



UNIVERSITY OF VERONA

DEPARTMENT OF LAW

PHD SCHOOL IN LAW AND ECONOMICS

PHD COURSE IN EUROPEAN AND INTERNATIONAL LAW

Cycle XXX / year 2014

**CROSS-BORDER COLLECTIVE REDRESS
IN THE EMPLOYMENT CONTEXT
UNDER EUROPEAN UNION LAW**

S.S.D. (Scientific Disciplinary Sector) IUS/14 - EUROPEAN UNION LAW

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ABSTRACT

The present research project concerns the topic of cross-border collective redress in the employment context under European Union (EU) law, examined using a comprehensive approach. Indeed, among the remedies for the effective protection and enforcement of workers' rights, collective actions, which include forms of industrial action and collective redress procedure, may be resorted to by workers or their representative organisations.

The analysis initially focuses on the protection of the fundamental right to collective action *vis-à-vis* the economic freedoms on the basis of the Court of Justice case law and its interpretation of the principles of effectiveness and proportionality, and in light of Article 28 of the EU Charter of Fundamental Rights. The precedence of the economic integration pillars appears to have prejudiced the protection of social rights within the EU, although their fundamental nature is recognised and they are included in European and international human rights' charters. Social rights have been undermined even in times of financial-economic crisis, raising questions about the legitimacy of the austerity measures that have affected the national social systems. In this case, the competence of the Court to safeguard fundamental rights has been challenged.

The legal framework for the protection of workers in Europe provides for the implementation of the main principles enshrined in EU primary law regarding the free movement of workers by establishing public enforcement procedures and recognising the right to act collectively, even in judicial proceedings. In view of increasing labour mobility, difficulties in regulating peculiar situations have emerged with regard to posted workers, who only temporarily engage in employment activities abroad in the framework of the cross-border provision of services. The legislation on transnational posting, consisting of two directives, provides for substantive elements, i.e. minimum standards of work terms and conditions, as well as procedural rules aimed at protecting posted workers from abuse and combatting social dumping. Alongside the mechanisms of control involving national authorities, the right to act individually or through trade unions or similar entities is envisaged.

Member States are called upon to ensure in order to guarantee the protection of rights, collective redress is considered, in general, to be a viable means for reasons of procedural economy and efficiency of enforcement. Relevant studies and legislative developments are still in progress, including the European Commission's initiatives on common principles for collective redress procedures, although they are non-binding. The adopted horizontal approach, which principally refers to consumer protection, but also to antitrust and environmental law, is aimed at raising awareness of this procedural remedy, which may even be resorted to in the employment context by virtue of the right to collective action as guaranteed in EU law.

Whenever disputes are characterised by transnational implications, private international law instruments are to be applied. Considering the relevant EU regulations addressing, among other issues, employment matters, remarks on the connecting criteria and the applicability of existing rules to collective redress procedures are put forward with particular regard to the employment context. As to the jurisdictional and conflict of laws provisions, the collective dimension does not appear to have found room in light of the jurisprudential tendencies and the observations of the European institutions submitted within the law making processes, thus necessitating specific rules, whether generally or pursuant to a sector-specific approach.

Against this background, the concluding considerations and recommendations address the opportunity to include in the relevant EU legislation specific provisions related to the right to collective action and to cross-border collective redress.

SOMMARIO

Il progetto di ricerca riguarda il tema del ricorso collettivo di carattere transfrontaliero in materia di lavoro nel diritto dell'Unione europea (UE) e viene affrontato secondo un approccio che racchiude diverse prospettive. Infatti, nell'ambito dei rimedi volti ad assicurare la protezione dei diritti dei lavoratori, gli stessi lavoratori o le organizzazioni rappresentative possono promuovere azioni collettive, che comprendono forme di sciopero e procedure di ricorso collettivo.

L'analisi si concentra inizialmente sulla tutela del diritto fondamentale all'azione collettiva, soggetto al bilanciamento con le libertà economiche, in base alla giurisprudenza della Corte di giustizia e della sua interpretazione dei principi di effettività e proporzionalità, e alla luce della disposizione di cui all'articolo 28 della Carta dei diritti fondamentali. È stata riconosciuta la prevalenza delle libertà volte a realizzare l'integrazione economica, pregiudicando in tal modo la protezione dei diritti sociali all'interno dell'UE, sebbene sia stata affermata la loro natura fondamentale e siano contenuti in strumenti europei e internazionali dedicati alla tutela dei diritti umani. L'affievolimento dei diritti sociali si è verificato anche nel contesto della crisi economico-finanziaria, dove sono state sollevate questioni circa la legittimità delle misure di austerità che hanno inciso sui sistemi sociali nazionali. In questo contesto, la competenza e il ruolo della Corte nella salvaguardia dei diritti fondamentali sono stati criticati.

Il quadro giuridico relativo alla protezione dei lavoratori in Europa è finalizzato a dare attuazione ai principi fondamentali sanciti dal diritto primario dell'UE in materia di libera circolazione dei lavoratori, stabilendo procedure di esecuzione pubblica e riconoscendo il diritto di agire anche in procedimenti giudiziari. In considerazione dell'aumento della mobilità del lavoro si sono registrate difficoltà di regolamentazione delle situazioni peculiari che interessano i lavoratori distaccati, i quali svolgono solo temporaneamente attività lavorative all'estero nell'ambito della libera circolazione dei servizi. La legislazione sul distacco transfrontaliero, contenuta in due direttive, prevede elementi sostanziali, vale a dire norme minime in materia di condizioni e termini di lavoro, nonché regole procedurali, volte a proteggere i lavoratori distaccati e a combattere il *social dumping*. Accanto ai

meccanismi di controllo che coinvolgono le autorità nazionali, è stabilito il diritto di agire individualmente oppure rappresentati da organizzazioni sindacali o simili.

Tra i rimedi effettivi che gli Stati membri devono offrire ai fini di tutelare i diritti dei lavoratori, il ricorso collettivo può essere ritenuto un efficace strumento anche per ragioni di economia e di efficienza processuale. Il tema è oggetto di studi e sviluppi legislativi, tra cui rilevano le iniziative della Commissione europea sui principi comuni applicabili ai meccanismi di ricorso collettivo, seppur non vincolanti. Principalmente riferito alla tutela dei consumatori, ma anche in materia di antitrust e di diritto ambientale, l'approccio orizzontale che è stato proposto appare utile per promuovere un'azione europea relativa al ricorso collettivo, che potrebbe ugualmente essere ricondotto nell'ambito del diritto di lavoro in virtù del riconoscimento del diritto all'azione collettiva nella legislazione europea rilevante.

Qualora le controversie siano caratterizzate da implicazioni transnazionali, gli strumenti di diritto internazionale privato devono trovare applicazione. Considerando i rilevanti regolamenti dell'UE che disciplinano, tra le altre, questioni legate ai contratti di lavoro, vengono valutati i criteri di collegamento e la possibile applicazione delle disposizioni alle procedure di ricorso collettivo in materia di lavoro. Per quanto riguarda le norme sui conflitti di giurisdizione e di leggi, alla luce della tendenza giurisprudenziale e delle osservazioni avanzate dalle istituzioni europee nell'ambito dei processi legislativi, la dimensione collettiva sembra non trovare spazio, richiedendo quindi regole specifiche da applicare in generale o in settori specifici.

Alla luce di quanto sopra, considerazioni conclusive e proposte di modifica affrontano l'opportunità di inserire nella legislazione rilevante disposizioni specifiche relative al diritto all'azione collettiva e al ricorso collettivo transfrontaliero attraverso un'interpretazione sistematica del diritto dell'UE.

CHAPTER 1

INTRODUCTION

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Executive Summary

The introductory chapter aims at illustrating the reasons for the research project and its main features. Collective redress with transnational implications represents an actual and cross-cutting topic, but the employment context has not yet been addressed. On the basis of ongoing research, including research conducted abroad, the study has been developed and integrated with arguments and doctrine. The scope is to provide an examination that covers the relevant profiles concerning cross-border collective redress in EU law, with particular regard to the employment context, from the substantive, procedural and private international law perspectives, with the ultimate objective of submitting recommendations for consideration in the development of EU-related policies.

1.1. Introduction: background.

The main question in this research project is whether the relevant existing European Union (EU) legislation, in which the right to collective action is recognised, is sufficient to grant effective protection to workers' rights in transnational disputes and whether collective redress could contribute to their enforcement. In view of the smooth functioning of the internal market, civil judicial cooperation is an essential policy of the European Union which is aimed at creating an area of freedom, security and justice where rights and freedoms are recognised to citizens. A particular situation involves workers who move abroad in the framework of the free movement of persons or the freedom to provide services. Within the legislation in force and in progress, the remedies to which workers may resort are not set forth in a clear (European) regime nor in specific provisions; such is the case for cross-border collective redress. In this context, issues arise from the substantive, procedural and private international law perspectives.

Some clarifications about the use of the term “collective redress” must be provided preliminarily with regard to the concept of collective action. The latter is mentioned when dealing with the fundamental social rights, as referred to in international and European instruments. It covers every type of activity that workers, trade unions or other organisations may implement to claim the respect for rights in employment matters. Collective redress, in line with the definition provided by the Commission¹, is addressed within the analysis under procedural law, as it is considered to be a means to initiate judicial proceedings. Commonly, collective redress, as a generic term, may comprise class, group or representative liti-

¹ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards a European Horizontal Framework for Collective Redress*, COM(2013)401 final of 11 June 2013, where it defined collective redress as «a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action. Collective redress facilitates access to justice in particular in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law». All EU documents are available at <http://eur-lex.europa.eu>.

gation and alternative dispute resolution procedures that enable groups of individuals with low-value losses to take on powerful corporate interests. The relevant terminology may also include class action, class context, and collective or multi-party litigation².

At the substantive level, the right to collective action is envisaged in the international and European charters on social rights and in the relevant legislation, in which the role of trade unions, representative organisations or other similar entities is deemed essential to the collective defence of workers' interests. This role should be performed in both extrajudicial and judicial situations. Collective actions mainly refer to extrajudicial activities undertaken to assert respect for work terms and conditions or to conclude a collective employment agreement. As a further means of protection falling within the social right to collective action, collective redress, as a judicial remedy, should be provided for in legal proceedings, in which trade unions may represent workers' interests at the national and European levels. In this regard, the representation of workers, i.e. local as well as posted workers, should be ensured in order to strengthen the opportunity to act collectively, even in cross-border cases.

As to representative organisations in the area of labour law, the right of trade unions to act has been questioned with respect to its impact on the smooth functioning of the internal market. In the framework of the freedoms of movement, obstacles have been faced when collective actions have hampered the economic activities of the relevant undertaking. In particular, the protection of fundamental social rights has been challenged when it is in conflict with the EU general principles enshrined in the Treaties. The balancing with the economic freedoms has en-

² On the terminology see D. FAIRGRIEVE, G. HOWELLS, *Collective redress procedures: European debates*, in D. FAIRGRIEVE, E. LEIN (edited by), *Extraterritoriality and collective redress*, Oxford, Oxford University Press, 2012, pp. 15-41, spec. pp. 17-18; M. DANOV, *The Brussels I Regulation: cross-border collective redress proceedings and judgments*, in *Journal of Private International Law*, 2010, Vol. 6, No. 2, pp. 359-393, spec. p. 359; see also C. HODGES, *The Reform of Class and Representative Actions in European Legal Systems, A new Framework for Collective Redress in Europe*, Oxford and Portland, Oregon, Hart Publishing, 2008; R. MULHERON, *The Class Action in Common Law Legal Systems: A Comparative Perspective*, Oxford and Portland, Oregon, Hart Publishing, 2004.

tailed a downgrading of the social rights, including the right to collective action. In this regard, the judgments of the Court of Justice in the *Viking* and *Laval* cases³ demonstrate the priority given to the market freedoms, and thus the placement of social rights within the EU legal order. After the entry into force of the Lisbon Treaty, which affirmed the legally binding effect of the EU Charter of Fundamental Rights, whose Article 28 protects the right to collective action, conflicts have continued to arise with regard to aspects of social policy because the EU does not have exclusive competence. According to the Charter, restrictions on the fundamental rights are allowed provided that the prescribed conditions are met⁴, and when emergency situations occur, such as economic and financial crisis. Nevertheless, the European institutions' commitment to concretely create the social dimension of the Union as envisaged in the Treaties has recently been manifested with the proclamation of the European Pillar of Social Rights⁵.

As to the procedural remedies, collective redress is referred to in other specific sectors, such as antitrust law and consumer policy⁶. Collective mechanisms for private enforcement were recognised as an effective means in the 2013 Communication of the Commission⁷. It stated that «collective redress facilitates access to justice in particular in cases where the individual damage is so low that potential

³ Court of Justice (Grand Chamber), judgment of 11 December 2007, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, EU:C:2007:772; (Grand Chamber), judgment of 18 December 2007, Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, EU:C:2007:809. See *infra* in Chapter 2, para. 2.2. All judgments of the Court of Justice are available at <http://curia.europa.eu>.

⁴ See Article 51; and *infra* in Chapter 2, paras. 2.1 and 2.2.

⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Establishing a European Pillar of Social Rights*, COM(2017)250 final of 26 April 2017; Proposal for a Interinstitutional Proclamation on the European Pillar of Social Rights, COM(2017)251 final of 26 April 2017; solemnly proclaimed by the European Parliament, the Council and the Commission on 17 November 2017. For comments see S. GIUBBONI, *Appunti o disappunti sul pilastro europeo dei diritti sociali*, in *Quaderni costituzionali*, 2017, n. 4, pp. 953-962.

⁶ See *infra* in Chapter 4, para. 4.1.

⁷ Communication from the Commission, COM(2013)401 final of 11 June 2013, cit.

claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law»⁸. This procedural mechanism is deemed to be a means of protection favouring weaker parties; even within the employment field, workers organised in trade unions may also more effectively claim respect for their rights and promote the defence of their economic and social interests.

Jointly with the 2013 Communication, the Commission adopted a Recommendation on common principles and guidelines for injunctive and compensatory collective mechanisms⁹. It invited the Member States to adapt their legislation on collective redress procedures by providing for an opt-in system, limiting the standing to representative actions brought by non-profit entities, establishing the loser-pays principle, limiting the funding of litigation by third parties and proscribing punitive damages. However, it is a non-binding instrument, and it has been criticised as to its legal value in the Member States¹⁰.

In any case, these EU initiatives show the legislative progress in relation to the development of means of private enforcement in different policy areas. Nevertheless, the employment context has not yet been addressed.

European labour law covers many different aspects, from the general principles, the freedom to move and to establish, to the work terms and conditions applicable to posted workers in the framework of the free provision of services. Indeed, with regard to the posting of workers regime¹¹, it is possible to identify a

⁸ *Ibidem*, spec. at para. 1.2.

⁹ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), in *OJ L* 201 of 26 July 2013, pp. 60-65.

¹⁰ See *infra* in Chapter 4, para. 4.1.

¹¹ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, in *OJ L* 18 of 21 January 1997, pp. 1-6; Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No

procedure for public enforcement (based on cooperation among the national authorities under Directive 2014/67) and specific provisions addressing private litigation in transnational situations. Private judicial remedies are deemed effective in pursuing the aim of protecting rights at the EU level in accordance with Article 47 of the Charter on the right to an effective remedy. Commonly, individual claims are initiated to seek the protection of rights, and the national rules apply. Collective mechanisms are indeed provided in the Member States' legal orders solely for certain categories of weaker parties, such as consumers. As to employment matters, most of the national systems recognise trade unions, associations or organisations of workers as being entitled to act in support of employees or on behalf of them. At the European Union level, such entities are granted a role within the social dialogue that is aimed at contributing to the development of legislation.

In transnational disputes, difficulties may arise when workers employed in one country wish to introduce proceedings in another Member State. Due to the fact that individual claims are often too challenging in terms of costs, length of the proceedings, as well as uncertainty about the applicable domestic law, workers are discouraged from acting against their employers. Assuming that collective redress is a more effective and viable means, and given the national procedural differences, issues related to private international law, such as the jurisdiction (which authority shall be competent), the applicable law (which law should be applied to employment relationship issues involving a class of workers) and the recognition and enforcement of judgments, are at stake.

The existing EU regulations in civil and commercial matters play a fundamental role by providing for uniform rules of private international law. Such acts contain specific rules on workers as weaker parties (namely, individual employment contracts), and in conjunction with the directives concerning posted workers, they offer a starting point from which to consider and examine the framework on collective redress in the employment context. The relevant EU regulations are: the Brussels I Recast on jurisdiction and the recognition and enforcement of judg-

1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), in *OJ L* 159 of 28 May 2014, pp. 11-31; see *infra* in Chapter 3.

ments¹² and Rome I or II on the applicable law¹³. In light of the entrance into force of the Brussels I Recast Regulation, European institutions, such as the European Parliament with its 2013 Resolution¹⁴, have observed that it does not cover certain aspects of the rules on jurisdiction applicable to employment law. Those initiatives have been spurred by the dismissal of the Proposal for a Regulation on the exercise of the right to take collective action, including the right to strike (Monti II Regulation), and the former proposal to add into the Brussels I Recast Regulation an article concerning the right to strike (Monti clause)¹⁵ with regard to the procedural aspects. Such acts clearly referred to the *Laval quartet* sentences, in which the Court of Justice, on the one hand, considered the social rights as fundamental, and on the other, recognised that their protection could be an obstacle to the economic freedoms. Accordingly, the right to collective action in the cross-border employment context is deemed essential with a view to both guaranteeing the smooth functioning of the internal market and protecting workers' rights across Europe.

In fact, the questions arising from the applicability of the present international private law instruments are the following: (i) whether, with respect to jurisdiction, the competent court pursuant to the provisions on individual employment contracts should have jurisdiction over collective redress; and whether, with regard to industrial actions, the forum for disputes, in line with the Rome II Regulation, should be the place where the industrial action is to be or has been taken; (ii) whether, as to the applicable law, with the aim of avoiding that the court applies

¹² Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in *OJ L* 351 of 20 December 2012, pp. 1-32.

¹³ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), in *OJ L* 177 of 4 July 2008, pp. 6-16; Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), in *OJ L* 199 of 31 July 2007, pp. 40-49.

¹⁴ European Parliament resolution of 8 October 2013 on improving private international law: jurisdiction rules applicable to employment (2013/2023(INI)), P7_TA(2013)0396. All European Parliament documents are available at www.europarl.europa.eu.

¹⁵ See *infra* in Chapter 2, para. 2.4.

the law of another Member State, which may not guarantee the most favourable solution, coherence between the jurisdictional rules and the rules governing the applicable law for employment disputes, as well as the need to prevent forum shopping, should be ensured; (iii) whether, relating to the recognition and enforcement of judgments, given that the Brussels I Recast Regulation provides for the abolition of *exequatur*, some problems might arise due to the differences in the national legislations related, for instance, to the procedural public policy of the requested court.

To conclude, the absence of a clear regime or specific provisions on collective redress gives rise to legal uncertainty, particularly because national laws provide different rules regarding collective mechanisms. Considering that the right to collective action is included within the fundamental social rights enshrined in international and European instruments, in conjunction with the right to an effective remedy, it appears necessary that the collective redress procedure shall be governed by EU law, thus providing for common conflict of jurisdictions and laws rules when no substantive standards are established.

Within this context, the protection of workers' rights calls for EU sector-specific action, particularly in light of the recent legislative developments concerning posted workers. Questions based on political grounds may interfere with future proposals for a legislative act on cross-border collective redress. Nevertheless, many recent initiatives in Europe, such as the abovementioned European Pillar on Social Rights, have addressed the need to protect social rights in order to strengthen the objective of an ever closer (social) Union.

1.2. Objectives.

The final aim is to determine a European Union legal framework on cross-border collective redress in the employment context. Collective redress may constitute an effective means of enforcement for the protection of workers' rights, falling within the fundamental social right to collective action with specific regard to judicial proceedings. Based on the analysis of legislation, doctrine and case law, it is possible to assert that the existing regime and rules are inconsistent and inappropriate to ensure means for workers' protection in the transnational context.

Therefore, the objectives of this work may be briefly summarised as follows: to provide an overview of the protection of the fundamental social rights *vis-à-vis* the economic freedoms and in times of economic and financial crisis, with particular regard to the right to collective action (in Chapter 2); to identify the existing legislation on the protection of rights of workers and posted workers, whether collective actions are included among the remedies available for this purpose, which are aimed at ensuring the fundamental procedural rights to access to justice and to an effective remedy (in Chapter 3); to point out the role of procedural law in the enforcement of rights, and in particular of collective redress as a means of private enforcement. It is not the purpose of this work to decide which form of collective redress proceedings is more effective (in Chapter 4); to analyse the existing applicable private international law rules to employment matters (of workers and posted workers) and to identify possible solutions suitable for cross-border collective redress in the employment context (in Chapter 5).

In conclusion (in Chapter 6), the final considerations stress the need for intervention on the research topic, and accordingly some recommendations are suggested to provide useful starting points for legislative development.

1.3. Approach.

To address the main topic of the research project, an approach covering various perspectives under EU law has been implemented. Cross-border collective redress in the employment context is examined in relation to the protection of fundamental social rights, particularly the right to collective action, in the EU legal order; from the EU civil procedure perspective, by assessing the need to regulate collective redress as a means of private enforcement; and from the EU private international law point of view, by assessing the existing rules applicable to employment matters and determining whether they are applicable to cross-border collective redress in the employment context. All EU law-related viewpoints are interconnected; thus, a comprehensive assessment of the topic is pursued to highlight the relevant issues.

The underlying reasoning of this approach is based on the assumption that, because collective action is recognised among the fundamental social rights, which are given priority in the realisation of the internal market and the area of freedom, security and justice, at the legislative level, there is a lack of appropriateness and a need to intervene in relation to the judicial remedy of collective redress. To protect and enforce the social rights, it is not sufficient to merely recognise them in binding instruments; rather, legislation setting forth clear rules within the procedural and private international law provisions is also required to achieve the aim of legal certainty.

1.4. Outline of this work.

The present work starts with a short preliminary and illustrative introduction in the present Chapter 1.

The recognition of fundamental social rights in the EU, including the right to collective action, based on an analysis of the relevant instruments on fundamental rights protection, as well as the case law at the EU and national levels, is addressed in Chapter 2. In particular, an analysis is conducted regarding the protection of fundamental social rights *vis-à-vis* the economic freedoms and then in times of economic crisis. The legal framework on the right to collective action is then examined.

In Chapter 3, the protection of workers under EU law is addressed by underlining the relevant provisions, which also refer to the right to collective action, and by examining the phenomenon of the posting of workers and the specific legislation.

Collective redress, as a judicial remedy, is assessed under Chapter 4 from an EU civil procedure perspective, considering the role of the EU action, its scope, legal basis and potential advantages.

Ultimately, private international law issues are examined in Chapter 5 by focusing on the existing instruments concerning employment matters and then evaluating the rules applicable to collective redress involving workers, as well as posted workers.

To conclude, in Chapter 6, considerations and possible suggestions are submitted.

CHAPTER 2

FUNDAMENTAL SOCIAL RIGHTS IN THE EUROPEAN UNION

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Executive Summary

Chapter 2 addresses the question of how fundamental social rights are considered and protected within the European framework, especially in the Court of Justice case law. Although social rights find a place in EU primary law, their relevance is balanced with the principles of economic integration, competition law, free movement of goods, freedoms of establishment or of provision of services in view of the smooth functioning of the internal market. Another conflict occurs when the protection of social rights is invoked against restrictive measures in times of economic-financial crisis. In this context, the protection of workers' rights across the EU is concerned, with particular regard to the right to collective action as a means of enforcement.

2.1. Introduction: fundamental social rights in the EU.

Fundamental social rights have experienced an evolution in terms of their position in the European Union (EU) legal order: originally, selective employment rights were provided in a set of legislative initiatives, and then included in the EU Charter of Fundamental Rights that become legally binding¹⁶. In this regard, the Court of Justice's jurisprudence has intervened in their interpretation and interplay with EU principles.

The preliminary questions address what the fundamental social rights are, why they need to be protected, whether the EU has competence over their exercise, and thus the Court of Justice's power to control respect for them and the legitimacy of EU and national acts.

The fundamental rights comprise social and employment rights, and they are mostly referenced in the international human rights documents and the national Constitutions. Social rights enable citizens to demand services and assistance (regarding the right to health, the right to education, social security rights, etc.) from the State and, in contrast, envisage obligations for the States, which shall concretely provide means of national measures or direct actions. In the employment context, such rights include, for instance, the right to collective action and to collective bargaining. In particular, the right to act collectively, including industrial actions, sympathy actions, blockades, strikes, lockouts as well as collective redress as judicial procedures, is aimed at achieving the protection for weak parties. The exercise of all such rights is covered by domestic law, which may differ from one State to another.

The objective of protecting the fundamental rights in EU law is to ensure that those rights are not infringed in areas of EU activity, whether through action at the EU level or through the implementation of EU law by the Member States. The reason for pursuing that objective is the need to avoid a situation in which the level of protection of the fundamental rights varies according to the national law in-

¹⁶ Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000, adapted at Strasbourg on 12 December 2007 and became legally binding on the EU with the entry into force of the Treaty of Lisbon (Treaty on European Union – TEU and Treaty on the Functioning of the European Union – TFEU) in December 2009. All EU legislation is available at <http://eur-lex.europa.eu>.

volved in such a way as to undermine the unity, primacy and effectiveness of EU law¹⁷.

From the outset of the European Communities, social rights did not fall within their competences¹⁸, given that the Communities were aimed at regulating economic freedoms as a means for the creation of the internal market. Social matters were not within the Communities' competences in accordance with Articles 117 and 118 of the European Economic Community (EEC) Treaty, except for the principle of non-discrimination with regard to remuneration for men and women (Article 119 EEC Treaty, now Article 157 TFEU).

By virtue of the Single European Act of 1986, the Community had the power to adopt directives as established by Article 118A of the EEC Treaty. It authorised the Council, acting by a qualified majority in the framework of the cooperation procedure, to establish the minimum requirements with a view to «encouraging improvements, especially in the working environment, as regards the health and safety of workers». This provision was maintained (see then Article 137 EC Treaty and now Article 153 TFEU).

In 1989, all of the Member States at that time, except for the United Kingdom, signed the Community Charter of Fundamental Social Rights of Workers, which was a political declaration with non-binding legal force or effect containing a series of social and labour rights for workers.

¹⁷ Court of Justice, judgment of 17 December 1970, Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114, para. 3; similarly, (Grand Chamber), judgment of 26 February 2013, Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, EU:C:2013:107, para. 60; judgment of 6 March 2014, Case C-206/13, *Cruciano Siragusa v Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo*, EU:C:2014:126, paras. 31-32; judgment of 10 July 2014, Case C-198/13, *Víctor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gobierno de España en Alicante) and Others*, EU:C:2014:2055, para. 47.

¹⁸ On the EU competences on social matters, see A. FABRE, *La «fondamentalisation» des droits sociaux en droit de l'Union européenne*, in R. TINIERE, C. VIAL (sous la direction de), *La protection des droits fondamentaux dans l'Union européenne. Entre évolution et permanence*, Bruxelles, Bruylant, 2015, pp. 163-194, spec. p. 165 f.; on the origin see also E. TRIGGIANI, *La complessa vicenda dei diritti sociali fondamentali nell'Unione europea*, in *Studi sull'integrazione europea*, 2014, IX, pp. 9-33, spec. pp. 9-13.

The Agreement on Social Policy of 2 February 1992 was annexed to the Protocol on Social Policy of the Treaty of Maastricht, and it was signed by only eleven Member States, excluding the United Kingdom. The Agreement goes back to the Joint Agreement of the Social Partners of 31 October 1991, which was elaborated by the social partners within the intergovernmental conference in Maastricht. The two texts are nearly identical. The Agreement on Social Policy proposed a constitutionally recognised role for the social partners in the Community legislative process, which had formerly engaged only with the Institutions. At the same time, a major extension of EC competences in employment and industrial relations was proposed, allowing for qualified majority voting with respect to some of the new competences. Nonetheless, the recognition of social rights was not aimed at giving relevance to such rights; rather, they were considered to be a corollary of the realisation of the common market and thus the economic integration¹⁹. The social rights were deemed to be instrumental²⁰, but, at the same time, they could be an obstacle to economic progress²¹.

In the 1993 Copenhagen criteria²², there was no space for either social policy aspects or for social rights; attention was given solely to the economic and political dimensions of the States that asked to become Members of the Union²³.

¹⁹ M. BENOLO-CARABOT, *Chapitre 2. Les droits sociaux dans l'ordre juridique de l'Union Européenne*, in D. ROMAN (sous la direction de), *Droits des pauvres, pauvres droits ? Recherches sur la justiciabilité des droits sociaux*, in *La Revue des Droits de l'Homme*, 2012, No. 1, pp. 84-102, spec. p. 87 ff., available at <http://revdh.revues.org>.

²⁰ A. FABRE, *La «fondamentalisation» des droits sociaux*, cit., p. 165: «conception instrumentale».

²¹ I. INGRAVALLO, *La Corte di giustizia tra diritto di sciopero e libertà economiche fondamentali. Quale bilanciamento?*, in *La Comunità internazionale*, 2008, No. 4, pp. 641-662, spec. at p. 643.

²² Available at www.consilium.europa.eu/en/european-council/conclusions.

²³ I. INGRAVALLO, *La Corte di giustizia tra diritto di sciopero e libertà economiche fondamentali*, cit., p. 654; I. INGRAVALLO, *Il diritto di sciopero e quello di contrattazione collettiva nell'Unione europea dopo il Trattato di Lisbona*, in P. GARGIULO (a cura di), *Politica e diritti sociali nell'Unione europea. Quale modello sociale europeo?*, Napoli, Editoriale Scientifica, 2011, pp. 217-242, spec. p. 218.

In 2000, the EU Charter of Fundamental Rights was proclaimed. It includes civil and political rights as well as socio-economic rights (Chapter IV “Solidarity”). Subsequently, the EU Charter was mentioned in the 2007 Lisbon Treaty under Article 6 TEU, whose paragraph 1 states: «The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties». The following paragraph 3 specifies that «Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law». It codifies the Court of Justice case law according to which the Charter has been used as a source of general principles of EU law, against which even the primary provisions of EU law in the Treaties may be measured and assessed.

As to employment and social policies, according to the Treaties, they fall primarily under the national competence of the Member States: Social policy is an area of shared competence between the EU and the Member States pursuant to Article 4, paragraph 2, letter *b* TFEU. The harmonisation of national laws in the areas of social exclusion and modernisation of the welfare protection systems are matters for which the EU may coordinate national laws (Article 153, paragraph 1 TFEU). Any EU legislation relating to employees’ protection against dismissal, information and consultation of workers, collective representation, defence of workers’ and employers’ interests, and conditions of employment for non-EU nationals, requires unanimity in the Council (Article 153, paragraph 2 TFEU). Pay, the right of association, the right to strike and the right to impose lock-outs are beyond the EU competence (Article 153, paragraph 5 TFEU). Principles on non-discrimination between men and women, mainly with regard to pay, are affirmed in Article 157 TFEU.

Among the European initiatives, the Institutions have focused on the need to give weight to social rights within the European integration process and to face new challenges and obstacles²⁴.

Remarks on the conception and placement of the social rights in the EU legal order may be pointed out, not only at the legislative (and non-legislative) level, but also at the interpretative level, on the basis of European and national case law.

The Court of Justice has intervened to clarify the rights of migrant workers in relation to the freedoms of movement within the internal market. In this regard, it can be debated whether the Court of Justice is the most appropriate venue to bal-

²⁴ In the 2006 Green Paper “Modernising labour law to meet the challenges of the 21st century”, COM(2006)708 final of 22 November 2006, the Commission called for actions to enforce workers’ rights and their protection in the labour market facing globalisation challenges. In 2010 it adopted the Communication “Reaffirming the free movement of workers: rights and major developments”. In the EU Citizenship Report “Dismantling the obstacles to EU citizens’ rights” of 27 October 2010 (action 15) and then in the 2013 EU Citizenship Report “EU citizens: your rights, your future”, the Commission addressed the need to remove administrative hurdles and to simplify procedures for Union citizens living, working and travelling in other Member States. In the Communication “Towards a job-rich recovery” of 18 April 2012 (the Employment Package), the Commission announced its intention to present a legislative proposal (information and advice) in order to support mobile workers in the exercise of rights derived from the TFEU and Regulation (EU) No. 492/2011. The Commission presented the 2013 Communication “Strengthening the social dimension of the economic and monetary union” (COM(2013)690 final of 2 October 2013), in which it «proposes a number of initiatives to strengthen the social dimension of EMU with a particular focus on three points: reinforced surveillance of employment and social challenges and policy coordination; enhanced solidarity and action on employment and labour mobility; strengthened social dialogue». This action falls within the scope of the Europe 2020 Strategy for smart, sustainable and inclusive growth, which places social policy at the core of the EU’s economic plan. Following the Communication, the European Parliament, in its Resolution of 21 November 2013 (P7_TA(2013)0515), «urges that social considerations be placed at the core of European integration and mainstreamed into all EU policies and initiatives; considers that the social dimension should be a reconciliation/trade-off factor in terms of ‘bench learning’; notes that the purpose of the social dimension of the EMU is to provide social security and a sufficient living standard for current and future generations; considers it important, therefore, for EU citizens to see that their Union is capable of promoting social progress».

ance market interests and the fundamental social rights²⁵. This consideration gives rise to doubts concerning the role and powers of the European judges, whose approaches as to whether the fundamental rights prevail or not have been different depending on the circumstances of the case. Certainly, the European integration process was originally aimed at creating a European economic area based on economic principles. The core of the European policies indeed focused on the internal market and later moved on to the people, i.e. the European citizens. Due to the recognition of the European citizenship, nationals can enjoy some specific rights, including social rights, when they move across the Member States.

The fact that social policy is under national sovereignty has not precluded the Court of Justice from interfering²⁶ and controlling the Member States' legislation, even in matters not under EU competence²⁷.

In the case law of the Court of Justice, relevant judgments have addressed issues related to fundamental rights in various areas of social policy. The recognition of the fundamental nature of social rights is linked to the adoption of the EU Charter of Fundamental Rights. Before the Lisbon Treaty, the Union did not provide for specific social rights, and European judges developed significant decisions in light of the principles of direct effect and supremacy²⁸. Because the fundamental rights did not have a written basis in EU law, the Court of Justice, in some cases, considered them as general principles and, in others, as principles of

²⁵ I. INGRAVALLO, *La Corte di giustizia tra diritto di sciopero e libertà economiche fondamentali*, cit., p. 643.

²⁶ *Ibidem*, p. 644.

²⁷ Court of Justice (Grand Chamber), judgment of 11 December 2007, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, EU:C:2007:772, paras. 40-41; (Grand Chamber), judgment of 18 December 2007, Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, EU:C:2007:809, paras. 87-88.

²⁸ M. BEIJER, *The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations*, Cambridge-Antwerp-Portland, Intersentia, 2017, pp. 110-112.

social rights²⁹. This evaluation is relevant to understanding the *status* of the fundamental rights (including social rights) in the EU legal order.

The Court of Justice first recognised the fundamental rights as part of the general principles for which it should ensure respect in the *Stauder* case of 1969³⁰. The question was related to Article 4 of Decision No. 69/71 EEC of the Commission of the European Communities. It concerned whether a requirement that the sale of butter at reduced prices to beneficiaries under certain social welfare schemes shall be subject to the condition that the name of beneficiaries shall be divulged to retailers could be considered compatible with the general principles of Community law in force. In its judgment, the Court held that «the most liberal interpretation must prevail, provided that it is sufficient to achieve the objectives pursued by the decision in question. It cannot, moreover, be accepted that the authors of the decision intended to impose stricter obligations in some Member States than in others»³¹. It then specified that «interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court»³². Thus, the Court affirmed the nature of the fundamental rights, considering them among the general principles of European law; accordingly, the fundamental rights were recognised as being at the same level as the good faith or legality principles³³.

This concept was further developed in the *Internationale Handelsgesellschaft* case of 1970³⁴. The fundamental rights were defined as an integral part of the general principles of law protected by the Court of Justice and thus fell within the framework of the structure and objectives of the Community, whilst inspired by

²⁹ A. FABRE, *La «fondamentalisation» des droits sociaux*, cit., p. 167 ff.

³⁰ Court of Justice, judgment of 12 November 1969, Case 29/69, *Erich Stauder v City of Ulm – Sozialamt*, EU:C:1969:57.

³¹ *Ibidem*, para. 4.

³² *Ibidem*, para. 7.

³³ On the definition of general principles through the Court of Justice case law, see L. FUMAGALLI, *Art. 19 TUE*, in F. POCAR, M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, Padova, CEDAM, 2^a ed., 2014, pp. 89-98, spec. pp. 95-96.

³⁴ Court of Justice, judgment of 17 December 1970, *Internationale Handelsgesellschaft*, cit.

the constitutional traditions common to the Member States³⁵. As general principles, the definition of such rights are derived from principles that are generally recognised at the international and national levels, including the fundamental rights.

Subsequently, in the *Nold* judgment of 1974³⁶, the Court of Justice reiterated that human rights are an integral part of the general principles of (European Union) law, and that as such, the Court itself was bound to draw inspiration from the constitutional traditions common to the Member States. Therefore, the Court cannot uphold measures which are incompatible with the fundamental rights recognised and protected in the Constitutions of the Member States. It also found that «international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law»³⁷. In addition to the consideration of fundamental rights as general principles deriving from the national constitutions and thus commonly recognised, the Court has referred to international instruments on human rights which integrate the national laws.

In the *ERT* judgment of 1991, the Court of Justice affirmed the nature of the fundamental rights as general principles and added a reference to the European Convention on Human Rights among the relevant international treaties³⁸.

With specific regard to social rights, they have been recognised as general principles of EU law, such as the trade union freedom, the elimination of discrim-

³⁵ *Ibidem*, para. 4.

³⁶ Court of Justice, judgment of 14 May 1974, Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, EU:C:1974:51.

³⁷ *Ibidem*, para. 13.

³⁸ Court of Justice, judgment of 18 June 1991, Case C-260/89, *ERT v DEP*, EU:C:1991:254, para. 41: «fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The European Convention on Human Rights has special significance in that respect (...)».

ination based on sex or on age³⁹, and the right to collective action and collective bargaining⁴⁰.

In the *Rutili* case of 1975⁴¹, the Court held that the restriction relating to public policy may not be invoked on grounds arising from the exercise of trade unions' rights. Indeed, according to the more general principle enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and ratified by all the Member States, and in Article 2 of Protocol No. 4 of the same Convention, «no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above-quoted articles other than such as are necessary for the protection of those interests 'in a democratic society'».

As to the non-discrimination principle, in the *Defrenne III* case⁴², after confirming that the respect for fundamental personal human rights is one of the general principles of Community law, the Court continued by asserting that «there can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights» on the basis of Article 119 of the EEC Treaty (now Article 157 TFEU), which requires the same remuneration for men and women, as well as on the basis of the European Social Charter⁴³ and ILO Convention No. 111 of 25 June 1958 concerning discrimination in respect of employment and occupation.

³⁹ Court of Justice (Grand Chamber), judgment of 22 November 2005, Case C-144/04, *Werner Mangold v Rüdiger Helm*, EU:C:2005:709, spec. para. 75 ff.; see also Court of Justice (Grand Chamber), judgment of 19 January 2010, Case C-555/07, *Seda Küçükdeveci v Swedex GmbH & Co. KG.*, EU:C:2010:21, para. 21.

⁴⁰ Court of Justice (Grand Chamber), judgment of 15 July 2010, Case C-271/08, *European Commission v Federal Republic of Germany*, EU:C:2010:426, paras. 37 and 41.

⁴¹ Court of Justice, judgment of 28 October 1975, Case 36/75, *Roland Rutili v Ministre de l'intérieur*, EU:C:1975:137, paras. 31-32.

⁴² Court of Justice, judgment of 15 June 1978, Case 149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena (Defrenne III)*, EU:C:1978:130, paras. 26-28.

⁴³ The European Social Charter was adopted in 1961 within the Council of Europe, and revised in 1996. Article 136 EC Treaty, now Article 151 TFEU, specifically refers to it jointly with the 1989 Community Charter of the Fundamental Social Rights of Workers.

The judgments of 2007 in the *Viking* and *Laval* cases focused on the right to collective action, according to which it, «including the right to strike, must be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures»⁴⁴.

It should be noted that within its previous judgments, the Court expressly referred to international instruments, such as the European Convention on Human Rights⁴⁵, the European Charter of Social Rights or the ILO Conventions⁴⁶, whereas in the most recent decisions, it has also referred to the Community Charter of Fundamental Social Rights for Workers and the Charter of Fundamental Rights⁴⁷.

Considering the abovementioned case law, the Court of Justice followed an extensive approach in order to recognise certain general principles of a social nature, such as the principle of non-discrimination. In this regard, significant are the cited *Defrenne III* and *Mangold* cases, in which the Court relied on the general clause on the prohibition of discrimination under Article 13 EC Treaty (now Article 19 TFEU) in order to qualify non-discrimination based on age as a general principle⁴⁸. Authors have deemed that such an approach is aimed at considering certain general principles applicable in various areas, including the social field⁴⁹.

⁴⁴ Court of Justice (Grand Chamber), judgment of 11 December 2007, *Viking*, cit., para. 44; (Grand Chamber), judgment of 18 December 2007, *Laval*, cit., para. 91. See G. BARRETT, *Lawyers, the Question of Whether the European Union is Good for Workers, and How to Help Doom a Referendum on the Lisbon Treaty Without Really Trying*, 2009, pp. 31-52, spec. p. 40, available at www.um.edu.mt/europeanstudies, who commented that «the case has actually created at least one benefit for trade unions: the recognition of the right to strike as general principle». On these cases see further in this Chapter, para. 2.2.

⁴⁵ Court of Justice, judgment of 28 October 1975, *Rutili*, cit., para. 32.

⁴⁶ Court of Justice, judgment of 15 June 1978, *Defrenne III*, cit., para. 28.

⁴⁷ Court of Justice (Grand Chamber), judgment of 11 December 2007, *Viking*, cit., para. 43; (Grand Chamber), judgment of 18 December 2007, *Laval*, cit., para. 90; (Grand Chamber), judgment of 19 January 2010, *Küçükdeveci*, cit., para. 22; (Grand Chamber), judgment of 15 July 2010, *Commission v Germany*, cit., para. 37.

⁴⁸ Court of Justice (Grand Chamber), judgment of 22 November 2005, *Mangold*, cit., para. 75: «The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law».

⁴⁹ A. FABRE, *La «fondamentalisation» des droits sociaux*, cit., p. 169.

Alongside the category of general principles, the Court in some cases has identified principles of social law of particular importance⁵⁰, such as the equality of part time and full time work⁵¹, the right to parental leave⁵², the weekly number of working hours⁵³ and the right to paid annual leave⁵⁴.

Moreover, the relevance afforded to these principles derives from other European instruments on social rights, namely the 1989 Community Charter of Fun-

⁵⁰ *Ibidem*, pp. 169-170.

⁵¹ Court of Justice, judgment of 10 June 2010, Joined Cases C-395/08 and C-396/08, *Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini* (C-395/08) and *Daniela Lotti and Clara Matteucci* (C-396/08), EU:C:2010:329, para. 32: «Clause 4 of the Framework Agreement [principle of non-discrimination] must be interpreted as articulating a *principle of European Union social law which cannot be interpreted restrictively*» (emphasis added).

⁵² Court of Justice, judgment of 12 June 2014, Case C-118/13, *Gülşay Bollacke v K + K Klaas & Kock BV & Co. KG*, EU:C:2014:1755, para. 15: «according to the Court's settled case-law, the entitlement of every worker to paid annual leave must be regarded as *a particularly important principle of European Union social law* from which there may be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Council Directive 93/104/EC (see *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, para. 22; *KHS*, C-214/10, EU:C:2011:761, para. 23; and *Dominguez*, C-282/10, EU:C:2012:33, para. 16)» (emphasis added).

⁵³ Court of Justice (Grand Chamber), judgment of 5 October 2004, Joined cases C-397/01 to C-403/01, *Bernhard Pfeiffer* (C-397/01), *Wilhelm Roith* (C-398/01), *Albert Süß* (C-399/01), *Michael Winter* (C-400/01), *Klaus Nestvogel* (C-401/01), *Roswitha Zeller* (C-402/01) and *Matthias Döbele* (C-403/01) v *Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, EU:C:2004:584, para. 100: «the 48-hour upper limit on average weekly working time, including overtime, constitutes *a rule of Community social law of particular importance* from which every worker must benefit, since it is a minimum requirement necessary to ensure protection of his safety and health (see, by analogy, Case C-173/99 *BECTU* [2001] ECR I-4881, paras. 43 and 47)» (emphasis added).

⁵⁴ Court of Justice, judgment of 26 June 2001, Case C-173/99, *The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)*, EU:C:2001:356, para. 43: «the entitlement of every worker to paid annual leave must be regarded as *a particularly important principle of Community social law* from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Directive 93/104» (emphasis added).

damental Social Rights for Workers and the Charter of Fundamental Rights of 2000⁵⁵, which includes all the civil and political rights, as well as the social rights (listed in Chapter 4 “Solidarity”), without making any distinction between them. Although Article 51, paragraph 2 of the Charter states that it does not modify or add EU competences as described in the Treaties, the Charter applies to all situations connected to matters falling under EU competences. Thanks to the Charter, the EU is no longer merely an economic integration process, but is also aimed at realising a European social model, because the Charter grants the same *status* to the social rights as to the civil rights⁵⁶.

After the proclamation of the Charter, the Court has referred to it when a case concerned a specific fundamental right; however, the general principles are often mentioned as well to provide added value to the rights laid down in the Charter⁵⁷. After the entry into force of the Lisbon Treaty, in which the Charter was expressly given binding legal value, the Court nevertheless referred to its case law on general principles or on particular important principles of social law. For instance, in the *Commission v Germany* judgment of 2010⁵⁸, the Court recognised the fundamental character of the right to collective bargaining as guaranteed under Article 28 of the Charter⁵⁹. It then added that from such Article 28, the protection of the fundamental right to bargain collectively must take full account, in particular, of national laws and practices⁶⁰.

The relationship between the rights included in the Charter and the non-written principles as stated by the Court gives rise to concerns about the relevance

⁵⁵ A. FABRE, *La «fondamentalisation» des droits sociaux*, cit., pp. 170-174.

⁵⁶ E. TRIGGIANI, *La complessa vicenda dei diritti sociali fondamentali nell'Unione europea*, cit., p. 16.

⁵⁷ M. BEIJER, *The Limits of Fundamental Rights Protection by the EU*, cit., p. 119.

⁵⁸ Court of Justice (Grand Chamber), judgment of 15 July 2010, *Commission v Germany*, cit.

⁵⁹ E. TRIGGIANI, *La complessa vicenda dei diritti sociali fondamentali nell'Unione europea*, cit., spec. p. 21; G. FONTANA, *Crisi economica ed effettività dei diritti sociali in Europa*, 27 novembre 2013, pp. 42-43, available at www.forumcostituzionale.it.

⁶⁰ Court of Justice (Grand Chamber), judgment of 15 July 2010, *Commission v Germany*, cit., paras. 38 and 41.

of the Charter itself in determining the placement of the fundamental rights, including social rights, within the EU legal order.

When the social rights are considered as general principles, they are placed within the hierarchy of EU law and thus protected by the Court of Justice. It appears that there are fundamental rules within EU primary law, which include, on the one hand, the principle pursuant to which the fundamental rights must be protected and, on the other, similar principles, such as those regarding market freedoms⁶¹. This justifies the need to balance them. However, the Court has recognised that the fundamental rights are not absolute and may be limited, as stated in the *Viking* and *Laval* cases. Indeed, restrictions may be based on public policy clauses, public interests or general principles of EU law. Even if social rights are considered as fundamental rights and are thus part of the general principles of EU law, they nonetheless may be balanced with the fundamental economic freedoms or principles enshrined in the Treaties. Such a finding is based on the fact that EU primary law has pursued the main objective of the European integration and the smooth functioning of the internal market⁶², because the Community was originally of a primarily economic nature⁶³. More precisely, limitations are provided for in Article 52, paragraphs 1 and 2 of the Charter, according to which some rights are not absolute and may be subject to restrictions provided that certain conditions are met.

It is clear that the Charter provisions apply when EU law is implemented by the Member States pursuant to Article 51, paragraph 1⁶⁴. In the case law, notably the *Åkerberg Fransson* judgment of 2013⁶⁵, the Court established that the funda-

⁶¹ M. BALBONI, *Rapporti tra diritto interno e diritto dell'Unione europea: verso un superamento della c.d. teoria dei controlimiti?*, in L.S. ROSSI, E. BARONCINI (a cura di), *Rapporti tra ordinamenti e diritti dei singoli. Studi degli allievi in onore di Paolo Mengozzi*, Napoli, Editore Scientifico, 2010, pp. 3-58, spec. p. 37.

⁶² A. FABRE, *La «fondamentalisation» des droits sociaux*, cit., p. 177.

⁶³ See further in this Chapter, para. 2.2.

⁶⁴ It states that «(...) according to which the provisions of the Charter are addressed to the Member States only when they are implementing European Union law».

⁶⁵ Court of Justice (Grand Chamber), judgment of 26 February 2013, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105; see also more recently judgment of 5 February 2015, Case C-117/14, *Grima Janet Nisttahuz Poclava v Jose María Ariza Toledano (Taberna*

mental rights must be respected by the Member States when they act within the scope of Union law. National legislations falling within the scope of EU law must thus comply with the Charter, given that all situations covered by EU law are in compliance with fundamental rights, and the applicability of EU law entails the applicability of the fundamental rights guaranteed by the Charter⁶⁶.

In the same regard, a significant case on social rights, namely on the right to information and consultation within the undertaking (as established by Article 27 of the Charter), is the *Association de médiation sociale (AMS)* judgment of 2014⁶⁷. In that case, the Court re-affirmed that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law⁶⁸, recalling the *Åkerberg Fransson* decision, which also dealt with the implementation of an EU directive in national legislation. However, in the *Association de médiation sociale* case, the Court stated that it was clear from the language 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»⁶⁹. Therefore, «Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, must be interpreted to the effect that, where a national provision implementing that directive is incompatible with European Union law, that article of the Charter cannot be invoked in a dispute between individuals in order to disapply that national provision»⁷⁰. This means that although the fundamental rights are included in the Charter, they nevertheless do not have direct effectiveness.

del Marqués), EU:C:2015:60, paras. 28-29; on this issue see M. BEIJER, *The Limits of Fundamental Rights Protection by the EU*, cit., spec. pp. 120-121 and 222 ff.

⁶⁶ Court of Justice (Grand Chamber), judgment of 26 February 2013, *Åkerberg Fransson*, cit., para. 21.

⁶⁷ Court of Justice (Grand Chamber), judgment of 15 January 2014, Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others*, EU:C:2014:2. For a comment see S. SCIARRA, *Association de médiation sociale. The Disputed Role of EU fundamental Principles and the Point of View of Labour Law*, in *Scritti in onore di Giuseppe Tesauero*, Napoli, Editoriale Scientifica, 2014, pp. 2431-2447.

⁶⁸ *Ibidem*, para. 43.

⁶⁹ *Ibidem*, para. 45.

⁷⁰ *Ibidem*, para. 51.

In addition, the remarks concern the content of the Charter, i.e. that it is not uniform because it includes rights and principles⁷¹. Such a distinction stems from the cited disposition of Article 51, paragraph 1, under which the European institutions and Member States shall «respect the rights, observe the principles and promote the application» of the Charter. Moreover, Article 52 determines the scope and interpretation of the rights and principles, and specifies in paragraph 5 that «[t]he provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality».

Some have levelled the criticism that the distinction between principles and rights was introduced to convince those Member States that were against the inclusion of the provisions of social rights, and thus their justiciability is minor⁷². The special *status* granted to principles appeared necessary, especially because the Charter contains many social rights, which the Member States did not want to be directly justiciable by individuals⁷³. The divide is not clear, and above all it does not correspond to the distinction between the civil and political rights, as opposed to the social and economic rights. Thus, the distinction is relevant for the enforceability of individual claims through the courts, which is more limited for principles than for rights. On the one hand, principles do not require positive actions by

⁷¹ A. FABRE, *La «fondamentalisation» des droits sociaux*, cit., p. 180. See also G. FONTANA, *Crisi economica ed effettività dei diritti sociali in Europa*, cit., p. 24; S. ROBIN-OLIVIER, «*La contribution de la Charte des droits fondamentaux à la protection des sociaux dans l'Union européenne: un premier bilan après Lisbonne*», in *Journal européen des droits de l'homme*, 2013, No. 1, pp. 109-134.

⁷² On the distinction see M. DAWSON, *The Governance of EU Fundamental Rights*, Cambridge, Cambridge University Press, 2017, p. 185 ff.; A. FABRE, *La «fondamentalisation» des droits sociaux*, cit., p. 180.

⁷³ M. BEIJER, *The Limits of Fundamental Rights Protection by the EU*, cit., spec. p. 132 ff.; when preparing the text a compromise has been reached as to the exclusion of horizontal direct effect of those provisions; remaining the main problem of the definition of implementation of EU law: G. FONTANA, *Crisi economica ed effettività dei diritti sociali in Europa*, cit., spec. p. 23.

Institutions or the Member States because they only entail the grounds for legitimacy control. On the other hand, rights are directly justiciable, as no implementing actions are needed⁷⁴.

Even if the distinction is not properly explained in the provision at hand, the *Explanation on Article 52* clarifies that principles do require the adoption of specific acts to be implemented, but they do not imply the possibility to claim positive action by the EU or the Member States⁷⁵. According to said Explanation, the articles on social assistance fall within the category of principles. From the above, it is significant to note that the legitimacy of national measures should be assessed in accordance with the Charter's provisions on the social rights⁷⁶.

In light of the distinction between rights and principles, as to the dispositions on the social rights, it is argued that they do not provide for rights, but consist of «mere programmatic principles without being immediately effective»⁷⁷. Therefore, they should require specific implementing actions.

When recognising the fundamental nature of the social rights, the Court of Justice has also relied on international instruments. Other European bodies, such as the European Court of Human Rights and the European Committee for Social Rights, have addressed the protection of such rights. However, from a general

⁷⁴ See M. BALBONI, *Rapporti tra diritto interno e diritto dell'Unione europea*, cit., p. 35.

⁷⁵ See *Explanation on Article 52 - Scope and interpretation of rights and principles*, in OJ C 303 of 14 December 2007, pp. 17-35, spec. p. 35: «Paragraph 5 clarifies the distinction between 'rights' and 'principles' set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51(1)). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities. This is consistent both with case-law of the Court of Justice and with the approach of the Member States' constitutional systems to 'principles', particularly in the field of social law. For illustration, examples for principles, recognised in the Charter include e.g. Articles 25, 26 and 37. In some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34».

⁷⁶ A. VITERBO, F. COSTAMAGNA, *L'impatto sociale*, cit., p. 188.

⁷⁷ *Ibidem*, p. 187.

point of view, an important difference can be noted: The Court of Justice has assessed the relevance and the protection of fundamental rights within the context of the European economic integration process. It has not focused on the rights themselves, but rather on the Treaties' logic based on the precedence of the economic freedoms. By contrast, the European Court of Human Rights has founded its reasoning on the relevant right granted by evaluating the legitimacy of limitations⁷⁸.

To conclude, fundamental social rights are part of EU law, but they may face challenges in their protection in specific contexts, as in case of balancing with the economic freedoms, in which the latter prevail, or in times of economic crisis, in which national measures implementing EU actions question their protection. As to the latter context, the need to preserve constitutional fundamental principles that form part of the national legal order against possible violation by EU law has been put forward⁷⁹.

Another way to grant protection is linked to private international law (PIL) rules aimed at coordinating the national legal systems and avoiding conflicts in private matters⁸⁰ by establishing safeguards in relation to all PIL aspects (jurisdiction, applicable law, recognition and enforcement of judgments), and, in particular, with specific provisions in cases involving weaker parties, including employees⁸¹. There are also special clauses on the overriding mandatory provisions and public policy aimed at preventing the violation of the fundamental rights.

⁷⁸ E. TRIGGIANI, *La complessa vicenda dei diritti sociali fondamentali nell'Unione europea*, cit., p. 22.

⁷⁹ I. INGRAVALLO, *La Corte di giustizia tra diritto di sciopero e libertà economiche fondamentali*, cit., pp. 655-656.

⁸⁰ Explanations on the origin and role of private international law system see F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale private e processuale*, Volume I, *Parte generale e obbligazioni*, Milano, UTET Giuridica, 8^a ed., 2017, p. 1 ff.

⁸¹ I. INGRAVALLO, *La Corte di giustizia tra diritto di sciopero e libertà economiche fondamentali*, cit., spec. p. 656. See further in Chapter 5.

2.2. Fundamental social rights *vis-à-vis* economic freedoms.

The recognition of the fundamental nature of social rights does not, however, imply their absolute protection. The Court of Justice designed a balancing test between the freedoms of movement and the social rights, according to which the right to collective action may be protected only when it is legitimate and proportionate to the achievement of the workers' goal⁸². EU principles, including the economic freedoms granted in the Treaties, as well as competition law, may be obstacles to their protection⁸³. Based on the case law of the Court of Justice, it is possible to examine the interplay of economic integration with social policy.

In the field of competition, in the *Albany* judgment of 1999⁸⁴, the Court exempted collective agreements from review under antitrust law. It addressed the relationship between the right to collective bargaining and the freedom of competition. In particular, its assessment concerned a Dutch collective agreement instituting a pension fund, with binding effect, that was not subject to the prohibition on the restriction of competition (under Article 85 ECC Treaties, now Article 101 TFEU). This is due to the nature and function of the institution, as well as the relevance of social dialogue in the European framework. According to the judgment, every collective agreement, even those without binding and *erga omnes* effect, implies a restriction on competition. The Court held: «It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty [now Article 101, par-

⁸² F. FABBRINI, *Europe in Need of a New Deal: On Federalism, Free Market and the Right to Strike*, in *Georgetown Journal of International Law*, 2012, Vol. 43, pp. 1175-1258, spec. p. 1201. See also P. DE PASQUALE, *L'economia sociale di mercato nell'Unione europea*, in *Studi sull'integrazione europea*, 2014, No. 2, pp. 265-278; A.P. MCCANN, *The CJEU on Trial: Economic Mobility and Social Justice*, in *European Review of Private Law*, 2014, Vol. 22, No. 5, pp. 729-767.

⁸³ For an excursus on this issue, see M. ROCCELLA, T. TREU, *Diritto del lavoro dell'Unione europea*, Milano, Wolters Kluwer CEDAM, 7^a ed., 2016, pp. 439-451.

⁸⁴ Court of Justice, judgment of 21 September 1999, Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, EU:C:1999:430.

agraph 1 TFEU] when seeking jointly to adopt measures to improve conditions of work and employment»⁸⁵. Its reasoning assumed that the competition rules in the Treaty are placed alongside the Treaty's expressed concern for a high level of employment and social protection⁸⁶. The Court found a way to protect the social dialogue from the competition rules, which negatively affected the other objectives set by the Treaties⁸⁷.

The Court also considered a collective agreement to be in compliance with the competition rules in the *van der Woude* case of 2000⁸⁸. It assessed the legitimacy of the provisions of a collective agreement related to health care insurance in accordance with Articles 85 and 86 of the EC Treaty. After examining the nature and purpose of the agreement at issue, the Court held that it contributed to improving the working conditions of the employees by ensuring that they had the necessary means to meet their medical expenses and by reducing the costs which, in the absence of a collective agreement, would have to be borne by the employees⁸⁹.

However, this finding has not always been implemented⁹⁰.

In the *FNV Kunsten Informatie en Media* case of 2014, the European judges refused to protect the right to a collective labour agreement aimed at establishing

⁸⁵ *Ibidem*, para. 59.

⁸⁶ See *ibidem*, para. 60: «It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty».

⁸⁷ See S. WEATHERILL, *The Internal Market as a Legal Concept*, Oxford, Oxford University Press, 2017, pp. 42-43.

⁸⁸ Court of Justice, judgment of 21 September 2000, Case C-222/98, *Hendrik van der Woude v Stichting Beatrixoord*, EU:C:2000:475.

⁸⁹ Court of Justice, judgment of 21 September 2000, *van der Woude*, cit., para. 25.

⁹⁰ In line with *Albany* case, on the compatibility with competition rules, see Court of Justice, judgment of 21 September 1999, Joined Cases C-115/97, C-116/97 and C-117/97, *Brentjens' Handelonderneming v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen*, EU:C:1999:434; judgment of 21 September 1999, Case C-219/97, *Maatschappij Drijvende Bokken v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven*, EU:C:1999:437.

minimum fees for self-employed service providers because the musicians were not workers, but were self-employed, and thus were subject to the competition rules⁹¹. By contrast, with regard to the tariffs of procurators established by professional associations, in line with its consolidated case law, the Court clarified that when these fees are included in the national legislation they may not constitute a breach of the competition rules by those professional associations⁹².

The exemption from the competition rules is strictly connected to the contents of the agreement and its objectives (“nature and purpose”) aimed at governing work conditions. It follows that when the requirements are not met, the collective agreement falls within the scope of Article 101 TFEU ff.

On the relationship between the social rights and the economic freedoms, the Court of Justice has delivered a significant number of decisions⁹³.

In the *Schmidberger* case of 2003⁹⁴, which dealt with a demonstration on the Brenner motorway promoted by an association to protect the biosphere in the Al-

⁹¹ Court of Justice, judgment of 4 December 2014, C-413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, EU:C:2014:2411, para. 27 ff.

⁹² Court of Justice, judgment of 8 December 2016, Joined Cases C-532/15 and C-538/15, *Euro-saneamientos SL and Others v ArcelorMittal Zaragoza SA and Francesc de Bolós Pi v Urbaser SA*, EU:C:2016:932; similarly, judgment of 19 February 2002, Case C-35/99, *Criminal proceedings against Manuele Arduino, third parties: Diego Dessi, Giovanni Bertolotto and Compagnia Assicuratrice RAS SpA*, EU:C:2002:97; (Grand Chamber), judgment of the Court of 5 December 2006, Joined cases C-94/04 and C-202/04, *Federico Cipolla v Rosaria Fazari, née Portolese (C-94/04) and Stefano Macrino and Claudia Capoparte v Roberto Meloni (C-202/04)*, EU:C:2006:758.

⁹³ On this issue, see M. BALBONI, *Rapporti tra diritto interno e diritto dell'Unione europea*, cit., p. 38 ff.

⁹⁴ Court of Justice, judgment of 12 June 2003, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, EU:C:2003:333. On this case, and also on the following *Omega* case, see M. ROCCA, *Posting of Workers and Collective Labour Law: There and Back Again. Between Internal Market and Fundamental Rights*, Cambridge-Antwerp-Portland, Intersentia, 2015, p. 230 ff.; Ö. EDSTRÖM, *The Right to Collective Action – in Particular the Right to Strike – as a Fundamental Right*, in M. RÖNNMAR (edited by), *Labour Law, Fundamental Rights and Social Europe*, Oxford and Portland, Oregon, Hart Publishing, 2011, pp. 57-75, spec. pp. 70-71; P. MENGOZZI, *Il principio personalista nel diritto dell'Unione Europea*, Padova, CEDAM, 2010, p. 134 ff.

pine region that allegedly hindered the free movement of goods by closing that motorway to all traffic, the Court affirmed that the fundamental rights, including the social rights, such as the freedoms of expression and association, are qualified as a legitimate justification for restrictions on the free movement of goods, and that the principle of proportionality was thus respected⁹⁵. Nevertheless, «neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed»⁹⁶. The Court then added that the interests involved must be weighed considering all the circumstances of the case; in that regard, the competent authorities enjoy a wide margin of appreciation⁹⁷.

Further, in the *Omega* case of 2004⁹⁸, the Court made it clear that the fundamental rights may, in principle, prevail over the economic freedoms and justify a restriction⁹⁹. The decision addressed the question of whether it is compatible with the provisions on the freedom to provide services and the free movement of goods

⁹⁵ Court of Justice, judgment of 12 June 2003, *Schmidberger*, cit., para. 74; on the judgment at issue, see N.N. SHUIBHNE, *Fundamental rights and the framework of internal market adjudication: is the Charter making a difference?*, in P. KOUTRAKOS, J. SNELL (edited by), *Research handbook on The Law of the EU's Internal Market*, Cheltenham, UK, Northampton, MA, USA, Edward Elgar Publishing, 2017, pp. 215-238, spec. p. 219 ff.; S. WEATHERILL, *The Internal Market as a Legal Concept*, cit., pp. 137-138; E. TRIGGIANI, *La complessa vicenda dei diritti sociali fondamentali nell'Unione europea*, cit., p. 19; U. CARABELLI, *Libera circolazione dei servizi nella CE e dumping sociale: una riflessione sul caso Laval*, in *Studi in onore di Vincenzo Starace*, Napoli, Editoriale Scientifica, 2008, Vol. 3, pp. 1737-1759, spec. p. 1744.

⁹⁶ Court of Justice, judgment of 12 June 2003, *Schmidberger*, cit., para. 80.

⁹⁷ *Ibidem*, paras. 81-82.

⁹⁸ Court of Justice, judgment of 14 October 2004, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, EU:C:2004:614.

⁹⁹ *Ibidem*, paras. 33-35; E. TRIGGIANI, *La complessa vicenda dei diritti sociali fondamentali nell'Unione europea*, cit., p. 20.

contained in the Treaty establishing the European Community for a particular commercial activity, in the case of the operation of a so-called “laserdrome” involving simulated killing action, to be prohibited under national law because it offends the values enshrined in the Constitution, namely human dignity. The Court concluded that Community law does not preclude the «commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity»¹⁰⁰. Thus, the order prohibiting that activity does not negatively affect the freedom to provide services.

The interrelation between the social right to a collective agreement or action and the internal market freedoms has been addressed in other judgments, i.e. the *Laval quartet* decisions of 2007 and 2008¹⁰¹, which were issued after the EU enlargement occurred between 2004 and 2007. Such judgments addressed issues related to the position of social rights within the EU legal order, and how such position is interpreted and assessed when questions regarding the balancing between EU principles are submitted. The aspects examined by the Court were the effectiveness of the Treaty provisions, the test of proportionality and the legitimacy of measures that may restrict the economic freedoms.

In the *Viking* judgment, the case regarded the freedom of establishment and the exercise of collective action promoted by the Finnish trade union aimed at boycotting the company’s decision to change its flag in order to apply the Estonian collective contract, which was cheaper than the Finnish one. The Court recognised that the social rights are fundamental and are part of the EU general principles; nevertheless, they are subject to balancing with the fundamental economic freedoms. The related provisions possess horizontal effectiveness, and thus they are invocable by private persons, including trade unions. In the case at issue, the

¹⁰⁰ Court of Justice, judgment of 14 October 2004, *Omega*, cit., para. 41.

