The social market economy and restriction of Free Movement Rights

The social market economy and restriction of free movement rights: *plus c'est la même chose*?

Abstract

Case law restricting free movement rights is criticized for privileging the internal market over social rights, achieved through reductive 'binary' reasoning that focuses too narrowly on the 'free movement versus social rights' dimension of the conflict. The problem is typically discussed for the economic freedoms but is evident elsewhere in free movement law too. This point is demonstrated through the example of EU citizenship and social assistance, which establishes that protecting national public finances justifies free movement restrictions when citizens are not seen as market participants. For better integration of economic, social and constitutional objectives, judicial assessments have progressed in some respects beyond the binary conflict method, evidencing the beginnings of the more complex accommodation of multiple dimensions that a system of multilevel constitutionalism requires. However, these advances have not yet produced significantly different outcomes in practice. The legacy of binary conflict reasoning proves stubbornly resilient to change.

1. Introduction

In *Brüstle*, Advocate General Bot observed that 'the Union is not only a market to be regulated, but also has values to be expressed'.[1] The array of values on which the EU is founded and to which it subscribes has been clarified and expanded in each instance of Treaty revision. Moreover, in defining the EU internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured', Article 26(2) of the Treaty on the Functioning of the European Union (TFEU) also requires that this task must be done 'in accordance with the provisions of the Treaties'.

Article 7 TFEU articulates the overarching process idea in its statement that '[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers'. More specifically for present purposes, codification of the Union's ambition to 'work for…a highly competitive social market economy' (Article 3(3) of the Treaty on European Union (TEU)), added by the Lisbon Treaty, exemplifies an *integrated* conception of market and non-market goals for EU law and policymaking. This idea of the social market economy reflecting but also arguably requiring the integration of market objectives and social objectives – rather than conceiving them as 'contradictory pairs' (Polomarkakis, 2017, p424) – informs the analysis that follows.

The controversial judgments in *Viking Line* and *Laval* provide the archetypal example of the 'contradictory pairs' approach in the sense of concerns about social dumping and the posting of workers being subsumed by freedom of establishment and the free provision of services protected by EU internal market law (Syrpis and Novitz, 2008).[2] On one view, the Treaty itself sets up a reductively binary – i.e. market v social – framing of these disputes by requiring that restrictions of free movement – even where such restrictions aim to protect fundamental social rights – must be defended i.e. shown to be justifiable in principle and proportionate (Barnard, 2008). The economic freedom protected by the Treaty acquires not just legal but also normative priority as a result. The conventional premises of the economic constitution then prevail i.e.

[1] AG Bot in Case C-34/10 *Brüstle* (EU:C:2011:138), para. 46 of the Opinion.
[2] Case C-438/05 *Viking Line*, EU:C:2007:772 and Case C-341/05 *Laval*, EU:C:2007:80.

economic freedoms as defining principles in the aim of integrating distinct national markets into an internal market; supported by an autonomous constitutional framework characterized by the principles of direct effect and primacy. Moreover, within that template, the Court of Justice necessarily retains command over a wide interpretative space.

It should also be remembered that the EU Treaties do not tend to provide guidance about how different policies and objectives committed to should be reconciled with each other, or whether and how they might be prioritized, when they end up in conflict in a given situation. Taking all Union objectives into account is one thing in the abstract; but how can it be given practical effect when concrete disagreements must be resolved? The fact that relevant Treaty amendments have never adjusted the restriction/defence structure of provisions conferring free movement rights adds to the confusion. The greater emphasis on competition enforcement and on the social dimension of the market that the ambition of a highly competitive social market economy aims to advance does not, in other words, change the EU's basic constitutional mechanisms in and of itself. Without more deliberate resetting – on the Court's own initiative as well as in the Treaties – it is difficult to see how 'the EU system['s] accumulated internal asymmetries between market integration at supranational level and social protection at national level, which generate frictions and are a source of disenchantment and hostility towards market opening' (Monti, 2010, p68) can be better addressed.

Normative balancing is not, however, the only relevant conflict vector in these cases. At the time of writing, a revised framework for the posting of workers (European Commission, 2016) is working its way through the EU's legislative procedures. This process highlights another significant dimension of the market/social conflict i.e. questions about respective Union/Member State(s) competences. The Union has limited capacity to act in the field of social protection [3] and the Member States have chosen diverse social models. Indeed, the Commission's plans for reform of EU legislation on posted workers were initially halted by national parliaments triggering the Lisbon Treaty's subsidiarity mechanism (European Commission, 2016b). EU citizenship case law on free movement restrictions provides another example of the competence dimension of market/social conflicts, in the sense of an inherently *Union* status necessarily challenging *national* regulatory discretion. Such challenges are particularly sensitive when the Union citizenship claim impacts on national public finances, leading the Court to articulate more forcefully a framework for free movement rights that seems to privilege, once again, the protection of market participants over the protection of the socially vulnerable. However, as will be seen, conflict questions about Union/national competence – and institutional balance – were vital in this case law too.

