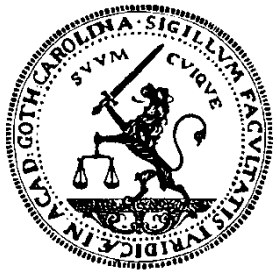

FACULTY OF LAW

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The rise or demise of ‘Social Europe’

A case law study in the context of worker protection

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"Huge challenges await us. It is up to us to shape these challenges. If we want a role to play in the future we have to play it now. It is up to us to ensure that the handwriting of the European Social Model is clearly visible in everything we do. Because Europe is the protective shield for all of us who can call this magnificent continent their home."

- Jean-Claude Juncker, President of the European Commission

Preface

Jag känner stor glädje men även ett visst vemod över att skriva detta förord eftersom det markerar slutet på en fantastisk resa som började för fyra och ett halvt år sedan i Lund. Att dagen skulle komma då jag var klar med juristutbildningen kändes oerhört långt borta där och då, men nu är den tiden snart här och jag ser fram emot att påbörja ett nytt kapitel i mitt liv. Jag är så tacksam över tiden i Lund och för alla härliga människor som jag har träffat under vägens gång.

Jag skulle vilja börja med att tacka min handledare Xavier Groussot för inspiration och vägledning genom den inte allt för enkla men spännande EU-rätten. Vidare vill jag tacka min fina vän Michelle, för att du alltid ställer upp och så även denna gång i form av korrläsning. Jag vill också tacka Rebecca som sett till att de senaste uppsatsveckorna varit fulla av skratt och för att du har peppat mig när det har behövts. Tack mamma och pappa för er kärlek, uppmuntran och eviga stöd.

Slutligen vill jag tacka alla fina vänner som gjort tiden i Lund så fantastisk!

Stockholm, den 22 maj 2018

Hanna Wallström

Abstract

The European Union is facing several challenges of constitutional, democratic, political and social nature. One of these challenges is the EU's 'social deficit'. The European Commission has listened to the critique and committed itself to reorient the European integration project towards a 'Social Europe'. The addition of social provisions to primary law through the Treaty of Lisbon, a promised revision of the Posted Workers Directive and the introduction of a European Pillar of Social Rights are the Commission's primary solutions to ensure that the Union moves beyond economic integration and tackles social concerns, promotes social values and protects social rights. However, due to the Court of Justice's interpretative power and prominent role in the institutional structure of the EU, it is crucial that the Court adjudicate cases in a socially sensitive manner if the EU is going to be successful in its endeavour to reorient the European integration project towards 'Social Europe'.

This thesis is primarily based on a study of benchmark cases in the ECJ's jurisprudence, both before and after the entry into force of the Lisbon Treaty. By conducting a case law study focused on cases in which worker protection conflicts with the interests of the European integration project, it has been possible to analyse the Court's approach in such cases and to ascertain whether the Court's adjudication reflects a commitment towards the realisation of Social Europe.

Conclusively, the case law study show that the Court of Justice often decide cases in favour of economic interests even if this tendency has slightly shifted due to the introduction of social provisions in the Lisbon Treaty. Whether the change of approach should be interpreted as reflecting a commitment towards the realisation of 'Social Europe' is difficult to answer. The Court does seem to take social concerns into account to a greater extent in the post-Lisbon era but one may argue that this is done on a merely rhetorical level. The Court still applies a method of adjudication that was established in the pre-Lisbon era, which views worker protection as a restriction that needs to be justified rather than an interest at equal footing with economic interests. The use of the freedom to conduct business, protected by the Charter of Fundamental Rights of the EU, to safeguard the contractual freedom of employers is another development that makes the ECJ's potential commitment to 'Social Europe' even more questionable.

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Abbreviations

AG	Advocate General
EU	European Union
EU Charter / Charter	The Charter of Fundamental Rights of the European Union
Court of Justice/ECJ/the Court	European Court of Justice
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

Today, the European Union is facing several challenges of constitutional, democratic, political and social nature. The financial crisis, the migration crisis, Brexit and the rise of nationalism and anti-European populism constitute clear examples of such challenges. A challenge that has not received as much attention as the abovementioned is the criticism of an alleged social deficit within the European constitutional framework, shown both by the interests that the Union represents and by the policies it produces. The Union's continuous liberalisation and deregulation has been accused of disrupting social regimes and labour law systems at a national level, contrary to the social compromise of a clear division of competence that the Union was founded upon. A new discourse has emerged from this criticism, focused on the necessity of a reorientation of the European integration project towards a 'Social Europe'. This concept entails a European Union that has moved beyond economic integration and tackles social concerns, promotes social values and protects social rights.[1]

In recent years, we have witnessed an increasing awareness of this issue and the EU, driven by the initiatives of the European Commission, which has introduced various measures in an attempt to reorient and ultimately, change the foundation of the Union. They have tried to counterbalance the deeply rooted liberal interests such as free trade, undistorted competition and freedom of movement with, *inter alia*, the addition of social provisions to the Treaty of Lisbon, the introduction of a European Pillar of Social Rights and a promised revision of the Posted Workers Directive.[2]

However, the fact remains that these liberal interests, which constitute the very foundation of the European integration project, do not go hand in hand with the protection of social values and rights. The tension that arises has to be resolved through adjudication and it is therefore up to the Court of Justice[3] to

[1] SCHIEK (2017), 'Towards More Resilience for a Social EU - the Constitutionally Conditioned Internal Market', pp. 1-3; GARBEN (2017), 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union', p. 26; GIUBBONI, (2018), 'Freedom to conduct a business and EU labour law', p. 175 and ROBIN-OLIVER (2018), 'Fundamental Rights as a New Frame: Displacing the Acquis', p. 97.
[2] See section 2.4.
[3] Hereinafter referred to as the Court of Justice, the ECJ or the Court.