¹⁰¹ Court of Justice (Grand Chamber), judgment of 11 December 2007, *Viking*, cit.; (Grand Chamber), judgment of 18 December 2007, *Laval*, cit.; judgment of 3 April 2008, Case C-346/06, *Dirk Ruffert v Land Niedersachsen*, EU:C:2008:189; judgment of 19 June 2008, Case C-319/06, *Commission of the European Communities v Grand Duchy of Luxembourg*, EU:C:2008:350; on these decisions, see, *inter alia*, G. FONTANA, *Crisi economica ed effettività dei diritti sociali in Europa*, cit., pp. 30-39.

effectiveness was indeed between two private subjects, i.e. an enterprise and a trade union¹⁰². To declare that, the Court followed a personalist approach by affirming the possibility for enterprises to act against trade unions and seek compensation¹⁰³.

As to the inclusion of trade unions among the persons that may invoke the effectiveness of the Treaty provisions, the Court found that trade unions are subject to the rules on the economic freedoms, namely Article 43 EC Treaty (now Article 49 TFEU) on the freedoms of establishment and Article 49 EC Treaty (now Article 56 TFEU) on the free provision of services¹⁰⁴. It followed its former case law and clarified that those provisions do not apply «only to quasi-public organisations or to associations exercising a regulatory task and having quasi-legislative powers»¹⁰⁵ and that «in exercising their autonomous power, pursuant to their trade union rights, to negotiate with employers or professional organisations the conditions of employment and pay of workers, trade unions participate in the drawing up of agreements seeking to regulate paid work collectively»¹⁰⁶. In other words, it interpreted the provision on the freedom of establishment as meaning that collective action initiated by a trade union or a group of trade unions against an undertaking to force it to enter into a collective agreement falls within the scope of that

¹⁰² Court of Justice (Grand Chamber), judgment of 11 December 2007, *Viking*, cit., paras. 35, 56-66; (Grand Chamber), judgment of 18 December 2007, *Laval*, cit., paras. 96-99; for comments see S. GIUBBONI, *Libertà economiche fondamentali e diritto del lavoro, oggi*, in *Europa e diritto privato*, 2015, No. 2, pp. 493-509, spec. p. 502 f.; U. GRUŠIĆ, *The principle of effectiveness in European law and European private international law: the case of transnational employment in the European Court of Justice and English Courts*, in J-S. BERGÉ, S. FRANCO, M. GARDEÑES SANTIAGO (eds.), *Boundaries of European Private International Law*, Brussels, Bruylant, 2015, pp. 443-462, spec. p. 449 ff.; I. INGRAVALLO, *La Corte di giustizia tra diritto di sciopero e libertà economiche fondamentali*, cit., p. 649; U. CARABELLI, *Europa dei mercati e conflitto sociale*, Bari, Cacucci Editore, 2009, p. 143 ff.

¹⁰³ P. MENGOZZI, *Il principio personalista nel diritto dell'Unione Europea*, cit., p. 132.

¹⁰⁴ On this aspect, see S. WEATHERILL, *The Internal Market as a Legal Concept*, cit., p. 96; P. MENGOZZI, *Il principio personalista nel diritto dell'Unione Europea*, cit., p. 131.

¹⁰⁵ Court of Justice (Grand Chamber), judgment of 11 December 2007, *Viking*, cit., para. 64.

¹⁰⁶ *Ibidem*, para. 65.

article¹⁰⁷. Assuming that, the compatibility of collective action with EU law must be assessed.

In the *Viking* judgment (as well as in the *Laval* one), the consideration of the principle of effectiveness, which was a driving force¹⁰⁸, was followed by the evaluation of the proportionality test. Restrictions on the freedom of establishment are allowed to the extent that they are necessary to pursue the protection of workers. Further, the legitimacy of collective actions is to be assessed by national judges having regard to the circumstances of the cases, national laws and practices governing that action. Thus, the exercise of collective actions which are not connected to a particular labour dispute are not justifiable in so far as it impedes cross-border commercial activity. They only have a strategic and political objective, which does not prevail over the economic freedoms¹⁰⁹. Accordingly, the trade unions' autonomy is limited. An examination of the Court's approach reveals that it focused on the balancing between the economic freedoms enshrined in the Treaties and the right to collective action, even though the latter is outside of the EU competences, a barrier over which it had been able to leap in interpreting the free movement law, but which has stopped legislative action dead¹¹⁰.

In calling upon the national judges to maintain a balance, i.e. to determine if the collective action is proportionate and justified, the Court did not directly decide or give an opinion about the precedence of one right over another, thus resulting in an inconsistency in its reasoning. As observed in the doctrine, «in both cases, the Court uses the term 'balancing', although the impression one gets is that it gave rather more weight to the economic freedoms invoked by the trade unions. A particular quirk of the EU judicial system is that the outcome of the balancing does not always have to be decided by the ECJ itself. The preliminary reference mechanism may create a situation where it is not the international court itself (in

¹⁰⁷ *Ibidem*, para. 55; Court of Justice (Grand Chamber), judgment of 18 December 2007, *Laval*, cit., 98.

¹⁰⁸ U. GRUŠIĆ, *The principle of effectiveness in European law and European private international law*, cit., p. 451.

¹⁰⁹ S. WEATHERWILL, *The Internal Market as a Legal Concept*, Oxford, Oxford University Press, 2017, pp. 125-128.

¹¹⁰ *Ibidem*, p. 127.

this case, the ECJ) that decides on the balance to be struck, in a given case, between economic objectives and human rights, but the national courts where the case originates – albeit under guidance of general guidelines formulated by the ECJ»¹¹¹.

Moreover, according to such judgment, «collective social fundamental rights are underrated in such a way that they do not count in the context of a genuine weighing process, but merely appear in the course of the examination of an encroachment on a fundamental economic freedom under the heading of ‘proportionality’»¹¹². In addition, no attention was given to the collective dimension of the situation, because the question was confined to individual employee rights as a *sine qua non* of general interest¹¹³.

The Court appears to have followed two different approaches as to the individual and collective dimension¹¹⁴. As to individual rights, it granted a broader protection based on the principle of equality; however, as to the collective dimension, due to the precedence of the economic freedoms, it recognised the necessity to eliminate obstacles to free circulation. Though, such consideration may be criticised because free movement is also the basis of the anti-discrimination principles¹¹⁵.

Similarly, the *Laval* judgment was concerned with the exercise of collective action *vis-à-vis* the economic freedoms, namely the free provision of services (Article 49 TEC, now Article 56 TFEU). The case regarded a Swedish trade union that promoted a strike in order to request the application of the Swedish collective contract by a Latvian company in favour of Latvian workers posted in a work-

¹¹¹ B. DE WITTE, *Balancing of Economic Law and Human Rights by the European Court of Justice*, in P.M. DUPUY, F. FRANCONI, E.U. PETERSMANN (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford, Oxford University Press, 2009, pp. 197-207, spec. pp. 206-207.

¹¹² J.M. SCHUBERT, *The Social Progress Clause in EU law*, 2010, pp. 1-7, at p. 2, available at www.smmpt.pt.

¹¹³ *Ibidem*, spec. pp. 2-3.

¹¹⁴ See further on this issue A. BOGG, ‘Individualism’ and ‘Collectivism’ in *Collective Labour Law*, in *Industrial Law Journal*, 2017, Vol. 46, No. 1, pp. 72-108.

¹¹⁵ G. FONTANA, *Crisi economica ed effettività dei diritti sociali in Europa*, cit., p. 43.

place in Sweden. The legitimacy of the collective action was based on the protection of the national workers of the hosting State (Sweden) towards social dumping measures. The Court deemed the strike action to be in violation of the free provision of services rules because the protection against dumping was granted by the application of Directive 96/71 on the posting of workers in the hosting State¹¹⁶. The question arising in this case concerned whether the strike, which was aimed at concluding the collective agreement on the posted workers' conditions, was a legitimate action, or whether it was in violation of the free provision of services under the Treaty¹¹⁷. The balancing test carried out by the Court between the fundamental social rights and the economic freedoms does not seem to be acceptable.

To declare that the exercise of collective action or bargaining is in compliance with EU law, the Court identified four requirements: The restriction shall pursue a legitimate objective in compliance with the Treaties; it shall be based on imperative reasons of general interest; it shall be appropriate to guarantee the realisation of the objective; and it shall be proportionate¹¹⁸. In the abovementioned cases, the Court recognised the absence of the last two requirements, i.e. appropriateness and proportionality. It determined the limits and characteristics of the exercise of the right to strike, also taking into account that industrial action may sometimes be “voluntarily” disproportionate¹¹⁹.

One criticism concerned the fact that the Court could have granted relevance to the social rights based on the evolution of the context. Indeed, the Lisbon Treaty inserted the reference to the internal market as a highly competitive social mar-

¹¹⁶ On the Directive see further in Chapter 3. In general, on the risk of social dumping within the enlargement of the European Union, see I. INGRAVALLO, *La Corte di giustizia tra diritto di sciopero e libertà economiche fondamentali*, cit., pp. 653-655.

¹¹⁷ On this issue, see P. MENGOZZI, *Il principio personalista nel diritto dell'Unione Europea*, cit., spec. p. 141 ff.; for some considerations held before the Court delivered its judgment see U. CARABELLI, *Libera circolazione dei servizi nella CE e dumping sociale: una riflessione sul caso Laval*, cit., p. 1748 ff.

¹¹⁸ Court of Justice (Grand Chamber), judgment of 11 December 2007, *Viking*, cit., para. 75; (Grand Chamber), judgment of 18 December 2007, *Laval*, cit., para. 101.

¹¹⁹ I. INGRAVALLO, *La Corte di giustizia tra diritto di sciopero e libertà economiche fondamentali*, cit., p. 649.

ket economy aiming at full employment and social progress in line with Article 3, paragraph 3 TEU.

Looking back at the judges' approach in *Schmidberger*, the Court first confirmed the restriction on the freedom of movement, and then it justified such restriction (the exercise of the fundamental social rights) through the recourse to "overriding requirements relating to public interest" and assessed the proportionality between the exercise of the social rights and its objective¹²⁰. The Court recognised that the freedoms of expression and assembly are not absolute, and thus such rights may be restricted provided that such limitations consist of objectives of general interest and are not disproportionate.

It stems from the foregoing that according to the Court's reasoning, the fundamental rights, on the one hand, may restrict the economic freedoms and, on the other, they do not come first like the economic freedoms; in other words, social rights emerge only as restrictions to the fundamental principles enshrined in the Treaties. In terms of the priority (between economic freedoms and social rights), critics have argued that the pre-Lisbon case law demonstrated a problem of inconsistency, because the Court did not systematically address the issue, and particularly, it showed an insufficient appreciation of or respect for the normative distinctiveness of the fundamental rights and the renewing perceptions of market hegemony¹²¹. Consequently, it questioned the fundamental nature of the right to collective action, including industrial action, enjoyed by trade unions within the EU legal order.

In affirming the primacy of the economic freedoms, the Court «obeys the logic of the Treaties», in which collective rights have no place. It follows that with the aim of stating the precedence of collective rights, the Court should have denied the horizontal direct effect of the provisions on the freedoms of movement

¹²⁰ It was defined as a breach/justification methodology that is based on the historic background of the European integration: S. REYNOLDS, *Explaining the constitutional drivers behind a perceived judicial preference for free movement over fundamental rights*, in *Common Market Law Review*, 2016, No. 53, pp. 643-678.

¹²¹ N.N. SHUIBHNE, *Fundamental rights and the framework of internal market adjudication: is the Charter making a difference?*, cit., pp. 221 and 231 ff.

(namely the freedoms of establishment and to provide services)¹²². However, this would have led to a contradiction in the Court’s reasoning¹²³.

By requiring an assessment of the balancing between the fundamental rights and the economic freedoms, the Court established a “hierarchical equivalence” between them¹²⁴. However, such equivalence should have been determined in a more balanced way by recognising the higher relevance of the right to strike itself and by defining the extent to which it could be exercised and limited by the economic freedoms¹²⁵.

Moreover, in these judgments, the Court deemed the right to collective action as a “right”, and not as “a freedom” as some national systems do¹²⁶. In any case, such a remark is unlikely to have led to a different ruling.

Collective action, as a restriction that may be justifiable, nonetheless is limited when it creates an obstacle to cross-border economic activities. In the recent *Sähköalojen ammattiliitto* judgment of 2015, the Court again recognised limitations on the right to collective action¹²⁷.

Proportionality in the balancing of opposing rights is a difficult concept to reconcile with the process of collective relations¹²⁸. The national courts have a

¹²² U. GRUŠIĆ, *The principle of effectiveness in European law and European private international law*, cit., spec. p. 450; G. FONTANA, *Crisi economica ed effettività dei diritti sociali in Europa*, cit., spec. p. 32.

¹²³ G. FONTANA, *Crisi economica ed effettività dei diritti sociali in Europa*, cit., spec. p. 33.

¹²⁴ See L. CALAFÀ, *Art. 28 Carta*, in F. POCAR, M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell’Unione europea*, cit., p. 1745; P. DE PASQUALE, *L’economia sociale di mercato nell’Unione europea*, cit., p. 272.

¹²⁵ E. TRIGGIANI, *La complessa vicenda dei diritti sociali fondamentali nell’Unione europea*, cit., spec. p. 21.

¹²⁶ I. INGRAVALLO, *La Corte di giustizia tra diritto di sciopero e libertà economiche fondamentali*, cit., p. 647.

¹²⁷ Court of Justice, judgment of 12 February 2015, Case C-396/13, *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*, EU:C:2015:86. This is further discussed in Chapter 5 under a different point of view. See also R. ZAHN, *New Labour Laws in Old Member States. Trade Union Responses to European Enlargement*, Cambridge, Cambridge University Press, 2017, p. 102 f.

¹²⁸ R. ZAHN, *New Labour Laws in Old Member States. Trade Union Responses to European Enlargement*, cit., p. 103; N. HÖS, *The Principle of Proportionality in Viking and Laval: An Ap-*

wide margin of interpretation, and this may lead to disparities in the protection of collective action across the EU Member States. Requiring a proportionality test in the case of collective actions results in the paradox that the more successful the strike action, the less likely it is that it would be considered proportionate¹²⁹.

Against this background, the Court affirmed that the fundamental rights are part of the EU general principles, and as a result they need to be balanced with the economic freedoms¹³⁰. With specific regard to the right to strike, such a statement could hardly be referenced, because under Article 137, paragraph 5 EC Treaty (now Article 153 paragraph 5 TFEU), it falls within the Member States' competences. It should follow that in case of conflicts between the economic freedoms and the right to strike, the control of its legitimacy is up to the national authorities, and that European judges are not allowed to intervene¹³¹. However, it is unlikely that the Court will not intervene, given that in any case the right to strike should be in compliance with the general principles of EU law¹³². Precisely, thanks to the recognition of the direct effect of the Treaty provisions on the freedoms of movement, the Court extended the EU competences, and its control, into areas that fall within the Member States' sovereignty¹³³.

appropriate Standard of Judicial Review?, in *European Labour Law Journal*, 2010, Vol. 1, No. 2, pp. 236-253.

¹²⁹ C. BARNARD, *EU Employment Law and the Future of the European Social Model: The Past, the Present and the Future*, in *Current Legal Problems*, Vol. 67, No. 1, 1 January 2014, pp. 199-237, spec. p. 205.

¹³⁰ U. CARABELLI, *Libera circolazione dei servizi nella CE e dumping sociale: una riflessione sul caso Laval*, cit., p. 1750.

¹³¹ *Ibidem*, p. 1752.

¹³² G. ORLANDINI, *Diritto di sciopero, azioni collettive transnazionali e mercato interno dei servizi: nuovi dilemmi e nuovi scenari per il diritto sociale europeo*, WP C.S.D.L.E. "Massimo D'Antona", INT - 45/2006, pp. 32-33, available at <http://csdle.lex.unict.it>.

¹³³ E. NAVARRETTA, *Libertà fondamentali dell'U.E. e rapporti fra privati: il bilanciamento di interessi e i rimedi civilistici*, in *Rivista di diritto civile*, 2015, No. 4, pp. 878-910, spec. p. 882. This situation has been qualified as a contradiction or a paradox: I. INGRAVALLO, *Il diritto di sciopero e quello di contrattazione collettiva nell'Unione europea dopo il Trattato di Lisbona*, cit., spec. pp. 218-219.

A different scenario occurs when acting under other provisions. In line with such a consideration, Directive 96/71 on the posting of workers is actually based on former Article 47, paragraph 2 EC Treaty (now Article 57, paragraph 2 TFEU) and Article 55 EC Treaty (now Article 66 TFEU) on the free provision of services, and it ruled on the minimum wage, although such matter was excluded under Article 137 EC Treaty¹³⁴.

Another critical issue related to the social rights and the economic freedoms is the assessment of the legitimacy of collective actions that must be carried out by the national judges, who may limit collective autonomy, although it constitutes an established common (European) tradition. Moreover, such an evaluation addresses the interplay between collective actions and the economic freedoms of the internal market, and not the fundamental rights of citizens or democracy. Solidarity values are not considered. The Court of Justice provided the national judges with guidelines for the assessment of the balancing between the social rights and the economic freedoms which risk prejudicing the national constitutional traditions. At the end, such reasoning has the consequence of allowing companies from the Member States with cheaper labour costs to move into other countries.

Employers' rights and the freedom to provide transnational services were addressed in the *Rüffert* case of 2008¹³⁵. The Court was asked whether Article 49 EC Treaty, in combination with Directive 96/71, precludes an authority of a Member State from adopting a legislative measure requiring the contracting authority to designate, as contractors for public works contracts, only contractors which, when submitting their tenders, agree in writing to pay their employees, in return for the performance of the services concerned, at least the wage provided for in the collective agreement in force at the place where those services are performed. In the case, the awarded German undertaking had used, as a subcontractor, an enterprise established in Poland which was suspected of having employed workers on the building site at a wage below that provided for in the "Buildings and public

¹³⁴ See U. CARABELLI, *Libera circolazione dei servizi nella CE e dumping sociale: una riflessione sul caso Laval*, cit., p. 1753.

¹³⁵ Court of Justice, judgment of 3 April 2008, *Rüffert*, cit. See P. MENGOZZI, *Il principio personalista nel diritto dell'Unione Europea*, cit., p. 161 ff.

works” collective agreement. The Court affirmed that, pursuant to Directive 96/71, interpreted in light of the fundamental freedom to provide services, a Member State is not entitled to impose on undertakings established in other Member States, through a legislative measure, a rate of pay such as that provided for by the “Buildings and public works” collective agreement, as it was capable of constituting a restriction within the meaning of Article 49 EC Treaty¹³⁶.

In the *Commission v Luxembourg* judgment of 2008¹³⁷, the Court found that in the framework of the free provision of services, the obligation imposed by the national authority upon the posting employer to retain the documents necessary for monitoring purposes prior to the commencement of work would constitute an obstacle to that freedom¹³⁸.

After the Lisbon Treaty entered into force, the Court addressed the relationship between collective bargaining and economic freedoms in the *Commission v Germany* case of 2010¹³⁹. The facts of the case concerned a German collective contract that committed the management of the social security services to a body without the prior publication of a European tender. The Court found a violation of the relevant legislative acts. In its reasoning, it re-stated the fundamental nature of the right to collective bargaining as affirmed in international instruments, as well

¹³⁶ V. BRINO, *Gli equilibri della Corte di Giustizia: il caso Rüffert*, in *Rivista italiana di diritto del lavoro*, 2008, II, pp. 479-486; I. INGLESE, *La direttiva sul distacco e le ingiustificate restrizioni alla libera prestazione di servizi*, in *Massimario di giurisprudenza del lavoro*, 2008, pp. 542-543.

¹³⁷ Court of Justice, judgment of 19 June 2008, *Commission v Luxembourg*, cit.

¹³⁸ A. DONNETTE, *A propos d'une rencontre mouvementée entre droit social et droit du marché. Les arrêts Viking, Laval, Rüffert et Luxembourg*, in *Revue des affaires européennes*, 2007-08, pp. 341-358; see also M. ROCCELLA, T. TREU, *Diritto del lavoro dell'Unione europea*, cit., p. 443; A. LO FARO, *Diritti sociali e libertà economiche del mercato interno: considerazioni minime in margine ai casi Laval e Viking*, in *Lavoro e diritto*, 2008, No. 1, pp. 63-96, spec. p. 63 ss.

¹³⁹ Court of Justice (Grand Chamber), judgment of 15 July 2010, Case C-271/08, *European Commission v Federal Republic of Germany*, EU:C:2010:426; for a comment see D. COMANDÈ, *Il diritto di negoziazione collettiva cede il passo alle norme europee sugli appalti pubblici: quale compromesso è sostenibile?*, in *Rivista italiana di diritto del lavoro*, 2011, II, pp. 903-912.

as in the Charter¹⁴⁰. Recalling its former case law, however, the Court specified that such right may be subject to certain restrictions, even if it enjoys constitutional protection in the Member States' legal order. As provided in Article 28 of the Charter, that right must be exercised in accordance with European Union law and must therefore be reconciled with the requirements stemming from the freedoms protected by the TFEU¹⁴¹.

To sum up, European judges have followed an approach pursuant to which the right to collective bargaining or action needs to be balanced with the principles envisaged in EU law. The fundamental rights are not absolute and need to be subject to the economic freedoms. In other words, the Court re-affirmed the precedence of the internal market within the European integration process to the detriment of the social rights¹⁴². The rights to collective action and bargaining have a relative character because their exercise needs to be in compliance with EU law, and they are thus subject to the principle of proportionality, given that such rights could restrict the economic freedoms¹⁴³.

In this scenario, the judgement delivered by the Court of Justice in the *CASTA* case of 2016, a reference for a preliminary ruling concerning the application of the EU general principles in national public activities whose relevant elements are confined to a single Member State, but from which it is nevertheless possible to determine a certain cross-border interest, necessitates reflection¹⁴⁴. The Court evaluated the compatibility of the Italian legislation authorising the regional health authorities to entrust medical transport activities to registered voluntary associations fulfilling the legal requirements, directly and without advertising, by

¹⁴⁰ Court of Justice (Grand Chamber), judgment of 15 July 2010, *Commission v Germany*, cit., paras. 37-39.

¹⁴¹ *Ibidem*, paras. 43-44; J.M. SCHUBERT, *The Social Progress Clause in EU law*, cit., at p. 3.

¹⁴² I. INGRAVALLO, *La Corte di giustizia tra diritto di sciopero e libertà economiche fondamentali*, cit., p. 643.

¹⁴³ *Ibidem*, spec. p. 646; see Court of Justice (Grand Chamber), judgment of 11 December 2007, *Viking*, cit., paras. 44-47; (Grand Chamber), judgment of 18 december 2007, *Laval*, cit., paras. 91-95.

¹⁴⁴ Court of Justice, judgment of 28 January 2016, Case C-50/14, *Consorzio Artigiano Servizio Taxi e Autonoleggio (CASTA) and Others v Azienda sanitaria locale di Ciriè, Chivasso e Ivrea (ASL TO4) and Regione Piemonte*, EU:C:2016:56, spec. at para. 42.

means of reimbursement of the expenditure incurred, with the EU principles on public health. It recognised that this was a purely internal situation (national transport contracts with voluntary associations) which pursued budgetary and public service purposes¹⁴⁵. The Member States are competent in the organisation of their public health and social security systems, and such objectives are taken into consideration by EU law¹⁴⁶. They indeed must guarantee the exercise of the fundamental freedoms in the area of health care and must not «introduce or maintain unjustified restrictions»; «however, in the assessment of compliance with that prohibition, account must be taken of the fact that the health and life of humans rank foremost among the assets or interests protected by the Treaty and it is for the Member States, which have a discretion in the matter, to decide on the degree of protection which they wish to afford to public health and on the way in which that degree of protection is to be achieved (judgement in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, para. 56 and the case-law cited)»¹⁴⁷. In the case at issue, the Court allowed restrictions on the economic freedoms in the pursuit of EU general principles, such as public health, limited only by the prohibition on the abuse of rights¹⁴⁸.

What if such a solution is (hypothetically) valid in the context of the protection of the social rights? The balance between economic freedoms and social rights should be determined on the basis of some considerations related to EU principles in the social context, the lawfulness of the restrictions on the economic freedoms, the compatibility of the national legislation with EU law, and the national law's objective. In particular, it could be asserted that the protection of social rights may be negatively affected in the case of national legislation that pursues «the objectives of the good of the community and budgetary efficiency on which that system is based»¹⁴⁹.

¹⁴⁵ *Ibidem*, para. 57.

¹⁴⁶ *Ibidem*, paras. 58-59.

¹⁴⁷ *Ibidem*, para. 60.

¹⁴⁸ *Ibidem*, para. 65. For some considerations, see D. DIVERIO, *Il ruolo degli Stati nella definizione del modello sociale europeo*, in *Studi sull'integrazione europea*, 2015, No. 3, pp. 515-545.

¹⁴⁹ Court of Justice, judgment of 28 January 2016, *CASTA*, cit., para. 63.

Overall, as the Charter is binding, the Court should have changed its approach and given relevance to the social rights by re-balancing the priorities. The main issue is how the internal market, as a legal concept, is framed. The starting point of the Court's findings is the economic freedoms, rather than the fundamental rights to collective action, including the right to strike, and to collective bargaining, which are only deemed as possible exceptions. In light of the case law, a distinction amongst social values and rights must however be drawn: social values of public interest (such as public health, as examined above) may restrict economic freedoms; whereas, a social right (such as the right to collective action) may be restricted when its exercise and consequences may affect the internal market.

Aside from the criticism on the balancing test required because of the hierarchical equivalence between social rights and market freedoms, it is significant that the Court recognised the social profile of the (then) Community¹⁵⁰. What could be debated is whether social policy could constitute a priority for the EU and thus be considered as an autonomous policy within the European integration progress. In this sense, the European Pillar of Social Rights¹⁵¹, which contains principles and rights that are essential for fair and well-functioning labour markets and welfare systems, could be a first step forward in the promotion of social rights' protection, notwithstanding that it serves solely as a guide without legal binding effect.

¹⁵⁰ Court of Justice (Grand Chamber), judgment of 11 December 2007, *Viking*, cit., para. 78; (Grand Chamber), judgment of 18 December 2007, *Laval*, cit., paras. 104-105.

¹⁵¹ See https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en.

2.3. Fundamental social rights in times of economic crisis.

Social rights were degraded as a result of actions within the direction of the integration process initiated by the Court of Justice case law on the internal market, where the precedence of the economic freedoms over social rights, as well as in the context of the economic governance, was recognised¹⁵². Nevertheless, social rights must be respected as fundamental rights that form part of the EU general principles and are constitutionally recognised at the national level, thus consisting of common constitutional traditions in the EU.

In introducing the present analysis, the statement addressed to the European Parliament in 2011 by the ILO Director General is relevant, in which it was underlined that «respect for fundamental principles and rights at work is non-negotiable; not even in times of crisis when questions of fairness abound. This is particularly important in countries having to adopt austerity measures. We cannot use the crisis as an excuse to disregard internationally agreed labour standards»¹⁵³. This raises the issue concerning how fundamental social rights are conceived in times of economic and financial crisis. The case law at European and national levels demonstrates a persistent claim for the protection of constitutional rights, even in emergency situations. In this regard, a measure adopted in accordance with the mechanisms of financial assistance or of the safety of the euro area were deemed to restrict social-labour rights due to the national reforms affecting the social system¹⁵⁴.

¹⁵² G. FONTANA, *Crisi economica ed effettività dei diritti sociali in Europa*, cit., pp. 5 and 17.

¹⁵³ ILO Director-General address to the European Parliament, Statement of 14 September 2011, available at www.ilo.org.

¹⁵⁴ On the mechanisms of financial assistance, see M. DAWSON, *The Governance of EU Fundamental Rights*, Cambridge, Cambridge University Press, 2017, p. 189 ff.; A. VITERBO, F. COSTAMAGNA, *L'impatto sociale della politica di condizionalità nel contesto della crisi nell'area euro: profili giuridici*, in N. NAPOLETANO, A. SACCUCCI (a cura di), *Gestione internazionale delle emergenze globali: regole e valori*, Napoli, Editoriale Scientifica, 2013, pp. 167-194, spec. pp. 167-177; on measures adopted in Spain, Portugal and Greece, see C. MARCHESE, *I diritti sociali nell'epoca dell'austerità: prospettive comparate*, in *Diritto pubblico comparato ed europeo*, 2017, No. 1, pp. 141-172, spec. pp. 150-157.

In the crisis context, not only the democratic freedoms but also the economic and social rights have been at issue¹⁵⁵. The anti-crisis strategy has been criticised because the protection of values and interests, including social rights¹⁵⁶, and the impact of the crisis on the social dimension were not duly considered¹⁵⁷.

It appears that in the situation of economic and financial crisis, the protection of rights should have been greater. Such issue was addressed by the European Parliament in its amendments¹⁵⁸ on the proposal on the strengthening of the financial mechanisms¹⁵⁹, in which it suggested making the compliance of such mechanisms

¹⁵⁵ On this issue see R. CAFARI PANICO, *L'affievolimento dei diritti nella crisi economica e politica dell'Unione europea*, in *Studi sull'integrazione europea*, 2017, No. 2, pp. 289-316; F. FINES, *L'atteinte aux droits fondamentaux était-elle le prix du sauvetage de la zone euro?*, in R. TINIÈRE, C. VIAL (sous la direction de), *La protection des droits fondamentaux dans l'Union européenne*, cit., pp. 195-211.

¹⁵⁶ Council of Europe, *Austerity measures - a danger for democracy and social rights*, adopted by the Parliamentary Assembly on 26 June 2012 (22nd Sitting), available at <http://assembly.coe.int>.

¹⁵⁷ European Union Agency for Fundamental Rights, *Protecting fundamental rights during the economic crisis*, Working Paper, December 2010, spec. pp. 47-50, available at <http://fra.europa.eu>; A. VITERBO, F. COSTAMAGNA, *L'impatto sociale*, cit., p. 177 ff.

¹⁵⁸ European Parliament legislative resolution of 12 March 2013 on the proposal for a regulation of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area (COM(2011)819 - C7-0449/2011 - 2011/0385(COD)) P7_TA(2013)0069; Position of the European Parliament adopted at first reading on 12 March 2013 with a view to the adoption of Regulation (EU) No .../2013 of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability (EP-PE_TC1-COD(2011)0385).

¹⁵⁹ Proposal for a Regulation of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area, COM(2011)819 final of 23 November 2011, then Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, in *OJ L* 140 of 27 May 2013, pp. 1-10.

with the social dimension and the EU democratic principles clear¹⁶⁰. In particular, the European Parliament proposed the introduction of a new Recital No. 2 on the respect and promotion of social rights within the employment context, by referring to the so-called “social clause” under Article 9 TFEU¹⁶¹, and a new Recital No. 11, in which it requested the involvement of social partners and civil society organisations in the law-making process¹⁶². In the adopted Regulation No. 472/2013, such additions were included, in conjunction with references to the need for compliance with Article 152 TFEU and Article 28 of the Charter¹⁶³.

To briefly contextualise, the legal basis of the anti-crisis measures should be considered¹⁶⁴. This consists of the memorandum of understanding concluded after the decision on the loan by the Member State in difficulty with the *Troika*, i.e. Presidents of the Commission, the European Central Bank and the International Monetary Fund. It is a programme containing all the necessary steps to be taken in order to overcome the crisis. This act was formed in accordance with the Treaty establishing the European Stability Mechanism (ESM)¹⁶⁵, adopted on the basis of

¹⁶⁰ A. VITERBO, F. COSTAMAGNA, *L'impatto sociale*, cit., p. 176.

¹⁶¹ See the proposed Recital No. 2, in European Parliament legislative resolution of 12 March 2013, cit.: «requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health».

¹⁶² See the proposed Recital No. 11: «social partners and civil society organisations in the preparation, implementation, monitoring and evaluation of financial assistance programmes, in accordance with national rules and practice».

¹⁶³ See the proposed Article 1, para. 4.

¹⁶⁴ On this issue, see F. FABBRINI, *Economic Policy in the EU after the Crisis: Using the Treaties to Overcome the Asymmetry of EMU*, in *Il Diritto dell'Unione europea*, 2016, No. 3, pp. 529-549, spec. p. 532, who defined it as a semi-governmental method; A. KOUKIADAKI, *Strategie di contenzioso contro le misure di austerità sulla base del diritto dell'Unione europea: i casi di Grecia e Portogallo*, in *Rivista giuridica del lavoro e della previdenza sociale*, 2015, No. 2, pp. 411-444.

¹⁶⁵ Signed on 2 February 2012 and set up in October 2012 as a successor to the European Financial Stability Facility (EFSF) and European Financial Stabilisation Mechanism (EFSM), replaced since 1 July 2013.

Article 136, paragraph 3 TFEU¹⁶⁶. The national measures adopted to overcome the crisis must be based on the principle of conditionality, that is to say that the loan is granted in so far as the country respects certain conditions in order to solve the economic crisis and to ensure that that mechanism will operate in a way that will comply with European Union law, including the measures adopted by the Union in the context of the coordination of the Member States' economic policies¹⁶⁷. The legal nature of those acts was argued by national judges as well as by authors, who classified them as acts having a pre-constitutional nature or being like international treaties, or like an "action plan"¹⁶⁸. In general, according to the main criticism, European institutions seemed to have found a way to interfere with the national social systems (which do not fall within the EU competences)¹⁶⁹.

It is undisputed that economic and financial adjustment programmes aimed at tackling the crisis may entail structural reforms and interference in the national social dimension, and in the welfare state in general¹⁷⁰.

The question arising in this context concerns the compatibility of such measures with the EU Treaty system, including general principles and fundamental rights. With the introduction of Article 9 TFEU by the Lisbon Treaty, which stresses the objective of enhancing the social dimension of the Union, having a

¹⁶⁶ Para. 3 was inserted in accordance with Article 1 of Decision 2011/199, European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, in *OJ L* 91 of 6 April 2011, pp. 1-2. See R. CAFARI PANICO, *L'affievolimento dei diritti nella crisi*, cit., pp. 290-291.

¹⁶⁷ G. FONTANA, *Crisi economica ed effettività dei diritti sociali in Europa*, cit., pp. 9-10. On this point see Court of Justice (Full Court), judgment of 27 November 2012, Case C-370/12, *Thomas Pringle v Government of Ireland and Others*, EU:C:2012:756, paras. 72, 108-112.

¹⁶⁸ On such definitions see C. MARCHESE, *I diritti sociali nell'epoca dell'austerità*, cit., p. 149, fn. 15.

¹⁶⁹ Among others, see G. FONTANA, *Crisi economica ed effettività dei diritti sociali in Europa*, cit., spec. p. 11.

¹⁷⁰ For a short overview of the programs adopted with regard to Greece, Ireland and Portugal, see A. VITERBO, F. COSTAMAGNA, *L'impatto sociale*, cit., pp. 178-179.

horizontal effect¹⁷¹, EU policies and measures must observe social-related issues in their elaboration and implementation. Problems with compatibility would therefore violate EU law, and, in particular, provisions having general application¹⁷², as well as the Charter, which has been binding since the entry into force of the Lisbon Treaty. In addition, in light of the national case law, compatibility has also been claimed with regard to the constitutional rights.

As to the assessment at the European Union level, some judgments have addressed the issues at hand.

The *Hellenic Republic v Commission* case of 2013¹⁷³ demonstrates the inconsistency of the situation arising in times of economic crisis related to competition policy. It concerned the illegality of a state aid that the Greek Government claimed to have delivered in the exceptional circumstances of the economic crisis. First, the General Court stated that «the economic crisis in the European Union from 2008 does not constitute a circumstance that is capable of calling in question the fact that the agricultural sector is exposed to strong competition within the European Union» and that «the Commission has moreover adopted specific rules aimed at authorising certain State aid during the economic crisis, in particular, the [Temporary Community Framework for State aid measures], which precluded aid granted in the primary agricultural sector being declared compatible with the internal market»¹⁷⁴. However, according to the Court's final judgment of 2016, the

¹⁷¹ P. DE PASQUALE, *L'economia sociale di mercato nell'Unione europea*, cit., p. 273 f.; E. TRIGGIANI, *La complessa vicenda dei diritti sociali fondamentali nell'Unione europea*, cit., p. 23; G. FONTANA, *Crisi economica ed effettività dei diritti sociali in Europa*, cit. p. 13; M.C. BARUFFI, *I diritti sociali nell'Unione europea dopo il Trattato di Lisbona*, in *Guida al Lavoro, Il Sole 24 ore*, 2010, No. 5, pp. 44-49.

¹⁷² A. VITERBO, F. COSTAMAGNA, *L'impatto sociale*, cit., pp. 180-183.

¹⁷³ President of the General Court, order of 19 September 2012, Case T-52/12 R, *Hellenic Republic v European Commission*, EU:T:2012:447; General Court, judgment of 16 July 2014, T-52/12, *Hellenic Republic v European Commission*, EU:T:2014:677; Court of Justice (Grand Chamber), judgment of 8 March 2016, Case C-431/14 P, *Hellenic Republic v European Commission*, EU:C:2016:145. For some comments see L. IDOT, *Aides à la production agricole et situation de crise*, in *Europe*, May 2016, Comm. n° 5, p. 25.

¹⁷⁴ General Court, judgment of 16 July 2014, *Hellenic Republic*, cit., para. 108.

Greek Government failed to allege emergency circumstances¹⁷⁵, and thus the Court declared the plea in law to be unfounded.

In the *Pringle* case of 2012¹⁷⁶ the Court stated the inapplicability of the Charter when the Member States institute a mechanism such as the European Stability Mechanism (ESM) because the «Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism» and its creation is not capable of affecting the exclusive competence held by the Union under Article 3, paragraph 1, letter *c* TFEU in the area of monetary policy for the Member States whose currency is the euro¹⁷⁷. If the ESM is placed outside the European legal framework¹⁷⁸, the problem is the determination of the context in which the institutions and the *Troika* act, even if not all the actions are attributable to the *Troika* (e.g. only to the Council). When EU institutions act, they are obliged to respect the Charter and EU law; accordingly, even with regard to financial measures, the Charter should be respected, given that the protection of fundamental rights is prescribed in the relevant legislation¹⁷⁹.

¹⁷⁵ Court of Justice (Grand Chamber), judgment of 8 March 2016, *Hellenic Republic*, cit., paras. 74-75.

¹⁷⁶ Court of Justice (Full Court), judgment of 27 November 2012, *Pringle*, cit. For comments see, among others, R. CAFARI PANICO, *L'affievolimento dei diritti nella crisi*, cit., pp. 291-292; E. BERTOLINI, *Il futuro della governance finanziaria europea alla luce della sentenza Pringle*, in *Rivista giuridica del lavoro e della previdenza sociale*, 2013, No. 2, pp. 180-194.

¹⁷⁷ Court of Justice (Full Court), judgment of 27 November 2012, *Pringle*, cit., para. 180.

¹⁷⁸ *Ibidem*, para. 158: «the Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union, such as the task of coordinating a collective action undertaken by the Member States or managing financial assistance, provided that those tasks do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties».

¹⁷⁹ See Article 1, para. 4 Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, in *OJ L* 140 of 27 May 2013, pp. 1-10, according to which institutions and Member States «shall fully observe Article 152 TFEU [and] take into account national rules and practice and Article 28 of the Charter of Fundamental Rights of the Euro-

On the compliance of the measures at issue with the Charter, it may be noted that, given that the ESM and the national measures adopted as a result of it are not included in the scope of EU law, the Member States are not obliged to respect Charter rights, and they are not subject to the Court of Justice's jurisdiction¹⁸⁰. However, such statement appears to be incoherent. Indeed, in the field of the Economic and Monetary Union (EMU) under the Treaties, the Member States and the institutions, when adopting economic or monetary measures, are required to comply with the Charter. Thus, given that the anti-crisis measures concern matters that fall under economic policy, their consistency with EU law should be ensured as well¹⁸¹.

On this point, the European Parliament has noted that the programmes are not bound by the Charter or by the provisions of the Treaties, and has stressed «that pursuing economic and financial stability in the Member States and the Union as a whole must not undermine social stability, the European social model or the social

pean Union. Accordingly, the application of this Regulation and of those recommendations does not affect the right to negotiate, conclude and enforce collective agreements or to take collective action in accordance with national law». Similarly, Recital No 7 and Article 1, para. 2 of Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, in *OJ L 140* of 27 May 2013, pp. 11-23.

¹⁸⁰ For a comment, among others, see A. STEINBACH, *Effect-based analysis in the court's jurisprudence on the euro crisis*, in *European Law Review*, 2017, Vol. 42, No. 2, pp. 254-269; F. MUNARI, *Da Pringle a Gauweiler: i tormentati anni dell'unione monetaria e i loro effetti sull'ordinamento giuridico europeo*, in *Il Diritto dell'Unione europea*, 2015, No. 4, pp. 723-755, spec. p. 741 ff.

¹⁸¹ Court of Justice (Full Court), judgment of 27 November 2012, *Pringle*, cit., paras. 158-164. On the responsibility of EU institutions for measures adopted within ESM, see R. CAFARI PANICO, *L'affievolimento dei diritti nella crisi*, cit., pp. 293-296, with regard to two judgments related to the situation in Cyprus, *Ledra Adversting* and *Mallis*.

rights of EU citizens»¹⁸², and thus the institutions and the Member States must respect those rights within the implementation of the adjustment programmes¹⁸³.

Also, in the *Gauweiler* judgment of 2015¹⁸⁴, which was decided upon reference for a preliminary ruling by the German Constitutional Court, the Court of Justice was questioned on the adjustment programme envisaged within the ESM system in light of the safeguarding of constitutional rights. Some citizens claimed respect for their fundamental democratic rights *vis-à-vis* the financial risks arising from the policy of assistance adopted by the European Central Bank (ECB) with respect to countries in over-indebtedness. The main question concerned the *ultra vires* action adopted by the ECB. The German Constitutional Court found itself competent as to the control of the legitimacy of the ECB action in light of the fundamental rights granted by the German Constitution. The Court of Justice interpreted the provisions concerning the ECB competences and confirmed its power to adopt the programme in question.

Specifically concerning the competence of the Court to address issues related to national measures falling within the ESM system, two orders considered Portuguese legislation establishing salary reductions for certain public-sector workers. Both in the *Sindicato dos Bancários* case of 2013¹⁸⁵ and in the *Sindicato Nacional* case of 2014¹⁸⁶, the Court of Justice stated that it «clearly lacks jurisdiction with

¹⁸² See Report of 28 February 2014 on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries (2013/2277(INI)), spec. points 32, 80-82.

¹⁸³ See European Parliament resolution of 13 March 2014 on Employment and social aspects of the role and operations of the Troika (ECB, Commission and IMF) with regard to euro area programme countries (2014/2007(INI)), point 40.

¹⁸⁴ Court of Justice (Grand Chamber), judgment of 16 June 2015, Case C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag*, EU:C:2015:400. On this case see L.F. PACE, *The OMT case, the “intergovernmental drift” of the Eurozone crisis and the (inevitable) rectification of the BVerfG jurisprudence in light of the ECJ’s Gauweiler judgment*, in *Il Diritto dell’Unione europea*, 2017, No. 1, pp. 155-176.

¹⁸⁵ Court of Justice, order of 7 March 2013, Case C-128/12, *Sindicato dos Bancários do Norte and Others v BPN - Banco Português de Negócios SA*, EU:C:2013:149.

¹⁸⁶ Court of Justice, order of 26 June 2014, Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial - Companhia de Seguros SA*, EU:C:2014:2036.

regard to the request», namely in connection with the 2011 Finance Law, taking into account the fact that the orders for reference did not contain any specific evidence to support the view that that law was intended to implement EU law. Thus, EU law was not involved and under Article 51, paragraph 1 of the Charter, the Court has no power to control measures falling outside the scope of EU law¹⁸⁷.

Some deemed the requests to be an expression of a «European constitutionality issue»¹⁸⁸, in which the Portuguese judges searched for a European legal basis to declare the national legislation at stake to be inadmissible. The national courts believed that the domestic measures were contrary to the principles of equality and non-discrimination, as well as to the right to fair and just working conditions. The social and welfare rights linked to the freedom of movement are included, as has been addressed by the Court of Justice in other cases¹⁸⁹.

The most recent judgment delivered by the Court of Luxembourg on the compatibility with Union law of the Greek discipline of collective redundancy adopted in times of crisis is the *AGET Iraklis* case of 2016¹⁹⁰. It originated from a legal action promoted by a Greek undertaking, to which, in compliance with Greek law, the Ministry of Labour Law decided not to grant an authorisation for the collective redundancy procedure, which was necessary in the case of a failure of the agreement between the parties. For the purposes of the present analysis, it is relevant to note that, according to the Court, the alleged existence of «an acute economic crisis and a particularly high unemployment rate» in the country does not affect the assessment of the incompatibility of Greek law with the effectiveness of Union law¹⁹¹. In this case the question was whether serious social reasons

¹⁸⁷ R. CAFARI PANICO, *L'affievolimento dei diritti nella crisi*, cit., pp. 299-300.

¹⁸⁸ C. SALAZAR, *Crisi economica e diritti fondamentali*, Relazione al XXVIII Convegno annuale dell'AIC, 11 October 2013, available at www.rivistaaic.it/relazione-al-xxviii-convegno-annuale-dell-aic-crisi-economica-e-diritti-fondamentali.html.

¹⁸⁹ R. CAFARI PANICO, *L'affievolimento dei diritti nella crisi*, cit., pp. 306-311; R. PALLADINO, *Protezione delle finanze degli Stati membri e ridefinizione delle condizioni di esercizio delle libertà fondamentali*, in *Studi sull'integrazione europea*, 2016, No. 3, pp. 533-556.

¹⁹⁰ Court of Justice (Grand Chamber), judgment of 21 December 2016, Case C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, EU:C:2016:972.

¹⁹¹ *Ibidem*, paras. 105-108.

might justify restrictions on the freedom of establishment and thus allow national measures concerning collective redundancy. As clarified in the opinion of Advocate General Wahl¹⁹², national measures adopted in accordance with a stability programme cannot affect the effectiveness of EU law, namely EU provisions on the economic freedoms.

Moreover, the anti-crisis measures also raised questions of compatibility with human rights. The European Court of Human Rights was indeed requested to intervene on this issue.

In the *Felicia Mihăieş and Adrian Gavril Senteş v Rumania* decision of 2011¹⁹³, the European judges deemed the national legislation providing for salary reductions compatible with the Convention, namely Article 1 of Protocol No. 1 (protection of property). The national authorities were better placed to deal with the case and enjoyed a margin of appreciation, provided that the proportionality and reasonableness principles are met. In such cases, due to the economic crisis and having regard to the balancing between the general public interests and individual rights, such measures were not considered to be in violation of the Convention.

Complaints against the cuts in wages and pensions envisaged in the national urgent measures adopted to respond to the financial crisis were the object of the *Koufaki and ADEDY v Greece* decision of 2013¹⁹⁴. The European Court recog-

¹⁹² Advocate General Wahl, opinion delivered on 9 June 2016, Case C-201/15, *AGET Iraklis*, EU:C:2016:429, para. 80.

¹⁹³ European Court of Human Rights, decision of 6 December 2011, Applications Nos. 44232/11 and 44605/11, *Felicia Mihăieş v Rumania* and *Adrian Gavril Senteş v Rumania*. All decisions and judgments of the European Court of Human Rights are available at <https://hudoc.echr.coe.int>.

¹⁹⁴ European Court of Human Rights, decision of 7 May 2013, Applications Nos. 57665/12 and 57657/12, *Ioanna Koufaki v Greece* and *ADEDY v Greece*. The cases were also brought before the General Court of the EU Court of Justice: see orders of 27 November 2012, Case T-541/10 and Case T-215/11, *Anotati Dioikisi Enoseon Dimosion Ypallilon (ADEDY) and Others v Council of the European Union*, EU:T:2012:626 and EU:T:2012:627, respectively. The applications concerned two Council Decisions that were addressed directly to Greece and regarded the fiscal surveillance and deficit reduction necessary to remedy the situation of excessive deficit. The Decisions allegedly violated, among others, the principle of conferral.

nised the wide margin of appreciation of the States in regulating their social policy and that national legislation is legitimate unless it is manifestly without a reasonable foundation. Moreover, this margin is even wider when the issues involve an assessment of the priorities as to the allocation of limited State resources. On the ground of the existence of an exceptional crisis, the Court deemed the measures justified¹⁹⁵.

Also, the *Mateus and Santos Januário v Portugal* case¹⁹⁶ concerned the payment of the applicants' public sector pensions, which were reduced in 2012 because of cuts to Portuguese Government spending. The Court examined the compatibility of the reductions in the applicants' pension payments with Article 1 of Protocol No. 1 and held that the reductions were proportionate in connection with the applicants' right to the protection of property. In light of the exceptional financial problems that Portugal faced at the time, and given the limited and temporary nature of the pension cuts, the Portuguese Government had struck a fair balance between the interests of the general public and the protection of the applicants' individual right to their pension payments.

Austerity measures and the economic crisis in Greece were recently subject to a complaint before the European Committee of Social Rights, who delivered its judgment in March 2017¹⁹⁷. According to the claimant, the legislation enacted between 2010 and 2014 as part of the austerity programme imposed to Greece had allegedly violated the provisions of the Social Charter on the rights to work, just conditions of work, a fair remuneration, of children and young persons to protec-

The actions were dismissed by the General Court for reasons of lack of standing of the applicants, because they had failed to demonstrate that they were directly concerned by the challenged acts and because the measures were deemed general and required the adoption of implementing measures by the Greek authorities, for which the latter enjoyed a broad discretion.

¹⁹⁵ See R. CAFARI PANICO, *L'affievolimento dei diritti nella crisi*, cit., pp. 303-304.

¹⁹⁶ European Court of Human Rights, decision of 8 October 2013, Applications Nos. 62235/12 and 57725/12, *António Augusto Da Conceição Mateus v Portugal* and *Lino Jesus Santos Januário v Portugal*; see R. CAFARI PANICO, *L'affievolimento dei diritti nella crisi*, cit., p. 304.

¹⁹⁷ European Committee of Social Rights, Decision on the merits of 23 March 2017, published on 5 July 2017, Complaint No. 111/2014, *Greek General Confederation of Labour (GSEE) v Greece*.

tion, and to take part in the determination of working conditions. The Committee found, *inter alia*, that the measures imposing the reduction in the minimum wage, especially for workers under the age of 25, were disproportionate and excessive, and violated Article 1, paragraph 2 of the Social Charter. As observed by the Committee, the national anti-crisis legislation did not seem to achieve the objective of restoring the economic situation; by contrast, it led to serious breach of workers' rights. However, such a decision is unlikely to have legally binding effects, rather it could be an interpretative guidance¹⁹⁸.

Moving at the national level, austerity measures adopted to face economic crisis were brought before Constitutional Courts with the aim of identifying the limits to the economic interventions and safeguarding social security systems and rights. A common element established in most of the relevant judgments of the Courts of such Member States consists of the minimum subsistence that is linked to human dignity¹⁹⁹. Under their judgments, the principles of proportionality and reasonableness were considered in order to assess the compatibility of the measures.

A short analysis of the Portuguese and Italian contexts is included here to show the way in which social rights, in general, are taken into account, and the challenges and obstacles that their protection encountered in times of crisis. Indeed, both the Italian (*Corte costituzionale*) and Portuguese (*Tribunal Constitucional*) Constitutional Courts have addressed the protection of social rights in some of their recent judgments, which were delivered in the context of the economic crisis.

Balancing social rights with economic measures is the core issue. The national courts have claimed respect for the fundamental rights provided for in the EU Charter in relation to the restrictive measures adopted by the States to tackle the economic crisis. As pointed out by the Court of Justice, the Member States must respect the fundamental rights whenever they are called upon to apply EU law, as stated by Article 51, paragraph 1 of the EU Charter. By contrast, national

¹⁹⁸ Similarly, on the non-binding value of the decisions of the European Committee, and the ILO reports, see further in this Chapter, para. 2.4 specifically on the right to collective action.

¹⁹⁹ C. MARCHESE, *I diritti sociali nell'epoca dell'austerità*, cit., pp. 157-168.

measures imposing restrictions on the social rights, such as those in the cases before the Portuguese and Italian Constitutional Courts, should not fall within EU law, because Article 5 TFEU provides that the Member States shall coordinate the economic policies within the EU. Thus, the measures adopted by them in the field of economic policies should not be subject to the EU general principles.

In general, judges apply constitutional principles with the aim of fully and effectively pursuing a high level of protection for constitutional rights. The balance between the fundamental rights and the economic measures has been implemented by the Court of Justice with reference to the fundamental economic freedoms as the pillars of EU law. Nevertheless, one could note that EU law clearly refers to the common constitutional traditions of the Member States²⁰⁰; thus, the Court of Justice should probably also take such national values into account. The finding of the Court, which has recognised the economic freedoms as prevailing over the social rights, appears not to have been followed by (some) national judges. It is, however, important to remember that, in the social and employment contexts, the EU does not have an exclusive competence. Broadly speaking, both the Italian and Portuguese Constitutional Courts have considered the protection of social rights in the current economic situation, dealing with austerity measures (EU-recommended) which have involved substantial cuts in their social provisions²⁰¹.

The *Tribunal Constitucional*, in its judgement No. 187 of 5 April 2013²⁰², declared the unconstitutionality of some of the austerity measures, in particular, those applicable to budgetary cuts²⁰³. The 2015 Country Report on Portugal²⁰⁴ in-

²⁰⁰ See Article 6, para. 3 TEU.

²⁰¹ On national decisions see F. GALLO, *Diritti socio-economici ed equilibri di bilancio*, in *Studi sull'integrazione europea*, 2017, No. 1, pp. 11-22, spec. p. 17 ff.

²⁰² Available at www.tribunalconstitucional.pt/tc/acordaos/20130187.html.

²⁰³ For some comments, see M. NOGUEIRA DE BRITO, L. PEREIRA COUTINHO, *A igualdade proporcional, novo modelo no controlo do princípio da igualdade?: comentário ao Acórdão do Tribunal Constitucional nº 187/2013*, in *Direito & Política / Law & Politics*, 2013, No. 4, pp. 182-191; R.A. PEREIRA, *Igualdade e proporcionalidade: um comentário às decisões do Tribunal Constitucional de Portugal sobre cortes salariais no sector público*, in *Revista Española de Derecho Constitucional*, 2013, No. 98, available at www.cepc.gov.es/en/publications/journals; V. CANAS, *Constituição prima facie: igualdade, proporcionalidade, confiança (aplicados ao "corte" de pensões)*, 2014, No. 1, available at <http://e->

cludes an overview of the relevant measures²⁰⁵. Moreover, it analyses the right to work: It «has probably been the most affected fundamental right in the context of the economic crisis. It has been affected by the crisis itself ([which] led to a significant rise of unemployment) and by austerity measures. These measures included pay-cuts, reduction[s] of severance payments and increase[s] in working hours without additional pay»²⁰⁶.

Portuguese Constitutional Court judgment No. 187 of 2013 concerned the suspension of holiday pay, which it declared unconstitutional as a violation of the principle of equality. The Court stated that the international and European obligations had a constitutional legal basis, but that they should not impose legislative measures that lead to the violation, not only of equality and proportionality principles, but also of human dignity²⁰⁷. The Constitutional law doctrine has deemed this case to be a condemnation of the violation of constitutional rights in relation to the EU agreement (the 2011 Economic Adjustment Programme)²⁰⁸ implemented by the national provisions²⁰⁹.

Some of the economic and financial measures that were produced to tackle the economic crisis have been the object of some important judgments of the Italian *Corte costituzionale*. Among them, sentence No. 310 of 10 December 2013²¹⁰

publica.pt/constituicaoprimafacie.html; J. REIS NOVAIS, *O direito fundamental à pensão de reforma em situação de emergência financeira*, 2014, No. 1, available at <http://e-publica.pt/odireitofundamentalpensao.html>.

²⁰⁴ M. RODRIGUES CANOTILHO, *The Impact of the Crisis on Fundamental Rights across Member States of the EU. Country Report on Portugal*, February 2015, PE 510.020, available at www.europarl.europa.eu/studies. For an overview, see also I. TÁVORA, P. GONZÁLEZ, *Chapter 5 - The Reform of Joint Regulation and Labour Market Policy during the Current Crisis: National Report on Portugal*, in A. KOUKIADAKI et al. (eds.), *Joint Regulation and Labour Market Policy in Europe during the Crisis*, 2016, available at www.etui.org.

²⁰⁵ M. RODRIGUES CANOTILHO, *The Impact of the Crisis*, cit., p. 16 ff.

²⁰⁶ *Ibidem*, p. 34.

²⁰⁷ D. BUTTURINI, *Portogallo: le norme nazionali imposte dall'austerità europea di fronte al giudizio di costituzionalità*, 30 May 2013, available at www.forumcostituzionale.it.

²⁰⁸ More info at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm.

²⁰⁹ D. BUTTURINI, *Portogallo*, cit., p. 26.

²¹⁰ Available at www.cortecostituzionale.it/actionPronuncia.do. Similarly, see also Italian Constitutional Court, sentence No. 275 of 16-21 December 2016, on the relationship between the

concerned the freezing of the salaries of university teachers. The Court held that, by virtue of the reasonableness principle, the development of such measures must be considered in the current economic, legal, national and European contexts²¹¹.

Italy has enacted a number of legislative and other measures related to the crisis, which are summarised in the 2015 Country Report on Italy²¹². Among them, in Law No. 92/2012 – the so-called *Legge Fornero*²¹³, named after the then Minister of Employment – the main objectives were more equal protection of workers, regardless of the type of employment contract, and more flexibility in hiring and dismissing workers²¹⁴. An Italian trade union (CGIL) submitted a complaint to the European Commission asserting that the Reform infringed EU law (i.e. Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work) because, among other things, it eliminated the requirement for a justification to use short-term employment contracts and, in so doing, «translate[d] into a wide broadening of the unjustified use of short-term contracts». Similar allegations were raised to the Court of Justice in the *Mascolo* case of 2014²¹⁵ concerning the use of short-term contracts to meet essentially permanent needs in the Italian public education sector²¹⁶. The Court held that «Clause 5(1) of the framework agreement on fixed-term work concluded on 18 March 1999, which is

principle of balanced budget and the protection of fundamental rights, where it held that the safeguarding of rights may affect the budget, and not vice versa.

²¹¹ Italian Constitutional Court, sentence No. 310 of 10 December 2013, para. 13.4.

²¹² G. NASTASI, G. PALMISANO, *The Impact of the Crisis on Fundamental Rights across Member States of the EU. Country Report on Italy*, February 2015, PE 510.018, p. 17 ff., available at www.europarl.europa.eu/studies. For an overview of the reforms, see also S. COLOMBO, I. REGALIA, *Chapter 4 - The Reform and Impact of Joint Regulation and Labour Market Policy during the Current Crisis: Italy*, in A. KOUKIADAKI et al. (eds.), *Joint Regulation and Labour Market Policy in Europe during the Crisis*, 2016, available at www.etui.org.

²¹³ For a critical comment, see G. PIAZZA, M. MYANT, *Italy's Labour Market Reforms of 2012: Did They Reduce Unemployment?*, 2016, available at www.etui.org.

²¹⁴ G. NASTASI, G. PALMISANO, *The Impact of the Crisis*, cit., p. 52 ff.

²¹⁵ Court of Justice, judgment of 26 November 2014, Joined Cases C-22/13, C-61/13 to C-63/13 and C-418/13, *Raffaella Mascolo and Others v Ministero dell'Istruzione, dell'Università e della Ricerca and Comune di Napoli*, EU:C:2014:2401.

²¹⁶ On this case see G. NASTASI, G. PALMISANO, *The Impact of the Crisis*, cit., p. 57 ff.

set out in the 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, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, pending the completion of competitive selection procedures for the recruitment of tenured staff of schools administered by the State, authorises the renewal of fixed-term employment contracts to fill posts of teachers and administrative, technical and auxiliary staff that are vacant and unfilled without stating a definite period for the completion of those procedures and while excluding any possibility, for those teachers and staff, of obtaining compensation for any damage suffered on account of such a renewal. It appears, subject to the checks to be carried out by the referring courts, that such legislation, first, does not permit objective and transparent criteria to be identified in order to verify whether the renewal of those contracts actually responds to a genuine need, is capable of achieving the objective pursued and is necessary for that purpose, and second, does not contain any other measure intended to prevent and punish the misuse of successive fixed-term employment contracts»²¹⁷.

As observed, in the specific and exceptional case of the economic crisis, the protection of social rights is affected in such a way as to undermine their “value” *vis-à-vis* economic and financial exigencies to enable the recovery of those States in debt and enhance safety in the euro area. It does not appear to be coherent from a substantive perspective in terms of safeguarding the social rights and the minimum work terms and conditions. Considering the legal basis of those austerity measures, the EU is not “directly” involved, and thus those measures do not fall within the scope of EU law (as required by Article 51 of the Charter). From the case law, the responsibility of the European Union has been affirmed *in abstracto*, but excluded *in concreto*, thus making it difficult to demonstrate its extracontractual liability²¹⁸. Nevertheless, respect for the fundamental rights must cover every situation independently of the specific legal basis, but as a matter of the general principles governing European and national actions. In addition, having in mind the case law in which the fundamental social rights have been considered as justi-

²¹⁷ Court of Justice, judgment of 26 November 2014, *Mascolo*, cit., para. 120.

²¹⁸ R. CAFARI PANICO, *L'affievolimento dei diritti nella crisi*, cit., pp. 304-305.

liable restrictions of the general interests to the economic freedoms, it may be derived that in times of crisis the protection of the social rights and workers' conditions in general, as an overriding reason in the public interest, may also constitute a limit on national austerity measures. Thus, from a general point of view, in times of economic crisis, a balancing test must also be assessed: on the one hand, the general public interests (the need to recover debts and adjust the economic situation) and on the other hand, the individual rights (such as a reasonable salary).

Against this background, recourse to collective action may be exercised to claim the protection of workers' conditions *vis-à-vis* the austerity measures. The question of its legitimacy under national law will raise political considerations, as it is a form of protest²¹⁹. This may also affect the legislative solutions at the procedural level regarding its exercise and effects with a view to safeguarding the smooth functioning of the internal market; accordingly, also private international issues will be at stake. The overall context calls for effective judicial remedies, including collective redress procedures, towards the national measures to concretely protect workers' interests and rights.

²¹⁹ F. DORSEMONT, *Collective Action Against Austerity Measures*, in N. BRUUN, K. LÖRCHER, I. SCHÖMANN (eds.), *The Economic and Financial Crisis and Collective Labour Law in Europe*, Oxford and Portland, Oregon, Hart Publishing, 2016, pp. 153-170, spec. p. 157 f.

2.4. In particular, the legal framework on the right to collective action.

The exercise of the right to collective action, including all means to act collectively, does not fall within EU competences and is thus covered by domestic laws which may differ from one State to another. Specifically related to collective actions, it seems clear that given the different provisions and parameters to evaluate their legitimacy, difficulties may arise in situations with international implications. In EU law, it is not possible to find specific rules governing collective action, apart from proposals for legislative acts and soft law documents of the Commission aimed at developing an EU action on collective redress, even if they do not specifically address the case of employees²²⁰.

In light of the foregoing considerations on the concept of fundamental rights in the EU legal order and the obstacles they have faced *vis-à-vis* the economic freedoms or in times of economic crisis, in other words, when the substance of those rights is affected, it is important to determine the specific instruments and provisions on collective action in the existing European scenario, by recalling the case law of the Court of Justice where appropriate.

At the regulatory level, the right to collective action, including the right to strike, has a constitutional basis in many States, as an individual fundamental right to be exercised collectively. Commonly, a strike is a form of protest considered as the most effective means for workers to achieve their goal. It can be freely exercised, without any prior procedural requirements and without any consequences to individual employment contracts²²¹.

There are various international legal bases²²² for the right to collective activities, including the right to strike, such as the 1966 International Covenant on Economic, Social and Cultural Rights²²³, the ILO Conventions No. 87²²⁴ and No.

²²⁰ See further in the present para. and in Chapter 4 on collective redress.

²²¹ F. FABBRINI, *Europe in Need of a New Deal*, cit., p. 1185 f.; see also Advocate General Mengozzi, opinion delivered on 23 May 2007, Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others*, EU:C:2007:291, paras. 68, 77 and fn. 31 to 33.

²²² For an excursus see V. KOSTA, *Fundamental Rights in EU Internal Market*, Oxford and Portland, Oregon, Hart Publishing, 2015, p. 224 ff.

²²³ See Article 8.

98²²⁵, the 1950 European Convention of Human Rights (ECHR)²²⁶, and the 1961 (then 1996) European Social Charter (ESC)²²⁷. In those provisions, each State party (or Member) is deemed to undertake steps using the maximum of its available resources or by all appropriate means, with a view to progressively achieving the full realisation of the rights, and to effectively complying with these obligations.

EU law, primarily the case law of the Court of Justice, expressly recalls said international and European instruments in order to endorse their objectives and purposes, respectively, in regulating and applying the law in the field of fundamental social rights.

At the EU level, moreover, the 1989 Community Charter of the Fundamental Social Rights of Workers protected (applicable to employers and workers, or their organisations) the freedom of association and the right to collective bargaining, as well as the right to resort to collective action, including the right to strike, in situations of conflicts of interests, subject to the obligations arising under national regulations and collective agreements²²⁸.

In line with this, Article 28 of the EU Charter of Fundamental Rights clearly provides for the right to collective action, including the right to strike. It states: «Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action». As a preliminary remark, the Charter makes a distinction between workers and

²²⁴ Convention concerning Freedom of Association and Protection of the Right to Organise, adopted in San Francisco on 9 July 1948, 31st ILC session, and entered into force on 4 July 1950.

²²⁵ Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, adopted in Geneva on 1 July 1949, 32nd ILC session, and entered into force on 18 July 1951. On ILO conventions, see J.R. BELLACE, *Back to the Future: Freedom of Association, the Right to Strike and National Law*, in *King's Law Journal*, 2016, Vol. 27, No. 1, pp. 24-45; Ö. EDSTRÖM, *The Right to Collective Action*, cit., pp. 58-61.

²²⁶ See Article 11. See also Ö. EDSTRÖM, *The Right to Collective Action*, cit., pp. 61-63.

²²⁷ See Article 6.

²²⁸ See the 1989 Community Charter, section “Freedom of association and collective bargaining”, points 11-13.

organisations, based on the differences between the Member States, where the right to collective action may be defined as either a collective or an individual right. The right to exercise collective industrial action can be utilised to achieve collective labour agreements offering better employment conditions than workers could attain individually. In other words, trade unions, whose freedom of organisation is guaranteed, must be given the right to effectively act in support of workers. Thus, the right to bargain for collective agreements, strengthened by industrial action, is decisive for such effective action. Nevertheless, Article 28 states that the rights must be safeguarded in accordance with Union law and with national laws and practices.