This paper aims, first, to highlight the multiplicity of challenges and conflicts at issue in cases where the restriction of free movement rights intersects with the protection of social rights. Treaty amendments have amplified social concerns at a substantive level but, at the same time, have not altered the free movement provisions at the heart of EU internal market law. Second, the paper asks more specifically whether the social market economy concept can or should make a difference in terms of enabling greater recognition of social interests when free movement restrictions require to be defended. It is argued that the concept does have legal potential in this respect and shown that the Court of Justice has recently adjusted its methods of reasoning to some extent to reflect the more integrated nature of the post-Lisbon legal environment. However, it is also suggested that the embedded imprint of binary reasoning is

[3] See Articles 148-161 TFEU; and note, in particular, the limitations in Articles 151 and 153. See further, European Commission, 2017.

difficult to overcome, showing that more radical options for change have not gained traction in judicial practice.

Section 2 first outlines how the Court of Justice has gradually demarcated greater space for national discretion in judgments about entitlement to social assistance in a host Member State. This case law reflects the relatively thin, and increasingly contested, membrane of transnational solidarity that underpins the extent to which citizens who are not economically active – i.e. citizens who are not, for the purposes of EU law, perceived as market participants – should be supported beyond the borders of their own State. This example demonstrates that the 'contradictory pairs', market-centered analysis critiqued in the *Viking Line* and *Laval* case law pervades free movement adjudication beyond classic disputes engaging the economic freedoms. However, while citizenship conflicts *can* be reduced to contradictory pairs – 'market v social' or 'citizen v State' or 'court v legislator' or 'Union v State' – the crucial point is that the case law is, in reality, about all of these things and about all of them at once.

If reducing situations characterized by multiple tensions to binary conflicts risks subduing the more complex reality, are different legal approaches possible? Are they, more than this, *required* in a system predicated on concepts of constitutionalism?[4] These questions are looked at in Section 3, which examines, in the context of defending free movement restrictions, the Court's first explicit comments on the social market economy concept in *AGET Iraklis*.[5] If this judgment changed anything, it relates to more comprehensive articulation of the different interests at stake in market/social conflicts and more open recognition of constitutional questions around Union/national competence. It will be seen that there was no dramatic legal revolution. However, more detailed exposition of underlying conflicts is not without value on its own terms. In particular, it may provoke deeper engagement, and responsibility, by a wider range of stakeholders in progressing what the applicable law should actually aim to achieve.

2. Separating market, social and constitutional objectives: social protection and EU citizenship law

In free movement law, the right to move and reside conferred on EU citizens by Article 21 TFEU is not discussed by the Court of Justice when one of the economic freedoms applies on the facts of the case.[6] On one view, this means that the free movement rights exercised under Article 21 TFEU are different from rights exercised by, for example, workers or service providers. However, Article 26 TFEU refers more broadly to the free movement of *persons* in defining the EU internal market. The Court confirms the interconnectedness of citizenship rights and economic rights in its 'specific expression' reasoning; for example, that 'Article [21 TFEU], which sets out generally the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article [45 TFEU] in relation to the freedom of movement for workers'.[7] The market-centered rather than social-centered 'contradictory pair' analysis criticized with respect to economic freedom case law is just as evident in citizenship case law when restrictions on free movement rights must be

[4] For present purposes, the Court of Justice's understanding of the constitutional features of the EU legal order is applied: see esp. Case 26/62 *van Gend & Loos*, EU:C:1963:1, Case 294/83 *Les Verts v Parliament*, EU:C:1986:166, Case C-405/02 P *Kadi v Council and Commission*, EU:C:2008:461, *Opinion 2/13*, EU:C:2014:2454.

[5] Case C-201/15 *AGET Iraklis*, EU:C:2016:972.

[6] E.g. Case C-583/14 *Nagy*, EU:C:2015:737, paras 19-25.

[7] Case C-293/03 *My*, EU:C:2004:821, para. 33.

defended. More specifically, citizenship law extends equal access to social benefits only to citizens who are market participants through being employed, self-employed or otherwise financially self-sufficient (thereby excluding, for example, citizens looking for work).

Normative propositions debated in scholarship on EU citizenship law are frequently in tension with one another. In particular, market citizenship and free movement paradigms remain vulnerable to the criticism that they sustain an incomplete understanding of the EU citizen as an instrumental unit of free movement that progresses, above all, the establishment of the internal market. From that perspective, linking the legal protection of the person inherently or predominantly to market logic fails to recognise, protect or advance the status of citizenship in a sufficiently human, person-driven sense. As a result, the shallowness of EU citizenship in practice frustrates the realisation of its deeper potential as an ethical as much as legal construct. The market participant institutes the citizen as a person reduced (O'Brien, 2013, 2016; Kochenov, 2017).