strike a balance between conflicting interests. Considering the important role of the Court in the European integration project, due to the preference of negative integration over positive, it becomes evident that the Court of Justice needs to contribute to the reorientation of the European integration project. Otherwise the realisation of 'Social Europe' will be nothing but a dream.[4]

1.2 Purpose and Research Questions

Against this background, I felt compelled to research the notion of 'Social Europe' further and particularly examine how the Court of Justice has solved the 'inherent tension between the construction of the internal market and the protection of social values', as the Advocate General Cruz Villalón phrased it in his Opinion in the case of *Santos Palhota and Others*.[5]

Accordingly, the purpose of this thesis is twofold. Firstly, to analyse relevant case law of the Court of Justice in order to form an understanding of the Court's approach in cases where the protection of workers conflict with interests of the European integration project. Secondly, to examine if this approach has shifted due to the introduction of social provisions in the Lisbon Treaty in order to analyse whether the Court's adjudication reflect a commitment towards the realisation of 'Social Europe'.

In order to fulfil this purpose, the following research questions have been chosen:

- How has the Court of Justice adjudicated in cases where there is an underlying tension between worker protection and interests of the European integration project?
- Does the Court of Justice's adjudication reflect a commitment towards the realisation of 'Social Europe'?

[4] SCHARPF (2014), 'After the Crash: A Perspective on Multilevel European Democracy', pp. 1-4.
[5] AG Cruz Villalón in C-515/08 *Santos Palhota and Others*, para. 38.

1.3 Research Methodology

In order to answer my research questions and ultimately, fulfil the purpose of this thesis, I have used an analytical legal method.[6] According to Claes Sandgren, this is a viable method when the researcher, in addition to discerning the law, aims to analyse it. The analytical element entails a critical examination of the law which makes it a feasible method when reviewing case law of the highest instance, in this case, the case law of the European Court of Justice. The analytical legal method is also considered to be more open and free in comparison to the legal dogmatic method and allows the researcher to examine material outside the traditional sources of law, *inter alia*, soft law, institutional documents, by-laws, implementation regulations etcetera. Furthermore, according to the analytical legal view there is not only one correct answer to a legal issue, since it perceives the community governed by law as a system open for interpretation.[7]

By using the analytical legal method, I have been able to describe the development of Europe from a social perspective and thus, delineate the contours of the notion of 'Social Europe'. It has also allowed me to examine and decode the case law of the ECJ to form an understanding of the Court's approach and management of cases in which the protection of workers conflict with interests of the European integration project. Furthermore, the analytical legal method has provided me with a viable methodology when ascertaining if the Court's approach has changed due to the introduction of social provisions in the Lisbon Treaty and when analysing whether the ECJ's adjudication reflects a commitment towards the realisation of Social Europe.[8]

Furthermore, since the legal basis of this thesis consists of an examination and analysis of EU law and the case law of the European Court of Justice, the EU legal method has been used. The EU legal method is, according to Jane Reichel, to be regarded as an approach of how to deal with the legal sources of the European Union.[9] The hierarchy of norms in European Union law is based on the differentiation between primary and secondary law. Principally, primary law consists of the Treaty on European Union (TEU), the Treaty on the Functioning of

[6] Translation from the Swedish term 'rättsanalytisk metod'.
[7] SANDGREN (2015), *Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation*, pp. 45-46.
[8] SANDGREN (2015), *Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation*, p. 48.
[9] KORLING & ZAMBONI (2013) *Juridisk metodlära*, pp. 109-110.

the European Union (TFEU), the Charter of Fundamental Rights of the European Union and the general principles of Union law as established by the Court of Justice of the European Union (CJEU). Secondary law primarily consists of regulations, directives, decisions, recommendations and opinions. In addition, the jurisprudence of the CJEU is a central source of law in the EU, next to primary and secondary legislation. The CJEU holds the task of ensuring that EU law is respected in the case of interpretation and application of the Treaties, pursuant to Article 19(1) TEU. The Court's role in the institutional structure of the EU and the historical preference of negative integration over positive integration has provided the Court with decisive influence on the development of the European legal community. Particularly in respect of the introduction of general principles such as the doctrine of direct effect and supremacy of EU law, the protection of fundamental rights and interpretation of both primary and secondary law. The EU legal method has provided me with an approach of how to deal with the legal sources of the EU. It encompasses an understanding of the relationship between the different sources and an awareness of the prominent role of the Court.[10]

1.4 Material and Research Outline

In the second chapter of this thesis, a variety of sources, mainly constituting of primary law, legal doctrine and soft law, have been used to describe the development of 'Social Europe'. Due to the vagueness of this notion, the use of different types of sources with varying importance has been suitable in order to establish a factual basis for the coming review and analysis of the Court of Justice's case law.

After establishing what the notion of 'Social Europe' entails, a study of case law in which the Court had to strike a balance between worker protection and interests of the European integration project follows in the third chapter. The selection of cases has been based on the legal issues of the case, i.e. whether it concerns a question related to worker protection, and its significance. The significance of a case has been determined by reviewing legal doctrine in order to ascertain which cases have affected the European legal sphere the most, both in a positive and a negative manner. By analysing relevant case law, I aim to form an understanding of the Court of Justice's approach to and management of cases

[10] KORLING & ZAMBONI (2013) *Juridisk metodlära*, p. 115.

in the context of worker protection and whether this has changed over time, for example, due to the introduction of the social objectives in the Treaty of Lisbon. In addition, relevant legal doctrine has been studied to ensure that the critical analysis of the case law is substantiated to a sufficient extent. In the last chapter of this thesis, the findings from the previous chapter are used in combination with EU legal doctrine and soft law to discuss and ultimately, answer the research questions of this thesis.

1.5 Delimitations

EU law is a highly interesting but very complex topic and delimitations is thus, vital. With regard to this, I have chosen to focus on the tension between two separate interests in the Court of Justice's case law, namely, worker protection and the interests of the European integration project.