On the one hand, not just procedural, but also substantive, national rules must be observed, because the European Union does not have exclusive competence in this field²²⁹. On the other hand, EU law, including EU objectives, values and purposes, must be considered. Under the first regard, in accordance with Article 153, paragraph 5 TFEU (former Article 137, paragraph 5 of the EC Treaty), measures taken for the development of a social dimension should not apply to certain matters, including the right to strike. The Member States are in any case obliged to respect the EU law general principles, as already observed.

In relation to the lack of EU competence and the need to respect fundamental rights, it is necessary to mention the two decisions of the Court of Justice in the *Viking* and *Laval* cases²³⁰, in which it held that the right to strike is a fundamental right of the EU constitutional order, but it also recognised the need to balance workers' rights with the economic freedoms. It may be observed that by affirming the priority of the market freedoms, the exercise of the right to collective action in the form of industrial action or strike may be compromised when facing a transnational situation, whilst they are permissible under domestic law²³¹. In any case, the last word on the legitimacy of the collective action is left to the national judges. In those judgments, the Court has assessed, in accordance with EU free movement

²²⁹ See Article 153 TFEU.

²³⁰ See *supra*, in Chapter 2, para. 2.2.

²³¹ T. NOVITZ, *The Internationally Recognized Right to Strike: A Past, Present and Future Basis upon Which to Evaluate Remedies for Unlawful Collective Action?*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2014, Vol. 30, No. 3, pp. 357-379.

principles, the collective action taken by labour unions aimed at deterring corporate migration (the undertakings wanted to reflag ships from their home country, Finland and Sweden, to new countries, Estonia and Latvia). In the Court of Justice's eyes, strikes, or collective actions, are legitimate (and justifiable restrictions) only if they meet the conditions recognised by EU law and thus in so far as they do not impede cross-border commercial activity²³². It seems that they can only have strategic and political objectives that do not prevail over the economic freedoms²³³. Accordingly, the autonomy of trade unions is limited. This finding demonstrates that «the right of trade unions to exercise their collective fundamental right is very seriously hampered by the application of internal market law»²³⁴.

In the *Laval* case, the Court found that trade unions had been exercising a fundamental right to take collective action recognised by EU law, but that its practical exercise had led to barriers to inward investment that were disproportionate and thus constituted a restriction on the freedom to provide services²³⁵. Only non-discriminatory, justified and proportionate industrial action is lawful.

When are collective actions legitimate? To assess this issue, the aims of the collective action (strike or industrial action) must be taken into account. In his opinion in *Laval* case, Advocate General Mengozzi noted that «Article 49 EC [now Article 56 TFEU] cannot impose obligations on trade unions which might impair the very substance of the right to take collective action»²³⁶. He then specified that the collective action shall be aimed, on the one hand, at defending the interests of trade union members and, on the other, at enabling them to pursue legitimate objectives recognised by Community law, such as the protection of workers in general and the fight against social dumping in the Member State concerned.

²³² On the restriction, see V. KOSTA, *Fundamental Rights in EU Internal Market*, cit., pp. 221-224.

²³³ S. WEATHERWILL, *The Internal Market as a Legal Concept*, cit., pp. 125-128.

²³⁴ B. DE WITTE, *Balancing of Economic Law and Human Rights*, cit., p. 206. See Court of Justice (Grand Chamber), judgment of 11 December 2007, *Viking*, cit., paras. 44-47; (Grand Chamber), judgment of 18 December 2007, *Laval*, cit., para. 91 ff.

²³⁵ Court of Justice (Grand Chamber), judgment of 18 December 2007, *Laval*, cit., para. 99.

²³⁶ Advocate General Mengozzi, opinion delivered on 23 May 2007, *Laval*, cit., paras. 251-252.

Nevertheless, because the right is not absolute, its exercise must be reconciled with the European public interests represented by the economic freedoms, and in particular the free provision of services.

One may argue that the Court of Justice respects the right to collective bargaining, collective action and strike only within the limits of the economic freedoms as a clearly lower value and not as an equivalent fundamental right. In doing so, it adopts a negative approach that is restricted to industrial action taken substantially by host country unions and not by posted workers²³⁷. On this latter issue, the situation not only gives rise to substantive problems (the protection of posted workers' rights), but also legal questions related to the possibility for posted workers to be represented by host country trade unions and the potential effects on them²³⁸.

The *Laval* case is significant both for the proceedings instituted before the Court of Justice, and for the complaint submitted to the European Committee of Social Rights (ECSR) by the Swedish Trade Union Confederation (LO) and the Swedish Confederation of Professional Employees (TCO)²³⁹, and the involvement of the ILO Committee that reported on the respect for the ILO Conventions. The problem before the ECSR was that industrial action against a foreign employer was forbidden under the 2010 *Lex Laval* in violation of Articles 6 and 19 of the ESC and the ILO Convention No. 87. On the one hand, in its 2013 Report, the ILO Committee had requested that the Swedish Government «ensure that workers' organisations representing foreign posted workers are not restricted in their rights simply because of the nationality of the enterprise»²⁴⁰. On the other hand,

²³⁷ R. BUSCHMANN, *Tensions between Trade Union rights in the EU Charter of Fundamental Rights and the European Convention on Human Rights*, 27 January 2015, available at <https://courtsandcharters2.files.wordpress.com/2015/01/tensions-between-trade-unionrights-in-the-eu-charter-of-fundamental-rights-and-the-european-conventionon-human-rights.doc>.

²³⁸ See further in Chapter 5.

²³⁹ ECSR, decision on admissibility and the merits of 3 July 2013 - 5 February 2014, Complaint No. 85/2012, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden*, available at <http://hudoc.esc.coe.int>. On this issue, see G. FONTANA, *Crisi economica ed effettività dei diritti sociali in Europa*, cit., pp. 25-26.

²⁴⁰ See International Labour Conference, 102nd Session, 5-20 June 2013, Report of the Committee of Experts on the Application of Conventions and Recommendations, available at

after it stated its competence²⁴¹, the ESCR affirmed that the Swedish legislation «constitutes a disproportionate restriction on the free enjoyment of the right of trade unions to engage in collective action, in so far as it prevents trade unions taking action to improve the employment conditions of posted workers over and beyond the requirements of the above-mentioned conditions». The Committee found the violations of Articles 6(2) and (4) and 19(4)(a) and (b) of the Social Charter, because the legislation introduced restrictions on the freedom to strike and collective bargaining. It stated that such rights are necessary for other social rights and reflect the rights in the national Constitutions. Ultimately, the Committee decision was in contrast with the findings of the Court of Justice.

This collective action in the *Laval* case has symbolic value: the trade unions applied to the ESCR to seek respect for international standards, because a collective remedy aimed at protecting social rights is not available in the EU system²⁴².

In the context of the protection of human rights, with regard to the European Convention on Human Rights, the right to collective action, including the right to strike, is not explicitly mentioned. Nevertheless, the case law of the European Court of Human Rights has offered protection of the right to collective action under Article 11, which provides everyone with the right to freedom of peaceful assembly and of association, including the right to form and to join trade unions for

<http://www.ilo.org>. Previously, in the 2010 Report on the application of conventions and recommendations, the ILO Committee addressed another case where EU law was concerned. The *BALPA (British Air Line Pilots Association)* dispute regarded the employer's reaction to the pilots' call to strike in protest against the employer's establishment of a daughter enterprise in France. British Airways claimed that the collective action was not in compliance with EU law and the freedom to establishment and it may cause damages, based on the Court of Justice judgments in *Viking* and *Laval* cases. BALPA withdrew the action and claimed before the Committee the violation of ILO Convention by the United Kingdom. The Committee found that trade union's rights were disregarded: see Application by the British Air Line Pilots Association to the International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations against the United Kingdom for breach of ILO Convention No. 87.

²⁴¹ See Complaint No. 85/2012, cit., para. 73.

²⁴² S. SCIARRA, *Pluralismo sindacale multilivello nella crisi. Gli orizzonti della Carta sociale europea*, in *Studi sull'integrazione europea*, 2014, No. 2, pp. 237-246, spec. p. 240 ff.

the protection of his interests²⁴³. In fact, the Court has held that «strike action is an important method by which trade unions protect their members' interests. It follows that any restriction on the freedom to strike can be justified under Article 11, 2 ECHR only if 'prescribed by law', in pursuance of one or more legitimate aims, and 'necessary in a democratic society' for the achievement of those aims»²⁴⁴.

In his Concurring Opinion in *Hrvatski Liječnički Sindikat v Croatia*²⁴⁵, Judge Pinto de Albuquerque clarified the substance of the collective action and the strict connection with Article 11 ECHR. He observed that the right of association of workers consists of the following essential elements: the right to form and join a trade union, the prohibition of closed-shop agreements, the right to bargain collectively with the employer and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members. Having regard to a democratic society, the Judge considered strike action as the ultimate practical «means to persuade the employer to hear» the demands of the workers. He affirmed: «If collective action represents the core of the workers' freedom of association, strike action is the core of the core»²⁴⁶. It follows that strike action should

²⁴³ M. ROCCA, *Posting of Workers and Collective Labour Law*, cit., p. 85 ff. and 224 ff. See also on this Article, F. DORSSEMONT, *The Right to Take Collective Action under Article 11 ECHR*, in F. DORSSEMONT, K. LÖRCHER, I. SCHÖMANN (edited by), *The European Convention on Human Rights and the Employment relation*, Oxford and Portland, Oregon, Hart Publishing, 2013, pp. 333-365; I. VAN HIEL, *The Right to Form and Join Trade Unions Protected by Article 11 ECHR*, in F. DORSSEMONT, K. LÖRCHER, I. SCHÖMANN (edited by), *The European Convention on Human Rights and the Employment relation*, cit., pp. 287-308. On the European Court case law concerning the right to strike see G. RAIMONDI, *L'evoluzione della giurisprudenza della Corte europea dei diritti dell'uomo sulla libertà sindacale e il diritto di sciopero*, in *Scritti in onore di Giuseppe Tesauero*, Napoli, Editoriale Scientifica, 2014, pp. 591-600.

²⁴⁴ European Court of Human Rights, judgment of 21 April 2009, Application No. 68959/01, *Enerji Yap-Yol Sen v Turkey*, para. 25 ff.; see also judgment of 2 October 2014, Application No. 48408/12, *Veniamin Tymoshenko and others v Ukraine*.

²⁴⁵ European Court of Human Rights, judgment of 27 November 2014, Application No. 36701/09, *Hrvatski Liječnički Sindikat v Croatia*.

²⁴⁶ Concurring Opinion of Judge Pinto de Albuquerque, *Hrvatski Liječnički Sindikat v Croatia*, cit., para. 8.

be accorded the *status* of an essential element of Article 11 and thus be an integral part of the wider right to the freedom of association.

In other similar cases, the European Court interpreted the right to strike in so far as the freedom of association and the right to collective bargaining are considered as a means for the employees to protect their occupational interests. In the *Schmidt and Dahlström v Sweden* case of 1976, the Court recognised that strike action was a means within trade union activities that could be applied to provide protection²⁴⁷. In the *Unison v the United Kingdom* decision of 2002, the Court stated that, «while the ability to strike represents one of the most important of the means by which trade unions can fulfil this function, there are others» and in the present case «the proposed strike must be regarded therefore as concerning the occupational interests of the applicant's members in the sense covered by Article 11 of the Convention»²⁴⁸. In this regard, the Contracting States enjoy a wide margin of appreciation and are left with the choice of the means by which the freedom of trade unions ought to be safeguarded²⁴⁹.

As to the right to collective bargaining, a notable case before the European Court of Human Rights is that of *Demir and Baykara v Turkey* of 2008²⁵⁰. It concerned the right to collective bargaining for public service employees, including the right to conclude collective agreements. The employer did not comply with

²⁴⁷ European Court of Human Rights, judgment of 6 February 1976, Application No. 5589/72, *Schmidt and Dahlström v Sweden*; see in this regard judgment of 2 July 2002, Applications Nos. 30668/96, 30671/96 and 30678/96, *Wilson, National Union of Journalists and others v the United Kingdom*.

²⁴⁸ European Court of Human Rights, decision of 10 January 2002, Application No. 53574/99, *Unison v the United Kingdom*.

²⁴⁹ European Court of Human Rights, decision of 10 January 2002, *Unison*, cit.; see also (Grand Chamber), judgment of 11 January 2006, Applications Nos. 52562/99 and 52620/99, *Sørensen and Rasmussen v Denmark*.

²⁵⁰ European Court of Human Rights (Grand Chamber), judgment of 12 November 2008, Application No. 34503/97, *Demir and Baykara v Turkey*. For comments see K. LÖRCHER, *The New Social Dimension in the Jurisprudence of the European Court of Human Rights (ECtHR): the Demir and Baykara Judgment, its Methodology and Follow-up*, in F. DORSSEMONT, K. LÖRCHER, I. SCHÖMANN (edited by), *The European Convention on Human Rights and the Employment relation*, Oxford and Portland, Oregon, Hart Publishing, 2013, pp. 3-46.

the agreement concluded with the trade union. The case was brought before the district court, which upheld the trade union claim. Then, the Turkish Court of Cassation declared the agreement void. The European Court considered the Court of Cassation's ruling to be in violation of Article 11 ECHR and concluded that the right to collective bargaining is an essential element of the right to association²⁵¹.

Regarding strike actions, in the *Enerji Yapi-Yol Sen* judgment of 2009²⁵², the European Court assessed whether the Government ban on strike action was disproportionate and in violation of Article 11 ECHR. Following an innovative approach, taking into account the relevant international and European instruments on social rights²⁵³, it considered the right to strike as an independent right, regardless of other means to protect workers' rights. It follows that the right to strike is covered by Article 11 as part of the freedom of association, irrespective of whether the State concerned provided for an alternative means for trade unions to defend their interests.

Granting protection to the right to strike under Article 11 ECHR enables the European Court to protect the social rights, even if they are not explicitly covered in the Convention, with the aim of guaranteeing effectiveness to the fundamental rights enshrined therein²⁵⁴.

Within the Council of Europe system, another instrument is of great relevance in the field of social protection, as mentioned in relation to the *Laval* case. The European Social Charter (ESC), enacted in 1961 and revised in 1996, in Article 6, paragraph 4, explicitly protects «the right of workers and employers to collective action in case of conflicts of interest, including the right to strike»²⁵⁵. The ESC,

²⁵¹ European Court of Human Rights (Grand Chamber), judgment of 12 November 2008, *Demir and Baykara v Turkey*, cit., para. 145.

²⁵² European Court of Human Rights, judgment of 21 April 2009, Application No. 68959/01, *Enerji Yapi-Yol Sen v Turkey*; see E. TRIGGIANI, *La complessa vicenda dei diritti sociali fondamentali nell'Unione europea*, cit., p. 18.

²⁵³ G. FONTANA, *Crisi economica ed effettività dei diritti sociali in Europa*, cit., p. 46.

²⁵⁴ E. TRIGGIANI, *La complessa vicenda dei diritti sociali fondamentali nell'Unione europea*, cit., p. 17.

²⁵⁵ For a comment, see S. EVJU, *The Right to Collective Action under the European Social Charter*, in *European Labour Law Journal*, 2011, Vol. 2, No. 3, pp. 196-224.

however, does not include any effective mechanism to enforce this right. Compliance by the signatory States is ensured through periodic reviews, and it was not until 1995 that an optional Protocol was adopted to allow a complaint before the European Committee of Social Rights. The Committee may also assess the compliance of a national situation with the Charter, including situations in which the transposition of a European Union Directive into domestic law may affect the proper implementation of the Charter²⁵⁶. This is justified on the basis that when the EU Member States agree on binding measures in the form of directives which relate to matters within the scope of the European Social Charter, they should take full account of the commitments they made upon their ratification of the European Social Charter, just as they should of all other international instruments to which they are parties²⁵⁷. Ultimately, neither the ECHR nor the ESC offer an effective means to protect the right to strike at the European level²⁵⁸.

As discussed above, although they are different bodies, their interplay (by reciprocal references) reinforces the protection of social rights based on the consensus of the States parties in such instruments. However, difficulties may arise when dealing with cross-border situations, such as with the economic freedoms. Assessment tests shall be based on a more “social” approach, despite the market freedoms, with the aim of finding a convergence with the other two bodies (the European Court and the ESCR) dedicated to the fundamental social rights’ protection.

At the EU legislative level²⁵⁹, some acts are significant in relation to collective action which are strictly connected to the Court of Justice case law on market

²⁵⁶ See ECSR, decision on the merits of 23 June 2010, Complaint No. 55/2009, *Confédération Générale du Travail (CGT) v France*, paras. 32-33.

²⁵⁷ *Ibidem*.

²⁵⁸ F. FABBRINI, *Europe in Need of a New Deal*, cit., pp. 1197-1198. However, on Complaint No. 85/2012 and its symbolic value, see S. SCIARRA, *Pluralismo sindacale multilivello nella crisi*, cit., p. 240 ff. On the role of the European Committee, see L. MOLA, *La prassi del Comitato europeo dei diritti sociali relativa alla garanzia degli standard di tutela sociale in tempi di crisi economica*, in N. NAPOLETANO, A. SACCUCCI (a cura di), *Gestione internazionale delle emergenze globali. Regole e valori*, Napoli, Editoriale Scientifica, 2013, pp. 195-220.

²⁵⁹ See V. KOSTA, *Fundamental Rights in EU Internal Market*, cit., p. 229 ff.

freedoms and appear to pursue the realisation of the social dimension of the Union.

Aimed at regulating the phenomenon of the posting of workers and thus avoiding discrimination and combatting social dumping, Directive 96/71 was adopted in the framework of the transnational provision of services²⁶⁰. Its Recital No. 22 refers to collective action by stating that the Directive does not interfere with the law of the Member States concerning collective action undertaken to defend the interests of trades and professions. Even if no other provisions address it, the reference is significant in so far as it recognises the right to act collectively in defence of interests in accordance with national laws.

Based on the findings of the *Commission v France* judgment of 1995²⁶¹, in which the Court upheld the Commission's complaint, according to which France failed to take appropriate measures to guarantee the free movement of goods blocked by protesting farmers, the so-called Monti Regulation on the functioning of the internal market in relation to the free movement of goods among the Member States, was adopted in 1998²⁶². It aims to ensure the free movement of goods in the EU, while acknowledging the right and freedom to take strike action. The Member States should ensure that existing alternative dispute resolution mechanisms cover cross-border situations. In Article 2, it includes the so-called Monti clause: «This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States». This is a rare acknowledgement in an EU legal measure of the right to strike as a form of collective action: The Regulation establishes the priority of this right and

²⁶⁰ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, in *OJ L 18* of 21 January 1997, pp. 1-6.

²⁶¹ Court of Justice, judgment of 9 December 1997, Case C-265/95, *Commission of the European Communities v French Republic*, EU:C:1997:595.

²⁶² Council Regulation (EC) No. 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States, in *OJ L 337* of 12 December 1998, pp. 8-9.

the right or freedom to take other actions recognised in the Member States over the EU principle of the free movement of goods.

In the framework of the free provision of services in the internal market, Directive 2006/123/EC²⁶³ mentions respect for the exercise of the fundamental rights, including the right to take industrial action (in accordance with national law and practices which respect Community law)²⁶⁴, even if they must be reconciled with the fundamental freedoms laid down in Articles 43 and 49 of the EC Treaty²⁶⁵.

As a result of the Court of Justice rulings in the *Viking* and *Laval* cases, in order to address trade union concerns that the economic freedoms were being given precedence over the social rights, a second Regulation (Monti II) was proposed in 2012, but it was ultimately withdrawn due to objections from some EU Member States²⁶⁶. It regarded «the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services»²⁶⁷.

²⁶³ See Recital No. 14 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, in *OJ L* 376 of 27 December 2006, pp. 36-68.

²⁶⁴ U. CARABELLI, *Libera circolazione dei servizi nella CE e dumping sociale: una riflessione sul caso Laval*, cit., pp. 1757-1758, where the Author underlines the different linguistic version in French and German, where it appears that the reference to national law and practices should respect EU law and not national law and practice should do it. He then added that if the meaning is that national law and practice should respect EU law, Directive 2006/123 is in contrast with Art. 137(5) TFEU, that provides a national competence on the matter.

²⁶⁵ Recital No. 14 and Article 1, para. 7, of Directive 2003/123 cit.

²⁶⁶ On the proposal see M. ROCCELLA, T. TREU, *Diritto del lavoro dell'Unione europea*, cit., pp. 446-448; M. ROCCA, *Posting of Workers and Collective Labour Law*, cit., p. 269 ff.; N. BRUUN, A. BÜCKER, F. DORSSEMONT, *Balancing Fundamental Social Rights and Economic Freedoms: Can the Monti II Initiative Solve the EU Dilemma?*, in *The International Journal of Comparative Labour Law and Industrial Relations*, 2012, Vol. 28, No. 3, pp. 279-306.

²⁶⁷ 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 of 21 March 2012.

This followed the 2010 Monti Report on a new strategy for the single market²⁶⁸, which addressed the question of, «on a practical ground, whether the Posting of Workers Directive still provides an adequate basis to manage the increasing flow of cross-border temporary secondment of workers, while protecting workers' rights. On a normative ground, the question concerns the place of workers' right to take industrial action within the single market and its status *vis-à-vis* economic freedoms»²⁶⁹. In the 2010 Report, after recalling the *Laval quartet* sentences, the author suggested the introduction of a provision to guarantee the right to strike, affirming that «a “social progress clause” would “immunise” the right of strike, as recognised at national level, from the impact of single market rules».

The goal of the proposed Monti II Regulation was to «clarify the general principles and applicable rules at EU level with respect to the exercise of the fundamental right to take collective action within the context of the freedom to provide services and the freedom of establishment, including the need to reconcile them in practice in cross-border situations»²⁷⁰. In the Explanatory Memorandum accompanying its proposal, the Commission stated that the proposed Regulation sought to address the «tensions between the freedoms to provide services and of establishment, and the exercise of fundamental rights such as the right of collective bargaining and the right to industrial action»²⁷¹, which was recognised by the Court of Justice's decisions in the *Viking* and *Laval* cases. It deemed the clarification of the *status* of the right to collective action in cross-border contexts to be necessary. A regulatory intervention at the EU level may be «the most effective and efficient solution to address the specific objective [of] reducing tensions between national industrial relation systems and the freedom to provide services»²⁷².

The Proposal, in its Recitals, recalled the international instruments that provide for the right to take collective action, which is the corollary of the right to

²⁶⁸ M. MONTI, *Report on a New Strategy for the Single Market at the Service of Europe's Economy and Society. Report to the President of the European Commission*, 9 May 2010, available at http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf.

²⁶⁹ *Report on a New Strategy for the Single Market*, cit., at p. 69.

²⁷⁰ See Proposal COM(2012)130 final, cit., para. 3.1.

²⁷¹ *Ibidem*, para. 2.2.

²⁷² *Ibidem*.

collective bargaining²⁷³. Article 1 contained the so-called Monti clause, which confirmed that the draft Regulation would not have affected the exercise of fundamental rights, including the right to strike provided by the industrial relations systems of the Member States or the enforcement of collective agreements. It was in line with the text of a similar provision added in the Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Recast)²⁷⁴, but it was later rejected²⁷⁵. Article 2 of the Proposal established the general principle according to which the exercise of the freedom of establishment and the freedom to provide services shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms. Such a mutually respect must then be in compliance with the principle of proportionality²⁷⁶. In addition, Article 3 provides dispute resolution mechanisms that the Member States shall ensure to resolve labour disputes, whenever strike actions or the exercise of the freedom of establishment or the freedom to provide services have transnational implications. However, these out-of-court settlements do not prevent from bringing judicial actions.

The Proposal at least seemed to represent a framework for the regulation of the exercise of the right to collective action, including strike, at the EU level within transnational contexts; indeed, the right to collective action itself is not affected. The Commission withdrew the proposed Regulation after several Member

²⁷³ *Ibidem*, Recital No. 1.

²⁷⁴ See Article 85 of the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, COM(2010)748 final of 14 December 2010: «This Regulation shall not affect the right of workers and employers, or their respective organisations, to engage in collective action to protect their interests, in particular the right or freedom to strike or to take other actions, in accordance with Union law and national law and practices».

²⁷⁵ See J.J. KUIPERS, *Schemes of Arrangement and Voluntary Collective Redress: A Gap in the Brussels I Regulation*, in *Journal of Private International Law*, 2012, Vol. 8, No. 2, pp. 225-249.

²⁷⁶ See Recital No. 13 of the Proposal COM(2012)130 final, cit.

States voiced objections concerning its legal basis²⁷⁷, and it has not made alternative proposals since then.

At the same time, the Commission submitted a second proposal on the enforcement of the Posting of Workers Directive 96/71, which was adopted in 2014²⁷⁸. This Directive aims to reconcile the exercise of the freedom to provide cross-border services under Article 56 TFEU with appropriate protection of the rights of workers who are temporarily posted abroad for that purpose. It takes into account the issue of how to set the right balance between the trade unions' exercise of their right to take collective action, including the right to strike, and the economic freedoms enshrined in the TFEU, particularly the freedom of establishment and the freedom to provide services²⁷⁹. Its Article 1, paragraph 2 contains a subsequent version of the 'Monti clause', which states: «[T]his Directive shall not affect in any way the exercise of fundamental rights as recognised in [the] Member States and at [the] Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in [the] Member States, in accordance with national law and/or practice. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and/or practice». Certain features should be highlighted: the disappearance of the reference to the compliance with Community/EU law and thus the primacy granted to national law and practices; the mention of the right or freedom to strike among collective actions; and the

²⁷⁷ On the dismissal, see F. FABBRINI, K. GRANAT, *Yellow Card, but No Foul: The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike*, in *Common Market Law Review*, 2013, No. 50, pp. 115-144.

²⁷⁸ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation'), in *OJ L* 159 of 28 May 2014, pp. 11-31.

²⁷⁹ See 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, COM(2012)131 final of 21 March 2012.

recognition of the protection of the right to strike as part of EU law, not only at the Member State level²⁸⁰.

Collective mechanisms for the enforcement of rights are envisaged in other sector specific acts as a means for legal proceedings aimed at effectively protecting rights.

²⁸⁰ A. IOSSA, *Monti Rules: Immunising Collective Action from Market Dynamics (or Vice Versa?)*, 9 October 2012, spec. p. 6, available at http://works.bepress.com/andrea_iossa/2/.

2.5. Concluding considerations.

As stated by the Court of Justice, the right to collective action is a fundamental social right and, in practice, it includes collective means for the enforcement of workers' rights. Recognising the fundamental social rights as part of the EU general principles implies that, under the hierarchical equivalence, they may be balanced with the other principles enshrined in the Treaties, such as the economic freedoms. As a result of the balancing test, they have been mainly downgraded in favour of the market freedoms based on the fact that the effectiveness of the Treaty provisions may not be affected by the exercise of a social right, i.e. a collective action (to pursue objectives related to employment terms and conditions), such as in the *Viking* and *Laval* cases. Nevertheless, what is more remarkable is that the Court affirmed that such right, and the protection of workers, could constitute a justifiable restriction when lawful and proportionate.

A similar outcome has occurred in particular circumstances, such as in times of economic crisis, when they were undermined with the aim of implementing an assistance programme to pursue financial stability. Precisely, in this situation, the question was whether compliance with the Charter was required even in cases in which the measures did not fall "directly" within the scope of EU law. Although the Court declared its lack of jurisdiction, the Member States are obliged to observe EU principles and objectives while acting under matters falling under EU law, such as economic and monetary policy.

In broader terms, as criticisms regarding the *Laval quartet* judgments pointed out, a change in the Court of Justice's approach is needed. It must give relevance to individuals and promote the protection of the fundamental rights versus the economic principles and governance.

For the purposes of the present study, the relevance of the social rights in the EU legal order has been analysed to stress the issue of the protection of workers' rights, especially in cross-border situations. In this respect, the question that arises is how such rights are effectively protected and enforced across the EU.

The protection and enforcement of workers' rights is quite a wide topic, and therefore the possibility for workers to have recourse to collective action in cross-border contexts is addressed. Particular attention is paid to the category of posted

workers, which has been involved in some judgments related to the fundamental social rights. The posting of workers implies legal questions as to the applicable regime, converging issues from the private international law perspective, as well as related to the market freedoms, namely the free provision of services, given that the pertinent legislation is based on the respective TFEU provisions.

To conclude, and to beckon the issues that will be discussed further, in general, the protection of rights may be pursued by the recognition (in the sense of affirmation) of the fundamental nature of the social rights, including the right to act collectively, through the provision of judicial and extrajudicial remedies, and on the basis of private international law instruments that establish rules for handling conflicts of jurisdictions or of laws.

CHAPTER 3

PROTECTION OF WORKERS' RIGHTS IN EUROPEAN UNION LAW

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Executive Summary

In employment disputes, workers seek the protection of work terms and conditions and social security rights against employers that have violated national legislation or EU law. When moving across the EU, based on the free movement of workers, EU citizens are entitled to enjoy those rights in the host State by virtue of the principles of non-discrimination and equal treatment. With the aim of protecting workers, not only are minimum substantive rights specifically determined, but also private international law rules are established. A peculiar situation concerns posted workers, whose legal regime falls within the framework of the free provision of services and includes workers' rights, minimum terms and conditions, as well as conflict of jurisdictions and laws rules. However, uncertainty may arise because of the lack of European provisions tailored to collective action as a means of collective enforcement of rights.

3.1. Introduction: the protection of workers in the EU.

The free movement of workers across the Member States granted by European Union (EU) primary law²⁸¹ is closely linked to the creation of an area of freedom, security and justice. Thanks to the European economic integration process, the mobility of workers has increased, and in recent years many efforts have been made by European institutions to protect workers. These efforts have addressed difficulties deriving from the need to safeguard the enlargement of the labour market at the European level, but also to ensure the effective guarantee of the fundamental freedoms provided by the Treaties in order to avoid social dumping within national labour markets²⁸². The fundamental economic freedoms are implemented by the Union with the aim of guaranteeing a level playing field for businesses and respect for the rights of workers.

«The completion of the internal market offers a dynamic environment for the transnational provision of services, prompting a growing number of undertakings to post employees abroad temporarily to perform work in the territory of a Member State other than the State in which they are habitually employed»²⁸³. This is the case for posted workers. Therefore, in view of fair competition and the smooth functioning of the internal market, obstacles may occur if no (common and European) rules require respect for certain working terms and conditions²⁸⁴. These rules may be based, on the one hand, on the free provision of services and, on the

²⁸¹ See Article 45 of the Treaty on the Functioning of the European Union (TFEU). All EU legislation is available at <http://eur-lex.europa.eu>.

²⁸² M. ROCCELLA, T. TREU, *Diritto del lavoro dell'Unione europea*, Padova, Wolters Kluwer CEDAM, 7^a ed., 2016, p. 156. For the purpose of the present study, social dumping means a specific form of regime in competition law that allows undertakings to take advantage of differences in labour and social regulation (and costs) between Member States in order to enhance their competitiveness. On the definition see also European Parliament resolution of 14 September 2016 on social dumping in the European Union (2015/2255(INI)), P8_TA(2016)0346, spec. para. I, 1 ff. All European Parliament documents are available at www.europarl.europa.eu.

²⁸³ See Recital No. 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, in *OJ L* 18 of 21 January 1997, pp. 1-6.

²⁸⁴ M. ROCCELLA, T. TREU, *Diritto del lavoro dell'Unione europea*, cit., p. 157.

other, on judicial cooperation in civil and commercial matters aimed at creating and developing an area of freedom, security and justice²⁸⁵. Indeed, the posting of workers regime, as described below, has been adopted to resolve questions related to the temporary performance of economic activity in another EU Member State.

The main aim was to impede the distortion of the internal market, and thus to ensure minimum standards for work conditions in all the EU Member States. Based on the existing legislative scenario, EU initiatives and case law, remarks on the need to regulate procedures at the EU level are provided in this Chapter, especially with regard to collective action as a means of enforcement. Indeed, remedies contribute to the safeguarding of the protection of the same rights in all the Member States. This enables market actors (workers, as well as consumers and businesses) to benefit from the internal market. To reap the full benefits of the European judicial area, access to justice must be made easier, particularly in cross-border proceedings²⁸⁶.

The protection of workers is addressed by EU legislation, within the scope of the free movement of workers or the free provision of services²⁸⁷. Under the first category, the EU has always had competence from the Treaty of Rome to adopt legislation governing employment protection on the basis of the former Article 118²⁸⁸, which referred to matters relating to «employment, labour law and work-

²⁸⁵ See Recital No. 1 of the Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in *OJ L* 12 of 16 January 2001, pp. 1-23) and Recital No. 4 of the Brussels I Recast Regulation (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), in *OJ L* 351 of 20 December 2012, pp. 1-32).

²⁸⁶ Communication from the Commission to the European Parliament and the Council, *An area of freedom, security and justice serving the citizen*, COM(2009)262 final of 10 June 2009, para. 3.4.

²⁸⁷ With specific regard to posted workers; see further *infra* in this Chapter.

²⁸⁸ Then Article 137 EC Treaty, now Article 153 TFEU according to which the European Parliament and the Council may also adopt non-harmonising measures designed simply to encourage cooperation between Member States in «the combating of social exclusion» and in the modernisation of social protection systems». This provision specifies the EU competence

ing conditions, the right of association and collective bargaining between employers and workers».

By way of example, EU directives now cover various areas of general employment protection law, including the employees' right to information as to their contractual terms of employment, the establishment of a European Works Council or other procedures for informing and consulting employees in EU-wide (groups of) undertakings; the information and consultation of employees to promote social dialogue between management and labour; the rights of workers to rest breaks, rest periods and paid annual leave; the protection of young people at work; the right to parental leave on the birth or adoption of a child; the rights of part-time or fixed-term workers; the rights of workers in the event of collective redundancies; the rights of workers on the insolvency of their employer; and the rights of posted workers. The general principles of EU law in the employment context have been affirmed, such as the equality between men and women and non-discrimination based on transgendered *status*, racial or ethnic origin, disability, age, sexual orientation, and religion or belief²⁸⁹.

Based on the EU legislation on the protection of workers, the right to collective action is implemented by provisions establishing the obligation upon the

to make directives which set out minimum requirements (always allowing Member States to maintain or introduce more stringent protective measures compatible with the Treaties) in the following fields: (a) improvement, in particular, of the working environment to protect workers' health and safety; (b) working conditions; (c) social security and social protection of workers; (d) protection of workers where their employment contract is terminated; (e) the information and consultation of workers; (f) representation and collective defence of the interests of workers and employers, including co-determination; (g) conditions of employment for third-country nationals legally residing in Union territory; (h) the integration of persons excluded from the labour market, without prejudice to any EU vocational training policy made under Article 166 TFEU; (i) equality between men and women with regard to labour market opportunities and treatment at work. For a comment on this Article, see L. CALAFÀ, *Art. 153 TFUE*, in F. POCAR, M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, Padova, CEDAM, 2^a ed., 2014, pp. 994-999.

²⁸⁹ On the Directives adopted in this field, see M. ROCCELLA, T. TREU, *Diritto del lavoro dell'Unione europea*, cit., p. 89 ff.; L. CALAFÀ, *Art. 153 TFUE*, cit., pp. 997-999; in general on the free movement of workers F. POCAR, I. VIARENGO, *Diritto comunitario del lavoro*, Padova, CEDAM, 2011.

Member States to ensure remedies to workers, as well as to representative associations, organisations or other similar entities. In this regard, Directive 2014/54²⁹⁰, which was adopted in the framework of the free movement for workers²⁹¹, is significant. It requires the national authorities to ensure that judicial procedures are available for all EU workers in cases of discrimination or violations of EU or national law. In addition, organisations, associations, trade unions or other entities may represent or support EU workers and their families²⁹². The right to take collective action is expressly included and safeguarded, provided that it complies with national laws and practice²⁹³.

Similar provisions on the right to take actions can be found in the legal framework concerning posted workers, who are workers temporarily moved to another State to perform a service. This situation implies that, on the one hand, the employer of posted workers makes use of the free movement of services. On the other hand, the worker does not need to avail himself of said freedom because he is not deemed to enter the labour market of the host State. Directive 96/71 on the

²⁹⁰ Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, in *OJ L* 128 of 30 April 2014, pp. 8-14.

²⁹¹ The relevant rules are contained in Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, in *OJ L* 141 of 27 May 2011, pp. 1-12, that updates (and codifies) earlier legislation on the freedom to move and work of EU citizens in another EU country.

²⁹² See Recitals Nos. 15 and 29 ensure the possibility for entities to represent workers and the respect for the right to collective action; and Article 3 on the defence of rights.

²⁹³ Article 3, paras. 2-4 states that «2. Member States shall ensure that associations, organisations, including the social partners, or other legal entities, which have, in accordance with the criteria laid down in their national law, practice or collective agreements, a legitimate interest in ensuring that this Directive is complied with, may engage, either on behalf of or in support of, Union workers and members of their family, with their approval, in any judicial and/or administrative procedure provided for the enforcement of the rights referred to in Article 1. 3. Paragraph 2 shall apply without prejudice to other competences and collective rights of the social partners, employees' and employers' representatives, where applicable, including the right to take action on behalf of a collective interest, under national law or practice. 4. Paragraph 2 shall apply without prejudice to national rules of procedure concerning representation and defence in court proceedings».

posting of workers and the Enforcement Directive 2014/67, which sets out control mechanisms related to the former²⁹⁴, are thus considered to assess questions concerning the protection of posted workers that may arise within transnational litigation from the substantive, procedural and private international law perspectives. As to the substantive rights, minimum requirements for employment terms and conditions are provided (through the harmonisation of national laws), even if their material content is not specified because it is not within EU competence. With regard to the procedural mechanisms to defend their rights, the fundamental right to an effective remedy as established in the Charter under Article 47 is referenced. Lastly, providing for the law applicable to posted workers and the competent authority to hear the disputes falls within the protective function of private international law rules. Overall, the legislation at hand can be defined as comprehensive, as these three aspects are inter-connected and pursue the same objective of protecting workers in the EU. The interaction between the fundamental rights and the procedural means of enforcement is indisputable. In other words, the legislation on the posting of workers contains substantive provisions on the rights and obligations upon the posting undertakings and the Member States, procedural mechanisms for control and rules on conflicts of jurisdictions and of applicable laws.

However, with regard to the existing context, it appears that trade unions have not engaged extensively to protect workers' rights, because few cases have addressed trade union actions before the Court of Justice. It could be argued that harmonising the rules (established in the Directives) does not offer an effective (means of) protection, because they do not impose specific remedies, but only obligations upon the Member States to enforce workers' rights, including the possibility for trade unions or other associations to act. In addition, national laws and practices concerning such entities must be observed. It follows that the differences between them may still cause legal uncertainty and discourage collective action in cross-border contexts.

²⁹⁴ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), in *OJ L* 159 of 28 May 2014, pp. 11-31.

3.2. The legal framework on posted workers.

According to the general rule, workers who ordinarily work in the country of establishment of their employer are covered by the law of their (employer's) home State, even when they are temporarily posted to another State (the host State) to perform services there. So, the posting is not exercised within the free movement of workers, and the workers do not enter the labour market of the host State²⁹⁵. This has caused a differentiation of the employment conditions applying to workers (local and posted) employed on the same site. The local workers would be protected according to the local standards, whereas the standards of the home State of the service provider would be applied to the posted workers. The ensuing inequality in labour protection leads to a comparative advantage for undertakings established in low-cost countries, which, in turn, may negatively affect the employment conditions in the host State. Accordingly, high-cost States might be tempted to extend their employment protection rules to all labour performed within their territory²⁹⁶. This has given rise to the problem of social dumping, especially when the Eastern countries became Members of the Union²⁹⁷. Further, the host States have faced difficulties in striking the right balance between workers' protection and the freedom to provide services and other fundamental principles of the internal market.

In this context, relevant legislative actions were adopted in order to regulate the posting of workers who moved in one Member State in the framework of the

²⁹⁵ A.A.H. VAN HOEK, *Private international law rules for transnational employment: reflections from the European Union*, in A. BLACKETT, A. TREBILCOCK (edited by), *Research Handbook on Transnational Labour law*, Cheltenham, UK, Northampton, MA, USA, Edward Elgar Publishing, 2015, pp. 438-454, spec. p. 448.

²⁹⁶ *Ibidem*, p. 449.

²⁹⁷ M. FORNASIER, *Employment, Posting of Workers*, in J. BASEDOW, G. RÜHL, F. FERRARI, P. DE MIGUEL ASENSIO (edited by), *Encyclopedia of Private International Law*, Cheltenham, UK, Northampton, MA, USA, Edward Elgar Publishing, 2017, pp. 116-123; C. BARNARD, *The Worker Protection Justification: Lessons from Consumer Law*, in P. KOUTRAKOS, N.N. SHUIBHNE, P. SYRPIS (edited by), *Exceptions from EU Free Movement Law*, Oxford and Portland, Oregon, Hart Publishing, 2016, pp. 106-130, spec. p. 107.

cross-border provision of services: Directive 96/71²⁹⁸, Directive 2014/67 (the Enforcement Directive) and the 2016 proposal for a Directive amending the former²⁹⁹. These acts are aimed at guaranteeing working conditions across the EU Member States by providing minimum standards and requiring the adoption of effective mechanisms for the protection of posted workers' rights.

Back in 1990, in the context of the potential enlargement of the EU Members and the increase in employment relationships based on the enjoyment of the free movement of workers and services, the Commission addressed the situation involving workers who temporarily perform work in another country other than the State in whose territory they habitually work. In these cases, the question was which national labour legislation should be applied to undertakings which posted a worker to carry out temporary work in another Member State. The private international law rules of the national systems applied, and the outcome was legal uncertainty, thus causing distortions of competition and difficulties in enjoying the market freedoms. Based on statistical data and on the case law of the Court of Justice, the Commission presented a proposal for a directive on the posting of workers³⁰⁰, which was then enacted in 1996, i.e. Directive 96/71.

²⁹⁸ For an analysis, see M. ROCCELLA, T. TREU, *Diritto del lavoro dell'Unione europea*, cit., pp. 158-164; S. GIUBBONI, *Libertà economiche fondamentali e diritto del lavoro, oggi*, in *Europa e diritto privato*, 2015, No. 2, pp. 493-509, spec. p. 499 ff.; D. DIVERIO, *Art. 56 TFUE*, in F. POCAR, M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, cit., pp. 417-428, spec. pp. 425-426; U. CARABELLI, *Europa dei mercati e conflitto sociale*, Bari, Cacucci Editore, 2009, p. 13 ff.; U. CARABELLI, *Una sfida determinante per il futuro dei diritti sociali in Europa: la tutela dei lavoratori di fronte alla libertà di prestazione dei servizi nella CE*, in *Rivista giuridica del lavoro*, 2007, No. 1, pp. 33-134.

²⁹⁹ Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016)128 final of 8 March 2016.

³⁰⁰ Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services, COM(91)230 final of 1 August 1991.

However, as early as in 1972³⁰¹ and 1976³⁰², the Commission had submitted legislative proposals, effectively the forerunners to Directive 96/71, which were based on a private international law background and were focused on the freedom of movement of workers under Article 39 of the EC Treaty (previously Article 48 of the EEC Treaty). They were later withdrawn following the adoption in 1980 of the Rome Convention³⁰³.

Directive 96/71 addressed the issue of which national law should apply to posted employees³⁰⁴ in light of the Court of Justice case law. It is also a political solution. Indeed, the posting of workers' regime in the context of the free provision of services opposes the interests of the host State's providers and workers, and works in favour of the interests of companies performing cross-border services (and sometimes even the interests of the posted workers). In addition, it opposes the interests of high-cost States and those of low-cost sending States. Directive 96/71 tried to balance these interests³⁰⁵. Posted workers are employed by the sending company and are therefore subject to the law of that Member State in terms of the employment relationship. According to the Directive, they are entitled by law to the minimum conditions provided by the legislation of the host Member State in which the tasks are carried out³⁰⁶. In other words, the Directive

³⁰¹ Proposition de règlement (CEE) du Conseil relatif aux dispositions concernant les conflits de lois en matière de relations de travail à l'intérieur de la Communauté of 23 March 1972, in *OJ C* 49 of 18 May 1972.

³⁰² Amended proposal for a Regulation of the Council on the provisions on conflict of laws on employment relationships within the Community, COM(75)653 final of 28 April 1976.

³⁰³ Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, in *OJ L* 266 of 9 October 1980, pp. 1-19; on the former proposals see S. EVJU, *Cross-border services, posting of workers, and jurisdictional alternation*, in *European Labour Law Journal*, 2010, Vol. 1, No. 1, pp. 89-98, spec. p. 90; S. EVJU, *Revisiting the Posted Workers Directive: Conflict of Laws and Laws in Conflict*, in *Cambridge Yearbook of European Legal Studies*, 2009-2010, pp. 151-182, spec. p. 156.

³⁰⁴ Under Article 2 of Directive 96/71 «posted worker means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works».

³⁰⁵ A.A.H. VAN HOEK, *Private international law rules for transnational employment*, cit., p. 450.

³⁰⁶ See Article 3 and Recital No. 6 of Directive 96/71. For an analysis, see G. ORLANDINI, *Mercato unico dei servizi e tutela del lavoro*, Milano, Franco Angeli, 2013, pp. 38-42. This Arti-

established a core set of terms and conditions of employment which need to be complied with by the service provider in the Member State where the posting takes place to ensure the minimum protection of the posted workers concerned. As set forth in its first Recital, the abolition of obstacles to the free movement of persons and services constitutes one of the objectives of the Community pursuant to (former) Article 3, letter *c* of the EC Treaty. Indeed, the ultimate goal of the Directive was to enhance the economic dimension of the European market by protecting persons enjoying their right to freely move³⁰⁷.

The Directive drew inspiration from the Court of Justice case law³⁰⁸.

In the *Rush Portuguesa* judgment of 1990, the Court incidentally affirmed the applicability of the host Member State's law³⁰⁹. The case concerned the provision of services of a Portuguese undertaking in France and the interpretation of Articles 59 and 60 of the EEC Treaty (now Articles 56 and 57 of the TFEU). The dispute regarded an undertaking established in Portugal specialising in construction and public works (*Rush Portuguesa*) and the French *Office National d'immigration*. *Rush Portuguesa* entered into a subcontract with a French undertaking for the carrying out of works for the construction of a railway line in western France. For that purpose, it brought its Portuguese employees from Portugal to France. The French *Office National d'immigration* requested specific conditions for the Portuguese workers, i.e. conditions as to the engagement *in situ* and an ob-

cle is further clarified in the 2016 proposal by introducing a few amendments, such as the term 'remuneration'. However, in relation to this, some national parliaments raised many doubts about its compatibility with the principle of subsidiarity, because it violated Member States' prerogatives in this field (for more information, see http://europa.eu/rapid/press-release_IP-16-2546_en.htm and documents cited therein).

³⁰⁷ See Recital No. 3 of Directive 96/71.

³⁰⁸ See, before the internal market was launched, on the interpretation of Regulation No 3 of the Council of the EEC concerning social security for migrant workers, Court of Justice, judgment of 17 December 1970, Case 35/70, *S.A.R.L. Manpower v Caisse primaire d'assurance maladie de Strasbourg*, EU:C:1970:120; and judgment of 5 December 1967, Case 19/67, *Bestuur der Sociale Verzekeringsbank v J. H. van der Vecht*, EU:C:1967:49.

³⁰⁹ Court of Justice, judgment of 27 March 1990, Case C-113/89, *Rush Portuguesa Lda v Office national d'immigration*, EU:C:1990:142.

ligation to obtain a work permit³¹⁰. If the case had fallen within the free movement of workers, those requirements could have been mandated.

When workers are posted in another Member State within the free movement of persons, and not within the free provision of services (based on the principle of the home State), it is undisputed that the host Member State's legislation shall apply (by virtue of the principle of equal treatment). In such cases, protection is granted to both posted and national workers, and downward competition is excluded. By contrast, the posting company could be affected by reverse discrimination because it will be subject to different legislation that eventually offers fewer guarantees. More relevance should have been given to the prohibition of discrimination by the Court when assessing this issue in the case at hand³¹¹.

The Court determined the situation of *Rush Portuguesa* within the free provision of services because «there is a temporary movement of workers who are sent to another Member State to carry out construction work or public works as part of a provision of services by their employer. In fact, such workers return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State»³¹². Therefore, the authorities of the host Member State may not impose on the supplier of services condi-

³¹⁰ M. ROCCA, *Posting of Workers and Collective Labour Law: There and Back Again. Between Internal Market and Fundamental Rights*, Cambridge-Antwerp-Portland, Intersentia, 2015, p. 150 ff. and 289 ff.; M. KULLMANN, *The Principle of Effet Utile and Its Impact on National Methods for Enforcing the Rights of Posted Workers*, in *The International Journal of Comparative Labour Law and Industrial Relations*, 2013, Vol. 29, No. 3, pp. 283-304, spec. p. 293 ff.; on the requirement of a work permit, see also application of 21 April 2017, Case C-18/17, *Danieli & C. Officine Meccaniche and Others v Arbeitsmarktservice Leoben*, in progress.

³¹¹ I. INGRAVALLO, *La Corte di giustizia tra diritto di sciopero e libertà economiche fondamentali. Quale bilanciamento?*, in *La Comunità internazionale*, 2008, No. 4, pp. 641-662, spec. pp. 654-655. See also G. FONTANA, *Crisi economica ed effettività dei diritti sociali in Europa*, 27 novembre 2013, pp. 1-57, spec. p. 38 f., available at www.forumcostituzionale.it.

³¹² Court of Justice, judgment of 27 March 1990, *Rush Portuguesa*, cit., para. 15.

tions relating to the recruitment of manpower *in situ* or the obtaining of work permits for the Portuguese work-force³¹³.

It must be noted that, at that time, the provision on the free movement of workers was not applicable to Portugal due to the transitional regime, and thus Article 39 EC Treaty was not yet applicable³¹⁴. Nevertheless, the Court deemed the situation in the case at issue to be different from the cases in which workers moved abroad to work. On the one hand, it identified the difference between the economic freedoms and their functions within the internal market and, on the other, it did appear to have found a solution to avoid concerns about social dumping practices³¹⁵.

In the ruling, the Court also affirmed: «Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means»³¹⁶. This means that the legislation of the host country shall apply to workers temporarily posted in its territory. Accordingly, such law may better protect workers' rights while respecting the freedom of the transna-

³¹³ *Ibidem*, para. 19. The Court also prohibited prior authorisation or verification of notification made before the undertakings post their workers: judgment of 7 October 2010, Case C-515/08, *Criminal proceedings against Vítor Manuel dos Santos Palhota and Others*, EU:C:2010:589; see M. KULLMANN, *The Principle of Effet Utile and Its Impact on National Methods for Enforcing the Rights of Posted Workers*, cit., p. 294.

³¹⁴ G. ORLANDINI, *Mercato unico dei servizi e tutela del lavoro*, cit., pp. 17-21.

³¹⁵ Court of Justice, judgment of 27 March 1990, *Rush Portuguesa*, cit., para. 18: «Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means».

³¹⁶ *Ibidem*.

tional provision of services³¹⁷. The Court further affirmed that the host Member State shall enforce its law by any means when the protection conferred under its law is not guaranteed by identical or essentially similar obligations by which the undertaking is already bound in the Member State where it is established³¹⁸.

The *Säger* case of 1991³¹⁹ contributed to the development of the legislation at issue. In that case, the Court addressed problems related to the social security systems applicable to posted workers. Article 49 EC Treaty (now Article 56 TFEU) was interpreted as not only prohibiting discriminatory measures, but also as providing for the right to market access in the host countries³²⁰. It follows that the national provisions of the host country could impede the freedom of cross-border activity when they are less favourable than the home country's provisions. Therefore, any national legislation that imposes stricter conditions upon foreign undertakings was deemed to be in violation of EU law, unless it is justified by overriding reasons of public interest³²¹.

³¹⁷ In this regard, see Recital No. 5 of Directive 96/71: «any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers».

³¹⁸ See, *inter alia*, Court of Justice, judgment of 21 October 2004, Case C-445/03, *Commission of the European Communities v Grand Duchy of Luxembourg*, EU:C:2004:655, para. 29.

³¹⁹ Court of Justice, judgment of 25 July 1991, Case C-25/90, *Manfred Säger v Dennemeyer & Co. Ltd.*, EU:C:1991:331.

³²⁰ *Ibidem*, para. 12: «Article 59 of the Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services». See M. FORNASIER, *Employment, Posting of Workers*, cit., pp. 117-118.

³²¹ *Ibidem*, para. 15: «the freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established. In particular, those requirements must be objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services and they must not exceed what is necessary to attain those objectives».

These conclusions find a confirmation in the text of the Directive³²². It is based on Article 53, paragraph 1 and 62 TFEU on the free provision of services. Recital No. 5 states that fair competition and measures guaranteeing respect for the rights of workers are to be provided in the framework of the transnational provision of services³²³. The following Recital No. 6 identifies the problem, i.e. which legislation is applicable to the employment relationship involving posted workers.

Article 1 limits the scope of application of the Directive by determining that it covers the situation in which undertakings established in a Member State post workers to the territory of another Member State to perform services³²⁴. The situation of posting was clarified by the Court in the *Vicoplus* case of 2011³²⁵. It stated that there must be an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of the posting³²⁶. Workers are hired out in accordance with Article 1, paragraph 3, letter c, where, in contrast to a temporary movement, the movement of workers to another Member State constitutes the very purpose of a transnational provision of

³²² For an analysis of the Directive and its implementation in some Member States, see A.A.H. VAN HOEK, M. HOUWERZIJL, *Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, Contract VC/2011/0096, November 2011, available at <http://ec.europa.eu/social/BlobServlet?docId=7510&>.

³²³ On these three broad interests pursued by the Directive see V. KOSTA, *Fundamental Rights in EU Internal Market*, Oxford and Portland, Oregon, Hart Publishing, 2015, pp. 196-200.

³²⁴ On the personal scope see C. BARNARD, *EU Employment Law*, Oxford, Oxford University Press, 4th ed., 2012, p. 218 ff.; A.A.H. VAN HOEK, M. HOUWERZIJL, 'Posting' and 'Posted Workers': *The Need for Clear Definitions of Two Key Concepts of the Posting of Workers Directive*, in *Cambridge Yearbook of European Legal Studies*, 2011-2012, Vol. 14, pp. 419-452.

³²⁵ Court of Justice, judgment of 10 February 2011, Joined Cases C-307/09, C-308/09 and C-309/09, *Vicoplus SC PUH* (C-307/09), *BAM Vermeer Contracting sp. zoo* (C-308/09) and *Olbek Industrial Services sp. zoo* (C-309/09) v *Minister van Sociale Zaken en Werkgelegenheid*, EU:C:2011:64. For further information see also opinion of Advocate General Sharpston delivered on 15 January 2015, Case C-586/13, *Martin Meat v Géza Simonfay and Ulrich Salzburg*, EU:C:2015:15, para. 21 ff. For an analysis see M. ROCCA, *Posting of Workers and Collective Labour Law*, cit., p. 205 ff.

³²⁶ Court of Justice, judgment of 10 February 2011, *Vicoplus*, cit., para. 44.

services³²⁷, and they work under the control and direction of the user undertaking³²⁸. The posted workers remain in the employ of the undertaking providing the service, no contract of employment is entered into with the user undertaking³²⁹, and they return to the Member State of origin after the completion of the service³³⁰.

Article 2 defines a posted worker as a worker who for a limited period of one year, according to Article 3, paragraph 6, carries out his work in the territory of a Member State other than the State in which he normally works. From a private international law perspective, this phrase is similar but not identical to the connecting factor of Article 8, paragraph 2 of the Rome I Regulation, which determines as the applicable law that of «the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract»³³¹.

Article 3, paragraph 1 of Directive 96/71 provides for substantive protection by establishing a conflict of laws rule according to which the Member States shall ensure that the posting undertakings guarantee workers posted to their territory the terms and conditions of employment (seven basic labour standards)³³² which, in

³²⁷ *Ibidem*, para. 46. See G. ORLANDINI, *Il distacco transnazionale*, in M. AIMO, D. IZZI (a cura di), *Esternalizzazioni e tutela dei lavoratori*, Torino, UTET Giuridica, 2014, pp. 637-674, spec. p. 667.

³²⁸ Court of Justice, judgment of 10 February 2011, *Vicoplus*, cit., para. 47, where the Court also specified that «That is the corollary of the fact that such a worker does not carry out his work in the context of a provision of services undertaken by his employer in the host Member State».

³²⁹ *Ibidem*, para. 50.

³³⁰ *Ibidem*, para. 49.

³³¹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), in *OJ L 177* of 4 July 2008, pp. 6-16. In relation to Article 3 of Directive 96/71, see further *infra* in this para.

³³² These are: «(a) maximum work periods and minimum rest periods; (b) minimum paid annual holidays; (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (g) equality of treatment between men and women and other provi-

the Member State where the work is carried out, are set by law, regulation or collective agreements that are universally applicable. This means that the employment terms and conditions provided by the national laws of the host country shall apply to the posted workers in that country, that is to say the law applicable to posted workers is the law of the host State³³³, «whatever the law applicable to the employment relationship».

All the mandatory rules in the areas of protection mentioned in Article 3 must be considered to apply as an overriding mandatory protection for all workers posted to that territory³³⁴. The Member States are allowed to apply their own laws. However, in cross-border situations, the national legislation must be coordinated by EU actions «in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided»³³⁵. The Directive does not harmonise the material content of the mandatory rules for minimum protection. That content may be determined by national laws (as well as a collective agreement), in accordance with EU law³³⁶.

sions on non-discrimination». The reason why these matters are listed is that these employment standards are of immediate interest during the period of posting: see Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services, COM(91)230 final of 1 August 1991, cit. On this point see U. GRUŠIĆ, *The European Private International Law of Employment*, Cambridge, Cambridge University Press, 2015, p. 254 ff, spec. p. 264 ff.

³³³ For further explanations see Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions - The implementation of Directive 96/71/EC in the Member States, COM(2003)458 final of 25 July 2003, para. 4.1.2. See also I. VIARENGO, *La legge applicabile al lavoratore distaccato in un altro Stato membro nell'ambito di una prestazione di servizi*, in B. NASCIBENE (a cura di), *La libera circolazione dei lavoratori. Trent'anni di applicazione delle norme comunitarie*, Milano, Giuffrè Editore, 1998, pp. 175-186.

³³⁴ A.A.H. VAN HOEK, *Private international law rules for transnational employment*, cit., p. 450.

³³⁵ Recitals Nos. 13 to 15 of Directive 96/71.

³³⁶ The Court intervened to define the conditions for example in the judgment of 12 February 2015, Case C-396/13, *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*, EU:C:2015:86, spec. paras. 27-70. On this case see S. GIUBBONI, *Salario minimo e distacco*

In the context of the award of a public contract, in the *RegioPost* judgment of 2015, the Court of Justice clarified that, in accordance with Article 26 of Directive 2004/18 on public works contracts and Article 3 of Directive 96/71, «the host Member State may lay down a mandatory rule for minimum protection (...), which requires undertakings established in other Member States to comply with an obligation in respect of a minimum rate of pay for the benefit of their workers posted to the territory of the host Member State in order to perform that public contract. Such a rule is part of the level of protection which must be guaranteed to those workers»³³⁷.

Hence, Article 3 aims to state a minimum threshold in the level of protection offered to posted workers. However, the Court of Justice interpreted the Directive as imposing a maximum. In this respect, the *Viking* and *Laval* judgments³³⁸ were criticised because of the narrow interpretation according to which the Directive provided maximum limits and not minimum standards upon posted workers' conditions³³⁹; therefore, they are not amendable *in melius* by a collective agreement

transnazionale, in *Rivista giuridica del lavoro e della previdenza sociale*, 2015, No. 2, part II, pp. 222-228.

³³⁷ Court of Justice, judgment of 17 November 2015, Case C-115/14, *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz*, EU:C:2015:760, paras. 61-66. On this subject see F. COSTAMAGNA, *Minimum wage between public procurement and posted workers: anything new after the RegioPost case?*, in *European Law Review*, 2017, Vol. 42, No. 1, pp. 101-111. To that effect see also Court of Justice, judgment of 18 September 2014, Case C-549/13, *Bundesdruckerei GmbH v Stadt Dortmund*, EU:C:2014:2235; judgment of 7 November 2013, Case C-522/12, *Tevfik Isbir v DB Services GmbH*, EU:C:2013:711.

³³⁸ Court of Justice (Grand Chamber), judgment of 11 December 2007, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, EU:C:2007:772; Court of Justice (Grand Chamber), judgment of 18 December 2007, Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, EU:C:2007:809.

³³⁹ See P. MENGOZZI, *Il principio personalista nel diritto dell'Unione Europea*, Padova, CEDAM, 2010, p. 149 ff.

(even more when collective contracts do not have *erga omnes* effectiveness)³⁴⁰. The Directive limits the application of the host State labour law to the areas mentioned therein unless the rule to be applied is considered to be part of public policy. This interpretation thus leaves less room for the application of the local labour standards³⁴¹. For instance, as affirmed in the *Rüffert* case, the host State may not require posting undertakings to pay wages above the minimum rate of pay fixed in the national legislation or the collective agreement³⁴².

Overall, in light of Article 3, the Directive has been interpreted as pursuing the full harmonisation of national systems, because the host States do not have discretion to offer more favourable terms and conditions and thus to go beyond the requirements provided in the Directive³⁴³.

At this point, it is worthwhile to mention the interrelation³⁴⁴ of the Directive with the existing (at that time) private international law instruments, namely the 1980 Rome Convention³⁴⁵. The coordination between these acts is governed by Article 20 of the Convention, now Article 23 of the Regulation under which «the [it] does not affect the application of provisions which, in relation to a particular matter, lay down choice-of-law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or

³⁴⁰ M. ROCCELLA, T. TREU, *Diritto del lavoro dell'Unione europea*, cit., p. 443; S. GIUBBONI, *Libertà economiche fondamentali e diritto del lavoro*, cit., spec. p. 499; G. FONTANA, *Crisi economica ed effettività dei diritti sociali in Europa*, cit., pp. 37-38.

³⁴¹ A.A.H. VAN HOEK, *Private international law rules for transnational employment*, cit. p. 451.

³⁴² Court of Justice, judgment of 3 April 2008, Case C-346/06, *Dirk Rüffert v Land Niedersachsen*, EU:C:2008:189, para. 34; commented, *inter alia*, by V. KOSTA, *Fundamental Rights in EU Internal Market*, cit., pp. 202-207. On minimum wage of pay and part-time posting see Court of Justice, judgment of 15 March 2001, Case C-165/98, *Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL, as the party civilly liable, third parties: Eric Guillaume and Others*, EU:C:2001:162, commented by M. ROCCA, *Posting of Workers and Collective Labour Law*, cit., p. 164 ff.

³⁴³ M. FORNASIER, *Employment, Posting of Workers*, cit., pp. 120-121.

³⁴⁴ Communication COM(2003)458 final, cit., para. 2.3.1.1; see also, among others, C. BARNARD, *EU Employment Law*, cit., pp. 229-234; S. EVJU, *Cross-border services, posting of workers, and jurisdictional alternation*, in *European Labour Law Journal*, 2010, Vol. 1, No. 1, pp. 89-98, spec. p. 90.

³⁴⁵ See Recitals Nos. 7 to 11 of Directive 96/71.

in national laws harmonized in implementation of such acts»³⁴⁶. This means that Article 3 of the Posting of Workers Directive takes precedence as *lex specialis* over the rules laid down in the Convention, now the Rome I Regulation³⁴⁷.

The provision on the law applicable to employment relationships involving posted workers set forth in Article 3 of the Directive supplements the 1980 Rome Convention, now the Rome I Regulation³⁴⁸. Article 8 of the latter determines, pursuant to paragraph 2, that in the absence of a choice by the parties the law applicable to employment contracts is the law of the habitual place of work (*lex loci laboris*). However, the Directive specifically addresses the situation of posted workers by establishing the applicability of the law of the host State.

The difference lies in the interpretation of the employment relation and the fact that the worker is «temporarily employed in another country». The Regulation ensures that during a temporary posting, the law applicable to the contract does not change. Such situation occurs when «the employee is expected to resume working in the country of origin after carrying out his tasks abroad»³⁴⁹. The Directive instead refers to situations of posting lasting one year, provided that the requirements to define the situation of posting are met. It follows from the above that when the host State law is applicable under Article 8 of the Rome I Regulation (by choice of the parties or as the law applicable in the absence of a choice),

³⁴⁶ See also Recital No. 11 of Directive 96/71.

³⁴⁷ As to the coordination of Article 3 of Directive 96/71 and Article 7 of 1980 Rome Convention the Commission affirmed that «The Directive must therefore be regarded as an implementation of Article 7 of the Rome Convention, concerning overriding mandatory rules» and «The Rome Convention and the Directive not having the same objectives, there is no inconsistency between these instruments»: see Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM(2002)654 final of 14 January 2003, point 3.2.9.2.

³⁴⁸ For a comment see A.A.H. VAN HOEK, M. HOUWERZIJL, *Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, cit., *Final Report*, p. 20 ff.

³⁴⁹ See Recital No. 36 of Rome I Regulation, that also specifies that «The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily».

the restrictions imposed by the Directive do not apply. On the contrary, the Directive restricts the operation of Article 8, paragraph 2 of the Regulation and the applicability of the country of origin principle³⁵⁰.

Paragraph 4 of Article 3 of the Directive allows the Member States to provide exemptions by means of collective agreements within the meaning of paragraph 8 of the same Article, concerning one or more sectors of activity, where the length of the posting does not exceed one month, as well as on the grounds that the amount of work to be done is not significant (paragraph 5).

Article 3, paragraph 7 prescribes that the obligation to protect the hard nucleus of the host State does not prevent the application of employment terms and conditions that are more favourable to workers. So, the workers may enjoy the terms and conditions of their home State when they are more favourable.

However, the public policy provisions of the host State law may extend to posted workers employment conditions on matters other than the hard nucleus. This is provided for in Article 3, paragraph 10 which, by virtue of the equal treatment principle, allows the application to posting undertakings of national laws, in compliance with the Treaty, on terms and conditions of employment on matters other than those referred to in paragraph 1 when they consist of public policy provisions³⁵¹, and «public policy may be relied on only if there is a genuine and suf-

³⁵⁰ M. FORNASIER, *Employment, Posting of Workers*, cit., pp. 119-120.