Another thread of the debate examines the inherent limits of EU competence vis-à-vis the capacity of the Member States, represented by the conditions in Article 20(1) TFEU that EU citizenship, first, is accessible only through the holding of Member State nationality and, second, 'shall be additional to and not replace national citizenship'. A related disagreement concerns the respective authority of the EU legislator and the EU judiciary to lead on the authorship of EU citizenship law. Here, the terms of Articles 20 and 21 TFEU – which explicitly authorise the EU legislator to attach conditions and limits to the exercise of citizenship rights[8] – call into question the legitimacy of case law in which the progression of citizenship rights overrides legislative constraints (Hailbronner, 2005, Sorensen, 2011; Dougan, 2013). That analysis engages with questions about institutional balance and the democratic credentials of the different institutional actors, especially at EU but also at national level (Davies, 2016a). A more complete picture of complexity emerges only by bringing these strands together: the tension between EU citizenship as an inherently supranational status that is nevertheless inherently tied to national regulatory oversight, with sometimes differing institutional visions about the substance of associated rights.

In corners of citizenship case law, a judicial creativity that advances the rights of the citizen, and thereby EU citizenship itself, is (still) evident.[9] However, for citizens who have moved yet are not economically active or financially self-sufficient in the host State, and whatever critical reaction this case law provokes from a normative perspective, judgments in recent years have focused more straightforwardly on respecting the conditions and limits expressed in secondary

[8] In contrast to how derogations from the economic freedoms are explicitly restricted to public policy, public security and public health concerns (see e.g. Article 45(3) TFEU on the free movement of workers).

[9] E.g. drawing from Article 20 TFEU directly to protect the 'substance' of EU citizenship rights in exceptional circumstances (and without requiring any cross-border movement), Case C-135/08 *Rottmann*, EU:C:2010:104; Case C-34/09 *Ruiz Zambrano*, EU:C:2011:124; Case C-165/14 *Rendón Marín*, EU:C:2016:675.

legislation.[10] In particular, the Court has less ambiguously than before[11] emphasised the requirements for lawful residence in a host State set down in Article 7 of Directive 2004/38 i.e. being economically active (as a worker or self-employed person); or otherwise, possessing comprehensive medical insurance and sufficient resources to avoid becoming a burden on the social assistance system of the host State.

Conversely, EU citizens who are not lawfully resident in a host State in accordance with Article 7 are not protected by EU legal guarantees of equal treatment with that State's nationals. This finding has had particular consequences for entitlement to social assistance[12] as well as other social benefits.[13] Citizens who are economically active – who are market participants – are, in contrast, entitled to full equal treatment:[14] in such circumstances, even '[t]he fact that the income from employment is lower than the minimum required for subsistence does not prevent the person in such employment from being regarded as a "worker" within the meaning of Article [45 TFEU]…even if the person in question seeks to supplement that remuneration by other means of subsistence such as financial assistance drawn from the public funds of the State in which he resides'.[15]

Constraints on access to social assistance for EU citizens do qualify as restrictions of free movement but restrictions that are, in the view of the Court, defensible. In this respect, the protection of national public finances has gained greater traction as a legitimate public interest defence. At a general level, the Court insists that 'aims of a purely economic nature cannot constitute an overriding reason in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty'.[16] Given that the internal market seeks to break down national barriers, there is a counter-protectionist logic behind that stance. In parallel, however, it is accepted that 'none the less…*interests of an economic nature*'[17] can provide a legitimate defence to free movement restrictions. This line of reasoning was first developed in case law on access to medical services,[18] and later applied to other sensitive sectors of public spending

[10] E.g. applying (strictly) the sufficient financial resources conditions in Articles 7 and 24 of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 2004 OJ L158/77, Case C-333/13 *Dano*, EU:C:2014:2358 ; Case C-67/14 *Alimanovic*, EU:C:2015: 597. A subtheme of this case law concerns the shift to more systemic and presumptive approaches to proportionality analysis, which contrasts with earlier cases exhibiting preference for case by case assessment of individual circumstances (e.g. Case C-413/99 *Baumbast*, EU:C:2002:49; Case C-140/12 *Brey*, EU:C:2013:565). For analysis, see Šadl and Rask Madsen, 2016.

[11] E.g. Case C-85/96 *Martínez Sala*, EU:C:1998:217; Case C-456/02 *Trojani*, EU:C:2004:488.

[12] E.g. Case C-333/13 *Dano.*

[13] E.g. Case C-308/14 *Commission v UK,* EU:C :2016:436.

[14] See Article 7(2) of Regulation 492/2011/EU on freedom of movement for workers within the Union, 2011 OJ L141/1 and e.g. Case C-213/05 *Geven*, EU:C:2007:438, para. 12 (emphasis added).

[15] Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze*, EU:C:2009:344, para. 28, confirming e.g. Case 53/81 *Levin,* EU:C:1982:105.

[16] Case C-35/98 *Verkooijen*, EU:C:2000:294, para. 48.

[17] Case C-141/07 *Commission v Germany*, EU:C:2008:492, para. 60 (emphasis added).