As to worker protection, I ascribe the term the meaning that corresponds with the traditional objective of labour law, i.e. the protection of workers. To define this further, I would like to refer to the words of Sir Otto Kahn-Freund, a scholar of labour and comparative law, who stated that '[t]he main object of labour law [is] to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'.[11]

Moreover, the European integration project is the process of legal, political and economic integration of the Member States' systems within the European Union. This integration process is an ever on-going development and the interests of such a project change over time. However, in this thesis the *interests of the European integration project* refer to the original objectives upon which the integration project rests, i.e. economic integration and more specifically, the establishment of an internal market. In Article 2 of the Treaty of Rome from 1957 it is stated that:

> The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.[12]

[11] DAVIES & FREEDLAND (1983), *Kahn-Freund's Labour and the Law*, p. 18.
[12] Article 2 of the Treaty of Rome.

This was to be accomplished by ensuring*, inter alia*, free trade, undistorted competition and free movement of goods, services, capital and persons.[13]

Furthermore, since I aim to analyse whether the Court of Justice's adjudication reflect a commitment towards the realisation of 'Social Europe', I have delimited the concept of 'Social Europe' as follows. The EU's competence within social areas has gradually increased and the Union now holds power to impact areas such as social policy,[14] employment,[15] citizenship,[16] public health,[17] vocational training and sport,[18] education and consumer protection.[19] Since the purpose of this thesis concerns the issue of worker protection, I have chosen to focus on two of the abovementioned areas, namely, social policy and employment. Social policy and employment constitute the core of the social dimension of the EU and it is therefore not inaccurate to talk about the realisation of 'Social Europe', even though the study of case law is limited to cases in which social policy and employment issues have been put under scrutiny by the Court of Justice.

1.6 Literature Review

The social dimension of the European Union has been researched to a large extent by scholars from all around Europe. The reason for this can be explained by the ambiguity and uncertainty surrounding EU's social sphere and the many unanswered questions that emanates from it. Legal scholars have examined and analysed the notion of 'Social Europe' from different perspectives and with varying research objectives. The latest issue of European Constitutional Law Review contains a whole special section on 'The Displacement of Social Europe', containing contributions by well-renowned legal scholars such as Claire Kilpatrick, Elise Muir, Sophie Robin-Olivier, Hanna Eklund, Zane Rasnača, Anne C.L. Davies, Stefano Giubboni, Mark Dawson and Sacha Garben.[20] The issue was published in March 2018, indicating the relevance and importance of further research on this topic.

[13] GRÖNING & ZETTERQUIST (2010), *EU: konstitution, institution, jurisdiktion*, p. 27.
[14] Article 151 TFEU.
[15] Article 145 TFEU.
[16] Article 20 TFEU.
[17] Article 168 TFEU.
[18] Article 165 TFEU.
[19] Article 169 TFEU.
[20] European Constitutional Law Review, Volume 14, Issue 1, March 2018.

In addition to legal doctrine, the European institutions have researched and contributed to the discussion of 'Social Europe' in various ways, for example through research papers, reports, speeches and opinions.[21]

The notion of 'Social Europe' is still a rather new idea and the vagueness of the concept might be the reason why research often take the form of academic articles rather than literature. It is an ever on-going development, possible to analyse from a lot of different perspectives. Since the research of the EU's social dimension and the alleged social deficit mostly can be found in academic articles, they are written from a specific perspective and have a very limited scope. My thesis, on the other hand, consists of an extensive study of case law, both pre-Lisbon and post-Lisbon, with the aim to identify the Court's approach towards worker protection as well as to analyse whether the Court's adjudication reflects a commitment towards the realisation of 'Social Europe'.

[21] See for example 'Reflection Paper on the Social Dimension' by the European Commission and 'Final Report of Working Group XI on Social Europe' by the Working Group on Social Europe.

2 The notion of 'Social Europe'

2.1 Introduction

The idea of 'Social Europe' is a highly vague concept, partly due to the absence of an official definition in any of the legal acts of the European Union. Despite the extensive research that exists, it has remained a contested and unclear idea. The notion has, however, been used and referred to by several actors, such as EU institutions, legal scholars and politicians.[22]

In this chapter, I aim to delineate the contours of this notion. My intention is not to provide a clear definition of 'Social Europe', but rather to present an overview of the development of the European Union from a social perspective.

2.2 The Foundational Period

The European integration project rests on the foundational idea of a clear division of competence. The removal of barriers to trade and the strive towards economic integration and growth was to be achieved on the transnational level, i.e. the European level, while issues relating to labour, social policy and redistributive measures would remain a national concern. This social compromise was embodied in the Treaty of Rome and granted the project the approval and acceptance from the national governments of its Member States in the starting phase of the project. The separation between social policy areas and economic integration was meant to safeguard the national systems from any intolerable social consequences that the European integration project might lead to, a concern shared by several Member States.[23] They did, however, transfer competence in the economic sphere, providing the Union with extensive power to promote

[22] Council of the EU, *The Rome Declaration*; JOERGES (2015), 'Social Justice in an Ever More Diverse Union', p. 92; DAMJANOVIC (2013), 'The EU market rules as social market rules: Why the EU can be a social market economy', p. 1685; JOERGES & RÖDL (2004), "Social Market Economy' as Europe's Social Model?', p. 2; ASHIAGBOR (2013), 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration', p. 319; GARBEN (2017), 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union', p. 26; GIUBBONI, STEFANO (2018), 'Freedom to conduct a business and EU labour law', p. 175; ROBIN-OLIVER (2018), 'Fundamental Rights as a New Frame: Displacing the Acquis', p. 97 and SCHIEK (2017), 'Towards More Resilience for a Social EU - the Constitutionally Conditioned Internal Market', p. 1.