³⁵¹ Communication COM(2003)458 final, cit., para. 4.1.2.2, according to which public policy provisions are «mandatory rules from which there can be no derogation and which, by their nature and objective, meet the imperative requirements of the public interest. These may include, in particular, the prohibition of forced labour or the involvement of public authorities in monitoring compliance with legislation on working conditions». See also Court of Justice, judgment of 23 November 1999, Joined Cases C-369/96 and C-376/96, *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)*, EU:C:1999:575, para. 30: «public-order legislation (...) must be understood as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State».

ficiently serious threat to a fundamental interest of society»³⁵². This concept, which is to be interpreted narrowly, includes the protection of workers. The Member States may offer more favourable employment terms and conditions than those provided in the EU directives that harmonised the pertinent employment matters. Nevertheless, the undertakings posting workers in another State must comply with the minimum standards covered by those directives. Therefore, the compatibility with public policy may not be invoked unless the State where the undertaking is seated did not correctly transpose the Directive³⁵³.

In the *Arblade* judgment of 1999³⁵⁴, the Court recalled that the application of national rules to providers of services established in other Member States must be appropriate for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it. The protection of workers is included among the overriding reasons relating to the public interest which may justify restrictions on the fundamental freedoms³⁵⁵. A restriction on the free

³⁵² Court of Justice, judgment of 19 June 2008, Case C-319/06, *Commission of the European Communities v Grand Duchy of Luxembourg*, EU:C:2008:350, para. 50. See V. KOSTA, *Fundamental Rights in EU Internal Market*, cit., pp. 207-209; G. ORLANDINI, *Il distacco transnazionale*, cit., p. 649 ff.

³⁵³ G. ORLANDINI, *Mercato unico dei servizi e tutela del lavoro*, cit., p. 29.

³⁵⁴ Court of Justice, judgment of 23 November 1999, *Arblade*, cit. For an analysis see M. ROCCA, *Posting of Workers and Collective Labour Law*, cit., p. 160 ff.

³⁵⁵ Court of Justice, judgment of 23 November 1999, *Arblade*, cit., paras. 36-38. Similarly, Court of Justice, judgment of 17 December 1981, Case 279/80, *Criminal proceedings against Alfred John Webb*, EU:C:1981:314, para. 19. See also M. FORNASIER, *Employment, Posting of Workers*, cit., p. 118, which wondered who shall be protected by mandatory provisions of the host State law: the posted workers, the workers of the host State, or either group. It is then interesting to mention the distinction between worker protection and worker welfare that stems from the Court's case law: when it refers to worker protection as a justification it relates to decent working conditions and prevails over EU market freedoms; by contrast, when rejecting the worker protection justification, it may be prioritising the Union interest in worker welfare: C. BARNARD, *The Worker Protection Justification*, cit., p. 109 ff. To be precise, the term worker protection is used in the present work to refer to all workers' rights and the possibility to enjoy rights when moving abroad, including all substantive (work terms and conditions) and procedural rights (such as remedies).

movement of services can be accepted only if it is justified by overriding reasons of public interest and is proportionate³⁵⁶.

The application of the host State law may put the foreign service provider at a disadvantage by obliging it to fulfil double standards (home State and host State), as well as depriving it of the comparative advantage. The Court of Justice affirmed that this is an obstacle to the free provision of services which can only be justified under specific conditions, which are elaborated in its case law. The Court recognised the protection of posted workers as a legitimate interest of the host State, but the application of the host State law must be both necessary and proportionate. One of the conditions for the application of the host State law is that it offers a real advantage to the workers concerned. When workers enjoy a comparable protection under the home State law, the application of the host State law is not justified³⁵⁷.

In the *Finalarte* case of 2001, the Court stressed that restricting measures may not be founded on national economic objectives, such as the protection of national undertakings³⁵⁸. The Court's reasoning clarified that the national courts shall assess whether the host State's rules «confer a genuine benefit on the workers concerned, which significantly adds to their social protection»³⁵⁹. This means that there are provisions aimed at combatting social dumping, as well as others that offer protection for workers. What stems from the above is that the Court did

³⁵⁶ J. MALMBERG, *Regulating Posted Work – Before and After the Laval Quartet*, in M. RÖNNMAR (edited by), *Labour Law, Fundamental Rights and Social Europe*, Oxford and Portland, Oregon, Hart Publishing, 2011, pp. 77-88, spec. p. 78.

³⁵⁷ A.A.H. VAN HOEK, *Private international law rules for transnational employment*, cit., pp. 449-450.

³⁵⁸ See Court of Justice, judgment of 25 October 2001, Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte Sociedade de Construção Civil Lda* (C-49/98), *Portugaia Construções Lda* (C-70/98) and *Engil Sociedade de Construção Civil SA* (C-71/98) v *Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* and *Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* v *Amilcar Oliveira Rocha* (C-50/98), *Tudor Stone Ltd* (C-52/98), *Tecnamb-Tecnologia do Ambiente Lda* (C-53/98), *Turiprata Construções Civil Lda* (C-54/98), *Duarte dos Santos Sousa* (C-68/98) and *Santos & Kewitz Construções Lda* (C-69/98), EU:C:2001:564, para. 39.

³⁵⁹ *Ibidem*, para. 42.

not consider anti-dumping measures as a national economic objective; on the contrary, such measures consist in one of the principles over which the economic integration process is based. Moreover, in this context, national downstream competition policies are not allowed³⁶⁰.

With regard to mandatory rules, the relationship with the applicable private international law instrument must be considered³⁶¹. Article 9 of the Rome I Regulation³⁶² establishes the applicability of the overriding mandatory provisions of the law of the *forum*. In relation to Directive 96/71, Recital No. 34 of the Regulation clarifies that the rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country in which a worker is posted in accordance with said Directive. The Directive designates the mandatory provisions to be observed during the period of transnational posting in the host Member State. These rules constitute a nucleus of minimum protection for posted workers, and in this sense the Directive concretises the abstract concept of overriding mandatory provisions in the context of the posting of workers, while respecting the principle of equality of treatment between national and non-national providers of services by virtue of Article 49 of the EC Treaty (now Article 53 TFEU) and between national and non-national workers³⁶³.

Returning to the content of Directive 96/71, Article 4 imposes the Member States to designate competent national authorities with the aim of cooperating for the purposes of the Directive, while Article 5 provides that appropriate measures shall be adopted in the event of a failure to comply with this Directive, including adequate procedures available to workers and/or their representatives for the enforcement of obligations. This last provision is indeed of interest in the assessment of the remedies involving posted workers, especially through collective

³⁶⁰ M. ROCCA, *Posting of Workers and Collective Labour Law*, cit., p. 169 ff.; G. ORLANDINI, *Mercato unico dei servizi e tutela del lavoro*, cit., p. 21.

³⁶¹ On this point see A.A.H. VAN HOEK, M. HOUWERZIJL, *Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, cit., *Final Report*, cit., p. 26 ff.

³⁶² It replaced Article 7 of the Convention, that is mentioned in Recital No. 10 of Directive 96/71.

³⁶³ M. FORNASIER, *Employment, Posting of Workers*, cit., p. 120.

mechanisms, which, given the transnational nature of the situation, may entail issues of private international law and from a procedural perspective.

The Court of Justice faced the question of trade unions representing posted workers in the *Sähköalojen ammattiliitto* judgment of 2015³⁶⁴. In this case, the Polish undertaking argued that the *Sähköalojen ammattiliitto*, the Finnish trade union, did not have standing to bring proceedings on behalf of the posted workers on the grounds that Polish law prohibits the assignment of claims arising from an employment relationship. On the contrary, the Court held that its *locus standi* before the referring (Finnish) court was governed by Finnish procedural law, which is applicable according to the principle of *lex fori*. Therefore, under Finnish law, the applicant had standing to bring proceedings on behalf of the posted workers³⁶⁵. The European judges affirmed that Polish law, i.e. the Polish Labour Code, to which the Polish undertaking referred, was not relevant with regard to the *locus standi* of the Finnish trade union before the referring (Finnish) court, which was governed by Finnish law. Thus, it did not prevent that trade union from bringing an action before the Satakunnan käräjäoikeus (Finnish court).

The Court concluded that «Directive 96/71 (...), read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, prevents a rule of the Member State of the seat of the undertaking that has posted workers to the territory of another Member State – under which the assignment of claims arising from employment relationships is prohibited – from barring a trade union from bringing an action before a court of the second Member State, in which the work is performed, in order to recover for the posted workers, pay claims which relate to the minimum wage, within the meaning of Directive 96/71, and which have been assigned to it, that assignment being in conformity with the law in force in the second Member State»³⁶⁶. In other words, national trade unions may represent non-national posted workers and are subject to the *lex fori* which may be the law of the host country³⁶⁷. This finding could be connected to Recital No. 22 of the

³⁶⁴ Court of Justice, judgment of 12 February 2015, *Sähköalojen ammattiliitto*, cit.

³⁶⁵ *Ibidem*, paras. 19-21.

³⁶⁶ *Ibidem*, para. 26.

³⁶⁷ M. ROCCELLA, T. TREU, *Diritto del lavoro dell'Unione europea*, cit., pp. 448-449.

Directive, according to which the law of the Member States concerning collective action to defend the interests of trades and professions is not prejudiced. It is significant that the Court valorised the role of trade unions in the place where the posted workers perform their services, in contrast to the previous rulings in the *Laval* case³⁶⁸.

Although the Court did not question or raise any doubts concerning the law applicable to trade unions involving posted workers (because it applied the host State law, which allows national trade unions to represent posted workers), it appears that private international law issues also deserve attention with regard to the coordination with other connecting factors provided in the Directive or in the Enforcement Directive 2014/67, as well as in the existing instruments aimed at protecting employees³⁶⁹.

Article 6 establishes a conflict of jurisdictions rule according to which judicial proceedings may be instituted in the host Member State, without prejudice to the right to institute proceedings in another State under existing international conventions on jurisdiction. This is an additional (alternative) *forum* where the employee can sue his/her employer only to enforce the terms and conditions of employment set forth in Article 3 of Directive 96/71³⁷⁰. This new specific jurisdiction is tailored to the peculiar situation in which posted workers find themselves. Thus, this clause constitutes a provision governing a specific matter, as authorised by Article 67 of the Brussels I Regulation (now Article 67 of the Brussels I *bis* Regulation)³⁷¹ and may be interpreted as an exception³⁷² to the general rules. It

³⁶⁸ A. MATTEI, *La Direttiva Enforcement n. 2014/67/UE e il recepimento nell'ordinamento italiano*, in *Rivista giuridica del lavoro e della previdenza sociale*, 2017, No. 1, part I, pp. 147-168, spec. pp. 156-157.

³⁶⁹ See *infra*, in Chapter 5.

³⁷⁰ Communication COM(2003)458 final, cit., para. 4.1.2.3; on the implementation of Article 6 in some Member States see A.A.H. VAN HOEK, M. HOUWERZIJL, *Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, cit., *Executive Summary*, p. 20 ff.

³⁷¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), in *OJ L* 12 of 16 January 2001, pp. 1-23; Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of

has also been interpreted as the consequence of the duty to apply the mandatory employment provisions of the host State, which is imposed only upon the host State itself. Indeed, the alternative *forum* recognises the courts of the host State as competent. Nevertheless, difficulties in instituting legal proceedings may be faced by posted workers, such as language barriers and unfamiliarity with the legal system. Looking at other available *fora*, they may bring actions before the courts of their home State where the employer is domiciled in accordance with Article 21 of the Brussels I *bis* Regulation. These courts, however, do not have the duty to apply the protective standards provided by the host State law³⁷³.

The remaining Article 7 sets the deadline to implement the Directive, and Article 8 states the Commission commitment to review its application³⁷⁴.

With respect to the last aspect, in the 2003 Communication³⁷⁵ the Commission pointed out the problems faced by the Member States related to the practical application of the Directive. Crucial issues included: the unclear definition of the mandatory provisions, as well as the rights and obligations arising out of the Directive; the lack of an explicit transposition of the jurisdiction clause of Article 6; and obstacles in seeking information and in monitoring compliance.

In 2006 the Commission adopted a guidance for the Member States concerning the implementation of the Directive in a more effective manner and in light of

judgments in civil and commercial matters (Brussels I *bis* or Recast), in *OJ L* 351 of 20 December 2012, pp. 1-32.

³⁷² G. ORLANDINI, *Il distacco transnazionale*, cit., spec. p. 642.

³⁷³ M. FORNASIER, *Employment, Posting of Workers*, cit., pp. 121-122. On the assessment of the *fora* available for posted workers see further in Chapter 5.

³⁷⁴ The Commission did not promptly assess the Directive as stems from European Parliament resolution of 10 October 2002 on the Commission communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the Commission's Action Plan for skills and mobility (COM(2002)72 – C5-0287/2002 – 2002/2147(COS)), P5_TA(2002)0466, point 24, that «urge[d] the Commission to lose no time in submitting its assessment (...) which should have taken place as long ago as December 2001».

³⁷⁵ Communication COM(2003)458 final, cit., para. 4.2.

the Court of Justice case law³⁷⁶, followed by the 2007 Communication, in which it presented the outcomes of the monitoring process based mainly on information given by the Member States and the Social Partners at the EU level in reply to questionnaires submitted to them in October 2006³⁷⁷. The policy documents showed that many Member States rely solely on their own national measures and instruments to control service providers, due to the absence of administrative co-operation, and problems related to access to information and cross-border enforcement.

After conducting a public consultation in 2015³⁷⁸, the Commission presented a proposal on 8 March 2016 amending Directive 96/71³⁷⁹ that, as underlined in the Explanatory Memorandum, it does not cover the aspects regulated by the 2014 Enforcement Directive, which provides for instruments to fight and sanction circumventions, fraud and abuses, with the result that they are complementary to each other and mutually reinforcing³⁸⁰.

As to the content of the 2016 proposal³⁸¹, in general, the revision introduced changes in three main areas: the remuneration of posted workers, rules on tempo-

³⁷⁶ Communication from the Commission, *Guidance on the posting of workers in the framework of the provision of services*, COM(2006)159 final of 4 April 2006.

³⁷⁷ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers*, COM(2007)304 final of 13 June 2007.

³⁷⁸ Commission Staff Working Document, Impact Assessment, Accompanying the document Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SWD(2016)52 final of 8 March 2016.

³⁷⁹ Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016)128 final of 8 March 2016, cit.

³⁸⁰ Explanatory Memorandum of the 2016 proposal, pp. 2-3. On the Enforcement Directive, see *infra* in this Chapter, para. 3.3.

³⁸¹ M. SCHMID-DRÜNER, *The revision of the Posting of Workers Directive*, PE 607.346, October 2017, available at www.europarl.europa.eu/supporting-analyses; E. VOSS, *Posting of Workers Directive – current situation and challenges*, PE 579.001, June 2016, p. 42 ff., available

rary agency workers, and long-term posting. A new provision on the labour law to be applied to posted workers when the anticipated or the effective duration of posting exceeds twenty-four months, is introduced³⁸². In those cases, the host Member State is deemed to be the country in which the work is habitually carried out; thus, in line with the rules of the Rome I Regulation³⁸³, its law will apply to posted workers' employment contracts when no choice of law is made. Nevertheless, the provisions that cannot be derogated under the law of the host State will apply. The requirement of a twenty-four month duration is based on the Court of Justice case law, according to which the distinction between the freedom of establishment and the freedom to provide services (temporarily) needs to be made on a case-by-case basis, taking into account not only the duration, but also the regularity, periodicity and continuity of the provision of services³⁸⁴.

Other amendments address the use of the term “remuneration” instead of “minimum rates of pay”³⁸⁵, as requested by the Court of Justice³⁸⁶, and the intro-

at www.europarl.europa.eu/studies; and M. KISS, *Posting of Workers Directive: Legislation in Progress*, PE 582.043, March 2017; K. EISELE, G. CARUSO, *Revision of the Posting of Workers Directive*, PE 581.381, May 2016; M. REMAC, *Posting of Workers – part of the expected Labour Mobility Package, Implementation Appraisal*, PE 558.784, September 2015, all available at www.europarl.europa.eu/thinktank. With regard to the legal basis, see European Parliament, Committee on Legal Affairs, Opinion on the legal basis of the Commission proposal for a Directive concerning the posting of workers (COM(2016)0128 – C8-0114/2016 – 2016/0070(COD)), PE 604.710v02-00. For comments see P. MATTERA, *Emploi, affaires sociales, compétences et mobilité des travailleurs*, in *Revue du Droit de l'Union Européenne*, 2016, No. 2, pp. 357-363.

³⁸² New Article 2a.

³⁸³ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), in *OJ L 177* of 4 July 2008, pp. 6-16.

³⁸⁴ Court of Justice, judgment of 30 November 1995, Case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, EU:C:1995:411.

³⁸⁵ The current Directive requires that posted workers are subject to the minimum rates of pay; while the 2016 proposal foresees that the same rules on remuneration of the host State apply as laid down by law or by universally applicable collective agreements. As to collective agreements, the Commission proposed that their rules become mandatory for posted workers

duction of an obligation upon the Member States to publish information on the constituent elements of remuneration³⁸⁷. Given that the rules on remuneration are established by the Member States in accordance with their law and practice, it follows that such rules on remuneration applicable to local workers are also valid for posted workers. Moreover, a new provision on situations of subcontracting chains gives the Member States the power to oblige undertakings to subcontract only to others that grant workers certain conditions on remuneration applicable to the contractor. Another new paragraph sets the conditions applicable to workers in specific cases, such as workers hired out by a cross-border agency³⁸⁸.

The proposal establishes that the posted workers will generally benefit from the same rules governing pay and working conditions as those applicable to the local workers in the host country. The Commission sought to implement the principle that the same work at the same place should be remunerated in the same manner³⁸⁹. Equal treatment and the prohibition of any discrimination based on nationality have been enshrined in EU law since the founding Treaties³⁹⁰. The principle of equal pay has been implemented through secondary law, not only between women and men, but also between employees with fixed-term contracts and comparable permanent workers, between part-time and full-time workers and between temporary agency workers and comparable workers of the user undertak-

in all economic sectors, contrary to the current regime that concerns only the construction sector.

³⁸⁶ Court of Justice, judgment of 12 February 2015, *Sähköalojen ammattiliitto*, cit., para. 66; judgment of 16 March 2006, Joined Cases C-131/04 and C-257/04, *C. D. Robinson-Steele v R. D. Retail Services Ltd* (C-131/04), *Michael Jason Clarke v Frank Staddon Ltd* and *J. C. Caulfield and Others v Hanson Clay Products Ltd* (C-257/04), EU:C:2006:177, para. 50; see also (Grand Chamber), judgment of 20 January 2009, Joined Cases C-350/06 and C-520/06, *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund* (C-350/06) and *Stringer and Others v Her Majesty's Revenue and Customs* (C-520/06), EU:C:2009:18, para. 58.

³⁸⁷ Article 1, para. 2, lett. (a), of the 2016 proposal.

³⁸⁸ Article 1, para. 2, lett. (b) and (c), of the 2016 proposal.

³⁸⁹ See F. BANO, *I confini della legalità. Distacco e manodopera low cost*, in D. GOTTARDI (a cura di), *Legal Frame Work. Lavoro e legalità nella società dell'inclusione*, Torino, Giappichelli Editore, 2016, pp. 223-237, spec. p. 231 f.

³⁹⁰ See (now) Article 45 TFEU.

ing. On the one hand, the posting of workers needs to be facilitated and, on the other, fair competition and respect for the rights of workers need to be achieved in light of Article 3 TEU, according to which the Union shall promote social justice and protection, and Article 9 TFEU, which gives the Union the task of promoting a high level of employment, in order to guarantee an adequate social protection and to combat social exclusion³⁹¹.

The objective of the proposal is thus to ensure that the implementation of the freedom to provide services in the Union takes place under conditions that guarantee a level playing field between foreign and local competitors and respect for the rights of workers. Almost twenty years after its adoption, the Commission found that Directive 96/71 no longer ensures such conditions against the background of the current economic and social situations in the Member States. Therefore, the targeted amendments to Directive 96/71 are aimed at striking the right balance between the freedom to provide services and the protection of posted workers' rights³⁹².

As the parliaments of eleven Member States have issued fourteen reasoned opinions, the yellow card procedure has been triggered³⁹³. In particular, the national complaints have argued that the Commission did not provide a detailed and sufficient statement on subsidiarity³⁹⁴; it did not engage in a wide enough consultation of all the stakeholders, including the social partners at the local and regional levels; it did not duly evaluate the necessity of the proposal and the scale of the problem; the legislation was premature, as the deadline for the transposition of the Enforcement Directive was on 18 June 2016; and from a substantial point of view,

³⁹¹ See also Recital No. 3 of the 2016 proposal.

³⁹² Recital No. 4 of the 2016 proposal.

³⁹³ Within the deadline in relation to the review under the subsidiarity principle (10 May 2016), reasoned opinions were submitted by the national Parliaments of Romania, the Czech Republic, Poland, Lithuania, Croatia, Estonia, Bulgaria, Denmark, Hungary, Latvia and Slovakia (available at www.ipex.eu). The threshold required to trigger the procedure was set to 19 votes (one third of the 56 total votes allocated to national Parliaments). The opinions represented 22 votes out of 56 in total.

³⁹⁴ The arguments affirming that the objective of the action could be better achieved at Member State level and that the Commission has not sufficiently proved that the action should be better achieved at Union level were stressed in the majority of the reasoned opinions.

it was in contrast with the principles of the Single Market, given that it did not consider the costs related to posting, thus removing the competitive advantage of the service providers. The Commission then adopted a Communication³⁹⁵ stating that the proposal for a revision of the Directive did not constitute a breach of the subsidiarity principle, as emphasised in a press-release by the Commissioner for Employment, Social Affairs, Skills and Labour Mobility, Ms Marianne Thyssen³⁹⁶. It insisted, *inter alia*, that the objectives of the proposal are to facilitate the correct functioning of the Internal Market, in particular the freedom to provide services (by virtue of Article 57 TFEU, according to which any person providing a service may, in order to do so, temporarily pursue his or her activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals), while ensuring a more level playing field between national and cross-border service providers, an adequate protection of posted workers, and clarity and predictability regarding the legal framework applicable to posted workers. In arguing that such purposes could be better achieved at the Union level, the Commissioner explained that if the Member States act unilaterally, at the national level, on the targeted changes proposed by the draft legislative act, their actions could lead to a fragmentation of the Internal Market as regards the freedom to provide services.

Under the legislative procedure³⁹⁷, negotiations have been initiated and reports adopted by the institutions³⁹⁸ under which amendments have been tabled,

³⁹⁵ Communication from the Commission to the European Parliament, the Council and the National Parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2, COM(2016)505 final of 20 July 2016.

³⁹⁶ Available at http://europa.eu/rapid/press-release_IP-16-2546_en.htm.

³⁹⁷ Available at www.europarl.europa.eu/oeil.

³⁹⁸ European Parliament, Report of 23 October 2017 on the proposal for a directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (2016/0070(COD)), A8-0319/2017; the Council reached an agreement on 23 October 2017, see General approach of 18 October 2017, ST 13153 2017 INIT, and of 23 October 2017, ST 13612 2017 INIT, available at www.consilium.europa.eu.

such as the reduction of the length of posting, and the determination of work conditions, especially remuneration. It appears that developments in the law-making process will mostly lie on political grounds with countries debating about the opportunity to provide for the principle of equal pay for equal work in the same place.

To conclude, the rules on the applicable law and on the alternative *forum* have not been changed substantially, but the provision in the proposed Recital No. 8 and Article 2a, that, in the case of a long-term posting of more than twenty-four months, the host State is deemed to be the country in which the work is carried out in line with the principle of the Rome I Regulation³⁹⁹. No amendments regarding collective redress as a means for the protection of workers' rights were submitted. In this respect, it is worth mentioning that the Council suggested the addition of a new Recital No. 11a concerning the recognition of fundamental rights, including the right or freedom to strike in accordance with national laws and practice⁴⁰⁰.

³⁹⁹ See F. VAN OVERBEEKE, *The Commission's proposal to amend the Posting of Workers Directive and private international law implications*, in *Nederlands Internationaal Privaatrecht*, 2017, No. 2, pp. 178-194, spec. pp. 188-189.

⁴⁰⁰ General approach of 23 October 2017, cit.

3.3. The enforcement of workers' rights in the EU.

In the framework of the transnational provision of services, Directive 96/71 was adopted with the aim of establishing minimum working terms and conditions. However, according to European institution studies and Court of Justice case law, the Directive did not grant effective remedies for employees seeking protection of their rights. Against this background, Directive 2014/67⁴⁰¹ intervened in order to complement and introduce mechanisms to control the authenticity of posting, to enforce sanctions and to impose a duty to inform upon the competent authorities. One provision, Article 11, recognises the right (of workers individually or represented by trade unions) to institute judicial or administrative proceedings for the defence of posted workers' rights. Given that specific EU private international law rules are lacking, whether collective redress, among collective actions, may be successfully promoted is subject to question, and it is unclear which rules apply to cross-border judicial proceedings. In the end, judicial cooperation in civil and commercial matters is closely linked to the free movement of persons and services, and the general principle of the mutual recognition of judgments is necessary for the proper functioning of the internal market.

Because posted workers will not be fully integrated into the industrial relations of the host State, they will not in practice be covered by the normal mechanisms for the supervision and control of working conditions in the host State. Nor will they, in practice, be under any close scrutiny by the control mechanisms in the State of origin. In this way, there is a risk of creating a free zone for irregular and undeclared work where neither the labour laws of the host State nor the labour laws of the State of origin are enforced in practice. It is of key importance for posted workers the access to legal remedies against abuses in the host country to be strengthened⁴⁰².

⁴⁰¹ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC, cit.

⁴⁰² M. MONTI, *Report on a New Strategy for the Single Market at the Service of Europe's Economy and Society. Report to the President of the European Commission*, 9 May 2010, p. 70, available at http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf.

In the framework on posted workers, not only are the substantive aspects, i.e. work terms and conditions, regulated in favour of employees moved temporarily abroad by virtue of the principles of equal treatment and non-discrimination, the procedural measures mainly falling within the administrative and judicial cooperation, as well as the provisions concerning the defence of their rights that require Member States to ensure remedies, are also provided with the aim of offering a high level of effectiveness of the protection for posted workers. In this regard, the Enforcement Directive is considered herein in order to assess whether it could constitute an effective basis for workers to resort to collective mechanisms of protection.

Transnational litigation in the employment context still has no legislative basis at the EU level, and private international law issues need to be addressed as well, given their function of safeguarding weaker parties by establishing protective grounds for the determination of jurisdiction and applicable law. The necessity to act is pointed out in light of the existing regulations and non-binding instruments.

Since the adoption of Directive 96/71, the documents of the European institutions⁴⁰³ and the Court of Justice case law⁴⁰⁴ have reported several deficiencies and problems with the application of the Directive. In order to pursue the effective implementation of this Directive and the respect for the obligations upon the Member States in cases concerning posted workers in the framework of the provision of services, the Enforcement Directive intervened to fill the gaps and overcome the difficulties arising from the application of the former regime.

⁴⁰³ See 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, COM(2012)131 final of 21 March 2012, p. 4 ff.; for further considerations, see Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, *The implementation of Directive 96/71/EC in the Member States*, COM(2003)458 final of 25 July 2003.

⁴⁰⁴ Especially in the so-called *Laval quartet* judgments, also considered in Chapter 2: Court of Justice (Grand Chamber), judgment of 11 December 2007, *Viking*, cit.; (Grand Chamber), judgment of 18 December 2007, *Laval*, cit.; judgment of 3 April 2008, *Rüffert*, cit.; judgment of 19 June 2008, *Commission v Luxemburg*, cit.

Directive 2014/67 aims to improve, enhance and reinforce the way in which Directive 96/71 was implemented, applied and enforced in practice across the European Union by establishing a general common framework of appropriate provisions and actions. It imposes measures to prevent any circumvention or abuse of the rules, as well as the obligation to determine proportionate and effective sanctions. At the same time, it ensures guarantees for the protection of posted workers' rights and the removal of unjustified obstacles to the free provision of services⁴⁰⁵.

On the one hand, the Enforcement Directive specifies how to identify a genuine posting by providing for factual elements set forth in Article 4, which are considered indicative and non-exhaustive, and do not need to be all satisfied in every posting case⁴⁰⁶. Particularly, paragraph 2 lists factors in order to determine whether an undertaking is genuinely performing substantial activities in the Member State of establishment, whereas paragraph 3 concerns the assessment of whether a posted worker is temporarily carrying out his or her work in a Member State other than the one in which he or she normally works. The identification of such elements, and the factual situation and circumstances in which a posted worker is expected to carry out his or her activities, is closely linked to the purpose of preventing, avoiding and combatting abuse⁴⁰⁷ and circumvention of the applicable rules

⁴⁰⁵ See Proposal COM(2012)131 final, cit., p. 11, and Article 1 of Directive 2014/67. For an analysis, see A. MATTEI, *La Direttiva Enforcement n. 2014/67/UE e il recepimento nell'ordinamento italiano*, cit., pp. 147-168; M. ROCCELLA, T. TREU, *Diritto del lavoro dell'Unione europea*, cit., pp. 164-167; E. VOSS, *Posting of Workers Directive – current situation and challenges*, cit., p. 42 ff.; M. ROCCA, *Posting of Workers and Collective Labour Law*, cit., p. 327 ff.; A. ALLAMPRESE, G. ORLANDINI, *La Direttiva 2014/67 del 15 maggio 2014 di attuazione della Direttiva 96/71 sul distacco transnazionale dei lavoratori. Un primo commento*, 2014, available at www.cgil.it; A. DEFOSSEZ, *La directive 2014/67/UE relative à l'exécution de la directive 96/71/CE concernant le détachement de travailleurs: un premier pas dans une bonne direction*, in *Revue trimestrielle de droit européen*, 2014, No. 4, pp. 833-847; G. ORLANDINI, *Mercato unico dei servizi e tutela del lavoro*, cit., pp. 117-127;

⁴⁰⁶ Recital No. 5 of Directive 2014/67. See also Proposal COM(2012)131 final, cit., pp. 13-14; F. BANO, *I confini della legalità. Distacco e manodopera low cost*, cit., spec. p. 227 ff.; M. ROCCELLA, T. TREU, *Diritto del lavoro dell'Unione europea*, cit., p. 165.

⁴⁰⁷ There may be abuses because of the lower cost thanks to the application of less burdensome existing protection upon posted workers in their home country.

by undertakings taking improper or fraudulent advantage of the freedom to provide services enshrined in the TFEU or of the application of Directive 96/71. The implementation and monitoring of the authenticity of posting required the introduction of indicative elements, thus facilitating a common interpretation at the Union level⁴⁰⁸.

On the other hand, the assessment of said constituent factual elements, the temporary nature of the posting and the condition that the employer is genuinely established in the Member State in which the posting takes place need to be carried out by the competent authority of the host Member State and, where necessary, in close cooperation with the home Member State⁴⁰⁹ through the exchange of information⁴¹⁰.

Other provisions concern the access to information (Article 5), administrative cooperation (Articles 6 to 8), monitoring compliance (Articles 9 and 10), the defence of rights (Article 11), subcontracting liability (Article 12), and cross-border enforcement of financial administrative penalties and/or fines (Articles 13 to 19)⁴¹¹.

In order to effectuate the provided framework and fulfil its objectives, the Member States were required to comply with it by promptly and adequately transposing the Directive into their legal orders by 18 June 2016⁴¹².

⁴⁰⁸ Recital No. 7 of Directive 2014/67.

⁴⁰⁹ Recital No. 8, Articles 6 to 8 and 13 to 19 of Directive 2014/67. In particular, Article 6 provides for «mutual assistance without undue delay», and Article 7 states that «the inspection of terms and conditions of employment to be complied with is the responsibility of the authorities of the host Member State». Moreover, Articles 9 and 10 provide Member States with the possibility to impose administrative requirements and control measures necessary in order to ensure effective monitoring of compliance with the obligations set out in this Directive and Directive 96/71, provided that these are justified and proportionate in accordance with Union law.

⁴¹⁰ See Article 5 of Directive 2014/67 and its Recital No. 18.

⁴¹¹ On this last articles, see C. PERARO, *Artt. 13-24 D.lgs. 17 luglio 2016, n. 136*, in R. DE LUCA TAMAJO, O. MAZZOTTA (a cura di), *Commentario breve alle leggi sul lavoro*, Milano, Wolters Kluwer CEDAM, 6^a ed., 2017, pp. 3064-3071.

⁴¹² See Article 23 of Directive 2014/67. In the Italian legal order, the Enforcement Directive has been transposed by Legislative Decree No. 136 of 17 July 2016: Decreto Legislativo 17 luglio

The first set of provisions governing the control of the authenticity of the posting may be invoked in case of their violation by the undertaking. Wrongful actions may be sanctioned by the competent national authorities, and new procedures govern the recognition and enforcement of decisions and sanctions. The provided mechanisms reflect the existing systems of cooperation in both the administrative and judicial spaces based on the principle of mutual trust. Although, in light of the above, it seems that substantial attention has been paid to preventing and combatting abuse, the 2014 Directive also established a fundamental right to act; indeed, in the case of a violation, posted workers shall be ensured judicial or administrative remedies.

Therefore, it is of interest to assess the relevance of posted workers' protection in both its individual and collective dimensions. In this regard, according to Article 11, paragraph 1 of the Enforcement Directive, in order to fully respect the rights granted by Directive 96/71, the Member States should provide «effective mechanisms for posted workers to lodge complaints against their employers directly, as well as the right to institute judicial or administrative proceedings, also in the Member State in whose territory the workers are or were posted, where such workers consider they have sustained loss or damage as a result of a failure to apply the applicable rules, even after the relationship in which the failure is alleged to have occurred has ended».

Paragraph 2 establishes that the jurisdiction of the courts in the Member States as laid down in the relevant EU or international instruments should be observed. Amongst them, as to the determination of the jurisdictional competence and the recognition and enforcement of decisions in civil and commercial matters,

2016, n. 136, Attuazione della direttiva 2014/67/UE del Parlamento europeo e del Consiglio, del 15 maggio 2014, concernente l'applicazione della direttiva 96/71/CE relativa al distacco dei lavoratori nell'ambito di una prestazione di servizi e recante modifica del regolamento (UE) n. 1024/2012 relativo alla cooperazione amministrativa attraverso il sistema di informazione del mercato interno («regolamento IMI»), in *Gazzetta Ufficiale* No 169 of 21 July 2016. For comments see L. CALAFÀ, A. MATTEI, C. PERARO, M. ROCCA, *D.lgs. 17 luglio 2016, n. 136*, in R. DE LUCA TAMAJO, O. MAZZOTTA (a cura di), *Commentario breve alle leggi sul lavoro*, cit., p. 3051 ff.

including employment issues, is the Brussels I Recast Regulation⁴¹³. The new Article 11 of the Enforcement Directive, if adequately transposed, should enhance the effectiveness of the remedies provided by the national legislation; this should also occur as a result of the implementation of Article 6 of Directive 96/71, according to which posted workers are allowed to bring actions before the courts of a host Member State against an employer whose seat is established in another Member State.

In the explanatory statement accompanying the proposal for the Enforcement Directive, the Commission observed that Article 11 relates to the defence of rights that is itself a fundamental right. Namely, Article 47 of the EU Charter of Fundamental Rights confirms the right to an effective remedy for everyone whose rights and freedoms, guaranteed by the law of the European Union, are violated or not respected⁴¹⁴. It follows that the remedies afforded to posted workers need to grant effective protection; otherwise, the Member States can be held liable for violations of EU primary law, i.e. the Charter, and secondary law, i.e. the Directive.

Against this background, individual claims, more often than collective actions, are initiated in relation to employment matters, because of the violation of rights or work conditions as stated in the national law or collective agreements. In cross-border situations, difficulties may be faced by an employee posted temporarily abroad in terms of the competent authority, the applicable law and the legal costs. Moreover, such complaints are very often unlikely to be effective for those reasons.

⁴¹³ Regulation No. 1215/2012 cit.

⁴¹⁴ Proposal COM(2012)131 final, cit., at p. 18. *Inter alia* see M. GOLDONI, *The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation*, in *European Constitutional Law Review*, 2014, Vol. 10, pp. 90-108. On the right to effective remedy, see M. CASTELLANETA, *Art. 47 Carta*, in F. POCAR, M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, Padova, CEDAM, 2^a ed., 2014, pp. 1770-1775; G. D'AVINO, A. MARTONE, *Il diritto ad un ricorso effettivo e ad un giudice imparziale ex art. 47 della Carta dei diritti fondamentali*, in A. DI STASI (a cura di), *Spazio europeo e diritti di giustizia. Il Capo IV della Carta dei diritti fondamentali nell'applicazione giurisprudenziale*, Padova, CEDAM, 2014, pp. 139-210.

Although the Enforcement Directive implements Directive 96/71 by clearly establishing the right to act, it probably could have stated specific rules that cover the collective dimension of the protection of posted workers in light of the case law of the Court of Justice and the former legislative proposals.

With respect to that effect, in line with the Court's findings in the *Laval quartet* judgments and the withdrawn 2012 proposal on the right to take collective action⁴¹⁵, it is relevant that Article 1, paragraph 2 of Directive 2014/67 provides that «the [Enforcement] Directive shall not affect in any way the exercise of fundamental rights as recognised in Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and/or practice»⁴¹⁶.

This is the so-called “Monti clause”, which expressly safeguards the exercise of fundamental rights as recognised in the Member States and at the European

⁴¹⁵ As observed in Chapter 2, para. 2.4; see 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 of 21 March 2012 (the so-called ‘Monti II Regulation’). It is interesting to note that this proposal was submitted on the same day of the proposal for the Enforcement of Posted Workers Directive, COM(2012)131 final, cit.; however, the former proposal was withdrawn since the yellow card procedure was triggered, because some national parliaments affirmed its non-compatibility with the subsidiarity principle.

⁴¹⁶ This provision is similar to the 2012 proposal on the right to take collective action and to Article 85 suggested within the proposal for a recast of the Regulation No 44/2001 (COM(2010)748 final of 14 December 2010), this clause is based on the findings of the report *A new strategy for the single market – at the service of Europe’s Economy and Society* presented on 9 May 2010 by Prof Mario Monti. He recommended to: (i) clarify the implementation of the Posting of Workers Directive and strengthening dissemination of information on the rights and obligations of workers and companies, administrative cooperation and sanctions in the framework of the free movement of persons and the cross-border provision of services; (ii) introduce a provision to guarantee the right to strike, modelled on Article 2 of Council Regulation (EC) No 2679/98 (the so-called ‘Monti Regulation’), and a mechanism for informal resolution of labour disputes concerning the application of the Directive.

Union level, such as the right or freedom to strike or to take other action, including collective action, covered by the specific industrial relations systems in the Member States, in accordance with national law or practice. In contrast to the previous proposals on the introduction of such a clause, it does not refer to the compliance with EU law⁴¹⁷, but exclusively to the respect for fundamental rights to collective action or agreements as defined in national legal orders⁴¹⁸. In this regard, the European legislator seems to have admitted a new approach to the balancing test between the social rights and the fundamental economic freedoms, contrary to the assessment carried out by the Court of Justice in the *Laval quartet* judgments. Indeed, the new provision makes it clear that the legitimacy of collective action needs to be evaluated in accordance with national laws or practice⁴¹⁹.

This provision is also innovative in comparison with Directive 96/71, in which only Recital No. 22 mentions the observation of the law of the Member States concerning collective action to defend the interests of trades and professions. In any case, the two Directives are complementary and concur to regulate the posting of workers. In such context, the respect for fundamental rights, including the right to collective action and to an effective remedy, is prescribed by Article 1, paragraph 2 cited above, jointly with Recital No. 48 of the Enforcement Directive⁴²⁰.

With a view to offering effective remedies, Article 9 of Directive 2014/67 on the monitoring of compliance imposes upon the Member States the «obligation to designate a contact person, if necessary, acting as a representative through whom the relevant social partners may seek to engage the service provider to enter into collective bargaining within the host Member State, in accordance with national

⁴¹⁷ However, see Article 28 of the EU Charter of Fundamental Rights that grants workers and employers, or their respective organisations, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

⁴¹⁸ S. GIUBBONI, *Libertà economiche fondamentali e diritto del lavoro*, cit., pp. 507-509.

⁴¹⁹ *Ibidem*, p. 508.

⁴²⁰ On this issue see V. KOSTA, *Fundamental Rights in EU Internal Market*, cit., pp. 194-195 and 218.

law and/or practice, during the period in which the services are provided». This means that actions by the social partners that are validly carried out under national law may invoke a higher level of minimum protection as provided for in Article 3.

With the aim of implementing such objectives, remedies should be ensured in both judicial and administrative proceedings, including the right of trade unions to act. Indeed, associations, organisations or other legal entities, which should be entitled to act on behalf or in support of posted workers, may provide better representation of posted workers' rights.

Recital No. 34 of the Enforcement Directive encourages the Member States to offer posted workers effective complaint mechanisms through which they may lodge complaints or engage in proceedings either directly or, with their approval, through relevant designated third parties, such as trade unions or other associations, as well as the common institutions of social partners. The national rules of procedure concerning representation and defence before the courts, and competences and rights of trade unions or other employee representatives under national law or practice, must be observed⁴²¹, although they may vary widely.

This is further emphasised by paragraph 3 of Article 11, which regards the role of trade unions. It states that the Member States must ensure the right of trade unions or other similar associations to be engaged on behalf of or in support of the posted workers in any judicial or administrative proceedings with the objective of implementing Directive 96/71 and the Enforcement Directive itself. It is undisputed that the social partners have a role in the protection, and thus the enforcement, of workers' rights that may assume significant relevance in cross-border situations. In general, trade unions can initiate legal proceedings whenever an employer violates the applicable labour legislation or collective agreements, and the related negotiations have been unsuccessful. However, as a disadvantage, only the members of the trade union can benefit.

In national employment contexts, trade unions, organisations or associations are generally entitled to act on behalf of employees within a political dialogue or even before the courts to claim the respect for workers' rights. However, a European framework on the legitimacy of trade unions to defend posted workers and

⁴²¹ See Article 11, para. 4, lett. (c).

on cross-border collective redress in general (i.e. trade unions of one country representing the posted workers from a different State) is lacking⁴²².

In this respect, Article 11 of the Enforcement Directive may constitute a starting point for the establishment of a common regime on collective redress in which employees and employers are involved. It clearly recognises the right of trade unions to engage in any judicial or administrative proceedings, although without providing any requirements. However, it is important to recall that according to paragraph 4 of Article 11, the «national rules of procedure concerning representation and defence before the courts» shall apply. That is (actually) the crucial point: due to the differences between the domestic systems, workers may face difficulties in seeking representatives that could act on their behalf or in support of them in the host State⁴²³.

The question that arises is therefore whether trade unions, associations or organisations of the host State are empowered to represent the posted workers in that territory in judicial or administrative proceedings instituted before the national courts. In other words, may posted workers be represented by the trade unions of the host State against the sending undertaking, which is established in another Member State, before the courts of the host country? National rules, also of private international law, become relevant, given the absence of rules determining jurisdiction, applicable law, and the recognition and enforcement of decisions at EU level specifically related to the exercise of collective actions.

Like Article 6 of Directive 96/71 considered above⁴²⁴, Article 11, paragraph 1 of the Enforcement Directive contemplates an alternative *forum* for posted workers, other than the State where the sending undertaking is established, that is to say the courts of the host Member State where the workers are or were posted,

⁴²² See *infra*, Chapter 4.

⁴²³ Under this aspect, some issues arise as far as the Italian legal order is concerned, because Article 5 of Decree No. 136 of 2016 cit. simply states that workers are entitled to judicial or administrative remedies without reproducing the wording of Article 11 of the 2014 Directive, nor reflecting its whole content: see C. PERARO, *The Enforcement of Posted Workers' Rights Across the European Union*, in *Freedom, Security & Justice: European Legal Studies*, 2017, No. 2, pp. 114-130, spec. p. 122 ff.

⁴²⁴ See *supra*, in this Chapter, para. 3.2.

when such workers consider that they have sustained loss or damage as a result of a failure to apply the applicable rules, even after the relationship in which the failure is alleged to have occurred has ended. Failing any disposition to that effect, this rule on jurisdiction may be applied to trade unions representing posted workers as well.

It is undisputed that Directive 2014/67 points out the relevant role of collective action and collective agreements that trade unions may promote on behalf or in support of posted workers. Namely, Article 1, paragraph 2, Article 5, paragraph 2, letter (b), Article 9, paragraph 1, letter (f), and Article 11, paragraphs 3 and 4, are based on the fact that «respect for the diversity of national industrial relations systems as well as the autonomy of social partners is explicitly recognised by the TFEU»⁴²⁵. However, it does not establish private international law rules for transnational collective mechanism of judicial enforcement.

Public enforcement procedures are provided in Articles 13 to 19 that require the Member States to cooperate at the administrative level to control the posting and to recover the penalties or notify requests of enforcement. Such mechanisms are aimed at fully protecting workers from abuses and violations of the relevant national and EU laws and necessitate undertakings to comply fully with their obligations under the Directive. Nevertheless, such administrative cooperation is designed for the national authorities and does not appear to directly involve workers, as it is not a private remedy of enforcement.

⁴²⁵ Recital No. 14 of Directive 2014/67.

3.4. Concluding considerations.

The protection and enforcement of workers' rights in the EU lie on a legal framework that consists of substantive provisions relating to the work terms and conditions, which must be guaranteed across all the Member States, a specific conflict of laws rule on the law applicable to the employment relationship involving posted workers, an alternative *forum* for posted workers to bring their claims, and the administrative procedures for enforcement. Where appropriate, considerations have been identified regarding the issue of collective remedies, especially when the legislative acts make reference to the right to collective action or to enjoy effective remedies for the protection of workers' rights. Both Directive 96/71 and Directive 2014/67 include statements in that regard, but they only harmonise the national rules and do not provide for common standards or uniform rules as to the procedures.

Particularly, the 2014 Enforcement Directive intervened in order to impose the Member States to adopt effective means for protecting posted workers, having considered the difficulties in implementing the existing EU law and the risks of abuse. It is, however, undisputed that the Member States are obliged to pursue the 2014 Directive's objectives by transposing it into their legal orders through means they deem appropriate, and their solutions may vary widely. This could be the case for Article 11 of the Enforcement Directive on the defence of rights. According to its provisions, it is expressly suggested that the Member States must offer posted workers effective complaint mechanisms; nevertheless, when providing such means domestic law and practice need to be respected.

Its concrete application will demonstrate whether or not EU law is fully observed. In the case of non-compliance, the violation of EU law and fundamental rights, namely the 2014 Directive and Article 47 of the Charter on the right to an effective remedy, eventually in conjunction with Article 28, may be invoked.

In light of the foregoing, in relation to the effectiveness of the existing legislation, on the one hand, it may be argued that judicial systems do not fall within EU competences in any case, and thus an EU action could not have interfered with specific rules. On the other hand, however, uniform standards and common private international law rules could have contributed towards pursuing a higher

level of rights' protection. The Enforcement Directive could probably have provided for uniform standards as to a collective action promoted by posted workers. By contrast, the national legislators could have had the possibility to introduce specific provisions on such issue when transposing the Directive. What can be added is that European and national case law may intervene in order to clarify the real scope of the provisions on the defence of rights. In this regard, considering the *Sähköalojen ammattiliitto* judgment and the legislative developments on the 2016 proposal on the revision of the Posting of Workers Directive, such as the addition of a new Recital on the right to collective action (as suggested by the Council), may be a starting point for determining the rules regarding the workers' protection.

Overall, from both the European and national perspectives, such situation can be described as a missed opportunity or a conscious choice. In this context, it is suggested that some efforts should be undertaken at the EU level in order to regulate transnational litigation in employment matters. What seems to be urgent is the ascertainment of the proper grounds for the determination of the jurisdiction and the law applicable to collective actions, including strikes, industrial actions and collective redress procedures, promoted by representatives of posted workers, taking into consideration the existing rules set forth in the Brussels I Recast Regulation, the Rome I Regulation and those established in the Directives on the posting of workers.

The effective protection of the social rights is a key concept for the elaboration of a common framework, also in light of the commitments envisaged in the European Pillar of Social Rights. This may raise awareness that a legislative response to the critical balance between market integration, including the measures undertaken due to the economic crisis, and social labour rights is needed.

CHAPTER 4

EU CIVIL PROCEDURE AND COLLECTIVE REDRESS IN THE EMPLOYMENT CONTEXT

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Executive Summary

To fully respect and enforce workers' rights, effective remedies must be provided by the Member States in their legal orders. The Union does not have competence over judicial systems, and thus national legislations are called upon to establish the means of enforcement. EU civil procedure, in conjunction with civil judicial cooperation, pursues the protection of fundamental rights and, as a result, the smooth functioning of the internal market. As individual claims are unlikely to be effective, collective mechanisms seem to be the appropriate means for weaker parties. At the EU level, in the absence of any specific rules, collective redress is governed by national laws, whose diversity may cause legal uncertainty in cases with cross-border implications. Some legislative acts deal with this procedural remedy by providing for harmonising rules in specific areas, such as consumer protection and antitrust law; other non-binding initiatives propose horizontal common principles. The employment context has not yet been specifically addressed; however, workers may certainly benefit from collective redress.

4.1. Introduction: the role of EU civil procedure.

In the context of the enforcement of workers' rights, the existing legislation does not provide for specific rules on the remedies for private enforcement or rules on the conflict of laws and of jurisdictions in cases with transnational implications. Rather, it recognises the right to collective action, whose exercise must be in compliance with national laws and practice. Consequently, further questions arise as to the effectiveness of collective actions in cross-border employment disputes and in relation to private international law issues, particularly when posted workers are involved. Before addressing these specific aspects, the role of EU civil procedure and an overview of the *status* of collective redress as a judicial remedy at the EU level are discussed herein, followed by an assessment of the opportunity to provide for collective redress procedures in employment disputes.

EU civil procedure shall be considered in strict connection with the protection of fundamental rights, the enforcement of rights, civil judicial cooperation and the smooth functioning of the internal market⁴²⁶. Thanks to mechanisms of private (and public) enforcement, the effective enjoyment of rights can be assured.

As early as in the *Johnston* case of 1986⁴²⁷ concerning the principle of equal treatment for men and women, the Court of Justice had referred to the requirement of judicial control as a general principle of law⁴²⁸. In interpreting the relevant directive, the Court clarified that the Member States are required to introduce measures that enable all persons who consider themselves wronged by discrimina-

⁴²⁶ On this interrelation see L. GORYWODA, N.E. HATZIMIHAİL, A. NUYTS, *Introduction: Market Regulation, Judicial Cooperation and Collective Redress*, in A. NUYTS, N. E. HATZIMIHAİL (eds.), *Cross-border Class Actions: the European Way*, Munich, Sellier European Law Publishers, 2014, pp. 1-55. On cross-border enforcement see X.E. KRAMER, *Cross-border Enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure*, in *International Journal of Procedural Law*, 2011, Vol. 2, pp. 202-230, spec. p. 208 ff.

⁴²⁷ Court of Justice, judgment of 15 May 1986, Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, EU:C:1986:206. All Court of Justice case law is available at <http://curia.europa.eu>.

⁴²⁸ *Ibidem*, para. 18, where the Court also recalled that «That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950».

tion to pursue their claims through the judicial process. Such measures shall be «sufficiently effective to achieve the aim of the directive and (...) must ensure that the rights thus conferred may be effectively relied upon before the national courts by the persons concerned»⁴²⁹.

In European law, civil procedure is sometimes assimilated into the instruments on cross-border litigation or on private international law⁴³⁰. However, grounded on different legal bases, Union law affects national procedure systems in other areas, especially those related to the internal market. The EU legislator did not specifically rule on civil procedure, except for sector-specific remedies, such as those applicable to consumer and antitrust law⁴³¹ and IP rights protection⁴³². The efficiency of the national judicial systems in the governance of enforcement in Europe is a priority for the respect of the rights granted by EU law⁴³³ and the proper functioning of the economy in the internal market, especially in the present context of the financial crisis⁴³⁴.

Considering that the European Union does not have competence over judicial systems, the national laws on enforcement vary widely among the Member States, which could lead to difficulties with the implementation and respect for the right to an effective remedy enshrined in Article 47 of the Charter⁴³⁵. In this regard, two

⁴²⁹ *Ibidem*, para. 17.

⁴³⁰ B. HESS, *The State of the Civil Justice Union*, in B. HESS, M. BERGSTRÖM, E. STORSKRUBB (eds.), *EU Civil Justice. Current issues and Future Outlook*, Oxford and Portland, Oregon, Hart Publishing, 2016, pp. 1-19, spec. pp. 1-2.

⁴³¹ See further *infra* in this para.

⁴³² B. HESS, *The State of the Civil Justice Union*, cit., p. 10. See Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, in *OJ L 157* of 30 April 2004, pp. 45-86. All EU legislation is available at <http://eur-lex.europa.eu>.

⁴³³ B. HESS, *The Role of Procedural Law in the Governance of Enforcement in Europe*, in H-W. MICKLITZ, A. WECHSLER (edited by), *The Transformation of Enforcement. European Economic Law in Global Perspective*, Oxford and Portland, Oregon, Hart Publishing, 2016, pp. 343-353.

⁴³⁴ B. HESS, *The State of the Civil Justice Union*, cit., p. 10.

⁴³⁵ On this Article, among others, see C. FAVILLI, *I ricorsi collettivi nell'Unione europea e la tutela antidiscriminatoria: verso un autentico approccio orizzontale*, in *Il Diritto dell'Unione europea*, 2014, No. 3, pp. 439-463, spec. p. 440 f.

aspects must be considered: the effective application of EU law by the national courts and the implementation of the fundamental “procedural” right to an effective remedy.

As to the first issue, the national courts, when applying EU legislation, act as “Union courts” and must provide effective judicial protection to everyone. However, pursuant to the principle of the procedural autonomy of the EU Member States, which the Court of Justice must observe⁴³⁶, the national procedures are subject only to restricted control in light of the principles of effectiveness and equivalence in connection with the principle of cooperation⁴³⁷. The courts of the Member States, as decentralised European courts⁴³⁸, are obliged to implement EU law efficiently, even if national procedural systems are outside EU competences.

⁴³⁶ On national procedural autonomy and loyal cooperation, see M.C. BARUFFI, *Art. 4 TUE*, in F. POCAR, M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell’Unione europea*, Padova, CEDAM, 2^a ed., 2014, pp. 13-24, spec. p. 21 ff.; C. FAVILLI, *I ricorsi collettivi nell’Unione europea*, cit., p. 440 ff.; G. TESAURO, *Diritto dell’Unione europea*, Padova, CEDAM, 7^a ed., 2012, p. 112.

⁴³⁷ See Court of Justice, judgment of 16 December 1976, Case 45/76, *Comet BV v Produktschap voor Siergewassen*, EU:C:1976:191, paras. 12-13: «12 (...) in application of the principle of cooperation laid down in Article 5 of the Treaty, the national courts are entrusted with ensuring the legal protection conferred on individuals by the direct effect of the provisions of Community law. 13 Consequently, in the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing the same right of action on an internal matter»; similarly, judgment of 16 December 1976, Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, EU:C:1976:188, para. 5; judgment of 9 March 1978, Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, EU:C:1978:49, para. 14 ff.; judgment of 19 June 1990, Case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, EU:C:1990:257, paras. 18-20; (Grand Chamber), judgment of 13 March 2007, Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, EU:C:2007:163, para. 37. On these principles see I. BENÖHR, *Collective Redress in the Field of European Consumer Law*, in *Legal Issues of Economic Integration*, 2014, Vol. 41, No. 3, pp. 243-256, spec. p. 249 ff.

⁴³⁸ See among others D.U. GALETTA, *L’autonomia procedurale degli Stati membri dell’Unione europea: Paradise Lost?*, Torino, Giappichelli Editore, 2009, p. 37 ff.

It follows that «the diversity of the adjudicative systems of EU Member States seems to be a bad starting point for the efficient (and equal) enforcement of EU law throughout the whole European Union»⁴³⁹. The differences as to procedural requirements may concern legal standing, time limits, or the burden of proof, and they may cause «potential conflict with the fundamental EU law principle of uniform application and equality because the domestic procedural systems form a *de facto* obstacle to the uniform application of substantive EU norms»⁴⁴⁰.

By contrast, the interference with national judicial systems by European harmonised rules could breach the principle of subsidiarity. This could lead to much more fragmentation and divergences in the implementation at the supranational level as a result. The Member States' resistance, aimed at preserving sovereignty over this field, is linked to the need to safeguard their national identity, and their private and cultural dimensions⁴⁴¹.

Nevertheless, this is an “apparent national procedural autonomy” because the Member States may be subject to judicial review in light of the principles of equivalence and effectiveness⁴⁴². According to the first principle, the national rules governing a dispute with a Union dimension may not be less favourable than those governing similar domestic actions, that is to say claims based on EU law should be dealt with in the same way as similar domestic claims⁴⁴³. However, un-

⁴³⁹ B. HESS, *The Role of Procedural Law in the Governance of Enforcement in Europe*, cit., p. 344.

⁴⁴⁰ E. STORSKRUBB, *Civil Procedure and EU Law. A Policy Area Uncovered*, Oxford, Oxford University Press, 2008, p. 2.

⁴⁴¹ On the respect of national identity, see M.C. BARUFFI, *Art. 4 TUE*, cit., pp. 13-14.

⁴⁴² Among others see B. HESS, *A coherent approach to European collective redress*, in D. FAIRGRIEVE, E. LEIN (edited by), *Extraterritoriality and collective redress*, Oxford, Oxford University Press, 2012, pp. 107-118, spec. p. 110.

⁴⁴³ M.C. BARUFFI, *Art. 4 TUE*, cit., p. 19. See Court of Justice, judgment of 21 September 1989, Case 68/88, *Commission of the European Communities v Hellenic Republic*, EU:C:1989:339, paras. 22-25: «22 According to the Commission, the Member States are required by virtue of Article 5 of the EEC Treaty to penalize any persons who infringe Community law in the same way as they penalize those who infringe national law. The Hellenic Republic failed to fulfil those obligations by omitting to initiate all the criminal or disciplinary proceedings provided for by national law against the perpetrators of the fraud and all those who collaborated in the

der the principle of effectiveness, the national rules must not render the exercise of rights conferred by the Union legal order virtually impossible or, at the very least, excessively difficult⁴⁴⁴. In other words, it does not simply require that rules of national law that impede the effective application of EU law be rendered inapplicable; rather, the domestic courts also must assess the extent to which the national rule in question is in fact justifiable in light of the principle of effectiveness⁴⁴⁵.

In addition, national procedural autonomy does not exist when domestic procedural rules are incompatible with the provisions on the free movement of goods or on discrimination on the ground of nationality, because they entail a breach of EU law⁴⁴⁶. Autonomy is also limited due to the obligation to make a referral to the Court of Justice for a preliminary ruling. These are the reasons why, in the sphere of procedural law, there is a refined emanation of the general loyalty principle⁴⁴⁷.

commission and concealment of it. 23 It should be observed that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. 24 For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive. 25 Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws».

⁴⁴⁴ P. CRAIG, G. DE BÚRCA, *EU Law. Text, Cases and Materials*, Oxford, Oxford University Press, 6th ed., 2015, pp. 230-232; M.C. BARUFFI, *Art. 4 TUE*, cit., p. 19; E. STORSKRUBB, *Civil Procedure and EU Law. A Policy Area Uncovered*, cit., p. 14 f., where the Author also referred to the Court of Justice's balancing approach under which the proportionality must be assessed between the restrictive impact of the national procedural or remedial rule against the legitimate aim that the rules uphold.

⁴⁴⁵ S. PRECHAL, K. CATH, *The European acquis of civil procedure: constitutional aspects*, in *Uniform Law Review*, 2014, Vol. 19, pp. 179-198, spec. p. 182 ff.

⁴⁴⁶ E. STORSKRUBB, *Civil Procedure and EU Law. A Policy Area Uncovered*, cit., p. 18.

⁴⁴⁷ *Ibidem*, p. 20.

In the debate on the role of procedural law, the choice between the centralised (directly before the Court of Justice) and decentralised (indirectly before the national courts) enforcement of EU law is important, given that the ultimate goal of EU law is its uniform application⁴⁴⁸.

With regard to the second aspect identified above, that is the implementation of the right to an effective remedy, and generally the connection between civil procedure and the fundamental rights⁴⁴⁹, considerations concern the fact that, via effective remedies, the protection of rights may be assured; and the fundamental right to an effective remedy, in conjunction with other procedural rights, such as access to justice and fair trial, included under Article 47 of the Charter⁴⁵⁰, which reflects Article 6 of the European Convention on Human Rights (ECHR), be respected⁴⁵¹. Said Articles must be interpreted on a case-by-case basis. However, rules of law must be clear, precise and predictable pursuant to the principle of legal certainty.

With a view to achieving the effectiveness and correct application of EU law, Member States are called upon to provide for effective remedies⁴⁵². The rights granted to European citizens need to be protected: even if there is no explicit link to procedural law, the civil element of their citizenship encompasses the right to justice and due process of law⁴⁵³. Indeed, one of the objectives of the EU is to strengthen the protection of citizens' rights. The interaction between citizenship and the emergence of an EU civil justice system is based on two directions: citizenship fosters a judicial space, and judicial cooperation in civil matters develops and gives substantive meaning to citizenship⁴⁵⁴. Said interrelationship is even

⁴⁴⁸ *Ibidem*, p. 17.

⁴⁴⁹ *Ibidem*, pp. 86-91.

⁴⁵⁰ For a comment see M. CASTELLANETA, *Art. 47 Carta*, in F. POCAR, M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, cit., pp. 1770-1775.

⁴⁵¹ R. MAŃKO, *Europeanisation of civil procedure. Towards common minimum standards?*, PE 559.499, June 2015, p. 5 ff., available at www.europarl.europa.eu/thinktank.

⁴⁵² C. FAVILLI, *I ricorsi collettivi nell'Unione europea*, cit., spec. p. 440 ff.

⁴⁵³ On civil procedure and European citizenship see E. STORSKRUBB, *Civil Procedure and EU Law. A Policy Area Uncovered*, cit., pp. 82-86.

⁴⁵⁴ *Ibidem*, p. 84.

more clear when a judgment issued in one Member State circulates in others, and its enforcement may be refused on the basis of public policy exceptions, which include the fairness of proceedings by virtue of the fundamental right to an effective remedy and fair trial⁴⁵⁵.

To that effect, in the *Krombach* judgment of 2000⁴⁵⁶, the Court evaluated the public policy concept in the context of the 1968 Brussels Convention, recognising that «the observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question»⁴⁵⁷. The right to a fair hearing, which is also protected by the ECHR, cannot be undermined on the ground that the Brussels Convention is aimed at securing the simplification of the formalities governing the reciprocal recognition and enforcement of judgments⁴⁵⁸. By determining a common European value of procedural fairness, the Court addressed the public policy exception and the need to safeguard the fundamental rights with judicial cooperation measures and national practices⁴⁵⁹.

This finding leads to other considerations. Assuming that the relevance of the effectiveness of a judicial procedure is a fundamental right in itself and that its goal is to protect fundamental rights, transnational judicial cooperation plays an essential role against this background. Given the diversities among the Member States' civil procedures, as a decentralised enforcement of EU law, a European action based on Article 81 TFEU is welcomed when dealing with cross-border litigation.

Amongst the EU private international law instruments, some cover aspects of international civil procedure, such as international jurisdiction, recognition and enforcement of foreign judgments, cross-border service of documents, taking of

⁴⁵⁵ J.J. KUIPERS, *The Right to a Fair Trial and the Free Movement of civil judgments*, in *Croatian Yearbook of European Law and Policy*, 2010, Vol. 6, pp. 23-51.

⁴⁵⁶ Court of Justice, judgment of 28 March 2000, Case C-7/98, *Dieter Krombach v André Bamberski*, EU:C:2000:164.

⁴⁵⁷ *Ibidem*, para. 42.

⁴⁵⁸ *Ibidem*, paras. 43-44.

⁴⁵⁹ E. STORSKRUBB, *Civil Procedure and EU Law. A Policy Area Uncovered*, cit., p. 90.

evidence abroad, and general issues of international legal cooperation⁴⁶⁰. The coordination of national procedural systems is based on the principle of mutual trust, jointly with the principle of mutual recognition, which governs the circulation of judgments across the EU⁴⁶¹. Judicial cooperation is deemed to represent a response to the pressures of the intersections between civil procedure and European law⁴⁶²; in reality, it is situated at the crossroads of procedural law, private international law and EU law and as such it is an interdisciplinary endeavour⁴⁶³.

It must be recognised that the legislative solutions adopted by the Union in the context of judicial cooperation, which, with the 1997 Treaty of Amsterdam, became a new EU policy, are aimed at improving the efficiency of the European civil justice system, and thus enforcing substantive law in cross-border situations and giving effectiveness to the fundamental rights granted to individuals. Fundamental rights may be protected solely via effective enforcement (procedural) means based on clear rules, and based on such means individuals may seek for the protection of their rights. Otherwise, differences among the Member States will create difficulties in cross-border litigation and disincentivise cross-border trade and the functioning of the internal market⁴⁶⁴.

EU competence is assured in EU primary law; indeed, the Commission has the power to promote legislative initiatives to overcome difficulties and pursue the

⁴⁶⁰ For a general overview see F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale*, Volume I, *Parte generale e obbligazioni*, Milano, UTET Giuridica, 8^a ed., 2017, p. 22 ff.; R. CLERICI, *Art. 81 TFUE*, in F. POCAR, M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, cit., pp. 500-505.

⁴⁶¹ These procedures have been reinforced with the abolition of *exequatur* at the enforcement stage with the Brussels I *bis* Regulation No. 1215/2012. Nevertheless, review proceedings remain under national laws of enforcement.

⁴⁶² E. STORSKRUBB, *Civil Procedure and EU Law. A Policy Area Uncovered*, cit., p. 4.

⁴⁶³ *Ibidem*, p. 11. On the relation between civil procedure and private international law see also X.E. KRAMER, *Harmonisation of Civil Procedure and the Interaction with Private International Law*, in X.E. KRAMER, C.H. VAN RHEE (editors), *Civil Litigation in a Globalising World*, The Hague, T.M.C. Asser Press, 2012, pp. 121-139.

⁴⁶⁴ B. HESS, *The Role of Procedural Law in the Governance of Enforcement in Europe*, cit., pp. 343-344; E. STORSKRUBB, *Civil Procedure and EU Law. A Policy Area Uncovered*, cit., pp. 1-2.

objective of the Member States to effectively fulfil EU law⁴⁶⁵. The legal basis⁴⁶⁶ for the adoption of EU civil procedure acts⁴⁶⁷ may be based either on Articles 67 and 81 TFEU, which confer upon the European legislator the power to adopt acts in the field of civil judicial cooperation when situations have transnational implications⁴⁶⁸, and they are mainly aimed at the approximation of procedural and private international law rules, or Article 114 TFEU, which permits the adoption of acts aimed at harmonising, in a sectorial and horizontal approach, the national procedures for the purpose of safeguarding the functioning of the internal market⁴⁶⁹. It is an advantage of acts based on Article 114, independently from their

⁴⁶⁵ B. HESS, *The Role of Procedural Law in the Governance of Enforcement in Europe*, cit., p. 344.

