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EU Social and Labour Rights and EU Internal Market Law

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EU Social and Labour Rights and EU Internal Market Law

DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

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Abstract

EU Social and Labour Rights have developed incrementally, originally through a set of legislative initiatives creating selective employment rights, followed by a non-binding Charter of Social Rights. Only in 2009, social and labour rights became legally binding through the Charter of Fundamental Rights for the European Union (CFREU). By contrast, the EU Internal Market - an area without frontiers where goods, persons, services and capital can circulate freely – has been enshrined in legally enforceable Treaty provisions from 1958. These comprise the economic freedoms guaranteeing said free circulation and a system ensuring that competition is not distorted within the Internal Market (Protocol 27 to the Treaty of Lisbon). Tensions between Internal Market law and social and labour rights have been observed in analyses of EU case law and legislation. This report, provided by Policy Department A to the Committee on Employment and Social Affairs, explores responses by socio-economic and political actors at national and EU levels to such tensions. On the basis of the current Treaties and the CFREU, the constitutionally conditioned Internal Market emerges as a way to overcome the perception that social and labour rights limit Internal Market law. On this basis, alternative responses to perceived tensions are proposed, focused on posting of workers, furthering fair employment conditions through public procurement and enabling effective collective bargaining and industrial action in the Internal Market.

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ACAS Advisory, Conciliation and Arbitration Service (UK)

AG Advocate-General

AKT Auto- ja Kuljetusalan Työntekijäliitto ry (Finnish Transport Workers Union)

BA British Airways

BALPA British Air Line Pilots' Association

CEAR ILO Committee of Experts on Conventions and Recommendations

CEEP European Centre for Enterprise with Public Participation

CEOE Spanish Confederation of Employers' Organisations

CFREU Charter of the Fundamental Rights of the European Union

CIF Construction Industry Federation

CIMA Construction Industry Monitoring Agency

CJEU Court of Justice of the European Union

DJEI Department of Jobs, Enterprise and Innovation (Ireland)

DSP Department of Social Protection (Ireland)

ECB European Central Bank

ECHR European Convention on Human Rights 1950

ECtHR European Court of Human Rights

EEA European Economic Area

EEC European Economic Community

EMU Economic and Monetary Union

ERO Employment Registration Order

EuroCIETT European Confederation of Private Employment Services

ETUC European Trade Union Confederation

EU European Union

GP General Practitioner

HRC Habitual Residence Condition

IBEC The Irish Business and Employers Confederation

ICTU Irish Congress of Trade Unions

IFI International Fund for Ireland

IHCA Irish Hospital Consultants' Association

ILO International Labour Organisation

IMF International Monetary Fund

IMO Irish Medical Organisation

INCA Istituto Nazionale Confederale di Assistenza

INSS National Institute of Social Security (Spain)

IT Information Technology

ITF International Transport Workers' Federation

JLC Joint Labour Committee

LMIA Labour Mobility Initiative Association (Poland)

MoU Memorandum of Understanding

MRCI Migrant Rights Centre Ireland

MS Member State of the European Union

NGO Non-Governmental Organisation

NERA National Employment Rating Agency (Ireland)

PWD The Posting of Workers Directive (Directive 96/71/EC)

REA Registered Employment Agreements

SA ry Säjköalojen ammattillitto ry (The Trade Union – Finland)

SIP Stowarzyszenie Interwencji Prawnej (Association for Legal Intervention, Poland)

SNCB Special Non-Contributory Benefit

TEEU Technical Engineering and Electrical Union (Ireland)

TEU Treaty on European Union

TFEU	Treaty on the Functioning of the European Union
UGT	Unión General de Trabajadores (General Union of Workers – Spain)
UNI	UNI Global Union
UNICE	Union of Industrial and Employers' Confederations of Europe
UNIS	Union des Syndicats de L'Immobilier
US	United States of America
WTO	World Trade Organisation

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EXECUTIVE SUMMARY

Background

This research study aims to illustrate the relationship between EU social and labour rights and the law of the EU Internal Market, give a systematic overview of how any conflicts have been reconciled and suggest policy recommendations to the most relevant actors, including the European Parliament. Presently, new economic governance is the focus of academic and public debates on EU employment and social affairs, in particular considering the impact of instruments such as Country Specific Recommendations (CSR) and Memoranda of Understanding (MoU) on life in Member States. Nevertheless, the potential tension between the hard law of the EU single market and labour and social rights at national and EU levels remains relevant for shaping future policy in employment and social affairs. Such tension had become a symbol of the EU's alleged neo-liberalism even before the global economic crisis of 2008. More importantly, exaggeration of the tension seems to stall the options for politically shaping employment and social policy. It is this dilemma which this research study addresses.

Aim

- Illustrate how the relationship of EU social and labour rights and Internal Market law has been structured by the interplay of CJEU case law, EU Directives and national law and practice
- Identify conceptual frictions between social and labour rights and Internal Market law and investigate whether these are experienced as problematic at national and EU levels
- Identify responses to disruptions as they are perceived at national and EU levels
- Offering new ways of interpreting Internal Market law as constitutionally conditioned, as a guide for future case law and legislation, aiming to realign social and labour rights and Internal Market law
- Identifying options for addressing some of these frictions by a range of actions at EU and national levels

Main findings

The research report finds that the **traditional interpretation of EU Internal Market law causes a number of frictions for protection and promotion of social and labour rights**. These restrictions are felt by social and institutional actors at national and EU levels. The specific experience at national levels varies in relation to the levels of outward and inward flow of workers and service provision as well as in relation to the prevalent industrial relations model.

Trans-border movement of workers in the EU has come under critical scrutiny in many Member States. The original concept of the Internal Market envisaged that workers move for improving their situation under the condition of equal treatment in the state where they work. The interpretation and **specification of the economic freedoms** by EU legislators and the Court of Justice has **created avenues for subjecting workers moving abroad to precarious employment practices.** Because posted workers enjoy no right to be treated equally with workers in the host state, they frequently find themselves in low-waged work, in particular when moving as posted agency workers. These precarious employment practices are concentrated in certain occupations and sectors, rather than spread throughout the economy. As a result, even relatively small numbers of **incoming precarious workers may disrupt employment conditions locally**. Voluntary industrial relations models, and those based on collective agreements as private contracts, are more vulnerable to the negative effects of precarious movement of workers than those where employment conditions are regulated by statute, or where industrial relations structures were weak before the Internal Market had any impact. **Social actors react by re-configuring their industrial relations systems**. This may indicate a trend of EU industrial relation systems converging on the model of state-centred industrial re-

lations relying on the extension of collective agreements by administrative order on the basis of legislation.

At the same time, those employment relations systems which combine statutory protection with strong industrial relations systems prove more resilient in integrating free moving workers on the basis of equal treatment. **Equal treatment of citizens who move to work is a fundamental precondition for mobilising positive potential of guaranteeing free movement of workers**. Guaranteeing free movement of workers (and other persons) on the basis of equal treatment is a unique feature of the European Union as a regional integration entity, and precondition for the continued existence of its socio-economic model. Disrupting employment relation models which have been successful in guaranteeing this equal treatment in practice not only fails in the task to promote social and labour rights, but also fails the EU integration model.

These results of a series of expert interviews led to **revisiting the image of tension as the main guide of perceiving the relationship of EU social and labour rights and Internal Market law**. On the basis of the legally binding Charter of Fundamental Rights of the European Union, it is suggested to conceptualise the Internal Market as a constitutionally conditioned market. This means that Internal Market law (economic freedoms and competition law) is to be infused with social and labour rights instead of being juxtaposed to them. This **demands a new appreciation of conflicts, and a change in future case law**, allowing more courageous legislation and autonomous rule-making for promoting social and labour rights.

The report thus recommends three types of activities: One, activities that promote the concept of a constitutionally embedded Internal Market and provide a knowledge base for its implementation. **Second,** legislative activities at EU levels that correct such legislation that responded to case law based on the old concept of tensions between Internal Market law and social and labour rights. **Third,** activities by social actors, notably trade unions and employer associations, that specify EU level regulation for certain particularly vulnerable sectors, and by trade unions that combine forces transnationally to effectively enforce these and other rules. Examples developed focus around the issue of **ensuring equal treatment of people moving** for work (including posted workers and posted agency workers), **furthering fair employment conditions** through public procurement and **enabling effective collective bargaining and collective industrial action in the Internal Market**.

Legislative proposals **include suggestions for the intended reform of the Posted Workers Directive**, basing this instrument on the principle of equal treatment of workers instead of equal treatment of business, as well as proposals for adaptations of regulations coordinating social security and ensuring equal treatment of free moving workers, and legislation in the field of competition law.

Proposals for activities by social actors include responding to specific conditions of posting in certain sectors, in particular in relation to occupational social security schemes, through collective agreements, establishing procedures for informing citizens who move to work of their rights, and to integrate them in collective representation structures, as well as creating transnational bargaining structures for setting employment conditions in sectors that are so transnational that national collective bargaining becomes dysfunctional.

1. A GROWING TENSION?

KEY FINDINGS

The Treaty of Lisbon has elevated EU social and labour rights to the same normative level as the established law of the Internal Market. If these fields of law are perceived as juxtaposed to each other, the potential for tensions between those two bodies of law seems endless. Approaching social and labour rights on the one hand and Internal Market law on the other hand not as irreconcilable antonyms, but rather as equally valid elements of the EU socio-economic model may pave the way for rebalancing and reinterpreting their interrelation.

1.1. Introduction

EU level guarantees of social and labour rights on the one hand and EU Internal Market law on the other hand are frequently perceived as fundamentally opposed. However, the original **mission of the EEC**, and its development into **the aims and objectives of today's EU** contest this perception of conflict. The aim of creating a market common to all the Member States and their peoples was always **meant to serve wider aims, including social aims**. Accordingly, the EU socio-economic model does not juxtapose social and labour rights on the one hand and Internal Market law on the other hand. This report sets out to identify **innovative ways** at EU, national and subnational level **to respect, protect and promote social and labour rights while safeguarding Internal Market law**.[1] This chapter scopes the preconditions to achieve this aim and sets out the stages and method of the investigation undertaken. It starts with a recapitulation of how the EU's socio-economic model and underlying values have developed (1.2), clarifies the position which EU social and labour rights have achieved following the last Treaty revision (1.3), summarises the legal frame of the Internal Market (1.4) and a reflects on potential tensions between EU social and labour rights and Internal Market law (1.5). Finally it outlines how this study has been conducted, and how the report is structured (1.6).

1.2. The EU's socio-economic model from Rome to Lisbon and beyond

The EEC's founding Treaty, the Treaty of Rome, was based on the principle of **embedded liberalism**: it focused on economic integration, while leaving social policy to its Member States. The social dimension of European integration was not simply ignored. Article 2 EEC Treaty specified that establishing a common market was only an instrument to fulfil the Community's tasks, which included the **promotion of an accelerated raising of the standard of living**, while Article 117 EEC demanded improvement of working conditions and standards of living for workers, "so as to make possible their harmonization while the improvement is being maintained".

However, while the Treaty contained a **detailed legal framework for** establishing **the Common Market**, the **framework for the social dimension** was much more **flexible**. Thus, the Treaty provided for **hard law** to achieve the creation of the **Common Market**, in particular through abolishing custom duties and quantitative restrictions on free movement of goods, services and persons, while postponing the free movement of capital, and establishing an EU level competition law regime. By contrast, the **legal frame for "social policy"** bordered on the arbitrary. The relevant Treaty chapter specifically guaranteed equal pay for women and men and the equivalence of annual leave provisions, but did not contain any dedicated legal base for creating secondary law. Today's Article 48 TFEU, a competence to coordinate Member States' social insurance systems and legislate to facilitate the free movement of workers, was

[1] (Schiek, 2011); (Ashiagbor, 2013) pursues a similar approach, though from a more sceptical position as to whether the EU can achieve this.

located in the chapter on the Common Market. It provided a base for **market-annexed social policy**.[2] A comprehensive social policy at the European level was seen as superfluous. Instead, the Treaty fathers expected that the accelerated rising of living standards would flow naturally from introducing the Common Market.

In the late 1960s, economic recession and related social unrest all over Europe forced the EEC and its Member States to recognise that such automatism was misconceived. Moreover, it appeared that economic liberalisation would disrupt the Member States' ability to hold up the social side of the EEC's implicit integration model.[3] The EEC's reaction in the 1970s was to **legislate for a floor of employment rights** in the fields of transfers of undertakings, collective redundancies and employers' insolvencies,[4] which emerged in the wake of the crisis and were also accredited to the Common Market, as well as through directives securing the equal treatment of women and men in employment[5] and social security.[6] In the 1980s and 90s, this was followed by legislation on health and safety[7] and information and consultation of workers in a variety of circumstances.[8] Progressive Treaty reforms created and subsequently expanded explicit competences to legislate in the social policy field.

In the early 1990s, the **Treaty of Maastricht created Union citizenship**. Following the development of case law on the free movement of workers, this became a transmission belt for **the judicial creation of social rights** flowing from the European Community,[9] as the EEC would be named after the Treaty of Maastricht.

The gradual expansion of the Common Market's social dimension was paralleled by a consolidation of its core mission, economic integration. The 1985 "**Single European Act**"[10] was dedicated to complete the mission of erasing barriers of trading goods and services over borders alongside increasing the mobility of the EU population. The Single Market Programme constituted an impressive package of legislative proposals aiming to underpin the economic freedoms, and to make them more effective. In 1993, the Treaty of Maastricht established an **Economic and Monetary Union**. The **asymmetric nature**[11] of the EMU meant that a **binding legal framework for the common currency**, including disputed benchmarks[12] such as

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[2] (Schiek, 2013a, p. 41).
[3] (Ashiagbor, 2013, p. 308).
[4] Council Directive 77/187/EEC of 14 February 1977 (protecting acquired rights of employees on transfer of undertakings) [1977] OJ L61/26 (later consolidated in Council Directive 2001/23/EC of 12 March 2001 [2001] OJ L82/16); Council Directive 75/129/EEC of 17 February 1975 (protecting employees' rights to be consulted in the event of collective redundancies) [1975] OJ L48/29 (later amended and consolidated in Council Directive 98/59/EC of 20 July 1998 [1998] OJ L225/16–21); Council Directive 80/987/EEC of 20 October 1980 (protecting employees' rights in the event of an employer's insolvency) [1980] OJ L283/23 (subsequently amended and later consolidated in Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 [2008] OJ L283/36).
[5] Council Directive 75/117/EEC of 10 February 1975 (equal pay directive) [1975] OJ L45/19; Council Directive 76/207/EEC of 9 February 1976 (equal treatment directive) [1976] OJ L39/40 (each recast by Directive 2006/54/EC (equal opportunities and equal treatment of men and women in matters of employment and occupation) [2006] OJ L204/23).
[6] Council Directive 79/7/EEC of 19 December 1978 (equal treatment of men and women in matters of social security) [1979] OJ L6/24.
[7] Council Directive 89/391/EEC of 12 June 1989 (safety and health of workers at work) [1989] OJ L183/1 (subsequently amended); Council Directive 93/104/EC of 23 November 1993 (working time) [1993] OJ L307/18 (subsequently amended and later consolidated in Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 [2003] OJ L299/9); Council Directive 92/85/EEC of 19 October 1992 (safety and health at work of pregnant workers and workers who have recently given birth) [1992] OJ L348/1 (subsequently amended); Council Directive 94/33/EC of 22 June 1994 (protection of young people at work) [1994] OJ L216/12 (subsequently amended).
[8] Council Directive 94/45/EC of 22 September 1994 (European Works Councils) [1994] OJ L254/64 (subsequently amended and later consolidated in Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 [2009] OJ L122/28); Council Directive 2001/86/EC of 8 October 2001 (employee involvement in the European company) [2001] OJ L294/22; Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 (general framework of informing and consulting employees) [2002] OJ L80/29.
[9] (Lenaerts, 2011).
[10] Single European Act, 17 February 1986, OJ 1987 L 169/1.
[11] (Verdun, 2013).
[12] For a macroeconomic critique see (Sawyers, et al., 2013).

limits on government debt and commitments to budget stability at national levels, was accompanied by a mere **coordination of economic policy**, which remains the responsibility of Member States. The coordination of economic policy introduced new processes, initially based on the exclusive interaction of the Council and the Commission with national governments. Broad economic policy guidelines were adopted by the Council based on an initial Commission recommendation and information by national governments, with subsequent monitoring by the Commission. The Treaty of Amsterdam introduced similar, although less engaging principles for **employment policy (1997).**

This initiated the development of "**new governance**" processes.[13] In response to the global economic and resultant euro area crisis, the EU added "new economic governance".[14] These processes are based on goals that are not legally binding, but instead enforced through an elaborated surveillance process, which also impacted upon social and labour rights at national levels. While this study focuses on the legal branch of EU integration, and the directly effective law of the Internal Market, it is important to remember that the **coercive force of these formally soft-law mechanisms** may well outperform the law of the Internal Market.[15] Nevertheless, the legal frame of the Internal Market remains decisive for actively protecting and promoting social and labour rights, as will be shown throughout the report.

Overall, the **EU's socio-economic model**[16] is a **mixed** one: it is based on a market economy, but the economic integration of the regional market is undertaken for the purpose to improve working and living conditions of all citizens. Accordingly, **economic and social integration are invariably linked**. This is most apparent in the interaction between establishing economic policy guidelines and coordinating employment and other branches of social policy. However, the law of the Internal Market is also imbued with social purposes, and indeed values.

1.3. EU social and labour rights after the Treaty of Lisbon

The **Treaty of Lisbon**, in force from 2009, achieved a considerable consolidation of the EU´s socio-economic model, while also establishing a legally binding catalogue of fundamental rights for the European Union. Its **elaborated catalogue of the Union's values and objectives** (Articles 2, 3 TEU) stresses the Union's social commitments to a degree hitherto unknown, while the Charter of Fundamental Rights for the European Union (CFREU) strengthens these commitments through explicit guarantees of social and labour rights.

1.3.1. Values underpinning social and labour rights

According to **Article 2 TEU**, the Union is founded on an impressive **set of values**: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to a minority. Its second sentence states that "these values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". It is suggested that this does not allocate a second-order rank to values such as solidarity.[17] Instead, the EU's objectives, especially the socio-economic ones, clarify that **solidarity is actually at the heart of the EU's raison d'être**.

These objectives are now assembled in the 3rd and 4th paragraphs of **Article 3 TEU**, which, for the first time in the EU's history, **elevates the establishment of the Internal Market and an economic and monetary union to free standing aims**, strengthening the economic

[13] It is impossible to reference all the literature on new governance. The notion of reflexive governance was developed by a number of authors with different viewpoints, including (Barcevicius, et al., 2014; Sabel & Zeitlin, 2010; Schutter & Lenoble, 2010); critical approaches include (Armstrong, 2010; 2012; Daly, 2012)
[14] (De Sadeleer, 2014; Schiek, 2013a, pp. 10-11).
[15] (Schiek, 2013b).
[16] For more detail see (Schiek, 2013a).
[17] For more references see (Schiek, 2012a, pp. 219-220).

mission. Alongside this, **the EU aims at** sustainable development, based on a highly competitive **social market economy**, full employment and social progress. Next to aims which are familiar from predecessor Treaties (combatting social exclusion and discrimination and promoting gender equality), Article 3 (3) adds **social justice, social protection and solidarity between the generations as new Treaty aim**s. In particular, the EU's commitment to social justice clarifies that the EU itself pursues solidarity within its EU level social dimension.

The non-economic values of Article 2 and corresponding objectives of Article 3 feed into horizontal clauses of the Treaty on the Functioning of the European Union (TFEU). The **horizontal social clause in Article 9 TFEU** is particularly relevant, since it commits the EU to **mainstreaming the objectives of social protection, social inclusion** and of high levels of employment, education, training and human health into all other policy areas.

All this indicates that the Treaty of Lisbon, by strengthening social elements of the Treaties' values and the EU's objectives, related the EU's economic and social aims to each other. This is underlined by the TFEU: the Union's objectives have to be pursued in accordance with the principles of an open market economy and free competition (Article 119 TFEU) as well as by the 1961 ESC, the Community Charter of Fundamental Social Rights of Workers 1989 and the improvement of working and living conditions under the goal of upward harmonisation (Article 151 TFEU). **The EU is now premised on an integrated approach to economic and social politics, and pursues socio-economic integration as a holistic aim**.

1.3.2. Social and labour rights in the Charter of Fundamental Rights

Finally, **social and labour rights** are included in the **Charter of Fundamental Rights for the European Union (CFREU)**, which – from December 2009 - is legally binding and has the **same value as the Treaties** (Article 6 TEU). Social and labour rights are **mainly located in** its **chapter IV**, headed "solidarity", **and chapter III**, headed "equality". Chapter II, headed "Freedoms", also contains some rights of relevance to modern working life, such as the right to data protection (Article 8), freedom of assembly and association (Article 12) and the freedom to choose an occupation and the right to engage in work (Article 15). The inclusion of social and labour rights in the CFREU underlines their heightened relevance in EU law. It also is a decisive step for guaranteeing different categories of human rights alongside each other.

Among the different approaches of categorising human rights, those approaches based on the historical development of human rights have had the most appeal.[18] The first human rights to emerge served to protect liberty and property from state intrusion and pre-date democracy. These **liberal human rights** can be summarised as "the right to be left alone", and today also comprise data protection and other privacy rights. Human rights that arrived with democracy establish a public sphere in which citizens can discuss, publish, convene and protest in order to influence democratic life - these include freedom of assembly, freedom of speech and also the right to vote (**democratic human rights**). The expansion of the scope of democracy necessitated another set of human rights: giving the right to vote to paupers and other non-possessing classes can easily become a sham if they are unable to actually participate in democratic life due to the need to work for a living. **Social human rights** comprise the right to decent housing and protection from starvation, but they also permeate and change liberal and democratic human rights as well. For example, enabling public space by funding a free press and impartial broadcasting institutions, teaching literary skills in free schools, and holding votes on days where no-one has to work are ways to develop democratic rights, as are the protection of liberal rights such as rights to privacy and not being injured in private spheres such as the workplace and the family.

[18] This draws on (Schiek, 2012a, pp. 53-60; Schiek, 2015, pp. 3-4).

As analysed in more detail below (4.2.2), the Charter abandons artificial divisions between liberal, democratic and social rights. It thus constitutes a modern human rights catalogue: beyond only formally granting rights, it also aims at making rights effective for all.

1.3.3. Social and labour rights included in this study

For this study, **collective labour rights (Article 12, 28 CFREU), rights to fair working conditions (Article 31 CFREU) and rights to social security and social assistance (Article 34 CFREU) have been chosen for further investigation**. This choice rests on the assumption that these rights collectively constitute central elements of Member States social state arrangements[19] and indeed frame the working life of many citizens.

The **rights to collective bargaining**, establishing collective agreements and taking collective action to underpin the collective bargaining process can be considered as **constitutive of European labour models**.[20] In relation to this right it is important to acknowledge that it actually **straddles different categories of human rights**. On the one hand, the **freedom of assembly and association (Article 12 CFREU)** is a **liberal democratic right**. On the other hand, once this right includes the formation of trade unions, it becomes a **social democratic right**. Further, **Article 28 CFREU**, by guaranteeing **a right to collective bargaining and industrial action**, makes this democratic right more efficient. The right to threaten and execute collective industrial action can be utilised to achieve collective labour agreements offering better employment conditions than workers could achieve individually. Collective labour agreements remedy the structural imbalance of labour markets, which has also been referred to as the **fallacy of labour markets**: [21] because most workers do not have any alternative to earning their main income on the labour market, they will not withhold their labour once wages fall below a certain level. Instead, they will expand its supply, for example by taking on a second occupation or overtime. Thus, on labour markets the mechanism by which supply and demand establish an ideal price is dysfunctional, as long as workers do not bargain as a collective. Accordingly, even market economy ideologues support a system of collective bargaining.[22] Additional justifications rest on the conviction that securing humane working conditions through the self-determination of workers is to be preferred to protective state legislation, such as statutory minimum wages. Relating to self-determination, the **right to collective bargaining and industrial action also guarantees a process**: workers are empowered to negotiate from a position of substantive equality, instead of becoming passive recipients of statutory protection. Accordingly, the right to collective bargaining is infringed in its essence if the parties negotiating a collective agreement are subjected to a detailed control of the process, or if the content of the demands they may make is prescribed.

All this underlines the fact that the **liberal democratic right (guaranteed in Article 12 CFREU**) and the **social democratic right (Article 28 CFREU)** are only functional in their interaction. The right to found a trade union would be of little value if this trade union would not be able to effectively act for workers. The right to bargain for collective agreements underpinned by credible industrial action again is decisive for such effective action.

The **right to fair and just working conditions in Article 31** explicitly highlights working time and annual leave provision, though its substantive scope is all-encompassing: fair and just working conditions are to respect human dignity. The implied right to a decent working life ensures that those who cannot live off their wealth retain their health and their dignity, enabling them to remain citizens although subjected to the vicissitudes of working life. This does not only demand efficient health and safety rules, as suggested by the provision's text, but al-

[19] See (Schiek, 2001), paragraphs 56-76; (Schiek, 2012a, pp. 31-38).

[20] (Dukes, 2014).

[21] While these ideas have been around for a long time (Stützel, 1982), they can still be tested in current scenarios (see e.g. (Hickel, 2007) on minimum wages in Germany).

[22] (Kaufmann, 1989), with references to Adam Smith, Marshall and Pigou.

so adequate wages and a working environment allowing persons to exercise their own judgment as far as suitable, to name just two examples. The guarantee of fair and just working conditions is the purpose of the majority of norms governing employment relationships, whether these are established by legislation or collective agreements. As with the right to collective bargaining and industrial action, the right to fair and just employment conditions is mainly directed at employers as the other side of the employment market.

Rights to social security and social assistance (Article 34 CFREU) embrace two different policy fields.[23] Their inclusion in one Charter article illustrates that both serve a common aim. This aim consists of **providing sufficient and reliable income to citizens who are unable to secure sufficient resources for themselves**. Resources by which citizens can secure that they have sufficient means to maintain themselves can stem either from inherited wealth, their accumulated possessions or their labour. In post-industrial societies, none of those resources is ever secure, though market-dependent income derived from employed or self-employed labour is subjected to particularly severe risks. The multiplication of **risks in post-modern societies** as well as the wide diversity of national traditions in protecting and including citizens results in fluid boundaries between social security and social assistance on the one hand and the provision of social services and public goods on the other hand.[24] Through social security and social assistance states and the EU, in cooperation with private actors, **ensure coherent and prosperous societies and the social inclusion of all**.

Social security and social assistance are distinguished by the methods applied and the specific functions they serve: In short,[25] **social security** aims at protecting against specific risks through specific contributions, while **social assistance** aims more widely to provide the preconditions for including all into society, drawing on the general tax base.

The classical risks from which workers and self-employed persons are protected by **social security** comprise illness, old age or lack of employment opportunities; more recently acknowledged risks include pregnancy, the need to provide care to children, the elderly or the disabled and the need to be educated at different stages in life. **Health care** systems, **pensions** and **unemployment benefits**, **pregnancy** benefits, **care** benefits and **services** providing placement, **education** or care are meant to secure against those classical risks. In many Member States, social security is provided on a contributory basis, frequently through **social insurance institutions** which are independent from the general state budget and rely on contributions by employees and employers. Insurance against work place accidents and illnesses are often funded by employers only, since it insures them against the risk of liability in tort or contract. Other Member States provide social security independently from the employment market. Such general systems may also be funded through national insurance payments, which are not protected against being absorbed by the general state budget.

Social assistance, by contrast, is funded through the general tax base in all Member States, though private funding (through charity or religious communities) may complement state funded social assistance. Tax funding may play a role in providing social security as well. It may be used to complement social insurance for specific purposes, or to temporarily top up ailing branches of social insurance. Thus, there is a **sphere of overlap** between **social security** and **social assistance**.

Rights to social security and social assistance are inextricably linked to a market economy, though their provision is frequently seen as a **task for states**. This is particularly true for **social assistance**. Insurance-based social security is frequently, by contrast, offered in the

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[23] More detail on the distinction of those fields is provided under 2.4.1.

[24] See also (White, 2014, p. 929), marginal number 34:03, who declares that the differentiation between social security and social assistance is "far from clear".

[25] For a more complete coverage of the complex field see (Cantillon, et al., 2012; Maydell, et al., 2006; Pennings, 2015).

framework of the employment relationship. Accordingly, in many EU Member States **social security institutions** are established through **collective labour agreements** concluded between management and labour.

1.3.4. Relevance of legally binding social and labour rights

Guaranteeing social and labour rights in a legally binding way is an important step for the European Union. It **offers the potential of civilising the Internal Market** through constitutional embedding. Presently, the CFREU's practical role remains ambiguous.[26]

The Court has already referred to Article 28 CFREU, which guarantees a right to collective bargaining and collective action[27] in its case law.[28] It has stressed that Article 28 is only guaranteed within the limits of EU law, though it also suggested that it can be used to justify restrictions of economic freedoms.[29] The Court has not yet related Article 28 and Article 12 CFREU, which guarantees freedom of association,[30] to each other, **though both constitute a source of the right to bargain collectively and threaten collective industrial action**.[31]

The Court has cited Article 31 CFREU, which guarantees fair and just working conditions,[32] on several occasions in order to underpin rights to paid annual leave.[33] Article 34 CFREU on rights to social assistance and social security[34] is labelled as a mere principle in the Explanatory Notes,[35] and categorised accordingly in academic writing.[36] The CJEU has not yet relied on Article 34 CFREU either.[37] To date, **the effects of the enhanced values and objectives of the EU on the interpretation of the rest of the Treaties are equally unclear**.[38]

It remains to be seen whether the guarantee of EU social and labour rights and the enhanced social values and objectives of the EU will lead to a re-interpretation of the law of the Internal Market. Chapter 4 develops a normative frame for a constitutionally conditioned Internal Market as a guide for such re-interpretation in future case law and legislation.

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[26] The CJEU's president perceives as its main achievement the enhanced "transparency to fundamental rights protection" (Skouris, 2014), while others hope that it may grow into a "counterweight to the neo-liberal orientation of the Treaties". (Barnard, 2012, p. 33).

[27] See above page 17 - 18.

[28] Case C-271/08 *COM v Germany* [2010] E.C.R. I-7087, paragraph 38. There is some more recent case law referring to Article 28 Charter, but not in relation to non-discriminatory restrictions of economic freedoms. Instead, these cases concern bans on discrimination resulting from directives (e.g. Case C-447/09 *Prigge et al* [2011] ECR I-8003, paragraph 47) or free movement of workers (e.g Case C-172/11 *Erny* ECLI:EU:C:2012:399, paragraph 50).

[29] Case C-271/08, as in footnote 27.

[30] See above page 18.

[31] For a more detailed critique of this, see below under 4.2.3.

[32] See above page 18.

[33] Case C-229/11 *Heimann & Toltschin* ECLI:EU:C:2012:693; Case C-536/12 *Lock* ECLI:EU:C:2014:351; paragraph 14; Case C-396/13 *Sähköalojen ammattiliitto ry [Elektrobudowa]* ECLI:EU:C:2015:86, paragraph 64-67. In the *Fenoll* case, the Court did not find it necessary to rely on the horizontal effect of Article 31 in order to establish that a person in an institution offering occupations for mentally disabled persons is a worker for the purposes of the Working Time Directive (Case C-316/13 *Fenoll* ECLI:EU:C:2015:200, paragraphs 43-47).

[34] See above page 18.

[35] Explanations (*) Relating to the Charter of Fundamental Rights, OJ 2007 C 303/02: 27.

[36] See (White, 2014, pp. 936-937), 34.39, (Reynolds, 2015).

[37] So far, the Court did not find it necessary to refer to Article 34 Charter (Case C-647/13 *Melchior* ECLI:EU:C:2015:54, following AG Mengozzi's opinion - ECLI:EU:C:2014:2301, Rn 56-58, on eligibility for unemployment benefit on the basis of employment with the European Commission). A further reference question on Article 3 (4) TEU in conjunction with Article 34 CFREU on accounting for periods of employment with the EU institutions for national pensions is pending before the Court (Case C-408/14 *Aliny Wojciechowski v ONEM*, referred by the Brussels Labour Tribunal). AG Mengozzi's opinion of 10 June 2015 (ECLI:EU:C:2015:339) rejects the unequal treatment relying on Article 45 TFEU in conjunction with Article 3 (4) TEU, instead of relying on Article 34 CFREU.

[38] Again, whether these can have any effects is disputed. For example, Larik doubts whether this can be the case (Larik, 2014), while Schiek bases the demand on the EU to accept societal governance on these new values (Schiek, 2012a, pp. 215-243; Schiek, 2013b) and Hendrickx views these values as the adequate basis for a "labour law for the United States of Europe" (Hendrickx, 2013).

1.4. EU Internal Market law: economic freedoms and competition rules

1.4.1. A holistic concept of the Internal Market

The EU Internal Market, originally known as Common Market, has been at the heart of EU integration for a long time – though never for its own sake, but always with the aim of approximating working and living conditions while simultaneously improving them (Article 117 EEC, 151 TFEU). Article 26 paragraph 2 TFEU defines the Internal Market as an area without frontiers where goods, persons, services and capital circulate freely, highlighting the central position of the four economic freedoms for realising the Internal Market.

As regards EU competition law, Protocol No 27 to the Treaty of Lisbon clarifies that "the Internal Market as set out in Article 3 (TEU) includes a system ensuring that competition is not distorted". This phrasing leaves no doubt that the EU competition rules **are of a "vital nature" for the establishment of an Internal Market**.[39]

1.4.2. Economic freedoms

The economic freedoms comprise **free trade** (free movement of goods and services) as well as **factor mobility** (free movement of persons, comprising workers and self-employed persons as well as service recipients, and capital). The provisions with the highest degree of practical relevance are the bans on restrictions of imports and exports of goods (mainly Articles 34-35 TFEU), of the free movement of workers abroad and back (Articles 45 seq TFEU), of the establishment of self-employed natural persons or companies abroad (Articles 49 seq TFEU) and of the provision or the acquisition of a service across a border (Article 56 TFEU seq). Restrictions on the free movement of capital, including shares of companies, (Articles 49 and 54, 63 TFEU seq), have been less relevant in recent years.

The **economic freedoms** have mainly been developed by the case law of the Court of Justice. In the 1960s, the Court developed the **principles of direct effect and primacy of EU law** in cases based on the free movement of goods, expanding these to all economic freedoms. They were thus **transformed into** a set of "**individual liberties for transnational economic actors**".[40] Any transnational actor (whether economic or not) can rely on these Treaty norms in order to challenge national policy or also EU policy. Further, the economic freedoms were interpreted in the widest possible way: they not only ban discrimination, but also demand unlimited market access for all who can demonstrate transnational activity. **They became prohibitions to restrict cross-border trade** with foreign goods and services **and cross-border movement of** foreign **persons**, including foreign **companies**. Any national rule can be challenged if it has the potential to adversely affect intra-Union trade or make cross-border services or movement less attractive than inner-national economic activity.

Such a **challenge can be rebutted** by the **Member States**, who are under a duty to justify **any** rules hindering market access. Discriminatory rules can only be justified with reference to explicit Treaty norms. However, **non-discriminatory restrictions can be justified** by reference to any goal supported by a general interest, provided the national rule is proportionate.[41] This also means that the Member States are competent to safeguard the general values of the European Union**, including EU Social and Labour Rights**. Thus as long as the EU has not

[39] Case C-469/09 *COM v Italy* [2011] E.C.R I-11483, paragraph 60. Before the Treaty of Lisbon, Article 3 (1) c EC made a "system ensuring that competition in the Internal Market is not distorted" one of the Communities policies. The relegation of the same principle, in stronger wording, to a Protocol – which has the same value of the Treaty according to Article 52 TEU, could not reduce the strength of the acclamation.

[40] (Schiek, 2012a, p. 81).

[41] For a slightly longer summary see (Schiek, 2012a, pp. 83-86), full coverage can be found in any textbook on EU law.

legislated, Member States must be given sufficient scope to fill their role as guardian of these rights.[42]

The Court has further extended the **reach of the economic freedoms** by **acknowledging their horizontal effect, with the exception of the free movement of goods**.[43] Mainly, such horizontal effect only affects associations and other regulators, which also must avoid non-discriminatory restrictions. As states can rely on **a wide range of imperative mandates to justify non-discriminatory restrictions**, those associations and regulators bound by economic freedoms, but without being state entities, have been allowed to refer to a similarly wide range of justifications. For example in the *Bosman* case the Court has acknowledged that sports associations can use the general interest of enabling the training of young players.[44] A similarly wide scope for justifying restrictions should also apply, for example, to partners of **collective bargaining agreements**. As regards individual actors, the Court has so far only ever acknowledged the horizontal effect of the ban on discrimination.[45] In those instances both states and individual actors can only rely on Treaty provisions anyway. However, if bound by economic freedoms individual actors should be able to invoke public security, public health and public policy in the same way that state actors can.

1.4.3. Specifically: free movement of workers and equal treatment

The guarantee of free movement of persons distinguishes the EU concept of regional economic integration from other similar endeavours around the globe. Other regional agreements, the WTO and the EU's agreements with other economic blocs do not include factor mobility next to free trade. As a consequence, free movement of persons is only provided for as an annex to free movement of services. Granting persons **an independent right to move freely creates an inextricable link between the Internal Market and societies**, or, as the Court puts it, promotes the 'economic and social interpenetration' of the European Union.[46] **Guaranteeing free movement** of persons independently from any employer providing a service, the EU allows its citizens to **counter the negative effects of free trade.** Free trade serves to integrate product markets, which again will lead to moving production sites to those locations with the best competitive advantage. For example, economic actors producing goods and services requiring a highly capitalised and technologically advanced economy will move to regions where such conditions prevail. Economic actors producing goods requiring a sunny climate will move to such regions, and those requiring large labour forces will move where there is an overflow of labour. Those dynamics will lead to industries and service sectors closing down in regions which do not offer ideal conditions, and to expansion in other regions. In guaranteeing the free movement of persons, in particular workers, the EU allows those affected by consequent unemployment to react independently. The fact that only a minority of the population uses this opportunity[47] does not diminish its conceptual relevance.

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[42] More detail on this in (Schiek, 2008, pp. 45-49).

[43] Case 36/74 *Walrave* [1974] E.C.R 1405, paragraph 18; Case C-415/93 *Bosman* [1995] E.C.R I-4921 Paragraphs 82-84. This position was modified by the *Fra.bo* case (C-171/11 ECLI:EU:C:2012:453), where the Court held that a private law body in Germany which established technical standards in the field of drinking water was bound by Article 34. However, the standard setting powers had been vested in the private law body by state legislation, and could thus be attributed to the state (paragraphs 31-34). Accordingly, Article 34 TFEU still has no horizontal effect, but it applies to private actors which Member States entrust with the standardization of technical equipment (van Gestel & Micklitz, 2013, pp. 158-159).

[44] Case C-415/93 *Bosman* [1995] E.C.R. I-04921.

[45] Case C-281/98 *Angonese* [2000] E.C.R I-4139, for free movement of workers.

[46] The *Manpower* case, relating to the social security regulation (now: Regulation 883/2004) and its relevance for workers hired out across a border, first used this phrase in connection to free movement of workers (Case C-35/70 *Manpower* [1970] E.C.R. 1251, paragraph 10).

[47] See more details on migration statistics in chapter 5.2.1, and Annex I.

Free movement of workers consists of two elements: the guarantee of movement as such,[48] but also the right to equal treatment at the place of work and in relation to social advantages and taxes in the state where migrant workers move to. While the migration rights are frequently the focus of discussions of free movement of workers, **equal treatment rights are more relevant for protecting social and labour rights,** both of the free movers themselves and those who remain in their state of origin. Without the right to equal treatment, migrant labour and self-employed individuals will often have to compete by price. Given the paradoxes of the labour market specified above,[49] a downward spiral of wage levels and other social conditions would be a likely consequence of free movement unprotected by equal treatment.[50] Thus, the **right to access labour markets under the condition of equal treatment** and its effective enforcement **is fundamental for** maintaining **the EU socio-economic model, which** places citizens and **the improvement of** their **working and living conditions** at its centre.