[23] DAWSON & DE WITTE (2013), 'Constitutional Balance in the EU', p. 229.

economic integration. The Union's primary aim was to create a common market and the free movement for persons, goods, capital and undertakings was consequently given a central position in the EU legal order, secured by Treaty provisions. The potential clash between economic integration and national autonomy in the field of social policy and labour law was not addressed by the Union when this social compromise was agreed upon.[24] Something that would eventually cause problems for the European integration project.

2.3 The EU's Social Deficit

As the integration project developed, the original balance and division of competence between the Member States and the EU began to shift. The focus of the Union was increasingly concentrated on creating an internal market and hence, removing all obstacles to trade. The priority of negative integration continued to cement the strong position of the Court of Justice in the Union's institutional structure and its jurisprudence reflected a tendency to expand the scope of EU law at the expense of national autonomy, even within the exclusive competence of the Member States. In the Court's effort to create an internal market, it began to strike down national rules in the fields of social policy and employment based on their incompatibility with the Treaty freedoms which ultimately restricted the Member States' power to decide on policy issues that shaped the social conditions of each country. The separation between social policy areas and economic integration, as agreed upon in the initial phase of the project, had been replaced by an increasing disruption of social systems at the national level. This generated a wider discussion about a probable 'social deficit' of the EU.[25]

The growing societal concern and the apprehension that the Union's economic and political objectives were disrupting the socio-cultural sphere at the national level led to a transfer of competence to the European level in the area of social policy. This transferral of power was laid down in Treaty of Maastricht and then in the succeeding Treaty of Amsterdam.[26] In this case, the reluctance to transfer competence to the transnational level was set aside in an effort to induce a more

[24] BARNARD & DEAKIN (2000), 'In search of coherence: social policy, the single market and fundamental rights', pp. 332-333.
[25] SCHARPF (2010), 'The asymmetry of European integration or why the EU cannot be a 'social market economy'', p. 218; DAWSON & DE WITTE (2013), 'Constitutional Balance in the EU', pp. 818, 824 and BARNARD & DEAKIN (2000), 'In search of coherence: social policy, the single market and fundamental rights', p. 333.
[26] CRAIG (2010), *The Lisbon Treaty: Law, Politics, and Treaty Reform*, p. 294.

acceptable balance between the economic and the social in the legal order of the EU. This constituted an endless dilemma for the supporters of 'Social Europe' who had to face the fact that if European governance would encompass a social dimension with actual context and effect, additional competence would have to be transferred to the European level. Social cohesion could then effectively be achieved, but at the expense of national autonomy and diversity, something that the Member States did not want to sacrifice.[27] Another important change introduced by the Treaty of Amsterdam was the inclusion of a section with the title Employment. The Union was now obliged to work towards attaining 'a high level of employment and of social protection'. This innovation was mainly a result from the pressure put on the EU by countries such as Sweden, Denmark and France.[28]

2.4 Reorientation of the European Integration Project

The European Union's fear of disintegration and the increasing support of 'Social Europe' led to the introduction of various EU measures with the aim to reduce the alleged social deficit. In 2002, a Working Group on 'Social Europe' was established and given the task to examine and propose solutions to certain issues relating to the social dimension of the Union. In their final report, it was stated that:

> Social considerations constitute an essential part of European integration. The EU cannot be a credible force for good in the wider world if it is indifferent to questions of social justice and poverty in European society or to how its citizens are treated at work and in retirement.[29]

The Working Group presented their view on the issue in their final report and stated that, *inter alia,* social objectives should be added to primary law. Furthermore, the Working Group concluded the report by stating that 'the group rejects any artificial opposition of economic and social objectives in European policy or any arbitrary hierarchical order between them'.[30] The Group thus clarified that the social and economic objectives of the EU should be treated equally and carry

[27] CRAIG (2010), *The Lisbon Treaty: Law, Politics, and Treaty Reform*, p. 297.
[28] BARNARD (2012), *EU Employment Law*, p. 22.
[29] WORKING GROUP ON SOCIAL EUROPE (2003), 'Final Report of Working Group XI on Social Europe', Brussels, 4 February 2003, CONV 516/1/03, p. 4.
[30] WORKING GROUP ON SOCIAL EUROPE (2003), 'Final Report of Working Group XI on Social Europe', Brussels, 4 February 2003, CONV 516/1/03, p. 29.

the same weight which might seem like an obvious thing but which has, as will be shown later, posed a challenge to the EU institutions and in particular, the Court of Justice.

2.4.1 Treaty of Lisbon

2.4.1.1 Background

On 1 December 2009, the Treaty of Lisbon[31] entered into force amending the Treaty on European Union and the Treaty establishing the European Community. It was initiated in 2002 as a constitutional project with the aim to create a European Constitution that would facilitate a deeper integration among the members of the Union. The project later failed and was replaced by the Treaty of Lisbon. Despite the 'negative' outcome of the project, the original European Constitution influenced the structure and substance of the Treaty of Lisbon to a relatively high degree.[32]

2.4.1.2 The Union's competence

The Lisbon Treaty only introduced minor modifications to the EU's competence within the social sphere. In the areas of social policy and employment, no changes were introduced. Thus, in the area of employment, the EU can support and complement the Member States in attaining a high level of employment[33] as well as 'adopt incentive measures designed to encourage cooperation between Member States'.[34]

In the field of social policy, the EU shares competence with the Member States.[35] The areas listed in Article 153(1) establish in what fields the EU can act to 'support and complement the activities of the Member States'[36] which relates to, *inter alia*, working conditions, social security and social protection of workers and protection of workers where their employment contract is terminated.[37]

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[31] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306 (hereinafter referred to as the 'Lisbon Treaty' or 'Treaty of Lisbon').
[32] MICKLITZ (2010), 'Failure or Ideological Preconceptions – Thoughts on Two Grand Projects: The European Constitution and the European Civil Code', p. 12.
[33] Article 147 TFEU.
[34] Article 149 TFEU.
[35] Article 4(2)(b) TFEU.
[36] Article 53(1) TFEU.
[37] Article 53(1)(b), (c) och (d) TFEU.