[18] E.g. Case C-158/96 *Kohll,* EU:C:1998:171, para. 50; Case C-368/98 *Vanbraekel,* EU:C:2001:400, para. 47; Case C-372/04 *Watts,* EU:C:2006:325, paras 103-104; Case C-173/09 *Elchinov,* EU:C:2010:581, para. 42.

such as education[19] and social security.[20] In many of these cases, the public interest defence submitted is arguably not of a *purely* economic nature. But the line between acceptable 'economic nature' defence and unacceptable 'purely economic' defence is difficult to draw.[21] Holding it enables the retention of strong rhetoric against national economic protectionism at one level while, at the same time, providing a route through which arguments connected to public spending concerns can at least be heard (Arrowsmith, 2015; Snell, 2016; Oliver, 2017).

Against that background, it may seem surprising that in citizenship case law more specifically – the less market-driven manifestation of free movement rights in theory – the Court has accepted in a blunter way that 'the exercise of the right of residence for citizens of the Union can be subordinated to the legitimate interests of the Member States – [to] the protection of their public finances'.[22] Initially, although the Court did acknowledge the protection of public finances as a legitimate concern of the Member States, it rationalized proportionate citizen claims against that concern by ruling that 'beneficiaries of the right of residence must not become an *unreasonable* burden on the public finances of the host Member State. [EU legislation] (…) thus accepts a *certain degree* of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are *temporary*'.[23]

In subsequent case law, prioritization of national financial interests became more evident. In *Bidar,* the Court ruled that 'although the Member States must, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States (…) it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State'.[24] With this phrasing, the Court recognises not just the claim of the individual citizen in a given case; but also potential implications for public spending in a more aggregate sense. That concern was later embedded directly in how the Court defines 'social assistance' i.e. benefits 'to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State'.[25]

As noted above, there has also been a shift in the proportionality dimension of the case law from requiring national authorities to assess a claimant citizen's individual circumstances to accepting that citizens who do not satisfy the criteria for lawful residence in Article 7 can be excluded from entitlement to certain benefits as a class.[26] The implications for a State's overall financial balance were given decisive weight through the Court's acknowledging that 'the assistance awarded to a single applicant can scarcely be described as an "unreasonable burden" for a Member State'; but accepting that 'while an individual claim might not place the Member

[19] E.g. Joined Cases C-11/06 and 12/06 *Morgan and Bucher*, EU:C:2007:626, para 36.
[20] E.g. Joined Cases C-396/05, C-419/05 and C-450/05 *Habelt, Möser and Wachter*, para. 83.
[21] E.g. Case C-20/12 *Giersch*, EU:C:2013:411, paras 47-56.
[22] Case C-140/12 *Brey*, para. 55.
[23] Case C-184/99 *Grzelczyk*, EU:C:2001:458, para. 44 (emphasis added).
[24] Case C-209/03 *Bidar*, EU:C:2005:169, para. 56.
[25] Case C-140/12 *Brey*, para. 61.
[26] Case C-67/14 *Alimanovic,* paras 59-63; Case C-308/14 *Commission v UK*, para. 80.

State concerned under an unreasonable burden, the accumulation of all the individual claims which would be submitted to it would be bound to do so'.[27]

Positive responses to these developments align mainly with the institutional perspective outlined earlier i.e. preferring greater judicial appreciation of and respect for the limits and conditions enacted in legislation. However, there has also been discomfort with and critique of the resulting exacerbation of citizenship's exclusionary character – questioned already around an individual's capacity to move in the first place in order to be able to benefit from the market-linked rights of EU citizenship; but more starkly when considered as a manifestation of social exclusion. The legal narrative on EU citizenship and social assistance thus demonstrates that while relevant binary conflicts – 'citizen v market', 'citizen v State', 'State v Union', etc. – can be identified and isolated, the range of actors, interests and tensions at play in a concrete dispute suggests more complicated, aggregate dynamics.

More particularly, recent case law has tried to resolve an escalating conflict between the Union value of free movement within the internal market and national public spending forbearance. But this focus has pulled the debate away from the social protection of the citizen. The simplifying impulse towards binary categorization of the relationships and tensions that are constantly being negotiated by the economic constitution is understandable at one level. But it poorly accommodates the more complex balancing of multiple interests that the system of EU constitutionalism craves. The particular danger for present purposes is that we sideline the dimensions that are harder to resolve or more controversial to air. In that light, recent case law does not address whether it is congruent with EU citizenship, as the 'fundamental status' of Member State nationals, to overlook or at least not to articulate the responsibilities of the host State – or indeed of the home State – for EU citizens who are demonstrably in need yet who do not have legitimate claims to social assistance under applicable EU legislation.[28]

Any expected role that the Charter might play in this context has also failed, at least to date, to be realized. Article 6(1) TEU establishes that the Treaties and the Charter have 'the same legal value'. However, first, the Court has been reluctant to assess restrictions of free movement rights in the case law against the social rights and social protections provided for in the Charter.[29] Second, while the right to move and reside conferred by EU citizenship is itself a fundamental right protected by Article 45 of the Charter, Article 52(2) of the Charter provides that '[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised *under the conditions and within the limits defined by those Treaties*' (emphasis added), a limitation on the potentially autonomous impact of the Charter that the Court has thus far confirmed and respected.[30]

The result of all of this is that social protection has not been sustained under EU citizenship law for those who have moved yet are considered not to be participating *adequately* in the

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[27] Case C-67/14 *Alimanovic*, para. 62.

