

Legal remarks on the introduction of European government subsidized child maintenance money in the sense of an independent European social benefit*, i.e. in addition to the national regulations

The demand to implement a childhood guarantee is not new in terms of its theoretical approach in the EU; the Commission Recommendation of 20.2.2013 states, among other things, that the fight against child poverty is a key issue in and for Europe which must be tackled energetically. Although the Commission has put the term "investing in children..." on paper, it has not yet taken the decisive step towards implementing a state substitute benefit (social benefit), although in 2017 the European Parliament called on the European Commission to initiate corresponding legislative action.

The relevant legal bases for this can be found in a prominent place:

With the Treaty of Lisbon (Article 6 (1) of the EU Treaty), the "Charter of Fundamental Rights of the European Union" became legally binding. From Art. 3 (3) EU TFEU follows the mandate of the EU to combat social exclusion and discrimination, to guarantee social protection and to protect the rights of the child in particular. Paragraph 5 of the provision calls - insofar as it is even clearer - for the "elimination of poverty", in particular child poverty.

With Article 33 of the TEU, the EU has also committed itself to ensuring the economic and social protection of the family; Article 34 of the EU TFEU even postulates "access to social security benefits" in accordance with Union law. It undertakes (and repeats in Art. 34 (3) of the EU TFEU) expressly and verbatim

"...to combat poverty, to respect the right to social assistance and... in accordance with rules laid down by Union law and national laws and practices, to guarantee this right..." (end of quote).

Other sources of law with roughly the same objective can be found - for example - in the "International Covenant on Economic, Social and Cultural Rights" (UN Social Covenant) of 1966, in which the contracting states (the EU is one of them) not only undertook to guarantee social rights (cf. e.g. Article 8 of the UN Social Covenant), but in addition undertook to initiate such rights.

The legislative appeal is therefore unambiguous and, as was shown above, was logically recognised.

In terms of legal doctrine, the above-mentioned provisions are not legally enforceable fundamental entitlements (rights) to performance; however, they represent much more than just a programme of principles. Their mandatory and binding legal character is recognised.

From a legal point of view, the goal can be achieved in two ways:

- a) Amendment and corresponding guidance of the European Social Fund and/or
- b) Community law (draft legislation), i.e. Community legislative measures defining the conditions of the right to benefits.

There may be doubts as to whether this would involve a violation of the principle of subsidiarity (cf. Article 5 (2) of the TEU).

The answer is provided by the "Protocol on the Application of the Principles of Subsidiarity and Proportionality", which specifies the criteria on the basis of which it is possible to determine whether or not intervention at EU level is appropriate.

Applying these criteria, it can be concluded that the legislative measure has cross-border aspects, which can be regulated by the Member States themselves (though especially with regard to newer Member States not sufficiently) and that the legislative measure at EU level would have obvious advantages (namely the achievement of the legislative objective - see above).

To put it differently: the principle of subsidiarity empowers the Union to exercise its powers if the objectives of a proposed measure cannot be sufficiently achieved by the Member States and the measure at Union level can bring added value.

In addition, the Union has agreed in the Treaty on the "Functioning of the European Union" to adopt a so-called "shared competence" with the Member States with regard to legislative measures, if - for example -

the area of "social cohesion" is concerned (cf. Art. 4 II c TFEU). It is legally unproblematic to subsume the legislative measure under this term, whereby the previous legal opinion is no longer valid in view of the postulates of the EU fundamental rights (see above), but also with reference to Art 9 TFEU.

(Previous thinking was that a "shared competence" in social policy pursuant to Art. 4(2)(b) TFEU can only be assumed if it concerns aspects which are mentioned in this Treaty, i.e. the TFEU. In that regard, the TFEU would only permit the coordination of social security for migrant workers (see Article 48 TFEU) and supporting measures in the field of social security and social protection of workers (see Article 153(1)(c) TFEU). This opinion fails to recognize that the implementation of the legislative proposal is likely to affect "social cohesion in the EU"; it also fails to recognise the legislative authority which the EU has set itself).

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