⁴⁶⁶ According to the settled case law of the Court of Justice, «the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure» (Court of Justice (Grand Chamber), judgment of 23 October 2007, Case C-440/05, *Commission of the European Communities v Council of the European Union*, EU:C:2007:625; (Grand Chamber), judgment of 8 September 2009, Case C-411/06, *Commission of the European Communities v European Parliament and Council of the European Union*, EU:C:2009:518). In principle, a measure is to be founded on only one legal basis. A dual legal basis can only be used if a measure simultaneously pursues a number of objectives or has several linked components, without one being secondary and indirect in relation to the other.

⁴⁶⁷ On this issue see B. HESS, *The State of the Civil Justice Union*, cit., spec. p. 2. On the evolution of the legal basis, see E. STORSKRUBB, *Civil Procedure and EU Law. A Policy Area Uncovered*, cit., p. 33 ff.; R. MAŃKO, *Europeanisation of civil procedure. Towards common minimum standards?*, cit., pp. 9-15; C. HODGES, *The Reform of Class and Representative Actions in European Legal Systems. A new Framework for Collective Redress in Europe*, Oxford and Portland, Oregon, Hart Publishing, 2008, p. 94 ff.

⁴⁶⁸ See F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale*, Volume I, cit., p. 22 ff.; R. CLERICI, *Art. 81 TFUE*, cit., pp. 500-505.

⁴⁶⁹ For instance, see Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, in *OJ L* 349 of 5 December 2014, pp. 1-19; Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), in *OJ L* 165 of 18 June 2013, pp. 63-79; see B. HESS, *The Role of Procedural Law in the Governance of Enforcement in Europe*, cit., pp.

sectorial nature, that they may be used «as a model for reforming more generally national systems»⁴⁷⁰. Similarly, the abovementioned provisions may constitute the legal bases for a European act on collective redress⁴⁷¹, implying a combination of market principles with judicial systems.

To conclude, all the conditions and elements identified in said Articles are in some way connected: the realisation of a European area of freedom, security and justice, where fundamental rights are respected, is pursued by fulfilling the principles governing judicial cooperation that contribute to the safeguarding of the functioning of the internal market. As a result, civil procedure has proven to be of an interdisciplinary nature⁴⁷².

In the context of EU procedural law, questions may arise with regard to the possibility to set common minimum standards to be applied at the EU level, and thus to implement them in all national legal systems with the aim of providing an EU-wide balance of the fundamental rights of litigants⁴⁷³. These may be deemed

345-346; A. DAMATO, *Art. 114 TFUE*, in F. POCAR, M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, cit., pp. 904-910. Specifically on Directive 2014/104 see D. GERADIN, *Collective redress for Antitrust Damages in the European Union: is this a reality now?*, in *George Mason Law Review*, 2015, Vol. 22, No. 5, pp. 1079-1101, spec. p. 1081 ff. In this regard, the Court of Justice had already affirmed that private antitrust litigation could contribute to effective competition law enforcement and that victims should have the right to seek compensation for harm suffered as a result of anti-competitive behaviour: judgment of 20 September 2001, Case C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, EU:C:2001:465, spec. para. 26 ff.; see also judgment of 13 July 2006, Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito v Fondiaria Sai SpA* (C-296/04) and *Nicolò Tricarico* (C-297/04) and *Pasqualina Murgolo* (C-298/04) v *Assitalia SpA*, EU:C:2006:461, para. 89 ff.

⁴⁷⁰ B. HESS, *The Role of Procedural Law in the Governance of Enforcement in Europe*, cit., p. 347.

⁴⁷¹ See further in this Chapter, para. 4.2.

⁴⁷² As stated by E. STORSKRUBB, *Civil Procedure and EU Law. A Policy Area Uncovered*, cit., spec. p. 11.

⁴⁷³ On this issue see R. MAŃKO, *Europeanisation of civil procedure. Towards common minimum standards?*, cit., p. 23 ff. Alongside the determination of common minimum standards in EU civil procedure, the idea of a code of European civil procedure has also become relevant.

to be in support of the mutual recognition of judgments in the European judicial area and to ensure the principles of access to justice, fair trial, effectiveness and equivalence⁴⁷⁴. Whether the application of common minimum standards may also apply to internal proceedings, and not only to cross-border cases, is subject to debate. The European Parliament's own-initiative resolution on common minimum standards⁴⁷⁵, in which it proposed the adoption of a directive based on Article 81, paragraph 2 TFEU⁴⁷⁶, is relevant to that effect. It also expressed that in order to improve efficiency in civil procedure, the Member States may extend the scope of application of the common minimum standards «not only to matters falling within the scope of Union law, but also to both cross-border and purely domestic cases generally»⁴⁷⁷. Procedural standards may also be identified in relation to collective redress, which is a viable means for claimants (especially for weaker parties) to seek the protection of their rights⁴⁷⁸.

In connection with the above considerations, the following remarks focus on the state of play of collective redress legislation at the EU level, with particular regard to the employment context.

⁴⁷⁴ B. HESS, *The State of the Civil Justice Union*, cit., pp. 15-16.

⁴⁷⁵ European Parliament resolution of 4 July 2017 with recommendations to the Commission on common minimum standards of civil procedure in the European Union (2015/2084(INL)), P8_TA-PROV(2017)0282.

⁴⁷⁶ *Ibidem*, point 10.

⁴⁷⁷ *Ibidem*, point 13.

⁴⁷⁸ See further in this Chapter, para. 4.2.

4.2. The legal framework on collective redress in the EU.

Collective actions, and in particular collective redress procedures, are perceived as tools for increasing access to justice, especially for weaker parties, and thus enhancing the functioning of the internal market, because judicial litigation is deemed as a means of enforcement⁴⁷⁹.

Back in 1993, the Commission addressed the need to assure access to justice for consumers and considered the protection of collective interests⁴⁸⁰. In addition to the soft law acts on extrajudicial procedures, such as alternative dispute resolution (ADR) instruments, after the entry into force of the Treaty of Amsterdam, binding measures to promote access to justice were adopted, including, for instance, the Directive on minimum common rules on legal aid⁴⁸¹ and the European Small Claims Procedure Regulation⁴⁸². Also the first Injunctions Directive⁴⁸³ established a common procedure to allow consumer bodies to stop unlawful practices that harm the collective interest of consumers anywhere in the EU.

The debate on effective protection and collective redress mechanisms has intensified since the adoption of the Consumer Policy Strategy for 2007-2013⁴⁸⁴. The Directive on injunctions adopted in 2009 does not, however, allow for collec-

⁴⁷⁹ C. HODGES, *The Reform of Class and Representative Actions in European Legal Systems*, cit., p. 187 ff.

⁴⁸⁰ Green Paper Access of consumers to justice and the settlement of consumer disputes in the Single Market, COM(93)576 final of 16 November 1993.

⁴⁸¹ Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, in *OJ L* 26 of 31 January 2003, pp. 41-47.

⁴⁸² Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, in *OJ L* 199 of 31 July 2007, pp. 1-22 (then amended).

⁴⁸³ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, in *OJ L* 166 of 11 June 1998, pp. 51-55. See I. BENÖHR, *Collective Redress in the Field of European Consumer Law*, in *Legal Issues of Economic Integration*, 2014, Vol. 41, No. 3, pp. 243-256, spec. p. 248 ff.

⁴⁸⁴ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *EU Consumer Policy Strategy 2007-2013, Empowering consumers, enhancing their welfare, effectively protecting them*, COM(2007)99 final of 13 March 2007.

tive redress for damages, which would compensate consumers for the harm or loss they have suffered⁴⁸⁵.

The institutions have engaged in many reflections about the legal context of collective actions in the EU, where the need of claimants to access justice and the risk of litigation abuse must be balanced⁴⁸⁶. The common starting point is the recognition of the fundamental rights, whose protection is an objective that the EU law must pursue. Studies related to specific sectors were conducted with a view to analysing possible effective means in the field of enforcement.

The Commission addressed remedies in antitrust law in the Green Paper of 2005, in which it identified the obstacles to a more efficient system for bringing claims and proposed options for problem solving to benefit consumers, as well as to improve the enforcement of antitrust law⁴⁸⁷. The Commission indeed recognised that it was unlikely that small claims by consumers or purchasers would be initiated, and that collective actions consolidating a large number of smaller claims into one action, thereby saving time and money, could better protect their interests⁴⁸⁸. As a follow up⁴⁸⁹, the European Parliament, assuming private actions

⁴⁸⁵ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version), in *OJ L* 110 of 1 May 2009, pp. 30-36.

⁴⁸⁶ On the relevant developments see, *inter alia*, T. BOSTERS, *Collective Redress and Private International Law in the EU*, The Hague, T.M.C. Asser Press, 2017, spec. p. 241 ff.; C. FAVILLI, *I ricorsi collettivi nell'Unione europea*, cit., spec. 443 ff.; L. GORYWODA, *The Emerging EU Legal Regime for Collective Redress: Institutional Dimension and Its Main Features*, in A. NUYTS, N. E. HATZIMIHAİL (eds.), *Cross-border Class Actions: the European Way*, Munich, Sellier European Law Publishers, 2014, pp. 59-68; C. HODGES, *The Reform of Class and Representative Actions in European Legal Systems*, cit., pp. 102-111; and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards a European Horizontal Framework for Collective Redress*, COM(2013)401 final of 11 June 2013, spec. para. 1.3 ff.

⁴⁸⁷ Green Paper Damages actions for breach of the EC antitrust rules, COM(2005)672 final of 19 December 2005, accompanied by SEC(2005)1732.

⁴⁸⁸ *Ibidem*, para. 2.5.

⁴⁸⁹ European Parliament resolution of 25 April 2007 on the Green Paper on Damages actions for breach of the EC antitrust rules (2006/2207(INI)), P6_TA(2007)0152.

to be complementary to and compatible with public enforcement⁴⁹⁰, stressed that «in the interests of justice and for reasons of economy, speed and consistency, victims should be able voluntarily to bring collective actions, either directly or via organisations whose statutes have this as their object»⁴⁹¹.

The findings in the 2005 Green Paper demonstrated that the obstacles to enforcement arose from the various legal and procedural rules of the Member States governing actions for antitrust damages before the national courts. The main problem was legal uncertainty. Thus, in the White Paper of 2008 on damages actions for breach of the EU antitrust rules, the Commission went further⁴⁹². It indeed proposed two collective redress mechanisms that shall be complementary, which are (i) representative actions brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims; and (ii) opt-in collective actions, in which the victims expressly decide to combine their individual claims for the harm they suffered into one single action⁴⁹³. Subsequently, in November 2008, the Commission adopted the Green Paper on Consumer Collective Redress⁴⁹⁴. The 2008 Green Paper sets out four options. They include: (1) no immediate action, (2) co-operation between Member States, extending national collective redress systems to consumers from other Member States without a collective redress mechanism, (3) a mix of policy instruments to strengthen consumer redress (including collective consumer alternative dispute mechanisms, a power for national enforcement authorities to request traders to compensate consumers and extending small claims to

⁴⁹⁰ *Ibidem*, point 6.

⁴⁹¹ *Ibidem*, point 21.

⁴⁹² White Paper on damages actions for breach of the EC antitrust rules, COM(2008)165 final of 2 April 2008, accompanied by SEC(2008)404, SEC(2008)405, SEC(2008)406. See also the impact assessment of group litigation in Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios, Final Report, 21 December 2007, p. 268 ff., available at <http://ec.europa.eu>; T. CHIEU, *Class Actions in the European Union?: Importing Lessons Learned from The United States' experience into European Community Competition Law*, in *Cardozo Journal of International & Comparative Law*, 2010, Vol. 18, pp. 123-157, spec. p. 143 ff.

⁴⁹³ White Paper, cit., section "Standing: indirect purchasers and collective redress".

⁴⁹⁴ Green Paper on Consumer Collective Redress, COM(2008)794 final of 27 November 2008.

deal with mass claims), and (4) binding or non-binding measures for a collective redress judicial procedure to exist in all Member States.

The European Parliament welcomed the proposals to set up such mechanisms aimed at improving collective redress while avoiding excessive litigation⁴⁹⁵, as well as the need to identify the members of group actions and the representative entities⁴⁹⁶. It deemed that collective redress, as a means to facilitate access to justice, is an important deterrent⁴⁹⁷.

Later, based on the Information Note of 2010 on the need for a coherent European approach to collective redress⁴⁹⁸, the Commission adopted a series of initiatives aimed at assessing the opportunity to submit a legislative proposal on collective redress in the EU.

In 2011, the Commission carried out a horizontal public consultation “Towards a coherent European approach to collective redress” with the purpose of identifying common legal principles on collective redress and evaluating the fields in which the different forms of collective redress could have an added value for better protecting the rights of EU citizens and businesses, and for improving the enforcement of EU legislation.

The European Parliament decided to provide its input to the European debate by adopting in 2012 a resolution based on a comprehensive own-initiative report on collective redress. It specifically determined various aspects of collective redress and clearly recognised that «in the European area of justice, citizens and companies must not only enjoy rights but must also be able to enforce those rights effectively and efficiently»⁴⁹⁹.

⁴⁹⁵ European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)), P6_TA(2009)0187, spec. point 4.

⁴⁹⁶ *Ibidem*, point 10.

⁴⁹⁷ *Ibidem*, point 4.

⁴⁹⁸ Towards a Coherent European Approach to Collective Redress: Next Steps, Joint information note by Vice-President Viviane Reding, Vice-President Joaquín Almunia and Commissioner John Dalli, SEC(2010)1192 of 5 October 2010.

⁴⁹⁹ European Parliament resolution of 2 February 2012 on “Towards a Coherent European Approach to Collective Redress” (2011/2089(INI)), P7_TA(2012)0021. See for comments S.I. STRONG, *Regulatory litigation in the European Union: does the U.S. class action have a new analogue?*, in *Notre Dame Law Review*, 2012, Vol. 88, No. 2, pp. 899-971, spec. p. 904 ff.

Effectiveness was also emphasised in the 2013 Communication of the Commission, which reported the main findings of the public consultation and addressed some central issues regarding collective redress⁵⁰⁰. Jointly with this Communication, the Commission called upon the Member States to follow its 2013 Recommendation on common principles for injunctive and compensatory collective redress mechanisms concerning violations of rights granted under EU law⁵⁰¹. The reason for this was that the aim of collective redress is «to facilitate access to justice in relation to violations of rights under Union law and to that end to recommend that all Member States should have collective redress systems at [the] national level that follow the same basic principles throughout the Union, taking into account the legal traditions of the Member States and safeguarding against abuse»⁵⁰².

⁵⁰⁰ Commission Communication COM(2013)401 final of 11 June 2013, cit.

⁵⁰¹ See Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, in *OJ L* 128 of 30 April 2014, pp. 8-14, spec. under Recital No. 15 where Member States are invited to examine the implementation of common principles for injunctive and compensatory collective redress mechanisms, with a view of ensuring effective legal protection, and without prejudice to the existing collective defence mechanisms available to the social partners and national law or practice. By contrast, Directive 2014/104 on antitrust damages actions cit. does not require the Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU (Recital No. 13).

⁵⁰² Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), in *OJ L* 201 of 26 July 2013, pp. 60-65. For comments, see T. BOSTERS, *Collective Redress and Private International Law in the EU*, cit., spec. p. 244 ff.; H. MUIR WATT, *Collective Redress*, in J. BASEDOW, G. RÜHL, F. FERRARI, P. DE MIGUEL ASENSIO (edited by), *Encyclopedia of Private International Law*, Cheltenham, UK, Northampton, MA, USA, Edward Elgar Publishing, 2017, pp. 46-54; R. GAMBLE, *Not a class act (yet): Europe moves softly towards collective redress*, in *European Competition Law Review*, 2016, Vol. 37, No. 1, pp. 14-24; B. HESS, *The State of the Civil Justice Union*, cit., p. 8; B. HESS, *The Role of procedural law in the Governance of Enforcement in Europe*, cit., pp. 343-353; D. GERADIN, *Collective redress for Antitrust Damages in the European Union: is this a reality now?*, in *George Mason Law Review*, 2015, Vol. 22, No. 5, pp. 1079-1101, spec. 1086 ff.; C. FAVILLI, *I ricorsi collettivi nell'Unione europea*, cit., p. 442 ff.; B. HESS, *Collective Redress and the Jurisdictional Model of the Brussels I Regulation*, in A. NUYTS, N.E.

As to the definition, in the Recommendation, under point 3, collective redress means «(i) a legal mechanism that ensures a possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons or by an entity entitled to bring a representative action (injunctive collective redress); (ii) a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action (compensatory collective redress)». Then, in point 4, collective redress is conceived as a representative action, because standing to sue is granted only to the “representative entities” identified in advance by Member States or to the public authorities: both shall act on behalf of a group of individuals (or legal persons) equally affected by unlawful acts performed by the same defendant.

In the accompanying Communication, the Commission specified that collective redress is «a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action. Collective redress facilitates access to justice in particular in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law»⁵⁰³.

Collective redress is thus considered as an instrumental means of furthering economic and social objectives⁵⁰⁴. It constitutes a procedural tool that encourages injured individuals to stand up for their rights and ensures that courts will be able

HATZIMIHAİL (eds.), *Cross-border Class Actions: the European Way*, cit., pp. 59-68, spec. pp. 67-68; A. STADLER, *The Commission’s Recommendation on common principles of collective redress and private international law issues*, in *Nederlands Internationaal Privaatrecht*, 2013, No. 4, pp. 483-488.

⁵⁰³ Commission Communication COM(2013)401 final of 11 June 2013, cit., para. 1.2.

⁵⁰⁴ R. MONEY-KYRLE, *Legal Standing in Collective Redress Actions for Breach of EU Rights: Facilitating or Frustrating Common Standards and Access to Justice?*, in B. HESS, M. BERGSTRÖM, E. STORSKRUBB (eds.), *EU Civil Justice. Current issues and Future Outlook*, cit., pp. 223-253, spec. p. 231.

to manage mass actions effectively and in a reasonable time. The terminology may vary among jurisdictions; thus, for the purposes of the present study, collective redress is used in line with the Commission's definition⁵⁰⁵.

Focusing on the Recommendation, the fact that it is a non-binding act based on Article 292 TFEU, containing common principles and guidelines for injunctive and compensatory collective mechanisms⁵⁰⁶, has been criticised due to its limited practical influence in improving effectiveness⁵⁰⁷ and thus concretely interfering with the national justice systems. Even if it is not legislative, on the one hand, it is a first (welcome) initiative suggesting a horizontal harmonisation of a selected area of civil procedure, i.e. collective mechanisms, for private enforcement in various EU fields. On the other hand, the Member States may, however, violate other duties enshrined in the Treaties, such as under Article 19 TEU and Article 47 of the Charter, which require them to provide access to justice⁵⁰⁸. To that effect, collective redress is deemed to be a viable means.

The Recommendation lays down principles common to injunctive and compensatory collective redress, followed by more principles applicable specifically to each individual category. These principles are supposed to represent the "minimum standards" that Member States are encouraged to apply in the national legislation governing collective procedures. In the Commission's opinion, compliance with these standards would improve the judicial protection offered to group

⁵⁰⁵ See also in Chapter 1. Collective redress represents a judicial means for the protection of rights, that is included under the category of collective actions. For comments on the terminology, see, in relation to the 2013 Recommendation, C. FAVILLI, *I ricorsi collettivi nell'Unione europea*, cit., p. 448 f.; and also R. MONEY-KYRLE, C. HODGES, *European Collective Action: Towards Coherence?*, in *Maastricht Journal of European and Comparative Law*, 2012, Vol. 19, No. 4, pp. 477-504, spec. p. 479 ff.

⁵⁰⁶ «Neither minimum procedural standards of collective actions, nor a maximum harmonisation have been proposed. The Recommendation and the Communication of the Commission appear as a kind of 'position paper' in an on-going political discussion»: B. HESS, *The Role of Procedural Law*, cit., p. 350.

⁵⁰⁷ I. BENÖHR, *Collective Redress in the Field of European Consumer Law*, in *Legal Issues of Economic Integration*, 2014, Vol. 41, No. 3, pp. 243-256, spec. p. 252 ff.

⁵⁰⁸ C. FAVILLI, *I ricorsi collettivi nell'Unione europea*, cit., spec. p. 453 f.

rights by means of procedures that are «fair, equitable, timely, and not prohibitively expensive»⁵⁰⁹.

The first set of common principles applicable to injunctive and compensatory collective redress deals with issues such as standing, the admissibility of actions, adequate information for potential claimants, funding of collective actions, and the application of the “loser pays” principle to the costs of lawsuits⁵¹⁰. In relation to the injunctive procedure, it is recommended that the Member States ensure expedient procedures and appropriate sanctions⁵¹¹. For compensatory redress, other features are proposed, such as the constitution of the claimant party on the basis of express consent (opt-in principle), the recourse to alternative dispute resolution and settlements, limits on lawyers’ fees, the prohibition of overcompensation and punitive damages, and the coordination with public enforcement proceedings⁵¹².

The suggested opt-in model has been animatedly debated and is still an issue under discussion. According to the Commission, the claimant party should be formed on the basis of the opt-in principle, which requires the express consent of the natural or legal persons claiming to have been harmed. Only reasons of sound administration of justice may justify exceptions to this principle, by law or by court order. In the Commission Communication, such topic is thoroughly addressed and is also based on a strict comparison with the US class action⁵¹³. The applicability of the decisions to persons who joined the action (opt-in) or who did not join the action, but, however, can benefit from the judgment effects (opt-out), is one of the major differences between the national collective mechanisms⁵¹⁴. In

⁵⁰⁹ Commission Recommendation (2013/396/EU) of 11 June 2013, cit., point 2.

⁵¹⁰ *Ibidem*, points 4 to 18.

⁵¹¹ *Ibidem*, points 19-20.

⁵¹² *Ibidem*, points 21 to 34.

⁵¹³ Commission Communication COM(2013)401 final of 11 June 2013, cit., para. 2.2.2.

⁵¹⁴ On national collective procedures and opt-in or opt-out models, see Commission Communication COM(2013)401 final of 11 June 2013, cit., para. 1.3; L. ERVO, ‘*Opt-In is Out and Opt-Out is In*’: *Dimensions Based on Nordic Options and the Commission’s Recommendation*, in B. HESS, M. BERGSTRÖM, E. STORSKRUBB (eds.), *EU Civil Justice. Current issues and Future Outlook*, cit., pp. 185-221, spec. p. 186 ff.; R. MONEY-KYRLE, *Legal Standing in Collective Redress Actions for Breach of EU Rights*, cit., p. 228 ff.; J. KODEK, *Class Actions – Some Reflections from a European Perspectives*, in E. LEIN, D. FAIRGRIEVE, M. OTERO CRESPO, V.

the first case, an express intention to be part of the action is necessary, while in the second, it is not necessary, because it applies in any case. Other relevant features pointed out with the aim of underlining the need to adopt the opt-in mechanism are related to the risk of abusive litigation⁵¹⁵. Furthermore, the opt-in system is in compliance with the autonomy of the parties to decide to participate or not in the litigation⁵¹⁶. It thus guarantees that collective judgments do not have a binding preclusive effect on the claimants who did not join. On the contrary, the opt-out system compromises the freedom of potential claimants to decide whether they want to litigate and contrasts with the right to an effective remedy, which requires the express consent to the possibility of joining litigation. In cases in which the claimants are not identified, it will be difficult to distribute the potential compensation obtained⁵¹⁷.

SMITH (edited by), *Collective Redress in Europe: Why and How?*, cit., pp. 117-132, spec. p. 121 ff.; A. JOHNSON, *To 'Opt-in' or To 'Opt-out? – That is the Question*, in E. LEIN, D. FAIRGRIEVE, M. OTERO CRESPO, V. SMITH (edited by), *Collective Redress in Europe: Why and How?*, cit., pp. 61-65; J. CRAMERS, M. BULLA, *Collective redress and workers' rights in the EU*, AIAS Working Paper 118, March 2012, p. 37 ff., available at www.uva-aias.net; D. FAIRGRIEVE, G. HOWELLS, *Collective redress procedures: European debates*, in D. FAIRGRIEVE, E. LEIN (edited by), *Extraterritoriality and collective redress*, cit., pp. 19-33; A. LAYTON, *Collective redress: policy objectives and practical problems*, in D. FAIRGRIEVE, E. LEIN (edited by), *Extraterritoriality and collective redress*, cit., pp. 93-104, spec. pp. 94-95; R. MONEY-KYRLE, C. HODGES, *European Collective Action: Towards Coherence?*, cit., pp. 477-504; C. HODGES, *The Reform of Class and Representative Actions in European Legal Systems*, cit., p. 117 ff.

⁵¹⁵ Commission Communication COM(2013)401 final of 11 June 2013, cit., para. 2.2.2.

⁵¹⁶ On legal standing issues see R. MONEY-KYRLE, *Legal Standing in Collective Redress Actions for Breach of EU Rights*, cit., pp. 223-253.

⁵¹⁷ *Ibidem*, para. 3.4. See also European Parliament resolution of 2 February 2012, cit., which stressed that «the European approach to collective redress must be founded on the opt-in principle, whereby victims are clearly identified and take part in the procedure only if they have expressly indicated their wish to do so, in order to avoid potential abuses». In the Explanatory Statement of the Report of 12 January 2012 on “Towards a Coherent European Approach to Collective Redress” (2011/2089(INI)), A7-0012/2012, «The rapporteur calls for only a clearly identified group of people to be able to take part in a representative action and identification must be complete when the claim is brought. The Constitutions of several Member States prohibit opt-out actions where a claim is brought on behalf of unknown vic-

As these methods are elements of national procedural systems, the appropriateness of a European action in this regard may be questioned. On the basis of the aforementioned principle of procedural autonomy, the Member States shall freely provide procedural requirements and, with respect to collective mechanisms, adopt opt-in or opt-out procedures⁵¹⁸. It is not, however, the purpose of the present study to support one model or the other. Certainly, a future European legislative framework on collective redress shall be accurately justified on this point in light of the subsidiarity principle.

In any case, this collective procedure is deemed to be a means of protection favouring (mostly) the weaker parties to disputes, although no express reference (to categories of weaker parties) is made in the Communication or in the Recommendation of the Commission. The determination of the scope of application of the common principles enshrined in the Recommendation stems from its Recital No. 7. It specifies that the «areas where the supplementary private enforcement of rights granted under Union law in the form of collective redress is of value, are consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection». Nonetheless, the horizontal application of the common principles may cover «any other areas where collective claims for injunctions or damages in respect of violations of the rights granted under Union law would be relevant»⁵¹⁹. Cases involving differences between the victims and the actor, such as a violation of human rights, and in particular social rights, may thus be governed⁵²⁰.

tims as victims would not be free not to bring an action. An opt-out action would also be problematic in light of Article 6 ECHR».

⁵¹⁸ M. DANOVA, *The Brussels I Regulation: cross-border collective redress proceedings and judgments*, in *Journal of Private International Law*, 2010, Vol. 6, No. 2, pp. 359-393, spec. p. 363.

⁵¹⁹ Recital No. 7, cit. See also X.E. KRAMER, *Cross-border Enforcement in the EU*, cit., p. 228, where the Author noted that «The recent legislative action in the area of collective redress may also offer a valuable contribution to a uniform recovery of (probably both domestic and cross-border) claims».

⁵²⁰ C. FAVILLI, *I ricorsi collettivi nell'Unione europea*, cit., spec. p. 446. On employment collective redress see in this Chapter, para. 4.3.

Further difficulties may be encountered when collective redress has cross-border implications. In the Recommendation, under point 17, the Commission called upon the Member States to ensure that foreign claimants are not excluded by the national rules on admissibility or standing⁵²¹. These cases may occur when claimants are from several Member States, or foreign groups of claimants or representative entities originate from other national legal systems. In other words, the courts shall recognise procedural standing of foreign entities under the law of their State of origin. This rule is consistent with the fact that, otherwise, due to a different legislation on *locus standi* for representative organisations in the State where the claim is initiated, the entity may not have legal standing because of restrictive criteria provided by the *lex fori*⁵²². When a diversity of requirements occurs, the public policy exception may be invoked against the recognition of decisions issued within a collective procedure. Under the following point 18, the Commission required that any officially designated representative entity shall be permitted to seize the court in the Member State having jurisdiction to consider the mass harm situation. This means that the procedural requirements set forth in the *lex fori* cannot limit the power of a foreign representative entity to act before the courts of a different Member State.

In so far as the present analysis is concerned, the fact that the Commission only referred to mass harm claims leaves doubts as to the applicability of the principles under points 17 and 18 to different situations, such as violations of employment terms and conditions. In general, the principles at stake do not sufficiently address the implications of private international law. For instance, this gap may lead to *forum shopping* or to a conflict of laws applicable to the constitution of the collective redress and the merits, given that the competent court should assess different laws, whether on contractual or extra-contractual obligations.

⁵²¹ On this issue see T. BOSTERS, *Collective Redress and Private International Law in the EU*, cit., spec. p. 244 ff.; A. STADLER, *The Commission's Recommendation on Common Principles of Collective Redress and Private International Law Issues*, in E. LEIN, D. FAIRGRIEVE, M. OTERO CRESPO, V. SMITH (edited by), *Collective Redress in Europe: Why and How?*, cit., pp. 235-249.

⁵²² R. MONEY-KYRLE, *Legal Standing in Collective Redress Actions for Breach of EU Rights*, cit., p. 240.

These crucial issues about jurisdiction and applicable law were indeed pointed out by the European Parliament in its 2012 Resolution⁵²³, but no response was found in the Commission's text. As to the first aspect, it stressed that the horizontal framework should have laid down rules to prevent a rush to the courts (*forum shopping*) and that rules for determining jurisdiction should have taken into account the provisions of the Brussels I Regulation⁵²⁴. It then suggested the application of the law of the place where the majority of the victims are domiciled, without prejudice to individual claims⁵²⁵.

From the procedural and private international law perspectives, it is indeed necessary to provide for specific rules on cross-border collective redress; nonetheless, common principles to be fulfilled in the legal orders of all EU Member States may support collective litigation by eliminating some substantive differences and thus facilitating, at a second stage, the circulation of judgments. This optimistic approach is based on the assumption that the Member States involved did implement the Recommendation's principles, thus having national legal systems with similar rules on collective redress. On the contrary, if the Member States did not fulfil such guidelines, problems may arise as to the certification of the collective redress, the resolution of the case, and finally the recognition and enforcement of collective judgments.

Thanks to the forthcoming assessment of the implementation of the Recommendation, as planned under its point 41, it will be of interest to evaluate the national measures adopted within the collective redress systems. Based on such findings and on possible case law at national and European levels, substantive and procedural aspects may be outlined in order to define a future European legislation on cross-border collective redress. With specific regard to employment matters, the Court of Justice case law might, however, not suffice when industrial actions are concerned, because there is a lack of any legislative provisions, common

⁵²³ European Parliament resolution of 2 February 2012, cit.

⁵²⁴ *Ibidem*, para. 26.

⁵²⁵ *Ibidem*, para. 27.

rules or private international law rules, as noted by the 2013 Parliament's Resolution on jurisdiction in employment matters⁵²⁶.

To conclude, considering the non-binding nature of those common principles, one may likely imagine that the EU Member States still provide for different collective mechanisms. In this scenario, EU private international law rules could thus help to manage cross-border cases.

Furthermore, from a procedural point of view, it is interesting to question whether a European collective redress procedure could be established based either on a comprehensive approach, thus resulting in a general procedural remedy, or on a sector-specific approach applicable to a single policy area. No answers have been found in the Commission's initiatives, and scholars have rarely discussed it. In line with the EU competences on procedural law, Articles 67 and 81 TFEU may constitute the appropriate legal basis⁵²⁷; otherwise, the adoption of a legislative act providing for a horizontal approach may be based on Article 114 TFEU aimed at approximating the national provisions on collective procedures. This last option is most advisable, with the view, on the one hand, to safeguarding national priorities and sovereignty and, on the other, coordinating the different legal systems⁵²⁸.

⁵²⁶ European Parliament resolution of 8 October 2013 on improving private international law: jurisdiction rules applicable to employment (2013/2023(INI)), P7_TA(2013)0396. On jurisdiction on employment collective redress, see further in Chapter 5.

⁵²⁷ B. HESS, *The Role of Procedural Law in the Governance of Enforcement in Europe*, cit., p. 346.

⁵²⁸ See B. HESS, *A coherent approach to European collective redress*, cit., spec. p. 111; see also G. WAGNER, *Harmonisation of Civil Procedure: Policy Perspectives*, in X.E. KRAMER, C.H. VAN RHEE (editors), *Civil Litigation in a Globalising World*, cit., pp. 93-119, spec. p. 107.

4.3. Collective redress in the employment context.

Workers' rights may be protected and enforced through collective actions, which include judicial means and out-of-court actions. The latter may consist of strike actions such as forms of protest or demonstrations⁵²⁹, whereas the notion of collective redress as a judicial procedure promoted by workers is defined in accordance with the Commission's explanation in its 2013 Communication⁵³⁰.

Workers may invoke the protection of their rights by initiating legal proceedings against their employer; however, the success of individual claims is hard to achieve. It is common for the Member States' legal orders to authorise the representation of workers by trade unions, associations, organisations or other similar entities that promote their interests (mainly at the stage of the negotiation of collective agreements) and to act on their behalf or in support of them before the courts.

The case law of the Court of Justice appears not to fully promote the role of trade unions. When referring to the fundamental rights to collective action or collective bargaining, the precedence of the economic freedoms has been stated⁵³¹, except for a few interpretations aimed at recognising the social dimension of the Union. The *Viking* and *Laval* cases addressed collective actions exercised in one Member State to seek respect for the work terms and conditions⁵³². Namely, the *Viking* case concerned a collective action relating to the reflagging of a vessel from the Finnish to the Estonian flag. In the *Laval* case, a Swedish trade union, by

⁵²⁹ With regard to collective actions against austerity measures see F. DORSSEMONT, *Collective Action Against Austerity Measures*, in N. BRUUN, K. LÖRCHER, I. SCHÖMANN (eds.), *The Economic and Financial Crisis and Collective Labour Law in Europe*, Oxford and Portland, Oregon, Hart Publishing, 2016, pp. 153-170, spec. p. 157 ff. On the notion of collective action under a comparative approach see F. DORSSEMONT, *Labour Law Issues of Transnational Collective Action – Comparative Report*, in F. DORSSEMONT, T. JASPERS, A.A.H. VAN HOEK (editors), *Cross-border Collective Actions in Europe: A Legal Challenge. A Study of the Legal Aspects of Transnational Collective Actions from a Labour Law and Private International Law Perspective*, Antwerpen – Oxford, Intersentia, 2007, pp. 245-273, spec. p. 254 ff.

⁵³⁰ See *supra* in this Chapter, para. 4.2.

⁵³¹ See *supra* in Chapter 2, para. 2.2.

⁵³² F. DORSSEMONT, *Labour Law Issues of Transnational Collective Action – Comparative Report*, cit., p. 259.

means of collective action, tried to force a Latvian provider of services to sign a collective agreement when performing services in Sweden. According to the Court's judgments, as trade unions are subject to the Treaty provisions on economic freedoms, even if the protection of workers amounts to a justifiable restriction, the economic freedoms prevailed⁵³³. Needless to say, these were cases concerning strikes or industrial actions.

As to the collective proceedings before the courts involving workers, the *Sähköalojen ammattiliitto* (a Finnish trade union) case⁵³⁴ could be recalled. It concerned claims brought before a Finnish court against a Polish undertaking to request the minimum pay in accordance with a collective agreement and with the Directive on the posting of workers, because the Finnish collective agreement provided for more favourable conditions than those under Polish law. Here, the dispute focused on the legal standing of the Finnish trade union and its power to represent the posted (Polish) workers. The fact that a collective redress was brought before the courts to claim respect for the work terms and conditions is remarkable. The Polish undertaking asserted the application of the law of the State of origin of the posting undertaking (Polish law), which required different conditions on the trade unions' legal standing, and it asked for the dismissal of the action. At the end, the Court did not uphold this argument and applied the *lex fori* (Finnish law), that is to say that the judicial proceedings are governed by the law of the court seised.

As this case shows, it is undisputed that the diversity between the (procedural) national laws or regulations causes difficulties with initiating proceedings and, in general, with granting access to justice and effective remedies in situations with cross-border implications. However, on the one hand, the recognition of the right to take collective action is always accompanied by the need to comply not only with EU law but also national legislation and practice (pursuant to Article 28 of the Charter). This is likely to be the main reason for legal uncertainty regarding the possibility to act in transnational litigation. On the other hand, the European

⁵³³ See in Chapter 2, para. 2.2.

⁵³⁴ Court of Justice, judgment of 12 February 2015, Case C-396/13, *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*, EU:C:2015:86.

Union does not have competence over this matter and finding a common European solution could entail political debate⁵³⁵.

Against this background, the focus must be on collective redress as a means of private enforcement of workers' rights based on the assumption that workers may benefit from such judicial procedures in terms of their access to justice and the success of their claims. Individual legal actions may concern low damage or may be similar to others resulting from the same infringement of law. Therefore, bundling claims into a single court action facilitates access to justice and strengthens the claimants' power. Even though public enforcement procedures have been established in some EU directives applicable to employment matters⁵³⁶, the opportunity to seek compensation through private remedies must be ensured by the national legal systems.

According to some national legislations, trade unions or other entities⁵³⁷ are entitled to act on behalf or in support of workers in cross-border disputes⁵³⁸, and thus are able to represent, in their countries, victims from other Member States, who are domiciled in different countries⁵³⁹. The recognition of the representative role of trade unions in labour law could indeed contribute to enhancing the effectiveness of the enforcement of rights in the EU.

⁵³⁵ In this regard, political resistance has been registered on the 2012 proposal on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, then withdrawn (see Chapter 2, para. 2.4), and on the 2016 proposal, on which the yellow card procedure was triggered (see Chapter 3, para. 3.2).

⁵³⁶ See *supra* in Chapter 3, para. 3.1.

⁵³⁷ On trade union functions in national context see R. ZAHN, *New Labour Laws in Old Member States. Trade Union Responses to European Enlargement*, Cambridge, Cambridge University Press, 2017, p. 17 ff.; D. SCHIEK, L. OLIVER, C. FORDE, G. ALBERTI, *EU Social and Labour Rights and EU Internal Market Law*, PE 563.457, September 2015, spec. p. 30 ff., available at www.europarl.europa.eu/supporting-analyses, noted that «effective collective industrial action is a precondition of a functioning system of collective bargaining. However, generally wage levels and levels of employment protection are more favourable for workers where trade union representation is effective, which again depends on the scope for collective industrial action».

⁵³⁸ J. CREMERS, M. BULLA, *Collective redress and workers' rights in the EU*, AIAS Working Paper 118, March 2012, spec. p. 19, available at www.uva-aias.net.

⁵³⁹ *Ibidem*, pp. 19-20.

Moreover, as to the effectiveness of collective redress, especially in cases concerning posted workers, access to justice is often arduous for individual workers due to their difficulties in promoting litigation, legal costs and their unfamiliarity with foreign legislation. It follows that workers who have moved abroad temporarily could also benefit from a collective procedure, when the representative organisation has the power to represent foreign members or when a foreign organisation may act before foreign courts.

Taking into account the legal framework in the Member States' and EU legal orders, the resort to collective procedures is mainly regulated with regard to damages claims based on consumer or antitrust law, and developments have been registered, for instance, in environmental law. In this context, it is advisable that the horizontal approach provided by the Commission with the 2013 Recommendation on common principles will apply to various policy areas. Employment matters are not mentioned, although not explicitly excluded; therefore, they may fall within its scope of application.

4.4. Concluding considerations.

Civil procedure, effective remedies, access to justice, enforcement of law and the protection of rights are correlated. While Member States are required to provide for measures available to individuals to seek the protection of their rights, the European Union has the power to promote judicial cooperation and to harmonise procedural systems when this is aimed at providing better solutions for European situations. An undisputed effective means of private enforcement is collective redress: on the one hand, it facilitates access to justice and, on the other, it contributes to the sound administration of justice, its economy and efficiency.

The latest legislative developments are of a non-binding nature, but nevertheless may serve as a starting point. The 2013 Communication and Recommendation were aimed at a convergence of national collective redress remedies through the establishment of common principles. Whether such principles are to be applied only in domestic or also in cross-border cases is not clear. The proposals pursue the harmonisation of procedural law at the European level and «can be regarded as a typical example for the application of the concept of integration: the growing Europeanisation of the substantive laws in Europe triggers a parallel need for a better enforcement in specific sectors»⁵⁴⁰.

It is sufficient to note here that alongside public enforcement, private means are to be offered to individuals to enable them to seek the protection of the rights enshrined in EU law. Collective redress can mostly contribute to defending the rights of weaker parties. Collective redress may represent an effective enforcement remedy not only for consumers and victims of damages for the violation of antitrust law or environmental law, but also for workers in employment disputes. The aim of collective claims is indeed to assist and provide a remedy to individuals who otherwise would have been unable to bring an action.

Combining the EU instruments, some resistance from the EU has resulted in the submission of legislation for private enforcement; whereas in specific areas in which the public interest is involved, legislative acts have been adopted, such as those applicable to consumer protection. As long as the public interest corre-

⁵⁴⁰ B. HESS, *Procedural Harmonisation in a European Context*, in X.E. KRAMER, C.H. VAN RHEE (editors), *Civil Litigation in a Globalising World*, cit., pp. 159-173, spec. p. 168 f.

sponds to subjective individual rights, the two concepts will correlate⁵⁴¹. However, for consumer protection and insolvency law, the Commission also started with recommendations before submitting a legislative proposal⁵⁴². This is a way to raise awareness about a particular issue deemed relevant within the law-making programme of the EU institutions.

Questions regarding the political usefulness of collective redress, which appears to be a crucial issue in cases in which a legislative act is proposed, may limit the possibility to concretely address the opportunity to establish a European legal framework on collective redress. In this regard, the last yellow card procedure triggered in relation to the 2016 proposal for the amendment of the Posting of Workers Directive is significant. When sensitive matters are under discussion, in order to safeguard national priorities the Member States rarely support European action.

From a systematic procedural point of view, Union actions have been sectorial, and the choices of legislative activities have not been comprehensive but rather incidental. A more systematic approach is thus needed, including better coordination of the EU instruments at the horizontal and vertical levels⁵⁴³.

In the existing scenario, issues related to the competent authority, the determination of the applicable law to the institution of collective redress as well as the merits of the case, and subsequently the recognition and enforcement of collective decisions, may arise. There are indeed a few rules on multiple party litigation, but they do not specifically address collective redress. During the waiting for the submission of legislative proposals, common rules or harmonising provisions, private international law issues are arising and require answers. Against this background, addressing employment matters is related to the issue of increasing labour mobility, and providing for a clear framework related to effective enforcement may be useful in practice, as well as for future legislative developments.

⁵⁴¹ B. HESS, *The Role of Procedural Law in the Governance of Enforcement in Europe*, cit., p. 348.

⁵⁴² *Ibidem*, p. 351.

⁵⁴³ B. HESS, *The State of the Civil Justice Union*, cit., p. 18.

CHAPTER 5

EU PRIVATE INTERNATIONAL LAW ON CROSS-BORDER COLLECTIVE REDRESS IN THE EMPLOYMENT CONTEXT

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Executive Summary

Private international law issues arise in relation to collective redress in the employment context with transnational implications. The present analysis covers the existing criteria for the determination of the jurisdiction and applicable law in employment matters and collective proceedings, distinguishing between collective redress procedures and industrial actions, and including remarks on cases involving posted workers. Consequently, the opportunity to set up specific grounds for jurisdiction and conflict of laws rules to be applied to cross-border collective redress in the employment context is examined.

5.1. Introduction: the role of private international law.

EU private international law rules pursue the objectives of certainty and predictability, comity and reciprocity (trust and confidence) in the recognition and enforcement of judgments from other sovereign States⁵⁴⁴. The cornerstone of the area of freedom, security and justice is the principle of mutual recognition of the Member States' laws and procedures by virtue of Article 81 TFEU. Mutual trust, as a precondition of mutual recognition, is the confidence that Member States shall afford to each other to facilitate the circulation of judgments across Europe⁵⁴⁵.

Mutual recognition, however, cannot be applied at the expense of fundamental rights derived either from the Charter or the European Convention of Human Rights (ECHR). Particularly relevant are Article 47 of the Charter and Article 6 ECHR on the right to effective remedies, access to justice and fair trial⁵⁴⁶. As mentioned above, the close connection in the European judicial area between the protection of fundamental rights and judicial cooperation contributes to achieving the realisation of a Union of rights and not only the economic integration.

⁵⁴⁴ See, *inter alia*, L. GILLIES, *Fundamental Rights and Judicial Cooperation in the Decisions of the Court of Justice on the Brussels I regulation 2009-2014*, in S. MORANO-FOADI, L. VICKERS (eds.), *Fundamental Rights in EU. A matter for two courts*, Oxford and Portland, Oregon, Hart Publishing, 2015, pp. 219-238, spec. p. 223.

⁵⁴⁵ F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale*, Volume I, *Parte generale e obbligazioni*, Milano, UTET Giuridica, 8^a ed., 2017, p. 290 ff.; M. WELLER, *Mutual trust within judicial cooperation in civil matters: a normative cornerstone – a factual chimera – a constitutional challenge*, in *Nederlands Internationaal Privaatrecht*, 2017, No. 1, pp. 1-21; R. MAŃKO, *Europeanisation of civil procedure. Towards common minimum standards?*, PE 559.499, June 2015, spec. p. 3, available at www.europarl.europa.eu/thinktank; R. CLERICI, *Art. 81 TFUE*, in F. POCAR, M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, Padova, CEDAM, 2^a ed., 2014, pp. 500-505, spec. p. 502 f.; X.E. KRAMER, *Cross-border Enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure*, in *International Journal of Procedural Law*, 2011, Vol. 2, pp. 202-230, spec. p. 218; M. TULIBACKA, *Europeanization of Civil Procedures: In Search of a Coherent Approach*, in *Common Market Law Review*, 2009, Vol. 46, No. 5, pp. 1527-1565, spec. p. 1542.

⁵⁴⁶ J.-J. KUIPERS, *The Right to a Fair Trial and the Free Movement of Civil Judgments*, in *Croatian Yearbook of European Law and Policy*, 2010, Vol. 6, pp. 23-51.

The circulation of decisions across Member States may be hampered when the violation of fundamental rights is invoked as a ground for the refusal of recognition or enforcement. In cases concerning collective redress, the grounds for non-recognition may relate to the procedural requirements imposed by the law of the requested State on collective mechanisms. The lack of common European procedural provisions leads to divergences and legal uncertainty in terms of recognition and enforcement⁵⁴⁷.

The harmony of decisions in the European judicial area is preliminarily achieved when the grounds for jurisdiction ensure or facilitate the allocation of jurisdiction upon the courts of one Member State⁵⁴⁸. Then, with a view to allowing the coincidence between *forum* and *ius*, the application of the *lex fori* shall be ensured by establishing identical connecting factors for both private international law aspects.

When dealing with cross-border collective redress, a first assessment examines the opportunity to join individual claims in one *forum* and to constitute collective proceedings, and then the subsequent probability that the final judgment will be recognised and enforced across Member States⁵⁴⁹, as well as the preclusive effect of such judgments against other actions initiated in a foreign country⁵⁵⁰.

⁵⁴⁷ E. STORSKRUBB, *Civil Procedure and EU Law. A Policy Area Uncovered*, Oxford, Oxford University Press, 2008, pp. 28-29. For a first appraisal on the need to regulate collective mechanisms, see C. PERARO, *Right to collective action in cross-border employment contexts: a fundamental social right not yet covered by EU private international law*, in *UNIO – EU Law Journal*, 2016, Vol. 2, No. 2, pp. 20-38, spec. p. 34 ff.

⁵⁴⁸ P. FRANZINA, *Armonia decisoria e competenza giurisdizionale nel regolamento “Bruxelles I-bis”*, in G. BIAGIONI (a cura di), *Il principio dell’armonia delle decisioni civili e commerciali nello spazio giudiziario europeo*, Torino, Giappichelli Editore, 2015, pp. 99-122, spec. p. 99.

⁵⁴⁹ On transnational class actions, see F. BENATTI, *Note in tema di class actions transfrontaliere*, in *Danno e responsabilità*, 2012, No. 1, pp. 5-11, spec. p. 6 ff.

⁵⁵⁰ Although not falling within the scope of the present work, interesting debates on private international law issues have been conducted in relation to US class actions in terms of extraterritoriality, jurisdiction and applicable law over non-US residents, that served as parameters for the elaboration of a European collective redress procedure. For comments on US class actions see, *inter alia*, T.J. MONESTIER, *Transnational Class Actions and the Illusory Search for Res Judicata*, in *Tulane Law Review*, 2011, Vol. 86, No. 1, pp. 1-79; L. SILBERMAN, *Morrison v. National Australia Bank: Implications for Global Securities Class Actions* (June 14,

In light of the foregoing analysis concerning the right to collective action as a fundamental social right, the protection of workers under EU law, including posted workers' rights, and the role of civil procedure, notably the effectiveness of collective redress in the context of enforcement, EU private international law has become relevant in addressing transnational issues. Certainly, the common principles on collective redress, pursuing a horizontal approach to be applied in all the EU Member States, as suggested by the Commission in 2013⁵⁵¹, at least constitute a basis for further legislative developments. Nevertheless, currently, the relevant EU private international law instruments are to be applied to cross-border collective redress, even if they do not specifically cover this procedural means, thus also raising questions about the opportunity to identify specific rules. It is even more interesting to focus on the employment context due to its special nature, which is conferred by the regulations on civil and commercial matters that provide for protective rules when weaker parties are concerned. The necessity to determine a legal framework on collective redress in the transnational employment context is also relevant in cases involving posted workers, for whom the legislation offers an alternative ground of jurisdiction and a special conflict of laws rule.

In this context, the analysis focuses on private international law issues with regard to employment matters, notably jurisdiction, applicable law and recognition and enforcement of collective judgments. Under the first two aspects, distinctions are made between individual employment contracts and posted workers' employment contracts, which are covered by specific legislation (respectively in paragraphs 5.2 and 5.3), and between collective redress procedures and industrial actions, given that these two kinds of actions relate to contractual or extra-

2011), in *Swiss Yearbook of Private International Law 2010*, NYU School of Law, *Public Law Research Paper No. 11-41*; T.J. MONESTIER, *Personal Jurisdiction over Non-resident Class Members: Have We Gone Down the Wrong Road?*, in *Texas International Law Journal*, 2010, Vol. 45, pp. 537-572; G.G. YORK-ERWIN, *The choice of law problem(s) in the class action context*, in *New York University Law Review*, 2009, Vol. 84, pp. 1793-1830; S.J. CHOI, L. SILBERMAN, *Transnational Litigation and Global Securities Class Actions* (January 13, 2009), in *NYU School of Law, Public Law Research Paper No. 09-06*.

⁵⁵¹ See *supra* in Chapter 4, para. 4.2.

contractual matters (respectively in paragraphs 5.2.1 and 5.3.1); finally, peculiarities related to posted workers are identified where appropriate.

The connecting factors considered in conflict of jurisdictions and conflict of laws provisions are examined for the purpose of supporting the attempt to define grounds for the determination of the most appropriate *forum* and law applicable to cross-border collective redress in the European employment context.

5.2. Jurisdiction over employment matters.

a) *Individual employment contracts.*

The relevant EU private international law instrument on jurisdiction over employment matters is Regulation No. 1215/2012 (the Brussels I *bis* or Recast Regulation)⁵⁵². As a general principle, employees are deemed to be in need of protection as weaker contractual parties⁵⁵³. Similar to the Rome Regulations⁵⁵⁴, specific relevance is given to parties considered to be weaker from a socio-economic perspective, which include employees.

Looking at the former Brussels Convention of 1968⁵⁵⁵, employment contracts were not governed by particular provisions, but by the general rules⁵⁵⁶. However, the Court of Justice developed a special approach for employment contracts by re-

⁵⁵² Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast), in *OJ L* 351 of 20 December 2012, pp. 1-32, that entered into force on 10 January 2015 and replaced Regulation No. 44/2001 (Brussels I Regulation). All EU legislation is available at <http://eur-lex.europa.eu>.

⁵⁵³ For a deep analysis of EU private international law on employment, see U. GRUŠIĆ, *The European Private International Law of Employment*, Cambridge, Cambridge University Press, 2015, spec. 7 ff.; L. MERRETT, *Employment Contracts in Private International Law*, Oxford, Oxford University Press, 2011, p. 79 ff.

⁵⁵⁴ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), in *OJ L* 177 of 4 July 2008, pp. 6-16; and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), in *OJ L* 199 of 31 July 2007, pp. 40-49.

⁵⁵⁵ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, in *OJ L* 299 of 31 December 1972, pp. 32-42.

⁵⁵⁶ See the Explanatory Report by Professor Fausto Pocar to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007, at para. 85, where the Author specified that «individual contracts of employment were completely ignored in the original Brussels Convention, and were consequently subject to the general rules and to the special rule on contractual obligations in Article 5(1), without any special restriction on the choice of forum (...)». The rules of jurisdiction in employment matters of the 2007 Lugano Convention are identical to those of the Brussels I Regulation.

ferring to the Rome Convention of 1980⁵⁵⁷, namely Article 6 thereof, which provides that a contract of employment is to be governed, in the absence of choice of the applicable law, by the law of the country in which the employee habitually carries out his work in performance of the contract, unless it appears from the circumstances as a whole that the contract is more closely connected with another country. According to the Report on the Convention⁵⁵⁸ «the adopting of a special conflict rule in relation to contracts of employment was intended to provide an appropriate arrangement for matters in which the interests of one of the contracting parties were not the same as those of the other and to secure thereby adequate protection for the party who from the socio-economic point of view was to be regarded as the weaker in the contractual relationship»⁵⁵⁹. In the absence of any special rules on employment contracts under the 1968 Convention, the Court had to verify the obligation characterising the contract, i.e. the obligation to carry out work, and then establish the country with the closest connection, because that country's courts are best suited to resolve disputes to which one or more obligations under such contracts may give rise⁵⁶⁰.

Therefore, a specific section was inserted into the Brussels I Regulation⁵⁶¹ and other adjustments were provided within the Recast Regulation to enhance the protection of the weaker parties. The provisions therein deal with jurisdictional issues

⁵⁵⁷ Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (80/934/EEC), in *OJ L* 266 of 9 October 1980, pp. 1-19.

⁵⁵⁸ Report on the Convention on the law applicable to contractual obligations by Professor Mario Giuliano and Professor Paul Lagarde, in *OJ C* 282 of 31 October 1980.

⁵⁵⁹ See Court of Justice, judgment of 26 May 1982, Case 133/81, *Roger Ivenel v Helmut Schwab*, EU:C:1982:199, paras. 13-14.

⁵⁶⁰ Court of Justice, judgment of 15 February 1989, Case 32/88, *Six Constructions Ltd v Paul Humbert*, EU:C:1989:68, para. 12 ff.; judgment of 15 January 1987, Case 266/85, *Hassan Shenavai v Klaus Kreischer*, EU:C:1987:11, para. 11 ff.; see L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, in A. DICKINSON, E. LEIN (eds.), *The Brussels I Regulation Recast*, Oxford, Oxford University Press, 2015, pp. 239-253, spec. p. 240.

⁵⁶¹ The creation of a specific section on employment contracts was envisaged in the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(99)348 final of 14 July 1999.

over individual contracts of employment and do not refer to the collective dimension of disputes or contracts.

In particular, Recital No. 18 of the Brussels I Recast Regulation states that the weaker party to an employment contract should be protected by rules that are more favourable than the general rules on jurisdiction thereof in terms of the protection of workers' interests⁵⁶². These rules shall pursue the objective of protecting the position of the weaker party in legal proceedings⁵⁶³. In the Brussels system, these provisions prevail over both the general rule under Article 4 and the alternative jurisdictional grounds contained in Section 2, Articles 7 to 9. By con-

⁵⁶² See also Recital No. 14 of the Brussels I *bis* Regulation that specifies that «in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect the autonomy of the parties, certain rules of jurisdiction in this Regulation should apply *regardless of the defendant's domicile*» (emphasis added).

⁵⁶³ F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale*, Volume I, cit., p. 95; S.M. CARBONE, C.E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il Regolamento UE n. 1215/2012*, Torino, Giappichelli Editore, 2016, pp. 175-177 on special fora; V. LAZIĆ, *Procedural Justice for 'Weaker Parties' in Cross-Border Litigation under the EU Regulatory Scheme*, in *Utrecht Law Review*, 2014, Vol. 10, No. 4, pp. 100-117, spec. p. 100; A. MALATESTA, *Regolamento (CE) n. 44/2001*, in F. POCAR, M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, cit., pp. 517-535, spec. p. 524 ff. See, in relation to Regulation No. 44/2011, Court of Justice, judgment of 14 September 2017, Joined Cases C-168/16 and C-169/16, *Sandra Nogueira and Others v Crewlink Ireland Ltd and Miguel José Moreno Osacar v Ryanair Designated Activity Company*, EU:C:2017:688, para. 49; judgment of 10 September 2015, Case C-47/14, *Holterman Ferho Exploitatie BV and Others v F.L.F. Spies von Büllesheim*, EU:C:2015:574, para. 43: «as is clear from the thirteenth recital, the regulation aims to provide the weaker parties to contracts, including contracts of employment, with enhanced protection by derogating from the general rules of jurisdiction»; (Grand Chamber), judgment of 19 July 2012, Case C-154/11, *Ahmed Mahamdia v République algérienne démocratique et populaire*, EU:C:2012:491, para. 44; judgment of 22 May 2008, Case C-462/06, *Glaxosmithkline and Laboratoires Glaxosmithkline v Jean-Pierre Rouard*, EU:C:2008:299, para. 17: «In the Regulation, jurisdiction over individual contracts of employment is the subject of a specific section, namely Section 5 of Chapter II. That section, which contains Articles 18 to 21 of the Regulation, seeks to ensure that employees are afforded the protection referred to in recital 13 of the preamble thereto».

trast, the rules on exclusive jurisdiction under Section 6, Article 24, have precedence over the jurisdictional rules in Sections 3, 4 and 5 concerning insurance, consumer contracts and individual contracts of employment, respectively. Thus, such provisions set forth a specific and complete regime that is autonomous and sufficient in relation to the general provisions. Indeed, with regard to the Brussels I Regulation, the Court of Justice held that the Regulation aims to provide the weaker parties to contracts, including contracts of employment, with enhanced protection by derogating from the general rules of jurisdiction, which stems from the wording of «the provisions of Section 5 that they are not only specific but also exhaustive»⁵⁶⁴. It follows that the provisions under Sections 1 and 2 of the Brussels I Recast Regulation are applicable to employment contracts in so far as they are recalled by Section 5.

In summary, the provisions on jurisdictional issues establish that an employee may only be sued in the Member State of his/her domicile, whereas the action against an employer may be brought alternatively in the courts of the country of its domicile (*forum rei*), in the country where the employee habitually carries out or has carried out his/her work or, failing that, in the courts where the business which engaged the employee is or was situated, if the employee does not carry out his/her work in any one country (*forum laboris*)⁵⁶⁵.

A preliminary remark concerns the scope of application of Section 5. It applies to individual employment contracts and matters relating to such contracts⁵⁶⁶. In any case, the use of the adjective individual clearly excludes all kinds of collective contracts, including collective agreements. National courts have faced difficulties in defining the variety of forms which employment relationships may take. The Member States' legislation varies as to the definitions of workers and em-

⁵⁶⁴ Court of Justice, judgment of 10 September 2015, *Holterman*, cit., para. 44; judgment of 22 May 2008, *Glaxosmithkline*, cit., para. 18.

⁵⁶⁵ See L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., pp. 247-249.

⁵⁶⁶ On this concept see, among others, C. ESPLUGUES MOTA, G. PALAO MORENO, *Articles 20 to 23*, in U. MAGNUS, P. MANKOWSKI (edited by), *European Commentaries on Private International Law. Brussels Ibis Regulation*, Köln, Sellier European Law Publishers, Ottoschmidt, 2016, pp. 534-558, spec. p. 537 f.

ployees that may be used in different contexts⁵⁶⁷. According to the Report on the application of the Brussels I Regulation⁵⁶⁸, «as in domestic law, the facts of a case do not always easily permit to qualify a relationship as an employment matter. In the Member States, even some sociological divergences have emerged. German law is concerned with [persons comparable to employees]. French law is mindful to protect commercial agents who do not really carry out independent work»⁵⁶⁹.

In providing a definition, two approaches are possible. On the one hand, the definition could be determined on the basis of the *lex causae*, which means on national law. On the other hand, the resort to an autonomous European definition seems to be more appropriate, regardless of any national substantive law. Such autonomous interpretation should be preferred because it furthers the uniformity that the Regulation seeks to achieve⁵⁷⁰.

In the *Shenavai* judgment of 1987⁵⁷¹, the Court of Justice held that «contracts of employment, like other contracts for work other than on a self-employed basis, differ from other contracts - even those for the provision of services - by virtue of certain particularities: they create a lasting bond which brings the worker to some extent within the organizational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements. It is on account of those particularities that the court of the place in which the characteristic obligation of such contracts is to be performed is considered best suited to resolving the disputes to which one or more obligations under such contracts may give rise»⁵⁷². The Court seems to adopt a strict interpretation of employment con-

⁵⁶⁷ L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., p. 241.

⁵⁶⁸ Report on the Application of Regulation Brussels I in the Member States, presented by Prof. Dr. Burkhard Hess, Prof. Dr. Thomas Pfeiffer and Prof. Dr. Peter Schlosser, 2007 (Heidelberg Report), available at http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf.

⁵⁶⁹ *Ibidem*, para. 152.

⁵⁷⁰ L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., spec. p. 241.

⁵⁷¹ Court of Justice, judgment of 15 January 1987, *Shenavai*, cit.

⁵⁷² *Ibidem*, para. 16; see also judgment of 13 July 1993, Case C-125/92, *Mulox IBC Ltd v Hendrick Geels*, EU:C:1993:306, para. 15.

tracts, thus reflecting the distinction between employees and the self-employed as provided for in some national legislation⁵⁷³. However, in line with the provisions contained in the Regulation, considering the special rules over employment contracts aimed at protecting the weaker party, a wider interpretation is preferred. In this sense, atypical contracts may also be included, and workers may be entitled to seek the protection of those rights granted by the national legislation to broader categories of workers⁵⁷⁴.

Closely linked to the definition of employment contracts and related matters, the identification of which claims or disputes may fall within the scope of application of Section 5 has been subject to debate. A distinction may be determined as to matters arising out of an employment contract (e.g. breach of contract), on the one hand, and matters that may be closely connected to it, on the other hand. Indeed, matters may be closely connected to the contract, but not arising (directly) out of the contract, and may be of a non-contractual nature⁵⁷⁵. Also, with regard to disputes, a broader approach is preferred for the purpose of granting wide protection to workers.

The first set of relevant provisions fulfilling the objective of protecting the weaker party to an employment contract is contained in Article 21, paragraph 1 of the Brussels I Recast Regulation. According to this, the employer who is domi-

⁵⁷³ L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., p. 241 f.

⁵⁷⁴ *Ibidem*, p. 242.

⁵⁷⁵ As Heidelberg Report pointed out (paras. 352-356) difficulties arise due to the inconsistency in different language versions of the Regulation. The German text is more detailed in its formulation than the French and English language versions. Its wording advocates against an extension to non-contractual matters. Most German authors subject the latter to Article 5(3) although some recognize that this interpretation does not lead to satisfying results. L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., pp. 242-243, reports English interpretation referred to a case concerning the breach of implied contractual duty of fidelity, where the judge considered that the Regulation does not cover conspiracy claim based on the assessment whether the acts complained of constituted breaches of the contract of employment and whether such breaches were relied on as the basis for the proceedings or not. In another case on ancillary bonus agreement the seised court declared the Regulation to be applied because it was related to the employment contract even if included in a separate document and concluded in a different time.

ciled in a Member State may be sued (a) in the courts of the Member State of his domicile; or (b) in another Member State, which may be (i) the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or, failing that, (ii) the place where the business which engaged the employee is or was situated. The option (between the general *forum rei* and the alternative grounds) to choose the *forum* is up to the employee, in line with the aim of offering him a broader protection.

The employee may thus bring claims before the court for the place where he is habitually working or in the place where he last did so. In practice, this means that where an employer attempted to use a mobility clause to transfer an employee to a different jurisdiction, and then dismisses him, the employee could bring his claim in the place where he has habitually worked before his transfer⁵⁷⁶.

To ground jurisdiction, the habitual place of work is established as the connecting factor. Its definition has been addressed by courts and scholars relying on national or European concepts.

In relation to Article 5, paragraph 1 of the Brussels Convention, according to the *Mulox* judgment of 1993, the habitual place of work is the place where the employee spends most of his working time, where he has an office, where he organises his activities for his employer and to which he returns after each business trip abroad⁵⁷⁷. That place must be deemed to be the place of performance of the obligation on which a claim relating to a contract of employment is based⁵⁷⁸. In other words, it is the place where or from which the employee principally discharges his obligations towards his employer⁵⁷⁹.

In the *Rutten* case of 1997, the Court stated that its previous case law must be taken into account when determining the place with which the dispute has the most significant link, while taking due account of the concern to affording proper protection to the employee as the weaker party to the contract⁵⁸⁰. It then held that

⁵⁷⁶ L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., p. 249 and fn. 77.

⁵⁷⁷ Court of Justice, judgment of 13 July 1993, *Mulox*, cit., paras. 24-25.

⁵⁷⁸ *Ibidem*, para. 25.

⁵⁷⁹ *Ibidem*, para. 26.

⁵⁸⁰ Court of Justice, judgment of 9 January 1997, Case C-383/95, *Petrus Wilhelmus Rutten v Cross Medical Ltd.*, EU:C:1997:7, para. 22.

where a contract of employment is performed in several Contracting States, the habitual place of work refers to the place where «the employee has established the effective centre of his working activities and where, or from which, he in fact performs the essential part of his duties *vis-à-vis* his employer»⁵⁸¹.

Given the similar concepts used in the Brussels I Recast and the Rome I Regulations, and also taking into account the former texts, the interpretation of these instruments has been based on a similar approach. Consequently, the explanation of each instrument may follow that of the other one. From a systematic perspective, this consistency may lead to the uniformity of employment rules and effectively grant protection for employees⁵⁸².

In this regard, in the *Koelzsch* judgment of 2011⁵⁸³, the Court of Justice affirmed that in order to determine the applicable law, the interpretation of the connecting factor of the place in which the work is habitually carried out must take into account case law in which similar concepts have been interpreted in the context of the Brussels Convention of 1968 and the Brussels I Regulation⁵⁸⁴. In line

⁵⁸¹ *Ibidem*, para. 23; on this judgment see S.M. CARBONE, C.E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, cit., pp. 198-199.

