferee does not have the possibility of participating in the negotiation process of such collective agreements concluded after the date of the transfer.'[3] The effect of this prohibition is, however, disputable, if the obligations of the transferee concerning the dynamic referring clauses do not emerge from domestic law – as in the UK – but only from the employment contract itself. This might be the case if this contract refers to a collective agreement that is even not applicable to the transferor (here: first employer) anymore.

The judgement, namely, continuously only refers to Article 3 of the Transfer Directive, without articulating the difference between Paragraphs 1 and 3 of Article 3,[4] although the two paragraphs establish different rules. Paragraph 1 demands unconditionally to uphold the working conditions provided for by the employment contract, whereas paragraph 3 requires the upholding of the working conditions that stem from a collective agreement only if none of four specific exceptions applies. It is further unclear whether the prohibition is applicable to all transfers – with regard to transferring the undertaking from the public to the private sector. Although the reasoning explicitly uses this aspect as an argument, the ruling does not mention it.

[3] Ruling and Paragraph 37.

[4] Article 3 „1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee. Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer. […] 3. Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement."

Coming to the reasoning of the judgement, it mentions two arguments in favour of the prohibition. First, the Transfer Directive does not aim solely to safeguard the interests of employees 'but seeks to ensure a *fair balance between the interests* of those employees, on the one hand, and those of the transferee, on the other. More particularly, it makes clear that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations.'[5] Next the ECJ argues that a dynamic clause referring to collective agreements negotiated and agreed after the date of transfer of the undertaking concerned 'is liable to limit considerably the room for manoeuvre necessary for a private transferee to make such adjustments and changes.'[6]

The principles of balancing the interests and of the need for adjustments have their origins in the *Werhof judgement*,[7] which is an example of the importance of the earlier decisions. In the Werhof judgement, however, the principle of fair balancing the interests is not specifically justified. The principle seems obvious, as every norm and its construing – especially in private law – should take into account the balance of interests. On the other hand, this principle does not seem to be in line with many judgements concerning individual labour law and consumer protection, where the ECJ usually argues in favour of one party solely, namely that whose interests are protected by the Directive under consideration.

In the field of labour law *Werhof*, *Alemo and Gewerkschaftsbund*[8] are until now the only judgements of the ECJ with explicit reference to the fair balancing of interests. This special status is left unexplained and therefore unreasoned. A probable explanation might be that the Transfer Directive is based on the competence for regulation the internal market and not on that on social policy. It is yet to come, whether this argument will be followed regarding other labour law Directives as well.

The second argument for the prohibition is based on *Article 16 of the EU Charter of Fundamental Rights* (FRC), according to which: 'The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.' In a methodological view, the interpretation of this provision in the Alemo judgement is frightening and even depressing. The first question that emerges is whether this provision of the Charter is applicable at all, as – following the logic of the ECJ – the Transfer Directive contains only

[5] Paragraph 25.
[6] Paragraph 28.
[7] **C-499/04** ***Hans Werhof v Freeway Traffic Systems GmbH*** [2006] ECR I-2413 ECLI:EU:C:2006:168.
[8] **C-328/13** ***Österreichischer Gewerkschaftsbund v Wirtschaftskammer Österreich*** [2014] ECR not yet reported ECLI:EU:C:2014:2197 paragraph 29.

minimal standards and the obligations of the transferee stem from domestic law. The application then does not explain itself.

Further one may question the deduction of the freedom of contract solely from Article 16 FRC, as also persons that do not engage in an undertaking hopefully enjoy the freedom of contract. In addition, the construing of Article 16 itself is questionable and insufficient. The judgement seems to consider Article 16 rather as a right than as a principle regarding the distinction between these two categories in Article 52 FRC. However, this should have been explicitly stated and reasoned, especially because Article 16 refers to EU and domestic law. Even if we see Article 16 establishing a right in the meaning of Article 52 FRC, we should ask for the meaning of this reference, especially whether it means a lower intensity of protection in comparison with provisions establishing a right but without containing such a reference.