Nevertheless, workers' **equal treatment rights** are **not appreciated unequivocally**. Magnette has argued that the equal treatment principle, applied to the labour market, deprives Member States of the opportunity to shed their superfluous labour.[51] More recently, Kukovec and Leczykiewicz emphasise that the insistence on equal treatment of free moving workers deprives workers from post 2004 Member States of the advantages of the EU Internal Market.[52] Their main argument is that without downward pressure on wages, labour markets in the West will not be sufficiently elastic to offer those workers any realistic chance to move.

These arguments **chime with supply-side led approaches to macro-economics**: in this view, the success of an economy depends on the best conditions for those who supply goods and services; and lowering the price of labour is the answer to unemployment (**orthodox approaches**). These teachings are **contradicted by researchers who find that the success of an economy depends on demand**, i.e. the capacity to sell goods and services: if those who supply goods and services cannot sell, their business will decline. From this perspective, the demand or purchase power in any economy is the main factor for its success (**heterodox approaches**, connected to the teachings of Sir Maynard Keynes). Both approaches come to different conclusions in relation to the interface of free trade, factor mobility and social conditions. While the space of this study does not allow anything close to full coverage, it is instructive to sketch the main arguments.[53]

Supply-side led economic policy is based on the belief that free trade will not initiate a downward spiral of social conditions, based on the **theory of comparative advantage**, established in the 17th and 18th century. According to this theory, different levels of wages and employment conditions in different countries are based on the different levels of efficiency of the work force: in highly capitalised economies with well educated workers, labour productivity is higher

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[48] Consisting of the right to leave one's own country, enter another country and remain there in order to find work and to engage in work, and to leave that other country in order to return to one's own country.

[49] See text at footnote 21.

[50] See for an economic explanation, from traditional perspectives, (Ruhs, 2014).

[51] "To equalise the salaries and the social rights of all workers meant depriving migrant workers from their main economic advantage, their lower cost.", referring to granting free movement rights to Italian workers in 1958 as a way to allow Italy "to export its surplus labour" (Magnette, 2007, p. 672).

[52] (Kukovec, 2014) suggests that on the one hand producers from former capitalist states rid themselves from worthless products, while the trade unions of the same Member States only pursue the objective of barring workers from other Member States from the Western meat troughs, while (Leczykiewicz, 2014) goes as far as demanding that Member States must be allowed to undercut each other's labour standards, as this is "by no means the only weapon in this battle", and highlights the advantages of Western countries in terms of access to technology, capital or resources. As a consequence she believes that only "free movement rights of employers" will translate "into benefits for workers". While the exact phrasing seems to overlook that in a market economy labour standards are not usually set by the state, but by labour markets instead, it is safe to assume that she too demands that workers from Eastern Member States should be safeguarded in their desire to undercut wages which have been collectively agreed on the basis of long and arduous labour disputes in Western Member States.

[53] Orthodoxy is represented by (Flanagan, 2006) heterodoxy by (Vercherand, 2014).

than in countries with less capital and less qualified labour. The higher wages in the first group of countries mirror this higher level of efficiency. **Free trade is** then expected to push the production of goods and services requiring much unskilled labour to less developed economies, while **complex goods and services** requiring highly capitalised companies and highly skilled workforces **will be produced in highly developed economies**. The theory **expects that the wages will decline**, especially for unskilled labour. This is not perceived as a problem,[54] because for this line of research the hypothetical long-term effects are all that matters. They are immune to falsification by empirically proven short term developments.

Heterodoxy, on which **demand-side led economic policy** is based, stresses the need to maintain demand for what is produced. Since **increasing wages is a precondition for the demand** to develop, these researchers suggest that **free trade will only be beneficial** under certain conditions. While not promoting uncritical protectionism, heterodox labour market theory demands that opening markets for trade in goods and services must **be accompanied by politics supporting high levels of wages and healthy labour conditions as well as monetary politics to ensure the adequate distribution of income**. Under these assumptions, basing an Internal Market on undercutting wages and labour conditions by having free moving workers treated unequally is a way to destroy economic success. **Heterodoxy can support the EU's model of regional integration, which is based on the free movement of labour on the basis of equal treatment**. Also the goal of progressively improving working and living conditions chimes with demand-led economic policy. Further on, heterodox theory provides the tools for embedding the EU socio-economic model into a successful global model.

Putting equal treatment at the centre of the free movement of workers thus not only corresponds to the Treaty's demands, but also **helps prevent the downward spirals of wages and employment conditions** which may lead to contraction of Europe's economies. Assuming that workers will usually move to better pastures, equal treatment rights afford them a higher levels of wages and better employment conditions. Equal treatment does not, however, establish a safeguard against being exposed to unsatisfactory employment conditions if these prevail in host countries.

Accordingly, off-the-cuff **claims that free moving workers must be allowed (if not required) to undercut collectively agreed wages is economically ill informed**. Such strategies may well lead to a general decline in wages, with resulting contraction of the European economy. At the very least, they will create the same hotbed for xenophobia which emerged in pre World-War 2 Europe – one of the purposes of founding the EEC was to avoid its reoccurrence.

Workers using their rights to free movement can also claim equal treatment beyond the employment relationship, in particular as regards social security and social assistance. This dimension of equal treatment ensures that migrants cannot be abused in order to challenge the accepted social minimum in their host country: if they were excluded from social advantages, they would be more liable to accept less advantageous employment conditions than the population in the host state in order to get by. **Equal treatment of migrants** in relation to social security and social assistance **is thus necessary in order to avoid pressure on existing levels of social security and social assistance provision, as well as on wages.**

If a sizeable proportion of migrants working in high wage Member States **is not fully protected by the equal treatment principle, downward pressure on working and living conditions** in those countries **may well occur**. This danger is not only created by EU free movers. Actually, the percentage of non EU migrants in most of the high wage Member States

[54] (Flanagan, 2006, p. 62).

is higher than that of EU migrants – with Ireland constituting a notable exception.[55] Thus, equal treatment of non-EU migrant in relation to employment and social advantages is equally important - though not the subject of this report**. Migrants, whether free movers or not, who cannot rely on the same level of social security and social assistance as the resident population are more easily pushed into employment that is low – waged or precarious in other ways**. These factors add to the vulnerability of some migrants stemming from lack of familiarity with the host country as well as language barriers, thus **undermining the conditions for the resident population as well as the socio-economic terms of free movement**.

In spite of all this, some governments consider **equal treatment of EU free movers in the fields of social security and social assistance as too demanding.** They feel under pressure by anti-immigration politicians to appear tough on alleged "welfare tourism", and demand restrictions of equal treatment rights which free moving workers undoubtedly have under EU law. Recent case law by the Court of Justice may be interpreted as supporting such demands.[56] Such ambiguous case law, which discontinues the support for equal treatment of free movers provided by former constellations of the Court, obviously has serious drawbacks. It legitimises national policies limiting migrant workers' equal access to social advantages in their host countries, and clashes with established principles of free movement law. If these policies prevail, they may deprive legislative efforts such as the recent Directive on enforcing free movement of workers of their positive effects.

1.4.4. Competition rules

The **competition rules comprise principled prohibition of cartels** (Article 101 TFEU), **abuse of dominant market positions** (Article 102 TFEU) and **state aid** (Article 107). Just as the economic freedoms can only be relied upon by those engaging in transnational activity, the competition rules only apply to actions which have an effect on competition in the Internal Market. In addition, the prohibition of cartels and state aid are further limited by express derogations (Article 101 (3) and Articles 107, 108). These derogations are limited to specific aspects: Under Article 101 (3) efficiency gains which also benefit consumers may justify cartels. This poses the question of how far economic actors can rely on EU social and labour rights in order to defend themselves against the allegation of engaging in a cartel or the abuse of a dominant market position. As regards Member States' actions, Article 106 TFEU[57] restricts the scope of application of the Treaty to **public undertakings and undertakings entrusted with the operation of services of general interest.** It thus offers Member States a justification for not applying competition law if this compromises the service of general interest. Again, it is not apparent whether Member States may also take other actions which may be interpreted as conflicting with the competition rules in order to promote social and labour rights. While the competition rules explicitly bind private actors only, the Court has expanded their scope by holding Member States bound by those rules via a combination of what are today Article 4 (3) TEU and Articles 101, 102 TFEU.[58]

1.4.5. Approximation of economic freedoms and competition rules

As construed in the Court's case law, **the scope of the application of competition rules and economic freedoms overlap**: while economic freedoms were originally addressed to states only, they may also bind private associations, and while competition rules were originally addressed to private actors (undertakings and their associations) only, they also bind Mem-

[55] See Annex 1.
[56] This case law is related in more detail under 2.4.4 and 2.4.5 (pages 54 - 59).
[57] This provision nominally applies to all Treaty rules, although its practical relevance is limited to competition rules.
[58] First held in Case C-311/85 *Vlaamse Reisbureaus* [1987] E.C.R 3801, paragraph 3, confirmed in Case C-96/94 *Centro Serviczi Spediporto* [1995] E.C.R I-2883, paragraph 20.

ber States. The **justification regime for the economic freedoms** is adapted to justifications typical for democratic legislators, and the justification regime included in the competition rules, in particular Article 101 (3), is traditionally interpreted as prioritising market efficiency.

If these justification regimes had remained as they originally were, a strict division between competition law and free movement would have to be maintained: competition law would only bind market actors, and free movement rules would only bind state actors.[59] **If the *effet utile* of both the economic freedoms and the competition rules is to be enhanced by applying the former to private economic and social actors and the latter to states, the justification regime must also move**. It must allow market and societal actors to rely on what used to be called "public policy justification" both for restricting economic freedoms and to conclude agreements or take other actions that may impact on liberal notions of competition. Moreover, just as Member States are granted a margin of appreciation if they restrict economic freedoms in order to safeguard human rights, social actors should also be granted a margin of appreciation in assessing the proportionality of their actions if they can rely on human rights for their activities and thus promote human rights.

1.5. EU social and labour rights and Internal Market Law

1.5.1. Contradictory interrelations

Social and labour rights and the law of the Internal Market are not always mutually exclusive. The guarantee of **free movement of workers**, as mentioned, **includes the equal treatment of** those workers who move in their host state. For the (prospective) employer, free moving workers can demand equal access to vacancies and promotions as well as equal working conditions, including in relation to occupational social benefits. They can also claim equal treatment from their host state as regards social and tax advantages. **Equal treatment does not, in itself, guarantee a sufficient level of entitlements**: treating workers equally badly is sufficient to comply with the principle. **Only in so far as people move for the better, does the free movement of workers reinforce social and labour rights**, and is in turn reinforced by social and labour rights.

Freedom to provide services and freedom of establishment, on the other hand, constitute **rights for** those conducting a **business**. The notion of "rights" may be confusing in this regard, since most businesses are not owned by natural persons, but by corporations and other legal entities. Often the day-to-day business is run by employed managers, while the legal ownership is distributed across a multitude of share-holders. Depending on the volume of their share ownership, share-holders may only have a factional interest in the business. **Granting rights to corporations will thus not empower individuals**. However, freedom of establishment and freedom to provide services may also be used by **small-scale entrepreneurs,** whose situation does **not fundamentally differ from** that **of workers**. In order not to overly complicate this report, this specific category of entrepreneurs is not addressed specifically. Instead, we shall refer to the rights of business subsequently if we refer to the freedom to provide services and the freedom of establishment by companies.

Competition rules, while partly characterised as the "purest element of the free market ideology",[60] are actually a double-edged sword for business. The prohibition on abusing a dominant market position aims at hindering large corporate actors from crushing smaller entrepreneurs. The prohibition of cartels, by promoting the reign of anonymous market powers, limits the scope for the conscious structuring of markets for large corporations. However, it also restricts

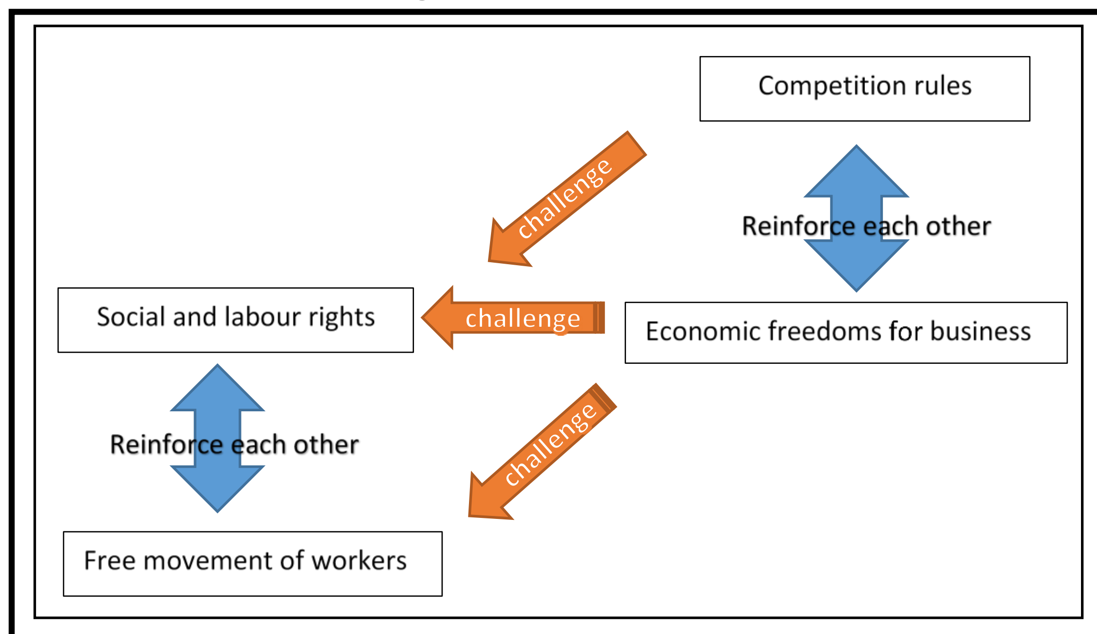
[59] This is the main argument of (Baquero Cruz, 2002) for maintaining brighter lines between free movement rights (applied to states) and competition rules (applied to private actors) as a precondition to maintain compatibility of the Internal Market with national democracies.

[60] (Ward, 2009, p. 129).

economic entities mainly motivated by aims other than profit maximisation in any endeavour to civilise or even socialise markets.[61]

There are also potential conflicts of interests between entrepreneurs and their employees. This implies that there will also be tensions between rights of business derived from the Internal Market and rights of employees derived from the Internal Market. As this report will expose, employers' freedom to provide services and to change their place of establishment frequently are construed in such a way that they conflict with equal treatment rights of workers moving to other Member States, as well as with rights to fair and just working conditions for all workers.

Figure 1: EU Social and Labour Rights and Internal Market Law



1.5.2. Economic freedoms for business and social and labour rights

From 2000[62] and increasingly from 2007, after the so-called "*Laval* quartet",[63] academic critique has focused on the tensions between social and labour rights on the one hand and economic freedoms and competition rules on the other hand.[64] As developed above,[65] Member States are the guardians of EU social and labour rights in the absence of EU legislation. Accordingly, tensions between social and labour rights and Internal Market law frequently appear as tensions between national policies and EU law. This has led **many authors to demand that Member States should have more scope** for protecting social and labour rights by restricting economic freedoms. Such demands are made from different conceptual angels. For example, Majone argues that the EU should refrain from any redistributive social policies and

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[61] It may even affect efficiency enhancing co-operations, which is the reason why it is not unconditional (Article 101 (3) TFEU).

[62] Some examples of early warning voices include (Scharpf, 2002; Streeck, 1997).

[63] The term 'Laval quartet' refers to four rulings of the Court which related to posted workers and protection of wages under national collective agreements and/or legislation (Case C-341/05 *Laval* [2007] E.C.R I-11767; Case C-438/*05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti (referred to as Viking subsequently)* [2007] E.C.R I-10779, Case C-346/06 *Rüffert* [2008] E.C.R I-01989 and Case C-319/06 *Commission v. Luxembourg* [2008] E.C.R I-04323). The expansive academic debate of these rulings is beyond any single footnote. It continues in academic journals (Barnard & Deakin, 2011; Daly, 2012; Rönnmar, 2010; Supiot, 2013) and has given rise to some dedicated edited collections, including (Bücker & Warneck, 2010; Freedland & Prassl, 2015).

[64] For an attempt to develop ways for reconciling economic and social constitutionalism see (Schiek, et al., 2011); for an argumentation in favour of more interpenetration of labour law and competition law at EU levels see (Driguez, 2006).

[65] See page 22.

instead focus on promoting free markets, based on the conviction that social policy can be maintained by Member States against regulatory competition, which will never lead to a race to the bottom,[66] while Everson and Joerges promote national autonomy in social policy through giving up the direct effect of economic freedoms and related regulatory competition.[67]

This **limited perspective** attracts a two-pronged critique. On the one hand, "reverse ordo-liberalism"[68] **must be rejected because relegating social policy to Member States and the promotion of markets to the EU does not work**. In particular, Member States whose economies are not export-oriented, rarely amass sufficient funds to maintain redistributive social policies sufficiently generous to counter the impact of market integration.[69] On the other hand, this limited concept **neglects the potential of EU level regulation** as well as the negative impact on the EU legislator resulting from restrictive case law on economic freedoms and competition law.

1.5.3. Relevance of tensions for regulatory actors (EU and national level)

The importance of reflecting on potential tensions between business rights guaranteed by Internal Market law and social and labour rights is underlined by those considerations. The **legal responses to those tensions are decisive for the scope left for regulative actors at EU and national levels to bring social and labour rights to life**. These regulatory actors include legislators at national and EU levels as well as non-state actors. Among those non-state actors, management and labour as well as social insurance institutions are of specific relevance. Management and labour create collective agreements, which may determine employment conditions and also create social insurance institutions. Social insurance institutions, in most Member States, have some regulatory capacity for creating byelaws. These may lay down details on how benefits are distributed, or contain more fundamental rules, establishing policies on how to promote health or bring unemployed people into work, for example.

In practice, **EU Internal Market Law** is most **frequently used in order to challenge national (social) policy**,[70] including autonomous rules, occasionally also in order to **challenge transnational trade union action**.[71] National legislation is frequently classified as hindering market access due to the fact that business finds it difficult to cope with 28 different sets of rules. The creation of harmonising legislation, as far as the EU is competent, has the potential to overcome this. EU level rules can thus go further in protecting and promoting social and labour rights than national level rules. The **EU legislator** frequently **creates common EU level standards for such social and labour rights** which have been accepted as justified restrictions of economic freedoms by national legislation.

The Court's **adjudication of** these **directives will frequently bring the Treaty freedoms back in**. For example, a directive may not cover a certain aspect, because the EU legislator considered that the matter should remain within the Member States' regulatory autonomy. The Court will state that Member States remain bound by the relevant economic freedom, using loopholes in legislation as a basis for judiciary guidelines for future legislation.[72] Legislation in the social policy fields frequently only sets minimum standards, corresponding to the need to

[66] (Majone, 2014).
[67] (Everson & Joerges, 2012).
[68] A term coined by Stefano Giubboni (2010, p. 254).
[69] Giubboni, ibid, and (Schiek, 2012a, pp. 230-233).
[70] For a numerical analysis of Grand Chamber judgments from 2004-2012 see (Schiek, 2012a, pp. 113-214).
[71] E.g. in the widely debated cases Case C-341/05 *Laval* and Case C-483/05 *Viking* (above footnote 63).
[72] See for an example from the field of public procurement (Caranta, 2015, pp. 409-414), using the illustrative phrase of a "pro-integration duo performing magic" in describing the collusion between the Court and the Commission. Of course, as Caranta acknowledges, the Court may also collude with the European Parliament or indeed European societies in convincing the Commission that the Internal Market is not an aim in itself (p 414-415, headed "institutional drama or of where the ECJ nurtured sustainable procurement, helping the Parliament (…) break the resistance of the Commission").

allow gradual implementation, and generally gives scope for upwardly spiralling improvements to social conditions. While this is allured to in Article 153 (2) (b) TFEU, the social progress clause already contained in the Treaty (Article 9 TFEU) requires that the principle is applied more widely. **If a directive leaves room for manoeuvre, the Court of Justice will consider that the economic freedoms at the base of the legislation apply in addition to the directives**. This **harbours the danger that legislative innovation is rendered ineffective**, should the Court announce that Member States or social partners may not use the scope left by the legislator to improve social conditions.

The Posted Workers Directive,[73] obliging Member States to guarantee some basic employment rights to posted workers, and the directives on public procurement,[74] which have recently been revised in favour of a wider range of social criteria, both constitute examples of balancing the freedom to provide services with social justice in this way. They allow Member States to go over and above what is required, and open up space to further social justice beyond the letter of the directive.

Such **legislation** is particularly relevant to the subject of this study in that it **contributes to respecting, protecting and promoting EU social and labour rights**. **Recent case law** gives rise to concern if it **limits the EU legislator's regulatory autonomy through judicial re-interpretation of directives** relying on the economic freedoms. In chapter 2, reinterpretations of the Posted Workers Directive and of the former Public Procurement Directives will be considered as an additional layer of limitation of EU social and labour rights. The responses of EU level and national actors, related in chapter 3 underline that the case law will often frustrate the original social aims of the legislation. This demonstrates the need to interpret EU Internal Market law as constitutionally conditioned by social and labour rights, as developed in chapter 4. Such an interpretation will be a condition for future rule-making at EU and national level to contribute to protecting and promoting EU social and labour rights in the Internal Market.

1.6. How the investigation has been conducted and how the report is structured

This research report pursues three aims:

First, it aims to illustrate how the interrelation of social and labour rights and EU Internal Market law is structured, establishing where there are conflicts and where social and labour rights reinforce Internal Market law.

Second, the report aims to establish how societal and political actors respond to the dynamic interaction between social and labour rights and Internal Market law through a comparative study of four Member States and the EU level.

Finally, the report aims to identify ways in which the EU Treaties' normative demands to respect, protect and promote EU social and labour rights can be reconciled with the traditional, and potentially outdated, views of EU Internal Market law.

The study's aims are thus normative and analytical at the same time. They are achieved through an interdisciplinary methodology, based on the cooperation of legal scholars and in-

[73] Directive 96/71 was arguably based on a dual motive. On the one hand, the Court had accepted in a series of cases that Member States could require service providers who employ workers demand that they work on the territory of another Member State to comply with some provisions protecting those workers (for example Case C-272/94 *Guiot* [1996] E.C.R I-1905, no requirement to pay into two different social insurances protecting builders against the risk to remain unemployed in *Summe*.369/ and 379/96 *Arblade* et al [1999] E.C.R. Further, the directive was created on the eve of Eastern Enlargement, and possibly already influenced by the perceived threat on local markets (Davies, 1997).

[74] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65, Directive 2014/25 of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L94/243.

dustrial relations experts. The **second chapter** of the study is guided by an analysis of case law from the Court of Justice, exposing how a traditional view of the interrelation between Internal Market law and social and labour rights highlights tensions between rights for business and social and labour rights. The **third chapter** presents the findings of 44 expert interviews exploring the question of how trade unions, employer associations and governmental actors in four Member States and at EU level perceive of and react to those tensions. **Chapter four** develops a normative perspective based on the elevated position of social and labour rights. **Chapter five** synthesises the findings of chapter three and the normative model developed in chapter four, identifying potential responses at different levels.

2. SELECTED SOCIAL AND LABOUR RIGHTS AND EU INTERNAL MARKET LAW

KEY FINDINGS

There are a number of perceived tensions between the law of the Internal Market and social and labour rights, which have been hotly disputed in recent years. From 2007, restrictions on collective bargaining and supporting industrial action emanating from economic freedoms and competition law have been at the centre of discussions in northern and western EU Member States. More recently, alleged conflicts between the free movement of workers and national systems of social security and social assistance are being aired by politicians from a number of Member States. The last two points demonstrate that there are not only tensions between social and labour rights on the one hand and economic freedoms and competition rules on the other, but that tensions also exist between different economic freedoms. This is based on the fact that the free movement of workers as an economic freedom reinforces social and labour rights in so far as it demands the equal treatment of free moving workers in the host state.

2.1. Introduction

As has become apparent, the interrelation between EU Internal Market law and social and labour rights is complex. However, the perception of this interrelation is less complex: the main perception is one of conflict, spurred by partly spectacular cases before the Court of Justice concerning **perceived tensions between the freedom to provide services and a number of social and labour rights**. Trade unions engaging in collective bargaining and threatening collective action have been challenged under recourse to the freedom to provide services and the freedom of establishment in conflicts with a trans-border dimension. Member States attempting to promote social justice in public procurements have been challenged under the freedom to provide services as well, and national legislation promoting occupational social security through collectively agreed arrangements has been challenged by recourse to EU competition law and the freedom to provide services again. Collective labour agreements protecting marginal self-employed workers have also been challenged by reference to EU competition rules. Finally, some Member States have recently voiced concerns about the equal treatment of workers who move to another Member State. These concerns have been reflected in recent case law of the CJEU which seems to limit equal treatment in accessing social security and social assistance for some free movers. **This chapter evaluates judicial challenges of social and labour rights** and their reflection in academic writing, specifically focussing on the relationships between Internal Market law and the right to collective bargaining and collective action, the right to fair working conditions and the respect for social security and social assistance.

2.2. Rights to collective bargaining & industrial action

2.2.1. Introductory remarks

While the rights to collective bargaining and industrial action are now guaranteed in the Charter, the EU has limited legislative competence in this field. In particular, **regulating wages, the rights of associations and the right to strike or imposed lock-outs are beyond the EU's legislative competence** (Article 153 (5) TFEU), while **it may regulate in the field of the representation and collective defence of the interests of workers and employers** (Article 153 (2) (f) TFEU). The limit on regulating pay corresponds to the prerogative that management and labour enjoy in this regard under a number of national constitutions. The EU

Treaty thus leaves regulatory space for management and labour.[75] Rights to collective bargaining and industrial action exist within the European Union in many different forms.[76] In some Member States, these rights are more encompassing than in others, as mirrored in the experiences of social actors at EU and national levels (below 3.2.). In Member States where a wider range of employment conditions are regulated by collective agreement than in others, a satisfactory regulation of employment conditions depends on a functioning system of collective bargaining. Given the structural imbalance of labour markets,[77] **effective collective industrial action is a precondition of a functioning system of collective bargaining**. In Member States where most employment rules are fixed by legislation or state administrative acts, the scope for collective industrial action may be less decisive for basic rules of employment law. However, generally wage levels and levels of employment protection are more favourable for workers where trade union representation is effective,[78] which again depends on the scope for collective industrial action.

2.2.2. Freedom to provide services

The freedom to provide services has come to be perceived as one of the main fields where tensions between collective bargaining rights and the Internal Market prevail. Recent case law around collective bargaining and trade union activity in favour of posted workers and collective agreements restricting the use of temporary agency work illustrates this tension. **The Court has classified collective bargaining processes underpinned by effective industrial action and collective bargaining agreements as infringements of business' freedom to provide services across a border.**

As mentioned,[79] an infringement occurs if an economic freedom is restricted, and that restriction is not justified. For all business-related economic freedoms the Court defines a restriction as any measure that is "liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty".[80] **Case law in the 1970s**[81] on the freedom to provide services established that **collective agreements can constitute a restriction of today's Article 56 TFEU,** and in **1997** the Court held that the **omission of a Member State to protect economic actors against violent protests targeting imports of goods** from another Member State infringed today's Article 34 TFEU.[82] It was thus easy to see that the Court would not hesitate to limit collective bargaining processes and collective agreements if they restrict the rights of business to offer their services abroad without sufficient justification.[83]

This was confirmed by the **2007 *Laval*** case:[84] a Swedish company, *L&P Baltic Bygg AB* ('*Baltic*'), which was owned by the Latvian company *Laval*, concluded a contract with a Swedish municipality for building a school in Sweden. *Baltic* requested that *Laval* hired out Latvian workers to them in order to deliver the work required under this contract. After short negotiations with the relevant Swedish trade union, *Byggnads*, the Latvian parent of Baltic concluded a collective agreement with a Latvian trade union. This was the first time that this employer had concluded a collective agreement. Its timing has been branded as suggesting "preemptive recognition",[85] i.e. the recognition of one trade union the employer prefers in order to avoid

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[75] On the extent to which this creates competences for EU level collective agreements see (Schiek, 2005; 2012b).
[76] On different conceptions of collective agreements and collective bargaining see (Jacobs, 2009).
[77] See above at 1.3.3, 17 and the text around footnote 21.
[78] (Bryson, 2007).
[79] Above 1.4.2, 21.
[80] Case C-55/94 *Gebhard* [1995] E.C.R I-4165, paragraph 37, more recently this is repeated, for example, in Case C-515/08 *Santos Palhota* [2010] E.C.R I-9133, paragraph 29.
[81] Case 36/74 *Walrave* [1974] E.C.R 1405, paragraph 18.
[82] Case C-265/95 *COM v France (Strawberries)* [1997] E.C.R I-6959.
[83] (Orlandini, 2000).
[84] Above footnote 63, with further references to academic coverage.
[85] (Woolfson & Sommers, 2006, p. 54).

negotiating with another, more assertive trade union. Subsequently, *Laval* did not apply the relevant Swedish collective agreements to the Latvian workers. *Byggnads* staged successful collective action, demanding that the employer negotiate a collective agreement with them to cover the Latvian workers. The Court of Justice found Swedish legislation which considered such collective action as legal, while prohibiting collective action against an employer who concluded a Swedish collective agreement, violated the Treaty because it discriminated against foreign employers. More importantly, it also held that **any threat of collective industrial action aiming to improve the working conditions for posted workers qualified as a restriction of the freedom to provide services**.[86] Thus, the industrial action would infringe Article 56 TFEU if it was not justified by a legitimate aim in the general interest and proportionate. The **Court accepted the improvement of working conditions as a legitimate aim,** and held that the collective industrial action by Swedish trade union would only constitute a proportionate restriction of freedom to provide services if necessary to improve working conditions. This test **differed markedly from the proportionality test applied in the *Schmidberger* case**,[87] where free movement of goods clashed with the freedom of assembly unrelated to trade union activities. In this case the Court had not judged the purpose for which an environmental organization could block a street in assessing whether the Member States' non-interference with this blockade constituted a proportionate restriction. Furthermore, it had **acknowledged that Member States needed a margin of appreciation** to ensure a balancing of human rights and economic freedom at the same level. **No such margin was granted to trade unions or the Swedish legislator in the *Laval* case**. Also, the Court based its finding of an **unjustifiable restriction of *Laval's* freedom** to provide services on the fact that the company were **unaware, prior to negotiating with the Swedish trade union, of the level of wages applicable after concluding a collective agreement**.[88] This demonstrated a fundamental misunderstanding of the process of collective bargaining, or any negotiation process: before entering into a serious negotiation about contractual terms, neither party can know what price they will agree with the other party.[89]

The dimensions of this fundamental misunderstanding became apparent when **Sweden** implemented legislation responding to the Court's demand that trade unions disclose the wage which would form the breaking point of any negotiation. The **reformed Posting of Workers Act requires trade unions to provide** the liaison office of the Swedish Work Environment Agency with **all collective agreements potentially applicable to posted workers**.[90] Thus, employers planning to post workers will not have to seriously negotiate with Swedish trade unions, but can instead supply any managerial declaration[91] stating that the minimum wages mentioned in this declaration will be paid to posted workers. The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has expressed its concern that Swedish trade unions are barred from taking action in support of their members who work for employers posting them to Sweden.[92]

The case arguably constituted a re-interpretation of **Directive 96/71** on posted workers, whose wording **attempts to accommodate different industrial relations systems. Article 3 (1)** of the Directive **demands that** host-state employment **rules applied to posted work-**

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[86] Laval case, above note 63, paragraphs 99-100.

[87] Case C-112/00 *Schmidberger* [2003] ECR I-5659.

[88] Paragraph 110.

[89] On the essential character of protecting the procedural elements of the right of collective bargaining see above page 18 (text after footnote 21).

[90] (Rönnmar, 2014), under III, see also 3.3.3 below.

[91] The act does not require that the employer posting workers to Sweden actually concludes a collective agreement with a local trade union. Laval only resorted to this strategy in order to expose the so-called "Lex Britannica", according to which the Swedish Co-Determination Act made action against a non-Swedish employer legal, even if this employer has concluded a collective agreement with a local trade union. "Lex Britannica" has since been repealed (Rönnmar, 2014).

[92] ILO CEAR, Report 2013, 178.

ers must be established by statute, legislation or administrative rules or by collective agreements or arbitration awards which have been **declared universally applicable**. This mirrors the approach to collective agreements prevalent in the French legal system: the regulatory function of collective agreements is not derived from the agreement between the trade union and the employer association (or the individual employer). Instead, **it depends on state action**, usually an administrative act declaring the collective agreement generally applicable.[93] However, **Article 3 (8) allows space for other conceptions of collective agreements**, which do not allow for state intervention through a declaration of universal applicability. If there is no provision for such declaration, the Member State (not the parties to the collective agreements) has the choice to **define as universally applicable two types of collective agreements**. These are agreements covering one profession or one industry in a **certain geographical area (type 1)** or agreements applied **throughout the national territory** after having been **concluded between the most representative employers' organisations and trade unions (type 2). This compromise** presupposes a multi-employer agreement, except in sectors where there is only one employer. Also, the choice of the relevant collective agreement is not left to the parties concluding the agreement. Instead, the Member State has to make that choice. Such state interference contradicts a system such as the Swedish one which classifies collective agreements as contracts under civil law.

The *Laval* case was decided before the Charter of Fundamental Rights for the EU (CFREU) became legally binding. However, the Court has as yet had no opportunity to revise this case law as far as collective industrial action is concerned. **The decision whether to threaten a service provider from another Member State with collective industrial action in order to achieve collective bargaining coverage for posted workers** is thus **a risky undertaking**. This is particularly acutely felt in Member States where the system of regulating employment conditions rests on autonomous industrial relations or a private law conception of collective agreements. These are the Scandinavian countries, the Anglo-Irish countries[94] and possibly also still Italy.[95] Unsurprisingly, a Swedish case once again illustrated this tension: the Fonnship case was based on an employer's claim for damages following a collective dispute concerning the transport sector aiming to convince the employer to sign a Swedish collective agreement. However, since the national court did not ask whether the collective action restricted economic freedoms, the Court did not have the opportunity to revisit Laval.[96]

Since the Charter entered into force**,** the Court ruled on the tensions between collective bargaining and the freedom to provide services **in the field of public procurement. The Commission raised an infringement procedure against Germany**[97] relating to a collectively agreed system of a **"third pillar" pension scheme for public sector employees**. These schemes require that employees commit part of their wages to build up additional old age pensions. **The collective agreement determined that the scheme should be administered by a public banking institute**. Since this institute was co-governed by trade unions and public employers, they trusted it to refrain from engaging in speculation on capital markets and risking the committed wages. In discussing whether the social partners were free to agree on such a rule, the **Court considered the constitutional right to collective bargaining, relying on Article 28 CFREU**, but disregarding Article 12 CFREU**. AG Trstenjak** proposed a **dual application of the principle of proportionality**. The Court should **not only consider whether respecting human rights would impact disproportionally on economic freedoms, but to ask also whether restricting human rights** in the name of protecting eco-

[93] For a very short overview on approaches to collective agreements in EU Member States see (Schiek, 2005), with references to the French/Roman model at pages 34-35. For industrial relations typologies see (Hoffmann & Hoffmann, 2009; Keune & Marginson, 2013), also expanded upon below (3.2).

[94] On the resulting BALPA conflict see below sub 2.2.3.

[95] On recent changes in the Italian tradition see (Sciarra, 2013).

[96] Case C-83/13 ECLI:EU:C:2014:201.

[97] Case C-271/08 *COM v Germany* [2010] E.C.R I-7087.

nomic freedoms **would be a disproportionate restriction of human rights**.[98] However, AG Trstenjak disregarded the procedural dimension of the right to collective bargaining in stating that management and labour could be legally required to incorporate Directive 2004/18 into a collective agreement. Accordingly, they could be barred from using a partner they trusted for establishing a pension facility. The Court did thus not find it necessary to pursue her complex line of argument. The Court held **that the parties to a collective agreement could be obliged to conduct a public procurement procedure** as demanded by the relevant EU directives, following its AG in this regard. Again, **this conveys a disregard for the procedural dimension of collective bargaining**.

The **pending UNIS case**[99] is partly a sequel to this. Enterprises which despised the **choice of health care insurance provider made in a generally applicable collective agreement**,[100] challenged the validity of this agreement, relying on a transparency principle derived from Article 56 TFEU. The claimants claimed that more transparency would have allowed for their preferred provider to be nominated as sole provider. AG Jääskinen considered that the social partners could conduct their negotiations in such a way as to safeguard sufficient transparency, mentioning Article 28 CFREU, but not Article 12 CFREU, in a footnote.[101] However, in France legislation demands that social partners provide transparency when negotiating about the establishment of a social insurance system. Thus, such a demand does not add any restrictions that do not exist already. Also, the AG doubted that this case has any trans-border element.[102] It remains to be seen whether the Court follows his advice to leave the final decision to the national court.

The recent *AKT* ruling[103] could have offered the Court the opportunity to address some criticism of its *Laval* case law. It resulted from a Finnish reference concerning the use of agency workers. ***AKT***, a trade union, sought a court order against *Shell Aviation Finnland Oy* on grounds of non-compliance with **a collective agreement**. The relevant clause **limited the use of agency workers to situations where there was an urgent staffing need for a limited duration**, for example on the grounds of a lack of skilled staff. The trade union found that *Shel*l employed agency workers on a regular basis over a long time, and not only in those circumstances. The national court considered that this clause might conflict with Article 4 (1) of Directive 2008/104 on temporary agency work. That provision states that restrictions of temporary agency work can only be justified on grounds of general interest, among others by the need to prevent abuses.

Usually a directive, lacking horizontal effect, would not bind parties to a private agreement,[104] such as a collective labour agreement. In the *Laval* case, formally based on Directive 96/71, the Court investigated the legitimacy of industrial action under Article 56 TFEU,[105] since it "represents a specific interpretation" of Article 56 TFEU.[106] AG Szpunar, in his opinion in the *AKT* case, considered that Directive 2008/104 should bind the partners of collective labour agreements, highlighting its close relation to the freedom to provide services[107] and citing case law

[98] Paragraph 202-223 of her opinion.
[99] Joint cases Case C-25/14 *UNIS* and Case C-26/14 *Beaudout Père & Fils SARL*.
[100] One of the claimants, *Beaudout Père & Fils SARL*, had challenged the same collective agreement unsuccessfully, relying on competition rules (Case C- 437/09, discussed below under 2.2.2 (see footnote 133).
[101] Opinion in joint Cases C-25, 26/14, ECLI:EU:C:2015:191, 77-79, footnote 44.
[102] Paragraph 75-81.
[103] Case C-533/13 *AKT [Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Öljytuote ry and Shell Aviation Finland Oy]* ECLI:EU:C:2015:173.
[104] This doctrine was first established in the Case 152/84 *Marshall* [1986] E.C.R. 723, and can be counted as established case law since Case C-91/92 *Faccini Dori* [1994] E.C.R. I-3325.
[105] Case C-341/05 [above footnote 63] paragraphs 86-92.
[106] Paragraph 145 of AG Mengozzi's opinion.
[107] Paragraphs 68 and 70 of his opinion.

on anti-discrimination directives.[108] The Court confined itself to the consideration that Member States' obligation under Article 4 (2), (3) Directive 2008/104 to revise any restrictions of agency work contrary to Article 4 (1) lies with the national legislator, and neither the national courts nor (implicitly) the national social partners. The Grand Chamber's **reluctance to relate to trade union rights** might indicate an enhanced sensitivity of the Court in relation to these rights.