⁵⁸² R. CAFARI PANICO, *Enhancing protection for weaker parties: jurisdiction over individual contracts of employment*, in F. FERRARI, F. RAGNO (edited by), *Cross-border litigation in Europe: the Brussels I Recast Regulation as a panacea?*, Milano, Wolters Kluwer CEDAM, 2015, pp. 41-66, spec. p. 60.

⁵⁸³ Court of Justice (Grand Chamber), judgment of 15 March 2011, Case C-29/10, *Heiko Koelzsch v État du Grand Duchy of Luxembourg*, EU:C:2011:151. On this issue, see S.M. CARBONE, C.E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, cit., pp. 199-200; L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., pp. 248-249; V. LAZIĆ, *Procedural Justice for 'Weaker Parties' in Cross-Border Litigation under the EU Regulatory Scheme*, cit., spec. p. 104; F. JAULT-SESEKE, *De la loi applicable à un contrat de travail qui s'exécute dans plusieurs Etats*, Note sous CJUE, 15 mars 2011, n° C-29/10, *Koelzsch c/ Etat du Grand-Duché de Luxembourg*, in *Revue critique de droit international privé*, 2011, No. 2, pp. 455-461.

⁵⁸⁴ On the interpretation of the concept of habitual place of work and the interchangeability of the instruments, see L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., p. 248; A.A.H. VAN HOEK, *Private international law rules for transnational employment: reflections from the European Union*, in A. BLACKETT, A. TREBILCOCK (edited by), *Research*

with this, the interpretation of the provisions of the Rome Convention, given that they set out similar concepts, should take into account the explanation of the rules on jurisdiction for the same matters⁵⁸⁵. In relation to employment matters, the purpose of the specific provisions relies on the need to protect the weaker of the contracting parties. It follows that Article 6 of the Rome Convention pursues the objective of guaranteeing the applicability of the law of the State in which the employee carries out his working activities, rather than that of the State in which the employer is established, because it is in the former State that the worker performs his economic and social duties, and it is there that the business and political environment affects the employment activities⁵⁸⁶.

This reasoning, however, creates an obstacle as noted by Advocate General Trstenjak in the *Koelzsch* case⁵⁸⁷, according to which the parallel interpretation of identical or similar terms arising from conflict rules and rules for determining international jurisdiction must take into consideration the different aims of the two private international law instruments. On the one hand, the conflict rules are aimed at determining one law applicable to a contract of employment. On the other hand, the purpose of the rules for determining international jurisdiction is to identify the court having jurisdiction by offering options to the claimant. This means that the uniformity of interpretations must be tested with reference to each individual case, and it cannot be held, as a presumption, that identical or similar expressions must be interpreted in a uniform manner⁵⁸⁸.

In addition, contrary to the Brussels I *bis* Regulation, it should be noted that the last place of habitual work is not mentioned in Article 8, paragraph 2 of the

Handbook on Transnational Labour law, Cheltenham, UK, Northampton, MA, USA, Edward Elgar Publishing, 2015, pp. 438-454, spec. pp. 440-443.

⁵⁸⁵ Court of Justice (Grand Chamber), judgment of 15 March 2011, *Koelzsch*, cit., para. 33. See F. JAULT-SESEKE, *De la loi applicable à un contrat de travail*, cit., pp. 456-458; on the arising of parallel issues under both Brussels and Rome regimes, see L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., spec. p. 240.

⁵⁸⁶ Court of Justice (Grand Chamber), judgment of 15 March 2011, *Koelzsch*, cit., para. 42.

⁵⁸⁷ Opinion of Advocate General Trstenjak delivered on 16 December 2010, Case C-29/10, *Koelzsch*, cit., EU:C:2010:789.

⁵⁸⁸ *Ibidem*, paras. 82-83.

Rome I Regulation⁵⁸⁹. It stems from this consideration that to reach a uniform interpretation among European private international law instruments on analogous matters, but which have different functions, the legislator should submit amendments in order to align the texts or relevant provisions. Uniformity may thus be ensured by providing similar rules in both instruments. This is the case of Article 21, paragraph 1 (b)(i) of the Brussels I Recast Regulation and the abovementioned Article 8, paragraph 2 of the Rome I Regulation: In the former Article, the place «*from where* the employee habitually carries out his work» was introduced as already established as a criterion in the Rome system⁵⁹⁰. This means that this factor of territorial connection will be relevant in practice when the working activity is carried out *in* or *from* more than one country where it has no habitual character, or when the habitual place of work is located outside the European Union (or the Lugano Convention)⁵⁹¹.

However, the criteria of legislative and jurisdictional competence fulfil different functions⁵⁹². The place where the employee habitually carries out his work may be utilised as the grounds for jurisdiction because it is the place where it is least expensive for the employee to defend himself⁵⁹³, but this concern has no weight in relation to legislative competence. Similar technical-legal concepts can frequently be interpreted in a similar way, but «this resemblance does not rest on a

⁵⁸⁹ It only states that the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. See L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., p. 247.

⁵⁹⁰ S.M. CARBONE, C.E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, cit., p. 196; L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., pp. 247-249.

⁵⁹¹ S.M. CARBONE, C.E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, cit., p. 198.

⁵⁹² A. ZANOBETTI, *Employment Contracts and the Rome Convention: the Koelzsch Ruling of the European Court of Justice*, in *Cuadernos de Derecho Transnacional*, Octubre 2011, Vol. 3, No. 2, pp. 338-358, spec. p. 355, available at www.uc3m.es/cdt; see also F. JAULT-SESEKE, *De la loi applicable à un contrat de travail*, cit., spec. p. 457.

⁵⁹³ Court of Justice, 27 February 2002, Case C-37/00, *Herbert Weber v Universal Odgen Services Ltd*, EU:C:2002:122, para. 40; judgment of 13 July 1993, *Mulox*, cit., para. 19.

link of necessity»⁵⁹⁴. It follows that the term “habitual place of work” has been interpreted narrowly by the Court in certain respects and widely in others⁵⁹⁵. The narrow interpretation considers that there cannot be more than one habitual place of work; on the contrary, the term is interpreted widely⁵⁹⁶ when the determination of the habitual place of work is essentially a search for the place that is the most closely connected with the employment dispute⁵⁹⁷. In this regard, the wide interpretation considers the habitual place of work as the principal place of work, which remains unchanged when the employee temporarily works abroad within the posting in the transnational provision of services framework⁵⁹⁸.

As to this last consideration, indeed, Article 21, paragraph 1 (b)(i) does not expressly include posted workers, thus referring to the non-changing of the habitual place of work when temporarily moved abroad. However, it seems undisputed that the courts of the place where the employee habitually carries out the work remain competent, even though the employee is temporarily posted in another Member State. This is confirmed by the provision under Article 6 of Directive 96/71, which provides for an alternative *forum*, that is the courts for the place where the worker is or was posted⁵⁹⁹.

Various situations related to work performance have been considered. The Court has also emphasised the need to guarantee adequate protection to the employee as the weaker of the contracting parties from the socio-economic point of view when the employee carries out his work in more than one Contracting State. To identify the place of work, the factors with a closer connection with the dispute shall be taken into account; otherwise, all courts of the Member States where the

⁵⁹⁴ A. ZANOBETTI, *Employment Contracts and the Rome Convention*, cit., p. 357.

⁵⁹⁵ R. CAFARI PANICO, *Enhancing protection for weaker parties*, cit., pp. 61-62.

⁵⁹⁶ F. JAULT-SESEKE, *De la loi applicable à un contrat de travail*, cit., p. 458.

⁵⁹⁷ U. GRUŠIĆ, *Jurisdiction in employment matters under Brussels I: a reassessment*, in *International Comparative Law Quarterly*, 2012, Vol. 61, No. 1, pp. 91-126, spec. p. 108.

⁵⁹⁸ R. CAFARI PANICO, *Enhancing protection for weaker parties*, cit., p. 62.

⁵⁹⁹ See further *infra* in this para.

employee carried out his working activity shall be deemed competent. In this way, however, the ultimate aim of effectiveness will be controverted⁶⁰⁰.

In this regard, in the *Weber* case of 2002⁶⁰¹, the Court established that in case «there are two or more places of work of equal importance or because none of the various places where the employee carries on his work activity has a sufficiently permanent and close connection with the work done to be regarded as the main link for the purposes of determining the courts with jurisdiction, it is necessary to avoid a multiplication of the courts having jurisdiction over a single legal relationship. Article 5(1) of the Brussels Convention cannot, therefore, be interpreted as conferring concurrent jurisdiction on the courts of each Contracting State in whose territory the employee carries on some of his work»⁶⁰². The factors determining the closest connection with one place must be considered to ground jurisdiction in order to avoid many courts from being deemed competent because the employee performed working activities in all the States concerned. In conclusion, the Court ruled (in relation to Article 5, paragraph 1 of the Brussels Convention) that in cases in which a worker performs the obligations in more than one State, the habitual place of work must be the place where he in fact performs the essential part of his duties *vis-à-vis* his employer. When the employee performs the same activities in more than one State the duration of the employment relationship must be considered. Thus, failing other criteria, the courts for the place where the employee has worked the longest shall be competent. Exceptions are possible when, in light of the circumstances of the case, a different place is more closely connected with the dispute. Otherwise, the employee may choose among the alternative *fora*⁶⁰³. In this judgment, the Court deemed irrelevant any qualitative cri-

⁶⁰⁰ S.M. CARBONE, C.E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, cit., p. 198.

⁶⁰¹ Court of Justice, judgment of 27 February 2002, *Weber*, cit.

⁶⁰² *Ibidem*, para. 55.

⁶⁰³ *Ibidem*, para. 58: «where an employee performs the obligations arising under his contract of employment in several Contracting States the place where he habitually works, within the meaning of that provision, is the place where, or from which, taking account of all the circumstances of the case, he in fact performs the essential part of his duties *vis-à-vis* his employer. In the case of a contract of employment under which an employee performs for his

teria relating to the nature and importance of the work done in various places⁶⁰⁴, except for the whole of the duration of the employment relationship and the facts that may determine the closest connection. In this way, the interpretation of the connecting factor is subject to the aim of effectively protecting the rights of the employee, who in the case of more than one place of work may choose the one that better corresponds to his interests⁶⁰⁵.

This statement was criticised by Advocate General Jacobs in his opinion in the *Weber* case⁶⁰⁶. He held that in cases in which the employee performs working activities in more than one State, he shall not have discretion in choosing his *forum*, and that such cases do not imply that the *forum* should be determined on the basis of what is most convenient for him. By contrast, this situation may lead to legal uncertainty. Thus, uniformity of criteria and avoiding a multiplicity of jurisdictions may be pursued by establishing a more abstract concern (to afford proper protection to the employee as the weaker party to the contract) not linked to the circumstances of the individual employee. To that effect, «the necessary link between the dispute and the court hearing it will not always mean that a court of the country whose law is applicable to the contract will have jurisdiction, desirable

employer the same activities in more than one Contracting State, it is necessary, in principle, to take account of the whole of the duration of the employment relationship in order to identify the place where the employee habitually works, within the meaning of Article 5(1). Failing other criteria, that will be the place where the employee has worked the longest. It will only be otherwise if, in light of the facts of the case, the subject-matter of the dispute is more closely connected with a different place of work, which would, in that case, be the relevant place for the purposes of applying Article 5(1) of the Brussels Convention. In the event that the criteria laid down by the Court of Justice do not enable the national court to identify the habitual place of work, as referred to in Article 5(1) of the Brussels Convention, the employee will have the choice of suing his employer either in the courts for the place where the business which engaged him is situated, or in the courts of the Contracting State in whose territory the employer is domiciled».

⁶⁰⁴ L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., p. 248.

⁶⁰⁵ E. PATAUT, *Note Affaire C-384/10*, in *Revue critique de droit international privé*, 2012, No. 2, pp. 648-666, spec. p. 661.

⁶⁰⁶ Opinion of Advocate General Jacobs delivered on 18 October 2001, Case C-37/00, *Weber*, cit., EU:C:2001:554.

though such a result undoubtedly is»⁶⁰⁷. It stems from this that the coincidence between *forum* and *ius* is not always the result of the proper application of the criteria, and thus the intrinsic objectives of the instruments are not pursued.

The Court addressed the question of the identification of the place of habitual work in a case involving two employers (double employment) in the *Giulia Pugliese* judgment of 2003⁶⁰⁸. It ruled that the dispute against the first employer may be brought before the courts of the second State where the employee habitually works provided that there is a sufficiently close connection between the two employment contracts. To verify such connection, it is required that the first employer has shown an interest in the work activity the employee conducts for the second employer. The Court clarified the elements to be considered in determining the place where the employee is entitled to bring an action against the first employer on the basis of the closest connection⁶⁰⁹, i.e. the employer must have an interest in the employee's performance of the service for the other employer. The so-determined link between the two contracts allows the employee to sue the first employer before the courts of the second place of work. In case it is not possible to establish any connection, the temporal element should be considered as stated in the *Weber* case.

As to the residual criterion of the place where the business which engaged the employee is or was situated, its function has been argued⁶¹⁰. This last head of jurisdiction is rarely relevant, and recourse to it will only be appropriate in excep-

⁶⁰⁷ *Ibidem*, para. 47.

⁶⁰⁸ Court of Justice, judgment of 10 April 2003, Case C-437/00, *Giulia Pugliese v Finmeccanica SpA, Betriebsteil Alenia Aerospazio*, EU:C:2003:219; see L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., p. 249.

⁶⁰⁹ Court of Justice, judgment of 10 April 2003, *Giulia Pugliese*, cit., para. 24: «The relevant factors may include: the fact that the conclusion of the second contract was envisaged when the first was being concluded, the fact that the first contract was amended on account of the conclusion of the second contract, the fact that there is an organisational or economic link between the two employers, the fact that there is an agreement between the two employers providing a framework for the coexistence of the two contracts, the fact that the first employer retains management powers in respect of the employee, the fact that the first employer is able to decide the duration of the employee's work for the second employer».

⁶¹⁰ See L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., pp. 249-250.

tional cases, as normally a stable base at which the employee carried out his work can be identified. According to the Court of Justice case law, the term “habitual place of work” shall be determined widely, and thus the rule of the engaging place of business, which is to be applied at a second instance, is deprived of any importance⁶¹¹. It may also lead to legal uncertainty and prejudice the protection of workers by creating a lack of predictability in the competent courts⁶¹².

In the *Voogsgeerd* case of 2011⁶¹³, with regard to Article 6, paragraph 2 of the Rome Convention, the Court held that factors relating to the way in which the employee’s actual employment is operated were not relevant to the determination of where the place of business at which the employee was engaged is situated, because it is related to the linking factor of the habitual place of work⁶¹⁴. «The use of the term ‘engaged’ in Article 6(2)(b) of the Rome Convention, clearly refers purely to the conclusion of the contract or, in the case of a *de facto* employment relationship, to the creation of the employment relationship and not to the way in

⁶¹¹ Referring to Article 6 of the Rome Convention, the Court of Justice (Grand Chamber), judgment of 15 March 2011, *Koelzsch*, cit., at para. 43, stated that «it must be held that the criterion of the country in which the employee ‘habitually carries out his work’, set out in Article 6(2)(a) thereof, must be given a broad interpretation, while the criterion of ‘the place of business through which [the employee] was engaged’, set out in Article 6(2)(b) thereof, ought to apply in cases where the court dealing with the case is not in a position to determine the country in which the work is habitually carried out». Also S.M. CARBONE, C.E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, cit., spec. at p. 201, explain that the place of engagement is relevant when the work activity is carried out in more than one State or when such place is outside the European Union, being an ancillary criterion. In order to determine the law applicable, the individual assessment of circumstances is requested: see A.A.H. VAN HOEK, *Private international law rules for transnational employment*, cit., pp. 445-446.

⁶¹² See R. CAFARI PANICO, *Enhancing protection for weaker parties*, cit., at p. 59, where the Author refers to the *Voogsgeerd* case (Court of Justice, judgment of 15 December 2011, Case C-384/10, *Jan Voogsgeerd v Navimer SA*, EU:C:2011:842) that took ten years to determine the court having jurisdiction over employee’s claim.

⁶¹³ Court of Justice, judgment of 15 December 2011, *Voogsgeerd*, cit.; see L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., p. 250 ff.

⁶¹⁴ Court of Justice, judgment of 15 December 2011, *Voogsgeerd*, cit., para. 44.

which the employee's actual employment is carried out»⁶¹⁵. The place of business may correspond to any stable structure of an undertaking, so not only subsidiaries and branches, but also other units such as offices⁶¹⁶. A degree of permanence is nonetheless required for such unit, as the purely transitory presence of an agent is not sufficient⁶¹⁷. Moreover, the place of business must belong to the undertaking that engaged the employee in that it forms an integral part of its structure⁶¹⁸. Thus, to classify a unit as the place of business of an undertaking, objective factors must demonstrate that «there exists a real situation different from that which appears from the terms of the contract, even though the authority of the employer has not been formally transferred to that other undertaking»⁶¹⁹.

The case in the *Voogsgaerd* judgment concerned the maritime sector and indeed revealed significant problems in identifying the linking factor. In general, difficulties are related to the international transport sector, which involves, for instance, airline staff, truck drivers, and maritime transport. In these cases, it is often difficult to establish the place where the employee worked, because the company and means of transport may be registered in different Member States, the relevant management may be seated in a third Member State and the employee's domicile is in a fourth State.

Jurisdictional issues related to the airline sector are addressed in the *Nogueira* case of 2017⁶²⁰. The Court interpreted the concept of the place where the employee habitually carries out his work in the case in which an employment contract is performed in the territory of several States and in which there is no effective centre of professional activities from which an employee performs the essential part of his duties *vis-à-vis* his employer. When disputes involve workers whose habitual place of work is difficult to ascertain, the courts must identify the place from which the employees principally discharged their obligations towards their em-

⁶¹⁵ *Ibidem*, para. 46.

⁶¹⁶ *Ibidem*, para. 54.

⁶¹⁷ *Ibidem*, para. 55.

⁶¹⁸ *Ibidem*, para. 57.

⁶¹⁹ *Ibidem*, para. 65.

⁶²⁰ Court of Justice, judgment of 14 September 2017, *Nogueira*, cit.

ployer⁶²¹. To do this, a circumstantial method implies an assessment of the nature of the legal relationships by taking into account all the factors which characterise the working activity. Such a factual approach may also limit the possibility to exploit or contribute to the achievement of circumvention strategies⁶²². Specific indicia have been indicated by the Court of Justice case law as regards work relationships in the transport sector, which are aimed at determining «in which Member State is situated (i) the place from which the employee carries out his transport-related tasks, (ii) the place where he returns after his tasks, receives instructions concerning his tasks and organises his work, and (iii) the place where his work tools are to be found»⁶²³. According to the judgment, referring to other instruments may be useful, but the determination of the habitual place of work may not rely only on comparable concepts⁶²⁴. Thus, «in the event of proceedings being brought by a member of the air crew, assigned to or employed by an airline, and in order to establish the jurisdiction of the court seised, the concept of ‘place where the employee habitually carries out his work’, within the meaning of that provision, cannot be equated with that of ‘home base’, within the meaning of Annex III to Regulation No 3922/91. The concept of ‘home base’ constitutes nevertheless a significant indicium for the purposes of determining the ‘place where the employee habitually carries out his work’»⁶²⁵.

Overall, the interpretation of the linking factors of the habitual place of work or the engaging place of business has raised difficulties in their practical application to disputes arising under individual employment contracts. In any case, the specific circumstances of the claims must be considered, in light of the interpretation the Court of Justice has delivered in similar cases (addressing similar concepts), though without undermining the functions of the jurisdictional provisions.

As a further provision enhancing workers’ protection, Article 21, paragraph 2 of the Brussels I *bis* Regulation provides that an employer not domiciled in a Member State may be sued in the courts for the place of habitual work (or the last

⁶²¹ *Ibidem*, para. 60.

⁶²² *Ibidem*, para. 62.

⁶²³ *Ibidem*, para. 63.

⁶²⁴ *Ibidem*, para. 66 ff.

⁶²⁵ *Ibidem*, para. 77.

place), or, failing that, of the place where the business which engaged the employee is or was situated. Thus, employees are entitled to bring proceedings against a non-European employer before the courts for the place where they habitually work⁶²⁶. In general, the extension of jurisdiction rules to third country defendants is aimed at ensuring that the protective jurisdiction rules available for employees will also apply if the defendant is domiciled outside the EU⁶²⁷.

Such provision is recalled under Article 6, which applies to employment contracts pursuant to Article 20, paragraph 1. This means that a court of a Member State may establish its jurisdiction on the basis of the jurisdictional rules of the Brussels I *bis* Regulation in all disputes involving an employee, regardless of the domicile of the other party.

Article 20, paragraph 1 also refers to the applicability of the special jurisdiction rule under which in disputes arising out of the operations of a branch, agency or other establishment, the defendant domiciled in an EU Member State may be sued in the courts for the place where the branch, agency or other establishment is situated. Moreover, paragraph 2 extends it to cases in which the employer is not domiciled in an EU Member State, but has a branch, agency or other establishment in one of the Member States⁶²⁸. The employer is thus deemed to be domiciled in that Member State. In other words, the place where the secondary seat of

⁶²⁶ On the application to non-EU-domiciled defendants see S.M. CARBONE, C.E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, cit., p. 195; R. CAFARI PANICO, *Enhancing protection for weaker parties*, cit., pp. 52-53; L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., pp. 245 and 250-251.

⁶²⁷ See Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), COM(2010)748 final of 14 December 2010, para. 3.1.2; S.M. CARBONE, C.E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, cit., p. 176; V. LAZIĆ, *Procedural Justice for 'Weaker Parties' in Cross-Border Litigation under the EU Regulatory Scheme*, cit., p. 108.

⁶²⁸ On the case of an embassy, see Court of Justice (Grand Chamber), judgment of 19 July 2012, *Mahamdia*, cit., spec. para. 49 ff. For comments see P. JUÁREZ PÉREZ, *De inmunidades, sumisiones y centros de trabajo: la stjue de 19 julio de 2012, Mahamdia c. República de Argelia*, in *Cuadernos de Derecho Transnacional* (Marzo 2013), Vol. 5, No. 1, pp. 254-272, available at www.uc3m.es/cdt.

the employer is situated has relevance to determining jurisdiction only when the employer is not domiciled in an EU Member State.

Lastly, Article 20, paragraph 1 introduces the possibility for an employee to bring actions against multiple defendants in the employment area by virtue of Article 8, point 1. An employer domiciled in a Member State may also be sued in the courts for the place where any one of the co-defendants is domiciled, provided that the close connection among the claims at the procedural as well as substantive levels⁶²⁹ renders hearing and determining them together expedient, thus avoiding the risk of irreconcilable judgments resulting from separate proceedings. Such mechanism is aimed at the proper administration of justice and procedural economy⁶³⁰. This possibility existed under the 1968 Brussels Convention, and its reinsertion⁶³¹ into the Brussels I *bis* Regulation contributes towards benefiting the employee who wishes to bring proceedings against joint employers established in

⁶²⁹ M.E. ANCELP, *Derived special jurisdiction (Art. 8)*, in A. DICKINSON, E. LEIN (eds.), *The Brussels I Regulation Recast*, cit., pp. 183-194, spec. p. 187 ff.; J.-J. KUIPERS, *Schemes of Arrangement and Voluntary Collective Redress: A Gap in the Brussels I Regulation*, in *Journal of Private International Law*, 2012, Vol. 8, No. 2, pp. 225-249, spec. p. 237 ff.; E. LEIN, *Cross-border collective redress and jurisdiction under Brussels I: a mismatch*, in D. FAIRGRIEVE, E. LEIN (edited by), *Extraterritoriality and collective redress*, Oxford, Oxford University Press, 2012, pp. 129-142, spec. p. 137 ff.

⁶³⁰ S.M. CARBONE, C.E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, cit., p. 176.

⁶³¹ The Commission addressed this issue in its Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009)175 final of 21 April 2009, see at para. 8.1: «With respect to employment contracts, it should be reflected to what extent it might be appropriate to allow for a consolidation of actions pursuant to Article 6(1). With respect to employment contracts, it should be reflected to what extent it might be appropriate to allow for a consolidation of actions pursuant to Article 6(1)».

different Member States⁶³². The collective dimension is, however, referred only to the defendant party⁶³³.

This reference was argued to be in contrast to what the Court of Justice held in the *Glaxosmithkline* case of 2008⁶³⁴, where it adopted a literal interpretation of the wording of the provision under Article 18 of the Brussels I Regulation, which did not mention Article 6, point 1 (now Article 8, point 1)⁶³⁵, and that, otherwise, it would have been contrary to the strict interpretation that must be afforded to derogation rules⁶³⁶. Thus, the Court stated that an employee could not rely on that provision to join a second defendant to the proceedings. Differently, the same aim of sound administration of justice would imply that both employees and employers could rely on that Article⁶³⁷. However, in the Court's opinion, the consequences of such an application would affect the objective of the protection of the weaker party to an employment contract⁶³⁸, even if, based on a teleological approach and in light of the Brussels regime, it should have been granted⁶³⁹.

⁶³² Proposal for a Regulation, COM(2010)748 final, cit., para. 3.1.6, where the Commission acknowledged that «The cases where an employer wishes to bring proceedings against several employees does not seem to arise in practice in matters of individual contracts of employment».

⁶³³ On the proposal of the Commission to introduce a similar possibility in favour of the employers, see R. CAFARI PANICO, *Enhancing protection for weaker parties*, cit., pp. 49-50. An employee may rely on Article 8, point 1 irrespective of the status of the anchor defendant, which may therefore be a company within the same group, a fellow employee, a former employer or a service provider: L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., p. 245.

⁶³⁴ Court of Justice, judgment of 22 May 2008, *Glaxosmithkline*, cit.

⁶³⁵ See *ibidem*, para. 19: «it is clear from Article 18, point 1, of the Regulation, first, that any dispute concerning an individual contract of employment must be brought before a court designated in accordance with the jurisdiction rules laid down in Section 5 of Chapter II of that regulation and, second, that those jurisdiction rules cannot be amended or supplemented by other rules of jurisdiction laid down in that regulation unless specific reference is made therein in Section 5 itself».

⁶³⁶ *Ibidem*, para. 28.

⁶³⁷ *Ibidem*, para. 29.

⁶³⁸ *Ibidem*, paras. 30-31 and para. 34: «the Regulation, in its current version, notwithstanding the objective of protection referred to in recital 13 in the preamble thereto, does not afford partic-

In relation to the Brussels Convention, as stated in the *Kalfelis* judgment of 1987⁶⁴⁰, the Court added the important condition that all claims should be so closely connected that it is expedient to determine them together in order to avoid irreconcilable judgments resulting from separate proceedings⁶⁴¹. This requirement was then incorporated within the text of the 2001 Regulation, but has caused difficulty in the case law ever since. The criterion of the claims being closely connected is purpose-related with the aim of preventing the irreconcilability of judgments if the claims were determined separately⁶⁴².

In the *Roche* case of 2006 the Court pointed out that to affirm that decisions may be regarded as contradictory, it is not sufficient that there is a divergence in the outcome of the dispute: that divergence must also arise in the context of the same situation of law and fact⁶⁴³.

The Court intervened to clarify whether this rule applies when actions brought against a number of defendants before the courts for the place where any one of them is domiciled have different legal bases, that is to say when one is contractual in nature, while the other is based on tort. In the *Freeport* case of 2007⁶⁴⁴, the Court ruled that from the wording of Article 6, point 1 of Regulation No. 44/2001 (now Article 8, point 1 of the Brussels I *bis* Regulation), it is not apparent that the

ular protection to an employee in a situation such as Mr Rouard's since, as a claimant before the national courts, there is no rule of jurisdiction available to him that is more favourable than the general rule laid down in Article 2, point 1, of the Regulation». See M.E. ANCELP, *Derived special jurisdiction (Art. 8)*, cit., pp. 186-187.

⁶³⁹ In favour of the extension of Article 6, point 1 of the Brussels I Regulation was Advocate General Poiares Maduro, see its opinion delivered on 17 January 2008, Case C-462/06, *Glaxosmithkline*, cit., EU:C:2008:22.

⁶⁴⁰ Court of Justice, judgment of 27 September 1988, Case 189/87, *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*, EU:C:1988:459.

⁶⁴¹ *Ibidem*, para. 13.

⁶⁴² M.E. ANCELP, *Derived special jurisdiction (Art. 8)*, cit., pp. 187-188.

⁶⁴³ Court of Justice, judgment of 13 July 2006, Case C-539/03, *Roche Nederland BV and Others v Frederick Primus and Milton Goldenberg*, EU:C:2006:458, spec. para. 26.

⁶⁴⁴ Court of Justice, judgment of 11 October 2007, Case C-98/06, *Freeport plc v Olle Arnoldsson*, EU:C:2007:595. On this case see M.E. ANCELP, *Derived special jurisdiction (Art. 8)*, cit., p. 191.

conditions thereof include a requirement that the actions brought against different defendants should have identical legal bases⁶⁴⁵. The assessment should focus on the existence of a connection between the various claims brought by the same plaintiff against different defendants, and on whether such connection implies that it is expedient to determine those actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings⁶⁴⁶. The legal bases of said actions may be considered among the factors that the national courts must assess for the opportunity to join various claims, if appropriate, although this is not necessary⁶⁴⁷.

As specified by the Court in the *Painer* case of 2011⁶⁴⁸, assuming that a difference in the legal basis of the actions brought against the various defendants does not in itself preclude joining the claims against multiple defendants, this is even more true when the national laws on which the actions against the various defendants are based are substantially identical⁶⁴⁹.

The provision of Article 8, point 1 is to be interpreted narrowly, given that it provides for a derogation from the general rule. In any case, the recourse to such provision is evaluated by the national courts case by case. So, Member States have a measure of autonomy in determining whether claims are sufficiently connected for the purposes of Article 8, point 1⁶⁵⁰.

Moreover, the disadvantages of its application to the co-defendant may be put forward whenever this proves that the claimant has brought the anchor claim in a

⁶⁴⁵ Court of Justice, judgment of 11 October 2007, *Freeport*, cit., para. 38.

⁶⁴⁶ *Ibidem*, para. 39.

⁶⁴⁷ *Ibidem*, para. 41.

⁶⁴⁸ Court of Justice, judgment of 1 December 2011, Case C-145/10, *Eva-Maria Painer v Standard VerlagsGmbH and Others*, EU:C:2011:798.

⁶⁴⁹ *Ibidem*, para. 82 and para. 83, where the Court concluded that «In the light of the foregoing considerations, the answer to the first question is that Article 6(1) of Regulation No 44/2001 must be interpreted as not precluding its application solely because actions against several defendants for substantially identical copyright infringements are brought on national legal grounds which vary according to the Member States concerned. It is for the referring court to assess, in the light of all the elements of the case, whether there is a risk of irreconcilable judgments if those actions were determined separately».

⁶⁵⁰ M.E. ANCELP, *Derived special jurisdiction (Art. 8)*, cit., p. 190.

country with the sole object of depriving him of his natural *forum* by demonstrating clear evidence of collusion or abuse. National courts may investigate the good faith of the claimant and interpret the close connection differently⁶⁵¹.

The purpose of safeguarding the position of the weaker party in the employment contract is fulfilled by the following provision under Article 22, paragraph 1, according to which an employer may bring proceedings only before the courts of the Member State where the employee is domiciled⁶⁵². As an exception, paragraph 2 thereof specifies that a counter-claim promoted by the employer may be brought before the courts of the State where the original claim is instituted under Section 5 (either in the habitual place of work or in the place of business)⁶⁵³.

In line with the objective pursued by the protective provisions in favour of employees, Article 23 provides for the possibility to conclude an agreement on the choice of the *forum*. The conditions required therein clearly benefit the weaker party by establishing that such agreement may be entered into after the dispute has arisen or, if it was concluded beforehand, may allow the employee to sue the employer before the courts of a State other than those on which the rules under Section 5 confer jurisdiction. «The effect of the agreement is thus not to exclude the jurisdiction of the latter courts but to extend the employee's possibility of choosing between several courts with jurisdiction»⁶⁵⁴. This is again based on the *favor laboratoris* principle⁶⁵⁵. As affirmed in Recital No. 19, the autonomy of the parties to an employment contract to determine the courts having jurisdiction is limited. It is clearly aimed at protecting the employee against contractual clauses establishing the jurisdiction of the courts of a Member State other than those determined under Section 5. As the Court of Justice held in the *Mahamdia* case of

⁶⁵¹ *Ibidem*, p. 191.

⁶⁵² S.M. CARBONE, C.E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, cit., p. 176. Employees may be sued before the courts of their domicile solely if it is located in one EU Member State.

⁶⁵³ Similar to Article 8(3), but wider because no requirement for the counterclaim to be related to the same contract or facts is provided. On this aspect see L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., p. 251.

⁶⁵⁴ Court of Justice (Grand Chamber), judgment of 19 July 2012, *Mahamdia*, cit., para. 62.

⁶⁵⁵ See L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., pp. 252-253.

2012, «it does not follow either from the wording or from the purpose of Article 21 of Regulation No 44/2001 that such an agreement may not confer jurisdiction on the courts of a third State, provided that it does not exclude the jurisdiction conferred on the basis of the articles of the regulation»⁶⁵⁶. Thus, an agreement on jurisdiction concluded before a dispute arises is effective «in so far as it gives the employee the possibility of bringing proceedings, not only before the courts ordinarily having jurisdiction under the special rules in Articles 18 and 19 of that regulation, but also before other courts, which may include courts outside the European Union»⁶⁵⁷. Indeed, in order to protect the employee as the weaker party to the contract, the jurisdiction of the courts determined under the special rules, even if alternative, could not be ousted by a choice of court agreement⁶⁵⁸.

As to the prorogation of jurisdiction under Article 25, its paragraph 4 states that agreements or provisions of a trust instrument conferring jurisdiction do not have legal force if they are contrary to Article 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24. To assess the substantive validity of the agreement, Article 25, paragraph 1 refers to the national conflict of laws rules of the Member State whose court has been chosen. Thus, there is no uniform conflict of laws rule within the EU regarding the law applicable to the substantive validity of jurisdiction agreements. *Forum-selection* agreements providing for the jurisdiction of a court of a third State are accordingly governed by national rules.

Measures of protection applicable to employees enshrined in the Brussels I Recast Regulation also relate to tacit prorogation (Article 26, paragraph 2), *lis pendens* (Article 31, paragraph 4), and the violation of special grounds of jurisdiction (Article 45, paragraph 1(e))⁶⁵⁹.

When the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1 of Article 26, which states that the courts before which a defendant enters an appearance have jurisdiction, ensure that the defendant is in-

⁶⁵⁶ Court of Justice (Grand Chamber), judgment of 19 July 2012, *Mahamdia*, cit., para. 65.

⁶⁵⁷ *Ibidem*, para. 66.

⁶⁵⁸ *Ibidem*, para. 64. On this point see L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, cit., p. 253.

⁶⁵⁹ That is further analysed in this Chapter, para. 5.4.

formed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance. This is an obligation upon the courts to inform the employee in order to avoid abuse or strategies prejudicing his rights.

Under Article 31, paragraph 4, within the *lis pendens* mechanism, the priority rule in favour of the chosen court does not apply when a weaker party is a claimant, and the choice of court agreement is invalid under the provisions of the Regulation. Indeed, as a general rule, in case the court chosen pursuant to an agreement is seised, any court of another Member State shall stay the proceedings until the court seised on the basis of the agreement declares its lack of jurisdiction under that agreement. To the contrary, if it grounds jurisdiction, the other court shall decline jurisdiction in favour of that court. However, when weaker parties are concerned, for the operability of said Article 31, it is required that the claimant is the weaker party (e.g. the employee) and the agreement is not valid under Article 23.

In light of the above considerations, the rules on jurisdiction over individual employment contracts are established to protect the weaker position of the employee against the employer. In any case, the interpretation of the connecting factors requires a relative approach on the basis of a circumstantial method, taking into account the scheme and aims pursued by the Regulation.

Jurisdictional rules' function and practical operability have been questioned, and suggestions for amendments have been put forward.

Based on the practical application of the residual criterion of the engaging place of business, it has been argued that it is «generally neither logical nor in the interest of the employee, as there will often be no real connection between that engaging place of business and the day-to-day work»⁶⁶⁰. Such ground shall be replaced with the place of business which gives the employee daily instructions on the work to be carried out, thus ensuring the connection between the courts having jurisdiction and the actual employment relationship, whenever the habitual place of work cannot be determined⁶⁶¹. In this way, the proposed head of jurisdiction fulfils the principles of predictability, certainty and proximity.

⁶⁶⁰ On this issue see U. GRUŠIĆ, *Jurisdiction in employment matters under Brussels I: a reassessment*, cit., spec. p. 108 ff.

⁶⁶¹ R. CAFARI PANICO, *Enhancing protection for weaker parties*, cit., p. 44 ff. and p. 57.

The coincidence between *forum* and *ius* may also be questioned in so far as it does not grant a high level of protection. In light of the entry into force of the Brussels I Recast Regulation, observations have been raised by the Committee on Legal Affairs of the European Parliament, which presented a motion for a Resolution in September 2013⁶⁶² that was then adopted in October 2013. It pointed out the necessity of ensuring coherence between the rules governing jurisdiction and the law applicable to a dispute in employment matters⁶⁶³. According to the Explanatory Statement accompanying the above-mentioned motion for a European Parliament resolution⁶⁶⁴, the principle of effectively protecting employees involved both in a collective and individual dimension needs to be pursued by providing that «a Member State should have jurisdiction over disputes in which its own employment law is applicable. Jurisdiction and applicable law should be that of the same Member State, in so far as possible». To improve the current system a «link between jurisdiction over employment disputes and the legal system applicable to the employment contract» must be ensured.

In that respect, the European Parliament thus called on the Commission to assess whether the existing legal framework takes sufficient account of the specialities of employment relationships⁶⁶⁵. In particular, it underlined that with regard to disputes arising under individual employment contracts, the court with the closest connection to the case should have jurisdiction⁶⁶⁶. To that effect, in its opinion, the courts for the place of business from which the employee receives day-to-day instructions should be competent rather than the courts of the place where the business which engaged the employee is or was situated⁶⁶⁷.

⁶⁶² See Committee on Legal Affairs, Rapporteur: Evelyn Regner, Report of 20 September 2013 on improving private international law: jurisdiction rules applicable to employment, (2013/2023(INI)), A7-0291/2013. All EP documents are available at www.europarl.europa.eu.

⁶⁶³ European Parliament Resolution of 8 October 2013 on improving private international law: jurisdiction rules applicable to employment (P7_TA(2013)0396). For a comment see R. CAFARI PANICO, *Enhancing protection for weaker parties*, cit., spec. p. 55 ff.

⁶⁶⁴ Report of 20 September 2013, cit.

⁶⁶⁵ European Parliament Resolution of 8 October 2013, cit., point 5.

⁶⁶⁶ *Ibidem*, letters D, F, H and L.

⁶⁶⁷ *Ibidem*, point 6(b).

As a follow up⁶⁶⁸ to the European Parliament's initiative, the Commission stated that the need to improve jurisdictional rules will be assessed only on the basis of the practical application of the Regulation in employment matters⁶⁶⁹.

b) Posted workers' employment contracts.

Alongside the protective rules provided in the Brussels I *bis* Regulation in relation to individual employment contracts, pursuant to its Article 67, provisions on specific matters contained in instruments of the Union or in national legislation harmonised pursuant to such instruments may apply as *lex specialis*.

In cases involving workers posted temporarily abroad, an alternative *forum* is provided by Article 6 of Directive 96/71 on the posting of workers⁶⁷⁰. In order to enforce the right to the terms and conditions of employment guaranteed in Article 3 of the Directive, in addition to the grounds of jurisdiction set out in Section 5 of the Brussels I *bis* Regulation⁶⁷¹, a posted worker may bring proceedings before the courts of the Member State in whose territory he is or was posted. Therefore, disputes arising out of the employment relationship between the employee moved abroad and his employer, which is seated in the home State, may be heard by the

⁶⁶⁸ Follow up to the European Parliament Resolution on improving private international law: jurisdiction rules applicable to employment, adopted by the Commission on 29 January 2014, SP(2014)61, in Procedure file No. 2013/2023(INI), available at www.europarl.europa.eu.

⁶⁶⁹ Other issues were touch upon, notably industrial actions, described below.

⁶⁷⁰ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, in *OJ L 18* of 21 January 1997, pp. 1-6; see C. BARNARD, *EU Employment Law*, Oxford, Oxford University Press, 2012, pp. 235-237; see further *supra* Chapter 3, para. 3.2. According to Article 2, para. 1 «'posted worker' means a worker who, *for a limited period*, carries out his work in the territory of a Member State other than the State in which he normally works», that must be read jointly with Article 3, para. 6 that specifies that «the length of the posting shall be calculated on the basis of a reference period of *one year* from the beginning of the posting» (emphasis added).

⁶⁷¹ Article 6 provides that «In order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State».

courts of the host State where the worker carries or carried out work activities temporarily. Such disputes could concern the employer with which the employment contract is concluded, or the hosting employer with which no contract is concluded, but which is in any case obliged to observe its own national legislation applicable to the work.

The question is on which basis the employee can choose the most suitable, and the most favourable, courts for litigation. This decision is based on the fact that the worker must seek the higher level of protection depending on the alleged violations. In case of violations of work terms and conditions, as established by Directive 96/71, the most appropriate court could be that for the place where the employee is posted, because this court knows its own national legislation better and may therefore enforce such rights. Differently, with a view to enforcing the judgment in the State of origin, the courts of this State may be chosen by the posted worker. However, concerns may regard the law applicable to the merits, because this is likely to be the law of the host State⁶⁷².

The alternative provided for posted workers is aimed at offering an option to choose the most favourable courts, thus facilitating access to justice in favour of the weaker party.

Similar to that ground, Article 11, paragraph 1 of Directive 2014/67 on the enforcement of the Directive on the posting of workers⁶⁷³, allows posted workers to bring proceedings in the courts of the host State, even though they moved there only temporarily. In particular, this Article on the defence of rights requires the Member States to ensure that there are effective mechanisms for posted workers to lodge complaints against their employers directly, as well as the right to institute judicial or administrative proceedings. It then specifies that such actions may be brought «also in the Member State in whose territory the workers are or were posted, where such workers consider they have sustained loss or damage as a re-

⁶⁷² In accordance with Article 3 of Directive 96/71; see further in this Chapter, para. 5.3.

⁶⁷³ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), in *OJ L* 159 of 28 May 2014, pp. 11-31.

sult of a failure to apply the applicable rules, even after the relationship in which the failure is alleged to have occurred has ended».

The situation of posted workers has been addressed in view of the increasing labour mobility. The general connecting factor of the habitual place of work established in the Brussels system is also applicable in the determination of the competent courts over posted workers' employment contracts. Indeed, according to a wide interpretation, this is the principal place of work, which remains unchanged when the employee temporarily works abroad within the posting in the transnational provision of services framework⁶⁷⁴. This is true because posted workers are not included under Article 21, paragraph 1 (b)(i) of the Brussels *I bis* Regulation. It seems undisputed that the courts of the place where the employee habitually carries out the work remain competent, even though the employee is temporarily posted in another Member State⁶⁷⁵. This is confirmed by the provision under Article 6 of Directive 96/71, which provides for an (additional) alternative *forum*, that is the courts for the place where the worker is or was posted, in cases of disputes and claims for respect of work terms and conditions provided by the law of the host State.

As noticed above⁶⁷⁶, the jurisdictional rule contained in the framework on posted workers has been interpreted as the consequence of the duty to apply the mandatory employment provisions of the host State, that is imposed only upon the host State itself. Nevertheless, in practice, difficulties in instituting legal proceedings in the host country may be faced by posted workers, such as language barriers and unfamiliarity with the legal system. Looking at other available *fora*, they may bring actions before the courts of their home State where the employer is domiciled in accordance with Article 21 of the Brussels *I bis* Regulation. The home State, however, does not have the duty to apply the protective standards provided by the host State law⁶⁷⁷.

⁶⁷⁴ R. CAFARI PANICO, *Enhancing protection for weaker parties*, cit., p. 62.

⁶⁷⁵ *Ibidem*.

⁶⁷⁶ See *supra* in Chapter 3, para. 3.2.

⁶⁷⁷ M. FORNASIER, *Employment, Posting of Workers*, in J. BASEDOW, G. RÜHL, F. FERRARI, P. DE MIGUEL ASENSIO (edited by), *Encyclopedia of Private International Law*, Cheltenham, UK, Northampton, MA, USA, Edward Elgar Publishing, 2017, pp. 116-123, spec. pp. 121-122.

5.2.1. Heads of jurisdiction for cross-border collective redress.

c) *Collective redress.*

The Brussels I Recast Regulation does not provide specific rules concerning jurisdiction over cross-border collective redress in general⁶⁷⁸ or for specific matters such as employment. As argued, given the nature of collective redress procedures, which represent collective strength and assemble individuals to act more effectively, they do not feature a typically weaker party in a natural person's individual capacity, and they do fundamentally change the inequality of litigation power between the contracting parties⁶⁷⁹. This is likely to be the reason why collective procedures are not covered by the Regulation, which was conceived only for individual disputes.

Currently, the absence of any special provision in the Brussels I *bis* Regulation for collective redress procedures implies that related claims should be treated (by analogy) in the same way as the actions falling within its scope of application. Nevertheless, the peculiar features characterising collective proceedings will give

⁶⁷⁸ P. MANKOWSKI, P. NIELSEN, *Introduction to Articles 17-19*, in U. MAGNUS, P. MANKOWSKI (edited by), *European Commentaries on Private International Law. Brussels Ibis Regulation*, cit., pp. 450-451, spec. p. 450; on private international law issues, mainly with regard to consumers' protection, see S. BARIATTI, *Le azioni collettive dell'art. 140-bis del codice del consumo: aspetti di diritto internazionale privato e processuale*, in *Rivista di diritto internazionale privato e processuale*, 2011, No. 1, pp. 19-54; L. CARBALLO PIÑEIRO, *Las acciones colectivas y su eficacia extraterritorial. Problemas de recepción y transplante de las class actions en europa*, Santiago de Compostela, Universidad de Santiago de Compostela, 2009, pp. 105-113. European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI)), P7_TA(2010)0304, point 32, stressed that «the Commission's forthcoming work on collective redress instruments may need to contemplate special jurisdiction rules for collective actions». Collective redress proceedings were taken into account within the Proposal for a Regulation, COM(2010)748 final, cit., mainly with regard to recognition and enforcement aspects: see further in this Chapter, para. 5.4.

⁶⁷⁹ Z.S. TANG, *Consumer Collective Redress in European Private International Law*, in *Journal of Private International Law*, 2011, Vol. 7, No. 1, pp. 101-147, spec. p. 107, who pointed out that «collective redress has not obtained the blessing of a special rule».

rise to some specific jurisdictional issues in the European context⁶⁸⁰. Whether the Brussels regime is suitable and thus adequately allocates jurisdiction for collective redress has been questioned.

As a preliminary remark, it should be recalled that collective redress presents different requirements among EU Member States, which may vary widely as to substantive as well as procedural aspects, e.g. the constitution of the collective procedures, and the effect of collective judgments, which may have consequences in terms of protection of fundamental rights, such as access to justice and fair trial. When dealing with collective proceedings, transnational implications may occur when the group consists of members coming from different Member States, or when the home State of some class members is different from the one in which the defendant is domiciled.

On the basis of the Brussels regime, the general rule and the special rules offer the claimants various available *fora*. In practice, to institute collective proceedings (in a broader sense, thus comprising representative actions or group actions), the plaintiff would have to consider the legal costs, the possible amount that could be awarded, as well as the legal issues related to the applicable procedural and substantive laws.

First, the general rule of the *forum rei* under Article 4 of the Brussels I *bis* Regulation may be applied to collective proceedings⁶⁸¹. Regardless of the Member States from which the claimants come, the action may be brought before the courts of the State where the defendant is domiciled. In this way, however, the members of different States may encounter problems because of higher costs,

⁶⁸⁰ M. DANOVA, *The Brussels I Regulation: cross-border collective redress proceedings and judgments*, in *Journal of Private International Law*, 2010, Vol. 6, No. 2, pp. 359-393, spec. p. 364 ff.

⁶⁸¹ For an analysis see E. LEIN, *Cross-border collective redress and jurisdiction under Brussels I: a mismatch*, cit., spec. p. 133 f.; M. DANOVA, *The Brussels I Regulation: cross-border collective redress proceedings and judgments*, cit., p. 365.

complex and lengthy procedures, unfamiliarity with foreign proceedings and legislation, that disincentivise participation in the collective procedure⁶⁸².

Second, the resort to special or protective grounds for jurisdiction may also be considered⁶⁸³. The rules related to contracts, torts, branches and multi-defendants may be relevant in respect of collective redress actions brought by a plaintiff class under the Brussels system.

With exclusive regard to disputes arising out of employment contracts, in the case of no choice of courts agreement, under Section 5 of the Brussels I *bis* Regulation, the available *fora* may be the place of the employer's domicile, the place of habitual work, the last place of habitual work or, failing that, the engaging place of business. From a practical perspective, claimants prefer to bring proceedings in the State where they carry out their working activities, as the employment contract is often governed by the law of that State. In this way, the coincidence between *forum* and *ius* is achieved.

Even if the peculiarities of collective redress are not governed by the Brussels system, the idea of collective litigation is not new⁶⁸⁴. Indeed, as described above, certain provisions address the case of multiple defendants (Article 8, point 1, applicable in employment matters pursuant to Article 20, paragraph 1) and the possibility of joining related actions under Article 30.

The last provision allows the consolidation of related actions that are pending in the courts of different Member States⁶⁸⁵. Under paragraph 3 of Article 30, ac-

⁶⁸² In relation to consumers collective litigation, see the problems outlined by the Commission in the Green Paper on Consumer Collective Redress, COM(2008)794 final of 27 November 2008, para. 6 ff.

⁶⁸³ M. DANOVA, *The Brussels I Regulation: cross-border collective redress proceedings and judgments*, cit., pp. 365-366.

⁶⁸⁴ B. HESS, *A coherent approach to European collective redress*, in D. FAIRGRIEVE, E. LEIN (edited by), *Extraterritoriality and collective redress*, cit., pp. 107-118, spec. p. 112. See also E. LEIN, *Jurisdiction and Applicable Law in Cross-Border Mass Litigation*, in F. POCAR., I. VIARENGO, F.C. VILLATA (edited by), *Recasting Brussels I*, Padova, CEDAM, 2012, pp. 159-172.

⁶⁸⁵ With regard to the Brussels I Regulation, see A. NUYTS, *The Consolidation of Collective Claims Under Brussels I*, in A. NUYTS, N.E. HATZIMIHAIL (eds.), *Cross-Border Class Action. The European Way*, Munich, Sellier European Law Publishers, 2014, pp. 69-83; J.N.

tions are related when «they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings». In the *Tatry* judgment of 1994⁶⁸⁶, related actions under Article 22 of the Brussels Convention (now Article 30 of the Brussels I Recast Regulation) were interpreted by affirming that in order to achieve the proper administration of justice, the interpretation of that Article «must be broad and cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive»⁶⁸⁷. In such cases, the court second seised may stay its proceedings. When the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof, any other court may also decline its jurisdiction. This mechanism is aimed at preventing contradictory judgments in case all the actions may be brought before the same courts having jurisdiction over all of them.

In light of the foregoing, in the absence of any specific provisions, it may be deemed appropriate to determine the courts having jurisdiction on the grounds established in the Brussels I *bis* Regulation, depending on the merits of the disputes. Therefore, when a group of workers wish to sue their employer, they may rely on the general rule under Article 4, as well as on the protective grounds under Section 5. Given the alternative nature of those heads of jurisdiction, the most favourable option should be in line with the connecting factor provided for the determination of the law applicable to the merits of the litigation. In any case, such argument may be acceptable at a practical level, but not from an interpretative perspective based on the aims and functions of the Regulation itself.

An important question arising in relation to collective redress proceedings regards the opportunity of the association, organisation, trade union or other similar

STEFANELLI, *Parallel litigation and cross-border collective actions under the Brussels I framework: lessons from abroad*, in D. FAIRGRIEVE, E. LEIN (edited by), *Extraterritoriality and collective redress*, cit., pp. 143-170, spec. p. 162 ff.

⁶⁸⁶ Court of Justice, judgment of 6 December 1994, Case C-406/92, *The owners of the cargo lately laden on board the ship “Tatry” v the owners of the ship “Maciej Rataj”*, EU:C:1994:400.

⁶⁸⁷ *Ibidem*, para. 53. Similarly, see Court of Justice, judgment of 13 July 2006, *Roche*, cit., para. 20 ff.

entity to rely on the special grounds of jurisdiction established for individuals in matters related to an employment contract.

In support of the identification of the proper *fora* available for collective redress promoted by a group of (represented) workers with transnational implications, considerations and interpretations pointed out in relation to consumer protection and the related special *fora* provided in the Regulation may prove useful.

It has been argued that associations acting on behalf of consumers are not natural persons because they have their own *locus standi*, and thus actions promoted by them do not fall within the scope of the Brussels I *bis* Regulation since this mainly concerns individual disputes. Consequently, the consumer *fora* are not open to associations or other entities acting in support of them or on their behalf⁶⁸⁸.

A representative action instituted on behalf of other consumers (by a representative that is a consumer itself) has been considered to be a kind of intermediate role between truly individual claims and collective redress. The representative claimant may rely on the special *fora*, provided that the other consumers on whose behalf the representative is acting, are identified or identifiable⁶⁸⁹.

The *Henkel* case of 2002⁶⁹⁰ is significant in relation to this issue. The Court affirmed that «a legal person which acts as assignee of the rights of a private final consumer, without itself being party to a contract between a professional and a private individual, cannot be regarded as a consumer within the meaning of the Brussels Convention and therefore cannot invoke Articles 13 to 15 of that Convention. That interpretation must also apply in respect of a consumer protection organisation such as the VKI which has brought an action as an association on be-

⁶⁸⁸ P. MANKOWSKI, P. NIELSEN, *Introduction to Articles 17-19*, cit., p. 451.

⁶⁸⁹ M. DANOV, *The Brussels I Regulation: cross-border collective redress proceedings and judgments*, cit., pp. 359, 376-377; Z.S. TANG, *Consumer Collective Redress in European Private International Law*, cit., p. 115 ff.

⁶⁹⁰ Court of Justice, judgment of 1 October 2002, Case C-167/00, *Verein für Konsumenteninformation v Karl Heinz Henkel*, EU:C:2002:555.

half of consumers»⁶⁹¹. If a contract between the parties of the dispute does not exist⁶⁹², consumers' special rules of jurisdiction may not be invoked.

This finding was upheld by Advocate General Bobek in the *Schrems* case of 2017⁶⁹³. In his opinion, he addressed the question of whether the *forum actoris* of the consumer under Article 16 of the Brussels I Regulation is applicable to assignees of consumer claims that are not themselves parties to a contract⁶⁹⁴. The exclusion of such a possibility is based on the following arguments. The wording of Articles 15 and 16 thereof clearly refer to the other party to a contract, and thus the special *forum* is always limited to the concrete and specific parties to the contract⁶⁹⁵. Interpreting Article 16 as including claims made by a consumer (assignee) on the basis of consumer contracts concluded by other consumers would cut the logical link and enlarge the scope of the special head of jurisdiction beyond the cases explicitly provided for by those Articles⁶⁹⁶. The aim of the special head of jurisdiction relating to consumers is to protect a person in his capacity as a consumer to a given contract. Conferring the special consumer *forum* on the basis of a claim emanating from a contract concluded by another person would weaken the link between the consumer *status* and a given contract, thus producing a paradoxical result⁶⁹⁷. Then, since Articles 15 and 16 are derogations from the general rule and the special rules for contracts, their interpretation must be narrow and should not be extended to include other situations⁶⁹⁸.

As stated by the Court in the abovementioned *Henkel* judgment and in the former *Shearson Lehman Hutton* judgment⁶⁹⁹, the Advocate General pointed out

⁶⁹¹ *Ibidem*, para. 33.

⁶⁹² *Ibidem*, para. 38.

⁶⁹³ Opinion of Advocate General Bobek delivered on 14 November 2017, Case C-498/16, *Maximilian Schrems v Facebook Ireland Limited*, EU:C:2017:863.

⁶⁹⁴ *Ibidem*, para. 77 ff.

⁶⁹⁵ *Ibidem*, para. 82.

⁶⁹⁶ *Ibidem*, para. 85.

⁶⁹⁷ *Ibidem*, para. 86.

⁶⁹⁸ *Ibidem*, para. 88.

⁶⁹⁹ Court of Justice, judgment of 19 January 1993, Case C-89/91, *Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH*, EU:C:1993:15.

that the special consumer jurisdiction was not applicable to legal persons acting as assignees of the rights of a consumer because those legal persons (a private company and a consumers' association) were not weaker parties and because those persons were not themselves parties to the contract⁷⁰⁰. Furthermore, he referred to the ruling in the *CDC Hydrogen Peroxide* case of 2015⁷⁰¹, according to which the Court declared that in relation to Article 5, point 3 of Regulation No. 44/2001 «the transfer of claims by the initial creditor cannot, by itself, have an impact on the determination of the court having jurisdiction. As a consequence, (...) the requirement for the application of that head of jurisdiction (the location of the harmful event) must be assessed for each claim for damages independently of any subsequent assignment or consolidation»⁷⁰². With regard to the *Schrems* case, he then argued that in the absence of any contractual relationship between the assignee and the other party to the original contract, the special consumer *fora* could not be invoked, nor could the creation of a new *forum* for the assignee-consumer be sought⁷⁰³. As to the application of the consumer *forum* to the assignee, contrary to what the Commission argued in its opinion with a view to protecting consumers residing within the same State, the Advocate General held that the local (internal) jurisdiction under Regulation No. 44/2001 (the competent courts are those of the place where the consumer is domiciled) may not be disregarded⁷⁰⁴ and that it even excludes the consolidation of claims of other consumers domiciled in the same country. Notwithstanding, a new special jurisdiction may be internally provided for by the national law⁷⁰⁵. It was then recognised that the Brussels I Regulation does not provide for specific provisions on the assignment of claims or collective redress procedures, and that judicial legislation would be inappropriate⁷⁰⁶.

⁷⁰⁰ Opinion of Advocate General Bobek delivered on 14 November 2017, *Schrems*, cit., para. 96.

⁷⁰¹ Court of Justice, judgment of 21 May 2015, Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others*, EU:C:2015:335.

⁷⁰² Opinion of Advocate General Bobek delivered on 14 November 2017, *Schrems*, cit., para. 109.

⁷⁰³ *Ibidem*, para. 110.

⁷⁰⁴ *Ibidem*, paras. 115-116.

⁷⁰⁵ *Ibidem*, para. 117.

⁷⁰⁶ *Ibidem*, para. 119 ff.

The Court delivered its judgment on 25 January 2018⁷⁰⁷ and upheld the findings of the Advocate General. First, it agreed with the interpretation given to the notion of consumer for the purposes of social media platforms⁷⁰⁸. Consequently, it acknowledged the derogative nature of the special provisions related to individual contracts of employment, that must be interpreted narrowly⁷⁰⁹ and that the necessary existence of a contractual link between the parties in the disputes serves to ensure the predictability of the *forum actoris*⁷¹⁰. Second, as to the assignment of claims, in line with its previous case law, the Court held that the consumer cannot bring the assigned claims within the jurisdiction of the courts of the place of his domicile. Situations other than those provided by the Regulation cannot be included in its scope of application. Thus, «an assignment of claims cannot provide the basis for a new specific *forum* for a consumer to whom those claims have been assigned»⁷¹¹, regardless the other consumers are domiciled in the same Member State, in another EU Member State or in a third country⁷¹². Finally, the Court did not refer to any possible *forum* for assigned claims that may be established under national law and that may nevertheless be in compliance with the objectives of the Regulation. It might have assumed that it is for the national procedural law of the courts having jurisdiction on the basis of a general (defendant's domicile) or special (consumer's domicile) ground to allow the consolidation of claims or the establishment of a collective redress procedure. From a first appraisal, the European judges seem to have limited their ruling to the referred questions by strictly interpreting the Brussels provisions, without addressing the issue of collective litigation, in particular the collective redress procedure and the related jurisdictional issues. This presumably relies on the fact that, in accordance with the *lex fori*, the case in the main proceedings was not regarded as a collective redress, but as an assignment of claims, which has already been defined by the Court.

⁷⁰⁷ Court of Justice, judgment of 25 January 2018, Case C-498/16, *Maximilian Schrems v Facebook Ireland Limited*, EU:C:2018:37.

⁷⁰⁸ *Ibidem*, paras. 25-41.

⁷⁰⁹ *Ibidem*, para. 43.

⁷¹⁰ *Ibidem*, paras. 44-46.

⁷¹¹ *Ibidem*, para. 48.

⁷¹² *Ibidem*, para. 49.

To sum up, the Regulation does not cover collective redress, nor may the provided heads of jurisdiction be extended to situations other than those to which it refers. In cases of the assignment of claims, the special provisions may not be invoked because they are not covered by the Regulation.

Could it be different when a representative, an organisation or another entity is engaged to lodge a collective complaint on the basis of a mandate? Within EU law, Regulation No. 2016/679 on consumer data protection provides for the right to bring an action of organisations or other similar entities (not-for-profit) on behalf of other members when it is based on the data subject's mandate⁷¹³.

In light of these considerations, moving to the employment field, the determination of the *forum* for a European collective redress may not be based on Section

⁷¹³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), in *OJ L* 119 of 4 May 2016, pp. 1-88, in particular see Recital No. 142 and Article 80. Heads of jurisdiction, also applicable to representative bodies, are provided for in Article 77 (data subject may lodge a complaint with a supervisory authority in the Member State of his or her habitual residence, place of work or place of the alleged infringement), Article 78 (proceedings against a supervisory authority may be brought before the courts of the Member State where the supervisory authority is established) and Article 79 (proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment; alternatively, before the courts of the Member State where the data subject has his or her habitual residence, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers). This Regulation shall apply from 25 May 2018. Currently, the matter is regulated by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, in *OJ L* 281 of 23 November 1995, pp. 31-50, whose Article 22 provides that «Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question». The question on whether this provision (jointly with Articles 23 and 24 thereof) allows public-service associations to take action against the infringer in the event of an infringement in order to safeguard the interests of consumers has been referred to the Court of Justice: see Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany) lodged on 26 January 2017, Case C-40/17, *Fashion ID GmbH & Co.KG v Verbraucherzentrale NRW eV*.

5. In cases in which, under national laws, the associations of workers are empowered to act on their behalf or in support of them, including foreign members, a workers' collective redress may be legitimately instituted. However, in the absence of a choice of *forum*, those associations may not rely on the special grounds of jurisdiction for disputes arising out of the employment contract.

Under a systematic and teleological interpretation of the Regulation, the extension of jurisdiction grounds that are identified only in relation to the individual dimension of civil and commercial disputes is prevented. It may not suffice to interpret the existing *fora* in order to determine the courts having jurisdiction over cross-border collective redress falling within the respective field⁷¹⁴. This context underpins the need to identify uniform European rules on jurisdiction governing the collective dimension, when national laws do not provide otherwise.

d) Collective redress involving posted workers.

With a view to addressing all the different scenarios concerning labour disputes, due to the increasing and actual implications arising from labour mobility, collective redress procedures may involve employees who are or were posted in one Member State. Disputes may regard claims against the posting employer brought by posted workers in the host country or in the Member State of origin.

According to the legal framework on the posting of workers, the head of jurisdiction available to posted employees is the alternative ground established under Article 6 of Directive 96/71. As already noted, the collective dimension has not been taken into account, except for the provision in Article 11, paragraph 3 of the Enforcement Directive 2014/67, which requires the Member States to ensure that trade unions and other third parties, such as associations, organisations and other legal entities, may engage, on behalf or in support of the posted workers or their employer, with their approval, in any judicial or administrative proceedings. This is indeed significant for the promotion of collective mechanisms of protection and enforcement of workers' rights. Though no requirements are provided

⁷¹⁴ L. CARBALLO PIÑEIRO, *Acciones colectivas transfronterizas: Prospectiva de Derecho Internacional Privado europeo*, in *Revista de Derecho Privado y Comunitario*, 2011, No. 2, pp. 585-617, spec. p. 597.

apart from compliance with the national rules of procedure, this may cause difficulties from the point of view of the worker who wishes to promote or join a collective redress.

The question of whether the actions of trade unions (or other entities) on behalf or in support of posted workers against the posting employer fall within the scope of the Brussels I Recast Regulation, specifically under its Section 5, has been argued⁷¹⁵. In light of the considerations reported above as to actions promoted by consumers' associations, workers' unions similarly may not rely on protective grounds set forth in the Brussels regime, because such reliance would require an extension of their scope of application.

A particular situation may occur when a representative who is one of the individual claimants (posted workers) himself is governed by the Brussels I Recast Regulation⁷¹⁶. In this case, there is an employment relationship between the representative and the defendant employer. The protective provisions shall thus apply to him. The question remains as to whether such a collective situation is legitimate under the applicable national law, or whether the claims shall be treated separately. This instance seems to be qualified differently from an assignment of claims, where lacking any contractual relationship between the assignee and the other party to the original contract, the protective grounds cannot be invoked, as stated in the *Schrems* case concerning consumers.

In the absence of any European provision, the problems are related to differences in the national procedural legislations on organisations and collective procedures, which may or may not grant the possibility to act in support or on behalf of a group.

e) Industrial actions.

Not falling within the contractual area, in the employment context, forms of collective action include protests, demonstrations, strikes or industrial actions. Such actions are mainly aimed at giving voice to workers' requests to respect the employment terms and conditions, to initiate collective negotiations or to con-

⁷¹⁵ R. CAFARI PANICO, *Enhancing protection for weaker parties*, cit., p. 58.

⁷¹⁶ *Ibidem*, pp. 58-59.

clude collective agreements. The relevant aspect for the purposes of the present study is that these types of collective actions may be an issue closely connected to the contract, although not directly arising out of the contract or its individual clauses. A transnational collective action may affect the employment relationship due to the potential consequences regarding the regular exercise of work activities (because protests or strikes commonly imply the non-regular conduct of activities). As a result, the employer may face economic difficulties (damages and loss) that afflict its market economy. In this scenario, not only do questions related to contractual matters arise, but also extra-contractual issues related to the liability of the trade union, association or organisation involved, which imply solutions in terms of private international law⁷¹⁷, although strike actions are primarily dealt with under national law.