2.4.1.3 The Charter of Fundamental Rights

The Treaty of Lisbon marked a turning point for 'Social Europe', since it concretised the vague ambition to promote and protect the social dimension of the EU in various ways. In addition, the Charter of Fundamental Rights of the European Union[38] was granted its legally binding character and the fundamental rights in the Charter should now be treated as equivalent to, for example, the Treaty freedoms.[39] This was also a significant improvement for 'Social Europe' since social rights, such as workers' right to information and consultation within the undertaking, right of collective bargaining and action, protection in the event of unjustified dismissal and right to fair and just working conditions, can be found in Chapter IV under the title Solidarity.[40]

2.4.1.4 Article 3(3) TEU

One of the Lisbon Treaty's innovations was the modification of the EU's objectives. It added social objectives to the previously stipulated economic and political objectives and can be viewed as an indication of the Union's will to reorient the European integration project. The objectives can be found in Article 3(3) TEU, which reads as follows:

> The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
>
> It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.
>
> It shall promote economic, social and territorial cohesion, and solidarity among Member States.
>
> It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.[41]

[38] Hereinafter referred to as the 'Charter' or the 'EU Charter'.
[39] LEBECK (2016), *EU-stadgan om grundläggande rättigheter*, p. 35 and SCHIEK (2017), 'Towards More Resilience for a Social EU - the Constitutionally Conditioned Internal Market', p. 1.
[40] Article 27, 28, 30 and 31 of the EU Charter.
[41] Article 3(3) of the Lisbon Treaty.

In comparison to the previous Treaty, there are references to the 'social' in Article 3(3) which indicates the commitment made by the EU institutions to steer the project in a more socially sustainable direction.[42] In my opinion, the introduction of social objectives can be viewed as a concretisation of the strive towards 'Social Europe', making it a turning point, provided that the new objectives are both promoted and respected by the EU institutions, including the Court of Justice. Professor Catherine Barnard states that Article 3(3) of the Lisbon Treaty 'emphasizes the links between the social and economic provisions of the Treaty'.[43]

One of the innovations introduced by the Treaty of Lisbon is the concept of a 'social market economy'. The conceptualisation of the EU as a social market economy has been widely discussed by legal scholars, especially due to the lack of a clear and precise definition from the EU. Some scholars have defined it as a constitutional principle which postulates the desired character of the future European Union.[44] Others describe it as the successful result of a long struggle by Social Democrats and Christian Democrats to reorient the European integration project towards a more social EU.[45] It has also been considered to reflect a compromise due to the insertion of the phrase 'highly competitive' before 'social market economy'.[46] Professor Fritz W. Scharpf has researched the notion of a 'social market economy' and links the meaning of it to the social market economies of countries such as Sweden, Denmark, the Netherlands, Germany and Austria. These countries' economic order is founded on the idea of a free market but with a comprehensive welfare system and legal regulations that complement and counterbalance that freedom.[47]

The EU Commissioner for Employment, Social Affairs and Inclusion, László Andor, gave a speech in 2011 about 'Building a social market economy in the European Union' and stated that:

> [T]he social market economy is based on two clearly distinct but complementary pillars: on the one hand, the enforcement of competition, and on the other, social

[42] CRAIG (2010), *The Lisbon Treaty: Law, Politics, and Treaty Reform*, pp. 312-313.
[43] BARNARD (2012), *EU Employment Law*, p. 27.
[44] JOERGES & RÖDL (2004), "Social Market Economy' as Europe's Social Model?', p. 10.
[45] SCHARPF (2010), 'The asymmetry of European integration or why the EU cannot be a 'social market economy", pp. 211-212.
[46] CRAIG (2010), *The Lisbon Treaty: Law, Politics, and Treaty Reform*, p. 313.
[47] SCHARPF (2010), 'The asymmetry of European integration or why the EU cannot be a 'social market economy", p. 212.

policy measures to guarantee social justice by correcting negative outcomes and bolster social protection.[48]

Thus, the social market economy could be viewed as reflecting an economic order that balances a social dimension which promotes and protects the social wellbeing of its citizens *with* market competition and economic growth.[49]

2.4.1.5 Article 9 TFEU

In addition to the social objectives in Article 3(3) TEU, the Treaty of Lisbon introduced a new horizontal social clause that requires the EU to consider 'the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion […]' when 'defining and implementing its policies and activities'.[50] Article 9 hence constitutes a further indication of the reorientation of the European integration project.[51]

2.5 European Debt Crisis until today

The efforts to establish a 'Social Europe' were counteracted by the EU's response to the European debt crisis, which amplified the previous allegations of a social deficit in the EU legal order. The efforts to save the Union from a financial collapse led to continued expansion of the Union's competence, at the expense of national autonomy, and the requirement for Member States in need of financial support to renegotiate and ultimately, reform their social systems. The EU had thus begun to influence the redistributive policies of Member States through legislative measures, a course of action far beyond what was initially agreed upon at the beginning of the integration project.[52] The critique of the EU grew and the reorientation towards a 'Social Europe' seemed to be nothing but a distant and unrealistic dream.