A similar **reluctance to deliver any ruling on the rights of trade unions** was demonstrated in the recent ***Säjköalojen ammattillitto ry (SA ry)*** **judgment.**[109] This case, among others, concerned the right of the Finish trade union *SA ry* to claim before Finnish courts outstanding wages of its Polish members, who had been posted to Finland. Although the referring court asked explicitly whether the principle of effective legal protection (Article 47 CFREU) must be interpreted in line with the freedom of trade union association (Article 12 CFREU), the Court did not provide any answer on whether trade union representation before the Courts is protected by Article 12 CFREU.

2.2.3. Freedom of establishment

Freedom of establishment has originally been conditioned upon the person or company moving to another Member States integrating into the legal and constitutional order of the host state.[110] This principle corresponded to the temporality of service provision, which justified the Court's demand that Member States were barred from subjecting service providers to all their legislation. However, **the Court has expanded the concept of temporary provision**, accepting for example that an economic activity over more than seven years still constitutes a cross-border service provision.[111] In parallel, the Court has strengthened the opportunities of companies to choose the Member States where they want to establish or re-establish.[112] Accordingly, **companies are relatively free to choose the Member State with the most favourable legal order to establish,** and can rely on the freedom to provide services across borders to other Member States even for long-term activities. The related opportunities are enhanced by technological developments which ease service provision over long distances.

All this means that **employers will find it increasingly easy to relocate within the EU**. Ideally, business will use these opportunities to move to regions where they find **better substantive conditions for production**, e.g. higher capitalization, more availability of technology or higher qualified workers. However, **it is also possible to use relocation in order to offer lower pay, demand longer working hours or reduce health and safety protection at work**. If employers only aspire to reduce labour costs, **they frequently relocate virtually**, by moving their corporate domicile without moving the actual economic activity. This enables them to profit from high level capitalization and industrial-technological infrastructure without having to pay equivalent wages.[113] If employers want to reduce wages, they could also announce that they will no longer apply collective agreements to which they are bound. Trade

[108] The recent case law, after the Charter acquired legally binding effect, mainly relates to Directive 2000/78 [e.g. Case C-447/09 *Prigge et al* ECLI:EU:C:2011:573], though the court had first developed that principle in relation to sex equality.

[109] See footnote 33 above.

[110] CJEU Case C-55/94 *Gebhard* [1995] E.C.R I-4421.

[111] Case C-115/01 *Schnitzer* [2003] E.C.R I-14847, for a critique see also (O'Leary, 2011, p. 533).

[112] Initiated by the judgment in case C-212/97 *CENTROS* [1999] E.C.R I-1459, and further expanded by the judgments in cases C-208/00 *Überseering* [2002] E.C.R I-9919 and C-167/01 *Inspire Art* [2003] E.C.R I-10155. While the judgment in case C-210/06 *Cartesio* [2008] E.C.R I-9641 seemed to re-establish the opportunity for a Member State to prevent a company registered under its national law from establishing abroad, this never had any impact on the opportunity for companies to establish branches in other Member States. Also, the same Member State is unable to prevent a foreign company from establishing in their national law (Case C-378/10 *VALE* ECLI:EU:C:2012:440).

[113] This phenomenon, known as off-shoring, is by no means specific to Europe. The principle corresponds best to the liberal model of capitalism typical for the United States and Australia, where it has a longer history (see, for example, (Penfold, 2007) for Australia).

unions which signed these collective agreements would naturally resist such a move. Trade union resistance to a virtual move is not conceptually different. After all, a virtual relocation renders inapplicable not only collective agreements, but also national labour law. Depending on the prevalent industrial relations model, that resistance would include the threat of effective industrial action, and the initiation thereof. In a number of Member States, such industrial action would be legal.[114]

The contested ***Viking*** **ruling**[115] concerned the industrial action of a Finnish trade union against a Finnish ship owner who wished to run a vessel under the Estonian flag, without changing its economic activity. The vessel operated as a ferry between Tallin and Helsinki, and ran at a loss. The owner had attempted several times to use Estonian jurisdiction in order to evade costly Finish wages.[116] However, before Estonia became a member of the EU, the owner had always given in to the Finish Seafarer Union's threats of industrial action. In 2004, it choose to rely on Internal Market law to gain support against the effective trade union. In response the Court established that the mere threat of collective action for that same purpose constitutes an unjustifiable restriction of the freedom of establishment. While in many national legal orders it is perfectly legal to stage **industrial action** in order to maintain representation after a change in ownership, the same activity **shall become unjustifiable if a cross-border situation within the EU is involved**. An employer who moves its corporate domicile to a non-EU jurisdiction would not be protected by Internal Market law. Similarly, **an employer refusing to conclude a collective agreement with one national trade union, because they prefer another national trade union, can still be subjected to industrial action if national law allows for this.** If the employer decides to move its corporate domicile (not its real operations) to another EU Member State, the corporation is protected by freedom of establishment. These contradictions alone suggest that the Court should revise its *Viking* case law.

The *Viking* case as such **has not had much impact on Finnish** law.[117] It arguably also **missed its second target**, an agreement of the International Transport Workers Federation **(ITF**) with its member trade unions around the **flag of convenience policy**, which supports a global agreement on minimum employment conditions at sea. ITF member organizations pledge not to engage in collective bargaining with a ship owner flying a flag of convenience, i.e. a flag of a jurisdiction with more convenient laws than the one in which the owner has its main economic assets.[118] This case addresses off-shoring,[119] a phenomenon which is particularly widespread in the transport industry. The Court held that the ITF policy infringed freedom of establishment because it applies to any virtual relocation, irrespective of whether the flag of convenience would result in lower employment standards.[120] A more precise wording of the ITF policy will easily escape that reasoning. However**, the *Viking* case did have effects in the UK**, from where it was referred to the Court of Justice. The *British Air Line Pilots' Association* (**BALPA**) had threatened strike action when negotiations with *British Airways* (BA) around the launch of a Paris-based daughter airline failed. While the **action** was **legal under UK law, BA threatened to apply for an injunction based** on the ***Viking*** case, and during the ensuing court proceedings BALPA refrained from taking action.[121] This affair resulted in a **complaint by BALPA to the ILO's CEAR** (Committee of Experts on the Application of Conventions and Rec-

[114] For example, the collective action leading to the ECJ's ruling concerning the *Viking* line (Case C-438/05 above footnote 63) was legal under Finnish law (cf opinion of AG Maduro, paragraph 6). Also, The German Federal Labour Court accepts as legitimate collective industrial action aiming at forcing an employer to adhere to a sector-wide collective agreement although the employer has opted out of that agreement (10.12.2002 case 1 AZR 96/02, BAGE 104, 155 = NZA 2003, 734).

[115] Case C-438/05, above footnote 63.

[116] The last of these conflicts is reported by *AG Maduro* in his opinion on the case (paragraphs 6-9).

[117] (Bruun, et al., 2011).

[118] (Blanpain & Dimitrova, 2010; Lillie, 2004).

[119] On this concept see above footnote 113.

[120] Case C-438/05, as above footnote 63, paragraph 88.

[121] See (Ewing & Hendy, 2010, p. 44).

ommendations). The Committee expressed "serious concern on the practical limitations on the effective exercise of the right to strike of the BALPA workers in this case", thus implicitly criticizing the *Viking* case law.[122]

2.2.4. Competition rules

Competition rules have likewise been interpreted in such a way that they may conflict with collective bargaining rights, which include the right to conclude binding collective agreements. The whole process of collective bargaining is based on combining employees in order to alleviate the pressure to undercut the price of each other's labour.[123] **Collective agreements are thus correctly referred to as a wage cartel**[124] – but this is a cartel which is perfectly legitimate, if one accepts the necessity for employees to combine in order to overcome structural market imbalance. This does not necessarily mean that employment is exempted from any market logic.[125] However, it does mean that **market mechanisms in employment are only accepted if workers have the opportunity to combine in order to achieve a just bargain.** The same conclusion can be reached from an economic perspective, which qualifies the employment relationship as an internal affair of the company, similar to relations to agents, which are also not subject to competition law.[126] If one goes even further and guarantees collective bargaining as a right, **this leads to the idea of the autonomy of collective bargaining**. The autonomy of collective bargaining **does not allow subjecting the collective agreement to the control of competition authorities**.[127]

The Court has always accepted that **workers or their associations, trade unions, are not undertakings** under what is today Article 101, 102 TFEU.[128] However, from a competition lawyer's perspective this does not necessarily mean that collective agreements are immune from control by competition authorities. **Multi-employer collective agreements also imply an agreement between the employers** (or a decision by their association) on one of the central categories of competition, the price of labour. Accordingly, the question is how such agreements can be exempted from the scope of competition law. Accepting the autonomy of collective bargaining could be achieved under traditional competition law categories, following the argument outlined above. **Collective bargaining agreements are necessary in order to allow workers to achieve acceptable working conditions in a self-organised way and must also encompass the correlative agreement between employers.** In other words, "the consequential effects restrictive of competition are inherent in the pursuit of those objectives," as the Court stated in the *Wouters* case, relating to a regulation by the Dutch Bar Association.[129] While there is a considerable discussion among competition lawyers as to how this case law can be aligned with their traditional categories, such an approach would be the best and **most elegant way to achieve the immunity of collective labour agreements from competition law**. It would still enable the competition authorities to pursue an abusive circumvention of competition law by alleged collective agreements (e.g. if employers founded a trade union in order to agree on pricing policies).[130]

[122] ILO Session 2010, Report III Part I A, p 209 [http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_123424.pdf].
[123] As explained in more detail above (see text between footnotes 20 and 21).
[124] For a summary of opinions that have developed from the 1920s see (Reichold, 2010).
[125] G. Monti, endorsing Polyani's work, relies on this principle in order to exempt the protection of employees from the scope of competition law (Monti, 2013, p. 41).
[126] (Driguez, 2006, pp. 51-78).
[127] (Rubiano, 2013; Bruun & Helsten, 2001).
[128] Case C-22/98 *Becu* [1999] E.C.R. I-5682.
[129] Case C-309/99, *Wouters* [2002] ECR I-1577, paragraph 97; confirmed in Case C-C-519/04 P, *Meca-Medina* [2006] ECR I-6991, paragraph 45.
[130] More detail in (Schiek, 2012c).

In 1996, the Court was challenged to decide whether a Dutch collective agreement would fall within the scope of application of Article 101 TFEU.[131] The Court concluded that in this specific case Article 101 would not apply to the collective agreement. However, **the Court did not follow its case law in *Wouters*** and derive a general immunity of collective agreements from the field of application of EU competition law. Instead of conceding that the collective bargaining agreement is an admissible "cartel" of its labour members, **the Court focused on the purpose of the agreement. Only such agreements which pursue certain acknowledged social aims will profit from what is now referred to as the "Albany exception**".[132] This principle was **confirmed in the *AG2R* case**,[133] which also concerned a collective agreement choosing a social security provider. The "Albany exception" is based on the reference in the Treaties to collective bargaining, for example in what is today Articles 152, 154 and 155 TFEU, and not on its human rights protection. Nevertheless, the Court was more accepting of collective bargaining than its Advocate General Jacobs, who would only exempt collective bargaining agreements regulating core employment conditions.[134]

Another Dutch case, the ***FVN Kunsten* case**,[135] concerned the **question of whether a collective agreement may set minimum remuneration for self-employed workers competing with employees**. AG Wahl proposed to leave the answer to the national court, which should consider whether the protection of employees is the purpose of the clause. Only if the answer would be in the positive, would he accept that the collective agreement is not within the scope of application of Article 101 TFEU, since the **"Albany exception" would only cover employees.** This statement seems to contradict the ILO commitments to which many Member States are bound in so far as ILO conventions cover all workers, also self-employed workers.[136] The **Court held that collective labour agreements could legitimately cover the working conditions of service providers whose situation is comparable to that of employees**, pointing also to the **wide notion of the term "worker" in its own case law**.[137] This ruling avoided an open clash between international social and labour rights and EU competition law.

There are numerous fields in which multi-employer collective agreements can conflict with competition law under the restrictive approach preferred by the Court. For example, **multi-employer agreements fixing working times** in retail sectors may be considered as an agreement fixing central pillars of competition for customers. Under the approach proposed above, this effect would appear as a necessary consequence of a collective agreement on working time, which is a core element of working conditions usually fixed by collective agreement.[138] Also **collectively agreed anti-crisis measures avoiding collective redundancies** might be considered. Collective agreements might provide for a temporary reduction of working time in order to prevent lay-offs[139] or establish a common institution of management and labour employing redundant workers with a view to retraining in specifically defined periods of crisis, possibly aided by public funding. Under the approach proposed above, any anti-competitive side effects of such agreements would be justified by their main purpose which clearly falls within the main purpose of collective bargaining. Traditional competition lawyers tend to have a more restrictive approach to so called crisis cartels, though.[140] Such a narrow approach would conflict with a constitutional guarantee of col-

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[131] Case C-67/96 *Albany* [1999] E.C.R I-5751.
[132] AG Wahl, Opinion in case C-413/13 *FNV Kunsten Informatie en Media*, paragraph 16.
[133] Case C-437/09, *AG2R Prévoyance v Beaudout Père et Fils SARL* [2011] E.C.R I-973.
[134] For a critique of Jacob's approach see AG Mengozzi, Opinion AG2R, as above, paragraph 43.
[135] Case C-413/13 *FNV Kunsten Informatie en Media* ECLI:EU:C:2014:2411.
[136] Rubiano (2013), see footnote 127 above.
[137] Paragraphs 30-38.
[138] Nevertheless, the 1990s saw some rulings at national levels, for example in Germany (KG 21/.2.1990 U 4357/89 AP Nr 60 Art 9 GG).
[139] Examples are reported by (Bispinck & Dribbusch, 2011, pp. 44-49).
[140] See for example, (Wardhaugh, 2014; Witt, 2012).

lective bargaining. Presently such arrangements seem to have little practical application.[141] Thus, an elaborated coverage in this study is not attempted.

2.3. Fair and just working conditions – economic freedoms

In the field of fair and just working conditions (Article 31 CFREU), this study will focus on the potential conflicts between primary law and EU social and labour rights, including such directives which aim at mitigating such conflicts. EU directives harmonising national employment laws such as directives on equal treatment of women and men, on establishing mechanisms for the information and consultation of workers, on the protection of wages in cases on employers' insolvency or on the protection of employment conditions in the cases of transfer of undertakings by contrast, are not the focus of this study. As far as competition rules are concerned, these have no immediate impact on fair and just working conditions. A restrictive approach to collective labour rights under EU competition law may indirectly influence employment conditions in so far as employment conditions tend to be more favourable in sectors covered by collective labour agreements. However, this impact is too remote to justify discussing competition rules in this section. This section, therefore, focuses on economic freedoms.

2.3.1. Free movement of posted workers: workers versus services?

Despite its fundamental relevance,[142] the right to equal treatment with workers in the host state **is withheld from posted workers**. This is based on a perceived conflict between the workers' rights to equal treatment and their employers' rights to freely provide their services.

If the timing of the Court's case law is any indication, the phenomenon of transnational posting of workers is closely related to temporary restrictions of free movement of workers in the context of enlargement rounds. Such restrictions were based on fears of existing Member States that their labour markets would become imbalanced. Already after southern enlargement in the 1980s, the posting of workers developed into an alternative route of migration for employees in the construction sector. In the 1990s the Court established the principle that those workers could not rely on free movement of workers.[143] Instead their **posting was framed as an expression of the employers' freedom to provide services**. Any limitations on moving these workers from the employer's country of establishment to the place where their work is needed have been qualified as restrictions of the freedom to provide services.[144]

The Court first addressed requirements of immigration control,[145] and subsequently **clarified that demanding the equal treatment of workers on the same building site would also constitute a restriction of freedom to provide services**. The Court frequently **accepted justifications for granting posted workers some of the host state employment rights** as based on the overriding public interest of protecting workers and/or to provide adequate social protection of workers in the construction industry.[146] The requirement to pay a statutory minimum wage was accepted[147] as well as demanding social security payments for wage continuation during work stoppage due to winter weather[148] or to secure annual holiday pay[149] and the requirement to provide surety for workers' wages.[150] Subsequently, the need to enforce national legislation pursuing such aims became its own justification ground. However, **workers moving as posted work-**

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[141] See below section 3.6.
[142] See above section 1.4.3.
[143] Case C-43/93 *Vander Elst* [1994] E.C.R I-3803, paragraph 21-22.
[144] Case 113/89 *Rush Portuguesa* [1990] E.C.R I-1417 paragraph 15.
[145] Ibid.
[146] See the summary in one of the last cases to which Directive 96/71 did not yet apply: Case C-369/96 *Arblade & Leloup* [1999] E.C.R I-8453 [paragraph 33-36].
[147] Case C-369/96 *Arblade & Leloup* [1999] ECR I-8453, Case C-164/99 *Portuguaia Construcões* E.C.R. [2002] I-787.
[148] Case C-272/94 *Guiot* [1996] E.C.R I-1905.
[149] Case C-490/04 *COM v Germany* [2007] E.C.R I-6095.
[150] Case C-60/03 *Wolff & Müller* [2004] E.C.R I-9553.

ers cannot claim equal treatment, by relying on their Treaty rights under what is now Article 45 TFEU. Instead, the host state may impose an obligation to grant certain employment rights on their employer.

Formally, workers have a choice whether to move independently or approach an employer who will post them. However, the long periods for which free movement of workers was suspended around Eastern enlargement seem to **have entrenched posting as the only way to move into Western labour markets**. At least as far as temporary stays are concerned, posting will be used if the legal environment allows companies to engender cost efficiency through posting.[151] Such business practices are frequently labelled "social dumping".[152]

Under this case law, EU citizens who are posted cannot rely on any rights derived from free movement of workers. The Court prioritises the employers' freedom to provide services. Accordingly, **the right to equal treatment with workers in the host state (Article 45 TFEU) is suspended while an EU worker is posted.** The posted worker can only rely on equal treatment and other rights derived from free movement after the posting situation ends. This is acknowledged in the recitals of Directive 2014/67, ensuring the enforcement of Directive 96/71, which states that:

> *(2) The free movement of workers gives every citizen the right to move freely to another Member State to work and reside there for that purpose and protects them against discrimination as regards employment, remuneration and other working conditions in comparison to nationals of that Member State. It needs to be distinguished from the freedom to provide services, which includes the right of undertakings to provide services in another Member State, for which they may send ('post') their own workers temporarily to carry out the work necessary to provide these services there.*

2.3.2. Posted workers: secondary law and freedom to provide services

Directive 96/71 thus constitutes a measure balancing competing rights.[153] The Directive demands that Member States ensure that posted workers active on their territory can enjoy a certain minimum catalogue of employment rights as provided for under national law (Article 3 (1)). **Posted workers have no claim to equal pay, or equal treatment with workers in the host state**.

Box 1: Catalogue of national employment rights to be applied to posted workers

Article 3 (1), letter a – g (summarised)

- Working time (maximum periods and minimum rest periods, minimum paid annual leave).
- Minimum rates of pay, including overtime, but excluding supplementary occupational retirement pensions.
- Conditions of supplying temporary agency workers and other forms of hiring out workers.
- Health and safety law, maternity protection, protection for children and young workers.
- Equality and non-discrimination.

Directive 96/71 corresponds to the dynamic developed above (1.5.3): it reacts to case law where – although the Commission brought strategic cases – the Court has accepted national legislation as justified by the aim of protecting social rights. The Posted Workers Directive is

[151] (Bertelsmann Stiftung, 2014, pp. 59, 74), more information on the factual extent of posting is reported under 5.2.1 and in Annex 1.
[152] (Countouris & Engblom, 2014).
[153] See also opinion by AG Cruz Villalón in case C-515/08 *Santos Palhota et al*, [2010] E.C.R I-9133, paragraph 38, where the AG identifies a conflict between the employer exercising freedom to provide services, the worker who is posted and the Member State hosting the worker and the employer.

atypical, though, because it does not harmonise employment conditions in Member States. Instead, it **coordinates the use of different national rules concerning employment conditions**, by stipulating for which fields posted workers enjoy equal treatment with workers in the host state. Thus, the Directive **does not establish a level playing field for service providers across the EU**. Instead, it establishes minimum conditions binding on all service providers which are active on the territory of any one Member State. These minimum conditions vary in line with national employment law. Accordingly, Article 3 (8) **uses the term "equality of treatment" in order to underline that all undertakings in a similar situation must be subject to the same obligations**. This is the only reference to equal treatment in Directive 96/71. In its regulatory concept, the **principle of equal treatment between** undertakings, the EU term for **corporate economic actors**, **does not leave scope for equal treatment of posted workers with workers in the host state.** In refusing to grant the right to equal treatment to workers who move through posting, the Directive is based on the Court's case law.

The rationale behind this regulatory approach derives from a certain interpretation of Internal Market law: employers should not have to comply with two employment regimes if they provide services across borders. Accordingly, the Court of Justice has qualified the Directive as a measure easing trans-border provision of services while ensuring fair competition between employers in the host state and those which operate transnationally, and granting posted workers minimum protection in line with some elements of the host state's laws[154] instead of equal treatment with workers in the host state.

So far, **the *Laval* case has been interpreted as stating that Member States** using those provisions **must not demand equal treatment for posted workers,** but may only grant them minimum protection in those elements that Article 3 (1) Directive 96/71 requires.[155] The recent ***Sähköalojen ammattiliitto ry (SA ry)* case**[156] has offered more detail on this. Among others, the reference questions explored whether the following **clauses were still encompassed by Article 3 (1) of Directive 96/71**: a **pay schedule providing for higher hourly rates for workers with more experience** and/or higher levels of qualification, **specified and differentiated rates for hourly and piece work**, a **daily allowance compensating for posting** and also paid to workers posted within the Member State, and **holiday pay**. All these clauses were classed as falling under Article 3 (1), and could be imposed on employers posting workers. However, the **posted workers were excluded from specific allowances relating to travel time and costs of accommodation, which workers in the host state received. This underlines that posted workers have no right to equal treatment**. AG Wahl, in a more restrictive opinion, had defended the view that posted workers would only be entitled to the lowest wage on any pay scale.[157] While the Court did not endorse this view, it reiterated the idea that posted workers are only entitled to minimum protection and not to equal treatment.[158]

In finding that a full pay scale, it generally applicable by state act, constituted the relevant minimum pay under Article 3 (1) Directive 96/71, the Court did not openly acknowledge AG Cruz Villalón's reasoning in the *Santos Palhota* case.[159] According to this reasoning, fair employment conditions are now supported by Article 31 CFREU, as a consequence of which a restriction of freedom to provide services based on respect for fair employment conditions should no longer require justification under a strict standard of proportionality. However, this argument could support the Court's shift in direction.

[154] Case C-401/05 *Laval* (above footnote 63) paragraphs 74 and 76.
[155] (Countouris & Engblom, 2014), with reference to the Case C-319/06 *COM v Luxembourg* case (see footnote 63).
[156] See footnote 33 above.
[157] Opinion of 18 September 2014, case C-396/13 ECLI:EU:C:2014:2236, paragraph 33-38.
[158] Case C-396/13, paragraph 30.
[159] Case C-515/08 *Santos Palhota* et al [2010] E.C.R I-9133, AG Cruz Villalón, paragraph 53.

2.3.3. Hiring out workers (agency work) and posting in secondary law

The business opportunities developed on the basis of this case law are particularly interesting when posting agency workers. This section only discusses the position of **posted agency workers** under EU Internal Market law. As mentioned, a comprehensive coverage of any individual directive in the field of labour law is not the intention of this study. An analysis of regulatory options at EU, national and sectoral levels which may protect the employment rights of agency workers while supporting economic growth and flexibility through promoting works agencies was provided by a separate study commissioned by the EU.[160]

An **employment agency's economic activity may comprise** acting as an agent between prospective employees and employers (employment placement agency) as well as **making available workers to third parties** (temporary works agency).[161] The term "employment agencies" alludes to the first type of activities, stressing the opportunities potentially offered by using agencies to place unemployed persons. These opportunities are, for example, used by public employment agencies in order to place long-term unemployed people. While many employment agencies combine the placing of employees and the provision of temporary agency work to user firms, the latter **activity constitutes the basis on which workers may also be posted**. This activity is more precisely referred to as hiring out of workers.

Where the wider literature considers the hiring out of workers to be a precarious employment practice, [162] this is attributed to two of its central features. **First, two entities together fulfil the employer function**: the agency employs the worker and the user firm directs her work. However, there is no sharing of responsibility between the two employers. The agency remains the employer responsible for payment, compliance with health and safety legislation, and also with employment protection legislation. The agency can function as an external human resources department, which requires very limited capital endowment. If the agency goes into liquidation, the capital of the user firm, which may have a substantive business, cannot be drawn upon to secure the employees' outstanding wages. **Secondly, agency workers may, in practice, be treated differently** from workers with whom they work side by side, which is the reason for special EU level and national legislation demanding equal treatment. The specific risk of unequal treatment derives from the need to sustain two employers, the works agency and the user firm. **To make agency work** a viable business, there are in principle two options. On the one hand, **the user firm may dedicate specific funds** for the activities of the agency, on the other hand **the agency workers may receive lower wages** than comparable workers in the user firm in order to balance the fees paid to the temporary works agency. If agency work is based on the second business model, there is a clear risk of precariousness. Further, **agency workers are perceived as being temporary**, even if they stay in a certain firm or a company for a long time. As a consequence they frequently do not profit from additional benefits such as extra time for training and education, inclusion in occupational pension schemes, prolonged leave for health or family issues which are dependent on a "waiting period". They are also at times excluded from using social facilities such as canteens, sport facilities or employers child care institutions, as has been noted in recent UK studies, for example.[163] Inequality may even encompass the provision of vital health and safety equipment: it is usual that an employer ("user firm") demands that agency workers bring their own security equipment (such as helmets, protective shoes), while regular employees are equipped with helmets.

[160] The European Parliament has issued a specific study on employment agencies (Eichhorst, et al., 2013), which focuses on the labour law perspective of temporary agency work.
[161] This terminological distinction is applied by (Eichhorst, et al., 2013, p. 17).
[162] On the status of agency work in the Internal Market see (Ahlberg, et al., 2008).
[163] (Forde & Slater, 2012; 2014).

In spite of all these risks, the Court has qualified the **hiring out of workers as a service protected by Article 56 TFEU**.[164]

The EU directive on agency work, **Directive 2008/104**,[165] issued 12 years after Directive 96/71, thus pursues a dual aim. On the one hand, the directive **demands that Member States review restrictions of agency work**, which can only be upheld on grounds of the general interest (Article 4). As mentioned, the Court has clarified in the AKT case,[166] that this obligation falls on the Member States, not the parties to collective agreements.

On the other hand, the directive **protects agency workers**. They **must be treated equally with workers at the user firm in relation to essential employment conditions** (Article 5 and 3) and access to internal vacancies (Article 6). They also have the **right to be represented** through bodies representing workers, either in the user firm or in the agency, or at both places (Article 7). The body of essential employment conditions in Directive 2008/104 is much larger than that for which Directive 96/71 provides minimum standards for posted workers. In addition, Directive 2008/104 demands equal treatment.

Box 2: Equal treatment of temporary agency workers in the user firm

Article 5 (1) establishes the principle of equal treatment for basic working and employment conditions for agency workers with workers in the user firm for the duration of their assignment.

Article 3 defines basic working and employment conditions including rules on working time, overtime, breaks, rest periods, night work, annual leave and public holidays as well as pay.

In relation to pay, Article 5 paragraphs 2-4 empower Member States:

- to establish exceptions for agency workers who are paid by the employment agency between assignments,
- to empower the social partners to establish exceptions through collective agreements, in particular relating to a qualifying period, but also to other elements, and
- to specify whether occupational social security schemes (e.g. pensions or health care), or financial participation schemes are included in the basic working conditions.

The **transnational hiring out of workers is also defined as posting under Directive 96/71** (Article 1 paragraph 3 letter c). The facts of the *Laval* case[167] constitute an example of the overlap of posting and hiring out workers: the Swedish company, who secured the public contract in the Laval case, already calculated their offer with the low wages of the workers to be hired out from their owner in mind. These workers were subsequently hired out to Laval. However, the Court did not consider applying the principle of equal treatment under Directive 2008/104 to these agency workers.

The question as to how those two directives can be aligned with each other has received some attention. A study for the European Commission suggests that workers hired out by agencies are covered by Article 45 TFEU, and concludes that Member States may require those workers, even if they are within the scope of application of Directive 96/71, to profit from the rights under Article 5 Directive 2008/104.[168] A study for the European Trade Union Institute concluded

[164] Case 279/80 *Webb* [1981] E.C.R 3305, Case C-307, 309/09 *Vicoplus* EU:C:2011:64, paragraph 22, Case C-91/13 *Essent* EU:C:2014:2206, paragraph 37.
[165] Council Directive 2008/104/EC on temporary agency work [2008] OJ L 327/9.
[166] See footnote 103 above.
[167] See footnote 63 above.
[168] (Hoek & Houwerzijl, 2011, pp. 185-186), with reference to the Court's ruling in *Vicoplus* (Case C-307/09 *Vicoplus* ECLI:EU:C:2011:64. This position has been confirmed in a more recent case (Case C-91/13 *Essent* ECLI:EU:C:2014:2206), and a further one is still pending (Case C-586/13, *Martin Meat*, opinion of AG Sharpstone of 15/01/2015 ECLI:EU:C:2015:15). These cases concern the question of whether workers hired out by entrepre-

that those agency workers should be treated as required under Directive 2008/104, but doubted whether this would impinge on Article 56 TFEU.[169] These doubts are underpinned by the different legislative bases of the directives.

Considering the question investigated in this study, the enhanced position of social and labour rights would suggest that both Directives must now be read in the light of the social clause contained in Article 9 TFEU, as well as in the light of the constitutionally guaranteed social and labour rights. This issue will be revisited in Chapter 5.

2.3.4. Public procurement and fair and just working conditions

The very detailed rules on public procurement also aim at protecting the freedom to provide services. The recent reform in this field has been assessed as a positive example of "the use of market mechanisms to incentivise good, socially responsible behaviour".[170] **Directive 2014/24** contains a number of clauses which aim **to enable Member States to ensure compliance of providers with social concerns, including providing fair working conditions** (Article 18 (2)) and allows for award criteria to contain social conditions (Article 67 (2) a)) as well as for contract performance conditions which may include social or employment-related considerations (Article 70). All this is based on previous case law of the Court of Justice, which developed in applying the predecessor to Article 56 TFEU and the predecessors to the public procurement directives to national practices aiming at "buying social justice".[171] Accordingly, this is **another example of the interaction between EU legislation and CJEU case law: legislation responds to case law** originating from restricting social policy in the name of the economic freedoms, that legislation is then interpreted restrictively by the Court, upon which the EU legislator re-introduced the option to promote social policy aims through public procurement. **It is to be expected that the practical application of the new legislation will be scrutinised by the Court on whether it is in compliance with Article 56 TFEU, independent from the question of whether national practice complies with the directives.**

While it is too early to fully assess the impact of the new directives,[172] there is already case law relating to two aspects of this field: the overlap between the posting of workers and public procurement, and the inclusion of contract clauses relating to minimum wages irrespective of posting.

The **overlap between the posting of workers and public procurement** was the subject of the ***Rüffert* judgment**, one of the four rulings of the "Laval quartet".[173] This judgment concerned legislation in Lower Saxony (a German state) which required that employers providing services to that state pay any posted workers in accordance with collective agreements usually applied in the sector. The legislation thus neither referred to statutory minimum wages nor to collective agreements extended to bind all employers by administrative decisions. The Court held that this was not covered by Directive 96/71 and violated Article 56 TFEU.[174] This severely **limits the scope for** applying, for example, local rules on **promoting a living wage**.[175] In response, a number of German states adopted legislation creating a specific statutory mini-

neurs established in Member States whose citizens had not yet profited from free movement of workers would require a work permit, which was answered in the positive. A similar position is taken by (Eichhorst, et al., 2013, p. 46).

[169] (Schömann & Guedes, 2012, pp. 55-61).

[170] (Barnard, 2014b, pp. 233-234).

[171] See for a fundamental treatment (McCrudden, 2007).

[172] A first case addressed the question in how far Member States may prefer the not-for-profit sector in their public contracting under Article 74 Directive 2014/24 (Case C-113/13 *Spezzino* ECLI:EU:C:2014:2440).

[173] See footnote 63 above.

[174] Case C-346/06, footnote 63 above.

[175] (Koukiadaki, 2014).

mum wage applicable for services provided to public bodies.[176] Presently, the ***Regio Post GmbH* case is pending** before the Court. The reference by the upper regional court in Koblenz[177] pursues the aim of declaring legislation of the Rhineland Palatinate on the matter as incompatible not only with Directive 96/71 and Article 56 TFEU, but also with Directive 2004/18/EC (Article 26). In this case, the public tender concerned mail delivery in Rhineland Palatinate, i.e. the legislation aimed at saving public bodies from having to contract with providers undercutting local wages while posting workers from abroad to the region. The Court's ruling will provide further clarity as to the extent to which regional minimum wages especially for public procurement will be compatible with Directive 96/71.

Similar legislation from North Rhine Westphalia has been **successfully challenged** before the Court. The reference concerned the contracting out of data – processing to Poland through a Federal institution (*Bundesdruckerei*) by the City of Bonn. In line with state legislation, the city insisted that the **Polish provider** offering services from Poland paid **the specified minimum wage, which was set to comply with living standards and prices in Germany**.[178] Since **no posting was involved**, Directive 96/71 did not apply. The Court thus decided on the basis of Directive 2004/18/EC, which states explicitly that special conditions relating to the performance of a contract must comply with EU law. The Court held that the condition of paying a minimum wage was a restriction of Article 56 TFEU. It also accepted that this restriction could, in principle, be justified by reference to general interests, such as the objective to protect employees. Though the case **differed fundamentally from a situation in which the service provider undercuts local wages by bringing workers into a high-wage country, the Court clarified** that a sectoral rule for the public service could never be justified due to its sectoral character. Further, the Court stated that the German public body must not be concerned by eventual negative repercussions of excessively low wages in Poland. In this regard the Court relied on the argument that any necessity for the workers to claim social assistance "would clearly not affect the German social security system".[179] This argument seems to imply that a German public authority would not be able to demand that service providers from abroad comply with local employment standards in their country of establishment. This seems to clash with the new public procurement directives' aim to enhance the scope for "buying social justice". Directive 2014/24[180] explicitly allows for performance conditions to include social and employment related criteria (Article 70). Demanding that workers in a low wage country are paid in line with conditions in high wage countries may be dubious. Nevertheless, it is difficult to justify that public bodies should be required to contract with businesses not complying with local employment standards.

2.3.5. Mobile business and low wage work

Sectors where **services** are necessarily **provided in a mobile way** are **particularly vulnerable to exploiting workers** through diverse techniques of applying a less favourable labour law regime. The transport by road sector constitutes a prime example: it is characterised by a high degree of competition and a weak market position of hauliers.[181] Also, fuel and wages constitute the main factors on which competition is made.[182] This leads to business models which allow employing low wage labour to become exceptionally attractive. The "**cabotage rules**", laid down in EU legislation,[183] were initially created in order to avoid long return journeys of drivers without a load: a driver taking on board a load within a country other than the

[176] For a summary in English see (Sack, 2012).
[177] OLG Koblenz 1 Verg 8/13 NZBau 2014, 317, lodged with the CJEU as case C-115/14 *Regio Post GmbH.*
[178] Case C-549/13 *Bundesdruckerei GmbH*, ECLI:EU:C:2014:2235.
[179] Paragraph 35 of the ruling.
[180] Above footnote 74.
[181] For a comprehensive report on employment conditions in this sector see (Broughton, et al., 2015).
[182] (AECOM, 2014).
[183] Council Regulation 1072/2009/EC on common rules for access to the international road haulage market [2009] *OJ* L 300/72.

country where her employer is domiciled would be paid under home state (not host state) rules for this journey. These exceptions now form the basis of a business model which allows employing low wage labour on a permanent basis in high wage countries, under the pretence of only offering individual "cabotage" routes.[184] Similar issues are reported for transport at sea,[185] and are likely to be relevant in the rail transport sector as well.[186] Exploitative employment practices in the airline sector have already received considerable attention.[187] In all these sectors, the complexity of the legal framework is compounded by the occurrence of public service obligations. The discharging of cargo on airports and in harbours is another field where competing employment law regimes have been subject to implicit regulation by (planned) EU legislation. **Technical advances enable employees of the carriers (i.e. ship or aircraft owners) to provide discharging services which traditionally have been provided by employees of harbours and airports**. These developments inspire economic competition around these services. The EU has encouraged public bodies such as harbours and airports to contract those services to private providers. The decision of which employees provide which services is heavily influenced by the question of which employment law regime delivers cheaper labour. If competition served to enhance the quality of services, other determinants should be decisive. In all these fields the question arises as to how working conditions and wages can be regulated under participation by workers (who are frequently self-employed) and in a socially sustainable way. As in the field of posting of workers,[188] **the question arises which level and character of legislation or other regulation is most suitable to support the protection of workers' rights**, including equal treatment.

The final fate of recent dossiers in the transport sector[189] is as yet unknown. The revision of employment rules for the road transport sector is also not imminent. Overall, this seems a field where a separate investigation would seem necessary, taking into account the legal framework emanating from competition and state aid law, the cabotage rules, the exceptions in working time rules for the transport sector as well as general approaches to labour mobility and the potential for supporting autonomous regulation by transnational representatives of management and labour. Accordingly, this sector has not been covered in the empirical work.

2.4. Social security and social assistance

2.4.1. Notions, EU competences and scope of study

The terms "social assistance" and "social security" are reproduced in this study from the official heading of Article 34 Charter of Fundamental Rights, as specified under 1.3.3. Despite their common purpose, social assistance and social security are distinct concepts. For the purposes of this study it is useful to distinguish between **social security for protecting against the risk of losing the capacity to earn one's living**, whether temporary or permanently, and **social assistance** as systems providing a basic level of **combating poverty**.

This distinction is relevant with respect to the **diversity of national traditions** and models, as well as to the **limits of EU legislative competences** in this field, which is perceived as

[184] (Thörnquist, 2013, pp. 22-30).
[185] The European Commission's detailed "interpretation" of the 1992 cabotage regulation expose extensive evasion strategies targeting in particular minimum wages and "manning rules" with all their implications on working time and health and safety of crew and passengers, (Communication from the Commission on the interpretation of Council Regulation (EEC) No 3577/92 (…) COM (2014) 0232 final).
[186] (European Foundation for the Improvement of Living and Working Conditions, 2006).
[187] (Jorens, et al., 2015).
[188] Which is promoted as a model in the recent study cited in footnote 182.
[189] While the Commission work programme stresses the importance of the aviation sector (COM (2014) 910 final, p. 7), the proposal for a regulation on ground handling services at airports (2011/0387/COD) has been withdrawn (COM (2014) 910 final Annex 2 No 72). The proposal for a regulation establishing a framework on market access to port services and financial transparency of ports (2013/0157/COD) is still pending.

being decisive for the bond between citizens and states.[190] Nevertheless, social protection is inextricably linked with working lives in the EU. For this reason, EU legislation may coordinate national social security systems to serve the needs of free moving workers (Article 48 TFEU). It may also harmonise national laws more generally in the field of social security and social protection of workers (Article 153 (1) (c)), while such harmonisation is excluded in order to combat social exclusion among the population as a whole (Article 153 (1) (k)). So far, EU legislation on social security and social assistance is mainly based on free movement rights.

Coordination of social security for free moving workers originated in 1971[191] and **promotes free movement**, thus arguably going beyond equal treatment. The two regulations constitute a separate social security code for migrant workers, and are meant to prevent any negative impacts of **having an occupation in different Member States** on claims to social security.[192] As mentioned, there is some overlap between social security and social assistance, where tax-funded benefits are extended to workers or those in receipt of social security benefits who do not achieve the socially accepted minimum income.