The competent authority shall be determined under Article 4 of the Brussels I *bis* Regulation on the basis of the general rule of the *forum rei*. However, a supplementary head of jurisdiction is established by Article 7, point 2 in favour of the courts for the place where the harmful event occurred or may occur⁷¹⁸. In this regard, the *locus delicti commissi* may concern the place of the harmful event (*locus actus*) or the place where the harmful event caused damages (*locus damni*)⁷¹⁹. There is no specific conflict of jurisdictions provision concerning industrial actions, and thus the jurisdictional issues shall be assessed with regard to the related

⁷¹⁷ For an analysis see F. DORSSEMONT, *Collective Action Against Austerity Measures*, in N. BRUUN, K. LÖRCHER, I. SCHÖMANN (eds.), *The Economic and Financial Crisis and Collective Labour Law in Europe*, Oxford and Portland, Oregon, Hart Publishing, 2016, pp. 153-170, spec. p. 165 ff.

⁷¹⁸ See, *inter alia*, F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale*, Volume I, cit., p. 83 ff.; A. MALATESTA, *Regolamento (CE) n. 44/2001*, cit., p. 522; F. MARONGIU BONAIUTI, *Le obbligazioni non contrattuali nel diritto internazionale privato*, Milano, Giuffrè, 2013, p. 15 ff.; E. LEIN, *Cross-border collective redress and jurisdiction under Brussels I: a mismatch*, cit., p. 134.

⁷¹⁹ On this criterion, see Court of Justice, judgment of 30 November 1976, Case 21/76, *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, EU:C:1976:166; judgment of 10 June 2004, Case C-168/02, *Rudolf Kronhofer v Marianne Maier and Others*, EU:C:2004:364; judgment of 16 July 2009, Case C-189/08, *Zuid-Chemie BV v Philippo's Mineralenfabriek NV/SA*, EU:C:2009:475. See also S. BARIATTI, *Le azioni collettive*, cit., spec. p. 29.

disputes arising out of this kind of action, whether they are of contractual or extra-contractual nature.

As far as extra-contractual issues are concerned, in its Resolution of October 2013⁷²⁰, the European Parliament underlined that the courts of the State where the industrial action is to be or has been taken shall have jurisdiction⁷²¹. In particular, it requested the Commission to consider whether it is necessary to clarify, within the provision of Article 7, point 2 of the Brussels I *bis* Regulation, that in the event of an industrial action, the courts for the place where it is to be or has been taken are competent in accordance with Article 9 of the Rome II Regulation on the law applicable to non-contractual obligations⁷²².

To that effect, the European Parliament referred to the *Torline* case of 2004⁷²³ concerning the legality of a notice of industrial action given by SEKO (a Swedish trade union) against DFDS Torline A/S (a Danish shipowner), with the objective of securing a collective agreement for the Polish crew of the cargo ship *Tor Caledonia*, which was owned by DFDS and served the route between Göteborg (Sweden) and Harwich (United Kingdom). The Court was requested to interpret Article 5, point 3 of the Brussels Convention. According to the Danish legal system, the jurisdiction to determine the legality of an industrial action and the jurisdiction to hear actions for damages for any consequential loss do not belong to the same national courts. Given that the object of the Brussels Convention is not the unification of national procedural rules, but the determination of rules to identify which court has jurisdiction in disputes concerning civil and commercial matters in intra-Community relations, and thus to facilitate the enforcement of judgments, such a distinction is accepted⁷²⁴. Maintaining that to obtain compensation for losses arising from industrial action which took place in one State, and for which a party

⁷²⁰ European Parliament Resolution of 8 October 2013 on improving private international law: jurisdiction rules applicable to employment, cit.

⁷²¹ *Ibidem*, letter K.

⁷²² *Ibidem*, point 6(a).

⁷²³ Court of Justice, judgment of 5 February 2004, Case C-18/02, *Danmarks Rederiforening, acting on behalf of DFDS Torline A/S v LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket för Service och Kommunikation*, EU:C:2004:74.

⁷²⁴ *Ibidem*, para. 23.

domiciled in another State is liable, a plaintiff would, first, have to bring proceedings before a court of the State of the defendant's domicile on the legality of the industrial action, and second, bring an action for damages before the courts of the place where the industrial actions occurred or should have occurred. This contravenes the principles of sound administration of justice, legal certainty and the avoidance of the multiplication of bases of jurisdiction as regards the same legal relationship, which the Court has repeatedly held to be objectives of the Brussels Convention⁷²⁵. In this regard, moreover, the Court affirmed that the application of Article 5, point 3 is not conditional on the actual occurrence of damage⁷²⁶. As already held in the *Henkel* case⁷²⁷, «the courts for the place where the harmful event occurred are usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence, is equally relevant whether the dispute concerns compensation for damage which has already occurred or relates to an action seeking to prevent the occurrence of damage»⁷²⁸. In conclusion, the definition of tort, delict or quasi-delict as grounds for a special jurisdiction may well comprise a case on the legality of an industrial action⁷²⁹. This rule is also applicable whenever national rules of procedure provide that the competent court is a court other than the one having jurisdiction to try claims for compensation for the damage caused by that industrial action⁷³⁰. In the present case, the Danish court had validly grounded its jurisdiction on the legality of the industrial action taking place in Sweden.

In light of this finding, the European Parliament noted that according to the then adopted Rome II Regulation, Swedish law would be applicable, and thus the

⁷²⁵ *Ibidem*, paras. 25-26.

⁷²⁶ *Ibidem*, para. 27.

⁷²⁷ Court of Justice, judgment of 1 October 2002, *Henkel*, cit., paras. 46 and 48: «It is therefore not possible to accept an interpretation of Article 5(3) of the Brussels Convention according to which application of that provision is conditional on the actual occurrence of damage. Furthermore, it would be inconsistent to require that an action to prevent behaviour considered to be unlawful, such as that brought in the main proceedings, whose principal aim is precisely to prevent damage, may be brought only after that damage has occurred».

⁷²⁸ Court of Justice, judgment of 5 February 2004, *Torline*, cit., para. 27.

⁷²⁹ *Ibidem*, para. 28.

⁷³⁰ *Ibidem*.

Danish court has jurisdiction, but it must apply Swedish law that is the law of the country where the action is to be, or has been, taken⁷³¹. This paradoxical situation does seem to result in prejudice to the effective protection of workers' rights. On the one hand, their constitutional right to act collectively may be limited and, on the other hand, the quality of justice may be reduced because the courts taking decisions on the industrial action will have to apply a foreign law with which they are less familiar⁷³².

In the abovementioned follow-up of 2014⁷³³, the Commission acknowledged that the need for intervention on jurisdictional issues over industrial actions had not been pointed out within the preparatory work of the Draft Proposal. Difficulties in interpretation may be resolved by the Court of Justice, and the suggestions of the Rapporteur could be a (supportive) element in the assessment.

To be more precise, however, in the Draft Proposal, collective actions have been addressed by a recommendation for the introduction of Article 85 on the respect for «the right of workers and employers, or their respective organisations, to engage in collective action to protect their interests, in particular the right or freedom to strike or to take other actions, in accordance with Union law and national law and practices». Though, this did not cover any private international law issue⁷³⁴.

In another case concerning an industrial action with transnational implications, the main proceedings were brought before the courts of the place where the defendant was domiciled. This occurred in the *Viking* case of 2007⁷³⁵. *Viking*, a company under Finnish law, brought an action before the High Court of Justice of

⁷³¹ Article 9 of Rome II Regulation. See further *infra* in this Chapter, para. 5.3.a.

⁷³² Motion for a Resolution of 20 September 2013, Explanatory Statement, cit., para. II; see also R. CAFARI PANICO, *Enhancing protection for weaker parties*, cit., pp. 56-57.

⁷³³ Follow up to the European Parliament Resolution on improving private international law: jurisdiction rules applicable to employment, cit.; R. CAFARI PANICO, *Enhancing protection for weaker parties*, cit., p. 58.

⁷³⁴ Proposal for a Regulation, COM(2010)748 final, cit., para. 3.4, Recital No. 27 and Article 85.

⁷³⁵ Court of Justice (Grand Chamber), judgment of 11 December 2007, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, EU:C:2007:772.

England and Wales, Queen's Bench Division (Commercial Court) (United Kingdom), requesting it to declare that the action taken by ITF, an international trade union seated in London, and FSU, a Finnish trade union, was contrary to Article 43 of the EC Treaty, to order the withdrawal of the ITF circular and to order FSU not to infringe the rights which Viking enjoys under Community law. The decision granting those requests was then appealed before the Court of Appeal (England and Wales) (Civil Division) (United Kingdom), that later referred to the Court of Justice for a preliminary ruling on issues related to fundamental rights and economic freedoms. Jurisdiction was not challenged; however, considerations have been pointed out in the English judgments⁷³⁶.

In the first instance, the English court noted that it had to adjudicate the case because «where jurisdiction is founded on the Brussels Regulation (or on its predecessor, the Brussels Convention) the Court has no power to decline to exercise that jurisdiction on the ground that it would be more suitable for the dispute between the parties to be litigated before the courts of another state»⁷³⁷. Indeed, the *forum non conveniens* rule has no place in the Regulation, whose principles attribute paramount importance to the certainty and predictability of jurisdictional rules⁷³⁸. It was then assumed that a conflict of jurisdictions would have arisen if the proceedings were instituted both in England and in Finland, on the basis of Article 2 of Brussels Regulation, as the ITF was seated in London, and on the basis of Article 6, point 1, because the Finnish trade union was one of a number of defendants to the same proceedings, respectively⁷³⁹. The solution should have been found in Article 27 concerning the *lis pendens* mechanism. Otherwise, irreconcilable judgments could not have been enforced in either of the States. In the

⁷³⁶ *Viking Line ABP v International Transport Workers' Federation & Anor* [2005] EWHC 1222 (Comm) (16 June 2005), available at www.bailii.org/ew/cases/EWHC/Comm/2005/1222.html; *International Transport Workers' Federation & Anor v Viking Line ABP & Anor* [2005] EWCA Civ 1299 (03 November 2005), available at www.bailii.org/ew/cases/EWCA/Civ/2005/1299.html.

⁷³⁷ *Viking Line ABP v International Transport Workers' Federation & Anor* [2005] EWHC 1222 (Comm) (16 June 2005), cit., para. 70.

⁷³⁸ *Ibidem*, para. 71.

⁷³⁹ *Ibidem*, para. 72.

second instance, the judge wondered about the decision not to stay the proceedings, as the Finnish courts were the natural *forum* of the dispute⁷⁴⁰.

This case was considered in the opinion of the Committee on Employment and Social Affairs of the European Parliament on the proposal for the recast of the Brussels I Regulation⁷⁴¹. Indeed, it acknowledged that there was some scope for *forum shopping* for court jurisdictions due to the lack of a jurisdiction for industrial actions as demonstrated in the *Viking* case. However, in the Rapporteur's view, this is against the spirit and the objectives of the Regulation and the courts of the Member State with the closest connection to the industrial action (which are naturally the courts for the place where the action is to be or has been taken) should have the competence to decide in those cases.

In light of the above considerations, putting aside the idea of applying the *forum non conveniens* doctrine or the comity principle, the advisable solution is to provide for a specific head of jurisdiction under which the courts of the place where the industrial action is to be or has been taken shall be competent⁷⁴². Furthermore, this is in line with the criterion provided for the determination of the applicable law to the matter under the Rome II Regulation. It will thus concentrate the dispute in one Member State⁷⁴³. From a more practical point of view, such a reference should also be included in the provision on the choice of court agreements.

It is indeed clear that there is a discrepancy between the provisions at stake, which may lead to a situation in which a court has to apply the law of another

⁷⁴⁰ *International Transport Workers' Federation & Anor v Viking Line ABP & Anor* [2005] EWCA Civ 1299 (03 November 2005), cit., para. 2.

⁷⁴¹ Opinion of the Committee on Employment and Social Affairs of 10 November 2011 for the Committee on Legal Affairs on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Rapporteur: Evelyn Regner.

⁷⁴² With reference to the *Viking* and *Laval* judgements, see U. GRUŠIĆ, *The Right to Strike Versus Fundamental Economic Freedoms in the English Courts, Again: Hiding Behind The "Public Law Taboo" in Private International Law*, in *Journal of Private International Law*, 2013, Vol. 9, No. 3, pp. 413-430.

⁷⁴³ R. CAFARI PANICO, *Enhancing protection for weaker parties*, cit., p. 48.

Member State, giving rise to the risk that the most favourable solution will not be fully guaranteed⁷⁴⁴.

⁷⁴⁴ On the problem of coordination between EU private international law provisions, also with regard to posted workers, see A.A.H. VAN HOEK, *Private International Law: An Appropriate Means to Regulate Transnational Employment in the European Union?*, in *Erasmus Law Review*, 2014, Vol. 7, No. 3, pp. 157-169.

5.3. Law applicable to employment matters.

a) *Individual employment contracts.*

Rules for the determination of the law applicable to individual employment contracts are contained in the Rome I Regulation which, in case of no choice of law, establishes in Article 8 that the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract shall apply. In the case of temporary employment activities carried out in another country, the country where the work is habitually carried out shall not be deemed to have changed (paragraph 2). If no habitual place is identified, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated (paragraph 3). Whether, from the circumstances as a whole, the contract is more closely connected with a country other than that determined through the above criteria, the law of that other country shall apply (paragraph 4). The choice of law is regulated by paragraph 1 of Article 8 that refers to Article 3, under which party autonomy is limited, because it imposes respect for the provisions that cannot be derogated by agreement under the law that would have been applicable according to paragraphs 2, 3 and 4 (that is the objectively applicable law)⁷⁴⁵. Furthermore, under Article 9, the application of overriding mandatory provisions of the *forum* is established, and the overriding mandatory provisions of the country of performance shall apply whenever they render the performance of the contract unlawful taking into account their nature and purpose, and the consequences of their application or non-application.

Like to the criteria laid down in the Brussels I *bis* Regulation, these conflict of laws rules are aimed at protecting the weaker party to a contract, since they are

⁷⁴⁵ See also Recital No. 35 of Rome I Regulation. For comments see U. GRUŠIĆ, *The European Private International Law of Employment*, cit., p. 38 ff.; C. HONORATI, *Regolamento (CE) n. 593/2008*, in F. POCAR, M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, cit., pp. 613-627, spec. pp. 625-626; P. MANKOWSKI, *Employment Contracts under Article 8 of the Rome I Regulation*, in F. FERRARI, S. LEIBL (eds.), *Rome I Regulation. The Law Applicable to Contractual Obligations in Europe*, Munich, Sellier European Law Publishers, 2009, pp. 171-216.

considered more favourable to their interests than the general rules, as recognised by Recital No. 23 of the Rome I Regulation. The specific protection technique (combining protective connecting factors and the obligation to observe mandatory rules) is used with the aim of ensuring that the choice of law in the contract can only benefit the weaker party⁷⁴⁶. The *favor laboratoris* principle is therein enhanced.

The connecting factors under Article 8 (i.e. the habitual place of work as a primary connecting factor and the engaging place of business as a secondary connecting factor) have been interpreted in light of the protection principle or the functional allocation of regulatory authority principle⁷⁴⁷.

Indeed, in the *Koelzsch*⁷⁴⁸ and *Voogsgeerd*⁷⁴⁹ cases, referred to above in the assessment of the concept of the habitual place of work within jurisdictional rules⁷⁵⁰, the Court held that the contract of employment is governed by the law of the State where the employee carries out his or her work activity, because it is in that State that the employee performs his or her economic and social duties, and it is there that the business and political environment affects employment activities⁷⁵¹. This means that the weaker parties are protected when the law of their social and economic environment applies. In other words, the conflict of laws mechanism is based on the socio-economic purpose of the provisions set forth in Arti-

⁷⁴⁶ U. GRUŠIĆ, *The European Private International Law of Employment*, cit., p. 137 ff.; A.A.H. VAN HOEK, *Private international law rules for transnational employment*, cit., spec. p. 439.

⁷⁴⁷ A.A.H. VAN HOEK, *Private international law rules for transnational employment*, cit., p. 443.

⁷⁴⁸ Court of Justice (Grand Chamber), judgment of 15 March 2011, *Koelzsch*, cit.

⁷⁴⁹ Court of Justice, judgment of 15 December 2011, *Voogsgeerd*, cit.

⁷⁵⁰ On the interplay between Rome and Brussels systems for the interpretation of similar concepts, see *supra* in this Chapter, para. 5.2; see also Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005)650 final of 15 December 2005, para. 4.2, where it explained that «The basic rule in paragraph 2(a) has been amplified and the reference is now to the “country in or from which...” to take account of the law as stated by the Court of Justice in relation to Article 18 of the Brussels I Regulation and its broad interpretation of the habitual place of work»; U. GRUŠIĆ, *The European Private International Law of Employment*, cit., p. 155 ff.

⁷⁵¹ Court of Justice (Grand Chamber), judgment of 15 March 2011, *Koelzsch*, cit., para. 42.

cle 8. In this way, the criteria established for the determination of the applicable law lead to the application of the law with which the worker is most familiar⁷⁵².

In addition to the protective grounds and the limitation on party autonomy, an escape clause based on a closer connection between the contract and one country is provided (Article 8, paragraph 4). The Court interpreted this provision in the *Schlecker* judgment of 2013⁷⁵³ that regarded the situation of a German employee who worked in Germany for a German employer for fifteen years. The parties then concluded a new contract under which the employee was appointed as the manager of the employer's Dutch branch; she then worked in the Netherlands for eleven years, while retaining her German residence. Later on, the employer informed the employee that the Dutch position would be abolished and invited her to move back to Germany. The worker initiated a proceedings seeking damages before the Dutch courts against the unilateral decision of the employer to change her place of work.

This case falls within the provision of Article 8, paragraph 2, second sentence, which prescribes that the country where the work is habitually carried out will not be deemed to have changed if the employee is temporarily employed in another country. A reference could also be found in Recital No. 36, which clarifies that «the conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily». In conjunction with the first sentence that explains that a posting is temporary when the employee is expected to resume working in the country of origin, this means that the applicable law does not change in these cases. This is because the intentions of the parties are relevant in determining the habitual place of work. Nevertheless, other elements must be considered.

To identify the applicable law, a hierarchical order of the connecting factors shall be followed. First, the nexus between the employment contract at issue and

⁷⁵² A.A.H. VAN HOEK, *Private international law rules for transnational employment*, cit., p. 444.

⁷⁵³ Court of Justice, judgment of 12 September 2013, Case C-64/12, *Anton Schlecker v Melitta Josefa Boedeker*, EU:C:2013:551; see U. GRUŠIĆ, *The European Private International Law of Employment*, cit., p. 157 ff.

the country where the employee habitually carries out his work must prevail⁷⁵⁴; therefore, its application precludes the secondary criterion of the engaging place of business.

In the present judgment, the Court held that Article 6, paragraph 2 of the Rome Convention «must be interpreted as meaning that, even where an employee carries out the work in performance of the contract habitually, for a lengthy period and without interruption in the same country, the national court may, under the concluding part of that provision, disregard the law of the country where the work is habitually carried out, if it appears from the circumstances as a whole that the contract is more closely connected with another country»⁷⁵⁵. To fulfil the objective of the provision, it is important that the law applicable to the contract is the law of the State with which that contract is most closely connected. The identification of the applicable law should be based on a factual approach that considers all the relevant elements of the case. As an outcome, the applicable law may «not automatically result in the application, in all cases, of the law most favourable to the worker»⁷⁵⁶.

Advocate General Wahl indeed recognised that to guarantee the higher level of protection by applying the conflict of laws rules set forth in the Rome Convention, a wide interpretative approach should prevail. Indeed, in the absence of a choice of law, the law of the place of performance of the contract applies and this

⁷⁵⁴ Court of Justice, judgment of 12 September 2013, *Schlecker*, cit., para. 32.

⁷⁵⁵ *Ibidem*, para. 42.

⁷⁵⁶ See Opinion of Advocate General Wahl delivered on 16 April 2013, *Schlecker*, cit., para. 36: «although the rules for determining the law applicable to the contract take into account the specific nature of the employment relationship, those rules must not, in my opinion, result - in all cases and regardless of the nature of the dispute - in the worker being granted the benefit of the national law which appears, from among all the conflicting laws and in the particular circumstances of the case, to be the most favourable to him. Contrary to what might be inferred, at first sight, from the facts giving rise to *Koelzsch* and *Voogsgeerd*, it is with a clearly expressed concern for ‘adequate’, and not necessarily optimal or ‘favourable’, protection for the employee and guided by considerations which had already been identified by the Court in interpreting the rules of jurisdiction laid down by the Brussels Convention, that the Court held that ‘compliance with the employment protection rules provided for by the law of that country must, so far as is possible, be guaranteed’».

does not imply, as a corollary, that the safeguard clause of the closest connection may be applied only in exceptional circumstances, and to the contrary where the habitual place of performance of the work is clear, that clause may not be applied at all⁷⁵⁷.

In respect to overriding mandatory provisions, it has been questioned whether Article 8, paragraph 1 refers to all the national provisions that cannot be derogated or only to those concerning the protection of employees⁷⁵⁸. According to a wide approach, the first interpretation could be upheld, thus including all the provisions that may grant a higher level of protection. Similarly, the Report on the Rome Convention also referred to provisions concerning employment in the widest sense⁷⁵⁹. On the contrary, from the interpretation of the wording, the only mandatory rules are those concerning employees⁷⁶⁰. The overriding mandatory provisions of the *forum* are at stake by virtue of Article 9 of the Rome I Regulation⁷⁶¹ because they serve as a limit to the application of foreign law in order to safeguard the public interest of that State.

⁷⁵⁷ Opinion of Advocate General Wahl delivered on 16 April 2013, *Schlecker*, cit., para. 45. See also P. STONE, *EU Private International law*, Cheltenham, UK, Northampton, MA, USA, Edward Elgar Publishing, 3rd ed., 2014, p. 353 ff., where he suggests a discriminatory reading of Article 8(4) in which the escape clause is used liberally when European employees are posted to non-EU countries but sparingly in case of posting within the EU.

⁷⁵⁸ Recital No. 37 defines the concepts used therein: «Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of ‘overriding mandatory provisions’ should be distinguished from the expression ‘provisions which cannot be derogated from by agreement’ and should be construed more restrictively».

⁷⁵⁹ Report on the Convention on the law applicable to contractual obligations by Professor Mario Giuliano and Professor Paul Lagarde, cit., p. 25: «the [relevant mandatory provisions] consist not only of provisions relating to the contract of employment itself but also provisions such as those concerning industrial safety and hygiene».

⁷⁶⁰ See also Recital No. 35: «Employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit»; U. GRUŠIĆ, *The European Private International Law of Employment*, cit., p. 145 f.

⁷⁶¹ A.A.H. VAN HOEK, *Private international law rules for transnational employment*, cit., p. 447.

In this context, the Court ruled in the *Unamar* case of 2013⁷⁶² that national public order legislations, however, are not «exempt from compliance with the provisions of the Treaty; if it did, the primacy and uniform application of European Union law would be undermined. The considerations underlying such national legislation can be taken into account by European Union law only in terms of the exceptions to European Union freedoms expressly provided for by the Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to the public interest»⁷⁶³. Thus, the application of overriding mandatory provisions must also be in compliance with the EU rules on free movement.

From the above, the underlying logic of the Rome system is to single out the law (or provisions) that offers more adequate and favourable protection to workers. Even when different scenarios are at issue, the national courts shall determine the applicable law based on the objective of fulfilling the principles of certainty, predictability and protection on which the conflict of laws rules are built.

b) Posted workers' employment contracts.

In the framework of the free cross-border provision of services, pursuant to Article 3 of Directive 96/71, posted workers' employment terms and conditions are subject to the law of the country where they moved to carry out working activities in accordance with the contract concluded with the employer located in their home State⁷⁶⁴. Thus, the law of the host State applies whenever violations by the posting employer of work terms and conditions provided therein occur. It is indeed stated that the minimum standards provided in the host country shall be respected independently of the law governing the contract (*lex causae*), regardless of whether they provide the most favourable protection. This is further emphasised under Article 3, paragraph 7.

As analysed above in Chapter 3 within the legal framework on posted workers, the specific provision of Article 3 takes precedence over the rules in the Rome

⁷⁶² Court of Justice, judgment of 17 October 2013, Case C-184/12, *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, EU:C:2013:663.

⁷⁶³ *Ibidem*, para. 46.

⁷⁶⁴ See *supra* in Chapter 3, para. 3.2.

I Regulation⁷⁶⁵. It follows that when the host State law is applicable under Article 8 of the Rome I Regulation (by choice or as the objectively applicable law), the restrictions imposed by the Directive do not apply. On the contrary, the Directive restricts the operation of Article 8, paragraph 2 of the Regulation and the applicability of the country of origin principle⁷⁶⁶. The assumption under the Regulation that, in cases of temporary work in another country, the habitual place of work shall not be deemed to have changed is controverted whenever the posting lasts one year pursuant to Article 3, paragraph 6 of the Directive.

Taking into account a systematic point of view by referring to the background of the legislation on the posting of workers, it may be noted that the conflict of laws rule pursues the objective of avoiding discrimination amongst local and posted workers. The adopted solution is aimed at guaranteeing, for posted workers, employment minimum standards under the host State law (i.e. the nucleus of mandatory rules for minimum protection or the hard core of protective rules)⁷⁶⁷ regardless of whether they are more favourable. The employment contract itself is, however, still governed by the home State law (in the case of absence of a contractual choice of law) pursuant to the Rome I Regulation. In this context, mandatory provisions may also apply.

Directive 96/71 refers to the 1980 Rome Convention, and in particular to the application of the mandatory rules of the objectively applicable law⁷⁶⁸ and those of the law of the Member State within whose territory the worker is temporarily posted⁷⁶⁹. While the Rome I Regulation specifies that «the rule on individual employment contracts should not prejudice the application of the overriding manda-

⁷⁶⁵ See Article 23 of the Rome I Regulation; Recital No. 11 of Directive 96/71. On the relation among the instruments see F. VAN OVERBEEKE, *The Commission's proposal to amend the Posting of Workers Directive and private international law implications*, in *Nederlands Internationaal Privaatrecht*, 2017, No. 2, pp. 178-194, spec. p. 181 ff.; A. DEFOSSEZ, *Les rapports entre la directive détachement et le Règlement Rome I: on efface tout et on recommande?*, in J-S. BERGÉ, S. FRANCO, M. GARDEÑES SANTIAGO (eds.), *Boundaries of European Private International Law*, Brussels, Bruylant, 2015, pp. 483-504.

⁷⁶⁶ M. FORNASIER, *Employment, Posting of Workers*, cit., pp. 119-120.

⁷⁶⁷ See Recitals No. 13 and 14 of Directive 96/71.

⁷⁶⁸ Recital No. 9 of Directive 96/71.

⁷⁶⁹ Recital No. 10 of Directive 96/71.

tory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC»⁷⁷⁰.

In addition, Recital No. 11 of the Enforcement Directive 2014/67 declares that in the case of no genuine posting situation and conflict of laws, the rules of the Rome I Regulation, which are aimed at ensuring that employees should not be deprived of the protection afforded to them by provisions (of the home State) which cannot be derogated by an agreement or which can only be derogated to their benefit, shall be considered in order to combat abuse.

Article 3, paragraph 10 of Directive 96/71 provides that public policy provisions of the host State law may extend to posted workers employment conditions on matters other than the hard nucleus by virtue of the equal treatment principle and in compliance with the Treaty. Public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of the society. This concept, which is to be interpreted narrowly, includes the protection of workers.

The interpretation of the aforementioned provisions leads to doubts with respect to the interrelationship between the Posting of Workers Directive and the Rome I Regulation, Articles 8 and 9. On the one hand, when the Directive does apply, there is no conflict of laws issue, and therefore the Rome rules do not come at stake. On the other hand, the reference to mandatory protection is linked to the limitation on party autonomy under Article 8, paragraph 1. Moreover, the duty to apply the core minimum standards to posted workers is up to the host State⁷⁷¹.

In line with the posting of workers legislation, a temporary transfer (currently fixed as one year) allows the application of more favourable work terms and conditions in comparison with the law of the home State, which is most often the law applicable to the employment contract under the Rome I Regulation determined (in the absence of a contractual choice of law) through the primary criterion of the habitual place of work. As pointed out by the case law, all the elements are to be

⁷⁷⁰ Recital No. 34 of Rome I Regulation.

⁷⁷¹ And this is the reason why Article 6 provides for the alternative head of jurisdiction. See also A.A.H. VAN HOEK, *Private international law rules for transnational employment*, cit., p. 455, spec. fn. 73; S. EVJU, *Cross-border services, posting of workers, and jurisdictional alternation*, in *European Labour Law Journal*, 2010, Vol. 1, No. 1, pp. 89-98, spec. p. 90.

considered to identify the applicable law. In doing so, the principles governing the (relevant) conflict of laws system shall not be undermined.

5.3.1. Law applicable to cross-border collective redress.

c) *Collective redress.*

Within the Rome regime, there are no specific rules applicable to collective redress as a procedural means; whilst for industrial actions, a specific provision is included under the Rome II Regulation, as described below. Under the first category, therefore, the operability of the existing conflict of laws rules over cross-border collective redress in the employment context must be assessed. Accordingly, the specific criteria set forth in relation to individual employment contracts may be adapted in cases involving a series of similar claims concerning disputes arising out of employment contracts concluded between a number of employees and the same employer where transnational implications may lead to the application of different laws because of different home countries or habitual places of work. Other cross-border situations may occur when a representative organisation initiates proceedings before the courts of its Member State of origin, while also acting on behalf of members that reside or are domiciled in another Member State, or when a representative organisation brings actions before the courts of a Member State other than its home State and acts on behalf of residents of its home State as well as residents of other States⁷⁷².

First, the constitution and admission of the *actor* in the collective redress procedures must be preliminarily assessed. For instance, the *lex causae* applies to the constitution of the representative organisation, because it is the law of the place where that organisation has been legally constituted. The domestic law determines the legitimacy of this type of group, which may be represented by the organisation in question, and thus whether foreign members may also be included. Differently, the collective redress procedure is governed by the *lex fori*, under which the legitimacy *ad processum* of that organisation must be controlled⁷⁷³. This means that the law of the courts seised applies to identify the possible entities that may bring

⁷⁷² Similarly, on consumers' collective actions, see L. CARBALLO PIÑEIRO, *Acciones colectivas transfronterizas*, cit., spec. p. 590.

⁷⁷³ On class certification, see R. MICHAELS, *European Class Actions and Applicable Law*, in A. NUYTS, N.E. HATZIMIHAİL (eds.), *Cross-Border Class Action. The European Way*, cit., pp. 111-141.

actions in that State, including foreign organisations. The *lex fori* also regulates the possibility to bring group actions in which the collective aspect lies in the fact that individual claims are procedurally brought and heard together. In general, the constitution and legitimacy to act of representative organisations, trade unions or other similar entities are matters for national legislation.

As previously mentioned, a case concerning the assignment of claims related to consumer protection alleged to form a class action has been recently addressed by the Court of Justice⁷⁷⁴. In line with the arguments of the Advocate General, but without further assessing the issue, the Court of Justice answered to the questions by recalling its earlier case law on the assignment of claims and on the opportunity to extend the existing jurisdictional criteria provided for by the Brussels system, and finally excluded such a possibility. Whilst, in its opinion⁷⁷⁵, Advocate General Bobek specifically considered the preliminary issue of the definition of a class action (as referred to in the application). He indeed resorted to the *lex fori* (Austrian law) to verify whether the action in the main proceedings could be qualified as a class action. In his view, the relevant provision of the Austrian civil procedure code concerning the case at hand could not be referred to as an instrument for instituting a class action, rather it concerns the assignment of claims. He added that, in practice, it served as a «useful tool to develop a *sui generis* mechanism for collective redress through the assignment of similar claims appertaining to multiple persons to a third party who will consolidate and pursue them in a single set of proceedings. Even though this system is commonly used through assignment to consumer organisations, claims can also be assigned to individuals»⁷⁷⁶. Advocate General specified that the national (Austrian) rule allows different claims of one applicant against the same defendant to be heard together in the same proceedings, provided that the court seised should have jurisdiction over each of the individual claims, including its territorial competence, and it must be possible to subject each claim to the same type of proceeding⁷⁷⁷.

⁷⁷⁴ Court of Justice, judgment of 25 January 2018, *Schrems*, cit. See *supra*, para. 5.2.1.

⁷⁷⁵ Opinion of Advocate General Bobek delivered on 14 November 2017, *Schrems*, cit.

⁷⁷⁶ *Ibidem*, para. 69 and fn. 15.

⁷⁷⁷ *Ibidem*, para. 70.

Assuming that a collective redress procedure is validly initiated, the relevant question is then which law is applicable to the dispute⁷⁷⁸. If different laws are deemed to be applicable, there may be difficulties in managing collective actions from the point of view of the claimants, and ultimately from the perspectives of the defendant and the judge as well. One possibility may be to exclude non-residents and to apply the *lex fori* to the homogenous group in order to avoid divergences among national laws.

In relation to consumer protection, the Commission addressed the problem of multiple laws applicable to collective redress court procedures in the Green Paper of 2008⁷⁷⁹. It recognised that in mass litigation in which consumers come from different Member States, the court would have to apply the different national laws of the various consumers to contractual obligations in accordance with Article 6 of the Rome I Regulation. To resolve this problem, it suggested the introduction of an amendment to the rules by imposing the application of the law of the trader (namely, the law of the place where the trader is seated) in collective redress cases, or of the law of the market most affected (i.e. where most of the consumers affected reside) or of the Member State where the representative entity is established⁷⁸⁰. In so far as extra-contractual consequences are concerned, e.g. in the area of product liability, where Article 5 of the Rome II Regulation should apply, the Commission affirmed that a choice of law agreement after the damaging event occurred by virtue of Article 14, paragraph 1, letter *a* of the same Regulation would help⁷⁸¹.

Accordingly, one specific conflict of laws rule that takes into consideration the overall situation should be appropriate to determine one single law that is applicable to cross-border collective redress. However, whether the application of one single law will suffice and, in relation to weaker parties, whether this is appropriate to grant protection, is debatable. From the claimants' perspective, the law applicable to the dispute cannot be predicted before the proceedings are initi-

⁷⁷⁸ R. MICHAELS, *European Class Actions and Applicable Law*, cit., p. 128 ff.

⁷⁷⁹ Green Paper on Consumer Collective Redress, COM(2008)794 final of 27 November 2008.

⁷⁸⁰ *Ibidem*, para. 59.

⁷⁸¹ *Ibidem*, para. 60. On the applicable law on actions in the field of consumers' protection see also S. BARIATTI, *Le azioni collettive*, cit., pp. 44-47.

ated, thus causing problems related to legal certainty. From the defendant's perspective, different laws may be applicable in cases involving individual or collective proceedings, which may lead to *forum shopping*.

With respect to employment contexts, in an extreme scenario, there may be employment contracts concluded with the same employer that are covered by different laws because the workers might be based in different Member States. The protection of workers' interests in a collective manner may be hampered as a result of this fragmentation⁷⁸².

The determination of the applicable law on the basis of an individual approach by examining the circumstances of each case creates problems in terms of certainty, because it may not lead to the most favourable solution for the workers' collective redress. Although there may be points in common for all the workers employed by the same company, the legal and social environment of each individual worker might vary, and this should be taken into account⁷⁸³.

As to employment collective litigation related to contractual matters, in determining the law applicable to a dispute involving a number of workers, the criteria under the Rome I Regulation may not be appropriate. The identification of a connecting criterion specific for collective redress proceedings appears to be the ideal solution. One suggestion could be to maintain the existing connecting factors and to refer to the majority of workers, e.g. to consider the place where the majority of workers habitually carry out their working activities. In addition, conflict of laws rules may be based on criteria similar to the grounds for jurisdiction, thus achieving the coincidence between *forum* and *ius*.

d) Collective redress involving posted workers.

Cross-border collective redress may concern posted workers, who only temporarily carry out their work activities in a State other than their State of origin. As noted above, Directive 96/71 imposes the observation of work terms and conditions as laid down by the laws or regulations in force in the host State, thus

⁷⁸² A.A.H. VAN HOEK, *Private international law rules for transnational employment*, cit., p. 446.

⁷⁸³ *Ibidem*.

guaranteeing minimum standards⁷⁸⁴. Recital No. 22 thereof prescribes that the law of the Member States concerning collective actions to defend the interests of trades and professions shall not be prejudiced. The right to collective action is also ensured by Directive 2014/67 in its Article 1, paragraph 2 on the exercise of fundamental rights, including the right or freedom to strike or to take other action covered by the specific national industrial relations systems as recognised in the Member States and at the Union level. Collective actions are nonetheless to be exercised in accordance with national law and/or practice. The following Article 11, paragraph 3 requires the Member States to ensure that trade unions and other third parties, such as associations, organisations and other legal entities, may engage, on behalf or in support of the posted workers, in any judicial or administrative proceedings to claim respect for the rights granted in the two Directives.

This obligation consists of a harmonising rule that all the Member States shall adequately transpose into their legal order. The national provisions are called upon to regulate the possibility for posted workers to be represented by national trade unions or other entities in the host State. Not only does collective action include strike, but also collective redress procedures as the Article refers to «any judicial or administrative proceedings». Given that no other requirement is prescribed, the question of whether trade unions can represent posted workers in the context of cross-border litigation depends on national laws.

As to collective proceedings involving posted workers, the Court addressed the question of the law applicable to the *locus standi* of a trade union in the abovementioned *Sähköalojen ammattiliitto* (a Finnish trade union) case of 2015⁷⁸⁵. A Polish undertaking was sued before a Finnish court by the Finnish trade union that claimed the minimum pay in accordance with the Finnish collective agreement and with the Directive on the posting of workers, because that collective agreement provided for more favourable conditions than under Polish law. The dispute focused on the legal standing of the Finnish trade union and its power to represent posted (Polish) workers. The fact that a collective redress was

⁷⁸⁴ See *supra* in Chapter 3, para. 3.2.

⁷⁸⁵ Court of Justice, judgment of 12 February 2015, Case C-396/13, *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*, EU:C:2015:86. See also *supra* in Chapter 4, para. 4.3.

brought before the courts to claim respect for work terms and conditions is remarkable. As to the union's *locus standi*, the Polish undertaking claimed the application of the law of the State of origin of the posting undertaking (Polish law), which required different conditions for the trade unions' legal standing, and asked for the dismissal of the action. Ultimately, the Court did not uphold this argument and applied the *lex fori* (Finnish law), as it was a matter for the national legislation of the court seised. Indeed, in light of Article 47 of the Charter, the law of the posting undertaking must not prevent a trade union from bringing an action before a court of the host Member State in which the workers are posted in order to recover pay claims which relate to the minimum wage and have been assigned to the trade union in accordance with the law of the second Member State⁷⁸⁶.

As this case shows, the differences in the national laws or regulations cause difficulties in initiating proceedings, and in general regarding access to justice and effective remedies in situations with cross-border implications. However, in light of the Enforcement Directive, all the Member States must ensure the possibility for posted workers to be represented before the courts of the State where they are or were posted. Similar to individual claims on employment contracts involving posted workers, the special conflict of laws rule under Article 3 must be taken into account. Thus, related disputes may be governed by the law of the host State in so far as the (allegedly violated) work terms and conditions under litigation are covered by the relevant Directives.

e) Industrial actions.

Industrial actions are considered in the Rome II Regulation on the law applicable to non-contractual obligations, in its Article 9, according to which disputes concerning the liability of a worker, an employer or an organisation for damages caused by an industrial action, pending or carried out, are governed by the law of the country where the action is to be, or has been, taken (*lex loci acti*)⁷⁸⁷. Recital

⁷⁸⁶ *Ibidem*, para. 26.

⁷⁸⁷ F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale*, Volume I, cit., pp. 456-457; Z. CRESPI REGHIZZI, *Regolamento (CE) n. 864/2007*, in F. POCAR, M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, cit., pp. 586-601, spec. p. 596-597; F. MARONGIU BONAIUTI, *Le obbligazioni non contrattuali nel diritto internazionale pri-*

No. 27 thereof clarifies that as the concept of industrial action, such as a strike action or lock-out, is governed by each Member State's internal rules, the Regulation assumes «as a general principle that the law of the country where the industrial action was taken should apply, with the aim of protecting the rights and obligations of workers and employers». In addition, Recital No. 28 states that «the special rule on industrial action in Article 9 is without prejudice to the conditions relating to the exercise of such action in accordance with national law and without prejudice to the legal status of trade unions or of the representative organisations of workers as provided for in the law of the Member States».

This explanation has given rise to doubts due to its reference to national definitions. It is deemed to be a derogation of the general principle of uniform interpretation, which requires an autonomous characterisation of the concept⁷⁸⁸. Thus, the notion of industrial action shall be determined according to the *lex causae* identified through the application of Article 9, or to the *lex fori*⁷⁸⁹. By contrast, it shall be given an autonomous definition, thus meaning all actions that are, in accordance with EU law, included under collective bargaining and collective action⁷⁹⁰.

Article 9 contains a special rule for damages for the specific case of an industrial action that is different from the general rule on obligations arising from tort set forth in Article 4 of the Rome II Regulation, which refers to the law of the

vato, cit., spec. p. 139 ff.; G. PALAO MORENO, *The Law Applicable to Non-Contractual Obligations*, in *Yearbook of Private International Law*, 2007, Vol. 9, pp. 115-126, spec. p. 122 ff. The inclusion of a specific article on industrial action was suggested by the European Parliament legislative resolution on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II"), P6_TA(2005)0284.

⁷⁸⁸ G. PALAO MORENO, *The Law Applicable to Non-Contractual Obligations*, cit., p. 118.

⁷⁸⁹ Z. CRESPI REGHIZZI, *Regolamento (CE) n. 864/2007*, cit., p. 596.

⁷⁹⁰ P. FRANZINA, *Il regolamento n. 864/2007/CE sulla legge applicabile alle obbligazioni extracontrattuali («Roma II»)*, in *Le nuove leggi civili commentate*, 2008, No. 5, pp. 971-1044, spec. p. 1016 ff.

country where the harm occurs⁷⁹¹. The conflict of laws rule in Article 9 applies only to non-contractual liability, that is to say non-contractual obligations deriving from industrial actions. It follows that it does not cover the consequences for individual employment contracts, which are governed by Article 8 of the Rome I Regulation. Prerequisites for the exercise of industrial actions and the legal *status* of trade unions or similar organisations are excluded⁷⁹². The legitimacy of the strike needs to be assessed under the law of the place where it takes place; indeed, strikes are so closely related to the public policy order of the place of the action that no other legal system could apply⁷⁹³. It has been argued that the territoriality of industrial actions is also revealed through the application of overriding mandatory provisions, which include the rules on socio-political assets⁷⁹⁴.

The conflict of law rule applies not only to workers' industrial actions but also to employers' actions. It does not make a distinction based on *favor laboratoris*⁷⁹⁵. It also applies without prejudice to the application of the law of the country where the person claimed to be liable and the person sustaining damage both have their habitual residence at the time when the damage occurs. However, in practice, this rarely occurs.

Article 9 applies without prejudice to Article 4, paragraph 2, which deems the law of the common habitual residence to be applicable⁷⁹⁶. Overall, the adequacy of Article 9 to offer a proper solution for the determination of the applicable law,

⁷⁹¹ See, in general, F. DORSSEMONT, A.A.H. VAN HOEK, *Collective action in Labour Conflicts under the Rome II Regulation*, in *European Labour Law Journal*, 2011, Vol. 2, No. 1 and No. 2, pp. 48-118; P. FRANZINA, *Il regolamento n. 864/2007/CE*, cit., p. 1018 ff.

⁷⁹² Z. CRESPI REGHIZZI, *Regolamento (CE) n. 864/2007*, cit., p. 597; G. PALAO MORENO, *The Law Applicable to Non-Contractual Obligations*, cit., p. 118.

⁷⁹³ M. FRANZEN, *Conflicts of Laws in Employment Contracts and Industrial Relations*, in R. BLANPAIN (editor), *Comparative Labour law and Industrial Relations in Industrialized Market Economies*, Alphen aan den Rijn, Kluwer Law International, 2014, pp. 245-267, spec. p. 265.

⁷⁹⁴ F. MARONGIU BONAIUTI, *Le obbligazioni non contrattuali nel diritto internazionale privato*, cit., p. 141.

⁷⁹⁵ *Ibidem*, p. 142; G. PALAO MORENO, *The Law Applicable to Non-Contractual Obligations*, cit., p. 117.

⁷⁹⁶ G. PALAO MORENO, *The Law Applicable to Non-Contractual Obligations*, cit., p. 121.

and thus whether it will prove to benefit workers, has been argued, because said Article refers to one place and does not offer flexibility⁷⁹⁷.

As an outcome of cross-border industrial actions, different laws may apply as to the legitimacy, exercise, contractual consequences and non-contractual obligations. It appears nonetheless that the connecting criterion of the place where the industrial action occurs or has occurred may also be used for the determination of jurisdiction. In this way, the courts of that place will apply their own law. This is also true when posted workers are involved, as the State of origin is not “directly connected” with the relevant situation.

⁷⁹⁷ *Ibidem*, p. 122.

5.4. Recognition and enforcement of collective judgments.

Recognition and enforcement of judgments in Europe are governed by the Brussels I Recast Regulation that provides for the mutual recognition of judgments and the abolition of the *exequatur* procedure⁷⁹⁸. Specific rules concerning collective redress procedures are not included. The question is thus whether under the existing rules collective judgments may circulate amongst the EU Member States.

According to the Explanatory Statement accompanying the Proposal for the recast of the Brussels I Regulation⁷⁹⁹, the Commission acknowledged that within the preliminary public consultation specific concerns were expressed with respect to the abolition of *exequatur*, not only in defamation cases but also in collective redress proceedings⁸⁰⁰. It then clarified that the Proposal abolishes the *exequatur* procedure for all judgments covered by the Regulation with the exception of judgments in defamation and compensatory collective redress cases⁸⁰¹. In particular, the *exequatur* procedure is maintained for judgments issued in collective «proceedings brought by a group of claimants, a representative entity or a body acting in the public interest and which concern the compensation of harm caused by unlawful business practices to a multitude of claimants»⁸⁰². Having ascertained the differences among Member States as to the collective mechanisms established in various areas with diverse requirements, the Commission asserted that «the required level of trust cannot be presumed at this stage»⁸⁰³. Such arguments were

⁷⁹⁸ F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale*, Volume I, cit., p. 290 ff.; R. MAŃKO, *Europeanisation of civil procedure*, cit., p. 3 ff.; A. MALATESTA, *Regolamento (CE) n. 44/2001*, cit., p. 532 ff.; A. MALATESTA, *Regolamento (UE) n. 1215/2012*, in F. POCAR, M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, cit., p. 539 ff.

⁷⁹⁹ Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), COM(2010)748 final of 14 December 2010, cit.

⁸⁰⁰ *Ibidem*, para. 2.

⁸⁰¹ *Ibidem*, para. 3.1.

⁸⁰² *Ibidem*, para. 3.1.1.

⁸⁰³ *Ibidem*, where it recalled the initiative on a European approach to collective redress to identify which forms of collective redress could fit into the EU legal system and into the legal orders of the EU Member States.

included in the proposed Recital No. 23, according to which the current procedure for recognition and enforcement shall continue to apply to defamation and compensation obtained in collective proceedings. The Commission further stated that «the provisions abolishing intermediate enforcement measures should be extended to judgments ordering compensation in collective proceedings in the event of adoption of measures for the harmonisation or approximation of the procedural rules applicable to such proceedings». Nonetheless, even in the absence of such harmonisation or approximation measures, the Commission could propose the abolition of intermediate measures for collective damages proceedings⁸⁰⁴. In the respective proposed Article 37, the *exequatur* procedure was retained for proceedings concerning the compensation of harm caused by unlawful business practices to a multitude of injured parties and which are brought by a state body, non-profit entity or a group of more than twelve claimants.

It appears that the collective redress procedure was only referred to actions brought by a group of more than twelve people and only related to unlawful business practices. However, the abovementioned arguments of the Commission are generic and not convincing. The qualification of a collective action is a matter for national legislations, which have not yet been harmonised. Thus, the divergences between the existing systems for national collective redress are not limited to proceedings related to unfair commercial practices. For the purpose of legal certainty, the European Parliament did note that it would be better to have no exemptions⁸⁰⁵.

With regard to workers and employers, the Proposal recognised the right to negotiate and conclude collective agreements and, in cases of conflicts of interests, to take collective action to defend their interests, including strike action, as referred to in Article 28 of the Charter, which can also be promoted by their respective organisations⁸⁰⁶. Respectively, the proposed Recital No. 27 and Article 85 prescribed respect for fundamental rights, including the right to engage in col-

⁸⁰⁴ *Ibidem*, Recital No. 23.

⁸⁰⁵ Report of 15 October 2012 on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), A7-0320/2012, Committee on Legal Affairs, Rapporteur: Tadeusz Zwiefka.

⁸⁰⁶ Proposal for a Regulation, COM(2010)748 final, cit., para. 3.4.

lective action to protect their interests, in particular the right or freedom to strike or to take other actions, in accordance with Union law and national law and practices⁸⁰⁷.

Nevertheless, the proposed provisions were not included in the final version of the Brussels I *bis* Regulation. As no restriction on the types of judgments falling within its scope of application was established, the existing rules on the recognition, enforceability and enforcement apply to judgments issued in collective proceedings in one EU State to be recognised and enforced in another EU State⁸⁰⁸. As to the recognition of foreign judgments issued in a third State, national rules of private international law shall apply.

The Brussels I Recast Regulation relies on the mutual recognition of decisions; indeed, no special procedure is required according to its Article 36 and in compliance with the conditions set forth in Article 37⁸⁰⁹. As an innovative feature in comparison with former Regulation No. 44/2001, under Article 39, no declaration of enforceability is needed for judgments that are enforceable in the issuing Member State, which will thus be enforceable in other Member States⁸¹⁰. Article 40 specifies that such a judgment carries with it, by operation of law, the power to proceed to any protective measures which exist under the law of the Member State addressed. However, the procedure for the enforcement of judgments given in another Member State is still governed by the law of the requested Member State, and judgments shall be subject to the conditions provided for national judgments pursuant to Articles 41 and 42. The request for enforcement must be accompanied by the certificate issued pursuant to Article 53 and the specific doc-

⁸⁰⁷ The so-called Monti clause: see *supra* in Chapter 2, para. 2.4.

⁸⁰⁸ M. HELLNER, *Private International Law and Collective Redress – The case of Antitrust damage claims*, in A. NUYTS, N.E. HATZIMIHAIL (eds.), *Cross-Border Class Action. The European Way*, cit., pp. 223-239, spec. p. 238; S. BARIATTI, *Recognition and enforcement in the EU of judicial decisions rendered upon class actions: the case of U.S. and Dutch judgments and settlements*, in F. POCAR., I. VIARENGO, F.C. VILLATA (edited by), *Recasting Brussels I*, Padova, CEDAM, 2012, pp. 319-339, spec. p. 327.

⁸⁰⁹ See P. FRANZINA, X.E. KRAMER, J. FITCHER, *The Recognition and Enforcement of Member States Judgments*, in A. DICKINSON, E. LEIN (eds.), *The Brussels I Regulation Recast*, cit., pp. 373-519, spec. p. 377 ff.

⁸¹⁰ In this regard see also Recital No. 26 of Brussels I Recast Regulation.

uments listed in Article 43. The grounds for the refusal of recognition or enforcement are established in Article 45. They include (a) non-compliance with the public policy of the requested Member State; (b) lack of service with the document in the case of proceedings in default of appearance that did not allow a defence; (c) irreconcilability with a judgment given between the same parties in the Member State addressed; (d) irreconcilability with an earlier judgment issued in another Member State or in a third State involving the same cause of action and between the same parties; (e) conflicts with the rules of jurisdiction under Sections 3, 4 or 5 of Chapter II, where the weaker party was the defendant; or Section 6 of Chapter II on exclusive jurisdiction. In these last situations, the court to which the application was submitted shall be bound by the findings of fact on which the court of origin based its jurisdiction, and the jurisdiction of the court of origin may not be reviewed. Moreover, the public policy exception may not be applied to the rules relating to jurisdiction.

For the purposes of the present analysis, on the one hand, it must be noted that no rule regards collective redress procedures and, on the other hand, it is significant and a valuable improvement that Article 45 enhances the protection of weaker parties by prescribing that a violation of jurisdictional grounds may only be an obstacle to recognition if a weaker party was a defendant in the dispute. To address the circulation of judgments issued in collective proceedings, some general remarks may first be made, independently of the relevant policy area.

The automatic recognition of judgments entails the mutual acceptance of their effects, which are granted in the State of origin, in a different legal order. The effects may be recognised by assimilation of the effects granted to a national judgment, or the original effects may be extended into the requested State⁸¹¹. In practice, the two theories do not cause different consequences, because, in any case, effects that are not contemplated in one legal order may not be recognised.

⁸¹¹ F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale*, Volume I, cit., p. 294; S.M. CARBONE, C.E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, cit., p. 324 ff.; P. WAUTELET, *Article 36*, in U. MAGNUS, P. MANKOWSKI (edited by), *European Commentaries on Private International Law. Brussels Ibis Regulation*, cit., pp. 813-824, spec. p. 818 f.; L. CARBALLO PIÑEIRO, *Acciones colectivas transfronterizas*, cit., p. 603 ff.

Under the public policy exception, Member States may invoke respect for the procedural requirements to constitute a collective redress (whether it is an opt-in or opt-out system becomes a relevant issue), in addition to the respect for procedural rights, which include the right to defence, access to justice, fair trial, as well as to the preclusive effect of the judgment in the case of an opt-out procedure. It has been argued that in relation to collective redress, the concept of public policy is more closely related to its procedural content, and the control of the substantive public policy is not at stake⁸¹².

As stated by the Court of Justice, the notion of public policy as a ground for the refusal to recognise and enforce judgments must be interpreted exceptionally and narrowly⁸¹³. Indeed, it is aimed at limiting the entry of foreign legal values that are contrary to the public policy of the Member State requested to enforce a decision⁸¹⁴. In relation to the Brussels Convention, the Court had already clarified that the courts of the State remain free to determine, according to their own conceptions, what public policy requires, and thus it is not for the Court to define the content of the public policy of a State. It is nonetheless required to review the limits within which the courts of a State may have recourse to that concept for the purpose of refusing the recognition of a judgment emanating from a court in another State⁸¹⁵. Judges may verify the effects of the foreign decision in their legal order, but not the decision itself.

The Court explained that recourse to a public policy clause can be envisaged only where the recognition or enforcement of a judgment delivered in another State would be at variance, to an unacceptable degree, with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental prin-

⁸¹² L. CARBALLO PIÑEIRO, *Acciones colectivas transfronterizas*, cit., p. 605 ff.

⁸¹³ See Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, in *OJ C 59* of 5 March 1979, pp. 1-65, spec. under Article 27: «this clause ought to operate only in exceptional cases».

⁸¹⁴ C.E. TUO, *Armonia delle decisioni e ordine pubblico*, in G. BIAGIONI (a cura di), *Il principio dell'armonia delle decisioni civili e commerciali nello spazio giudiziario europeo*, cit., pp. 161-183, spec. pp. 168-169.

⁸¹⁵ Court of Justice, judgment of 28 March 2000, Case C-7/98, *Dieter Krombach v André Bamberski*, EU:C:2000:164, paras. 22-23.

ciple⁸¹⁶. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order⁸¹⁷.

As far as collective proceedings are concerned, the different conditions required by national civil procedural laws may be invoked as grounds for refusal under the public policy exception provided that they are imposed to safeguard fundamental rights and values⁸¹⁸. For instance, it may be apparent when the right to a defence is involved.

In the *Gambazzi* case of 2009⁸¹⁹, the Court held that the exercise of the right of defence «occupies a prominent position in the organisation and conduct of a fair trial and is one of the fundamental rights deriving from the constitutional traditions common to the Member States and from the international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, among which the European Convention for the Protec-

⁸¹⁶ The concept of public policy includes fundamental principles of the *forum*, including fundamental rights' protection: see P. PIRODDI, *Armonia delle decisioni, riconoscimento reciproco e diritti fondamentali*, in G. BIAGIONI (a cura di), *Il principio dell'armonia delle decisioni civili e commerciali nello spazio giudiziario europeo*, cit., pp. 29-72, spec. pp. 35-36.

⁸¹⁷ Court of Justice, judgment of 28 March 2000, *Krombach*, cit., para. 37.

⁸¹⁸ «[W]hile it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State»: *ibidem*, para. 23. And in judgment of 2 April 2009, Case C-394/07, *Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, EU:C:2009:219, para. 39, the Court added that «it is however for the Court to explain the principles which it has defined by indicating the general criteria with regard to which the national court must carry out its assessment»; similarly, see judgment of 16 July 2015, Case C-681/13, *Diageo Brands BV v Simiramida-04 EOOD*, EU:C:2015:471.

⁸¹⁹ Court of Justice, judgment of 2 April 2009, *Gambazzi*, cit. The case concerned a defendant, who entered appearance but who was excluded from the proceedings by order on the ground that he had not complied with the obligations imposed by an order made earlier in the same proceedings. Thus, the appealed judgment was issued as he was in default of appearance.

tion of Human Rights and Fundamental Freedoms is of particular importance»⁸²⁰. This right may also be subject to restrictions provided that they are aimed at pursuing objectives of public interest and are proportionate⁸²¹. The respect for fundamental procedural rights as enshrined in the ECHR is thus a requirement for the recognition of judgments across the European Union⁸²². National values and principles raised in opposition to the recognition of a judgment must nonetheless be in compliance with European principles⁸²³. Policy objections must meet the strict EU standards and must not undermine the fundamental principles of mutual trust and free movement of judgments. In preventing national values from being invoked when recognition and enforcement are sought, the public policy clause was deemed to be a harmonising provision⁸²⁴. The provision on the right to defence under Article 45, paragraph 1, letter *b* is supplemented and widened by the concept of public policy under letter *a* thereof⁸²⁵.

In light of the above, in the context of an opt-out mechanism, it has been noted that the right to defence and procedural guarantees may be violated inasmuch as absent members were not notified or served, and could not opt-out from the action⁸²⁶. These concerns led the Commission to exclude the (US) opt-out model, as explained in its 2013 initiatives⁸²⁷, and to maintain the *exequatur* procedure, as

⁸²⁰ *Ibidem*, para. 28.

⁸²¹ *Ibidem*, para. 29.

⁸²² C.E. TUO, *Armonia delle decisioni e ordine pubblico*, cit., pp. 172-173, who recognised that alongside a communitarian public policy, thanks to the dialogue between the Courts of Luxembourg and Strasbourg, there is a Europeanisation of the public policy concept. See also F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale*, Volume I, cit., p. 306 ff.

⁸²³ C.E. TUO, *Armonia delle decisioni e ordine pubblico*, cit., p. 177; R. FENTIMAN, *Recognition, Enforcement and Collective Judgments*, in A. NUYTS, N.E. HATZIMIHAİL (eds.), *Cross-Border Class Action. The European Way*, cit., pp. 85-110, spec. p. 101.

⁸²⁴ C.E. TUO, *Armonia delle decisioni e ordine pubblico*, cit., p. 179.

⁸²⁵ F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale*, Volume I, cit., p. 311.

⁸²⁶ See M. HELLNER, *Private International Law and Collective Redress*, cit., p. 238.

⁸²⁷ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards a European Horizontal Framework for Collective Redress*, COM(2013)401 final of 11 June 2013

stated in the 2010 Proposal for the recast of the Brussels I Regulation⁸²⁸. Indeed, questions regarding the publicity of the proceedings and the methods for opting-out may arise in relation to the right to defence, as well as within the concept of public policy⁸²⁹.

With respect to the default of appearance (letter *b*)⁸³⁰, in the *Trade Agency Ltd* judgment of 2012⁸³¹, the Court stated that opposition may be based on the ground of the default of appearance when, in light of all the relevant circumstances, the judgment is a manifest and disproportionate breach of the defendant's right to a fair trial referred to in the second paragraph of Article 47 of the Charter on account of the impossibility of bringing an appropriate and effective appeal against it⁸³². Closely related to the right to defence⁸³³, this also concerns the procedural protection of the defendant. In the context of collective procedures, this may be the case where persons are not formally parties to the proceedings, but may nonetheless be bound by the final judgment in accordance with the law of the State of origin. The requested courts shall address those procedural requirements⁸³³.

The effectiveness of judgments is a matter for the *lex fori* which is called upon to rule about the extent to which the decision marks the other claims as *res ju-*

and Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), in *OJ L* 201 of 26 July 2013, pp. 60-65, analysed supra in Chapter 4, para. 4.2.

⁸²⁸ Proposal for a Regulation, COM(2010)748 final, cit.

⁸²⁹ M. HELLNER, *Private International Law and Collective Redress*, cit., p. 238; D. FAIRGRIEVE, *The impact of the Brussels I enforcement and recognition rules on collective actions*, in D. FAIRGRIEVE, E. LEIN (edited by), *Extraterritoriality and collective redress*, cit., pp. 171-189, spec. pp. 178-186.

⁸³⁰ In relation to the Brussels I Regulation, see D. FAIRGRIEVE, *The impact of the Brussels I enforcement and recognition rules on collective actions*, cit., pp. 186-187.

⁸³¹ Court of Justice, judgment of 6 September 2012, Case C-619/10, *Trade Agency Ltd v Seramico Investments Ltd.*, EU:C:2012:531.

⁸³² *Ibidem*, para. 62.

⁸³³ D. FAIRGRIEVE, *The impact of the Brussels I enforcement and recognition rules on collective actions*, cit., p. 187.

dicata and thus for instance whether a decision rendered as a result of a representative action is binding upon the other claimants⁸³⁴.

As to the irreconcilability of judgments given between the same parties in the requested Member State (letter *c*) and with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed (letter *d*)⁸³⁵, the Court affirmed that this occurs when two decisions «entail legal consequences that are mutually exclusive»⁸³⁶. This provision may be applicable to collective judgments. Critical issues are faced in cases in which the members involved in two different proceedings are not identical. In the absence of any case law on this point, it would be possible for a binding judgment issued in a collective proceedings to be opposed in the State of enforcement. Cases involving an opt-out procedure would be more complex: incompatibility may be registered because some of the members were not parties to the proceedings in the State where the irreconcilable judgment was issued⁸³⁷.

A limit on the review of jurisdiction (letter *e*) is imposed upon the judge seised with a request for non-recognition or enforcement, who shall be bound by the findings of fact on which the court of origin based its jurisdiction (Article 45, paragraph 2) and shall not assess the jurisdiction of the judge *a quo*, even on the basis of public policy grounds (paragraph 3)⁸³⁸. Exceptions are provided for exclusive and protective jurisdiction. In light of these conditions, it seems that a collective judgment may not be opposed on the basis of jurisdictional issues. This is

⁸³⁴ P. MANKOWSKI, P. NIELSEN, *Introduction to Articles 17-19*, cit., p. 451.

⁸³⁵ F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale*, Volume I, cit., p. 317 ff.; D. FAIRGRIEVE, *The impact of the Brussels I enforcement and recognition rules on collective actions*, cit., pp. 187-188.

⁸³⁶ Court of Justice, judgment of 4 February 1988, Case 145/86, *Horst Ludwig Martin Hoffmann v Adelheid Krieg*, EU:C:1988:61, para. 22.

⁸³⁷ See B. HESS, *Cross-border Collective Litigation and the Regulation Brussels I*, in *IPRax Praxis des Internationalen Privat- und Verfahrensrechts*, 2010, No. 2, pp. 116-121.

⁸³⁸ F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale*, Volume I, cit., p. 320 ff. and 336 ff.

true even when workers are involved, because they (may) represent the plaintiff party to the proceedings. Indeed, generally, the weaker party would never be the defendant, or at least in the extreme scenario in which the employer sues a group of workers to claim their contractual or non-contractual liability, such as damages arising out of industrial actions.

Questions of recognition and enforcement have also been referred to collective settlements, whose nature is essentially contractual except for their judicial approval (by an EU court), which may then circulate under the Brussels regime⁸³⁹.

In conclusion, the effectiveness of collective judgments rendered in one State may be hampered on the grounds listed in the Brussels I Recast Regulation, mainly on the basis of the public policy exception and other procedural safeguards due to the different approaches to collective redress of the national systems⁸⁴⁰. Issues that may be more crucial arise with respect to foreign collective judgments, notably US class action decisions⁸⁴¹, which are not discussed herein.

⁸³⁹ See R. FENTIMAN, *Recognition, Enforcement and Collective Judgments*, cit., p. 98 ff.; S. BARIATTI, *Recognition and enforcement in the EU of judicial decisions rendered upon class actions*, cit., pp. 328-339; S. BARIATTI, *Le azioni collettive*, cit., pp. 51-53; B. HESS, *A coherent approach to European collective redress*, cit., spec. pp. 113-115; I. TZANKOVA, H. VAN LITH, *Class actions and class settlements going global: the Netherlands*, in D. FAIRGRIEVE, E. LEIN (edited by), *Extraterritoriality and collective redress*, cit., pp. 67-91.

⁸⁴⁰ The effect of the judgments is also governed by national legislation, that is linked to the model adopted for collective proceedings. Whether they are opt-in or opt-out systems, advantages and disadvantages from the members' perspective may be pointed out: see R. FENTIMAN, *Recognition, Enforcement and Collective Judgments*, cit., p. 91 ff.

⁸⁴¹ Among others see R. FENTIMAN, *Recognition, Enforcement and Collective Judgments*, cit., p. 85 ff.; S. BARIATTI, *Recognition and enforcement in the EU of judicial decisions rendered upon class actions*, cit., pp. 319-339; S. BARIATTI, *Le azioni collettive*, cit., pp. 48-50; M. DANOV, *The Brussels I Regulation: cross-border collective redress proceedings and judgments*, cit., p. 378 ff.

5.5. Concluding considerations.

In the context of the enforcement of rights, when the right to collective action, jointly with the right to an effective remedy, shall be ensured as imposed in the EU legislation concerning workers and posted workers, national laws are called upon to grant protection for both substantive and procedural rights. Facilitating access to justice in cross-border litigation is indeed one of the main objectives of the realisation of a European judicial area. When, in specific fields, no common rules as to the procedural means are provided for at the European level, the domestic provisions apply. To coordinate the Member States' legal orders, uniform EU conflict of jurisdictions and conflict of laws rules are adopted.

In relation to the peculiar means for collective redress, which is a viable remedy that contributes to procedural economy and efficiency, and may be resorted to in various policy areas, difficulties arise in the existing legal framework within the judicial civil cooperation. Although the European institutions have considered this issue incidentally, and is under legislative developments, the inadequacy of the Brussels and Rome systems has been pointed out. The main question may be summarised as follows: will it suffice to interpret the existing private international law provisions, or should new special jurisdictional and legislative rules be included?