Despite these hardships, the EU continued its endeavour to transform the Union and President of the European Commission, Jean-Claude Juncker, has since

[48] ANDOR, LÁSZLÓ (2011), European Commissioner responsible for Employment, Social Affairs and Inclusion, 'Building a social market economy in the European Union', SPEECH/11/695.
[49] ANDOR, LÁSZLÓ (2011), European Commissioner responsible for Employment, Social Affairs and Inclusion, 'Building a social market economy in the European Union', SPEECH/11/695.
[50] Article 9 TFEU.
[51] BARNARD (2012), *EU Employment Law*, p. 28.
[52] DAWSON & DE WITTE (2013), 'Constitutional Balance in the EU', pp. 824-825.

he took office in 2014, repeatedly highlighted the importance of ensuring that European governance encompass a social dimension. In 2017, the Commission published a Reflection Paper on the Social Dimension of Europe, presenting what they believed to be the challenges facing 'Social Europe' and how to turn their 'aspirations into reality'.[53] According to the Commission, the EU has always contained a social dimension in addition to its economic goals and 'there is now a strong European […] commitment to uphold fundamental values, rights and social objectives.'[54] Furthermore, The European Commission is of the opinion that the EU is at a crossroads and argues:

> As the Europe of 27 looks to shape its future, the discussion on the social dimension of our Union is timely and essential. In recent years, Europe has been busy with 'firefighting', responding to one crisis after another. Now is the time to draw lessons and to open a new chapter. For this, we must take a longer-term perspective and confront the more profound transformations in our economy and society.[55]

The European Commission's ambition to reorient the European integration project towards a more social Europe has led it to present multiple measures in the hope of fixing the alleged social deficit. In the end of 2017, the Commission presented its European Pillar of Social Rights, encompassing three different categories of protection. Namely, 'equal opportunities and access to the labour market', 'fair working conditions' and 'social protection and inclusion'.[56] By introducing a European Pillar of Social Rights, the Commission hoped to reinvigorate convergence in the Union while simultaneously guaranteeing the protection of social rights.[57] However, since the measure constitutes soft law and thus not legally binding, it is highly questionable if it will have any real impact.

Another discussion that reflects the on-going reorientation towards a 'Social Europe' is the call for a revision of the Posted Workers Directive. On March 8 2016, the Commission proposed a reform of the directive with the aim to establish the principle of 'equal pay for equal work in the same place'.[58] After months

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[53] COMMISSION (2017), 'Reflection Paper on the Social Dimension of Europe', p. 3.
[54] COMMISSION (2017), 'Reflection Paper on the Social Dimension of Europe', p. 6.
[55] COMMISSION (2017), 'Reflection Paper on the Social Dimension of Europe', pp. 6-7.
[56] EUROPEAN PARLIAMENT, COUNCIL OF THE EUROPEAN UNION, EUROPEAN COMMISSION (2017), 'European Pillar of Social Rights'.
[57] PRESIDENT OF THE EUROPEAN COMMISSION, JEAN-CLAUDE JUNCKER (2015), 'State of the Union 2015: Time for Honesty, Unity and Solidarity'.
[58] EUROPEAN COMMISSION (2016), Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final, p. 4.

of negotiations, a common understanding of the targeted revision of the directive was reached between the Commission, the Council and the Parliament and a joint statement was presented on March 1 2018, taking the proposal one step closer to a legal reform.[59]

However, the contemporary discourse of 'Social Europe' is often lacking or downplaying one crucial aspect of the European integration project. Namely, the role of the Court of Justice. The Court has become a highly influential actor in the judicial world of the EU and scholars have discussed the potential difficulties in creating a social dimension due to the fact that the Court itself is part of the 'social legitimacy problem of the European integration process'.[60] The Court of Justice's commitment to 'Social Europe' is hence critical for the success of the reorientation of the European Union. An analysis of the Court's case law, both before and after the introduction of social objectives through the Lisbon Treaty, is therefore pertinent to form an understanding of whether the Court has truly committed itself to the creation of 'Social Europe' or if it has continued to prioritise economic integration.

[59] EUROPEAN COMMISSION (2018), Joint statement on the revision of the Posting of Workers Directive, 1 March 2018.
[60] FEENSTRA (2017), 'How Can the Viking/Laval Conundrum Be Resolved? Balancing the Economic and the Social: One Bed for Two Dreams?', p. 313.

3 Case Law Study

3.1 Introduction

In this chapter, case law in which the Court of Justice has struck a balance between worker protection and interests of the European integration project is examined. I will first discuss cases in the pre-Lisbon era before I continue with an examination of cases that was adjudicated after the Lisbon Treaty entered into force. By doing this, I aim to answer the first research question of this thesis. Namely, *How has the Court of Justice adjudicated in cases where there is an underlying tension between worker protection and interests of the European integration project?* I will analyse and answer this question continuously throughout this chapter.

Before we turn to the case law study, the Court of Justice's function and role in the European integration project will be elaborated on. By accentuating the Court's important task in terms of its interpretative power, it becomes evident why it is crucial that the ECJ respects and promotes social values if 'Social Europe' is going to stand any chance of realisation.

3.2 The Court of Justice

3.2.1 Priority of negative integration

In the beginning of the European integration project, the main focus of the Union was to establish an internal market and the removal of barriers was consequently, a priority for the Union. The effectiveness of negative integration *in lieu of* politically approved harmonising measures, i.e. positive integration, awarded the Court an important role in the pursuit of an internal market. When legislative proposals were facing resistance in the Council, the Court could circumvent such political blockades and strike down national rules that did not coincide with the interests of the European integration project. Thus, judicial law-making by the ECJ was prioritised over the political process and resulted in a European court

with a lot of power, far exceeding a mere interpretative role. The Treaty freedoms came to serve as the Court's primary tool in its strive for economic integration.[61]

3.2.2 Function of the Court

Today, the function of the Court is to uphold the treaties and ensure a uniform interpretation and application of EU law in all Member States. This is done through various forms of legal proceedings, one of them being the preliminary ruling procedure. National courts may, and in some cases must, ask for guidance if they are uncertain of the interpretation of European Union law.[62] The interpretation or clarification stated in the judgment are not only relevant for the case at hand, but for the whole EU due to the rulings *erga omnes* effect.[63] In practice this means that once the ECJ has decided a case, the ruling is enforceable in all Member States and must therefore be respected throughout the Union and by every judicial actor.[64]