Substantively, the judgement sees a *restriction of the freedom of contract* on the side of the transferee due to the fact that he/she has no opportunity to influence the content of the collective agreement that would bind him because the employment contract refers to it. This does, however, restrict neither his freedom of contract nor his trade union freedom. His freedom of contract is restricted solely by the fact, that – according to the Transfer Directive – the transferee is bound by the individual contract concluded with the transferor. This seems to be ignored by the judgement, as it constantly refers to Article 3 of the Directive without precisely invoking Paragraph 1 of Article 3.

The transferee could easily avoid this restriction by just not acquiring the undertaking (as he could avoid other "restrictions" that stem from the characteristics of the undertaking). Taking this opportunity into consideration, it is not at all understandable why the judgment values this restriction as infringing the "very essence" of the freedom of contract and not only as a mere "limitation" – if both notions are understood in the meaning of Article 52 Section 1 FRC. The reference of the Alemo decision to the ruling *Deutsches Weintor*[9] is then incorrect. There is an interference with the essence of the freedom of undertaking was only ascertained if a certain measure practically leads to the prohibition of practicing a profession, a constellation that is greatly different from that considered in the *Alemo* case. This is one of the many examples, where the reference to an earlier judgement is not convincing, because it stated only something similar to the question now at stake at does not give any reason why the similar can be transposed to the present question.

[9] Paragraph 36 of the *Alemo* ruling refers "by analogy" to ECJ C–544/10 *Deutsches Weintor v Land Rheinland-Pfalz [2012 only digitally reported]* ECLI:EU:C:2012:526, paragraphs 54 and 58.

However, a bond to the dynamic referring clauses indisputably strengthens the obligation of the transferee, demanded by the Directive, to the employment contract concluded with the transferor. The ECJ therefore should have examined, whether the alternative faced by the future transferee, namely the strict application of Article 3 Paragraph 1 to the dynamic referring clauses, could be justified according to Article 52 Section 1 FRC and its test of proportionality. In this scrutiny, the possibility of the transferee to modify the employment contract shall be relevant, besides the respect for an existing employment contract and the employee's freedom of contract. It is though understandable that the judgement does not examine this point in detail, already because the ECJ was not asked to do this.

However, the judgment's objections against the dynamic clause rely heavily on the argument, that the *transferee lacks the opportunity to modify the conditions of payment*. If one looks closer, this opportunity depends upon the national rules on the protection against dismissal in case the employer offers a modified contract (and/or the rules on the employer's possibility to unilaterally adjust the contract of employment). Thus, the impact of a national provision that binds the transferee to a dynamic clause and its encroachment upon the freedom of contract depend upon these rules of national law. Therefore it seems that the bond to the dynamic clause infringes Article 16 solely, if the national law does not procure the transferee with sufficient means to alter the contract regarding the conditions of work, that the dynamic clause affects; the judgement could and should have said only this.

In British law, the employer has much more opportunities to reach a change of the contract of employment than in many other Member States, as the protection against dismissal is there much weaker. In addition, the later judgement *Gewerkschaftsbund* has argued just contrarily to *Alemo.* There the ECJ used the transferee's possibility to modify the conditions of work by a new contract (i.e. possibly after threating to dismiss) as an argument to bind the transferee to the transferor's collective agreement[10] (although the possibilities of an Austrian employer to do this are quite more restricted than in Britain). Thus, one of the two reasoning must be flawed.

From a methodological point of view, the *Alemo* decision scarcely takes the wording and structure of the Directive into consideration, no distinction is made between either Section 1 and 3 of Article 3 or the obligations of the transferee to the individual contract or the collective agreement. The aim of the Directive is understood (unexplained) differently as in other Directives of labour law relevance. Primary law predominates in the end; however, the reasoning thereto is in substantive issues too short and too shallow.

[10] **C 328/13** ***Österreichischer Gewerkschaftsbund v Wirtschaftskammer Österreich*** [2014] ECR not yet reported ECLI:EU:C:2014:2197 paragraph 30.

Among the recent decisions of the ECJ, the *Alemo* judgement is therefore one with the *poorest reasoning.* Fortunately, the interpretation of secondary law is significantly better in many other judgements. They take, in particular, the wording and the structure of secondary law much more into consideration. One should recall here that, in the last years, several judgments emphasised: "it is settled case-law that an interpretation of a provision of European Union law cannot have the result of depriving the clear and precise wording of that provision of all effectiveness".[11] In case that new questions regarding the content of Union law arise, this statement should encourage answering the question according to the statute instead of just saying: the question cannot be answered as there is no ECJ judgement on the issue yet.