As discussed, the extension of the jurisdictional rules would controvert the Brussels system. Nor does considering all the EU instruments based on a systematic approach to find appropriate solutions appear to be useful, as they are different in terms of their functions and aims. Therefore, coordination between the relevant Regulations could not support the resolution of transnational implications when dealing with collective redress. It is nevertheless advisable that the coincidence between *forum* and *ius* is to be achieved through the establishment of similar connecting factors. The adequate allocation of jurisdictional and legislative functions will accordingly facilitate the circulation of judgments.

CHAPTER 6

CONCLUSIONS

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Executive Summary

Cross-border collective redress in the employment context has proven to be a debated issue from different perspectives. Considerations have been pointed out starting with the case law of the Court of Justice, which offered some interpretations as to the recognition of the fundamental social right to take collective action, moving to the legal framework related to labour mobility, where workers' rights must be protected and the phenomenon of transnational posting must be carefully regulated, to the role of civil procedure in providing for effective judicial remedies in close relationship with private international law rules. In view of (advisable) future legislative developments on an EU regime on collective redress, some recommendations are submitted.

6.1. Summarising conclusions.

Cross-border collective redress in the employment context assessed pursuant to a comprehensive approach highlights the peculiarities related to the different perspectives analysed so far.

The need for the regulation, coordination and effective protection of social rights seems to be a key concept for the elaboration of a European framework on this procedural means. A legislative response to the critical balance between market integration and social rights, notably the right to collective action (provided by Article 28 of the Charter), which was struck by the Court of Justice in the *Viking* and *Laval* judgments, is requested. The protection of workers' rights and the enjoyment of the freedoms of movement are instrumental in achieving the establishment of a common and internal market. The existing EU rules do not fully satisfy these needs, and the priorities in sensitive matters, such as labour policies, are compared with the interests of the Member States in safeguarding their own peculiarities and identity.

Notwithstanding the recognition of the right to collective action in the general category of the fundamental social rights, this does not imply with certainty that there are specific provisions in the EU legal order; however, it necessarily indicates that the EU ascribes it some importance. Recognising the fundamental social rights as part of the EU general principles means that, under the hierarchical equivalence, they may be balanced with other principles enshrined in the Treaties, such as the economic freedoms. As stated by the Court of Justice, the protection of workers may be a justifiable restriction, when lawful and proportionate, on these freedoms.

The protection of the social rights was undermined in times of economic crisis, when austerity measures were adopted. In this situation, the question regarded the compliance of such measures with the Charter, even if they did not fall directly within the scope of EU law. On the one hand, the Court declared its lack of jurisdiction; on the other, the Member States are however obliged to observe EU principles and objectives while acting under matters falling under EU law, such as economic and monetary policy.

From a substantive perspective, relevance shall be given to the rights against the economic principles and governance. This leads to the question of how such rights are effectively protected and enforced across the Member States. The EU legislative acts on workers' protection provide for mechanisms of public enforcement; however, private means are left to national discretion, except for the harmonising rules imposing the obligation to ensure effective remedies.

In this context, due to the increasing labour mobility, diverse factors give rise to difficulties in addressing safeguards for workers in transnational employment relationships. Particularly, the category of posted workers is covered by specific legislation (Directive 96/71 and Directive 2014/67) converging issues related to market freedoms, namely the free provision of services, with minimum work terms and conditions, defence of rights, procedures for control and private international law aspects. The 2016 proposal for the amendment of the Posting of Workers Directive is under legislative process; this has proven to be a crucial topic because the respect for the subsidiarity principle was first claimed in it. Later, amendments were proposed by the EU legislator that affect some aspects related to the minimum requirements, as well as, among other issues, the (eventually welcome) reference to the right to collective action.

As to the effective judicial remedies available to individuals to seek the protection of their rights, the Member States enjoy procedural autonomy, and only rarely does the EU attempt to interfere with national competences. Judicial systems may nonetheless be coordinated or harmonised at the European level with a view to facilitating access to justice and ensuring sound administration of justice, economy and efficiency in proceedings. The European Union has the power to promote judicial cooperation and to harmonise procedural systems when this is aimed at better solving European situations. With regard to collective procedures, there is no uniform approach, nor are there any EU-tailored provisions.

The latest legislative developments submitted by the European Commission, which are aimed at the convergence of national collective redress remedies through the establishment of common principles, are of a non-binding nature, but they may nevertheless serve as a starting point. They create a horizontal approach in dealing with collective redress, mainly referring to consumer protection and

victims of damages for the violation of antitrust law or environmental law. The employment context is not mentioned, although it is also not (explicitly) excluded.

Looking at the existing scenario, issues related to the competent authority, the determination of the applicable law, and the recognition and enforcement of collective decisions may arise. Taking into account the relevant EU regulations, there are indeed a few rules on multiple litigation, but they do not specifically address collective redress. The rules on conflict of jurisdictions and of laws need to be adapted to the new rights deriving from the exercise of the freedom of movement that are recognised within the EU legal order. Labour law and the protection of workers' rights are just an example of this modern approach. If the internal market is a continuous process towards the implementation of the objectives of the Union, why should the private international law rules remain unchanged, especially when they are aimed at protecting the weaker parties?

From an interpretative point of view, the current private international law provisions may not be extended to cover situations other than those falling within their scope of application. This is particularly true when collective claims are instituted in matters governed by protective rules. On the one hand, arguments against the weak nature of the actor may be put forward; on the other, the aims and functionality of the systems regarding the jurisdiction and applicable law may be hampered. Whether coincidence between *forum* and *ius* should be established in achieving the best solution to handle cross-border litigation is questioned. From the analysis of the case law and the EU institutions' observations in light of the entry into force of the Brussels I Recast Regulation, coordination among private international law instruments must at least be assured. The need to set up a specific ground for jurisdiction over industrial actions has also been proposed: this does not find a proper place in the Brussels system, whereas it does in the Rome system. Further issues arise in situations involving posted workers, which enjoy an alternative ground for jurisdiction and a specific conflict of laws rule. The establishment of uniform rules on collective procedures may then facilitate the circulation of judgments based on the principle of mutual recognition and enforcement.

To conclude, a more systematic approach is needed, including better coordination of the EU instruments at the horizontal level. Thus, an EU action on cross-

border collective redress in the specific sector of employment appears necessary, as this would be in line with former law-making developments implemented by the EU with regard to the protection of other weak parties.

6.2. Some recommendations.

In light of the foregoing considerations, some recommendations for adjustments of the existing legislative framework related to employment matters (workers and posted workers) are submitted. Such recommendations take into account the case law of the Court of Justice analysed so far, in which relevance has been given to the factual circumstances of the cases, which may indeed contribute in the determination of proper rules for the resolution of conflicts of jurisdictions or of applicable laws.

As to the need of protecting the fundamental social rights, from a substantive point of view, a provision on the right to take collective action referring to both judicial and extrajudicial means shall be included in all relevant acts in line with the so-called Monti clause and as recently suggested by the Council with reference to the 2016 proposal for the amendment of Directive 96/71. However, a Recital may not suffice, because it does not have legally binding effects like an article. Therefore, with a view to concretely imposing the Member States to safeguard the social right in question, a provision is required in which the collective dimension related to the exercise of social rights and to the (judicial and extrajudicial) remedies for their protection and enforcement is specified. The aim is to guarantee both the recognition of social rights and the access to justice, regardless of the procedural form and of the judicial or administrative nature of the proceedings. These suggestions could be considered within the legislative framework on workers, and especially on posted workers.

From a procedural perspective, the adoption of common principles and common minimum standards applicable to collective redress procedures may contribute to the alignment of national civil procedural laws. This is hopefully the aim of the current initiatives of the Commission, which were initiated in 2013. Focusing on the private enforcement means would support the improvement of the existing EU legislation.

Accordingly, private international law instruments should be adapted to the exigencies raised by collective redress systems in transnational litigation, without hampering their functionality. It is therefore advisable to identify a ground for jurisdiction that is suitable to deal with the collective dimension, as well as the pro-

tection of the weaker party, even if that party is a collective claimant. These two elements may indeed be combined. Maintaining that the coincidence between *forum* and *ius* leads to the best solution (from the perspectives of the claimant, the defendant and the judge), identical connecting factors may be established. The solutions set forth in conflict of jurisdictions or of laws rules should in any case pursue the objective of protecting the weaker party to the employment relationship.

As to collective redress concerning employment contracts and related matters, in the absence of a choice of court or law agreement, the jurisdictional and legislative competence may be based on the place of the employer's establishment, which, from a factual assessment of the circumstances and considering that all plaintiff members have a link with it, is deemed to be the closest place to the employment relationship and is in line with the criterion of the place from which the worker receives daily instructions. This last factor was suggested by the European Parliament in its 2013 Resolution on the Recast Regulation, with regard to individual disputes. In that document, it also addressed the situation regarding industrial action issues and proposed that the place where the industrial action is to be or has been taken should be considered. Such a criterion is indeed in line with the conflict of laws rule provided by the Rome II Regulation on the law applicable to non-contractual obligations, and thus it should be included among the grounds for jurisdiction.

In cases involving posted workers, when acting collectively against the (posting or hosting) employer, the place where the workers are or were posted may be relevant when the disputes relate to the employment terms and conditions that must be respected in the host State during the posting. For any other disputes related to the employment relationship, the habitual place of work of the employees, or the place where the posting undertaking is established, i.e. the home country, shall be considered as a connecting factor.

LIST OF CASES

Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany) lodged on 26 January 2017, Case C-40/17, *Fashion ID GmbH & Co.KG v Verbraucherzentrale NRW eV*, in progress

Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 16 January 2017, Case C-18/17, *Danieli & C. Officine Meccaniche and Others v Arbeitsmarktservice Leoben*, in progress

Court of Justice, judgment of 25 January 2018, Case C-498/16, *Maximilian Schrems v Facebook Ireland Limited*, EU:C:2018:37

Court of Justice, judgment of 14 September 2017, Joined Cases C-168/16 and C-169/16, *Sandra Nogueira and Others v Crewlink Ireland Ltd and Miguel José Moreno Osacar v Ryanair Designated Activity Company*, EU:C:2017:688

Court of Justice (Grand Chamber), judgment of 21 December 2016, Case C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, EU:C:2016:972

Court of Justice (Grand Chamber), judgment of 8 March 2016, Case C-431/14 P, *Hellenic Republic v European Commission*, EU:C:2016:145

Court of Justice, judgment of 28 January 2016, Case C-50/14, *Conorzio Artigiano Servizio Taxi e Autonoleggio (CASTA) and Others v Azienda sanitaria locale di Ciriè, Chivasso e Ivrea (ASL TO4) and Regione Piemonte*, EU:C:2016:56

Court of Justice, judgment of 17 November 2015, Case C-115/14, *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz*, EU:C:2015:760

Court of Justice, judgment of 10 September 2015, Case C-47/14, *Holterman Ferho Exploitatie BV and Others v F.L.F. Spies von Büllenheim*, EU:C:2015:574

Court of Justice, judgment of 16 July 2015, Case C-681/13, *Diageo Brands BV v Simiramida-04 EOOD*, EU:C:2015:471

Court of Justice (Grand Chamber), judgment of 16 June 2015, Case C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag*, EU:C:2015:400

Court of Justice, judgment of 21 May 2015, Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others*, EU:C:2015:335

Court of Justice, judgment of 12 February 2015, Case C-396/13, *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*, EU:C:2015:86

Court of Justice, judgment of 5 February 2015, Case C-117/14, *Grima Janet Nisttahuz Poclava v Jose María Ariza Toledano (Taberna del Marqués)*, EU:C:2015:60

Court of Justice, judgment of 26 November 2014, Joined Cases C-22/13, C-61/13 to C-63/13 and C-418/13, *Raffaella Mascolo and Others v Ministero dell'Istruzione, dell'Università e della Ricerca and Comune di Napoli*, EU:C:2014:2401

Court of Justice, judgment of 18 September 2014, Case C-549/13, *Bundesdruckerei GmbH v Stadt Dortmund*, EU:C:2014:2235

General Court, judgment of 16 July 2014, T-52/12, *Hellenic Republic v European Commission*, EU:T:2014:677

Court of Justice, judgment of 10 July 2014, Case C-198/13, *Víctor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gobierno de España en Alicante) and Others*, EU:C:2014:2055

Court of Justice, order of 26 June 2014, Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial - Companhia de Seguros SA*, EU:C:2014:2036

Court of Justice, judgment of 12 June 2014, Case C-118/13, *Gülray Bollacke v K + K Klaas & Kock BV & Co. KG*, EU:C:2014:1755

Court of Justice, judgment of 6 March 2014, Case C-206/13, *Cruciano Siragusa v Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo*, EU:C:2014:126

Court of Justice (Grand Chamber), judgment of 15 January 2014, Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others*, EU:C:2014:2

Court of Justice, judgment of 7 November 2013, Case C-522/12, *Tevfik Isbir v DB Services GmbH*, EU:C:2013:711

Court of Justice, judgment of 17 October 2013, Case C-184/12, *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, EU:C:2013:663

Court of Justice, judgment of 12 September 2013, Case C-64/12, *Anton Schlecker v Melitta Josefa Boedeker*, EU:C:2013:551

Court of Justice, order of 7 March 2013, Case C-128/12, *Sindicato dos Bancários do Norte and Others v BPN - Banco Português de Negócios SA*, EU:C:2013:149

Court of Justice (Grand Chamber), judgment of 26 February 2013, Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, EU:C:2013:107

Court of Justice (Grand Chamber), judgment of 26 February 2013, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105

Court of Justice (Full Court), judgment of 27 November 2012, Case C-370/12, *Thomas Pringle v Government of Ireland and Others*, EU:C:2012:756

President of the General Court, order of 19 September 2012, Case T-52/12 R, *Hellenic Republic v European Commission*, EU:T:2012:447

Court of Justice, judgment of 6 September 2012, Case C-619/10, *Trade Agency Ltd v Seramico Investments Ltd.*, EU:C:2012:531

Court of Justice (Grand Chamber), judgment of 19 July 2012, Case C-154/11, *Ahmed Mahamdia v République algérienne démocratique et populaire*, EU:C:2012:491

Court of Justice, judgment of 15 December 2011, Case C-384/10, *Jan Voogsgeerd v Navimer SA*, EU:C:2011:842

Court of Justice, judgment of 1 December 2011, Case C-145/10, *Eva-Maria Painer v Standard VerlagsGmbH and Others*, EU:C:2011:798

Court of Justice (Grand Chamber), judgment of 15 March 2011, Case C-29/10, *Heiko Koelzsch v État du Grand Duchy of Luxemburg*, EU:C:2011:151

Court of Justice, judgment of 10 February 2011, Joined Cases C-307/09, C-308/09 and C-309/09, *Vicoplus SC PUH (C-307/09), BAM Vermeer Contracting sp. zoo (C-308/09) and Olbek Industrial Services sp. zoo (C-309/09) v Minister van Sociale Zaken en Werkgelegenheid*, EU:C:2011:64

Court of Justice, judgment of 7 October 2010, Case C-515/08, *Criminal proceedings against Vítor Manuel dos Santos Palhota and Others*, EU:C:2010:589

Court of Justice (Grand Chamber), judgment of 15 July 2010, Case C-271/08, *European Commission v Federal Republic of Germany*, EU:C:2010:426

Court of Justice, judgment of 10 June 2010, Joined Cases C-395/08 and C-396/08, *Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini (C-395/08) and Daniela Lotti and Clara Matteucci (C-396/08)*, EU:C:2010:329

Court of Justice (Grand Chamber), judgment of 19 January 2010, Case C-555/07, *Seda Küçükdeveci v Swedex GmbH & Co. KG.*, EU:C:2010:21

Court of Justice, (Grand Chamber), judgment of 8 September 2009, Case C-411/06, *Commission of the European Communities v European Parliament and Council of the European Union*, EU:C:2009:518

Court of Justice, judgment of 16 July 2009, Case C-189/08, *Zuid-Chemie BV v Filippo's Mineralenfabriek NV/SA*, EU:C:2009:475

Court of Justice, judgment of 2 April 2009, Case C-394/07, *Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, EU:C:2009:219

Court of Justice (Grand Chamber), judgment of 20 January 2009, Joined Cases C-350/06 and C-520/06, *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund* (C-350/06) and *Stringer and Others v Her Majesty's Revenue and Customs* (C-520/06), EU:C:2009:18

Court of Justice, judgment of 22 May 2008, Case C-462/06, *Glaxosmithkline and Laboratoires Glaxosmithkline v Jean-Pierre Rouard*, EU:C:2008:299

Court of Justice, judgment of 3 April 2008, Case C-346/06, *Dirk Rüffert v Land Niedersachsen*, EU:C:2008:189; judgment of 19 June 2008, Case C-319/06, *Commission of the European Communities v Grand Duchy of Luxemburg*, EU:C:2008:350

Court of Justice (Grand Chamber), judgment of 18 December 2007, Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, EU:C:2007:809

Court of Justice (Grand Chamber), judgment of 11 December 2007, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, EU:C:2007:772

Court of Justice (Grand Chamber), judgment of 23 October 2007, Case C-440/05, *Commission of the European Communities v Council of the European Union*, EU:C:2007:625

Court of Justice, judgment of 11 October 2007, Case C-98/06, *Freeport plc v Olle Arnoldsson*, EU:C:2007:595

Court of Justice, (Grand Chamber), judgment of 13 March 2007, Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, EU:C:2007:163

Court of Justice, judgment of 13 July 2006, Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito v Fondiaria Sai SpA* (C-296/04) and *Nicolò Tricarico* (C-297/04) and *Pasqualina Murgolo* (C-298/04) v *Assitalia SpA*, EU:C:2006:461

Court of Justice, judgment of 13 July 2006, Case C-539/03, *Roche Nederland BV and Others v Frederick Primus and Milton Goldenberg*, EU:C:2006:458

Court of Justice, judgment of 16 March 2006, Joined Cases C-131/04 and C-257/04, *C. D. Robinson-Steele v R. D. Retail Services Ltd* (C-131/04), *Michael Jason Clarke v Frank Staddon Ltd* and *J. C. Caulfield and Others v Hanson Clay Products Ltd* (C-257/04), EU:C:2006:177

Court of Justice (Grand Chamber), judgment of 22 November 2005, Case C-144/04, *Werner Mangold v Rüdiger Helm*, EU:C:2005:709

Court of Justice, judgment of 21 October 2004, Case C-445/03, *Commission of the European Communities v Grand Duchy of Luxembourg*, EU:C:2004:655

Court of Justice, judgment of 14 October 2004, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, EU:C:2004:614

Court of Justice (Grand Chamber), judgment of 5 October 2004, Joined cases C-397/01 to C-403/01, *Bernhard Pfeiffer* (C-397/01), *Wilhelm Roith* (C-398/01), *Albert Süß* (C-399/01), *Michael Winter* (C-400/01), *Klaus Nestvogel* (C-401/01), *Roswitha Zeller* (C-402/01) and *Matthias Döbele* (C-403/01) v *Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, EU:C:2004:584

Court of Justice, judgment of 10 June 2004, Case C-168/02, *Rudolf Kronhofer v Marianne Maier and Others*, EU:C:2004:364

Court of Justice, judgment of 5 February 2004, Case C-18/02, *Danmarks Rederiforening, acting on behalf of DFDS Torline A/S v LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket för Service och Kommunikation*, EU:C:2004:74

Court of Justice, judgment of 12 June 2003, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, EU:C:2003:333

Court of Justice, judgment of 10 April 2003, Case C-437/00, *Giulia Pugliese v Finmeccanica SpA, Betriebsteil Alenia Aerospazio*, EU:C:2003:219

Court of Justice, judgment of 1 October 2002, Case C-167/00, *Verein für Konsumenteninformation v Karl Heinz Henkel*, EU:C:2002:555

Court of Justice, judgment of 27 February 2002, Case C-37/00, *Herbert Weber v Universal Ogden Services Ltd*, EU:C:2002:122

Court of Justice, judgment of 25 October 2001, Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte Sociedade de Construção Civil Lda* (C-49/98), *Portugaia Construções Lda* (C-70/98) and *Engil Sociedade de Construção Civil SA* (C-71/98) v *Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* and *Urlaubs- und Lohnausgleichskasse der Bauwirtschaft v Amilcar Oliveira Rocha* (C-50/98), *Tudor Stone Ltd* (C-52/98), *Tecnamb-Tecnologia do Ambiente Lda* (C-53/98), *Turiprata Construções Civil Lda* (C-54/98), *Duarte dos Santos Sousa* (C-68/98) and *Santos & Kewitz Construções Lda* (C-69/98), EU:C:2001:564

Court of Justice, judgment of 20 September 2001, Case C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, EU:C:2001:465

Court of Justice, judgment of 26 June 2001, Case C-173/99, *The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)*, EU:C:2001:356

Court of Justice, judgment of 15 March 2001, Case C-165/98, *Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL, as the party civilly liable, third parties: Eric Guillaume and Others*, EU:C:2001:162

Court of Justice, judgment of 21 September 2000, Case C-222/98, *Hendrik van der Woude v Stichting Beatrixoord*, EU:C:2000:475

Court of Justice, judgment of 28 March 2000, Case C-7/98, *Dieter Krombach v André Bamburski*, EU:C:2000:164

Court of Justice, judgment of 23 November 1999, Joined Cases C-369/96 and C-376/96, *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)*, EU:C:1999:575

Court of Justice, judgment of 21 September 1999, Joined Cases C-115/97, C-116/97 and C-117/97, *Brentjens' Handelonderneming v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen*, EU:C:1999:434

Court of Justice, judgment of 21 September 1999, Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, EU:C:1999:430

Court of Justice, judgment of 21 September 1999, Case C-219/97, *Maatschappij Drijvende Bokken v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven*, EU:C:1999:437

Court of Justice, judgment of 9 December 1997, Case C-265/95, *Commission of the European Communities v French Republic*, EU:C:1997:595

Court of Justice, judgment of 9 January 1997, Case C-383/95, *Petrus Wilhelmus Rutten v Cross Medical Ltd.*, EU:C:1997:7

Court of Justice, judgment of 30 November 1995, Case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, EU:C:1995:411

Court of Justice, judgment of 6 December 1994, Case C-406/92, *The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj"*, EU:C:1994:400

Court of Justice, judgment of 13 July 1993, Case C-125/92, *Mulox IBC Ltd v Hendrick Geels*, EU:C:1993:306

Court of Justice, judgment of 19 January 1993, Case C-89/91, *Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH*, EU:C:1993:15

Court of Justice, judgment of 25 July 1991, Case C-25/90, *Manfred Säger v Dennemeyer & Co. Ltd.*, EU:C:1991:331

Court of Justice, judgment of 18 June 1991, Case C-260/89, *ERT v DEP*, EU:C:1991:254

Court of Justice, judgment of 19 June 1990, Case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, EU:C:1990:257

Court of Justice, judgment of 27 March 1990, Case C-113/89, *Rush Portuguesa Lda v Office national d'immigration*, EU:C:1990:142

Court of Justice, judgment of 21 September 1989, Case 68/88, *Commission of the European Communities v Hellenic Republic*, EU:C:1989:339

Court of Justice, judgment of 15 February 1989, Case 32/88, *Six Constructions Ltd v Paul Humbert*, EU:C:1989:68

Court of Justice, judgment of 27 September 1988, Case 189/87, *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*, EU:C:1988:459

Court of Justice, judgment of 4 February 1988, Case 145/86, *Horst Ludwig Martin Hoffmann v Adelheid Krieg*, EU:C:1988:61

Court of Justice, judgment of 15 January 1987, Case 266/85, *Hassan Shenavai v Klaus Kreischer*, EU:C:1987:11

Court of Justice, judgment of 15 May 1986, Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, EU:C:1986:206

Court of Justice, judgment of 26 May 1982, Case 133/81, *Roger Ivenel v Helmut Schwab*, EU:C:1982:199

Court of Justice, judgment of 17 December 1981, Case 279/80, *Criminal proceedings against Alfred John Webb*, EU:C:1981:314

Court of Justice, judgment of 15 June 1978, Case 149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena (Defrenne III)*, EU:C:1978:130

Court of Justice, judgment of 9 March 1978, Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, EU:C:1978:49

Court of Justice, judgment of 16 December 1976, Case 45/76, *Comet BV v Produktschap voor Siergewassen*, EU:C:1976:191

Court of Justice, judgment of 16 December 1976, Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, EU:C:1976:188

Court of Justice, judgment of 30 November 1976, Case 21/76, *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, EU:C:1976:166

Court of Justice, judgment of 28 October 1975, Case 36/75, *Roland Rutili v Ministre de l'intérieur*, EU:C:1975:137

Court of Justice, judgment of 14 May 1974, Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, EU:C:1974:51

Court of Justice, judgment of 17 December 1970, Case 35/70, *S.A.R.L. Manpower v Caisse primaire d'assurance maladie de Strasbourg*, EU:C:1970:120

Court of Justice, judgment of 17 December 1970, Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114

Court of Justice, judgment of 12 November 1969, Case 29/69, *Erich Stauder v City of Ulm – Sozialamt*, EU:C:1969:57

Court of Justice, judgment of 5 December 1967, Case 19/67, *Bestuur der Sociale Verzekeringsbank v J. H. van der Vecht*, EU:C:1967:49

BIBLIOGRAPHY

Z. ADAMS, S. DEAKIN, *Structural adjustment, economic governance and social policy in a regional context: The case of the Eurozone crisis*, in A. BLACKETT, A. TREBILCOCK (edited by), *Research Handbook on Transnational Labour law*, Cheltenham, UK, Northampton, MA, USA, Edward Elgar Publishing, 2015, pp. 111-123

A. ALLAMPRESE, G. ORLANDINI, *La Direttiva 2014/67 del 15 maggio 2014 di attuazione della Direttiva 96/71 sul distacco transnazionale dei lavoratori. Un primo commento*, 2014, available at www.cgil.it

B. AÑOVEROS TERRADAS, *Consumer Collective Redress under the Brussels I Regulation Recast in the Light of the Commission's Common Principles*, in *Journal of Private International Law*, 2015, Vol. 11, No. 1, pp. 143-162

M. BALBONI, *Rapporti tra diritto interno e diritto dell'Unione europea: verso un superamento della c.d. teoria dei controlimiti?*, in L.S. ROSSI, E. BARONCINI (a cura di), *Rapporti tra ordinamenti e diritti dei singoli. Studi degli allievi in onore di Paolo Mengozzi*, Napoli, Editoriale Scientifica, 2010, pp. 3-58

F. BANO, *I confini della legalità. Distacco e manodopera low cost*, in D. GOTTARDI (a cura di), *Legal Frame Work. Lavoro e legalità nella società dell'inclusione*, Torino, Giappichelli Editore, 2016, pp. 223-237

S. BARIATTI, *Le azioni collettive dell'art. 140-bis del codice del consumo: aspetti di diritto internazionale privato e processuale*, in *Rivista di diritto internazionale privato e processuale*, 2011, No. 1, pp. 19-54

S. BARIATTI, *Recognition and enforcement in the EU of judicial decisions rendered upon class actions: the case of U.S. and Dutch judgments and settlements*, in F. POCAR., I. VIARENGO, F.C. VILLATA (edited by), *Recasting Brussels I*, Padova, CEDAM, 2012, pp. 319-339

C. BARNARD, *EU Employment Law and the Future of the European Social Model: The Past, the Present and the Future*, in *Current Legal Problems*, Vol. 67, No. 1, 1 January 2014, pp. 199-237

C. BARNARD, *EU Employment Law*, Oxford, Oxford University Press, 4th ed., 2012

C. BARNARD, *The Worker Protection Justification: Lessons from Consumer Law*, in P. KOUTRAKOS, N.N. SHUIBHNE, P. SYRPIS (edited by), *Exceptions from EU Free Movement Law*, Oxford and Portland, Oregon, Hart Publishing, 2016, pp. 106-130

M.C. BARUFFI, *I diritti sociali nell'Unione europea dopo il Trattato di Lisbona*, in *Guida al Lavoro, Il Sole 24 ore*, 2010, No. 5, pp. 44-49

M. BEIJER, *The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations*, Cambridge-Antwerp-Portland, Intersentia, 2017

J.R. BELLACE, *Back to the Future: Freedom of Association, the Right to Strike and National Law*, in *King's Law Journal*, 2016, Vol. 27, No. 1, pp. 24-45

J.R. BELLACE, *Pushback on the right to strike: Resisting the thickening of soft law*, in A. BLACKETT, A. TREBILCOCK (edited by), *Research Handbook on Transnational Labour Law*, Cheltenham, UK, Northampton, MA, USA, Edward Elgar Publishing, 2015, pp. 181-193

F. BENATTI, *Note in tema di class actions transfrontaliere*, in *Danno e responsabilità*, 2012, No. 1, pp. 5-11

I. BENÖHR, *Collective Redress in the Field of European Consumer Law*, in *Legal Issues of Economic Integration*, 2014, Vol. 41, No. 3, pp. 243-256

M. BENOLO-CARABOT, *Chapitre 2. Les droits sociaux dans l'ordre juridique de l'Union Européenne*, in D. ROMAN (sous la direction de), *Droits des pauvres, pauvres droits ? Recherches sur la justiciabilité des droits sociaux*, in *La Revue des Droits de l'Homme*, 2012, No. 1, pp. 84-102, available at <http://revdh.revues.org>

E. BERTOLINI, *Il futuro della governance finanziaria europea alla luce della sentenza Pringle*, in *Rivista giuridica del lavoro e della previdenza sociale*, 2013, No. 2, pp. 180-194

A. BOGG, *'Individualism' and 'Collectivism' in Collective Labour Law*, in *Industrial Law Journal*, 2017, Vol. 46, No. 1, pp. 72-108

T. BOSTERS, *Collective Redress and Private International Law in the EU*, The Hague, T.M.C. Asser Press, 2017

V. BRINO, *Gli equilibri della Corte di Giustizia: il caso Rüffert*, in *Rivista italiana di diritto del lavoro*, 2008, II, pp. 479-486

N. BRUUN, A. BÜCKER, F. DORSSEMONT, *Balancing Fundamental Social Rights and Economic Freedoms: Can the Monti II Initiative Solve the EU Dilemma?*, in *The International Journal of Comparative Labour Law and Industrial Relations*, 2012, Vol. 28, No. 3, pp. 279-306

R. BUSCHMANN, *Tensions between Trade Union rights in the EU Charter of Fundamental Rights and the European Convention on Human Rights*, 27 January 2015, available at <https://courtsandcharters2.files.wordpress.com/2015/01/tensions-between-trade-unionrights-in-the-eu-charter-of-fundamental-rights-and-the-european-convention-on-human-rights.doc>

R. CAFARI PANICO, *Enhancing protection for weaker parties: jurisdiction over individual contracts of employment*, in F. FERRARI, F. RAGNO (edited by), *Cross-border litigation in Europe: the Brussels I Recast Regulation as a panacea?*, Milano, Wolters Kluwer CEDAM, 2015, pp. 41-66

R. CAFARI PANICO, *L'affievolimento dei diritti nella crisi economica e politica*

dell'Unione europea, in *Studi sull'integrazione europea*, 2017, No. 2, pp. 289-316

L. CALAFÀ, A. MATTEI, C. PERARO, M. ROCCA, *D.lgs. 17 luglio 2016, n. 136*, in R. DE LUCA TAMAJO, O. MAZZOTTA (a cura di), *Commentario breve alle leggi sul lavoro*, Milano, Wolters Kluwer CEDAM, 6^a ed., 2017, pp. 3051-3072

U. CARABELLI, *Europa dei mercati e conflitto sociale*, Bari, Cacucci Editore, 2009

U. CARABELLI, *Libera circolazione dei servizi nella CE e dumping sociale: una riflessione sul caso Laval*, in *Studi in onore di Vincenzo Starace*, Napoli, Editoriale Scientifica, 2008, Vol. 3, pp. 1737-1759

U. CARABELLI, *Una sfida determinante per il futuro dei diritti sociali in Europa: la tutela dei lavoratori di fronte alla libertà di prestazione dei servizi nella CE*, in *Rivista giuridica del lavoro*, 2007, No. 1, pp. 33-134.

L. CARBALLO PIÑEIRO, *Acciones colectivas transfronterizas: Prospectiva de Derecho Internacional Privado europeo*, in *Revista de Derecho Privado y Comunitario*, 2011, No. 2, pp. 585-617

L. CARBALLO PIÑEIRO, *Las acciones colectivas y su eficacia extraterritorial. Problemas de recepción y trasplante de las class actions en europa*, Santiago de Compostela, Universidad de Santiago de Compostela, 2009

S.M. CARBONE, C.E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il Regolamento UE n. 1215/2012*, Torino, Giappichelli Editore, 2016

T. CHIEU, *Class Actions in the European Union?: Importing Lessons Learned from The United States' experience into European Community Competition Law*, in *Cardozo Journal of International & Comparative Law*, 2010, Vol. 18, pp. 123-157

S.J. CHOI, L. SILBERMAN, *Transnational Litigation and Global Securities Class Actions* (January 13, 2009), in *NYU School of Law, Public Law Research Paper No. 09-06*

D. COMANDÈ, *Il diritto di negoziazione collettiva cede il passo alle norme europee sugli appalti pubblici: quale compromesso è sostenibile?*, in *Rivista italiana di diritto del lavoro*, 2011, II, pp. 903-912

F. COSTAMAGNA, *Minimum wage between public procurement and posted workers: anything new after the RegioPost case?*, in *European Law Review*, 2017, Vol. 42, No. 1, pp. 101-111

P. CRAIG, G. DE BURCA, *EU Law. Text, Cases and Materials*, Oxford, Oxford University Press, 6th ed., 2015

J. CREMERS, M. BULLA, *Collective redress and workers' rights in the EU*, AIAS Working Paper 118, March 2012, available at www.uva-aias.net

G. D'AVINO, A. MARTONE, *Il diritto ad un ricorso effettivo e ad un giudice imparziale ex*

art. 47 della Carta dei diritti fondamentali, in A. DI STASI (a cura di), *Spazio europeo e diritti di giustizia. Il Capo IV della Carta dei diritti fondamentali nell'applicazione giurisprudenziale*, Padova, CEDAM, 2014, pp. 139-210

M. DANOV, *The Brussels I Regulation: cross-border collective redress proceedings and judgments*, in *Journal of Private International Law*, 2010, Vol. 6, No. 2, pp. 359-393

M. DAWSON, *The Governance of EU Fundamental Rights*, Cambridge, Cambridge University Press, 2017

B. DE WITTE, *Balancing of Economic Law and Human Rights by the European Court of Justice*, in P.M. DUPUY, F. FRANCONI, E.U. PETERSMANN (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford, Oxford University Press, 2009, pp. 197-207

P. DE PASQUALE, *L'economia sociale di mercato nell'Unione europea*, in *Studi sull'integrazione europea*, 2014, No. 2, pp. 265-278

A. DEFOSSEZ, *Les rapports entre la directive détachement et le Règlement Rome I: on efface tout et on recommence?*, in J-S. BERGÉ, S. FRANCO, M. GARDEÑES SANTIAGO (eds.), *Boundaries of European Private International Law*, Brussels, Bruylant, 2015, pp. 483-504

A. DEFOSSEZ, *La directive 2014/67/UE relative à l'exécution de la directive 96/71/CE concernant le détachement de travailleurs: un premier pas dans une bonne direction*, in *Revue trimestrielle de droit européen*, 2014, No. 4, pp. 833-847

D. DIVERIO, *Il ruolo degli Stati nella definizione del modello sociale europeo*, in *Studi sull'integrazione europea*, 2015, No. 3, pp. 515-545

A. DONNETTE, *A propos d'une rencontre mouvementée entre droit social et droit du marché. Les arrêts Viking, Laval, Rüffert et Luxembourg*, in *Revue des affaires européennes*, 2007-08, pp. 341-358

F. DORSSEMONT, A.A.H. VAN HOEK, *Collective action in Labour Conflicts under the Rome II Regulation*, in *European Labour Law Journal*, 2011, Vol. 2, No. 1 and No. 2, pp. 48-118

F. DORSSEMONT, *Collective Action Against Austerity Measures*, in N. BRUUN, K. LÖRCHER, I. SCHÖMANN (eds.), *The Economic and Financial Crisis and Collective Labour Law in Europe*, Oxford and Portland, Oregon, Hart Publishing, 2016, pp. 153-170

F. DORSSEMONT, *The Right to Take Collective Action under Article 11 ECHR*, in F. DORSSEMONT, K. LÖRCHER, I. SCHÖMANN (edited by), *The European Convention on Human Rights and the Employment relation*, Oxford and Portland, Oregon, Hart Publishing, 2013, pp. 333-365

Ö. EDSTRÖM, *The Right to Collective Action – in Particular the Right to Strike – as a Fundamental Right*, in M. RÖNNMAR (edited by), *Labour Law, Fundamental Rights and*

Social Europe, Oxford and Portland, Oregon, Hart Publishing, 2011, pp. 57-75

L. ERVO, 'Opt-In is Out and Opt-Out is In': *Dimensions Based on Nordic Options and the Commission's Recommendation*, in B. HESS, M. BERGSTRÖM, E. STORSKRUBB (eds.), *EU Civil Justice. Current issues and Future Outlook*, Oxford and Portland, Oregon, Hart Publishing, 2016, pp. 185-221

C. ESPLUGUES MOTA, G. PALAO MORENO, *Articles 20 to 23*, in U. MAGNUS, P. MANKOWSKI (edited by), *European Commentaries on Private International Law, Brussels Ibis Regulation*, Köln, Sellier European Law Publishers, Ottoschmidt, 2016, pp. 534-558

S. EVJU, *Cross-border services, posting of workers, and jurisdictional alternation*, in *European Labour Law Journal*, 2010, Vol. 1, No. 1, pp. 89-98

S. EVJU, *Revisiting the Posted Workers Directive: Conflict of Laws and Laws in Conflict*, in *Cambridge Yearbook of European Legal Studies*, 2009-2010, pp. 151-182

S. EVJU, *The Right to Collective Action under the European Social Charter*, in *European Labour Law Journal*, 2011, Vol. 2, No. 3, pp. 196-224

F. FABBRINI, *Economic Policy in the EU after the Crisis: Using the Treaties to Overcome the Asymmetry of EMU*, in *Il Diritto dell'Unione europea*, 2016, No. 3, pp. 529-549

F. FABBRINI, *Europe in Need of a New Deal: On Federalism, Free Market and the Right to Strike*, in *Georgetown Journal of International Law*, 2012, Vol. 43, pp. 1175-1258

A. FABRE, *La «fondamentalisation» des droits sociaux en droit de l'Union européenne*, in R. TINIÈRE, C. VIAL (sous la direction de), *La protection des droits fondamentaux dans l'Union européenne. Entre évolution et permanence*, Bruxelles, Bruylant, 2015, pp. 163-194

D. FAIRGRIEVE, G. HOWELLS, *Collective redress procedures: European debates*, in D. FAIRGRIEVE, E. LEIN (edited by), *Extraterritoriality and collective redress*, Oxford, Oxford University Press, 2012, pp. 15-41

D. FAIRGRIEVE, G. HOWELLS, *Collective Redress Procedures—European Debates*, in *International and Comparative Law Quarterly*, 2009, Vol. 58, pp. 379-409

C. FAVILLI, *I ricorsi collettivi nell'Unione europea e la tutela antidiscriminatoria: verso un autentico approccio orizzontale*, in *Il Diritto dell'Unione europea*, 2014, No. 3, pp. 439-463

R. FENTIMAN, *Recognition, Enforcement and Collective Judgments*, in A. NUYTS, N.E. HATZIMIHAİL (eds.), *Cross-Border Class Action. The European Way*, Munich, Sellier European Law Publishers, 2014, pp. 85-110

G. FONTANA, *Crisi economica ed effettività dei diritti sociali in Europa*, 27 novembre

2013, pp. 1-57, available at www.forumcostituzionale.it

M. FORNASIER, *Employment, Posting of Workers*, in J. BASEDOW, G. RÜHL, F. FERRARI, P. DE MIGUEL ASENSIO (edited by), *Encyclopedia of Private International Law*, Cheltenham, UK, Northampton, MA, USA, Edward Elgar Publishing, 2017, pp. 116-123

M. FRANZEN, *Conflicts of Laws in Employment Contracts and Industrial Relations*, in R. BLANPAIN (editor), *Comparative Labour law and Industrial Relations in Industrialized Market Economies*, Alphen aan den Rijn, Kluwer Law International, 2014, pp. 245-267

P. FRANZINA, *Il regolamento n. 864/2007/CE sulla legge applicabile alle obbligazioni extracontrattuali («Roma II»)*, in *Le nuove leggi civili commentate*, 2008, No. 5, pp. 971-1044

P. FRANZINA, *Armonia decisoria e competenza giurisdizionale nel regolamento “Bruxelles I-bis”*, in G. BIAGIONI (a cura di), *Il principio dell’armonia delle decisioni civili e commerciali nello spazio giudiziario europeo*, Torino, Giappichelli Editore, 2015, pp. 99-122

P. FRANZINA, X.E. KRAMER, J. FITCHER, *The Recognition and Enforcement of Member States Judgments*, in A. DICKINSON, E. LEIN (eds.), *The Brussels I Regulation Recast*, Oxford, Oxford University Press, 2015, pp. 373-519

D.U. GALETTA, *L’autonomia procedurale degli Stati membri dell’Unione europea: Paradise Lost?*, Torino, Giappichelli Editore, 2009

F. GALLO, *Diritti socio-economici ed equilibri di bilancio*, in *Studi sull’integrazione europea*, 2017, No. 1, pp. 11-22

R. GAMBLE, *Not a class act (yet): Europe moves softly towards collective redress*, in *European Competition Law Review*, 2016, Vol. 37, No. 1, pp. 14-24

D. GERADIN, *Collective redress for Antitrust Damages in the European Union: is this a reality now?*, in *George Mason Law Review*, 2015, Vol. 22, No. 5, pp. 1079-1101

L. GILLIES, *Fundamental Rights and Judicial Cooperation in the Decisions of the Court of Justice on the Brussels I regulation 2009-2014*, in S. MORANO-FOADI, L. VICKERS (eds.), *Fundamental Rights in EU. A matter for two courts*, Oxford and Portland, Oregon, Hart Publishing, 2015, pp. 219-238

S. GIUBBONI, *Appunti o disappunti sul pilastro europeo dei diritti sociali*, in *Quaderni costituzionali*, 2017, n. 4, pp. 953-962

S. GIUBBONI, *Libertà economiche fondamentali e diritto del lavoro, oggi*, in *Europa e diritto privato*, 2015, No. 2, pp. 493-509

S. GIUBBONI, *Salario minimo e distacco transnazionale*, in *Rivista giuridica del lavoro e della previdenza sociale*, 2015, No. 2, part II, pp. 222-228

- M. GOLDONI, *The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation*, in *European Constitutional Law Review*, 2014, Vol. 10, pp. 90-108
- L. GORYWODA, N.E. HATZIMIHAİL, A. NUYTS, *Introduction: Market Regulation, Judicial Cooperation and Collective Redress*, in A. NUYTS, N.E. HATZIMIHAİL (eds.), *Cross-border Class Actions: the European Way*, Munich, Sellier European Law Publishers, 2014, pp. 1-55
- U. GRUŠIĆ, *The Right to Strike Versus Fundamental Economic Freedoms in the English Courts, Again: Hiding Behind The “Public Law Taboo” in Private International Law*, in *Journal of Private International Law*, 2013, Vol. 9, No. 3, pp. 413-430
- U. GRUŠIĆ, *Jurisdiction in employment matters under Brussels I: a reassessment*, in *International Comparative Law Quarterly*, 2012, Vol. 61, No. 1, pp. 91-126
- U. GRUŠIĆ, *The European Private International Law of Employment*, Cambridge, Cambridge University Press, 2015
- U. GRUŠIĆ, *The principle of effectiveness in European law and European private international law: the case of transnational employment in the European Court of Justice and English Courts*, in J-S. BERGÉ, S. FRANCO, M. GARDEÑES SANTIAGO (eds.), *Boundaries of European Private International Law*, Brussels, Bruylant, 2015, pp. 443-462
- M. HELLNER, *Private International Law and Collective Redress – The case of Antitrust damage claims*, in A. NUYTS, N.E. HATZIMIHAİL (eds.), *Cross-Border Class Action. The European Way*, Munich, Sellier European Law Publishers, 2014, pp. 223-239
- B. HESS, *Cross-border Collective Litigation and the Regulation Brussels I*, in *IPRax Praxis des Internationalen Privat- und Verfahrensrechts*, 2010, No. 2, pp. 116-121
- B. HESS, *The State of the Civil Justice Union*, in B. HESS, M. BERGSTRÖM, E. STORSKRUBB (eds.), *EU Civil Justice. Current issues and Future Outlook*, Oxford and Portland, Oregon, Hart Publishing, 2016, pp. 1-19
- B. HESS, *Procedural Harmonisation in a European Context*, in X.E. KRAMER, C.H. VAN RHEE (editors), *Civil Litigation in a Globalising World*, The Hague, T.M.C. Asser Press, 2012, pp. 159-173
- B. HESS, *A coherent approach to European collective redress*, in D. FAIRGRIEVE, E. LEIN (edited by), *Extraterritoriality and collective redress*, Oxford, Oxford University Press, 2012, pp. 107-118
- B. HESS, *The Role of Procedural Law in the Governance of Enforcement in Europe*, in H-W. MICKLITZ, A. WECHSLER (edited by), *The Transformation of Enforcement. European Economic Law in Global Perspective*, Oxford and Portland, Oregon, Hart Publishing, 2016, pp. 343-353
- B. HESS, *Collective Redress and the Jurisdictional Model of the Brussels I Regulation*, in

- A. NUYTS, N.E. HATZIMIHAİL (eds.), *Cross-border Class Actions: the European Way*, Munich, Sellier European Law Publishers, 2014, pp. 59-68
- C. HODGES, *The Reform of Class and Representative Actions in European Legal Systems. A new Framework for Collective Redress in Europe*, Oxford and Portland, Oregon, Hart Publishing, 2008
- N. HÖS, *The Principle of Proportionality in Viking and Laval: An Appropriate Standard of Judicial Review?*, in *European Labour Law Journal*, 2010, Vol. 1, No. 2, pp. 236-253
- I. INGLESE, *La direttiva sul distacco e le ingiustificate restrizioni alla libera prestazione di servizi*, in *Massimario di giurisprudenza del lavoro*, 2008, pp. 542-543
- I. INGRAVALLO, *Il diritto di sciopero e quello di contrattazione collettiva nell'Unione europea dopo il Trattato di Lisbona*, in P. GARGIULO (a cura di), *Politica e diritti sociali nell'unione europea. Quale modello sociale europeo?*, Napoli, Editoriale Scientifica, 2011, pp. 217-242
- I. INGRAVALLO, *La Corte di giustizia tra diritto di sciopero e libertà economiche fondamentali. Quale bilanciamento?*, in *La Comunità internazionale*, 2008, No. 4, pp. 641-662
- F. JAULT-SESEKE, *De la loi applicable à un contrat de travail qui s'exécute dans plusieurs Etats*, Note sous CJUE, 15 mars 2011, n° C-29/10, Koelzsch c/ Etat du Grand-Duché de Luxembourg, in *Revue critique de droit international privé*, 2011, No. 2, pp. 455-461
- A. JOHNSON, *To 'Opt-in' or To 'Opt-out? – That is the Question*, in E. LEIN, D. FAIRGRIEVE, M. OTERO CRESPO, V. SMITH (edited by), *Collective Redress in Europe: Why and How?*, London, The British Institute of International and Comparative Law, 2015, pp. 61-65
- P. JUÁREZ PÉREZ, *De inmunidades, sumisiones y centros de trabajo: la stjue de 19 julio de 2012, Mahamdia c. República de Argelia*, in *Cuadernos de Derecho Transnacional* (Marzo 2013), Vol. 5, No. 1, pp. 254-272, available at www.uc3m.es/cdt
- J. KODEK, *Class Actions – Some Reflections from a European Perspectives*, in E. LEIN, D. FAIRGRIEVE, M. OTERO CRESPO, V. SMITH (edited by), *Collective Redress in Europe: Why and How?*, London, The British Institute of International and Comparative Law, 2015, pp. 117-132
- V. KOSTA, *Fundamental Rights in EU Internal Market*, Oxford and Portland, Oregon, Hart Publishing, 2015
- A. KOUKIADAKI, *Strategie di contenzioso contro le misure di austerità sulla base del diritto dell'Unione europea: i casi di Grecia e Portogallo*, in *Rivista giuridica del lavoro e della previdenza sociale*, 2015, No. 2, pp. 411-444
- X.E. KRAMER, *Cross-border Enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure*, in *International Journal of Procedural*

Law, 2011, Vol. 2, pp. 202-230

X.E. KRAMER, *Harmonisation of Civil Procedure and the Interaction with Private International Law*, in X.E. KRAMER, C.H. VAN RHEE (editors.), *Civil Litigation in a Globalising World*, The Hague, T.M.C. Asser Press, 2012

J.-J. KUIPERS, *Schemes of Arrangement and Voluntary Collective Redress: A Gap in the Brussels I Regulation*, in *Journal of Private International Law*, 2012, Vol. 8, No. 2, pp. 225-249

J.-J. KUIPERS, *The Right to a Fair Trial and the Free Movement of Civil Judgments*, in *Croatian Yearbook of European Law and Policy*, 2010, Vol. 6, pp. 23-51

M. KULLMANN, *The Principle of Effet Utile and Its Impact on National Methods for Enforcing the Rights of Posted Workers*, in *The International Journal of Comparative Labour Law and Industrial Relations*, 2013, Vol. 29, No. 3, pp. 283-304

A. LAYTON, *Collective redress: policy objectives and practical problems*, in D. FAIRGRIEVE, E. LEIN (edited by), *Extraterritoriality and collective redress*, Oxford, Oxford University Press, 2012, pp. 93-104

V. LAZIĆ, *Procedural Justice for 'Weaker Parties' in Cross-Border Litigation under the EU Regulatory Scheme*, in *Utrecht Law Review*, 2014, Vol. 10, No. 4, pp. 100-117

E. LEIN, *Cross-border collective redress and jurisdiction under Brussels I: a mismatch*, in D. FAIRGRIEVE, E. LEIN (edited by), *Extraterritoriality and collective redress*, Oxford, Oxford University Press, 2012, pp. 129-142

E. LEIN, *Jurisdiction and Applicable Law in Cross-Border Mass Litigation*, in F. POCAR., I. VIARENGO, F.C. VILLATA (edited by), *Recasting Brussels I*, Padova, CEDAM, 2012, pp. 159-172

A. LO FARO, *Diritti sociali e libertà economiche del mercato interno: considerazioni minime in margine ai casi Laval e Viking*, in *Lavoro e diritto*, 2008, No. 1, pp. 63-96

K. LÖRCHER, *The New Social Dimension in the Jurisprudence of the European Court of Human Rights (ECtHR): the Demir and Baykara Judgment, its Methodology and Follow-up*, in F. DORSSEMONT, K. LÖRCHER, I. SCHÖMANN (edited by), *The European Convention on Human Rights and the Employment relation*, Oxford and Portland, Oregon, Hart Publishing, 2013, pp. 3-46

J. MALMBERG, *Regulating Posted Work – Before and After the Laval Quartet*, in M. RÖNNMAR (edited by), *Labour Law, Fundamental Rights and Social Europe*, Oxford and Portland, Oregon, Hart Publishing, 2011, pp. 77-88

R. MAŃKO, *Europeanisation of civil procedure. Towards common minimum standards?*, PE 559.499, June 2015, available at www.europarl.europa.eu/thinktank

P. MANKOWSKI, *Employment Contracts under Article 8 of the Rome I Regulation*, in F.

FERRARI, S. LEIBLE (eds.), *Rome I Regulation. The Law Applicable to Contractual Obligations in Europe*, Munich, Sellier European Law Publishers, 2009, pp. 171-216

P. MANKOWSKI, P. NIELSEN, *Introduction to Articles 17-19*, in U. MAGNUS, P. MANKOWSKI (edited by), *European Commentaries on Private International Law, Brussels Ibis Regulation*, Köln, Sellier European Law Publishers, Ottoschmidt, 2016, pp. 450-451

C. MARCHESE, *I diritti sociali nell'epoca dell'austerità: prospettive comparate*, in *Diritto pubblico comparato ed europeo*, 2017, No. 1, pp. 141-172

F. MARONGIU BONAIUTI, *Le obbligazioni non contrattuali nel diritto internazionale privato*, Milano, Giuffrè, 2013

K. MASLAUSKAITE, *Posted Workers In The Eu: State Of Play And Regulatory Evolution*, Policy Paper 107, 24 March 2014

A. MATTEI, *La Direttiva Enforcement n. 2014/67/UE e il recepimento nell'ordinamento italiano*, in *Rivista giuridica del lavoro*, 2017, No. 1, part I, pp. 147-168

P. MATTERA, *Emploi, affaires sociales, compétences et mobilité des travailleurs*, in *Revue du Droit de l'Union Européenne*, 2016, No. 2, pp. 357-363

A.P. MCCANN, *The CJEU on Trial: Economic Mobility and Social Justice*, in *European Review of Private Law*, 2014, vol. 22, No. 5, pp. 729-767

P. MENGOZZI, *Il principio personalista nel diritto dell'Unione Europea*, Padova, CEDAM, 2010

L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, in A. DICKINSON, E. LEIN (eds.), *The Brussels I Regulation Recast*, Oxford, Oxford University Press, 2015, pp. 239-253

L. MERRETT, *Employment Contracts in Private International Law*, Oxford, Oxford University Press, 2011

R. MICHAELS, *European Class Actions and Applicable Law*, in A. NUYTS, N.E. HATZIMIHAÏL (eds.), *Cross-Border Class Action. The European Way*, Munich, Sellier European Law Publishers, 2014, pp. 111-141

L. MOLA, *La prassi del Comitato europeo dei diritti sociali relativa alla garanzia degli standard di tutela sociale in tempi di crisi economica*, in N. NAPOLETANO, A. SACCUCCI (a cura di), *Gestione internazionale delle emergenze globali. Regole e valori*, Napoli, Editoriale Scientifica, 2013, pp. 195-220

T.J. MONESTIER, *Transnational Class Actions and the Illusory Search for Res Judicata*, in *Tulane Law Review*, 2011, Vol. 86, No. 1, pp. 1-79

T.J. MONESTIER, *Personal Jurisdiction over Non-resident Class Members: Have We*

Gone Down the Wrong Road?, in *Texas International Law Journal*, 2010, Vol. 45, pp. 537-572

R. MONEY-KYRLE, *Legal Standing in Collective Redress Actions for Breach of EU Rights: Facilitating or Frustrating Common Standards and Access to Justice?*, in B. HESS, M. BERGSTRÖM, E. STORSKRUBB (eds.), *EU Civil Justice. Current issues and Future Outlook*, Oxford and Portland, Oregon, Hart Publishing, 2016, pp. 223-253

R. MONEY-KYRLE, C. HODGES, *European Collective Action: Towards Coherence?*, in *Maastricht Journal of European and Comparative Law*, 2012, Vol. 19, No. 4, pp. 477-504

F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale*, Volume I, *Parte generale e obbligazioni*, Milano, UTET Giuridica, 8^a ed., 2017

H. MUIR WATT, *Collective Redress*, in J. BASEDOW, G. RÜHL, F. FERRARI, P. DE MIGUEL ASENSIO (edited by), *Encyclopedia of Private International Law*, Cheltenham, UK, Northampton, MA, USA, Edward Elgar Publishing, 2017, pp. 46-54

R. MULHERON, *The Class Action in Common Law Legal Systems: A Comparative Perspective*, Oxford and Portland, Oregon, Hart Publishing, 2004

F. MUNARI, *Da Pringle a Gauweiler: i tormentati anni dell'unione monetaria e i loro effetti sull'ordinamento giuridico europeo*, in *Il Diritto dell'Unione europea*, 2015, No. 4, pp. 723-755

E. NAVARRETTA, *Libertà fondamentali dell'U.E. e rapporti fra privati: il bilanciamento di interessi e i rimedi civilistici*, in *Rivista di diritto civile*, 2015, No. 4, pp. 878-910

T. NOVITZ, *The Internationally Recognized Right to Strike: A Past, Present and Future Basis upon Which to Evaluate Remedies for Unlawful Collective Action?*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2014, vol. 30, no. 3, pp. 357-379

A. NUYTS, *The Consolidation of Collective Claims Under Brussels I*, in A. NUYTS, N.E. HATZIMIHAİL (eds.), *Cross-Border Class Action. The European Way*, Munich, Sellier European Law Publishers, 2014, pp. 69-83

G. ORLANDINI, *Il distacco transnazionale*, in M. AIMO, D. IZZI (a cura di), *Esternalizzazioni e tutela dei lavoratori*, Torino, UTET Giuridica, 2014, pp. 637-674

G. ORLANDINI, *Mercato unico dei servizi e tutela del lavoro*, Milano, Franco Angeli, 2013

G. ORLANDINI, *Diritto di sciopero, azioni collettive transnazionali e mercato interno dei servizi: nuovi dilemmi e nuovi scenari per il diritto sociale europeo*, WP C.S.D.L.E. "Massimo D'Antona", INT - 45/2006, pp. 32-33, available at <http://csdle.lex.unict.it>

L.F. PACE, *The OMT case, the "intergovernmental drift" of the Eurozone crisis and the*

(inevitable) rectification of the BVerfG jurisprudence in light of the ECJ's *Gauweiler* judgment, in *Il Diritto dell'Unione europea*, 2017, No. 1, pp. 155-176

G. PALAO MORENO, *The Law Applicable to Non-Contractual Obligations*, in *Yearbook of Private International Law*, 2007, Vol. 9, pp. 115-126

E. PATAUT, *Note Affaire C-384/10*, in *Revue critique de droit international privé*, 2012, No. 2, pp. 648-666

C. PERARO, *The Enforcement of Posted Workers' Rights Across the European Union*, in *Freedom, Security & Justice: European Legal Studies*, 2017, No. 2, pp. 114-130

C. PERARO, *Right to collective action in cross-border employment contexts: a fundamental social right not yet covered by EU private international law*, in *UNIO – EU Law Journal*, 2016, Vol. 2, No. 2, pp. 20-38

P. PIRODDI, *Armonia delle decisioni, riconoscimento reciproco e diritti fondamentali*, in G. BIAGIONI (a cura di), *Il principio dell'armonia delle decisioni civili e commerciali nello spazio giudiziario europeo*, Torino, Giappichelli Editore, 2015, pp. 29-72

F. POCAR, I. VIARENGO, *Diritto comunitario del lavoro*, Padova, CEDAM, 2011

F. POCAR, M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, Padova, CEDAM, 2^a ed., 2014

S. PRECHAL, K. CATH, *The European acquis of civil procedure: constitutional aspects*, in *Uniform Law Review*, 2014, Vol. 19, pp. 179-198

G. RAIMONDI, *L'evoluzione della giurisprudenza della Corte europea dei diritti dell'uomo sulla libertà sindacale e il diritto di sciopero*, in *Scritti in onore di Giuseppe Tesauero*, Napoli, Editoriale Scientifica, 2014, pp. 591-600

S. REYNOLDS, *Explaining the constitutional drivers behind a perceived judicial preference for free movement over fundamental rights*, in *Common Market Law Review*, 2016, No. 53, pp. 643-678

S. ROBIN-OLIVIER, «*La contribution de la Charte des droits fondamentaux à la protection des sociaux dans l'Union européenne: un premier bilan après Lisbonne*», in *Journal européen des droits de l'homme*, 2013, No. 1, pp. 109-134

M. ROCCA, *Posting of Workers and Collective Labour Law: There and Back Again. Between Internal Market and Fundamental Rights*, Cambridge-Antwerp-Portland, Intersentia, 2015

M. ROCCELLA, T. TREU, *Diritto del lavoro dell'Unione europea*, Padova, Wolters Kluwer CEDAM, 7^a ed., 2016

C. SALAZAR, *Crisi economica e diritti fondamentali*, Relazione al XXVIII Convegno annuale dell'AIC, 11 October 2013, available at www.rivistaaic.it/relazione-al-xxviii-

convegno-annuale-dell-aic-crisi-economica-e-diritti-fondamentali.html

M. SCHMID-DRÜNER, *The revision of the Posting of Workers Directive*, PE 607.346, October 2017, available at www.europarl.europa.eu/supporting-analyses

J.M. SCHUBERT, *The Social Progress Clause in EU law*, 2010 (paper discussion)

S. SCIARRA, *Association de médiation sociale. The Disputed Role of EU fundamental Principles and the Point of View of Labour Law*, in *Scritti in onore di Giuseppe Tesaurò*, Napoli, Editoriale Scientifica, 2014, pp. 2431-2447

S. SCIARRA, *Pluralismo sindacale multilivello nella crisi. Gli orizzonti della Carta sociale europea*, in *Studi sull'integrazione europea*, 2014, n. 2, pp. 237-246

N.N. SHUIBHNE, *Fundamental rights and the framework of internal market adjudication: is the Charter making a difference?*, in P. KOUTRAKOS, J. SNELL (edited by), *Research handbook on The Law of the EU's Internal Market*, Cheltenham, UK, Northampton, MA, USA, Edward Elgar Publishing, 2017, pp. 215-238

L. SILBERMAN, *Morrison v. National Australia Bank: Implications for Global Securities Class Actions* (June 14, 2011), in *Swiss Yearbook of Private International Law 2010*, NYU School of Law, Public Law Research Paper No. 11-41

A. STADLER, *The Commission's Recommendation on Common Principles of Collective Redress and Private International Law Issues*, in E. LEIN, D. FAIRGRIEVE, M. OTERO CRESPO, V. SMITH (edited by), *Collective Redress in Europe: Why and How?*, London, The British Institute of International and Comparative Law, 2015, pp. 235-249

J.N. STEFANELLI, *Parallel litigation and cross-border collective actions under the Brussels I framework: lessons from abroad*, in D. FAIRGRIEVE, E. LEIN (edited by), *Extraterritoriality and collective redress*, Oxford, Oxford University Press, 2012, pp. 143-170

A. STEINBACH, *Effect-based analysis in the court's jurisprudence on the euro crisis*, in *European Law Review*, 2017, Vol. 42, No. 2, pp. 254-269

P. STONE, *EU Private International law*, Cheltenham, UK, Northampton, MA, USA, Edward Elgar Publishing, 3rd ed., 2014

E. STORSKRUBB, *Civil Procedure and EU Law. A Policy Area Uncovered*, Oxford, Oxford University Press, 2008

S.I. STRONG, *Regulatory litigation in the European Union: does the U.S. class action have a new analogue?*, in *Notre Dame Law Review*, 2012, Vol. 88, No. 2, pp. 899-971

Z.S. TANG, *Consumer Collective Redress in European Private International Law*, in *Journal of Private International Law*, 2011, Vol. 7, No. 1, pp. 101-147

G. TESAURÒ, *Diritto dell'Unione europea*, Padova, CEDAM, 2012

E. TRIGGIANI, *La complessa vicenda dei diritti sociali fondamentali nell'Unione europea*, in *Studi sull'integrazione europea*, 2014, IX, pp. 9-33

C.E. TUO, *Armonia delle decisioni e ordine pubblico*, in G. BIAGIONI (a cura di), *Il principio dell'armonia delle decisioni civili e commerciali nello spazio giudiziario europeo*, Torino, Giappichelli Editore, 2015, pp. 161-183

I. TZANKOVA, H. VAN LITH, *Class actions and class settlements going global: the Netherlands*, in D. FAIRGRIEVE, E. LEIN (edited by), *Extraterritoriality and collective redress*, Oxford, Oxford University Press, 2012, pp. 67-91

A.A.H. VAN HOEK, M. HOUWERZIJL, *'Posting' and 'Posted Workers': The Need for Clear Definitions of Two Key Concepts of the Posting of Workers Directive*, in *Cambridge Yearbook of European Legal Studies*, 2011-2012, Vol. 14, pp. 419-452

A.A.H. VAN HOEK, M. HOUWERZIJL, *Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, Contract VC/2011/0096, November 2011, available at <http://ec.europa.eu/social/BlobServlet?docId=7510&>.

A.A.H. VAN HOEK, *Private international law rules for transnational employment: reflections from the European Union*, in A. BLACKETT, A. TREBILCOCK (edited by), *Research Handbook on Transnational Labour law*, Cheltenham, UK, Northampton, MA, USA, Edward Elgar Publishing, 2015, pp. 438-454

A.A.H. VAN HOEK, *Private international law: an appropriate means to regulate transnational employment in the European Union?*, in *Erasmus Law Review*, 2014, Vol. 7, No. 3, pp. 157-169

F. VAN OVERBEEKE, *The Commission's proposal to amend the Posting of Workers Directive and private international law implications*, in *Nederlands Internationaal Privaatrecht*, 2017, No. 2, pp. 178-194

I. VAN HIEL, *The Right to Form and Join Trade Unions Protected by Article 11 ECHR*, in F. DORSSEMONT, K. LÖRCHER, I. SCHÖMANN (edited by), *The European Convention on Human Rights and the Employment relation*, Oxford and Portland, Oregon, Hart Publishing, 2013, pp. 287-308

I. VIARENGO, *La legge applicabile al lavoratore distaccato in un altro Stato membro nell'ambito di una prestazione di servizi*, in B. NASCIMBENE (a cura di), *La libera circolazione dei lavoratori. Trent'anni di applicazione delle norme comunitarie*, Milano, Giuffrè Editore, 1998, pp. 175-186

A. VITERBO, F. COSTAMAGNA, *L'impatto sociale della politica di condizionalità nel contesto della crisi nell'area euro: profili giuridici*, in N. NAPOLETANO, A. SACCUCCI (a cura di), *Gestione internazionale delle emergenze globali: regole e valori*, Napoli, Editoriale Scientifica, 2013, pp. 167-194

G. WAGNER, *Harmonisation of Civil Procedure: Policy Perspectives*, in X.E. KRAMER, C.H. VAN RHEE (editors), *Civil Litigation in a Globalising World*, The Hague, T.M.C.

Asser Press, 2012, pp. 93-119

P. WAUTELET, *Article 36*, in U. MAGNUS, P. MANKOWSKI (edited by), *European Commentaries on Private International Law, Brussels Ibis Regulation*, Köln, Sellier European Law Publishers, Ottoschmidt, 2016, pp. 813-82

S. WEATHERILL, *The Internal Market as a Legal Concept*, Oxford, Oxford University Press, 2017

M. WELLER, *Mutual trust within judicial cooperation in civil matters: a normative cornerstone – a factual chimera – a constitutional challenge*, in *Nederlands Internationaal Privaatrecht*, 2017, No. 1, pp. 1-21

R. ZAHN, *New Labour Laws in Old Member States. Trade Union Responses to European Enlargement*, Cambridge, Cambridge University Press, 2017

A. ZANOBETTI, *Employment Contracts and the Rome Convention: the Koezsch Ruling of the European Court of Justice*, in *Cuadernos de Derecho Transnacional*, Octubre 2011, Vol. 3, No. 2, pp. 338-358, available at www.uc3m.es/cdt.