3.2.3 Tools of legal reasoning

Essential to the interpretative role of the Court of Justice is the arduous task of balancing conflicting interests. There is no guidance in the Treaties of how the Court is supposed to execute this delicate task and the Court has therefore developed certain tools of legal reasoning.[65]

When one of the conflicting interests is a Treaty freedom, i.e. free movement of goods, persons, services or capital, the Court apply the 'rule of reason' approach. This essentially means that the Court examines whether a national measure is justified in light of the underlying objective, despite having a restrictive effect on a Treaty freedom. In this assessment, the principle of proportionality is an important component. This principle is used in a rather flexible manner by the

[61] SCHARPF (2010), 'The asymmetry of European integration or why the EU cannot be a 'social market economy'', p. 215 and TUORI (2015), *European Constitutionalism*, p. 234.
[62] Court of Justice, 'Jurisdiction' < https://curia.europa.eu/jcms/jcms/Jo2_7024/en/>, accessed 16 May 2018.
[63] BLAUBERGER & SCHMIDT (2017), 'The European Court of Justice and its political impact', pp. 910-911.
[64] BLANPAIN (2012), *European Labour Law*, p. 80.
[65] BARTL & LEONE (2015), 'Minimum harmonisation and Article 16 CFR: Difficult Times Ahead for Social Legislation?', p. 8.

Court but it is often described as comprising of three elements. Firstly, the national measure has to be an appropriate means for ensuring the achievement of the objective. Secondly, the national measure should not go beyond what is necessary to attain the objective in question. Thirdly, the national measure has to be proportionate in relation to the objective that it aims to attain, in other words, reasonable.[66]

If the case at issue concerns a fundamental right, the Court is supposed to do a fundamental rights review in order to ascertain whether a restriction to the right in question is legitimate. Article 52(1) of the EU Charter provides guidance of what this review entails. It states that:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.[67]

3.3 Case law pre-Lisbon

3.3.1 Rush Portuguesa & Albany

My starting point is the case of *Rush Portuguesa*[68] from 1990. The case concerned a Portuguese company that was awarded a subcontract in the construction project of a railway between Paris and the Atlantic Coast. The wages of the Portuguese employees were equivalent to what was standard in Portugal but substantially lower than French wages. This sparked a conflict in which the French authorities tried to restrict the possibility for the Portuguese company to accept the contract and the conflict eventually ended up before the Court of Justice. The ECJ ruled, based on the principle of freedom to provide services, that the Portuguese company was within its right when it took on the contract. However, the Court made an important *obiter dictum* as a response to the concerns raised by France regarding the risk of social dumping. The Court stated:

> [I]n response to the concern expressed in this connection by the French Government, that Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of

[66] GRÖNING & ZETTERQUIST (2010), *EU: konstitution, institution, jurisdiktion*, p. 114.
[67] Article 52(1) of the EU Charter.
[68] C-113/89, *Rush Portuguesa*, Judgment of the Court (Sixth Chamber) of 27 March 1990, EU:C:1990:142.

> industry, to any person who is employed, even temporarily within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means.[69]

The statement neutralised the ruling's deregulatory potential by granting Member States a possibility to protect themselves from socially unacceptable competition from low-wage countries which, from a worker protection perspective, was highly positive. However, the ruling in *Rush Portuguesa* created a link between the social sphere at the national level and economic integration and thus, eliminated the barrier that previously separated the internal market and national labour law.[70]

Albany[71] is another case in which the Court confirmed the linkage between national labour law and internal market rules, in this case, competition law. In its judgment, the Court recognised that collective agreements on the national level could potentially restrict competition. It concluded that Article 85, now Article 101(1) TFEU, which prohibits agreements that is incompatible with the internal market from a competition perspective, does not apply to collective agreements. The Court stated that 'the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1)'.[72] The Court also referred repeatedly to the Treaty's social policy provisions before stating that it 'follows from an interpretation of the provisions of the Treaty as a whole'[73] that such agreements falls outside the scope of Article 85. In this case, the Court favoured the collective bargaining process and ultimately, granted it a protected place within the EU legal order by preserving its autonomy.[74]

In both of these cases, the ECJ struck a balance between competing interests that benefitted the integration project as well as the protection of workers. It secured the freedom to provide services in *Rush Portuguesa* while simultaneously refraining from disrupting French labour law. In *Albany,* the Court concluded that collective agreements were exempted from judicial examination under Arti-

[69] C-113/89, *Rush Portuguesa*, para. 18.
[70] GIUBBONI (2018), 'Freedom to conduct a business and EU labour law', p. 179.
[71] C-67/96, *Albany International BV* v *Stichting Bedrijfspensioenfonds Textielindustrie,* Judgment of the Court of 21 September 1999, EU:C:1999:430.
[72] C-67/96, *Albany* v *Stichting Bedrijfspensioenfonds Textielindustrie*, para. 59.
[73] C-67/96, *Albany* v *Stichting Bedrijfspensioenfonds Textielindustrie*, para. 60.
[74] ASHIAGBOR (2013), 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration', p. 311.

cle 85 which indicates once again the Court's restrictive approach towards affecting the national systems on the basis of competition rules, in this case a Treaty provision regarding competition policy. I believe that these two cases indicate that the Court respected national autonomy and had an ambition to keep economic integration separated from the 'social', i.e. national labour law. This was also in line with the original social compromise upon which the integration project is founded.[75]

3.3.2 Laval and Viking

In 2007, the ECJ decided two cases which suggested that the Court had reconsidered its previous approach to cases in which internal market rules clash with national labour law.[76]