Beyond social security coordination, **workers also have the right to be treated equally in relation to all social and tax advantages** in the Member States (Article 45 (2), Regulation 492/2011). The right to equal treatment is repeated implicitly in Directive 2004/38 (Article 24). That Directive is not focussed on workers, but is instead known as the **Citizens' Rights Directive**.[193] It contains mainly rules on immigration, which are less generous for persons who are not economically active, than for those who are. It also grants equal treatment rights for economically inactive citizens, which are equally less generous. The mix of rules for free moving workers and self-employed persons has raised the concern that the rights of economically active free movers would be compromised and approximated to the lower levels of those moving without the aspiration to become economically active.[194] This would, in turn, have negative consequences on the position of workers who do not move.[195]

Further, and corresponding to the **"spill-over effect" of Internal Market Law**,[196] the economic freedoms and competition law also impact on national systems of social security and social assistance. As in the field of collective labour rights, the fact that the Member States retain the main responsibility for social security and social assistance does not exclude the applicability of Internal Market Law.

This study, being focused on Internal Market Law, does not deliver an encompassing coverage of EU citizens' rights to social security and social assistance. It is only concerned with the impact of Internal Market Law on the field, focusing on impact of EU competition rules, economic freedoms for business and free movement of workers. We will start with the spill over effects of the EU competition rules, and then address the confusing field of workers' rights in social security and social assistance.

2.4.2. Competition rules – impacting on social security

As indicated, the **competition rules can also be used adversely against collectively agreed social security in two respects**. Firstly, the general question as to how far cartels should be exempt from the application of **Article 101 TFEU** is of relevance to those schemes.

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[190] (Beaudonnet, 2015, p. 1).
[191] Today mainly contained in Regulation (EC) 883/2004 of the European Parliament and the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1 and Regulation 987/2009 of the European Parliament and the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L284/1.
[192] On the differences between social security and social assistance see 1.3.3 above.
[193] (Guild, et al., 2014).
[194] (Wollenschläger, 2011).
[195] See above sub 1.4.3.
[196] (Lange, 2007, p. 259), for a recent confirmation see (Schimmelpfennig, 2014).

Secondly, in the cases *AG2R* and *Albany*, the schemes had been extended to apply throughout the sector, and at the same time preferred one pension or health care provider. This led the Court to investigate the question of whether there was an abuse of a dominant market position (**Article 102 TFEU**).

In such procedings, two lines of reasoning are relevant, both relating to the question whether the company or organisation is qualified as an undertaking, which again is the precondition for both Article 101 and Article 102 TFEU to be applied. First, it **needs to be established whether the company or organisation is an undertaking**. Here the Court applies an objective or functional test, for which it is relevant whether the activity is also provided on the market, and whether the establishment of a dominant market position potentially distorts competition. A recent case unrelated to labour and social rights seems to indicate that the standards are becoming stricter here.[197] Secondly, in relation to social security providers, the **notion of solidarity has also been used to exempt a provider** from the scope of application of competition law, as for example in the *AG2R* case.[198]

The case law on this particular aspect, which is of central relevance to **any social insurance scheme,** is unfortunately contradictory**.** The Court has accepted that agreements between non-profit sickness funds which were also constituted as public bodies were not subject to EU competition law because the cooperation between these funds was based on "a solidarity mechanims according to which equalisation (of risks) is effected between sickness funds in order to remedy the financial disparities resulting from differences in the degree of risk. [199] In the *AGR2* case cited above, the Court stressed the fact that the premiums paid were unrelated to the risk of employees becoming ill.[200] If a scheme does **not display a sufficient degree of solidarity, it would be subject to competition law.** For example, if Member States were to allow public insurers and private companies to provide certain services such as health care, elderly care or pension provision, the Court might find that all these entities were undertakings and subject to competition law.[201]

2.4.3. Economic Freedoms as business rights and social security

The free movement rights may also have an impact on social security and social assistance.

First, the freedom to provide services may become utilised in order to challenge social security provision and social institutions at national levels. As already discussed in the section on collective bargaining, the freedom to provide services, in combination with public procurement rules, has been used to challenge a third pillar pension system used by public employers.[202] The increasing overlap of economic freedoms and competition rules has invited another challenge of collectively agreed health insurance schemes, which are generally applicable to artisanal bakeries and the insurance sector.[203] In these cases there is no connection with public procurement – but nevertheless, **the obligation to contract with a certain health care provider is interpreted as interfering with the freedom to receive services from a foreign provider**. The opinion of AG Jääskinnen allows a cautiously positive assessment in relation to this specific case: he suggests that the national court considers carefully whether there is any transnational element in this case, and also suggests that even if Article 56 applies, the

[197] Case C-553/12 *P*, DEI, ECLI:EU:C:2014:2083, , [42]-[44].
[198] Above footnote 133.
[199] In the case C-264/01 *AOK Bundesverband et al* [2004] E.C.R I-02493, the Court found that agreements between non-profit sickness funds which were also constituted as public bodies were not subject to EU competition law because the funds were not to be classed as undertakings.
[200] Paragraphs 50-52
[201] On this problem see (Gronden & Szyszczak, 2014, p. 242).
[202] Case C-271/08 *COM v Germany* [2010] E.C.R I-7087.
[203] Case C-26/14 *Beaudout Père & Fils SARL*; Case C-25/14 *UNIS*. Case C-26/14 revisits the insurance scheme as was already at stake in the *AG2R* case [see footnote 133].

transparency provided for by the collective bargaining procedure under national law might be sufficient to protect the rights of foreign service providers.

Interestingly, the **social security regulations address the position of posted workers**, thus confirming their position as citizens who move for economic reasons. In line with the Posted Workers Directive, the social security status of posted workers remains mainly in the state where their employer is established (Article 12 Regulation 883/2004, Article 14 Regulation 987/2009). There are some exceptions to this principle though. Also, the social security regulations are more restrictive in defining posting: **an activity of more than 24 months is not privileged as posting (Article 12 Regulation 883/2004)**, and **posting by companies without economic activities in the country of establishment does not exclude the workers from the social security regime** in the host state (Article 14 (2) Regulation 987/2009). Accordingly, case law on social security at times relates to Article 45 TFEU in protecting rights of posted workers.[204]

2.4.4. Free movement of workers - established case law up to 2012

The equal treatment principles inherent in the free movement of employed and self-employed workers (Articles 45, 48 TFEU and related secondary law)[205] must also be complied with by Member States. This is of particular relevance in relation to the rights derived from Article 34 CFREU on social security and social assistance.

As far as **equal treatment rights are derived from worker** status, it is important to realize that the Court pursues a wide notion of workers,[206] which includes fractional and marginal workers.[207] The **formal classification of those working under the direction of another for remuneration as self-employed** under national law **bears no relevance** for workers' status **under EU law**.[208] If formally self-employed intermediaries, e.g. service station operators, are not sufficiently independent in relation to the commercial and financial risk under Article 101 TFEU,[209] they can hardly be denied worker status under Article 45 TFEU. Furthermore, rights derived from the free movement of workers "do not necessarily depend on the actual or continuing existence of an employment relationship."[210] Accordingly, former workers,[211] not-yet workers (job-seekers)[212] and prisoners[213] can claim (some) equal treatment rights. An agency worker, who is classed as self-employed and thus deprived from employment protection under national law, thus being forced to give up work instead of enjoying maternity protection in the later stages of pregnancy, and commences work three months after giving birth, retains worker status throughout.[214] **Directive 2004/38 partly codifies these principles** in Articles 7, 14 and 24, but not without clarifying that the case law on the free movement of workers remains unaffected (recital 9).

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[204] Case C-404/98 *Plum* [2000] E.C.R. I-9386, paragraph 19; Case 611/10, *Hudzinski*, ELI:EU:C:2012:339, paragraphs 79-80.

[205] EU legislation on coordination of social security systems also applies to self-employed persons, whose rights to free movement and equal treatment are protected by Article 49 TFEU. In so far the 2004 Directives are based on Article 308 EC (now: 352 TFEU with slightly changed wording).

[206] Case C-46/12 *N* ECLI:EU:C:2013:97, paragraph 39; C-507/12 *Jessy Saint Prix* ECLI:EU:C:2014:2007, paragraph 33.

[207] Case C-413/01 *Ninni-Orasche* [2003] E.C.R. I-13217, paragraphs 23-27; Case C-456/02 *Trojan*i [2004] E.C.R. I-7595, paragraph 15.

[208] Case C-94/07 *Raccanelli* [2008] E.C.R. I-5939, paragraph 33.

[209] Case C-217/0 *Espanola de Empresarios de Estationes de Servicia* ECLI:EU:C:2006:784, paragraph 44.

[210] Case C-507/12 *Jessy Saint Prix* (see footnote 206 above).

[211] Case C-291/05 *Eind* [2007] E.C.R. I-10719, paragraphs 35-45; Case C-39/86 *Lair* [1988] E.C.R. 3190, paragraphs 31-36.

[212] Case C-138/02 *Collins* [2004] E.C.R. I-2733, paragraphs 26-31; Case C-292-89 *Antonissen* [1991] E.C.R. I-746, paragraphs 11-13.

[213] Case C-482/01 *Orfanopulos and Olivieri,* and 493/01 [2004] E.C.R. I-5257, paragraph 50.

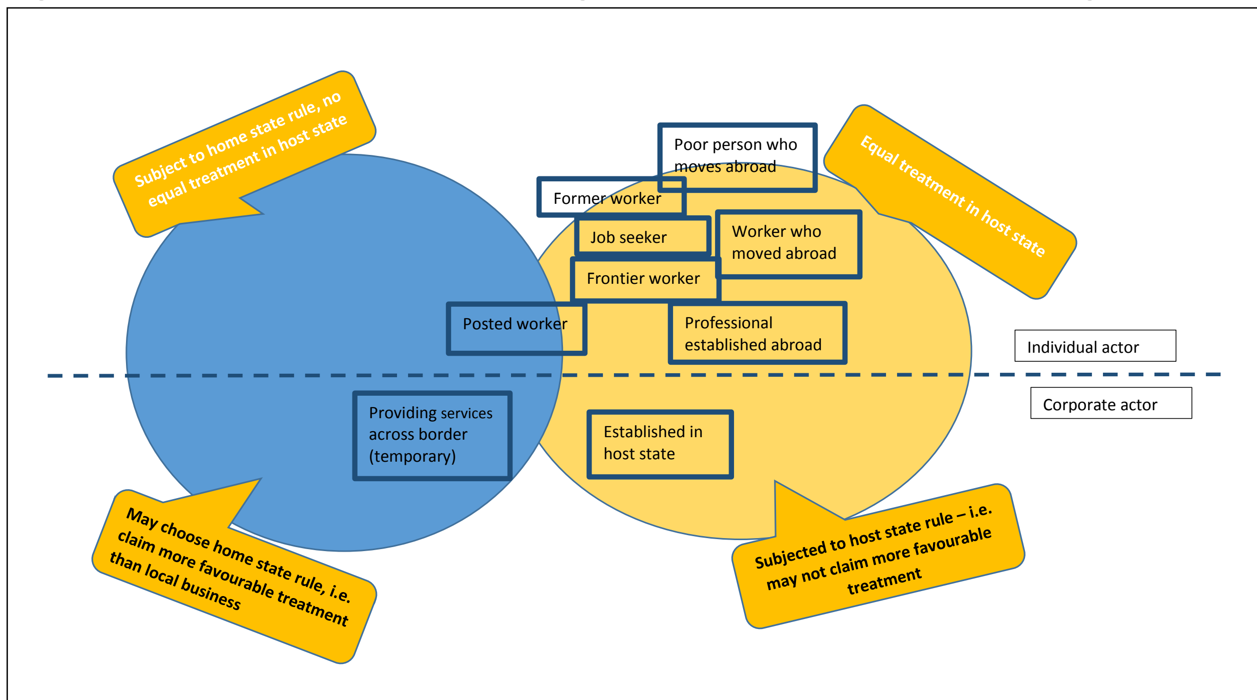
[214] Case C-507/12 *Jessy Saint Prix*, above footnote 206.

As mentioned initially, EU legislation **coordinates the national social security systems** with a view to supporting the free movement of workers (now: Regulation 883/2004 and Regulation 987/2009).

While **Regulation 883/2004** repeats the principle of equal treatment (Article 4), its main purpose is to improve the standard of living and conditions of employment of free moving persons (recital 1). This is mainly achieved by **securing the exportability of certain benefits, as well as an uninterrupted social security career of moving workers** (Articles 5-7), alongside the principle that only one national social security system applies to any person at the same time (Article 11). The regulation also covers tax-funded specific payments, which Member States provide in order to raise those with low claims to social security above the socially accepted minimum. These are referred to **as "special non-contributory benefits" (SNCB, Article 70)**, which are **distinguished from social assistance**. SNCB are not exportable, because this would either give beneficiaries a level of income that is too high or too low for the conditions in the host state. To compensate for the loss of portability, the SCNB can be claimed in the host state.[215]

In combination with the legislation sketched above, this results in a comprehensive coverage of those moving for an economic activity under equal treatment principles, while allowing their employers and other contract partners to choose the most favourable legal and economic environment for their business, as illustrated in this figure:

Figure 2: Free movement and social rights - established case law and legislation



2.4.5. Reducing the compelling force of equal treatment rights?

Recent case law on the rights to social security and social assistance confirms the concern that the mixing of rights for economically active and inactive citizens in one instrument may impact negatively on the rights of the former. By reclassifying special contributory benefits partly as social assistance under Directive 2004/38, and subsequently expanding the restrictions on those benefits for non-economically active citizens to persons which were formerly protected by the free movement of workers, **the Court has effectively started to chip away at the**

[215] See for a summary (Verschueren, 2014, pp. 159-164).

equal treatment principle which is so important for the EU's socio-economic model. It has also given up the principle that all those who legally stay in a Member State should partake in the socio-economic minimum as defined in that Member State. This principle was initially developed in case law on free movement of workers and later confirmed and expanded in case law on EU citizenship.[216]

This development started with two cases which concerned economically inactive movers, and are thus outside the scope of this study. However, they will have repercussions on the rights of workers and those partaking in worker status and shall thus be shortly considered. The ***Brey* case**[217] concerned a married couple of pensioners who moved abroad after ceasing to work, taking their pensions, but not their social assistance claims, with them under Regulation 883/2004. They were subsequently refused a special non-contributory benefit (SNCB), which was granted in their host state. The Court first reclassified the SNCB as social assistance under Directive 2004/38. It did not, however, divest the Breys from the benefit, although the reasoning is unclear in that respect. AG Wahl had been clearer, in stating that under Directive 2004/38, as well as former case law on what are today Articles 18, 20 and 21 TFEU, Member States must provide equal treatment to those who are legally resident in their territory.[218] Accordingly, the Breys were not deprived from the SNCB, and did not have to live in their host state at an income that was considered too low. As a result, **all former workers will have to jump two hurdles in order to claim additional benefits: it is not sufficient to establish that these are SNCBs under Regulation 883/2004, they must additionally justify their equal treatment under Article 24 Directive 2004/38.** This defies the purpose of Regulation 883/2004 which can only be achieved if the coordination system is maintained as a separate system.

The equation of SNCBs under Regulation 883/2004 with social assistance under Directive 2004/38 was repeated in the ***Dano* ruling**,[219] concerning the claim of a very young mother from Romania who claimed "Basic Income Support for Job-seekers" (job-seeker allowance) under the German SGB II.[220] This benefit, while paid from the general tax base, responds to the activation agenda: it is meant to reaffirm the self-responsibility of job-seekers and assist them in securing their livelihood through their own resources, predominantly through (re)integration into the labour market (§1 (2) SGB II, § 2), while also ensuring that they have sufficient resources to lead their life in dignity (§ 1 (1) SGB II).[221] Nevertheless, any job-seeker status of this young woman was never discussed. Following *Brey*, the Court classed this SCNB as social assistance at the same time. Following AG Wathelet, **the Court also developed a new logic on citizenship rights for the economically inactive population**. Instead of maintaining the established doctrine that citizen residing lawfully in a Member State on any basis[222] could claim equal treatment with nationals of the host state, subject to specific exceptions in EU legislation; the Court restricted equal treatment rights to those residing on

[216] Case C-85/96 *Martínez Sala* [1998] E.C.R. I-2708 constitutes the first case bridging case law on free movement of workers and EU citizenship, the *Troiani* case (above footnote 207) confirms that Member States would have to expel citizens if they do not longer feel able to pay their benefits, to avoid treating them unequally in comparison with their own citizens (paragraph 45).

[217] Case C-140/12 *Brey* ECLI:EU:C:2013:565.

[218] AG Wahl, Opinion in Case C-140/12 *Brey* ECLI:EU:C:2013:337, at paragraph 96: "To resume until a Member State has put an end to the lawful residence of a Union citizen by a decision that complies with the procedural guarantees enshrined notably in articles 15, 30 and 31 of the Directive (…) a citizen (…) may invoke EU law for the duration of his lawful stay. Such a decision must be taken independently from the question whether the Union citizen fulfils the requirement of sufficient resources." The Court has not been quite as clear, but nevertheless came to the same conclusion as AG Wahl (paragraphs 46-48 of the ruling).

[219] Case C-333-13 *Dano* ECLI:EU:C:2014:2358.

[220] Sozialgesetzbuch (SGB) Zweites Buch (II) - Grundsicherung für Arbeitsuchende - (Artikel 1 des Gesetzes vom 24. Dezember 2003, BGBl. I S. 2954), accessible at http://www.gesetze-im-internet.de/sgb_2/

[221] Case 22, 23/08 *Vatsouras & Koupatantze* [2009] E.C.R. I-04585, paragraph 45.

[222] Case C-456/02 *Trojani* [2004] E.C.R. I-7595, paragraphs 40-44; Case C-85/96 *Martínez Sala* [1998] E.C.R. I-2708, paragraph 63.

the basis of Directive 2004/38. **This allows the creation of a marginalised category of persons who cannot partake in the receptive solidarity**[223] **extended to citizens**, with the related danger of exerting downward pressure on social standards for all.

The Court's recent judgment in the ***Alimanovic* case**[224] extended this restrictive approach to EU free movers who had worked: a family of Swedish citizens, who had lived in Berlin from 1993-1999, returned to Berlin and received certificates of lawful residence in July 2010. Ms Alimanovic and her then 16 year old daughter worked in various temporary posts from June 2010 to May 2011. Subsequently, they received Basic Income Support for Jobseekers. The Court **qualified the job-seeker allowance as social assistance**, relegating facilitation of **access to the employment market** to a **secondary** motive.[225] It held that **Member States can revoke job-seeker allowance for EU citizens who have moved to another Member State for work if they are not employed for at least one year before becoming unemployed**. This **contradicted AG Wathelet's opinion**,[226] who had supported equal treatment rights for this category of job seekers **relying** on **the real link** they **established with their host state through former employment -** – although he endorsed unequal treatment of economically inactive free movers in the *Dano* case.

The **tendency to restrict rights of access to benefits is thus not limited to the economically non-active**. The ***Giersch* case** can be cited as another example for reducing the social rights of trans-border workers: their children will have to prove an existing link with the country in which their parents work specifically in order to gain equal access to higher education.[227]

After the recent case law, **a poor person having no access to the labour market will not be socially included** in the host society via social benefits, **even if she is granted a residence permit**. Further, **free moving citizens** who used to be protected by equal treatment rights, **such as job-seekers, frontier workers and former workers** are increasingly **falling between the cracks of a home state system** which no longer supports them, and a **host state system to which they are only granted access if establishing a stable socio-economic link** to the host state. Depending on the development of the case law, the **insecurities of free movers** and their limited access to the accepted social minimum **will deter** some of them from moving abroad and **have a negative impact on the bargaining position of those who are not deterred from moving**.

[223] On this notion in more detail (Schiek, 2015).

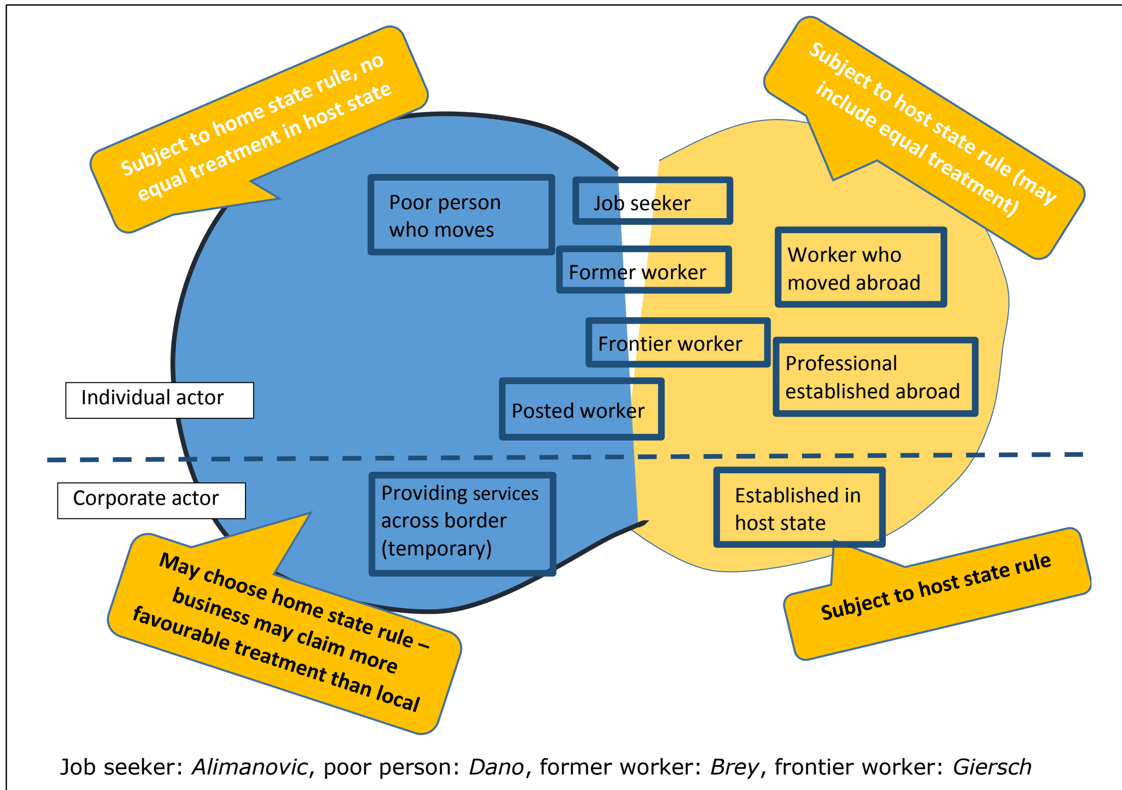
[224] Case C-67/14 *Jobcenter Berlin Neukölln* v *Alimanovic*, ECLI:EU:C:2015:597. The case has been referred by the German Federal Administrative Court (Farahat, 2014).

[225] While the Court did not state this expressly, the judgment thus overrules the *Vatsouras & Koupatanze* judgment, above footnote 221.

[226] ECLI:EU:C:2015:210, paragraphs 112-122

[227] Case C-20/12 *Giersch*, ECLI:EU:C:2013:411, (O'Leary, 2014).

Figure 3: Equal treatment for free movers after recent case law



Job seeker: *Alimanovic*, poor person: *Dano*, former worker: *Brey*, frontier worker: *Giersch*

2.5. Chapter conclusion

Given the interplay between the Court's case law and EU legislation it is **unsurprising that the dominant perception of EU social and labour rights in the Internal Market is one of tension**.

Up to 2012, the Court established **little tolerance for collective bargaining underpinned by effective industrial action**, and defended the rights of business derived from the freedom to provide services and the freedom of establishment against perceived intrusion by those making use of these rights. The more recent case law refrains from addressing these issues. This may be interpreted as indicating a phase of reflection, and reconsideration. While trade union density is declining in the EU, the pre-2012 case law may be seen to support a trend of discouraging the engagement of workers in this traditional form of self-governance. Given the diversity of industrial relations systems in the Member States, it is to be expected that this tendency impacts differently on the options of actors at national levels.

As regards rights to **fair working conditions**, the **interplay of the Court and the legislator has entrenched** a new form of precarious work: **posted workers**. Although moving around the EU, they **are deprived of equal treatment rights with workers in the host state**. The Enforcement Directive[228] addresses some of the more abusive emanations of posting, while not adjusting the principle of unequal treatment in order to accommodate the desire of employers to make providing services more profitable through low-pay strategies. It is expected that this plays out differently in the Member States depending on the level of wages and employment conditions. Concurrently, weakening trade union representation and denying equal treatment may amplify the precarious position of posted workers. The predominant lib-

[228] 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') [2014] OJ L159/11.

eral conception of the freedom of establishment and the freedom to provide services also protects business models based on the choice of the place of establishment and long-term cross border posting of agency workers. The frictions between EU legislation on posting and agency work might give actors at national levels reason for concern too.

In the field of **social security and social assistance**, there is no normative expectation of tensions between the Internal Market and social and labour rights. In principle, the equal treatment arm of the free movement of workers (and the individual self-employed persons) should reinforce claims of migrants to social security and social assistance. The compelling force of equal treatment in these fields is also of importance for supporting the position of local workers who do not move. Traditionally, the EU's regulatory approach has been to provide comprehensive social security for free movers through the technique of coordination on the one hand and to guarantee equal treatment in the fields of social security and social assistance on the other hand. Both were derived from the Treaty's free movement rights. Separate codifications of both principles have established a satisfactory system of coverage overall. Again, the position of posted workers is less secure, as they are not established in the social security systems of host states. However, in contrast to the employment legislation on posted workers, the **social security legislation grants workers posted abusively or for more than 24 months rights to equal treatment**. In relation to marginal free moving workers (job-seekers, former workers and frontier workers), **recent case law provides cause for concern in that it withdraws the promise of equal treatment for these vulnerable categories**, reflecting a tendency in Member States to allow the emergence of a marginalised category of legally resident, but socially deprived citizens without rights to claim social assistance or access social security.

3. POLICY RESPONSES AT NATIONAL AND EU LEVEL

KEY FINDINGS

The synthesis of 44 expert interviews with respondents at EU level and in Ireland, Poland, Spain and Sweden illustrates the experience of and responses to the demands of Internal Market law and social and labour rights. The chapter finds that EU level and national level actors experience the relation between the two as a tension when seeking to bring to life social and labour rights. Tensions experienced as prevalent evolve around posting of workers and free movement of workers and associated rights to social protection and assistance, while the enhanced opportunities of business to choose favourable legal environments and the demands of competition law were only experienced as problematic in two of the Member States and not mentioned at EU level. Responses to these tensions are shaped by a range of institutional and structural factors, and in some cases are constrained by crisis measures introduced as a result of austerity. Overall, the findings raise questions not only about the substance of EU law but also its application and enforcement.

3.1. Introduction

The material in this chapter **presents findings from interviews with EU level actors**, and interviews **with actors in the four Member States covered in this study: Ireland, Poland, Spain and Sweden**. The aim of the chapter is to provide primary evidence on two issues. Firstly, how do **social actors perceive tensions between social and labour** rights on the one hand and Internal Market law on the other? Secondly, **what responses have these social actors developed** to address these tensions? Details of the methodology adopted can be found in Annex 2, whilst Annex 3 and Annex 4 provide details of the generic interview schedule and the list of respondents. Section 3.2 provides an overview of the socio-economic and industrial relations systems in the four Member States and at EU level. Further details on the EU context, derived directly from the interviews, are provided in Annex 5. The remaining sections synthesise the expert interviews with a focus on those issues that were most prevalent (see also 3.2.6).

3.2. Context of responses and debates at national and EU levels

Potential tensions between Internal Market law and social and labour rights are **likely to be experienced differently** in different Member States and at the EU level. Initial expectations were that those differences would **resonate with differences in socio-economic situations across Member States**, as well as in relation to the **prevailing industrial relations models**, and **involvement in European integration processes**. The four Member States were chosen for this study because they differ in regards to their socio-economic situations as well as their industrial relations systems. They also have different experiences with European integration and encountered the global economic crisis differently; some are economically strong (Sweden) or unaffected by recent crisis management for other reasons (Poland), and others have only recently emerged from specific measures adapted to overcome the Eurozone economic crisis (Spain and Ireland).

This section offers some preliminary observations on those features in the four Member States as well as at EU level, highlighting the context of responses to tensions analysed.

3.2.1. Ireland

In Ireland, the **economy initially profited immensely from EU integration**, which is reflected in the 'Celtic Tiger' image or caricature. However, with the **introduction of the euro currency** the economy became **increasingly dependent upon internal private credit**,

which led to severe repercussions in the global crisis.[229] In spite of these recent experiences with the crisis, this is a country with medium to high levels of labour and social standards within the EU.[230]

The **model of industrial relations in Ireland is voluntary**, but with a strong underpinning of **state-focused corporatist elements**. Industrial relations are **voluntary** in so far as there is no obligation of employers to negotiate with any worker representatives or trade unions. Also, collective labour agreements are not, in themselves, legally binding on the parties to those agreements, and their effect on the individual employment relationship depends on individual incorporation. Accordingly, **any practical effects of collective agreement would depend on implementation through collective bargaining and, if necessary, industrial action**. If this implementation was not successful, the employee would fall back on statutory protection. The **corporatist elements**, first established by the Industrial Relations Act 1946, rested on the role of the Labour Court. Similar to Scandinavian labour courts and the British ACAS, the Irish Labour Court is an arbitration institution. The 1946 Act established that the **registration of a collective agreement by parties representative of both sides of the industry** with the Labour Court made this agreement legally binding for the whole sector. These **Registered Employment Agreements** (REAs)[231] not only **extended collective agreements to all employers** of a sector, but they were also **the basis for legal effects of those collective agreements** generally. Joint Labour Committees (JLCs) determined wages and other employment conditions in certain **sectors with weak collective bargaining structures** by establishing **Employment Regulation Orders** (EROs). All of this established a **system of generally binding collective agreements**, which is unusual for voluntary industrial relation systems. Both institutions were challenged successfully before the Irish courts.[232] Accordingly, **from 2013**, neither REAs nor EROs were applied, which removed the corporatist elements from the Irish voluntarist system. While legislation on minimum wages is still in place, collectively agreed wages now only apply due to industrial relations pressure.

In **May 2015**, the government has tabled the **Industrial Relations (Amendment Bill) 2015**, aiming, among others, to **replace the former REA system** with a new mechanism. Employment conditions for a whole sector can be established **by ministerial order**, upon recommendation by the Labour Court following an application to review the pay, pension or sick pay system in a sector. The application can be made by a trade union, an employers' association or jointly by trade unions or employers' association.[233]

3.2.2. Poland

Poland is one of the EU Member States which **has avoided EU imposed crisis management measures for a long time**,[234] but has recently adopted some measures aimed at

[229] (Woods & O'Connel, 2012).

[230] On labour market regulation in Ireland see (European Commission, 2013a); on the unemployment insurance rate in Ireland see (European Commission, 2013b).

[231] REAs could be registered by individual employers and trade unions, but also be based on negotiations within Joint Industrial Councils, which were voluntary negotiation bodies aimed at engendering industry level bargaining. These were typical for the construction industry and other highly unionised sectors.

[232] The Industrial Relations Acts 2001 – 2004 allowed to bring an unresolved trade dispute before the Labour Court if employers refused to engage in collective bargaining. These were successfully challenged by Ryanair (Ryanair v The Labour Court [2007] IESC 6). The JLC system was invalidated by the Supreme Court in 2011 (John Grace Fried Chicken Ltd & Ars v Catering Joint Labour Council & Ors [2011] IEHC 277, on this see (Doherty, 2012), and the REA system was invalidated in 2013 by the same court (Doherty, 2013) with further references).

[233] An overview of the bill is available under http://www.djei.ie/press/2015/20150508.htm; the Bill can be accessed at http://www.oireachtas.ie/viewdoc.asp?DocID=28887&&CatID=59.

[234] In 2009, the Polish government tabled a vision for Poland 2030, based on a very optimistic assessment of the economy's resilience in the face of the crisis (www.poland2030.pl). In 2012, there was still no sign of crisis measures (Rae, 2012); but from 2013 Poland has been subjected to an excessive deficit procedure (see COM (2014) 422).

reducing the budget deficit diagnosed by the European Commission. The **labour market** is still **characterised by outward migration of Polish workers**, both on the basis of the free movement of workers and on the basis of posting. **Inward migration is less voluminous** overall, **and dominated by citizens from 3rd countries**, especially Ukraine, Russia and Vietnam. Accordingly, there is less concern with incoming EU migrants than in some other Member States.

The Polish **industrial relations model** has been characterised as **mixing liberal elements** (often attributed to US counsel and partly reflected in Polish academic opinion) with more **traditional elements from the pre socialist** and socialist past.[235] **Industrial relations** based on freedom of associations only emerged after 1989, and are **strongly conditioned by legislation**.[236] For example, the **Trade Union Act establishes a registration requirement**, limits the rights of self-employed workers to join a trade union and implies a company-based structure of trade unions. It also gives trade unions representative functions for all workers at the work-place, regardless of membership. Collective agreements can be concluded at any level, and there **may be a duty to enter into negotiations on collective agreements** if employees are not yet covered by one or the collective agreement is about to expire. The Act on Collective Dispute Settlement closely regulates collective industrial action. **Strikes** and other forms of collective action are only legal as **a last resort**, subject to explict ballot requirements, and are **excluded in certain sensitive sectors**.[237] Thus, the legal system still restricts the scope of effective collective bargaining. In practice, collective bargaining takes place at company level, and coverage of collective agreements is limited (16% of the workforce in 20 % of the companies[238]).

As in most Visegrad countries,[239] **legislation is far more important for the regulation of employment and working conditions**. However, the level of protection is relatively low, as is symbolised by the low statutory minimum wage.[240] Statutory protection is also eroded by the option to contract with workers on the basis of civil law contracts, thus circumventing the protection of employment law.

3.2.3. Spain

Spain has been hit hard by the global economic crisis, which is sometimes related to the fact that – as in Ireland – **private credit became easily available with the initiation of the euro currency**. This, among others, created a serious **"housing bubble" from the early 2000s**.[241] After 2010, **numerous legislative measures were taken in order to increase economic competitiveness** in the light of the need to apply for financial support from the EU and the IMF. Among these, the **2012 Law on Urgent Measures for Reforming the Labour Market** (Law 3/2012) is of particular importance for the subject of the study.

This Act, on the one hand, moved along the lines of similar initiatives from the mid-1990s in that it intensified labour market segmentation by creating more space for fixed term, agency and marginal part time work.[242] In a new development, it **considerably weakened the relatively young system of constitutionally guaranteed collective bargaining in Spain**.[243]

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[235] (Meardi, 2002; Shields, 2007).
[236] (Unterschütz & Woźniewski, 2011).
[237] (Mitrus, 2014).
[238] (Unterschütz & Woźniewski, 2011, p. 167 with footnote 8).
[239] See (Hoffman, et al., 2009, p. 396). The Visegrad Countries comprise Poland, Hungary, and the Czech Republic, ibid.
[240] A Council of Ministers regulation of 11 September 2014 has raised the minimum wage to as of 1 January 2015 to PLN 1,750 i.e. about 475 €.
[241] (Dellepiane, et al., 2013; Eichengreen, et al., 2013)
[242] See on this (López, et al., 2014; Rodriguez Contreras, 2007).
[243] Democratic industrial relations only emerged after 1975 in Spain (Aguilera, 2004 , p. 212).

The constitutional guarantee was implemented with the Estatuto de Lavoradores (1980), which provided for the erga omnes effect of terms and conditions of collective agreements, as well as basing collective bargaining on representation of workers through trade unions as well as through works councils (**a so called 'dual channel' system**). In spite of a relatively low unionisation rate, trade unions used to have influence via the works councils on the majority of the firms. At the same time, the success of trade unions in works council elections could be used as an indicator of their representativeness. This led to the emergence of **two dominant trade unions, and relative stability of the pluralist trade union system, which again encouraged strong sectoral level collective bargaining**.[244] **The 2012 legislation, by contrast, gave absolute priority to company level collective agreements**, which led to a decrease in sector level collective bargaining.

Law 3/2012 **also increased employer prerogative** by introducing specific rights for employers to **vary employment conditions unilaterally**, and to demand abstention from trade unions in exchange for a higher salary. Further, and **independent of legislation, practices have been introduced to lower the level of wages awarded by collective agreement**. This was achieved by following a strategy of decentralisation, leading to **atomisation of companies into multiple nominally independent entities which are linked to a network of contractors and subcontractors** or temporary works agencies.[245] This provided obstacles both for the right to collective bargaining as well as to the opportunities for social dialogue. The weak employment market also led to the outward migration, to a large degree based on the free movement of workers. This resulted in a weakening of the contribution base for social security systems in a time of crisis, which partly counteracted legislation aiming to stabilise the social security system.

3.2.4. Sweden

Sweden has a relatively strong economy, and has weathered the global economic crisis comparatively well. This is attributed to the **Nordic or social-democratic welfare state model** and a coordinated market economy supporting social equality.[246] Standards in the labour market remain comparatively high: there is a high level of organisation in trade unions and employer organisations and a wide coverage of collective agreements. Wage decline during the crisis has been less pronounced than in other Member States; and the social security system was reconfigured well before the crisis.[247] The increasing influx of service providers from Member States with lower wages and levels employment protection from 2004 is perceived as a threat to these achievements.[248]

The Swedish **industrial relations system is focused on autonomous bargaining** of central employment conditions between trade unions and employer associations. Although underpinned by state legislation,[249] it allows for a high degree of autonomy for the parties to collective bargaining and **gives them wide scope to engage in industrial conflict**. There is a stable consensus in society that the state should not interfere in wage formation. Accordingly, wages are regulated only through collective agreements and individual employment contracts. There is **no statutory minimum wage**, and **no system for extending the binding force of collective agreements**.

[244] (Fernández Rodríguez, et al., 2014)
[245] On temporary agency work in Spain see (Chacartegui Jávega, 2013)
[246] (Freeman, 2013).
[247] (Börklund & Freeman, 2010).
[248] (Ahlberg, 2013, pp. 312-313).
[249] The Act on Workers' Participation (Medbestämmandelagen) has, from 1976, regulated central aspects of the industrial relations model, which was originally conceived as a collective agreement (Basic agreement).

Collective agreements are subject to contract law, binding only on the signatories and their members. While **only the unionised employees are bound by the agreements**, the **employers are under an obligation to apply collective agreements to non-unionised workers as well**. This is an implied term of any collective agreement. This is the basis for the **wide coverage by Swedish collective agreements of 90 % overall, and 84 % in the private sector**.[250] The monitoring and enforcement of collective agreements is a task for the parties to the agreements, not for any public body.[251] In particular, **trade unions are free to raise claims against employers, and if necessary to stage industrial action if they do not apply collective agreements** to all their workers.[252] Employers can be bound by collective agreements through affiliation to an employers' organisation or by concluding an 'application agreement'[253] directly with the trade union. In order to ensure sector-wide coverage, Swedish law sets very few limits for trade unions to convince an employer to become bound by a collective agreement. Industrial action, including sympathy action and blockades, are the usual means to achieve coverage for employers who are not unionised.[254]

3.2.5. The EU level

At the EU level, **the absence of a general regulatory authority by the EU over employment conditions and social law** is the key point regarding the interrelation of social and labour rights and Internal Market law. **Social policy is an area of shared competence** between the EU and the Member States (Article 4 2. (b) TFEU). **Pay, the right of association, the right to strike and the right to impose lock-outs are beyond EU competence** (Article 153 (5) TFEU). The harmonisation of national laws in the areas of social exclusion and the modernisation of welfare protection systems are also beyond EU competence, though the EU may coordinate national laws (Article 153 (1) TFEU). Furthermore any EU legislation around employees' protection against dismissal, information and consultation of workers, collective representation and defence of workers and employers' interests, and the conditions of employment for non-EU nationals, requires unanimity in the Council (Article 153 (2) TFEU).