However, efforts to *derive results from primary law* lag behind the standard reached regarding secondary law not only in *Alemo,* but very often in other cases as well. This is definitely regrettable, as the influence of primary law increases also in the field of private law, especially through fundamental rights. With such a 'generous' interpretation of a fundamental right as in *Alemo,* many provisions of secondary law as well as many domestic provisions encumbering the employer could be set aside just arguing/pretending that there is a violation of the freedom of contract. Additionally, in many judgements – rather in the field of social law than in private law – the ECJ does not take the clear wording of secondary law into consideration and invokes primary law, however, without drawing any consequences from this for the specific norm of secondary law. Both solutions are problematic from a methodological point of view.

Discrimination

Looking at the methodology of discrimination cases, we see, that the ECJ developed its non-discrimination jurisdiction on the basis of discrimination based on sex. Since the adoption of the FRC, a wide range of prohibitions of discrimination is now guaranteed in written primary law as well. Secondary law regulates protection against discrimination on the grounds of only some of the specific characteristics mentioned in *Article 21 of the Charter*. It provides e.g. no explicit protection against discrimination based on social origin or property.

Therefore, the methodological question arises: to what extent Member States are obliged to remedy against discrimination based upon a characteristic that is mentioned in Article 21 FRC but not regulated by a Directive? This leads us to Article 51 paragraph 1 FRC. The ECJ affirms

[11] Z.B. EuGH C-147/11 *Czop v Secretary of State of Work and Pensions*, [2012 only digitally reported] ECLI:EU:C:2012:538 paragraph 32.

that the Member States are bound by the Charter if the issue lies within the scope of application of EU law.[12] However, this might raise problems, which I will illustrate shortly regarding the example of a general protection against dismissal.

There is no Union legislation on this topic, although various Directives demand a protection against dismissal in specific situations (e.g. maternity, parental leave, transfer of undertaking, part-time work) and prohibit the misuse of successive fixed-term contracts. Some then argue, that the termination of employment falls already within this ambit, because it is embraced and regulated by several directives; particularly the prohibition regarding successive fixed-term contracts presupposes that the employer cannot terminate the contract "at will".[13] However, it is not settled if such reasoning would suffice to bring the general protection against dismissal under the scope of Union Law; in my opinion, it should not suffice.

Even if we would decide otherwise and accept that the regulation of termination lies within the scope of EU law, it is still disputable whether the prohibition in Article 21 FRC would set aside a provision of national law in the context of a relation between private parties (horizontal effect), e.g. if the national provision excludes some employees (as those employed in small enterprises) from its regime of general protection against dismissal.

The ECJ addressed the problem of a direct horizontal effect of the Charter Provisions in its judgement *Mediation Sociale.*[14] A French statute was in breach with a Directive regarding a topic that is covered be Article 27 FRC, which deals with the "Workers' right to information and consultation within the undertaking". The statute provided that part-time employees should be counted only partially regarding the threshold required for the application of the rules on consultation. The Court said that Article 27 cannot set aside the French provision, because "it is clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law."[15] Thus it seems that the obstacle for the direct effect stems from the "refrain" that refers to Union and national law; however, this is not really settled, because it could perhaps stem as well from the remaining words of the Article, namely "at the appropriate level".

[12] C-617/10 *Åkerberg Fransson v Åklagaren* [2013] not yet reported ECLI:EU:C:2013:105 paragraph 21: The fundamental rights guaranteed by the Charter must be complied with where national legislation falls within the scope of European Union law. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.

[13] This proposition was put forward by Prof. *Numhauser-Henning* at the Conference in Frankfort in 2012. Cf. also Clause 1 lit b ETUC-UNICE-CEEP, Annex to Council Directive 1999/70/EC of 28. June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L 175/46.

[14] C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others* [2014] ECR not yet reported ECLI:EU:C:2014:2.

[15] Paragraphs 45-46.

Nonetheless, the judgement distinguished the case at stake from the *Kücükdeveci*-case "in so far as the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such."[16] Thus, according to the ECJ, provisions on discrimination have a more precise content than Article 27.