[28] For discussion of 'citizens in tolerated, but not supported, in-between situations' as a result, see Nic Shuibhne, 2015, pp932-934; characterized as a 'starve them out' strategy by Thym, 2015, p260; addressed as an 'outsider class…which is socially challenging and morally questionable' in Davies, 2016b, p5. However, cf. recently in the UK, *R. (on the application of Gureckis) v Secretary of State for the Home Department* [2017] EWHC 3298; in this High Court judgment, administrative policy on the removal of rough sleepers was found to be incompatible with EU free movement law.

[29] See esp. Case C-333/13 *Dano*, paras 85-91.

[30] E.g. Case C-390/12 *Pfleger*, EU:C:2014:281, para. 60.

internal market. The case law provides a reminder that the act of free movement may be transnational by definition, but competence for social policy remains in substance with the Member States. The binary approach taken by the Court aims primarily to alleviate Union/national conflict; but then omits consideration of other conflicts, such as the market/social balance between economic responsibility and protection of vulnerable citizens. The underlying message is that national finances pay for social rights that will be extended to nationals of the State in question and to EU citizens who are market participants there. More socially vulnerable EU citizens are not protected; and neither is their fate even raised for judicial discussion.

The same compression of underlying interests is seen in *Viking Line* and *Laval*. In his 2010 Report for the European Commission, capturing both the wave of criticism directed at that case law and the stronger social impetus injected into the EU Treaties by the Lisbon amendments, Monti observed that the case law 'revived an old split that had never been healed: the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level' (Monti, 2010, p68). That may be true, but it is not (just) that EU market objectives clash *only* with national social protection standards. First, different Member States have different social protection standards, and these will clash with each other. Second, as the Court's recognition of an *EU-level* fundamental right to take collective action in *Viking Line* and *Laval* demonstrates, EU social protection standards exist too – but they may be different from national standards in a given dispute. Neither of these points found adequate reflection in the binary reasoning style of the relevant judgments

In her contribution to this special issue, Gerbrandy recalls that a central purpose of the economic constitution is to protect individual economic freedom against both market-power and state-power. She concludes that '[c]ompetition law seems to have lost the link with a "humane" market and with the "social" sphere in which it functions. It has only a very tenuous connection with the notion of solidarity. [A] more fine-tuned approach is called for, because the risk of a disconnect from supporting a free society looms' (Gerbrandy, 2018, pTBC). The same thoughts could be applied in connection with the EU citizenship and social assistance example outlined here. At one level, detecting similar 'disconnects' in two very different EU regulatory spaces is suggestive of a wider systemic imbalance.

However, the case law on citizenship and social assistance arguably meets with stronger approval on other metrics: it evidences greater engagement with and respect for national priorities in a large and diverse Union; and greater judicial respect for legislative choices, attracting deeper democratic credentials. Ultimately, then, the question is: what legal principles should transcend the more fluid dynamics of policymaking? What constitutional values should limit the choices of both national and EU actors, and guide how these choices are translated into law? How can we protect the beings as well as the States, remembering the *Van Gen den Loos* promise of the EU as a 'new legal order…the subjects of which comprise not only the Member States but also their nationals'? How can the market and the social be *integrated* more meaningfully in the sense suggested by Article 3(3) TEU, but integrated also with the competence and institutional questions generated by multilevel constitutional governance?

3. Integrating market, social and constitutional objectives: evidence of a new legal approach?

It has been observed that '[i]n practice, EU internal market law is most frequently used in order to challenge national (social) policy' (Schiek et al, 2015, p27) – as a public interest defence of

national choices. Thus, while social protection is of course an EU objective on its own terms (Barnard and de Baere, 2014), the sharper end of the market/social legal debate has concerned cases where national social protection levels are questioned as constituting a limitation on or obstacle to fuller EU market participation.

In *Viking Line* and *Laval,* the Court worked through the stages of assessment applied as standard in free movement disputes i.e. first, determination of whether or not national rules were a restriction of free movement rights; second, consideration of justification and proportionality (Reynolds, 2016). An alternative legal approach was inferred by Advocate General Poiares Maduro in *Viking Line*, when he suggested that '[n]either the Treaty rules on freedom of movement, nor the right to associate and the right to strike are absolute. Moreover, nothing in the Treaty suggests that the [Union]'s social policy objectives must always take precedence over the objective of having a properly functioning common market. On the contrary, the inclusion of both policy objectives in the Treaty signifies the aim of the [Union] to bring these policies together'.[31] This conciliation method – attributing equality of status for economic freedoms and social rights – does reflect the 'same legal value' given to the Charter and the Treaties by Article 6(1) TEU. Similarly, Advocate General Trstenjak suggested that 'general equality in status implies, first, that, in the interests of fundamental rights, fundamental freedoms may be restricted. However, second, it implies also that the exercise of fundamental freedoms may justify a restriction on fundamental rights'.[32] But how would an equal status approach work in practice? Norms of equal status are still in conflict with each other in a concrete dispute, which needs to be resolved. The limitation in Article 52(2) of the Charter, which actually accords priority to the Treaty in free movement disputes, was also noted in Section 2.