The **lack of EU level legislative authority is not compensated by EU level collective labour agreements. Autonomous collective bargaining is the exception**: although Article 154 (3) and 155 TFEU allow for the conclusion of EU level collective agreements independently from EU legislation,[255] management and labour at EU level respect the prerogative of national social partners. So far, they have only chosen the form of framework agreement for autonomous implementation. There are instances of collective bargaining in multinational corporations within the EU;[256] as well as instances of coordination of collective bargaining at EU levels.[257] Mainly, **negotiations between management and labour at the EU level take the form of social dialogue under the Treaties** (Articles 153, 154, 155 TFEU). Under Article 154, the Commission is under an obligation to consult specifically, in a two stage process, with the social partners on social policy legislation, namely the European Trade Union Confederation (ETUC), the Confederation of European Businesses (UNICE), and the European Centre for Enterprise with Public Participation (CEEP). The social partners may start to negotiate for agreements at EU level (Article 154 (3), and 155 TFEU) in response to a

[250] Summary of the annual report for 2014 (Swedish National Mediation Office, 2015).

[251] The Swedish 'labour inspectorate' (the Work Environment Authority) only monitors and enforces the legislation on health and safety at work.

[252] To add some background to the Laval case, it should be noted that the Building Workers' Union (Byggnads) have a tradition of closely monitoring employers, and intensified these controls for posted workers from 2004 (Thörnquist, 2013, pp. 9-10).

[253] An application agreement is an agreement by which the employer undertakes to apply a certain collective agreement, usually the central agreement for the sector in question.

[254] Around 70 per cent of the workers are union members according to the National Mediation Office (2015).

[255] (Jacobs & Ojeda-Aviles, 1999; Schiek, 2012b).

[256] (Sciarra, 2013; Leonardi, 2012).

[257] (Hoffmann & Hoffmann, 2009; Keune & Marginson, 2013; Schiek, 2012b).

consultation launched by the European Commission. Any resulting agreements can be translated into Directives, which may require transposition through national legislation or national collective agreements (Article 155 (2) TFEU). Overall this is a **highly legalistic industrial relations model**, in which agreements between the EU level social partners hardly become legally binding by themselves.

In practice, EU-level industrial relations are characterised by heterogeneity, frequently reflecting differences between Member States of different regions (e.g. East/West or North/South), and by increasingly complex interactions between actors operating at the different levels of a transnational enviroment.[258] **EU industrial relations constitute a 'multi-level system'.** The main regulatory competences remain at national levels, but are conditioned by EU Treaty law as interpreted by the Court of Justice as well as by EU level regulation and collective bargaining.[259] In addition to the EU and national institutions of governments, trade unions and employer associations, other social and policy actors play an increasingly important role in defending or lobbying for Internal Market law and/or social and labour rights of free movers and posted workers. These include Brussels-based not-for-profit organisations as well as lawyers providing legal advice on mobility rights and access to social service in different Member States on a voluntary basis.[260]

3.2.6. Expectations for the evidence by expert interviews

The diversity across the EU level and the Member States led us to expect diverse perceptions of, and reactions to, the tensions between social and labour rights and EU Internal Market law.

In **Sweden and Ireland**, due to their voluntary tradition of labour relations and a relatively strong economy, **we expected a greater exposure to the influx of posted workers as well as free movers**. In so far as **EU legislation protecting posted workers presupposes state legislation, we expected pressure on industrial relation** systems based on collective agreement instead of legislation. Also, the restrictive approach of the European judiciary to collective labour rights renders voluntary systems more vulnerable.

In **Spain and Poland** we expected **less inward migration** and **more outward movement**, and that the **dominance of the statutory protection of employment rights** would make the **conditions of national employment less vulnerable to pressures emerging from the freedom to provide services**. In particular **in Poland**, where the collective bargaining system is focussed on company level agreements, we expected **less impact of the Laval line of case law**.[261] We would also expect that any deregulatory effects of Internal Market law would be overshadowed by economic governance and by reactions to the economic crisis in Spain.

For the EU level we expected that any reflection on the suitability of existing EU legislation or proposals to strengthen EU level since the EU level regulation would be coloured by the Court's restrictive case law.

The chapter now turns to the **synthesis of expert interviews**, structured by the tensions identified as most prevalent by the interviewees. This **structure differs from chapter 2**, which elaborates systematically how the three clusters of EU social and labour rights covered by this study have been challenged by Internal Market law before the Court. Not all these tensions are equally relevant to our interviewees, partly reflecting the differences outlined above. The chapter **starts with freedom to provide services and posting of workers**, since this is the policy issue which came up most frequently in the interviews, covering the

[258] (Keune & Marginson, 2013).
[259] (Bercusson, 2009, pp. 11-24).
[260] We provide further detail on the EU context for understanding specific tensions in Annex 4 in this report. This Annex draws on some of the interview data with EU actors.
[261] Case C-341/05, see footnote 63 above.

general situation of posted workers, fair working conditions, **collective bargaining rights**, posting combined with agency work, issues of enforcement and **social security and social assistance**. **Next**, the synthesis covers the second most apparent emanation of the tensions between the freedom to provide services and social and labour rights: **public procurement**. A short section summarises responses highlighting potential abuses of freedom of establishment. This is followed by tensions between the freedom to provide services and social and labour rights and reports on **tensions between EU competition law and social and labour rights**. Finally, we look at the **free movement of workers**, which has been assumed as a factor supporting social and labour rights via the principle of **equal treatment**. We find that this principle is **challenged** by re-defining the notion of 'worker' and national reservations on treating free moving workers equally in the fields of social security and social assistance.

3.3. Posted workers

Postings of workers emerged as the point most widely covered in the responses at all levels, and by all respondents, giving rise to a wide range of practical problems as well as providing a rich illustration of the perception of and responses to the tensions between economic freedoms – here the freedom to provide services – and social and labour rights.

3.3.1. Posting: dependent migration; precarious, low-waged employment

The responses also revealed that **posting**, in particular the posting of agency work, has developed into **a form of conditioned migration** which offers employers the opportunity to access low wage labour. Interestingly, Polish and Swedish respondents discussed the situation of lorry drivers when asked about posting, referring to the **provision of services by low-paid drivers under cabotage rules** as well as the "normal" transport through a neighbouring country in this context.[262] While the Swedish respondents stressed the wage-depressing effects of those activities, Polish employers and public servants submitted that applying the German minimum wage to drivers abroad comes close to "blocking freedom of services". Spanish respondents discussed the **establishment of supply chains involving low-wage countries** such as Romania and Bulgaria in the same context. Practices such as using cabotage services, foreign transport firms or establishing supply chains in low-wage countries do not seem to have much in common with posting legally. From an economic perspective all these practices appear as **functional equivalents** because they utilise wage differentials between different countries in order to **compress the cost of production or service provision through using low wage labour**. Accordingly, it is not surprising that interviewees from both management and labour refer to these practices when asked about posting. Posting emerges as a marginal form of employment, which warrants special protection measures for posted workers.

At the EU level, the trade unions viewed the **difficulties experienced by posted workers as a reflection of the inferior position of social and labour rights** in comparison to EU Internal Market law. This inferiority was perceived as **entrenched in the Treaties**, for which reason the ETUC interviewee considered a Social Progress protocol as condition sine qua non for any positive change:

> *'what we say is that if there is a conflict between fundamental social rights and economic freedoms, then fundamental rights should take precedent, and we want this protocol to be annexed to the Treaty so it would be at the highest level. Because we cannot address all these issues only through a Directive, I mean we have tried and that's why we want the revision of the posted workers' Directive, but we are fully aware that even if a Directive could help, it still cannot overrule the rulings of the ECJ.' (Interview, ETUC)*

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[262] For an explanation of these practices see above sub 2.3.5.

The priority of the **Social Progress protocol** was supported by Irish trade union respondents and explicitly contradicted by the Polish trade union interviewees, who considered changes to Directive 96/71 (Posted Workers' Directive) as a more realistic goal as well as more targeted to overcome the perceived problems. These Polish interviewees also considered that demanding the prioritisation of social and labour rights over economic freedoms did not go far enough:

> *(…) Social rights are human rights (…) and there is no discussion that they must be respected absolutely and in all circumstances. (…) (M)arket freedoms are just legal provisions (…) shaped by the legislator who must always take into account the charter of fundamental rights (…) The ETUC wants to put it explicitly in the statement that social rights prevail, so they disagree with us."*

These trade union representatives also **demanded a revision of the Court of Justice's** approach to the proportionality test, making explicit reference to the Schmidberger case.[263]

3.3.2. Fair working conditions for posted workers

Problems relating to fair working conditions for posted workers were the most prevalent, though these were articulated with more urgency in Sweden and Ireland than in Spain and in Poland.

Respondents from **trade unions and labour inspectorates** from all Member States expressed **concern that posted workers were paid significantly lower wages** than other workers in the host states. This concern was shared by employers interviewed in Spain and Sweden. The Spanish employer stressed that different wage levels should be respected in supply chains (and public procurement), but expressed a different view in relation to posting. A Polish interviewee from the NGO **LMIA**, which lobbies for maximum use of free movement rights, held a contrasting view, stressing that when it comes to Polish entrepreneurs providing services abroad **"there is no social dumping"**, since "posted worker do not take away nobody's job because he is meant by definition to come back". Two respondents, both from employers' umbrella associations at EU level, stressed that posting was of limited relevance statistically.[264]

Directive 96/71 was not generally seen as offering sufficient protection for posted workers' substantive employment conditions. In contrast to this, the two respondents from EU level employers' associations considered the directive a good compromise between social and labour rights and Internal Market principles, and opposed any revision. Trade union respondents at EU level and from Poland stressed that a **clearer definition of posting is needed**, a view shared by a Spanish public sector interviewee. Further, employer representatives and trade union respondents from Sweden missed a **clearer definition of what constituted the basic requirements under Article 3** (1) Directive 96/71.

There were different responses to these problems. In Spain, full implementation of Directive 96/71 was considered as sufficient, while **Irish legislation** ensured **full equal treatment of posted workers in relation to statutory employment rights**. The latter option was portrayed as over-implementation of the Directive. However, this option is arguably **covered by Article 3 (10) Directive 96/71**, given the fact that in Ireland most employment rights are generated in the voluntary industrial relations system.

Most respondents agreed that **posted workers** as precarious workers **experiencing a language barrier in the place of work need targeted information about their rights**. In the temporary works agency sector, the employer association EuroCIETT and the cross-sectoral EU level trade union UNI or agency workers of all sectors have agreed on a sectoral

[263] On this issue see above footnote 87.
[264] See on statistical information of the relevance of posting below 5.2.3.

platform promoting knowledge of employment rights in countries where agency workers would be posted.[265] The ETUC provided training for its members, and briefed them on updates and developments around posting. An NGO working with migrants in Spain engages in providing workers posted from Spain to other EU Member States with information about their entitlements in the host countries. The same organisation regretted that trade unions frequently do not represent incoming and outgoing posted workers effectively. Swedish trade unions, on the other hand, strive to recruit posted workers as members, especially those posted on long-term projects.

Suggested responses, which are not yet prevalent, included naming and shaming strategies implemented by trade unions, up to consumer boycotts targeting multinational companies exploiting posted workers. Also, a Spanish NGO working with posted workers suggested that a register of posted workers would be helpful in supporting this vulnerable group.

3.3.3. Posted workers and collective bargaining

These responses already indicate that **collective bargaining coverage** and trade union representation **can improve the employment conditions of posted workers**.

Spanish employer respondents related that posting was prevalent in weakly unionised sectors, and the **labour inspectorates** reported that posted agricultural workers frequently were reluctant to become unionised, which again limited their practical protection from exploitation. **Trade union** respondents suggested that action aimed at naming and shaming multinational companies engaged in unethical employment practices involving posting would be best staged at the EU level.

Respondents from **Poland** stressed that **workers posted to other countries** would **frequently not** be **covered by collective agreements** in their home country, with the exception of the some workers in the construction sector. Absence of coverage would be typical for the care sector, from which a large proportion of workers are posted. The NGO lobbying for free movement rights stated that Polish employers struggled to adapt to pay levels required by collective agreements concluded in the Nordic countries, whether these agreements were generally applicable (as in Norway and Finland) or not.[266] Respondents from the Polish ministry explained that Polish employers would often join Swedish or Danish employers' associations and pay in line with Swedish collective agreements initially. In the medium term this would force them out of business, since they were unable to influence collective negotiations sufficiently to secure terms and conditions suitable for their specific situation.

As expected, **tensions** between the freedom to provide the service of posting workers and collective labour rights were **mainly felt in Sweden and Ireland**, where collective bargaining still has a discernible impact on employment conditions. Trade union respondents from **Ireland** expressed concern that **posted workers could not be included in the special pension scheme for construction workers**, which is a collectively agreed institution. **Swedish trade unions** consistently strive to improve the working conditions of posted workers by **inducing employers from other Member States to adhere to Swedish collective agreements**. This strategy is supported by some employers in the construction industry. **Large construction companies will require that their subcontractors conclude an adhesion agreement** with a Swedish trade union, and apply Swedish collective agreements. This was

[265] 'Agreement between UNI Europa and EuroCIETT to set up a European Observatory on cross-border activities within the Temporary Agency Work sector' [online] available at: http://www.eurociett.eu/fileadmin/templates/eurociett/docs/Cross_Border_Activities/Joint_agreement_Eurociett_UNI_on_setting_up_Observatory.pdf [accessed 26/03/2015]. The data on the observatory is accessible under http://www.eurociett.eu/index.php?id=172 [accessed 26/03/2015].

[266] The then pending case C-396/13 *Sähköalojen ammattiliitto ry (SA ry)* (above, footnote 33) was quoted as an example, as Polish employers were not used to differentiated wage structures and the requirement to provide bonuses for meals, accommodation and the general demands of being posted away from home.

seen as a sign of quality of the subcontractor. At the same time the main contractor avoided any liability as a consequence of categorising an employee as posted although they were entitled to Swedish employment conditions. The trade union respondents reported that it was frequently difficult to ensure that all these collective agreements are actually applied.

In both countries, traditional industrial relations models came under strain.

Ireland presents an interesting case study because the former system of Registered Employment Agreements and Employment Regulation Orders has first been abolished by Court order, and is now in the process of being **replaced by a more state centered system**. The interviewees report that the system prior to 2013 provided a stable level of employment conditions above the (low) statutory guarantees, which mirrored the level of trade union density in the different sectors. In the construction sector, the most representative trade unions and employer associations had concluded sectoral collective agreements, which had become legally binding as Registered Employment Agreement (REA). The REAs not only provided for pay levels above the minimum wage, but also established a sector-wide monitoring body, the Construction Industry Monitoring Agency (CIMA) and dispute resolution procedures. Further, the labour inspectorate (National Employment Rating Agency – NERA) had statutory powers to enforce REA and to recover outstanding wages for posted workers. After the REA system became dysfunctional, interviewees from the employer association for construction observed:

> *Employers just decided that, even if they were hiring migrant workers as opposed to posted workers, they would just put them onto a rate (lower) than the REA rate.*

Some **trade unions undertook to enforce the payment of REA rates through industrial action, with some success**, according to the CIF interviewee. It seems worthy of note that for the construction sector, respondents from the employer and trade union sides agreed that binding sectoral collective agreements would offer the best national response to the dilemmas of posting, while the cross-industry employers' association IBEC is reluctant to accept extension of sectoral collective agreements.[267]

Since the REA system presupposes sector level collective bargaining, it never protected posted workers beyond the construction sector. A comparable level of protection would be offered by **Employment Regulation Orders (EROs),** which were in place in sectors such as **retail, catering and hostelry**. These sectors frequently used agency workers, who consisted of migrants to a large extent and might also be posted. The ERO's were perceived as a necessary complement of REAS by interviewees from both sides of industry, as well as from an NGO supporting migrants (MRCI).

[267] The phenomenon that trade union and employer associations in the construction sector demonstrate a congruence of interest when it comes to combat competition on the basis of very low wages has also been confirmed by an empirical study of employer strategies in Austria, Ireland and Switzerland (Afonso, 2011).

Box 3: From REA's and ERO's to ministerial extension of collective agreements - Ireland

Registered Employment Agreements (REA) and Employment Regulation Orders (ERO) under the Irish Industrial Relations Act complemented the voluntary Irish industrial relation system until they were invalidated by a series of Supreme Court rulings.

The legislation accorded a central role to the Irish Labour Court as an arbitration institution, while maintaining as much autonomy for management and labour as possible. Requiring the registration by parties which are representative of management and labour, the legislation ensured legitimacy of the statutory extension of REAs in reliance on industrial relation categories. In the construction industry, REAs were created by Joint Industrial Councils in practice. Also, the Joint Labour Committees (JLCs), which created EROs in sectors with low levels of union membership, consisted of representatives of management and labour. After an REA or ERO was in place, the Labour Court could also be seized to review the established labour standards. This system ensured that pay was not regulated by state intervention, although it was based on legislation.

The Supreme Court rulings rested on the argument that the arbitration institution and management and labour had achieved uncontrolled regulatory powers, which contradicted the democratic principle that it must be possible to trace back legislation to parliamentary authority. The Court thus did not acknowledge the idea that industrial relations also rest on democratic principles, as long as there is freedom of association and an assessment of representativeness.

The draft follow up legislation abandons the industrial relations model behind the REA and EROs, replacing it with ministerial orders for extending collective bargaining agreements throughout a sector (Sectoral Employment Order). At the same time, the legislation establishes the normative effect of registered employment agreements for the parties covered by them. The Labour Court will maintain a role in the registration of agreements, in particular in assessing whether the parties which applied for a REA are substantively representative of management and labour. The Labour Court should only recommend a Sectoral Employment Order if necessary to promote harmonious employment relations and avoid industrial unrest as well as to promote high levels of training and equitable employment conditions in a sector. Accordingly, the proposed new model moves closer to a corporatist system of employment orders, while also achieving the normative effect of collective labour agreements.

In **Sweden, the *Laval* ruling** and the subsequent Labour Court ruling[268] **was experienced as outlawing the autonomous industrial relation system** as a basis to secure the basic employment rights of posted workers, let alone their equal treatment with Swedish workers in the relevant sector. While the respondents gave the impression that such **equal treatment is still aspired in some parts**, the aftermath of the Laval case has led to a **decline in collective bargaining activities** relating to posted workers. The Swedish legislator, after heated political debate, adopted the so called "Lex Laval" (SFS 2010:228) in an attempt to implement Directive 96/71 in a way more agreeable to the Court of Justice.[269] The perception amongst many of the Swedish respondents was that **Lex Laval does not adequately protect the social and labour rights of posted workers**, and discourages trade unions from engaging in industrial action in order to protect them. The coverage of posted workers by collective agreements has decreased drastically, particularly in construction (as noted by a union representa-

[268] AD 2009 no. 89, summarised by (Rönnmar, 2010)
[269] For a more detailed record of the 'reimplementation' of the Directive, see (Ahlberg, 2013).

tive: Interview, LO-TCO Rättsskydd AB) at a time when the number of postings to Sweden has increased considerably.[270]

Box 4: "Lex Laval" in Sweden

"Lex Laval" (SFS 2010:228) amended the Posting of Workers Act and the Codetermination Act. There are no statutory obligations for foreign employers posting workers to Sweden as regards pay or other terms and employment conditions. Instead, the act is based on the assumption that, as a rule, foreign employers will be bound by collective agreements with Swedish trade unions, either through temporary affiliation to a Swedish employers' association or as signatories to an 'application agreement'. The novelty introduced by *Lex Laval* is that it restricted the trade unions' right to take industrial action in order to bring the foreign service provider to sign a collective agreement if it does not do so voluntarily. These restrictions refer partly to the content of demands which trade unions can make when staging collective industrial action against employers who wish to avail themselves of the economic advantages of posting, and partly they establish preconditions on when collective industrial action is admissible at all. The new legislation regulates the content of demands that a trade union may underpin by industrial action in favour of covering posted workers through a collective agreement. The demanded employment conditions:

- Must correspond to those of a collective agreement that is applied throughout Sweden to corresponding workers within the relevant sector (cf Article 3(8) of Directive 96/71).
- Must refer solely to minimum rates of pay or other minimum conditions included in the perceived hard nucleus of the Directive.
- Must be more favourable for the workers than those following from Swedish legislation.
- Must require that the employer is unable to demonstrate that posted workers are already guaranteed employment conditions at least as favourable as those demanded by the trade union.

The fourth condition is most controversial, since it does not require that the equally favourable conditions are laid down in a collective agreement, or that management and labour in Sweden can enforce those conditions in any way. Since the Swedish labour inspectorate does not monitor employment conditions beyond health and safety concerns, this leaves posted workers unprotected from employers presenting employment conditions on paper which are not applied in practice.[271]

Interviewees agree that there are severe shortcomings of "Lex Laval" in practice. The guaranteed minimum level of protection for posted workers depends on the trade unions' motivation and resources to monitor and control conditions. **Employer associations, as well as some trade union interviewees, indicate that there may be scope for a revision of the legislation, though it is difficult to find a model that is compliant with the Swedish industrial relations model and the Court's case law**. One interviewee stated that this dilemma could only be overcome if and when the CJEU refrains from viewing industrial action and provisions protecting workers as unjustified restrictions (Interview, LO-TCO Rättsskydd AB).

[270] Oväntat många utstationerade i Sverige, Europaportalen.se http://www.europaportalen.se/2014/02/ovantat-manga-utstationerade-i-sverige

[271] (Ahlberg, 2013, p. 315; Rönnmar, 2014).

Presently two public inquiries are exploring prospective further amendments. A parliamentary inquiry, initiated in 2012[272] and provided with an expanded mandate in 2014,[273] is investigating how the Swedish industrial relation model will have to be adapted to the requirements of EU law in order to allow effective protection of the position of collective agreements for posted workers. A second inquiry is tasked with a proposal to implement the Directive on the enforcement of the Posting Directive in Sweden.[274] A key point to be considered here is to find ways of making collectively agreed minimum terms and conditions applied throughout a sector accessible for foreign service providers and posted workers.[275] As mentioned above[276], the present compromise has attracted critique by the CEAR. Trade unions have been reluctant to comply with the legislation, as this would compromise their stance in collective bargaining. Notwithstanding the difficulties of transposing national solutions in collective labour law from one country to another, it may well be the case that a public register of all collective agreements as in the planned Irish legislation may add to the proposals under consideration.

3.3.4. Hiring out of workers (agency work) and posting

A number of respondents submitted that the **marginal quality of posted employment is exacerbated if agency workers** are posted, particularly where this results in a concentration of posted agency workers in specific sectors. Respondents from **Ireland in particular** stressed that posting agency workers is frequently used, and abused, in order to avoid paying high wages or social security contributions. An interesting observation was made by the CIF representative (construction sector employer association) in relation to the now obsolete REA system: as long as posted workers had to be paid in line with those generally applicable collective agreements, agency workers posted from other countries were an attractive alternative.

> *'In the past couple of years we've seen a re-emergence of a lot of these agencies, Irish agencies and workers, construction workers working for agencies at rates that our members couldn't compete with. When you are faced with a situation when you have your own direct employees and you're paying them whatever rate and you've got agency workers working for other contractors at a much lower rate, what do you do?'*

However, since directly posted construction workers could only claim the minimum wage, agency workers are (once again) used only in cases of unexpected staff shortages, and not in order to circumvent protections for posted workers.

Other interviewees observed that a comparatively high number of temporary works agencies established in Ireland, due to the low thresholds for establishing companies here and the favourable tax regime. These agencies would then post migrant workers from within and beyond the EU to countries other than Ireland, and many of the posted agency workers had never been in Ireland before working in some other Member State. The mutual information system agreed between EuroCIETT and UNI, mentioned above,[277] was spurred by the specific situation of posted agency workers.

3.3.5. Abuse of posting and enforcing the Posted Workers' Directive

There was wide agreement that compliance with the conditions required by the PWD directive was not perfect, and that posting was frequently abused.

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[272] Dir. 2012:92 Utstationering på svensk arbetsmarknad

[273] Dir. 2014:149 Tilläggsdirektiv till Utstationeringskommittén

[274] 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').

[275] Dir. 2014:150 Tilläggsdirektiv till Utredningen om nya utstationeringsregler.

[276] Footnote 92

[277] See footnote 265.

Even those who did not find fault with Directive 96/71 conceded this point. Many respondents found that the Enforcement Directive might improve the situation. **Spanish respondents**, trade unions, labour inspectorates and the judiciary, all pointed to **Article 6 Directive 2014/67 as demanding Member States' administrations to provide detailed statistics of outgoing and incoming posted workers**.

In Ireland, the NERA representative pointed to Article 4 of the Directive (identification of a genuine posting and prevention of abuse and circumvention) and the provisions on **cross-border administrative fines** and penalties collection. They also stressed the **necessity of providing information in multiple languages**, detailing that they had information materials in 26 languages at one point. Language issues are also raised by the Polish labour inspectorate, who detailed that German companies posting workers to Poland would only provide information in German, and stressed the advantage of enhanced administrative cooperation.

Nevertheless, Directive 2014/67 (the Enforcement Directive) will not solve all the problems, in particular due to insufficient resources in many Member States and at the EU level, as highlighted by an EU level respondent:

> *'The resources that are dedicated to those at the European level and at the national level, to enforce the rules, are insufficient. So that there's a lot of abuse' (Interview, EU Rights Clinic)*

Polish respondents raised the issue of **discriminatory practices of enforcing the directive**, **stating that** at times only Polish posted workers were subject to controls in other Member States, even on building sites with posted workers from several countries. Further, the interviewee from the Polish ministry of labour expressed **concern over the potential abuse of the joint liability clause**, and the open-ended list of efficient control measures in Directive 2014/67. The NGO lobbying for effective free movement rights was sceptical of effective enforcement at a more fundamental level:

> *"Increasing control mechanisms leads to the situation when these companies that employ legally and are on the spotlights and are easy to control (…). Instead of civilising and legalising these relations it will go deeper into the grey zone. (…) Some companies will not resign from sending the workers. (…) They will continue to do that but without revealing their activity to control institutions and without declaring workers to social security etc. There were many posting companies "until 1st control" then they closed one company and opened another sometimes in a different country recruiting different workers."*

Swedish and Irish respondents **stressed the decisive role of trade union representation at the place of posting for enforcing posted workers' rights**.

3.3.6. Social security for posted workers

The social security situation of posted workers emerged as a specifically problematic point. The practicality of the EU regulations coordinating social security[278] has been questioned by most respondents from all states, and by EU level non-governmental organisations providing advice for migrant workers using posting.

Mainly, these difficulties are due to **frictions between regulation 883/2004 and Directive 96/71** and the relevant case law. **Posting under the regulation is limited for a maximum of 24 months**, and posting from **employers who have no business activity in the state** from where they post does not **bring the posted worker under the social security law** of the state of their employers' formal establishment. Accordingly, posted workers may not obtain the A1 form which is required to exempt them from social security payments in the host state.

[278] See above under 2.4.4 and 2.4.5.

Polish and Swedish respondents reported this same difficulty from different ends: the Swedish respondents noted that posted workers frequently have to pay social security contributions, although this may not result in them being able to claim benefits due to the non-expiry of waiting times. The Polish respondents noted that if posted workers could not obtain an A1 certificate, they would frequently not be insured in the host state either, resulting in interruptions of their social security coverage. Further, respondents from both countries mentioned discrepancies in national law between tax authorities and social security authorities. The Polish social security authorities will not accept posting if the employer does not have sufficient revenue, which does not seem to be reflected in EU law.

Irish and Swedish trade union respondents highlighted insecurities regarding collectively agreed schemes. Irish trade union respondents would prefer to apply the Construction Workers' Pension Scheme, which is a social partner institution, to posted workers. Swedish trade union respondents felt that at least the insurance against work place accidents should be applied to posted workers, while the government is reluctant to change the relevant legislation for fear of non-compliance with the Laval judgment.[279]

3.4. Public procurement

Public procurement contracts were seen by respondents as an area where **tensions between social and labour rights and freedoms to provide services** could be clearly observed. Oversight processes by public contracting authorities were sometimes weak, and as a result social and labour rights were often difficult to enforce. In **Ireland**, a number of union respondents noted that this situation could be improved by a **robust transposition of the new public procurement** directives (2014/23-25). **Better information sharing** was also called for by respondents in Ireland, particularly in tendering processes for public works contracts. The ICTU representative in Ireland was in favour of part of the payment for public works contracts to be withheld (placed in a 'holding' account) pending final checks for compliance with employment standards. However, the IBEC representative in Ireland felt it would be disproportionate for an organisation to be precluded from tendering for public contracts, as a result of minor breaches.

Some trade unions in Ireland had sought to include social objectives through public procurement, promoting collective agreements as an appropriate tool for specifying social criteria to select service providers. Judges in Ireland have also ruled in favour of **including clauses guaranteeing social rights**. These clauses are well-suited to guarantee protection against professional accidents but it is **crucial to reinforce the sanctions process and to improve collaboration with labour inspectorates**. In **Poland** however, it was noted by employer representatives that such social clauses in public procurement were set mainly to ensure contract compliance rather than to promote social and labour rights. **Trade unions pointed out that public procurement by its nature had to fulfil certain social goals** so the social clauses may not be seen as inhibiting contractual freedom or economic freedoms.

Sweden presents a further interesting case in relation to public procurement. Many Swedish law experts have interpreted different types of qualitative criteria as unjustified restrictions to the cross-border provision of services or sales of goods. One of the most heated debates in this area concerns the **extent to which procuring entities can dictate pay and other working conditions for workers who will perform the contract**. While it is generally accepted by Swedish social partners that **suppliers of goods manufactured abroad need to respect national labour law and ILO core conventions**, there is debate over whether **it is appropriate to require the contractor to pay wages in accordance with current collec-**

[279] (Ahlberg, 2013, p. 316; Rönnmar, 2014).

tive agreements when work under the contract is performed in Sweden.[280] Far reaching and misleading interpretations of the *Rüffert* case – which deals with posting, not with procurement – were taken as a pretext for the conclusion that this could never be done unless collective agreements were universally applicable.

After adoption of the 2014 public procurement directives,[281] actors favouring less scope for social criteria in public procurement have revived these arguments. Article 18(2) Directive 2014/24 is cited as not applicable in Sweden, because there is no mechanism in Sweden to achieve a ministerial declaration of universal application for collective agreements. This may explain why few procuring authorities have included such clauses in their contracts. However, these restrictive approaches are increasingly criticised, in particular by those who defend the Swedish collective agreements system. It is in this context that the 'Vita jobb' model may be a particularly important development, since this offers one mechanism for the promotion of social and labour rights through socially responsible procurement.

Box 5: 'Vita jobb' and Public Procurement in Sweden

In 2012, Sweden's second largest city Malmö decided to apply the 'Vita jobb' model ('White Jobs') that aims at preventing both 'social dumping' and undeclared work. Procuring authorities apply contract conditions which prevent undeclared labour and require the supplier to give its workers pay and other minimum terms and conditions according to the applicable collective agreement. Trade unions provide the authorities with relevant information about the terms and conditions in the sector in question. If a local authority does not have the ability or the will to carry out the control of the contract conditions itself, it can hire a person from the trade union to do so. In such a case, he or she does not act in his/her capacity as trade union representative, but as a consultant commissioned by the local authority. As such, he/she will be subject to the same rules on secrecy as a public employee. At present, the municipality of Stockholm is preparing the introduction of the same model, and an increasing number of local authorities adopt other policies for socially responsible procurement.

Government policies around procurement are also changing in Sweden. Early in 2014, the Swedish Competition Authority, which monitors the proper application of the Act on Public Procurement, was given an extended mission, including a mandate to draw up a guide on how to include labour clauses in public contracts. **The new government also plans to ratify ILO Convention No 94**, and has set up a public inquiry on how this can be made compliant with the new EU Directives.[282] Expert panels consisting of representatives from the social partners and academia, linked to the Competition Authority's project as well as to the public inquiry, may well produce contradictory advice. Thus, arriving at a comprehensive legislative proposal will be a difficult task.[283] The inquiry is to present its proposals on 1 September 2015 at the latest, yet, as seen from this discussion above, it will be a significant achievement if it manages to reconcile the tension between procurement law and workers' rights.

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[280] Sweden has not ratified ILO Convention No 94 on labour clauses in public contracts, because the European Commission had warned the Government in a 1998 non-paper that this would result in infringement of EU law on public procurement and posting of workers. During negotiations of the 2004 Public Procurement Directives, the then Social Democratic Swedish government achieved the inclusion of a recital stating that these Directives would not prevent Member States from ratifying the Convention. (Ahlberg & Bruun, 2014), also with a more detailed record of the whole debate in Sweden.

[281] Directive 2014/24/EU on public procurement and repealing; Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, see footnote 74.

[282] Dir. 2014:162 Upphandling och villkor enligt kollektivavtal.

[283] Kerstin Ahlberg is a member of both expert panels.

3.5. Freedom of establishment

There were some clear tensions reported between the fundamental freedom of the 'freedom of establishment' and the promotion of social and labour rights. Imbalances in employment and social security regimes, in terms of costs to employers, across the Member States can be problematic. One respondent noted that **'the employer does the sums'** and chooses the **best Member State in which to establish to minimise costs (ICTU** respondent, Ireland). Whilst employers are free to establish where the most favourable legal order exists, this inevitably results in tensions:

> *'for many other European countries it's cheaper to create a company in Ireland and to post your workers through Ireland…there's some significant abuses of that in terms of agency work so people are employed by agencies who are based in Ireland but have never been to Ireland and know nothing about Ireland, but they are employed through Ireland…that is not evidencing in Ireland itself but in other European countries. But I am aware from colleagues that the ease that you can open a company in Ireland is creating something of a problem for them' (Irish Congress of Trade Union- ICTU- representative).*

In Ireland, the NERA representative pointed out that **interviewing workers is often the best way to determine the genuine ethos of the employer**. However, the employees may collude in their own exploitation in order to secure employment, as was also recognised at EU level. The ETUC respondent noted that they are about to start a fact-finding project aimed at mapping the key facts in relation to this phenomenon, which is still largely unexplored. Information gathering appears crucial here to the specific abuses in the case of letterbox companies, not just in terms of working conditions but also social security, taxation and other complex areas of fair treatment for workers.

Spanish respondents reported new developments in this area. While Spain had been a target for letter box companies for a while, nowadays **Spanish companies develop an interest** in **establishing letter box companies in other countries**. Trade union respondents regretted that **collective bargaining and industrial action does not constitute a barrier to this, since consultation rights of works councils are frequently neglected before** changing the corporate domicile of a company. **Subcontractor companies in Romania and Bulgaria** in particular offer advantages in terms of taxes and wage levels.

3.6. Collective bargaining and EU competition law

Tensions here were mostly experienced in Ireland and Spain. In Ireland, specific tensions in this area related to self-employed and freelance workers. The **Irish Competition Authority** has taken the view that **attempts by freelancers to negotiate collectively amounts to 'cartel' action**, as such these workers should be classified as self-employed and thus they should qualify as 'undertakings'. The Irish Congress of Trade Unions has consistently lobbied for an amendment to competition legislation to clarify that this is not the case. In 2013, the Authority initiated proceedings against the Irish Medical Organisation (IMO) following the IMO's refusal to rescind a decision of its General Practitioner (GP) Committee to withdraw certain patient services in protest at proposed Government cuts to fees paid to GPs under public contracts. The case was settled before trial in summer 2014 with both sides claiming vindication. Currently, there is a long-running dispute between the Irish Hospital Consultants' Association (IHCA) and the Government concerning agreeing rates of pay for consultants (self-employed persons) that provide their services in public hospitals. The ICTU also raised this issue with the 'Troika' of the ECB, IMF and European Commission, as the Irish Memorandums of Understanding (MoUs) stipulated that there could be no change to Irish competition law during the course of the funding programme. **The ICTU has claimed that the decision in the FNV Kunsten[284] has 'dramatically altered the landscape' in that**

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[284] Case C-413/13, see footnote 135 above.

'it has unequivocally held that it is wrong to define workers as undertakings under competition law simply on the basis that they are "self-employed"'. The Irish Competition Authority has not yet responded to the call from the ICTU to reverse its 2004 decision.

The **Spanish Competition Authority** has **investigated** some **clauses of collective agreements** specifically. One of those is the impact of **rules on working time in** collective agreements on the possibility of Sunday openings in retail. The Court for the Defence of the Competence of the Basque Country (Spain) has opened an investigation about this matter. In the Resolution of the 13th of May 2008, the Court asserted that the right to collective bargaining and industrial action is not an absolute right because the trade unions are obligated under the Competition Law in the same way as companies are. By contrast, in the Resolution of the 31st of January 2011, the Court says that it is necessary to achieve the correct equilibrium between the right to collective agreement and competition law. Collective agreements have their own place and play an important function of defending workers' interests which is perfectly compatible with competition laws.

The Spanish Labour Inspectorate highlights that it would be technically possible to include specific clauses in collective agreements triggering competition rules, especially in times of crisis. For example, agreements about freezing prices might be admitted in times of economic restructuring processes. On the other hand, provisions about shopping time tables, opening hours of shops or sales periods - that are negotiated with the representatives' bodies - should not be seen as conflicting with competition rules.

3.7. Equal treatment of free movers

Free movement of workers should reinforce social and labour rights through equal treatment rights in the host state of free movers, as well as by strengthening workers' market position by giving them access to more posts. **The interviews illustrate numerous challenges to ensuring the factual equal treatment**, which are experienced by EU free movers and migrant workers from beyond the EU. Further, the coordination of social security systems, as an important tool to promote free movement, is far from perfect. Finally, equal treatment in the field of social assistance is affected by increasing reluctance of national governments to maintain these principles. In this context restrictive interpretation of the notion of 'worker' may frustrate free movement rights.

3.7.1. Ensuring factual equal treatment, facilitating free movement

EU level employer associations seeking to promote free movement of workers highlighted barriers resulting from lack of adequate information and **supported sector specific portals for spreading information about available posts**. This would in their view address skills shortages. **EU level trade unions** in **their support of free movement of workers** are more focused on **equal treatment at the place of work**, which they consider a central element of fairness.[285]

Respondents at national level illustrated the consequences of the vulnerable position of migrant workers, whether from the EU or non-EU countries. Most did not report any direct discrimination of EEA workers. However, **multiple examples of disadvantageous situations of EEA workers were observed** which did not qualify as direct discrimination.

In Ireland, the IBEC representative noted that an employment rights floor had to be set at some level; an inevitable consequence of free movement and globalisation was that workers would move to 'higher wage' countries and work under conditions that might not be accepted by the nationals of these countries.

> *'The question is: is there some kind of legal mechanism that should be utilised to prevent this from happening? I don't think that there should; it would infringe on the principle of free movement of workers, free movement of establishment. I hear some people saying those principles should be rolled back...I don't know how you can go about that now. At*

[285] See ETUC strategic action plan 1011-2015, 7.16-7.32

the moment, I think that the balance from the legal point of view is very good. I think it is a very strong floor...minimum wage, holiday pay, paid leave and all the rest...perhaps a better education around those rights would be useful' (IBEC representative).

The point that EU free movement law causes migration which ultimately leads to lower salaries in the host country was also underlined by **Spanish trade union**. The NGO **supporting** migrants and the trade unions also observed that there is also **differentiation between EU free movers**: those **from core Member States enjoy better working conditions than those from Eastern Member States**, and **migrants from Romania and Bulgaria were often in the** same detrimental position as migrants from non-EU Member States. The interviewees from the Spanish NGO working with migrants expressed particular concern about the situation of agricultural and domestic workers from Bulgaria and Romania.

Polish respondents pointed to research providing evidence for **factual discrimination of migrant workers** in several respects. [286] At times, a **less advantageous position was achieved by offering a civil law contract instead of an employment contract**. The NGO representative underlined the particularly vulnerable situation of non EU migrants:

'Usually the foreigners are not directly discriminated, it's just that their working conditions are different. These differences are difficult to prove because they work illegally. They also work in such sectors where illegal employment generally is widespread'

These migrant are inhibited by employer specific work permits and the renewed mandate of the labour inspectorate to penalise employees and employers for illegal occupation.