Then one should ask, if this result depends upon the fact that a prohibition of discrimination is specified by a Directive. The sequence of the judgment points at an answer in the negative, because it deals only afterwards with the question, if the concretisation of the fundamental right by a Directive might lead to a horizontal effect. However, this is another example of the methodological difficulties the understanding of a judgment might raise. Regarding the norms themselves, one should note, in a methodological perspective, that the text of the Charter does not give clear advice in such an important question as how far the provisions of the Charter might be invoked directly in a dispute between private parties.

In the last years, many if not most discrimination cases referred to the ECJ dealt with *age discriminatio*n. Secondary law contains much more provisions on this topic, than on other grounds of discrimination, especially because the Framework Directive 2000/78/EC only here allows using the "suspect" criteria in specific cases (Article 6 of this Directive). The first hurdle therefore is to find a permissible regulatory aim. The ECJ is – correctly – rather liberal in this regard.

This is even visible in the case of *Commission v Hungary*[17] regarding the retirement age of judges, as the judgment – rejecting the objections of the Commission - accepts the regulatory aims put forward by the Hungarian Government. Further, the judgment does not criticise at all the new retirement age of 62, although it is lower, than the other age limits evaluated in previous rulings and is in addition lower than the general retirement age, which would counsel a stricter review. This leniency remains without explanation.

However, the *Commission v Hungary* judgment seemingly applies the test of proportionality in a quite stricter manner, than in other cases concerning retirement age. There, the national provisions may declare or allow for the termination of the employment contract at a certain age on the grounds of labour market policies (if the vacancy is filled afterwards). In the *Commission v Hungary* case the Court has used a new, "innovative" aspect to reach the conclusion, that the Hungarian regulation discriminates. It condemned the method, how the new age limit has been

[16] Paragraph 47.
[17] C-286/12 *European Commission v Hungary* [2012] ECR only digitally reported ECLI:EU:C:2012:687.

set: as the new rules led to a significant change and took effect rapidly, they had excessively encroached upon the legitimate expectations of the judges concerned.

Once again, it is firstly methodologically unclear, whether this leads in general to a new dimension of the various prohibitions of discrimination in Union Law. The judgment does not give an answer to this major question. If we read the judgment as establishing a new general rule, then even a non-discriminating change of the retirement age must be accomplished 'cautiously'. Secondly, the judgement does not at all elucidate why and how it deduces the protection of legitimate expectations from a non-discrimination norm. The protection of legitimate expectations seems to be rather a topic resorting to the principle of equality (Article 20 FRC, which applied in the case as well) than to non-discrimination. From a systematic point of view it seems necessary to separate the two rules in order to avoid a blurring of argumentation. Thus, from a methodological point of view, also this judgement presents some flaws, irrespective of the result.

A glance in the future

Especially the intense reference to primary law sources that rarely contain exact provisions, but also the sometimes negligent approach to secondary law *transfers the decision-making from the legislator to the courts*, particularly to the ECJ. Political discourse turns therefore more and more into a legal discourse. Politically, this is quite often not an improvement, because courts often are less suitable to resolve political questions that complex socio-economic questions than the legislator, and legal discourses are always narrower than political discussions. From a legal point of view, the relevance of methodology in Union law is increasingly important and becomes more important than in Member States. Unfortunately, the endeavours to present a convincing reasoning are not in a few cases insufficient and even lag behind what easily could be achieved. Particularly, it is not sufficient even within the scope of EU law to say, we are looking for the 'best decision' as this does not present the yardstick to measure for the 'best'.

The starting point for methodology in EU law should be, that judgements cover all the relevant arguments and do not present only those, that speak in favour of the outcome the court wants to reach. Furthermore, the reasoning should articulate and consider also other possible interpretations (norm-hypotheses) at least if they are obvious. This requirement applies to the interpretation of norms as well as to references to former judgements. This is not too much of an effort, as a comparison of the judgements in preliminary rulings with those delivered by the General Court (former Court of First Instance) shows. The latter are namely a lot more detailed

as preliminary rulings. Nevertheless, also legal scholars are addressed here. Legal writing should not only introduce and explain rulings, but also evaluate and if necessary criticise them regarding their logic and persuasive quality. From a methodological point of view, the convincing deduction of the result of the judgement – primarily from the text of the norms, secondarily from former rulings – is a central element of the rule of law and a precondition for its effectiveness.