A second alternative approach goes further by suggesting explicit alterations to the Court's standard legal method. Moreover, Treaty change provides the relevant legal foundations. In that respect, Monti argued that 'the entry into force of the Lisbon Treaty, which explicitly sets out the social market economy as an objective for the Union and makes the European Charter of Fundamental Rights legally binding at Treaty level…should shape a new legal context' (Monti, 2010, p69). In *Santos Palhota,* Advocate General Cruz Villalón argued that this new legal context could displace the conventional rule that exceptions from free movement rights must always be interpreted strictly. In his view:

> In so far as the protection of workers is a matter which warrants protection under the Treaties themselves, it is not a simple derogation from a freedom, still less an unwritten exception inferred from case-law. To the extent that the new primary law framework provides for a mandatory high level of social protection, it authorises the Member States, for the purpose of safeguarding a certain level of social protection, to restrict a freedom, and to do so without European Union law's regarding it as something exceptional and, therefore, as warranting a strict interpretation. That view, which is founded on the new provisions of the Treaties cited above, is expressed in practical terms by applying the principle of proportionality.[33]

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[31] AG Poiares Maduro in Case C-438/05 *Viking Line* (EU:C:2007:292), para. 23 of the Opinion. Monti described it as 'conciliation between economic freedoms in the single market and workers' rights' (Monti, 2010, p8).

[32] AG Trstenjak in Case C-577/10 *Commission v Germany* (EU:C:2012:477), para. 81 of the Opinion.

[33] AG Cruz Villalón in Case C-515/08 *Santos Palhota* (EU:C:2010:245), para. 53 of the Opinion.

Recourse to an adapted proportionality test reorients the proposal as less of a legal revolution than it might first have seemed (Nic Shuibhne, 2010; Barnard, 2012), though this would of course depend on the extent of the adaptation. However, the scale of mindset change involved in rethinking the respective scope of rights/restrictions – a principle of legal interpretation of established and widespread application – should not be underestimated.

A third option is more radical still: moving beyond *equal* status for market freedoms and social rights so that the latter *prevail*. Barnard and de Baere outline the problem through the lens of the posted workers case law: '[t]he moment collective action was found to be a "restriction" and thus in breach of EU law, the "social" interests were on the back-foot, having to defend themselves from the economic rights of free movement…So, despite recognition of the right to strike for the first time in these cases, the limitations on the exercise of that right laid down by EU law subsume much of the right' (Barnard and de Baere, 2014, p12). Under a reverse priority model, the Court would instead '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…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' (Schiek et al, 2015, p89; see also, p79: 'the purpose of human rights protection is to provide a meta-layer of rights, which enjoy priority over other law. This demands priority of the [Charter] over Internal Market law').

The Court's response to the 'new legal context' generated by the Lisbon Treaty seems more modestly to align to date with the conciliation method i.e. the first 'equality of status' alternative outlined above. It does mark an advance from previous case law in that it progresses the evaluation beyond purely binary market/social reasoning, which, as argued in this paper, compresses the multiplicity of actors and of substantive interests involved in EU-related disputes. It is typically referred to as the 'fair balance' method i.e. '[w]here several rights and fundamental freedoms protected by the European Union legal order are at issue, the assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and a fair balance between them'.[34]

Two notes of caution should be sounded, however. First, this method is not actually new at all. In particular, it pre-exists the new legal context that was apparently constituted by the Lisbon Treaty.[35] What could be said to have changed is its more prevalent, more explicit use. But second, the Court still attributes methodological force to the 'architectural imbalance [that] exists in the adjudication of conflicts between free movement and fundamental rights' (Reynolds, 2016, p674). For example, in *Erny*, the Court ruled, post-Lisbon, that 'although it is apparent, in particular from [Article 152(1) TFEU], that the European Union respects the autonomy of the social partners, the fact none the less remains, as is stated in Article 28 of the Charter ... that the right of workers and employers, or their respective organisations, to negotiate and conclude collective agreements at the appropriate levels must be exercised *in accordance with European Union law*'[36] – in that case, more specifically, in accordance with Article 45 TFEU and the requirements of freedom of movement for workers. Thus, even where the Court uses the language of fair balance, the deep roots of free movement law logic establish

[34] Case C-283/11 *Sky Österreich*, EU:C:2013:28, para. 60. Discussing the difference between conciliation and balancing as judicial methods, see Davies, 2016c, pp223-224.
[35] See esp. Case C-112/00 *Schmidberger*, EU:C:2003:333, paras 81-82.
[36] Case C-172/11 *Erny*, EU:C:2012:399, para. 50 (emphasis added).

more of a hierarchy, a set of parameters that inform and constrain the outcome of the 'fair balance' of relevant interests in reality.