In all states, EU migrants and migrants from beyond the EU may be at high risk of being exploited in certain types of work, and by detrimental contractual forms, such as agency work, civil law contract work or other marginal work. These risks may culminate in certain sectors, for example, domestic work and cleaning in Ireland, agricultural work in Spain and Poland, and domestic services in Sweden.

As a regulatory instrument for specific sectors, Irish Joint Labour Committees and EROs can be highlighted as a **past example of good practice**, whose future is uncertain.

Box 6: Ireland: from Joint Labour Committees to ministerial orders

Joint Labour Committees (JLCs) were sectoral standard-setting bodies comprised by management and labour and State representatives, which set terms and conditions by Employment Regulation Orders (EROs) for sectors where collective bargaining practice could not be established. These EROs were particularly important in retail, catering and hotels. EROs were deemed to be included in employment contracts in these sectors, which are characterised by a high proportion of migrant workers, both from within and beyond the EU.

The planned new system does not propose the re-establishment of JLCs. Instead, the ministerial employment orders can only be established upon recommendation of the Labour Court based on an application of a trade union, and employer organisation or both. Thus, the tripartite structure is replaced by the recommendation of an arbitration institution, and ministerial decision. If the ministerial orders are re-established in place of former EROs they might again become a best-practice example of ensuring sector-specific minimum wages.

[286] http://interwencjaprawna.pl/docs/ziemia-obiecana.pdf.

3.7.2. Social security coordination

As regards social security of free moving workers, the area of **non-contributory benefits emerged as a problem** in most Member States. The observation of INCA, an Italian organisation active throughout the EU, mirrors widespread problems:

> *A second category… was about people who can enjoy non-contributory benefits…You know that the history of the regulation of coordination of social security systems is directly linked to the history of free circulation of workers-the idea to remove obstacles to free circulation at that time in the 1950s emerged from the central will to create a free Common Market - it did not originate from the intention to promote social rights in favour of workers but as economic measures finalised to the creation of the Common Market. And already then it was clear that workers would not be incentivised to move to another country if (that would imply that) they had lost rights to social assistance (Interview, INCA).*

The **challenges of applying Regulation (EC) No 883/2004 due to its complexity** were also widely perceived. For example, **Spanish** respondents reported that difficulties in administrative cooperation may result in frustrating the rights of migrants under Regulation 883/2004. For example, **approving a retirement pension involving this regulation elicits waiting times of up to six months**, while under domestic regulation only a week is needed for the concession of a retirement benefit. The only country with a good administrative cooperation is Germany, and the reason could because of the fact that Spanish and German social security institutions share an administrative database.

In **Sweden**, similarly, **difficulties emanated from the complex interrelation between state funded and collectively agreed benefits** and the lack of reflection of these systems in Regulation (EC) No 883/2004. Two particular issues are highlighted below.

Firstly, the Swedish **unemployment insurance** system combines a basic insurance and a voluntary income-related insurance. In order to qualify for voluntary income-related insurance a worker has to join one of the 28 independent unemployment insurance funds. To become a member one must have been employed for at a minimum of at least one month. After one year of uninterrupted membership, the worker is entitled to receive an earnings-related daily allowance. The problem for migrant workers is that this criterion can be difficult to fulfil. According to Sweden's application of the Regulation there must not be a gap between affiliation to the unemployment insurance of another Member State and voluntary membership in a registered unemployment insurance fund. Since migrants need time to understand the system, they frequently do not fulfil that condition.

Secondly, in Sweden **collectively agreed occupational social security** systems are widespread. Even employers who are not bound by collective agreements are able to voluntarily insure their workers under the collectively agreed insurance policies, and in fact many of them do so. As a consequence, around 90 per cent of all employees in Sweden are covered.[287] Again, **there are frictions in the system of coverage not only for posted workers, but also for marginal and self-employed workers**.

3.7.3. Equal treatment in the field of social assistance

Beyond the employment relationship, free moving workers' life is made difficult by the increasingly **restrictive approach of Member States in relation to social advantages**. The potential spill-

[287] Work-related insurance, leaflet from AFA försäkring, available at: https://www.afaforsakring.se/globalassets/sprak/f6285_forsakringar-i-arbetslivet-engelska.pdf

over effect of case law concerning persons who are no longer or not yet workers on the position of marginal workers[288] was confirmed by the respondent from the EU rights:

> *"in Brey they are saying that Member States can impose 'lawful residence' as a condition, or giving access to social assistance to EU migrants (…) there is some creeping erosion of* ***the hitherto sanctified position of workers, if you can call it that, the privileged status that workers used to enjoy, that is definitely being eroded*** *in fact. And we see it not only because Member States are basically unilaterally adopting guidelines to limit who benefits from worker status under European law (…) taking advantage of the fact that the European Court says that the final analysis of whether you get to be a worker or not is for the national courts to make. So as a result, the national authorities are able to exploit that by basically adopting the guidelines and then the courts are (…) giving deference to the national authorities about that subjective assessment, whether someone is or is not a worker." (Interview, EU Rights Clinic)*

Similar views were voiced by the EU-level participant from **INCA, who** stressed an emerging trend whereby **national governments and courts tend to restrict the notion of who is worker for the purpose of EU migrants' free movement rights**. The changes brought about by the ongoing **fragmentation of employment relations** and the growth of non-standard forms of work make the definition of who is a worker fuzzier and the use of social entitlements for EU migrant workers more difficult

> *…the crisis has opened up a series of problems- the national states are trying to carve out from within the EU rules margins of discretion to restrict the freedom to free circulation. This is achieved in two ways: one is acting on the level of national law and its grey areas, especially for example the definition of the notion of the worker. And (another way is that) others such as Belgium, Germany (…) they are doing things that indirectly violate EU law. The paradox now is that they use the demagogic discourse about the need to reduce abuse (on the social security system) by free movers, but in fact what we are seeing is that it is the MSs who are abusing EU law … (Interview INCA).*

In **Ireland**, the migrants rights NGO highlighted how **EEA workers can allegedly lose worker status by being absent from Ireland for shorter periods. While the loss of worker status offers** access to the Supplementary Welfare Allowance, receipt of such allowances may then be used to find that the person is no longer habitually resident in Ireland, blocking access to other social advantages, as the DSP representative pointed out. Finally, NGO representatives in Ireland expressed **concern that work records in the migrants' home state** (or some other EEA state) **were not always taken into account** in determining entitlement to contributory benefits, frequently because the applicants were not made aware of the relevance of this information. The DSP representatives pointed out that the introduction of a more advanced, EU-wide electronic information system would reduce those difficulties.

In Ireland there are also **problems with frontier workers**. In July 2014 the European Commission has issued a reasoned opinion as Ireland is withholding **carer's allowance** from UK citizens residing in Northern Ireland.[289] This arose from a very interesting example of a situation involving a number of aspects of free movement:

> *'A family (from another EU state) that had been living in Ireland with a disabled child were getting child benefit, disabled child allowance and carer's allowance. They moved North of the border (to the UK) because I think that they thought the services for a child would be better up there... The husband continued to work here, which made him still eligible for ben-*

[288] See above, text between footnotes 50 and 54.
[289] http://europa.eu/rapid/press-release_MEMO-14-470_en.htm.

efits, but only for the child benefit. He stopped getting the carer's allowance. The family made a complaint to the European Commission.

Another variety of the **habitual residence test is applied in Sweden**, where a potential recipient of benefits has to prove temporary or permanent residence in Sweden. The main difficulty for migrant workers or economically active persons relates to the definition of these categories. It seems to be difficult for social assistance agencies to judge whether an economic activity is sufficient to qualify a person as a worker entitled to full access to equal treatment. The same goes for the definition of a job seeker under the Free Movement of Citizens Directive (2004/38/EC) and its implementation in the Swedish Aliens act. As a consequence **marginal migrant workers from other EU countries frequently experience difficulties in accessing special non-contributory benefits**. As a good practice example, a specific project giving legal advice is highlighted below.

Box 7: Faktumjuristerna - legal advice clinic catering for marginal workers

Faktumjuristerna is a non-profit student project where law school students from the University of Gothenburg work with providing free legal advice for vendors of the street magazine Faktum. The vendors are individuals living in homelessness, and many of Faktum's vendors are homeless EU-citizens, mainly from eastern European countries such as Romania and Bulgaria. Faktumjuristerna work with these individuals on a weekly basis.

A respondent from Faktumjuristerna noted that the main issue they encounter relates to the requirements for right of residence for EU citizen, and how Swedish and EU law is interpreted by local authorities. The "key" to access to social assistance in Sweden for EU citizens is meeting the requirements for the right of residence, which is particularly difficult for the homeless. They also experience difficulties in recording their details with the Swedish population register maintained by the Swedish Tax Agency, which requires proof of having met the requirements for the right of residence for at least a year. Being able to claim child benefits and housing benefits presupposes having a record on the population register. For the vendors of Faktum, this tension between accessing social rights and the freedom of movement (right of residence) has proven particularly challenging (Interview, Faktumjuristerna). Even though selling the magazine is a job and the requirements for being viewed as an employee or self-employed are set fairly low, Swedish authorities tend not to see the selling of Faktum as ground for right of residence.

According to the respondent from Faktumjuristerna, courts in the UK have considered vendors of the street magazine Big Issue as self-employed, which means that they meet the requirements for right of residence, according to Directive 2004/38/EC. The vendors of Faktum in Sweden work in the same way and according to the same rules as those who sell the Big Issue, thus it was felt that the same interpretation should be made in Sweden.

3.8. Conclusions

The perception of tensions between EU social and labour rights and EU Internal Market law differs between Member States as well as between national and EU levels. EU law, established by Treaties, case law and EU legislation, is frequently experienced as a barrier in attempts to ensure respect for and promotion of social and labour rights. This is felt in particular around posted workers.

Adequate protection of posted workers, it seems, is only achieved with state centred industrial relations systems. The Irish case demonstrates how an abolition of a state-imposed extension of collective agreements has rendered the Posting of Workers Directive ineffective. The Swedish case too, demonstrates how rules that do not conform with national level industrial relations systems can have unanticipated consequences, which are detrimental to ensuring that

workers benefit from social and labour rights. Frictions between Directive 96/71 and Regulation 883/2004 result in limited social security for posted workers. Their participation in collectively agreed social security systems is further inhibited by the restrictions placed on any collective bargaining in their favour by the Laval case. Abuses of posted workers' rights are commonplace, in particular if posting of agency workers is used and sometimes abused to combine low wages, low taxes and limited social security protection with employing posted agency workers in high wage countries. Clearer, more encompassing, definitions of posted workers are also needed, alongside better mechanisms for enforcing existing social and labour rights, and better information provision.

Frustration of social and labour rights can emerge from the use of freedom of establishment, frequently with long subcontractor chains. Tensions also occur occasionally between competition law and social and labour rights. Though these were not reported frequently, they link to collectively agreed occupational social security systems. This suggests that these tensions should be addressed. Equal treatment rights of workers, even if they move freely, are weakened by recent restrictive case law, and Member States' increasing reluctance to extend social security and social assistance fully to EU free movers.

Responses to these tensions were varied, and shaped by a range of institutional and structural factors in individual Member States. Many of the participants view the key problem as that of enforcement of existing models, particularly in the case of posting of workers. However, others felt revisiting the substance of existing provisions was necessary. A range of 'practical' solutions at national and EU level related to better information-sharing, and the development of good practice toolkits for actors.

Overall the responses confirm that tensions between EU social and labour rights and Internal Market law are a problem of practical relevance, which cannot be addressed without tackling the conceptual frictions underlying the Court's case law. Addressing these frictions is the subject of the next chapter.

4. A CONSTITUTIONALLY CONDITIONED INTERNAL MARKET - A NEW NORMATIVE FRAMEWORK

KEY FINDINGS

Based on prevalent interpretations of EU Internal Market law, EU social and labour rights and the Internal Market are perceived as irreconcilable antonyms, which again demands that either the Internal Market or social and labour rights must enjoy priority. The legally binding force of the Charter of Fundamental Rights for the European Union renders such perceptions inadequate: the Charter guarantees social and labour rights, and it is of equal value with Internal Market law contained in the Treaty. Accordingly, it demands a coherent framework for an Internal Market based on (instead of juxtaposed to) social and labour rights. This constitutionally conditioned Internal Market requires new standards. On the one hand, these must comply with the hierarchy the Charter establishes among the rights it guarantees. On the other hand, a method is needed to align equally positioned rights and freedoms with each other if and when they clash. The constitutionally conditioned Internal Market offers new perspectives on the limitations of collective bargaining and collective industrial action by reference to economic freedoms and EU competition law, as well as the promotion of free movement of workers and self-employed persons under the condition of equality

4.1. Introduction

The perception of the Internal Market and social and labour rights seems to suggest an impasse between fundamentally juxtaposed bodies of law. While Internal Market law promotes a downward spiral of working conditions through enabling businesses to compete on the basis of choosing low-wage regions as governing their operations in high wage countries, EU social and labour rights support fair working conditions as well as equal rights of all workers to social security and to social assistance. They also demand respect for and the promotion of the freedom of association of workers in trade unions, collective bargaining, collective agreements and collective industrial action.

This chapter sets out to develop the **constitutionally conditioned Internal Market** as a normative frame for the activities of EU institutions (including the Court of Justice) and EU level and national policy makers. This includes a guide on how EU Internal Market Law (including EU competition law) has to be interpreted differently in order to do justice to the Charter's legally binding effect, and the hierarchy of values and rights expressed therein. While the detailed analysis will only address the social and labour rights chosen for this study, the general frame will also be useful for assessing the impact of EU Internal Market law on other social and labour rights.

The next subsection develops the concept of a constitutionally conditioned Internal Market, exploring the concepts of conflict solution for clashing rights envisaged by the Charter. Next, the chapter will expand on how this new normative frame changes the relationship between EU social and labour rights and EU Internal Market Law.

The chapter's conclusion will draw the achievements of this chapter together into a framework which can be used to assess potential legal challenges for regulatory initiatives by EU level and national policy makers which aim at respecting, protecting or promoting social and labour rights.

4.2. A constitutionally conditioned Internal Market

4.2.1. The general concept

Relating constitutional arguments to the EU's Internal Market is not fundamentally new. After all, the constitutionalisation of economic integration is one of the specific characteristics of the EU. However, some of the traditional accounts of "constitutionalising a market"[290] proceed on the assumption that all market activity is to be protected per se. In this traditional view, markets are based on egotism and unconditional freedom to trade and compete. Viewed from this perspective, social and labour rights can only be perceived as a challenge and must be constrained as much as possible.

The model of a **constitutionally conditioned market**, by contrast, suggests that **markets** do **not necessarily** have to be a **paradise for untamed anti-social behaviour**. Such markets would risk endangering society which again is the basis for markets. This model draws on the idea that **markets are socially embedded**,[291] a **Polanyian** notion which has commanded some academic attention recently.[292] Polanyi[293] observed that markets provide a fertile ground for a certain set of motivations evolving around competitiveness and self-interest. He submitted that for a society to survive other motivations for actions are also necessary, such as co-operation and trust. From this he derived the idea that markets must remain embedded in society if these dynamics should not destroy society, which at the same time is the basis for markets.

Today, business administration literature frequently stresses that **cooperation and trust are** actually **preconditions for market success**.[294] Polanyi observed tensions in a specific form of capitalism prevalent in 19th and 20th century Britain, which are no longer exclusively determinative in current market-based economies. Nevertheless, **the basic idea that markets are only one part of society, on which they depend, remains current**. Moreover, not only are markets connected to society, they also constitute spheres where persons interact. **European integration** was from its inception **based on the hope that cooperation on markets will gradually bring the people of Europe closer together**, and engender cooperation in other spheres as well.[295] If this concept is to remain sustainable, markets need to be embedded in a frame which secures continued interaction in a sustainable way. Human rights regimes constitute such a frame. The European Union has long acknowledged this,[296] and the legally binding Charter for Fundamental Rights in the European Union is one of the incorporations of this acknowledgement.

Article 6 TEU states that the Charter has the same status as the Treaty. This could be read as establishing a principle of **co-originality of economic freedoms and human rights**. Under such a principle, economic freedoms and fundamental (human) rights would be offered the same level of protection. However, **the purpose of human rights protection is to provide a meta-layer of rights, which enjoy priority over other law**.[297] This demands **priority of the CFREU over Internal Market law**. The CFREU itself endorses the absolute priority of human dignity in its Article 1. This demands that human rights protection enjoys priority over

[290] E.g. (Hatje, 2010; Petersmann, 2008; Poaires Maduro, 1998).
[291] On this concept see in more detail (Schiek, 2011; 2012a).
[292] See for example (Caporaso & Tarrow, 2009; Joerges & Falke, 2010).
[293] (Polanyi, 1957 (1944)).
[294] See for example (Bachmann, 2001; Dietz, 2004; Gould-Williams, 2003; Tzafrir, 2005).
[295] This is the basic idea behind the Schuman declaration which set the tone for European integration based on the idea of instrumentalism; for a literature review on this see (Kurt, 2009).
[296] It could be argued that the CFREU is only the last stone in an edifice whose construction began in 1957 with the Treaty of Rome. This Treaty already guaranteed a nucleus of social and labour rights, most notably equal pay for women and men, paid annual leave and equal treatment for free moving workers. Early case law characterised both equal pay and free movement of workers as fundamental rights - see Case 43/75 *Defrenne* [1976] E.C.R. 456 on equal pay, and Case C-152/73 *Sotgiu* [1974] E.C.R. 154 on free movement.
[297] This view is supported by (Jääskinen, 2014, p. 1713; Lazarus, et al., 2011, p. 62).

mere economic policies. However, within EU scholarship the view is defended that Internal Market law is at the same level as human rights law.[298] The Court's case law, as we shall see, at times even supports the priority of Internal Market law over human rights.

This chapter maintains that the main purpose of **a human rights catalogue** is to create a fundamental layer for any legal order, which **has priority over other law**. However, given the strong convictions behind a constitutionalised dimension of the Internal Market itself, it also specifies what respecting, protecting and promoting EU social and labour rights implies if these are only of equal rank with Internal Market law. Both positions require a fundamentally new perspective on tensions between social and labour rights and rights derived from the Internal Market, and a change in the Court's case law in many of the matters highlighted in chapters 1-3.

4.2.2. Adieu to traditional divisions in human rights protection

The CFREU has been perceived as a game changer for human rights protection in the European Union, because it proceeds beyond traditional views of human rights of human rights protection. Two aspects are worthy of being highlighted within the constraints of this study.[299]

First, the **Charter** is characterised by **going beyond traditional compartmentalisations** of civil, political and socio-economic rights.[300] This is mirrored in the fact that the CFREU **does not place social and labour rights in a specific section dedicated to softer, less legally binding or otherwise de-qualified socio-economic rights**. Instead, social and labour rights are scattered across the Charter. For example, Article 5 CFREU prohibits slavery and forced labour, Article 8 guarantees data protection and may be interpreted as covering data processing by employers, Article 12 guarantees the right to join a trade union, and Article 15 guarantees the right to engage in work. These provisions are found in the chapter headed "freedoms", entailing traditional rights to liberty which could be used fruitfully to constitutionalise the labour market. Similarly, rights to equality and non-discrimination contained in chapter III are not usually qualified as socio-economic rights deserving a weaker level of enforcement. These human rights, traditionally wielded against state intervention, play an important role in labour law. In addition, social and labour rights are also located in chapter IV, headed "solidarity". This heading has incited some authors to assume that all articles of this chapter only contain "mere principles" without further argument.[301] Such an easy categorisation does not do justice to the more complex approach of the Charter. It is also incongruent with the wording of some of the provisions contained in chapter IV. For example, Article 32 states a clear cut prohibition of child labour.

Second, the Charter pursues a **modern concept of human rights**, in that it not only requires the **EU institutions and Member States** to respect fundamental rights, but at the same time **demands that these rights are protected and promoted.** This is already mirrored in Article 1, according to which human dignity must not only be respected, but also protected. Since **human dignity can be viewed as the root of all human rights**,[302] the duty to respect human rights is also seen as prioritising liberal over social rights as well. The principle that human rights oblige states to respect, protect and promote human rights is also congruent with European human rights development from other sectors, in particular by the European Court of

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[298] (Oliver & Roth, 2004), de Vries has taken a similar approach recently, stressing that the economic freedoms must be considered just as fundamental as human rights in the EU after the Treaty of Lisbon (Vries, 2013, pp. 83-87).

[299] The European Parliament has recognised that a study on human rights requires much more resources than those allocated to this project, by funding a more voluminous study on the subject of human rights principles in the EU (Lazarus, et al., 2011).

[300] (Kenner, 2003, p. 4; Lazarus, et al., 2011, pp. 60-62).

[301] See for example, (Reynolds, 2015).

[302] This is reflected in the second paragraph of the Charter's preamble which states that the values of dignity, freedom, equality and solidarity are indivisible, and also mirrors the common traditions of national constitutions (see (Dupré, 2014, pp. 7-8 with further references).

Human Rights (ECtHR) in its interpretation of the European Convention on Fundamental Rights (ECHR).[303]

For the interrelation of social and labour rights with Internal Market law this implies that there is **no fixed hierarchy between social and labour rights on the one hand and human rights aligned with the Internal Market on the other hand**.[304] Instead, social and labour rights as well as other human rights require the EU's and Member States' passive respect, as well as active protection (e.g. in markets and other horizontal situations) and promotion (e.g. through legislation and other measures).

4.2.3. Social and Labour Rights in the Charter

The numerous social rights protected by the Charter include the rights to collective bargaining and industrial action, which can be derived from **Articles 12 and 28 CFREU, and are underpinned by Article 11 ECHR.** The European Court of Human Rights has in 2008 and 2009 respectively held that Article 11 contains as essential elements the right to bargain collectively[305] and the right to take collective action, at least for trade union members.[306] In accordance with Article 52 (3) CFREU, Article 12 CFREU, which corresponds to Article 11 ECHR, must henceforth be read to include the right to collective bargaining. Article 28 only constitutes a specification of that right.[307]

Article 31, headed **fair and just working conditions**, accords workers a right to working conditions respecting health, safety and dignity (paragraph one), as well limits to working hours, weekly rest periods and paid annual leave. While the Court of Justice has referred to Article 31 mainly in the context of annual leave,[308] the reference to dignity gives the provision a potentially unlimited reach. It has been referred to as a basis for **fair wages**,[309] and could also be seen as a base for a working environment respecting **employees' privacy** and freedom of harassment. It has even been taken to underpin the right to **protection against dismissal** and a right to adequate voluntary redundancy schemes.[310] Article 31 is complemented by Article 15 (3) CFREU, which guarantees non-EU nationals who have leave to work in one of the Member States working conditions equivalent to nationals of the host state.

Article 34, in demanding that the EU respects entitlements to **social security benefits and social and housing assistance**, as well as entitlements to social security benefits and social advantages of those moving within the EU, is specifically characterized as a principle in the explanatory notes to the Charter. This means in accordance with Article 52 (5) that these rights are only "judicially cognizable" in so far as they are implemented by legislative and executive acts by the EU institutions. Given the vast array of EU legislation on the field of social security benefits and access of those moving between Member States to social assistance, there is quite a wide array of materials which allow for judicial protection in this field.

4.2.4. Rights underpinning Internal Market law in the Charter

Next to social and labour rights, the **CFREU also guarantees rights for** economic actors, including **owners of businesses who are employers**. These rights are also scattered

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[303] For more detail on this see (Lazarus, et al., 2011, pp. 34-37).
[304] (Vries, 2013).
[305] *Demir and Baykara v Turkey* (2008) (App. No. 34503/97) paragraph 154.
[306] *Enerji Yapi-Yol Sen v Turkey* (2009) (Application No. 68959/01).
[307] In a similar direction, though not quite as decisive, see (Barnard, 2014a), implied at marginal note 12, and (Dorssemont, 2014), who suggests at marginal note 14 that "the right to take collective action is less stringent under the Charter" than under the ECHR.
[308] E.g. Cases C-155/10 *Williams* [2011] E.C.R. I-8409; Case C-214/10 *KHS G* [2011] E.C.R. I-ii757; Case C-337/10 *Neidel* ECLI:EU:C:363; Case C-282/10 *Dominguez* ECLI:EU:C:33.
[309] Reference question in case C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial* ECLI:EU:C:2014:2036, which was rejected as inadmissible.
[310] (Bogg, 2014, p. 856).

throughout the Charter. For example, the right to a private life (now: Article 7 CFREU) has been relied on by business to ward off the European Commission's activities in enforcing competition law,[311] the **freedom to conduct a business (Article 16 CFREU)** has been relied upon in order to defend employers against the consequences of national legislation implementing the directive on transfer of undertakings.[312] Further, the **employers' right to property (Article 17 CFREU)** can be interpreted as being restricted by certain forms of industrial action, by national tax collection and by requirements emanating from health and safety legislation: all these constitute rules that impact on the undisturbed use of one's property.

Finally, **Article 15 CFREU** guarantees rights which underpin the TFEU economic freedoms: while paragraph one guarantees the **right to engage in work** and to pursue a freely chosen and accepted occupation, paragraph 2 codifies as a **fundamental right the right of every citizen of the Union to seek employment, work, exercise the right of establishment and provide services in any Member State**. This means that the free movement of workers, freedom of establishment and the freedom to provide services are also established as fundamental rights. In contrast to the economic freedoms, those fundamental rights under Article 15 are only granted to citizens, i.e. to natural persons, while economic freedoms can also be relied on by legal persons (e.g. companies). **The Charter thus strengthens the free movement rights of natural persons, since only those are underpinned by a fundamental rights guarantee, but not the economic freedoms of corporations**.

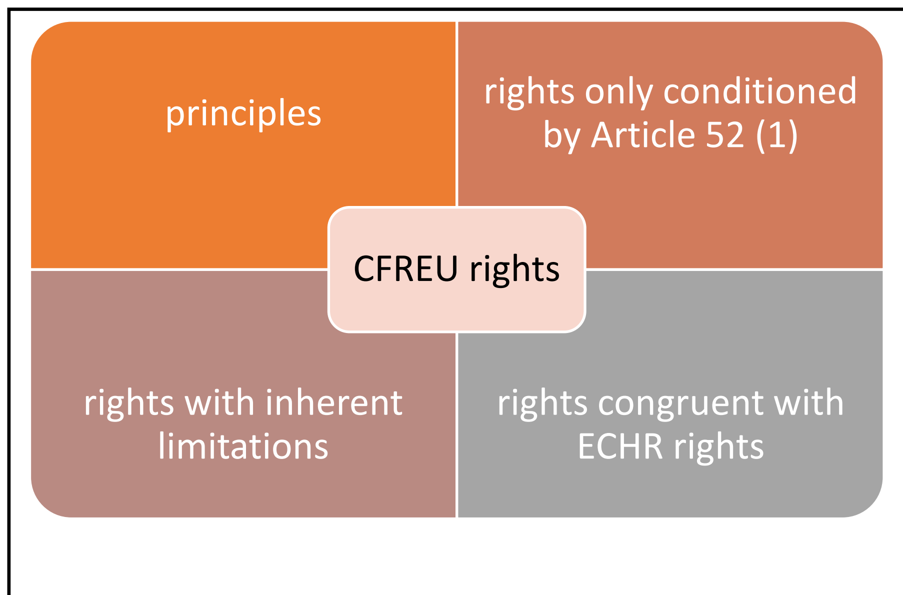
4.2.5. Tensions within the Charter

All this indicates that **when we speak about tensions between social and labour rights and Internal Market law**, we do not only refer to Charter rights versus Treaty rights. Instead, **we** also **refer to tensions between different Charter rights**. **The question of whether there is a hierarchy** between economic freedoms as guaranteed in the Treaties and social and labour rights as guaranteed in the Charter remains relevant. However, it **is** also **transformed into a question of whether there is** an equivalent hierarchy, or **any** other **conflict resolution mechanism within the Charter**.[313] This is the question to which we turn next.

The Charter itself seems to provide for a complex matrix in relation to the different articles. On the one hand, there is the distinction between rights and principles. On the other hand, the Charter contains two different rules for aligning conflicting rights: under Article 52 (1) all rights may be limited if this is necessary to protect the rights and freedoms of others. On the other hand, certain rights are inherently limited in that they are only guaranteed for example in accordance with Union law.

[311] Case C-92/00 *Roquette Frères* SA [2002] E.C.R. I-09011, paragraphs 22-24.
[312] Case C-426/11 *Alemo Herron* ECLI:EU:C2013:521.
[313] (Jääskinen, 2014, p. 1713).

Figure 4: Diversity of Charter Rights



4.2.6. Rights and Principles

Article 52 (5) of the Charter codifies a difference between rights and principles, and limits the extent to which principles are "judicially cognisable", i.e. legally enforceable before courts. It states that principles "may be implemented" by legislation or executive acts. While this might suggest that there is no obligation to implement the principles, Article 51 (1) clarifies that when implementing EU law, the EU institutions as well as Member States must observe the principles and promote the application thereof. Accordingly, **principles cannot just be ignored**. Even if the principles are not judicially cognisable in that legal claims cannot be based on them, they can still be relevant in interpreting EU Treaty Law as well as secondary law. The Court of Justice is included as one of the institutions required to observe and promote principles.

For the subject of this study – the question as to whether social and labour rights can place limits on Internal Market Law – the difference between rights and principles matters. **Rights can only be limited if this is provided for by law, and the limitations are proportionate and respect the essence of the rights. Principles, since they are in need of implementation, seem beyond the concept of limitation**. There is also no explicit protection of their essence.

Although the difference matters, **the Charter does not clarify which of its provisions contains rights and which contain principle**s. In so far as the explanations have legal value, the wording of the Charter itself does not seem decisive. The **explanations categorise Articles 25, 26 and 37 as principles**, although the headings of the first two articles contain the term "right". The **explanations also state that articles may contain rights and principles** alongside each other**, and mention Article 34 as an example**.

Whether a CFREU provision guarantees a right or a principle depends on its content of the provision. Does it have a justiciable content? In this case, it is a right. Is it clearly a demand to improve a situation to achieve a certain goal? In that case, it is a principle. For the social and labour rights which are the focus of this study, a mixed picture emerges.

Box 8: Articles 12, 28, 31 and 34 CFREU – rights or principles?

The right to collective bargaining underpinned by credible threats of industrial action rests on Articles 12 and 28 CFREU simultaneously, which complicates its classification. Article 12 is clearly a right, and is rooted in Article 11 ECHR. Article 28 CFREU is phrased as a right in its heading. The content also includes factual activities, such as negotiating and taking collective action, which can be guaranteed as rights. The conclusion of collective agreements may also require a legal frame adding a level of principle.

Article 31 uses the language of rights but seems a mixed provision: the guarantee of fair and just working conditions does need to be implemented by employment law provisions. The Charter states one of those – the right to annual leave – but does not specify its content. Accordingly, this is a mixed provision as well.

Article 34, relating to social security and social assistance, is only a principle in so far as no specific level of social security and social assistance is guaranteed. The provision qualifies the right of workers to equal treatment (Articles 15 and 21 CFREU). Also, a minimum standard of social protection could be derived from the guarantee of human dignity in combination with this provision. The Explanations qualify Article 34 as a provision containing rights and principles next to each other. This indicates that the EU embraces the concept of a rights-based social state instead of welfare states granting discretionary benefits which can be withdrawn at any time.

4.2.7. Different quality of rights and conflict solutions

As regards conflicts between rights, the Charter itself indicates a two level solution. First, **Article 52 (1)** states that rights may be limited if this is proportionate and justified by the need to protect the Charter rights and freedoms. This indicates that all the Charter rights are related to each other, and that there is no principal priority given to any of them. This **constitutes the general rule**.

Further **some Charter rights** are conceptualised **with an inherent restriction**. For example, the freedom to conduct a business (Article 16) and the entitlement to social security and social assistance (Article 34) are only guaranteed "in accordance with Union law and national law and practices", and the right to property "may be regulated by law in so far as is necessary for the general interest". Adding these inherent limitations into the text of the articles, the Charter indicates that these rights **are subject to more limitations than others**. There are thus more options to limit those rights, not only in favour of other Charter rights, but also in favour of maintaining national law and practice or the general interest.

As regards the social and labour rights and rights of businesses which are the subject of this study, this allows a first interim conclusion. The rights to conduct a business (Article 16 CFREU) is only guaranteed with an inherent restriction, while right to seek employment, work, establish and provide services individually (Article 15 CFREU) is recognised without that inherent restriction. Thus, **economic freedoms exercised in the form of a corporate business** and not **individually are subject to more limitations than those economic freedoms exercised by a natural person**. Further, the right to fair and just working conditions (Article 31 CFREU) is unlimited. The right to **collective bargaining and industrial action** is guaranteed in contradictory ways. While Article 28 CFREU states that the right to collective bargaining and collective industrial action is only guaranteed in accordance with Union law, Article 12 CFREU guarantees freedom of association unconditionally. In the light of the ECtHR's case law, and in line with Article 52 (3) CFREU, Article 12 must be read to also embody rights to collec-

tive bargaining and collective industrial action.[314] Accordingly, the CJEU case law limiting rights to collective bargaining and industrial action in favour of employers' rights to conduct their business across borders does not comply with the **Charters' complex system of aligning rights to one another**. This is a first indication that **the solution found in the "Laval quartet" is indeed no longer feasible** after the CFREU attained legally binding force.

4.2.8. Conflicts between Charter rights of equal rank

The Charter also guarantees a number of equally ranked rights, such as the individual right to seek work across borders, or to provide services individually across borders (both in Article 15). Further, the qualification of collective bargaining and industrial action as a subsection of Article 12 rights is not yet universally accepted. For example, the Court of Justice only refers to Article 28 CFREU.[315]

Accordingly, there is the need to consider **how conflicts between equally ranked rights should be resolved**. The resolution of such conflicts **is the bread and butter of constitutional courts all over the world**, and has occupied constitutional lawyers accordingly. Thus, there are a number of principles which constitutional courts can rely on in order to mitigate such conflicts.

The starting point must be that the constitutional rights guaranteed are of equal rank. Thus, even if they conflict, it is necessary to find a solution which limits each of them as little as possible. This suggests that **rights can be guaranteed, protected and promoted to different degrees**. Alexy's suggestion to consider rights as "**optimisation principles**"[316] captures this idea which has been codified in the Charter. It suggests that courts and policy makers are under a positive duty to optimise rights as far as possible. The doctrine of "praktische Konkordanz" entails the same principle,[317] and essentially means that **if rights of equal value clash, both rights have to be realised to the degree that on balance neither is limited more than necessary to allow maximisation of the countervailing right**. Article 52 CFREU complements this principle of mutual maximisation with the guarantee that **no right will be deprived of its essence**. This addition safeguards against the specific danger of full justiciability of human rights, which is **particularly acute in relation to the right of collective bargaining, collective agreements and collective industrial action**: it demands that social actors are given normative space in which to balance their competing interests.[318] The essence of the right to collective bargaining and collective industrial action lies in the purpose of providing workers with **an effective procedure** to freely negotiate working conditions. As discussed above,[319] this purpose is frustrated if each and every demand made in the course of collective bargaining is subjected to a full proportionality test, or if the trade unions and employers' associations have no freedom to decide when to take collective industrial action. They have to be granted an appropriate margin of appreciation as regards the demands they wish to pursue and the conditions under which they take collective industrial action.

The **principle of proportionality applied in the correct way** would contribute much to achieving this balance. As Article 52 CFREU specifies, proportionality is a requirement of the legitimate limitation of any human right guaranteed therein. The limitation must be made to achieve another legitimate aim. The specific limitation must be suitable to achieve that aim. Even if it is suitable, it must not go over and above what is necessary to achieve that aim - any less restrictive alternative is to be preferred. A limitation will also be disproportionate if on

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[314] See with more detail on this (Veldman, 2013).
[315] These are the cases *COM v Germany* (occupational pensions), *UNIS, AKT* and *Säjköalojen ammattilitto*, discussed under 2.2.2
[316] (Alexy, 2002).
[317] (Schladebach, 2014).
[318] (Fischer-Lescano, 2008; Kittner & Schiek, 2001).
[319] At pp 18, 34 to 35.

balance that specific limitation is disproportionate. A case in point is a limitation which deprives the human right of its essence. Further, a very serious limitation of a human right in favour of a minor aim, such as convenience for persons working in administration, will not satisfy this final threshold.

In balancing two rights of equal value, **proportionality must be applied both ways**.[320] Limiting the right to conduct a business in favour of the right of privacy by legislation protecting the data of employees is an example. Such legislation will frequently demand that employers do not retain data for longer than the employment relationship lasts. Employers would thus not be able to rely on past information when re-hiring someone, or in their dealings with a business where the former employee now works. In balancing the two rights, Courts must ask whether the limitation of the employers' rights is necessary to achieve the aim of employee privacy. Conversely, they must also ask whether a limitation of employee privacy is really necessary in order to achieve the aim of business freedoms. Mainly, this demands that the Court's famous proportionality test has to be applied both ways, while to date the Court only uses one direction.

4.2.9. Interim conclusion on a constitutionally conditioned Internal Market

The principle of a constitutionally conditioned Internal Market allows a re-appreciation of the Court's case law, which interprets Internal Market law in such a way that it is in tension with EU social and labour rights. This **perception of tension is not very innovative, or indeed current**, **if we consider the EU's value base and the legally binding Charter of Fundamental Rights.** Embedding the Internal Market, which has existed before the expanded value base of the TEU and the legally binding Charter, with those younger layers of principles supports the concept that the rights of economic actors, derived from Internal Market law, presuppose respect for and promotion of social and labour rights.

If Internal Market law and social and labour rights appear to be in conflict in specific situations, on a principled position the human rights based rights should prevail over those not so based. This does not give social and labour rights absolute priority, since the CFREU also guarantees some rights for business, such as the right to property and the right to conduct a business, alongside free movement rights. The Charter does provide guidance in cases of conflict. Notably, the right to conduct a business is only guaranteed in line with Union law – i.e. the Charter specifies that it is not at a higher level than Treaty law. This also applies to Article 28 CFREU. However, the guarantee of freedom of association under Article 12 CFREU must be interpreted in line with the correspondent right in the ECHR, Article 11. This right has been interpreted by the ECtHR to include the right to bargain collectively, conclude collective agreements and take collective industrial action. Article 12 CFREU must be interpreted accordingly. **Article 12 CFREU guarantees freedom of association as a free standing right**, and not only in accordance with Union law. As stated above, **freedom of association includes collective labour rights. Accordingly, EU primary law places collective labour rights at a higher level than** Treaty law, including **the law of the Internal Market**. Similarly, rights to fair and just working conditions are not limited by respect to European Union law (Article 31 CFREU), while Article 34 CFREU guarantees rights to social security and social assistance in accordance with the rules laid down in Union law. If the rights guaranteed by Articles 12 and 31 CFREU would clash with the right to business and the right to property, the Court would be required to have the latter rights cede to the former, should mutual maximisation be impossible. **From a human rights perspective, mere economic interests can never trump human rights.**

Many scholars disagree with the proposition that collective labour rights or any other human rights can possibly constitute fundamental values in the EU, which are in principle at a level

[320] For an example of this see above, see 2.2, footnote 97.

higher than other Treaty law. Even from the perspective of this human-rights-sceptical position the CJEU case law would have to change**. So far, the CJEU does not locate Internal Market law and social and labour rights at the same level**. **Instead, it prioritises Internal Market law.** This prioritisation is a consequence of the **one-sided application of the principle of proportionality**: the Court only requires the limitation of Internal Market law to be justified by reference to proportionality. It never questions the legitimacy of limiting human rights, including social and labour rights, in order to maximise Internal Market law. This would have to change. The Court would have to consider whether the limitations it imposes on a human right in the name of protecting an economic freedom is proportionate. The limitation of a human rights in favour of an economic freedom could only be accepted if there is no less intrusive way of protecting that economic freedom.