However, in its judgment in *AGET Iraklis*, delivered in December 2016, the Court referenced the social market economy concept for the first time – all the more striking when contrasted with the opening lines of Advocate General Wahl's Opinion in the same case. He introduced the EU as being 'based on a *free market economy*, which implies that undertakings must have the freedom to conduct their business as they see fit'.[37] The dispute concerned the compatibility of conditions in Greek law applied to an authorization procedure for collective redundancies with freedom of establishment under EU internal market law. In particular, national administrative authorities authorizing collective redundancies were required to take into account conditions in the national labour market and the interests of the national economy. The crisis-driven priorities of the national regulatory context are inescapable.

First, the Court found that such a scheme constituted a restriction on freedom of establishment under Article 49 TFEU. This is not the place to comment at length on the breadth of restrictions on free movement law, a question of some debate (Antonaki, 2017, pp1522-1525). But it must be observed that this very breadth is itself a significant part of the market dominance problem. If virtually every (non-discriminatory) national regulatory choice is conceived as an impediment to the operation of the EU market, that is already a market/non-market value judgement that then necessitates EU-level review of national policy decisions. How the authorization process challenged in *AGET Iraklis* amounts to a 'serious obstacle' to freedom of establishment is not self-evident.[38]

However, second, when considering justification of the legislation in light of overriding reasons in the public interest, the Court invoked not the 'free market economy' characterisation of the Advocate General but, instead, Article 3(3) TEU, to proclaim: 'the European Union is not only to establish an internal market but is also to work for the sustainable development of Europe, which is based, in particular, on a highly competitive social market economy aiming at full employment and social progress, and it is to promote, inter alia, social protection'.[39] It continued that 'the European Union thus has not only an economic but also a social purpose' and that, therefore, free movement rights 'must be balanced against the objectives pursued by social policy'.[40] The judgment thus articulated the range of values protected by the Treaty, including the social values embedded there. Importantly, it also gave weight to a Treaty-mandated space designated for addressing *national* social concerns, engaging with the competence dimension of the case.

The Court reaffirmed the distinction noted in Section 2 between public interest arguments based on 'purely' economic grounds (not acceptable) and measures taken (in this case) for 'the encouragement of employment and recruitment which, being designed in particular to reduce

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[37] AG Wahl in Case C-201/15 *AGET Iraklis* (EU:C:2016:429), para. 1 of the Opinion (emphasis added); for analysis, Antonaki, 2017; and Polomarkakis, 2017.

[38] *AGET Iraklis,* para. 57. The Court found that the legislation at issue 'render[ed] access to the Greek market less attractive *and, following access to that market*, to reduce considerably, or even eliminate, the ability of economic operators from other Member States who have chosen to set up in a new market *to adjust subsequently their activity in that market* or to give it up, by parting, to that end, with the workers previously taken on' (*AGET Iraklis,* para. 56; emphasis added).

[39] Case C-201/15 *AGET Iraklis*, para. 76.

[40] *AGET Iraklis,* para. 77. In this respect, the Court referred to Articles 151, 147(2) and 9 TFEU. See further, Schiek, 2017, pp634-638.

unemployment, [constitute] a legitimate aim of social policy'.[41] It therefore ruled that 'the criterion of "interests of the national economy" to which th[e] legislation refers cannot be accepted. Indeed, a prohibition on effecting collective redundancies which is dictated, in particular, by the wish to prevent an economic sector, and consequently the country's economy, from suffering the adverse effects that they cause must be regarded as pursuing an economic aim, which…cannot constitute a reason in the public interest that justifies a restriction on a fundamental freedom guaranteed by the Treaty'.[42]

That statement invokes a fundamental yet elusive concern of internal market law; what Snell describes as 'the purest of economic reasons—protectionism' (Snell, 2016, p120). Snell acknowledges the central role that countering protectionism plays in EU internal market law yet argues that the absence of a definition of or reference to the concept in the Court's case law is then problematic (Snell, 2016, p128). Davies has argued that 'policy decisions about how the economy should be organised are not just about protectionism, and trade, and efficiency, and wealth, but also about social bonds and the quality of life. These are legitimate, even essential, concerns to take into account, and to put into the policy balance, if a regulator wishes to improve the well-being of the regulated' (Davies, 2016c, pp219-220). The judgment in *AGET Iraklis* does reflect this contention in many respects.

However, the contested national measure failed the necessity dimension of the proportionality test since the applicable conditions were considered to have been set out too generally and imprecisely.[43] We are in a sense, then, back at square one. We do find greater articulation of the range of complex interests at play in disputes too quickly shorthanded as market/social conflicts. And there is more conscious effort to apply a conciliation or 'fair balance' method in the Court's case law, which aims to convey a sense of equal status of applicable norms as befits a complex polity framed by constitutional legal boundaries. But is there any substantial change? Does the achievement of the internal market remain (too) pivotal in the legal consciousness of the Union and its institutions, even though the primary legal (Treaty) texts do not demand this after Lisbon? Here, Azoulai's analysis captures perfectly both the progress – that there has been more of a 'connection' between the social and market and 'between the different national and sectoral elements of the situations' of conflict – and the lack of progress – but not yet the 'necessary correction in view of the distortions of power that are at stake in such contexts' – that the case law now presents (Azoulai, 2008, p1355).

4. Conclusion

The EU Treaties are awash with a spread of commitments to what we term non-market values, in contrast to how the logic of economic constitutionalism once considered the market to be distant or at least apart from these other values in a constitutive sense. Furthermore, the structural features, such as competence limitations, that inform different parts of the EU Treaties and underpin the permitted reach of EU policymaking define the context in which the substantive objectives of the Treaties play out. As a legal constraint, that is as it should be. And just as the economic constitution must involve constitutionalism, the social market economy is still a market.

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[41] *AGET Iraklis*, para. 74. The Court also analysed the national scheme for compatibility with Article 16 of the Charter (see paras 62-70, 82-94 and 103 of the judgment).
[42] *AGET Iraklis,* paras 96-97.
[43] *AGET Iraklis*, paras 98-103.

However, the social market economy concept arguably requires greater recognition and pursuit of the integrated character of the market and the non-market spheres – of the idea that social values *are* market values too. But how can the social market economy as a common *purpose* agreed to by the Member States produce a more meaningful legal difference when conceptions of its very social dimension are enduringly diverse and contested – this fact itself mandated by the structural principles of the EU constitution? Three conclusions on that critical question are offered here.

First, alternative legal approaches have been suggested with a view to achieving reorientation away from the dominance of free movement rights. However, the radical upheaval that their putting into practice would impose on the integrity of the wider EU legal framework is a stark disincentive to their realization. For example, why should social protection – as distinct from many other good objectives protected by EU primary law – reverse the deeply rooted and widely applied interpretative principle that exceptions from rights should be construed narrowly, as advocated under the second legal approach summarised above? Why not environmental protection too? Similarly, why should gender discrimination not also trigger the more profound reversal suggested by the third alternative approach, which would privilege fundamental rights expressed in the Charter above other objectives protected by the EU Treaties, overriding the 'same legal status' proviso in Article 6(1) TEU? Pushing imbalances towards the other extreme merely changes, not addresses, the existence of an imbalance in the first place. If radical changes to the system of EU (free movement) law are merited, further Treaty change should spell them out very plainly.

For those who would prefer to break apart the established system of free movement law to give effect to more radical alternatives, *AGET Ikaklis* will feel like another disappointment in a long line of disappointments. However, second, while it is just one judgment, there is interesting potential in the justification part. Antonaki rightly emphasises the 'in principle' dimension of the Court's reasoning – its confirmation of and recourse to the social market economy ambition makes it clear that less general and more precise conditions could save legislation that constrains freedom of establishment in order to meet social objectives that are important and conditioned by circumstances applicable at national level (Antonaki, 2017, p1522).[44] That in itself marks a change from *Viking Line* and *Laval.* Shaping the legislative reform aftermath of those decisions, States, beings and institutions, at national and EU levels, are working more effectively together to figure out how and to what extent the social dimension of an integrated internal market can be made real (Schiek, 2017, 640).

Furthermore, at a time in which the denigration of expertise and even basic facts has come to shape our interrogation of EU functions and purposes,[45] we should not underestimate the substantive value of clarity and of the evidently greater space given to explaining the decision seen in *AGET Iraklis*. In the example of citizenship case law on access to social assistance, the impoverished consequences of applying a binary approach to complex challenges were discussed. The value of acknowledging the range of actors involved and the range of interests at stake should not be dismissed. It makes the Court's eventual choices clearer and easier to

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[44] See similarly, Polomarkakis, 2017, p433, arguing that the judgment could be read as a signal that the Court 'not only…tolerate[s], but…accept[s], at least as a theoretical possibility, that measures enacted to achieve [social] aims shall not constitute infringements of the fundamental freedoms', in direct response to Article 3(3) TEU as an element of the 'EU's constitutional reality'.

[45] For powerful discussion of the implications of this in the context of Brexit, see Dougan, 2017, pp6-11.

evaluate against the requirements of the Treaties. It reflects rather than represses the complexity of disputes that arise in a mature economic, social and constitutional order.

Finally, third, we should remember that the role and reach of 'the market' in society at large produce some of the most challenging, frustrating, serious and daunting questions of our times. To think that the EU is either particularly at fault or particularly equipped to deal alone with their resolution asks far too much of the EU – and far too little of the rest of us.

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