Only **the perspective** defended here, which **embraces human rights as first-order principles**, allows a decision in cases where human rights protection and economic freedoms clash. In this case, the **economic freedoms would have to cede to human rights if the purpose of human rights is frustrated by the protection of economic freedoms**.

4.3. Some practical consequences

This section develops examples of adequate responses to conflicts between social and labour rights and rights underpinning Internal Market law. Each of the three subsections will first consider an alternative to the traditional reasoning of the Court of Justice and then continue to develop the arguments for justifying regulatory activities at EU, national and regional levels. It will indicate if the human rights sceptical and the human rights embracing position result in different levels of protection.

4.3.1. Collective labour rights and economic freedoms

Under **the Court's present case law**, workers' **rights to collective bargaining**, underpinned by a credible threat with efficient collective industrial action, **are limited in favour of the freedom to provide services** across a border **as well as in favour of** moving a company across a border (**freedom of establishment**). The Court resolves any tension in favour of the economic freedoms. The Court argues that the economic freedoms are restricted by efficient collective industrial action and collective bargaining agreements with a cross-border effect. Examples include collective action in favour of the equal treatment of posted workers, and collective action aimed at maintaining collective agreement coverage after moving the registration of a business to another Member State. **The Court states that such restrictions can only be justified** on the basis of the general interest **to protect jobs (but not working conditions) or** the general interest **to provide reasonable social protection to workers**, especially in the construction industry.[321] For that justification, the collective industrial action and the **demands** raised in that context, **as well as collective bargaining agreements, must be transparent**. In the Laval case this meant that the limit of what the trade union wishes to achieve must be disclosed before starting any negotiations. The Court does not discuss whether the resulting restriction of workers' rights is proportionate to the aim pursued has to be employed.

Under the principles of a constitutionally conditioned market this line of argument is untenable. In discussing how this reasoning must change, we will first pursue the argument that human rights should be considered as being of a higher order than economic freedoms, and then submit as an auxiliary line of argument how the cases should have been resolved if economic freedoms and human rights were of equal value.

[321] See section 2.3.1 above with footnotes 144 - 146 .

- **If human rights constitute are of higher order than economic freedoms**

Assuming that the CFREU rights enjoy priority over Internal Market law does not mean that there is no conflict in these cases, since **the CFREU itself guarantees social and labour rights alongside rights for business**. However, as developed above, the limitations of individual Charter rights differ, resulting in a **more stringent protection of collective labour rights than business rights**.

To resume: the rights of freedom of association (Article 12 CFREU) and to collective bargaining and collective industrial action (Article 28 CFREU) are inextricably linked. This is particularly well established by the ECtHR case law on Article 11 ECHR, which clarifies that a guarantee of freedom of association for trade unions includes constitutional protection of collective bargaining and collective industrial action. In order to maintain congruence of the ECHR and CFREU, the stronger right is the decisive one. **Article 12 CFREU is guaranteed without specific restrictions as a liberal right, and in particular is not only guaranteed within the framework of EU law, as Article 28 CFREU.** Accordingly, Article 12 is decisive. Nevertheless, in line with Article 52 (1) CFREU, the rights to collective bargaining and industrial action can be limited in order to protect the general interest as well as competing rights. However, any such limitation must not deprive the rights to collective bargaining and collective industrial action of their essence.

The **economic freedoms of corporations can be underpinned by Article 16 CFREU, and are thus only guaranteed in accordance with Union law**. Since Charter Rights are part of Union law, Article 16 CFREU rights are only guaranteed in line with Article 12 CFREU rights. Accordingly, **business in the EU must expect to be subjected to industrial action and bound by collective bargaining agreements**. The case law would have to change in so far as the Court would have to assume that **a strike and related action** is nothing unusual. Accordingly, such activity **would not in itself establish a restriction of economic freedoms** – just as the existence of national employment protection law must not be considered a restriction of economic freedoms.[322] If a Swedish business which wants to conduct business in Sweden without being bound to a collective labour agreement with a certain trade union would have to expect to be subjected to collective industrial action, a Latvian business not wanting to conduct business in Sweden without being bound to a collective labour agreement would have to expect collective action as well. There is no specific detriment.

There are **limited sets of circumstances** under which industrial action or **collective bargaining might be considered as a restriction of economic freedoms**. First, if a natural person conducts a business [instead of a company], she is protected by the guarantee for natural persons to move or trade across borders (Article 15 CFREU). **Collective industrial action aimed at preventing free movement as such**, instead of only influencing the conditions under which it takes place, **could be qualified as restriction** of economic freedoms without violating the Charter. Such a restriction **could still be justified**. However, any resulting limitation of collective industrial action i**s unjustified if it impinges upon the essence** of the constitutional rights to freedom of association, collective bargaining and industrial action. Making collective industrial action fully calculable would not satisfy that condition: collective industrial action must maintain an element of credible threat by causing economic harm. Also, since it underpins collective bargaining, bargaining as an open-ended process must be maintained. This excludes any obligation of trade unions to disclose their last line of compromise before the negotiations are concluded, and requires that both parties maintain a margin of appreciation on when to take collective industrial action. Other restrictions of collective bargaining in the name of economic freedoms must not go beyond what is necessary to protect business rights of natural persons (two-way proportionality, see below). Though companies are less protected

[322] Case C-190/98 *Graf* [2000] ECR I-493.

under Article 16 CFREU than natural persons, they are not unprotected. Accordingly, collective industrial action aiming at destroying a company would constitute a first-order conflict of constitutional rights.

In all the other cases, a limitation of collective labour rights would only be admissible on the basis of legislation. Since the EU has no competence to legislate around collective industrial action (Article 153 TFEU), this legislation would either be national legislation, or EU level collective agreements.

- **If economic freedoms are at the same level as human rights**

Even if we accept for a moment the idea that the Treaties guarantee an uncivilised market, and award the economic freedoms in themselves the same status as human rights, the CJEU case law would have to change. **Under this assumption, collective labour rights have to be exercised in line with Internal Market Law and economic freedoms have to be exercised in line with collective labour rights as well.** If there is a conflict between those rights, mutual optimisation of those rights will have to be achieved.

This requires that, upon finding a restriction of an economic freedom through collective industrial action or collective bargaining, the Court applies the **proportionality test in two directions**. On the one hand**,** the Court may ask (as it regularly does) whether the restriction of economic freedoms through the exercise of collective labour rights can be justified. On the other hand**, the Court must ask (which it has never done so far) whether the restriction of collective labour rights in the name of economic freedoms can be justified**. This is the only way to safeguard the mutual optimisation of collective labour rights and economic freedoms instead of prioritising economic freedoms.

Thus, for example, the question of whether collective agreements can be required to be underpinned by a credible threat of collective action in order to achieve equal treatment of posted workers must be answered differently than in the Laval case. In the Laval case the Court held that the mere fact that an employer does not know what the results of a collective bargaining process will be renders the collective industrial action disproportionate. However, it is the nature of any bargaining process that both sides are not clear up front about the limits of their demand. **Thus, demanding that the trade union disclose to the foreign employer its last line of defence, before the employer has even started negotiating, means rendering the bargaining process meaningless**. The Court would thus continue its deliberations after stating that it is indeed inconvenient for an employer to be pressurised into a negotiation. It would have to ask **whether the constitutional right to pressurise employers into bargaining collectively by industrial action can still be exercised if the trade union has to disclose its lowest possible compromise before starting industrial action**. The answer to this question would probably be in the negative.

The Court would then have to ask **whether there is a less restrictive method** to safeguard the employers' right to provide services across a border. That method could be found in **allowing scope for cross-border service provision in the practical exercise of collective bargaining.** As the responses reported in chapter 3 demonstrate, the Swedish system does leave scope for the practical exercise of service provision across a border. For example, Polish employers frequently sign adhesion contracts, and Swedish construction companies conclude subcontracts with companies from other Member States which adhere to Swedish collective agreements.[323] Recently, trade unions in Nordic countries have started cooperating across borders in order to ensure that interests of posted workers are considered in collective bargain-

[323] Above page 69-65.

ing.[324] There is nothing which indicates that such cooperation is not suitable for employers and their associations.

- **To sum up**

These factual arguments are to a certain degree speculative, and also the national court would be best placed to consider them, should a case similar to Laval ever be referred to the Court of Justice. **Nevertheless, the outline should demonstrate that *Laval*, *Viking* and any upcoming similar cases would have to be decided differently because the CFREU is legally binding.** If Charter Rights are at a higher level than economic freedoms, collective labour rights may still conflict directly with the rights of entrepreneurs as natural persons moving or trading across borders, though they might only conflict with corporate business rights if aiming to eliminate the corporation. Even if Charter Rights are only protected at the same level as economic rights, the Court would still have to conduct a two way proportionality test, which would result in a more stringent protection of collective labour rights than provided under the old case law.

4.3.2. Collective labour rights and competition rules

Similar considerations apply to the tension between EU competition law and collective labour rights, as developed by the Court of Justice (above under 2.2.4). Competition rules are not underpinned directly by Charter rights. Whilst there is a certain connection between some competition rules and the freedom to conduct business, the prohibition of cartels as well as the prohibition to abuse a dominant market position limit freedoms to conduct business. Thus, the competition rules themselves, in a fundamental rights perspective, balance the freedom to conduct business of different market participants. **Accordingly, under the perspective of the constitutionally embedded Internal Market there is no case for defending the expansion of competition rules to collective bargaining agreements**. The classification of collective agreements as cartels would lead to a very specific content control by the national competition authorities. This would restrict the freedom to determine the content of those agreements to such a degree that the essence of the right to collective bargaining would be lost. The right to collective bargaining guarantees a process in which trade unions and employer associations can establish employment conditions. This process is trusted to be fairer than just the individual employment contract. This higher degree of fairness depends on the functioning of the process. The trade unions and employer associations need to have a sufficient degree of autonomy over the content they demand to be implemented in their agreements, as well as autonomy on when to initiate collective industrial action. Restricting these freedoms in the name of competition law is not necessary, as the deliberations in chapter 2.2.4 have demonstrated.

However, if we assume that Internal Market law is at the same level as human rights protected by the CFREU, the competition rules are at the same level as collective labour rights guaranteed by Articles 12, 28 CFREU. Again, these collective labour rights are not conditioned upon compliance with competition rules – Article 12 CFREU prevents this. **This would support to truly reconcile competition rules and collective labour rights as proposed above**: the only option open to the Courts is to accept that collective agreements are a necessary outcome of the exercise of collective labour rights, and that the agreement of several employers to the same collective agreement is necessary as well. Accordingly, a collective labour agreement will not constitute a cartel or an abuse of a dominant market position.[325] Only false collective agreements can constitute cartels. Such agreements may emerge where business collude with a trade union (possibly one founded for this purpose) in order to circumvent EU competition law.

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[324] (Lovén-Seldén, 2014).
[325] See 2.2.4 above.

4.3.3. Rights to conduct a business and equal treatment of workers

A number of conflicts evolve around the position of workers moving to another EU Member State for work. If these workers are posted, current EU case law and EU level legislation stipulate that they lose any right to equal treatment under host state rules.[326] This is based on the employers' freedom to provide services. Under the principles of a constitutionally conditioned Internal Market, this solution cannot be upheld, because **the Charter does not differentiate between posted workers and other employees**.

Rights of business to provide services across a border are not wholly unprotected under the Charter. **Rights to conduct a corporate business are, according to Article 16 CFREU, only guaranteed in line with Union law**. All workers can rely on Article 15 CFREU in their rights to move freely, and on Article 21 (2) CFREU in their right to be treated equally irrespective of nationality. Further, Article 15 (3) CFREU, stating that non-EU nationals are entitled to equivalent working conditions as EU nationals if they are authorised to work in the EU, indicates that free movement rights under Article 15 to have an equality dimension. **As mentioned, the Charter does not differentiate between employees on the basis of their status. Rights to free movement and equal treatment under Article 15 and 21 apply to posted workers just as to other workers with a less precarious status.** Further, workers have a right to fair and just working conditions under Article 31 CFREU. The practical relevance of Article 31 is reduced if business can avail themselves of constructions such as posting in order to avoid high-wage collective agreements or legislation guaranteeing favourable employment conditions.

Present case law and legislation deprive posted workers from their right to be treated equally in the host state. Since Article 21 (2) – using the same wording as Article 18 TFEU – proscribes discrimination on grounds of nationality without prejudice to special provisions in the Treaties, those defending the status quo might argue that freedom to provide services constitutes such a specific provision. Such argumentation would lead to a conflict between equal treatment rights and economic freedoms. Accordingly, the equal treatment rights of posted workers could only be limited as far as this is justified because freedom to provide services cannot be exercised without such unequal treatment. This line of argument will be very difficult to sustain.

Creating legislation, or other types of EU level regulation to achieve equal treatment of workers in sectors where posting and hiring out of work across borders has become entrenched, would be a legitimate activity to combat abuse and to re-introduce free movement of workers under the condition of equal treatment as a principle of the Internal Market. Any challenge relying on established notions of protecting freedom to provide services could be countered with argumentation relying on the human right guarantees underpinning free movement of all workers, which were not in existence when the posted workers case law emerged.

4.3.4. Equal treatment of free movers versus national prerogatives (social security and social assistance)

The politically sensitive issues of limiting free movement rights, an agenda being pursued by some Member State governments, is not a problematic one under the Charter. **States do not command over human rights.** They may act in order to balance conflicting human rights. In so far as they implement EU law in this process by availing themselves of exceptions from free movement rights, they have to safeguard the CFREU rights as well. In particular, Member States are under an **obligation to respect and promote the rights to social assistance and social security guaranteed in Article 34 CFREU**, along with the **constitutional guarantee of free movement rights for natural persons (Article 15 TFEU)**. The populist argument that social assistance systems will collapse if equal treatment is provided will in all

[326] See above 2.3.1, page 42 - 43

likelihood not survive stringent human rights scrutiny. The free moving worker at least, who is at the heart of this study, is not a specific risk for social security and social assistance systems, as has been established by voluminous studies (see also below chapter 5.)

4.4. The role of legislation and collective regulation at EU and national levels

So far, we have only established that social and labour rights as well as rights deriving from Internal Market law are both underpinned by Charter rights, and must be balanced if they conflict. We have also established that there are different levels of managing the conflicts provided by the Charter itself. **We have not yet considered how the different levels of governance in the European Union interact in respecting, protecting and promoting both classes of Charter rights.** In the Court's practice, which is frequently the main focus of attention,[327] such conflicts occur if EU Treaties and EU legislation underpin the Internal Market while national law or social practice protect and promote social and labour rights.

However, such a strict division of labour would not seem in line with a constitutionally conditioned Internal Market at all: instead of developing strategies to align social and labour rights with the Internal Market, this strategy perpetuates the perceived tensions. The constitutionally conditioned Internal Market requires that social and labour rights are promoted at the same level as the Internal Market. This cannot be achieved through case law alone. It necessitates general responses through regulation at EU and national levels, issued by the EU or its Member States and their regions as well as by socio-economic actors, again at the most adequate level. Accordingly, we must ask the question how the constitutionally conditioned Internal Market determines regulatory activities at different levels.

From the perspective of the Internal Market itself, which aims at abolishing restrictions for free movement of goods, persons, services and capital across borders, **regulation established at European level is more advantageous than national or subnational regulation**. Lower level regulation for the promotion of social and labour rights at national levels will frequently create divergent legislation, which again can become the source of distortions of the Internal Market. EU level legislation or EU level collective agreement are more suitable to create a common floor of rights, or even uniform regulation, if this is necessary to avoid such distortions. Accordingly, the tensions with rights underpinning the Internal Market, as specified in Article 15 Charter, are less prevalent in the case of EU level regulation.

However, national and sub-national traditions in social and labour rights are very diverse and specific, which may warrant EU level legislation difficult to achieve, or even undesirable. Thus, the promotion of social and labour rights requires regulation at different levels. Equally, the practical implementation of rights underpinning the Internal Market is still determined by the regulatory environment at national and regional levels. Accordingly, activities promoting those rights should also be taken at those levels, this is not the prerogative of the EU level alone.

Further, thinking of regulation and other actions at EU, national and regional levels, we must not only consider public actors such as states, municipalities and the EU institutions. **In the employment field, collective agreements are an established form of non-state regulation in many Member States.** As demonstrated in chapter 3, these are used to varying degrees in different Member States, corresponding to different industrial relations models.[328] There is also scope for EU level collective agreements, though these are not yet common.[329]

4.5. Chapter conclusion

The protection of social and labour rights in the Charter for Fundamental Rights for the European Union (CFREU) does not establish a carte blanche for the prioritisation of social and la-

[327] See, for example, the contributions in the edited collection by (Vries, et al., 2013).
[328] See 3.2 above.
[329] (Schiek, 2012c).

bour rights over Internal Market law. After all, rights of business derived from Internal Market law is also protected by the Charter. However, any one-sided preference for those business rights is limited by the elaborate system of balancing conflicting human rights against each other, established by Article 52 Charter as well as by the specifications of limitations in the Charter rights themselves. In relation to the tensions discussed in chapter two, this implies the necessity of changes in the Court's case law, as well as innovative approaches to regulation at EU levels, both by the EU legislator and EU level representatives of management and labour.

This study does not aim at identifying any "correct" level of regulation.[330] More humbly it develops arguments for regulators at national and EU levels wishing to promote social and labour rights while also respecting the Internal Market. Chapter five provides such argumentation in relation to the main tensions identified in chapter one, as far as they have been confirmed as relevant in the investigation of four Member States and the EU level.

[330] Different scenarios for this are, for example, developed by (Bertelsmann Stiftung, 2014).

5. CONCLUSIONS AND RECOMMENDATIONS

KEY FINDINGS

Restoring social and labour rights to their rightful place as irrevocable principles, demands that they condition the Internal Market, rather than being conditioned by the demands of the Internal Market. This is the conclusion of chapter four in one sentence. Achieving this paradigmatic change will not be easy. It presupposes new orientations for EU legislation and policy as well as a change in direction by the Court of Justice. The restrictive case law on freedom to provide services and competition law and collective labour rights, which has been identified as a source of disruption for national social models in chapter three, interacts with EU legislation and policy by way of mutual reinforcement. This implies an integrated approach to changes. Therefore, the report recommends three types of activities:

(1) Activities that promote the concept of a constitutionally embedded Internal Market.

(2) Legislative activities at EU levels that correct such legislation that responded to case law based on the old concept of tensions between Internal Market law and social and labour rights.

(3) Activities by social actors, notably trade unions and employer associations, to specify EU level regulation for certain particularly vulnerable sectors, and to combine forces transnationally to effectively enforce these and other rules.

The activities suggested are exemplary, since an exhaustive report on required changes would go beyond any individual study. These examples focus on ensuring equal treatment for people who move to work, including posted workers and posted agency workers and on restoring collective bargaining in the Internal Market.

5.1. Introduction

The chapters 2 – 3 have confirmed that EU legislation and CJEU case law have in the past often been based on the assumption that social and labour rights and the Internal Market are juxtaposed to each other. In many instances this has led to restricting social and labour rights if they are perceived as interfering with economic freedoms and competition law. Such a path had been adopted long before the *Laval* and *Viking* cases were decided, which came to symbolise the insoluble antagonism between social and labour rights and the Internal Market. Chapter 4 has developed the model of a constitutionally conditioned Internal Market, which moves beyond this antagonism: it demands that the Internal Market is infused by social and labour rights instead of being juxtaposed to them. Reversing the path taken in fields such as equal treatment of all workers by employers and social security providers, protecting fair and just employment conditions and dealing with collective bargaining and industrial action in an Internal Market might be achieved through a range of activities.

A new concept such as the constitutionally embedded Internal Market will require some activities to promote the concept, and to build a knowledge base on the potential implications of a new approach. Such activities may also potentially convince members of the EU and the national judiciary to better protect constitutional rights, including social and labour rights, when applying EU Internal Market law.

A change in perspective also requires legislative activities. Much EU legislation is conditioned by past case law which was less embracing of social and labour rights, and partly did not allow actors at national levels to fully utilise the potential of labour rights.

Further, the responses synthesized in chapter 3 have reconfirmed the pivotal role of collective representation. Collective representation can complement EU legislation as well as secure benefits of formal guarantees of social and labour rights in the Charter and in legislation.

In concluding on a constructive note, this chapter focuses on those fields which have emerged as most relevant in the expert interviews conducted for this study. This report's limited remit means that, beyond these specific findings, it does not set out to propose a full revision of European labour and social security law. Instead, the proposals are developed as examples of how to move towards an Internal Market conditioned by social and labour rights.

The order of presentation will not follow chapters 2 and 4, but instead prioritise the main concerns which emerged from the interviews. From these, consequences of excessive protection of freedom to provide services have emerged as main concern. Posting of workers, and in particular abuse of the freedom to post agency workers across borders, emerged as even more urgent as assumed on the basis of current literature. The responses to our interviews suggest that posting of workers has emerged as another form of precarious work, which employers may use in order to avoid full exposure to employment law at the place of work. The empirical findings also underline the relevance of trade union representation (and potentially new and different industrial relations strategies) for safeguarding even the limited rights the EU guarantees for posted workers. Further, the empirical findings have demonstrated that the tensions between competition law and social and labour rights are experienced in a number of Member States, in particular in relation to collective representation and collective bargaining, as well as in relation to social security institutions.

5.2. Workers moving in the Internal Market

5.2.1. Factual relevance of labour mobility throughout the EU

In recent times the extent to which workers move freely has been the subject of public attention. On the one hand the relatively low levels of free movement are being criticised because enhanced movement of workers could act as an economic buffer in the current crisis. On the other hand, it is observed that the proportion of persons using their free movement rights as EU citizens has increased from 2004, when the joining of post-socialist states increased the wage drift in the EU. The percentage of **EU citizens making use of their free movement rights increased** from below 2 % **to just below 3 %.** Since Ireland, Sweden and the UK opened their labour markets to inward migration immediately after 2004, one might assume that these countries have higher levels of EU free movement from that point in time than other Member States. While this is not the case in the UK and Sweden, Ireland is one of the Member States with the highest percentage of EU free movers after 2004. It is also not true that there is no free movement to those post-2004 Member States. Even after the economic crisis in 2007, in most of them (with the exception of Poland and Hungary) the percentage of non-national EU residents increased. Some of them are also home to a considerable percentage of non-EU citizens.[331] The statistics on free movers do not include workers who move on the basis of posting. While some interviewees suggested that these numbers are negligible on the basis of a study assessing that 1 % of the EU workforce consists of posted workers,[332] this assessment is contestable. If posted and free moving workers together constitute 4 % of the workforce, one in four EU workers who move is posted. This is not insignificant.

This **increased movement, although still of little significance overall, has stimulated negative perceptions of EU free movers in some Member States.** These **fears**, often fuelled by the media and populist parties, **are contradictory**. On the one hand, the resident population **fears a decline in wages and other employment standard**, on the other hand, **national politicians increasingly wish to refuse benefits to EU migrants**, which would push them into any employment, including substandard. As the expert interviews confirm, free movers might initially accept lower standards because these still appear advantageous to

[331] Annex 1 contains some graphs established on the basis of Eurostat, as well as some references underpinning this paragraph. For a labour lawyer's perspective see also (Neal, 2013).

[332] (IDEA CONSULT, 2011).

them. However, equal treatment in employment, social insurance and benefits leads to adaptation to standards in their host country. This reduces the risk of wage-depression caused by influx of migrants. **The equal treatment principle emerges as precondition of free movement without causing social frictions in the receiving economies.** [333] Nevertheless, equal treatment of migrants remains contested. Even the European Commission's work programme[334] envisages "supporting labour mobility" while also "supporting the role of national authorities in fighting abuse or fraudulent claims",[335] suggesting that there is a sizeable proportion of free movers making fraudulent claims. It thus will become necessary to stress the pivotal role of labour mobility under the condition of equal treatment, if the EU socio-economic model and indeed its economic success should have any future. The myth of the undeserving and non-contributing migrant seems to stand in the way of a more realistic assessment.

- While no amount of evidence will completely dispel this myth, existing studies on non-economically active migrants[336] could be complemented by **analysis of migrants moving for work (including employed, self-employed and marginal workers)**.

5.2.2. Equal employment conditions for posted workers

Equal treatment in employment conditions should be the basis on which workers move in the Internal Market (Article 45 TFEU). However, the empirical findings illustrate once again that reality is far from congruent with this principle.

Above all, **EU legislation on equal treatment of free movers is contradictory**. While workers under Article 45 TFEU and Regulation 492/2011 are legally guaranteed equal treatment, workers posted by their employers are not (Directive 96/71, reacting to case law by the Court of Justice). Independently from workers' choice, **the presence of a sizeable percentage of posted workers on effectively lower wages will undermine local working conditions.** These effects will be felt more severely in sectors where employment constitutes a large portion of costs and where temporary employment is prevalent. Sectors such as construction, domestic services to the long-term ill and agriculture were mentioned in our interviews.

The past years have seen a plethora of studies, including those funded by the European institutions, exploring the situation of posted workers.[337] These have proposed numerous improvements of the legal protection of posted workers which shall not be repeated here.[338] Nevertheless, the proposition that **posted workers should have a claim to equal treatment at the place of work** has not been put forward. This is defended with the argument that under conflicts of law (international private law) principles the employment law applying to a worker is that of her habitual place to work, which is deemed to be the place of where her employer is established. Employees in the state of the employer's corporate domicile should thus be the ones with whom posted workers are treated equally.

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[333] See above chapter 1.4.3., p. 22

[334] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions: Commission Work Programme 2015: A New Start (COM (2014) 910 final).

[335] Ibidem p. 7.

[336] (Juravle, et al., 2013).

[337] See for example (Hoek & Houwerzijl, 2011; Evju, 2013).

[338] (Evju, 2013; Hoek & Houwerzijl, 2011). The minimum for legal clarity is a clearer definition of posting, demanding that the posting enterprise delivers a substantive economic activity in the state whose labour law they wish to apply, the exclusion of temporary agencies from the class of employers who can avail themselves of posting, the exclusion of multinational corporation from intercompany posting, including a serious contribution of employers who post to costs of accommodation, catering and travel for family visits in the criteria for definition of posting, a legislative clarification that Member States may demand equal treatment of posted worker in line with Article 3 (10), which would legalise the Irish and UK implementation of the Directive, a clearer definition of the core employment conditions for which Member States have to demand equal treatment in Article 3 (1).

EU regulation on a similar issue, in relation to workers hired out to another employer, is less timid: Directive 2008/104 requires that agency workers are treated equally in relation to core employment rules, not only to minimum rules. This is a compromise limiting equal treatment of workers in favour of their two employers, the works agency and the user firm. In relation to other precarious forms of work, such as part time work and fixed term work,[339] the equal treatment principle is more encompassing. Arguably, equal treatment cannot be fully realised if the employer position is divided between two employers, as in the case of agency workers, but also posted workers. However, refusing any equal treatment to posted workers is not justifiable other than with reference to conflict of law principles, which do not have constitutional status.

In the first instance, **posted workers' rights to equal treatment in the host state (derived from free movement rights) should not be curtailed in favour of their employers' freedom to provide services**. Consequently, as a default position, posted workers should be entitled to equal treatment with workers in the place of work (host state). Exceptions might be justified for very short periods, as both Directive 96/71 and Directive 2008/104 acknowledge. Directive 96/71 provides for exceptions for 8 days (Article 3 (2)) or a month (Article 3 (3), (4)). It is important to **provide specific rules to prevent abuse**: especially for workers with few formal qualifications, the employer may be tempted to dismiss them at the end of the 8 day or 4 week period in order to replace them with another posted worker. Such abuse can be prevented by requiring that a posted worker covered by an exception must not replace another worker, and by calculating the duration of the posting not on a personal level. Both directives provide that **exceptions** from equal treatment can be made **on the basis of collective agreements**. Again, a **safeguard** against abuse is required, in particular **preventing the use of employer-funded trade unions** for those collective agreements. Further, transnational collective bargaining structures would be necessary to make such exceptions viable for transnational activities such as posting (see below 5.5).

- **Equal treatment of workers at the place of work should be the rule, irrespective of whether they work as posted worker, agency worker, and free moving worker or have never moved at all**. The revision of Directive 96/71 is a good place for starting to implement this principle. As for other forms of precarious work, such as part time, fixed term contract and agency work, the principle of equal treatment should be the basis of any secondary law regulating posting.
- Beyond equal treatment **of posted workers and agency workers**, a second regulatory principle comes to mind: both phenomena are **high-risk employment practices** which **warrant specific consideration for employees**. Specific arrangements rewarding the heightened flexibility demonstrated by posted workers and agency workers should also be considered. EU activity could initiate projects to develop best practice examples in this field, which may be suitable for collective agreement as well as legislation at national and EU levels.

5.2.3. Moving workers and social security

EU citizens who move to another Member State for work should have access to **social security** in the host state under the **principle of equal treatment** (Article 4 Regulation 883/2004). Defending this principle is an **important corollary to defending equal treatment in employment**. As expanded upon in more detail above,[340] only a robust defence of equal treatment in both spheres ensures that **non-nationals can anticipate an accumulated level of**

[339] Addressed by Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part time work concluded by UNICE, CEEP and ETUC [1998] OJ L14/9 and Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L175/43.

[340] On the socio-economic relevance of linking free movement to equal treatment see chapter 1.4.3 (pp 22 - 26), on the development of the Court's case law see chapter 2.4.5 (pp. 56-58).

income which does not compromise living standards in their host country. Motivated by the myth that free moving workers are a disproportionate burden on national social systems, there is a rising disinclination amongst Member States to maintain equal treatment of EU free movers. Member States are more focused on those benefits funded from the general tax. Due to the **oscillating spheres of overlap between social security and social assistance**,[341] a reduction of state-funded benefits will in the medium term affect both systems.

In the field of social security, equal treatment is not sufficient to ensure that **workers who move do not suffer disadvantage in substance**, especially in comparison to those who do not move. The EU's response to this problem has been the **coordination of national social security systems** (Regulations 883/2004 and 987/2009)[342]. The findings of the expert interviews conducted for this study suggest that this **coordination does not fully achieve the aim of avoiding disadvantage in substance**.

In part, this relates to the **rules relating to posted workers**, which **differ** from EU legislation on the employment of posted workers. Directive 96/71/EC contains fewer restrictions on employers to profit from the advantages of posting than the social security regulations. Under the social security regulations (Article 12 Regulation 883/2004, Article 14 Regulation 987/2009), posting must be limited to 24 months, the employer must have a genuine business activity at the place where her business is registered, and must have the intention to recall the employee after the posting ends. While these **stricter rules** have been recommended as a model for the employment-related rules,[343] Article 12 Regulation 883/2004 **still** constitutes **an exception from the principle of equal treatment. Equal treatment** would require that the worker is governed by the social security system at the place of work.

The exceptions from the equal treatment principle were established in order to respond to employers' interests without violating the principle that only one national social security system applies to each worker. Nevertheless, **employees who are posted might also view these exceptions as advantageous**. Persons who only work in another Member State for a short time may not be interested in changing into that social security system. Depending on the quality of the social security system in the home state, employees may resist being moved to the host state system even after 24 months. While EU employees do have a choice in some circumstances (Article 15 Regulation 883/2004/EC), **posted workers do not have an individual choice**.[344] This lack of choice may induce employees to opt or even ask for a posting arrangement in order to avoid a change into an unfamiliar social security system, notwithstanding the potential disadvantage of suffering unequal treatment in employment.

The **expert interviews** revealed some instances of **insufficient accessibility of national social security systems for workers who move**, especially for short periods or in marginal employment. In **Sweden**, workers who move **may fail to acquire seamless membership in unemployment funds**, which means that they may not acquire access to unemployment coverage before completing a new waiting period. In **Ireland**, **periods of employment completed abroad were often disregarded** for entitlements to some contributory benefits.[345] Benefit entitlements requiring a period of prior employment are typically related to the risks of unemployment.[346] In this field, Regulation 883/2004 does not support the **entrepreneurial unemployed person**, who moves abroad while unemployed in order to find work: this group of persons needs to register with two unemployment institutions, and in any case can only

[341] See above page 20.
[342] See above chapter 2.4.
[343] (Evju, 2013; Hoek & Houwerzijl, 2011).
[344] Article 16 Regulation 883/2004 allows Member States to agree exceptions from Articles 11-15, which would also allow more flexibility in favour of posted workers. However, those exceptions cannot be chosen by posted workers, or collectively agreed upon by their trade unions and employers. Any concession depends on state approval.
[345] See above chapter 3.7.2, p. 80 seq.
[346] (Eichenhofer, 2013, pp. 159-184)

draw unemployment benefits for a very limited period.[347] These limits are related to the prevalence of a nationally conditioned frame for unemployment benefits.

- Presently, there is some discussion about a general European unemployment insurance system. However, what emerges from our reports is the need to create some **social security benefit for marginal mobile workers, i.e. those who move frequently or only once in order to escape unemployment or underemployment.** While the competence base for a general EU level unemployment insurance is contested, it would be **worthwhile investigating the scope of creating** a regulation for **an EU level benefit scheme for this type of person under Article 48 TFEU**.

5.2.4. Enforcing rights of workers who move

Directive 2014/54 complements Regulation 492/2011, in enhancing the options for workers who do move freely to raise individual complaints, and establishes the obligation of Member States to provide some support by public equality bodies for rights enforcement. Any proactive policies such as dialogue with social partners and non-governmental organisation or the encouragement of equality plans are at best a recommendation. The Directive thus reproduces the approach taken by the EU anti-discrimination law acquis, which is subject to criticism for its lack of proactive measures ensuring equality. Nevertheless, the directive will certainly contribute to enforcing[348] equal treatment rights of workers who move. In our study it emerged that posted workers and posted agency workers are even more at risk of being deprived of their social and labour rights than other workers who move.

- **Supporting mechanisms such as those instigated by Directive 2014/54 should be made available to all citizens moving for work**, including posted workers.
- The supporting mechanisms should encompass claims to social security and social assistance as well as claims in relation to employers and employment agencies, whether public or private.

5.3. Public procurement and fair working conditions

In the past, the Court of Justice has viewed the use of public procurement for the purpose of promoting fair employment conditions with scepticism. [349] In line with ILO convention 94, public procurement can be used to "buy social justice" by imposing social conditions on contractual partners. The requirement that those providing services or delivering goods for a public contractor provide employment condition in line with local usage is of particular interest. Depending on where the services are provided or the goods produced, the reference point may be local conditions in the Member State where the public contract is concluded, or the local conditions in another Member State.

Directive 2014/24 and Directive 2014/23 allow for procuring entities to insist on making the local remuneration at the place of work a condition of fulfilling contractual obligations with a public entity. Practical implementation of these principles is likely to result in challenges before national courts, which may be heard before the European Court of Justice following a reference.

- Instead of just waiting for reactions of the Member States and litigation strategies aiming to compromise the full effect of these provisions, **pilot projects for developing socially responsible public procurement** could be developed during the implementation phase of this directive.

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[347] Articles 61-65 Regulation 883/2004, see also Article 56 Regulation 987/2009

[348] The proposals recommended by another report for the European Parliament for enforcement shall not be repeated (Canetta, et al., 2012).

[349] On this see above section 2.3.4, pp. 48 seq.

5.4. Collective bargaining in the Internal Market

Our interviewees have confirmed that in there is a role for collective bargaining structures in the Internal Market. Many of the problems which emerged from the national reports require **information of workers, for which trade unions are indispensable**. Other problems would warrant **regulation specific to a sector** or even a certain group of businesses, which can be achieved through collective bargaining. Even the **problems** of posted, temped and free moving workers **to obtain adequate social security could be tackled by collective agreement**: in the construction industry, social partners in many Member States have developed models of ensuring annual leave claims of workers who frequently change their employer. These are secured through sector specific institutions established through collective bargaining.

While it is correct that collective bargaining is on the decline not only in Europe, but globally, this is no reason to give up on the advisory function of trade unions, which proved so crucial in the *Sähköalojen ammattilitto* case. There is certainly scope to develop that function further for the transnational level.

5.4.1. The EU needs to mature to adapt to transnational industrial conflict

Ultimately, the adequate working conditions under which the Internal Market is constitutionally conditioned will only emerge if and when trade unions retain the right to exert pressure not only within national borders, but also transnationally. As elaborated in chapter 2, the Court of Justice has in the past restricted transnational trade union activity in order to protect economic freedoms of employers.[350] The **expert interviews have confirmed that there is a practical relevance for collective bargaining** in favour of posted workers and in relation to respond to cross-border moves of companies.[351] In this field, the **EU is unable to regulate** for lack of legislative competence (Article 153 paragraph 5 TFEU). Without **convincing the EU judiciary that collective bargaining underpinned by effective industrial action is a normal element of labour markets in democratic societies**, there seems little prospect of achieving progress in this regard.

- By way of **awareness rising**, the EU level actors can support such development by offering not only research opportunities, but also **opportunities for exchange** between researchers and practicing lawyers including judges. There is also the option of developing **reasoned opinions** and other instruments that may build a knowledge base for those interested in developing options for trans-border collective bargaining and collective action.

5.4.2. Competition law as sword of Damocles?

As mentioned in chapter 2, the Court of Justice has pursued a relatively restrictive course in relation to collective labour agreements and competition law,[352] although there **remain instances in which national actors feel that collective bargaining and collective industrial action should be possible** in the fields targeted by the Court of Justice (including bargaining for self-employed workers and bargaining around important economic parameters such as working time). While a **constitutional perspective** on this aspect of European labour law suggests **that collective bargaining agreements are beyond the scope of application of Article 101 TFEU as well as Article 102 TFEU.** While the Court has made some concessions in relation to Article 101, it has applied Article 102 TFEU to collective agreements which it had exempted from Article 101.[353] In both cases, this was related to the declaration of universal

[350] Above sections 2.2.2 and 2.2.3, pp. 33- 40.
[351] See above sections 3.3.3., pp. 69 seq. and 3.5, pp. 77 seq.
[352] See above section 2.2.4, p. 40
[353] CJEU *Albany* above footnote 131, CJEU *AG2R Prévoyance*, above footnote 133.

applicability by the state authorities, which established a monopoly of the health insurers concerned. The Court did not find Article 102 to be violated so far. However, as the Court's case law currently stands, those concluding sectoral collective agreements on occupational social security with cross-border application would act under the risk to be subjected to competition authorities' control.

- In the field of **awareness building**, a research and publicity activity on collective bargaining and the more practical aspects of cross border social security might be a way to achieve a wider interest in these fields than an activity which just focuses on industrial action.
- In this field, the EU commands over **legislative competence**. The **Commission** could use its powers under Article 105 TFEU to issue **guidelines** on the relation of competition law and collective agreements. The **Council** could **amend Regulation 1/2004 to specify how competition authorities**, including the European Commission, **should refrain from investigating collective labour agreements**, except in cases where there is a clear indication that collective agreements are utilised to circumvent competition law.

5.4.3. Collective bargaining and social security

A number of responses indicated that there are still elements of social security which are governed by collective agreements. This is particularly relevant in the field of occupational social security, i.e. systems complementing basic coverage by statutory social insurance. The **Swedish** respondents mentioned that there is still **wide scope for occupational social security systems, which again are habitually agreed between trade unions and employers**, in relation to unemployment. Similarly, for sectors where accidents are especially severe or frequent, the Swedish respondents mentioned collectively agreed solutions. The **Irish** respondents mentioned **occupational pension schemes for the construction sector**, which are based on collective agreement.

Specifically, in the field of posted workers and workers who are hired out, there are specific needs to ensure full coverage in social security systems. On a practical level, there are numerous questions raised by the prospect to expand social security schemes, perhaps initially for certain sectors, by collective agreement. These options will thus not be used without further knowledge building activities.

As mentioned there are some specific **competition law issues relating to occupational social security**.[354] While the increasing relevance of occupational social security is incrementally acknowledged in legislation supporting labour mobility,[355] the role of collective bargaining for creating institutions suitable for mobile workers is underexplored. The opportunities related to collectively agreed occupational social security with trans-border potential would deserve specific attention in such an exploration.

- There is scope for exploration of options to include in the planned labour mobility package **scope for collectively agreed transnational institutions for occupational social security.**

5.4.4. Enforcing workers' rights and collective representation

As far as the employment relationship is concerned, **social and labour rights of workers who move will only be enforced effectively if they profit from strong collective representation**. Migrant workers' representation in national trade unions is not yet perfect: **lan-**

[354] See above section 2.4.2, pp. 52-53.

[355] Directive 2014/50 of the European Parliament and the Council of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights, O.J. 2014 L 128/1.

guage and cultural barriers as well as a specific set of interests resulting from the experience of migration pose a challenge for trade unions. These difficulties are aggravated by the fact that free movement is not always a one-off activity, resulting in permanent settlement in the host state. The free mover has a wider perspective and may move away to yet another Member State. Traditional work place based representation will need to be expanded by other means of communication, as well as transnational trade union structures, underpinned by transnational cooperation of trade unions, labour inspectorates and non-governmental organisations working with migrants. This is not a matter where the EU legislator can and should be in the drivers' seat.

- In complementing the individual rights approach of Directive 2014/54**, active encouragement of rights clinics such as the one highlighted in section 3.7.3** (Box 7) should be considered.
- The implementation period of this directive could be utilised to **support projects experimenting with collective and proactive methods** to prevent that migrant workers find themselves on a path entrenching their unequal treatment in the host state. The European Parliament could take the initiative to launch a pilot project in this regard.

5.4.5. Specific opportunities of collective bargaining for posted workers

Collective bargaining may offer specific opportunities to overcome the conundrum around the position of posted workers.

First, the vulnerable position of posted workers seems to indicate that they may in particular profit from collective representation through collective bargaining. Secondly, the sectors where posting prevails, are characterised by highly specific demands on workers, such as seasonal nature of activities in construction and agriculture, irregular working hours in the transport, agricultural and care sector, to name but a few. Our respondents reported a number of examples where these specific demands are addressed through **sectoral collective agreements**. It is worthy of note that several respondents from the construction industry displayed a positive attitude to providing a level playing field through sectoral collective bargaining agreements.[356] Such agreement of respondents of employers' organisations and trade unions was not apparent beyond this specific sector. The option of agreeing on sectoral rules is one of the advantages of collective bargaining as a regulatory instrument.

Our interviewees raised a number of **practical issues in relation to posting which seem best addressed by collective bargaining**, as long as representativeness and independence of the concluding trade unions is safeguarded. For example, the expansion of collectively agreed **pension arrangements** (**Ireland**) and of collectively agreed **insurance against accidents and workplace** (**Sweden**) were seen as a valuable addition to the protection of construction workers posted abroad.

Presently, Directive 96/71 seems to exclude the conclusion of sectoral agreements specifically taking the position of posted workers into account. Article 3 (8), in the interpretation given by the Court of Justice, does not accommodate the variety of collective bargaining systems in the European Union. This means that workers posted to those countries where collective bargaining is based on autonomous negotiations are less well protected under EU law, although strong industrial relations may provide other advantages.

- **Adapting Article 3 (8) of Directive 96/71 in order to accommodate voluntary industrial relations systems as well as emerging transnational collective bargaining structures would create space for resolving problems for posted workers**.

[356] See above section 3.3.3, pp. 70 and 72, see also (Afonso, 2011).

5.5. Conclusion

This chapter has outlined a few practical consequences of overcoming the perception of tensions between Internal Market law and EU social and labour rights, moving towards a constitutionally conditioned Internal Market where respect for and promotion of social and labour rights is seen as precondition for sustainable economic success.

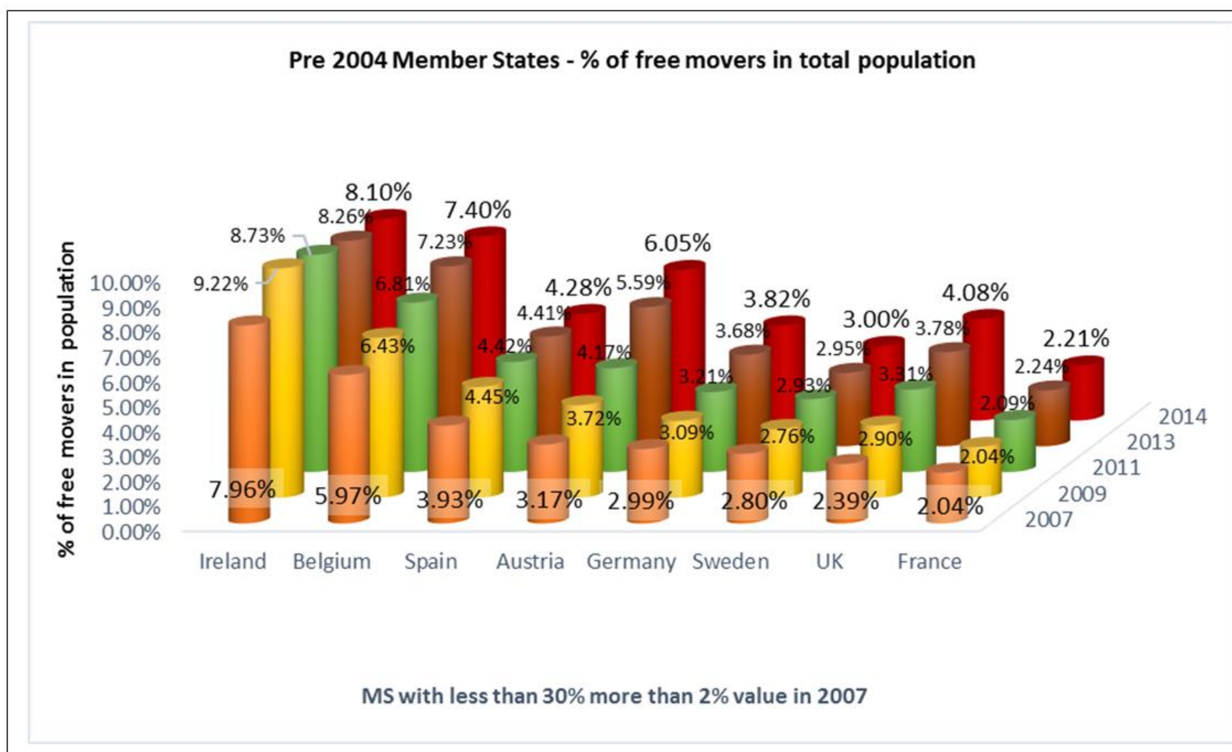
Actions proposed suggest a programme mixing research studies and pilot projects, cooperation with social actors and legislative proposals.

ANNEX 1: FREE MOVEMENT IN THE EU – SOME DATA

As a background to the often-expressed fears of social actors at different levels relating to the extent to EU free movement, some information on the factual relevance of this phenomenon is helpful. The information comprised below has been obtained from Eurostat, using statistics on population by sex, age group and citizenship, up to August 2015 under http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_pop1ctz&lang=en.

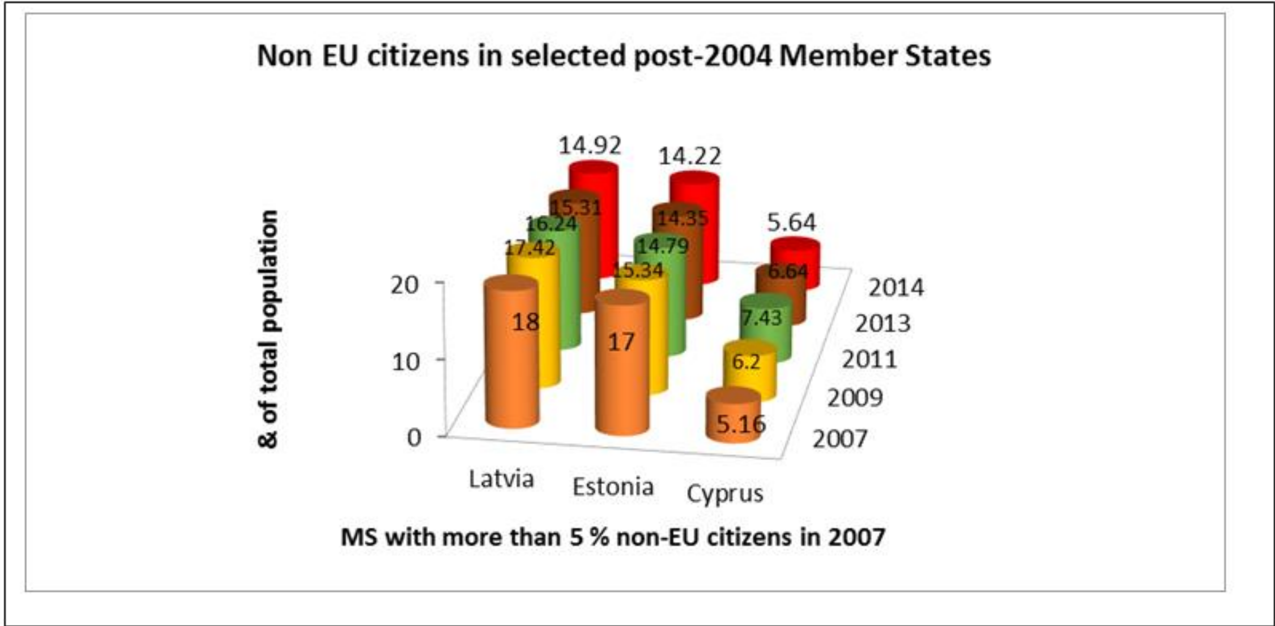
If assessing social reality, absolute numbers of free movers are less relevant than the proportion of free movers accommodated in different Member States in relation to their own population. Even a short glimpse into the statistics reveals a nuanced practice which defies any simple categorisation, and in particular the popular assumption that "rich" Northern and Western Member States have to absorb a higher proportion of free movers than some poorer and even some Eastern Member States (Benton & Petrovic, 2013; Potpcheva, 2014; Fuller & Ward, 2013)

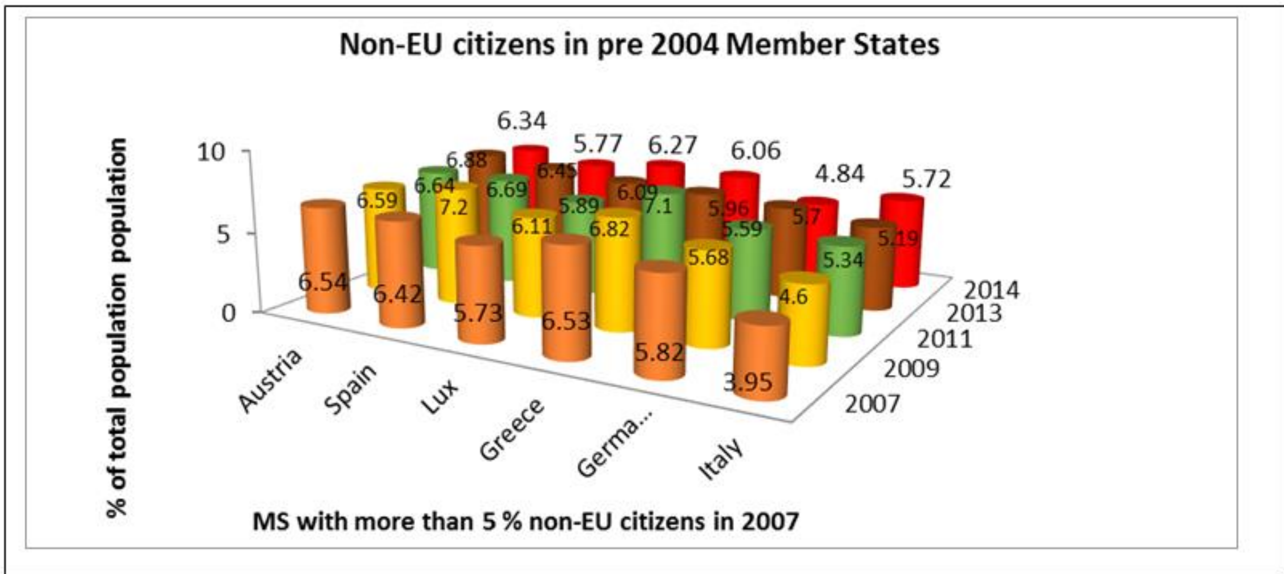
For the purpose of this report it seems sufficient to consider free movement from 2007, when the first ripples of the global crisis were felt. Of course Luxembourg always tops the table with a proportion of EU citizens from other Member States (free movers) between 35% in 2007 and 39% in 2014. But beyond that, and in contrast to perceived wisdom, Member States such as Germany and the UK are home to a modest proportion of EU free movers – 3.82% and 4.08 % respectively in 2014, starting from 2.99% and 2.39 % respectively in 2007. Ireland has a considerably higher proportion of now 8.10% after a peak of 9.22 % in 2009, starting with 7.96% in 2007. Germany, the UK and France, which are usually referenced as the countries hosting most inner-EU migrants (or free movers), lag relatively far behind with less than 4.1 % EU migrants in their absolute population. The highest increase during the global economic crisis is to be found in Austria (3.17 – 6.05%) and the UK (2.39%-4.08%), followed by Belgium, Germany and Spain respectively.



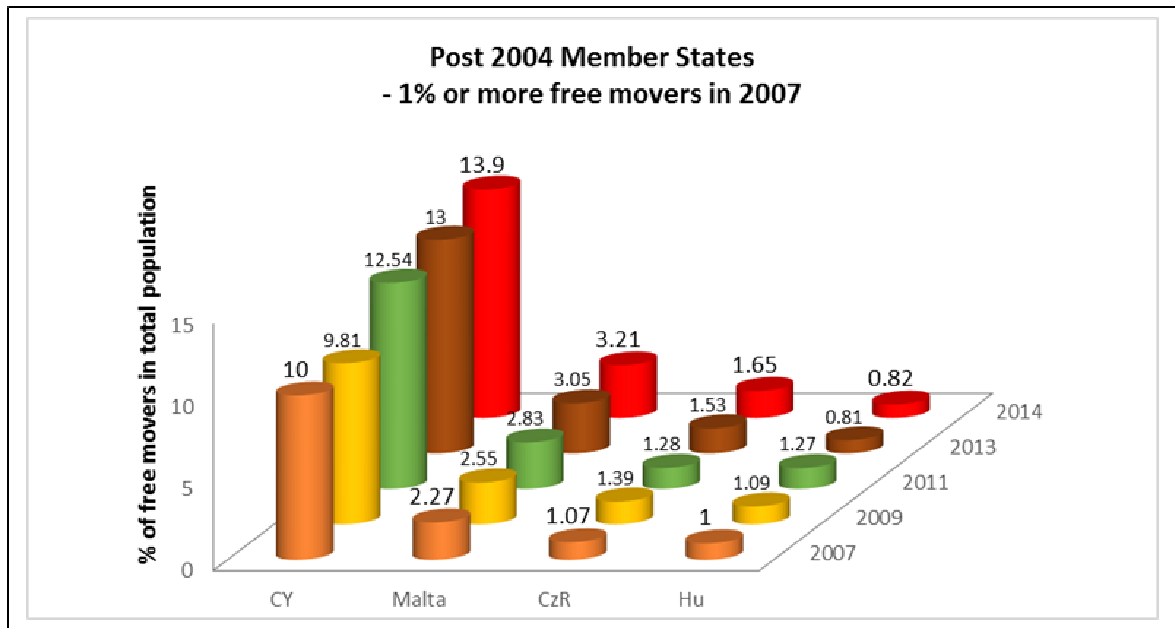
And while Member States which acceded to the EU from 2004 have relatively low proportions of EU migrants on the whole, some of them are home to a relatively high proportion of non-EU

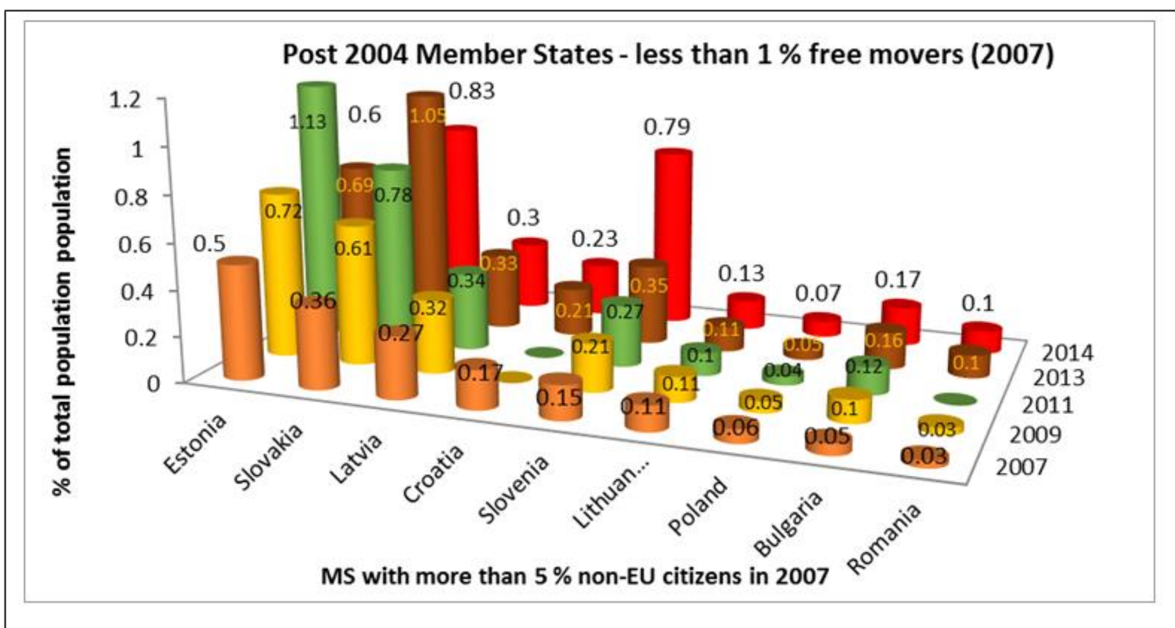
citizens. This means that they integrate, in spite of weak economic performance, a high proportion of migrants – as do pre-2004 Member States, in all of which the proportion of non-EU migrants in the population is higher than that of free movers.





Even the hypothesis that the global economic crises from 2007 will lead to a decline in the EU's population and free movement into those countries suffering economic decline is not correct: the population of all EU Member State has increased between 2007 and 2013, and in most states –with the exception of Hungary and Poland – the proportion of EU free movers within the total population has increased as well.





Overall, it may well be the case that citizens of Member States with high unemployment move more frequently to Member States with thriving economies than citizens of Member States with thriving economies move to Member States with high unemployment. This does not seem problematic in principle. Instead, it is in line with the original idea behind including free movement of persons into the Common Market: people should be enabled to profit from the Common Market as much as business by being enabled to move freely under the condition of equal treatment. While the Spaak report of 1956 still foresaw numerous exceptions to free movement of labour, it was clear in the principle that free movement of labour should enable workers to take advantage of the Internal Market. The citizens who make use of free movement rights overwhelmingly contribute more to their host countries than they receive in local benefits. Accordingly, there is little evidence that benefit claims by non-economically active EU foreigners have a palpable effect in countries such as the UK and Germany. And while there is less movement of working-age population from the North to the South and the West to the East than vice versa, there is a sizeable movement of old-age pensioners from the North to the South. This population claims ample benefits and causes high costs in the local health services. Interestingly, the dimension of the detriment caused to their host countries is under-researched (Juravle, et al., 2013).

ANNEX 2: METHODOLOGY

For the primary research conducted for this project, 44 interviews in total were conducted across four Member States and at EU level. The methodology adopted was inductive in nature. A list of potential tensions was identified and this was discussed and refined through discussions amongst the project team, including a face-to-face project meeting. From this, an interview schedule was developed. This was designed to be a 'generic' schedule, covering all possible tensions, but with the possibility for the schedule to be adapted and refined to fit the tensions that were of particular interest and importance within individual Member States and for EU actors. The generic interview schedule can be found in Annex 2. In practice, the topics covered, and the amount of time devoted to covering each tension varied from respondent to respondent, and the team were able to benefit from the flexible and adaptable nature of semi-structured interview schedules, to allow important issues to emerge. Nonetheless, the generic schedule provided a common framework of understanding, to ensure some comparability and common understanding of issues across quite different Member State contexts.

A list of interviewees can be found in Annex 4. In some cases, individuals agreed to be named, in other cases, interviewees agreed only for their organisation to be named. For consistency, we have reported only organisation names. In each Member State and at EU level, evidence was gathered from employer associations and trade unions as well as public bodies, including labour inspectorates, ministerial departments and judges. Specific actors in individual countries and at EU level should allow adding different perspectives. Of particular interest is the perspective on the migrant's experience, for example through organisations offering advice or support for migrants in the European Union at national or EU level. Other specific actors could comprise organisation specifically engaged with promoting free movement rights. However, at EU level the evidence on current policy initiatives was very limited due to the recent change-over at the helm of all the central EU institutions. It was thus impossible to conduct interviews with the European Commission in particular, and the evaluation of its working programme was necessarily limited by its present vagueness. The coverage of interviewees is thus quite broad, and the chapter reporting the empirical findings is able to summarise views on tensions and responses from a range of perspectives. Interviews were conducted through a variety of means, including face-to-face interviews, telephone and Skype. In some cases, interviews were recorded and transcribed in full. In other cases, notes were taken and written up after the interview. Interviewees were provided with details about the project, and informed consent protocols, in line with good practice at the University of Leeds, where ethical approval for the project was secured.

ANNEX 3: SUMMARY INTERVIEW SCHEDULE FOR THE PRIMARY RESEARCH IN CHAPTER 3

Collective bargaining and industrial action / freedom to provide services

- What is the Degree of protection by collectively agreed employment rights for workers?
- Have there been any issues in xxx national or xxx sector context in extending these protections to posted workers?
- What is your understanding of a tension between collective rights and freedom to provide services (EU Internal Market law)?
    - How has this played out within xxx national context and or xxx sector context?
        - Prompt use of or opposition to collective action
- How does this tension affect your organisation / the individuals or interests you represent?
- How have you/your organisation responded to such tensions?
- What issues have you/your organisation encountered in responding to this tension?
- How do you/your organisation think that the tension should best be resolved?
    - Prompt – ideas about best practices
- Are you aware the use of public procurement to achieve social objectives within xxx national context?
- Have there been any issues in xxx national or xxx sector context in using collective agreements to select a service provider on certain social grounds?
- What is your understanding of a tension between collective rights and freedom to provide services (EU Internal Market law)?
    - How has this played out within xxx national context and or xxx sector context?
        - Prompt promotion of / opposition to meeting social objectives through public procurement

- How does this tension affect your organisation / the individuals or interests you represent?
- How have you/your organisation responded to such tensions?
- What issues have you/your organisation encountered in responding to this tension?
- How do you/your organisation think that the tension should best be resolved?
    - Prompt – ideas about best practices

Collective bargaining and industrial action / freedom of establishment

- Are you aware of any issues associated with the movement of companies within the EU and efforts to maintain labour standards?
- Have there been any instances in xxx national or xxx sector context of using collective action in response to planned movement of companies?
- What is your understanding of a tension between collective rights and freedom of establishment (EU Internal Market law)?
    - How has this played out within xxx national context and or xxx sector context?
        - Prompt promotion of / opposition to the movement of companies to other Member State
- How does this tension affect your organisation / the individuals or interests you represent?
- How have you/your organisation responded to such tensions?
- What issues have you/your organisation encountered in responding to this tension?
- How do you/your organisation think that the tension should best be resolved?
    - Prompt – ideas about best practices

Collective bargaining and industrial action / EU competition law

- Are you aware of any issues associated with collective agreements triggering competition rules?
- Have there been any instances in xxx national or xxx sector context of using collective agreements within the context of a 'crisis cartel'?
- What is your understanding of a tension between collective rights and competition law)?
    - How have these played out within xxx national context and or xxx sector context?
        - Prompt promotion of / opposition to the movement of companies to other Member State

- How does this tension affect your organisation / the individuals or interests you represent?
- How have you/your organisation responded to such tensions?
- How do you/your organisation think that the tension should best be resolved?
- How do you/your organisation think that the tension should best be resolved?
    - Prompt – ideas about best practices

Fair and just working conditions / free movement of workers

- Could you tell me about the degree of protection by collective and statutory employment rights for national and migrating workers [incoming and outgoing]
- Are you aware of any differential treatment between national workers and workers from another member state [here the focus is on individual movers rather than posted workers]
- Could you tell me about the degree of protection by statutory social rights, e.g. access to unemployment benefits, any bridging benefits, health care and complementary social assistance for national and migrating workers [incoming and outgoing]
- Are you aware of any differential treatment between national workers and workers from another member state [here the focus is on individual movers rather than posted workers]
- What is your understanding of the relationship between the free movement of workers within the EU and working conditions / social security provision within xxxcountry?
- How does this affect your organisation / the individuals or interests you represent?
- How have you/your organisation responded to such this?
- What issues have you/your organisation encountered in responding to this?
- How do you/your organisation think that the issue should best be resolved?
    - Prompt – ideas about best practices

Fair and just working conditions / freedom to provide services

- Could you tell me about the degree of protection by collective and statutory employment rights for national and posted workers?
- What is your understanding of a tension between freedom to provide services and fair and just working conditions in the context of posting.
    - How has this played out within xxx national context and or xxx sector context?
- How does this tension affect your organisation / the individuals or interests you represent?
- How have you/your organisation responded to such tensions?
- What issues have you/your organisation encountered in responding to this tension?
- How do you/your organisation think that the tension should best be resolved?
    - Prompt – ideas about best practices

- Are you aware the use of public procurement to achieve social objectives within xxx national context?

- Have there been any issues in xxx national or xxx sector context in which service providers are selected within procurement processes on certain social grounds?
- What is your understanding of a tension between fair and just working conditions and freedom to provide services within the context of public procurement processes?
    - How has this played out within xxx national context and or xxx sector context?
        - Prompt promotion of / opposition to meeting social objectives through public procurement
- How does this tension affect your organisation / the individuals or interests you represent?
- How have you/your organisation responded to such tensions?
- What issues have you/your organisation encountered in responding to this tension?
- How do you/your organisation think that the tension should best be resolved?
    - Prompt – ideas about best practices

Social security and social assistance / Competition rules

- Are you aware of social security situations where providers have been considered 'undertakings' within the meaning of EU completion law and thus subject to scrutiny as potential cartels or abusers of dominant market positions?
- What is your understanding of a tension between social security and social assistance and EU competition rules?
    - How has this played out within xxx national context and or xxx sector context?
- How does this tension affect your organisation / the individuals or interests you represent?
- How have you/your organisation responded to such tensions?
- What issues have you/your organisation encountered in responding to this tension?
- How do you/your organisation think that the tension should best be resolved?
    - Prompt – ideas about best practices

Social security and social assistance / freedom to provide services

- Are you aware of social security situations where the provision of a service by a particular provider has been challenged as in conflict with the freedom to provide services?
- What is your understanding of a tension between social security and social assistance and freedom to provide services?
    - How has this played out within xxx national context and or xxx sector context?
- How does this tension affect your organisation / the individuals or interests you represent?
- How have you/your organisation responded to such tensions?
- What issues have you/your organisation encountered in responding to this tension?
- How do you/your organisation think that the tension should best be resolved?
    - Prompt – ideas about best practices

Social security and social assistance / freedom of movement

- Could you tell me about the degree of protection by statutory social rights, e.g. access to unemployment benefits, any bridging benefits, health care and complementary social assistance for national and migrating workers [incoming and outgoing]?
- Could you tell me about the degree of protection by collectively agreed social rights (e.g. occupational pension or health schemes) for national and migrant workers [incoming and outgoing]?
- Are you aware of any differential treatment between national workers and workers from another member state [here the focus is on individual movers rather than posted workers]?
- What is your understanding of the relationship between the social security and social assistance and the free movement of workers within the EU within xxx country?
- How does this affect your organisation / the individuals or interests you represent?

- How have you/your organisation responded to such this?
- What issues have you/your organisation encountered in responding to this?
- How do you/your organisation think that the issue should best be resolved?
    - Prompt – ideas about best practices?

- We have been talking about the relationship / tensions between Internal Market law and social and labour rights. Is there anything that you think we have missed that might be relevant to this issue? Are there some tensions that are relevant to the work of you/ your organisation that haven't been raised? Could you tell us more about them?

ANNEX 4: LIST OF INTERVIEW PARTNERS

Note: not all interview partners agree to being disclosed. Accordingly, only organisation names have been used.

Interviews: EU level

1. UNIONS: European Trade Union Congress
2. UNION/NGOs: INCA and European Observatory of Social Rights Brussels
3. EMPLOYERS: Social affairs department Business Europe
4. EMPLOYERS: EUROCIETT
5. EMPLOYERS: European Chemical Employers Group
6. NGOs: Legal supervisor EU Rights Clinic
7. STATE: Commission no interview available, secondary sources used to set out position.

Interviews: Ireland

8. UNIONS: Irish Congress of Trade Union (ICTU)
9. UNIONS: Technical, Electrical, Engineering Unin (TEEU)
10. UNIONS: Unite
11. EMPLOYERS: Irish Business and Employers Confederation (IBEC)?
12. EMPLOYERS: Construction Industry Federation (CIF)
13. NGOs: Migrant Rights Centre Ireland (MRCI)
14. NGOs: Crosscare Migrant Project
15. STATE: National Employment Rights Authority (NERA; Labour Inspectorate)*
16. STATE: Department of Jobs, Enterprise & Innovation (DJEI)*
17. STATE: Department of Social Protection (DSP)‡
    *one interview

    ‡two interviewees from this organisation

Interviews: Spain

18. UNIONS: Unión General de Trabajadores (UGT), one of the two major labour unions in Spain.
19. EMPLOYERS: BASI, SA Member of the CEOE (Spanish Confederation of Employers' Organisation).
20. NGOs: Foundation Maria Aurelia Capmany
21. NGOs: Migraestudio.
22. SUPREME COURT: Judge of Supreme Court of Spain.
23. STATE: Labor Inspectorate. Labor Inspectorate in Catalonia (Spain)
24. STATE: Legal Service of the INSS (National Institute of Social Security)
25. STATE: Retirement Pensions Department of the INSS (National Institute of Social Security)

Interviews: Poland

26. LABOUR INSPECTORATE: Departament Legalności Zatrudnienia Główny Inspektorat Pracy (Legality of employment Department; Head Labour Inspectorate)
27. NGO: Labour Mobility Initiative Association (Stowarzyszenie Inicjatywa mobilności Pracy) ;
28. NGO: Stowarzyszenie Interwencji Prawnej
29. TRADE UNIONS: Intarnational Department at NSZZ "Solidarność trade union
30. TRADE UNIONS: Expert Department at NSZZ "Solidarność trade union
31. TRADE UNIONS: legal expert at NSZZ "Solidarność trade union
32. EMPLOYERS' ORGANISATION: Pracodawcy Pomorza – employers' organization in Pomorskie Region
33. GOVERNMENT: International Labour Law Unit of Labour Law Department in the Ministry of Labour and Social Policy
34. GOVERNMENT: Ministry of Economy, Deputy Director of European Affairs Department
35. GOVERNMENT: Ministry of Economy, Head of Unit at the Ministry of Economy
36. GOVERNMENT: Ministry of Economy Expert in the European Affairs Department

Interviews: Sweden

37. UNIONS: Head of LO-TCO Rättsskydd AB
38. UNIONS: Swedish Transport Workers Union
39. EMPLOYERS: Confederation of Swedish Enterprise
40. EMPLOYERS: Road Transport Employers' Association
41. EMPLOYERS: Skanska Sverige AB
42. STATE: Official at the Government Offices combined with published documents expressing the position of the Government
43. NGOs: Lawyer at Faktumjuristerna
44. OTHER: Sydsvenska hälsogruppen AB

ANNEX 5: CONTEXT FOR UNDERSTANDING TENSIONS BETWEEN SOCIAL AND LABOUR RIGHTS AND INTERNAL MARKET LAW AT EU LEVEL

Chapter 3 looked at **specific tensions between social and labour rights and internal labour market law**. Here we make some observations from the EU level interviews, about the context in which these tensions should be understood. The first issue is that of subsidiarity and the levels at which responses to the tensions occurred. EU level actors/stakeholders pointed to the relatively limited direct role that they had in responding to these tensions. This reflected the different forms that the organisations took and the level at which they operate. Many pointed to the importance of their affiliates operating at the **national level** in developing practical solutions and thus the **overriding significance of national responses to the tensions highlighted**. Indeed, for employer associations in particular, there was a strong preference for national level solutions to any EU-level tensions and issues around social and labour rights and internal labour market laws.

The second point to highlight is the **importance of the recent economic and political climate** in which the various stakeholders interviewed operate. It was noted in section 4.2 that the economic recession had impacted on individual Member State in different ways. The political, economic and social climate, and the implications of this climate for stakeholders at EU and national level, is critically important to understanding how these stakeholders interpret and respond to tensions, and the constraints that shape their actions. At EU level, the ETUC participant used the example of the right to strike to highlight what she perceived as hostility towards social rights within the broader global climate and cited a deadlock in the supervisory system of the International Labour Organisation on the issue of the right to strike to show that global trends and pressures shape experiences of and responses to EU level tensions. At EU level the EU Rights Clinic also placed EU issues into a broader global context. The participant noted the lack of attention that is given by many migrants rights NGOs to EU migrant workers. Mobility within the EU is often not considered to be 'migration' by some NGOs, and yet, within current political discourses immigration and EU mobility are increasingly conflated. Such political discourses may be starting to have implications for the manner in which Member States interpret, implement and enforce EU law with the potential for new vulnerabilities for EU migrant workers. According to the Migrant Rights Clinic respondent, the fact that these are two distinctive areas where different rules and instruments apply is put into question by the practices of some Member States. Definitional 'shifts' and underlying tensions therefore relate **to the way in which such organisations see each other under a changing global political climate**.

Related to this, interviewees also pointed to the challenges of seeking to promote and ensure **an equal footing for EU social and labour rights**, alongside Internal Market freedoms, in the context of austerity measures across Europe. Here the development of political solutions to the global economic crisis outside of the legal frame of the Treaties **raised questions about the significance** of some of the constitutional developments in the area EU social rights to the experiences of EU citizens 'on the ground'. This raises questions about the **application and enforcement** of EU law rather than its substance, a point highlighted by an EU level respondent.

> *'But I think the problem is that the social … or social rights are simply overlooked today in the current political context with the crisis and everything. If you look at some of the austerity measures implemented in EU countries, they do not respect the charter of fundamental rights, it's just not respected and a number …have not respected the treaties, yet this is what is happening. (Interview, ETUC).*

The third point to highlight is that the **overall status of social and labour rights** compared to internal labour market freedoms (in other words, the very notion of tensions between the

two) was viewed very differently by respondents – at both national and EU level. For some respondents (often employee representatives) the interrelation between these spheres was described as **'conflict'** whereas for others (often employer representative) the label **synergy** better represented a view of the Internal Market as framework that contributes to social development (through growth) others still were comfortable with the term tension.

For those who saw the relationship between social rights and the Internal Market as a conflict, the importance of maintaining the social dimension of the EU as a **priority policy issue** was stressed. The sense here, both at a national and EU level, was that the **correct balance has not yet been struck**. For the ETUC, for example, the ultimate solution lies in further treaty change so that greater weight for fundamental social rights is written into the overarching framework of EU law. There was recognition that there had been an alteration in the footing on which social and labour rights stand within the framework of EU law, with the changing status of the Charter of Fundamental Rights in 2009 with the Lisbon Treaty, so that it is also part of Primary Law. However, some actors felt that in reality, this **had not been sufficient to ensure, or even strengthen, the application of these fundamental rights** on the ground. Under this viewpoint, the potential of the Charter as a means to ensure that social and labour rights were on an equal footing to internal labour market laws was recognised, but this was seen as a potential mechanism, rather than one that was currently being realised. Furthermore, respondents recognised the limitations of the Charter for the achievement of a balance between social and labour rights and economic freedoms:

> *'I think the Charter is far too weak, because it doesn't really help very much in practice. That doesn't mean there aren't things that can't be done, and maybe we haven't been successful enough to use it, but I think there is sadly not enough, and we should also look at a revision of the Treaty to strengthen it, but there again if the Treaty is not respected by those who are supposed to be the guarantee, or the guardian of the Treaties, then what can you do?' (Interview, ETUC).*

Union representative organisations saw **the clear potential** in seeking to change the normative position of existing legislation to address the conflict and proportionality between social/labour rights on the one hand and economic freedoms on the other. In particular, a social progress protocol which would be annexed to the Treaty, was seen as a measure which could resolve the tensions. The ETUC, and some individual unions at a national level, were actively lobbying on a number of fronts to try and forward this agenda.

For other respondents, **the tensions** between social and labour rights on the one hand and internal labour market law on the other were seen as **less problematic**. Employer representatives at EU level, for example, argued that **existing laws and legislation** (at a national level as well as EU level) provided the means through which tensions could be resolved. Furthermore, employer representatives sought to highlight how social and labour market rights, along with internal labour market law **could together promote to the goals of the European Union:**

> *"I think what we would emphasise quite strongly is that it's synergies rather than tensions. So we always see the Internal Market as a tool and as a framework that contributes to social development because it does contribute to growth and growth contributes to employment and employment contributes to prosperity and social development in fact……we have seen a lot of improvement in social standards, in living standards in the EU, especially in the countries that joined EU recently. So in Central and Eastern Europe, so we see a lot of developments there and we see also in general in Europe, we see development, also thanks to the single market…..we also have to keep in mind that… there is a lot of added value of single market for social development and for living standards" (Interview, Business Europe).*

Recent EU level policies, such as the Agency Working Directive and the Posted Workers Enforcement Directive, were seen by EU level employer representative groups as evidence that that **tensions** between social and labour rights and internal labour market law **did exist**, and that these could be addressed effectively through appropriate EU directives, transposed and implemented at national level to fit the particular circumstances of individual Member State. The sense from employers' associations was that the **balance was about right:**

> *'That [Agency working] directive is in essence based on that dual dimension, on this tension. One the one hand you have a provision… that allow(s) the industry to better provide its services and to better serve the needs of companies and workers. On the other hand you have provisions on equal treatment, equal pay, which in essence touch on the social and employment rights of the workers…So indeed this dimension is at the centre of what we are campaigning for and we are not saying it should be this extreme of a single market……we see the need for balanced and appropriate regulation. No unjust restrictions but also an appropriate protection of workers' rights (Interview, EuroCIETT)*

Whilst several participants, at EU and national level, viewed the national level as the appropriate level to respond to or resolve the tensions a couple of participants noted that these levels are also embedded within the tension itself. They therefore highlight the dynamic of national level interests in shaping both the substance and the enforcement of EU law and policy. One of the respondents at EU level (the EU Rights Clinic) saw the tensions we identified as expressed through Member State taking action to restrict free movement rights. For this stakeholder (working to assist those making use of free movement rights) the notion of **tension incorporated not only the substance but also the enforcement** of EU law and the extent to which issues of enforcement allowed Member States to restrict the rights of EU migrants. Moreover the participant from Business Europe articulated a tension in terms of the competing needs of employers and employees from very different national contexts. This highlights the point that substance of EU measures cannot be understood as a product of a tension between the internal labour market and the social but also between the interests of stakeholders at national level.

> *'Well ……… it's not only about Internal Market and social rights. It's too simple to say it this way…..it's the rule that will somehow make it possible to also create an atmosphere of fair competition between countries that have very different levels of development and different competitive advantages and very diverse countries. So it's not as simple as saying this is a balance between social rights and Internal Market because these two are not contradicting each other. We had to find a rule that would make it possible for companies from very different countries and for workers from very different countries to work with each other in a commonly accepted way. That is the balance …….but I wouldn't emphasise that it's a balance between the two (social and labour rights and economic freedoms). (Interview, Business Europe).*

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