In the case of *Laval,*[77] the eponymous construction company had posted workers to its subsidiary, Baltic Bygg, located in Sweden. The trade union in Sweden wanted Baltic Bygg to enter into a collective agreement that granted their workers better terms but the negotiations turned out unsuccessful, and Laval entered into a collective agreement with a Latvian trade union instead.[78] As a response, the Swedish trade union initiated collective action in the form of a blockade which resulted in the termination of Baltic Bygg's contract and ultimately led to bankruptcy.[79] Laval then brought an action before the Swedish Labour Court claiming that the collective action was unlawful on the basis of its right to freedom of movement and in particular, Laval's right to provide services in Sweden. The Swedish Labour Court referred the case to the Court of Justice for a preliminary ruling.[80]

The second case, *Viking,*[81] concerned a conflict between Viking Line, a company that operated a ferry between Estonia and Finland, and the Finnish Seaman's Union, FSU, who was party to the collective agreement that the employees of

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[75] GIUBBONI (2018), 'Freedom to conduct a business and EU labour law', pp. 178-179.
[76] FEENSTRA (2017), 'How Can the Viking/Laval Conundrum Be Resolved? Balancing the Economic and the Social: One Bed for Two Dreams?', p. 310.
[77] Case C-341/05, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet,* EU:C:2007:809.
[78] Case C-341/05, *Laval un Partneri*, paras 27-28, 33.
[79] Case C-341/05, *Laval un Partneri*, paras 34, 38.
[80] Case C-341/05, *Laval un Partneri*, paras 39-40.
[81] C-438/05**,** *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti*, Judgment of the Court (Grand Chamber) of 11 December 2007, EU:C:2007:772.

Viking Ling were employed under.[82] Due to financial reasons, Viking Line wanted to reflag their ferry to operate under Estonian flag and therefore enter into a collective agreement with an Estonian trade union instead of FSU.[83] With the support of ITF, the International Transport Workers' Federation, FSU encouraged all member unions to decline any initiative from Viking Line to negotiate which ultimately prevented Viking Line from entering into a collective agreement with an Estonian trade union.[84] The FSU subsequently announced its intention to take collective action which resulted in Viking Line seeking an injunction that would prohibit the FSU to do so. They based their claim on the right to freedom of establishment.[85] The Court of Appeal ultimately referred the question to the ECJ, asking whether Viking Line could rely on this provision when challenging the collective action by FSU.[86]

The following analysis will be structured based on the three issues that the Court of Justice discussed in the cases of *Laval* and *Viking*. Firstly, the question of whether the right to take collective action falls outside the scope of EU internal market law. Secondly, the question of whether the Treaty freedoms are applicable in horizontal situations, i.e. between private parties. Thirdly, if a national policy can constitute an obstacle to the internal market. In addition, the Court's balancing exercise will be examined.

3.3.2.1 Collective action and the scope of EU law

In *Laval*, the trade union argued that the right to take collective action should be viewed as falling outside the scope of EU internal market law since the Union has no competence in that area.[87] They argued that an application of the Treaty freedoms potentially would endanger workers' right to collective bargaining and their right to strike.[88] The Court, however, disagreed and stated that although the right to take collective action falls within the area of competence of the Member States, they must 'exercise that competence consistently with Community law'.[89] Based on this, the Court concluded that EU internal market law, in this case the freedom to provide services, is applicable to a collective action such

[82] C-438/05, *Viking Line*, paras 6-7.
[83] C-438/05, *Viking Line*, para. 9.
[84] C-438/05, *Viking Line*, para. 12.
[85] C-438/05, *Viking Line*, paras 13, 22-23.
[86] C-438/05, *Viking Line*, para. 32.
[87] C-341/05, *Laval un Partneri*, paras 86-87.
[88] ASHIAGBOR (2013), 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration', p. 311.
[89] C-341/05, *Laval un Partneri*, para. 87.

as the one in *Laval*.[90] In the case of *Viking*, the ECJ came to the same conclusion and argued, in reference to the applicability of the provision on freedom of establishment, that:

> […] in principle, collective action initiated by a trade union or a group of trade unions against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article.[91]

3.3.2.2 Applicability of the Treaty freedoms

Another issue that was addressed in the judgments is the question of whether EU internal market law, e.g. the Treaty freedoms, applies to situations concerning private parties. By reference to its case law in which Treaty provisions were granted horizontal effect, the ECJ concluded that the Treaty freedoms do not only apply to the public sphere but also to parties who 'participate in the drawing up of agreements seeking to regulate paid work collectively'.[92]

3.3.2.3 Restriction of the Treaty freedoms

The third issue that *Laval* and *Viking* touched upon was the question of whether a national policy could be viewed as restricting or interfering with trade and the creation of the internal market. The Court's case law had previously extended the scope of internal market law to apply to situations where a national policy affected the market access of a service provider or an individual or company wanting to establish in another Member State. This development also entailed that even measures that treated all parties the same, i.e. non-discriminatory measures, could be viewed as a breach of the Treaty if they interfered with the access to the market.[93] In *Laval*, the ECJ stated that the right to take collective action 'make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden', resulting in the conclusion that it constitutes a restriction to the freedom to provide services.[94] In *Viking*, the ECJ stated that collective action would make the enjoyment of the right to freedom of establishment become 'less attractive, or even pointless'.[95] The Court furthermore stated

[90] C-341/05, *Laval un Partneri*, para. 88.
[91] C-438/05, *Viking Line*, para. 55.
[92] C-438/05, *Viking Line*, paras 64-66.
[93] ASHIAGBOR (2013), 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration', p. 312.
[94] C-341/05, *Laval un Partneri*, para. 99.
[95] C-438/05, *Viking Line*, para. 72.

that by using collective action in an effort to implement the trade union's 'policy of combating the use of convenience', i.e. preventing Viking to re-flag their ferry to another country in order to give their employees lower wages, the action 'must be considered to be at least liable to restrict Vikings exercise of its right of freedom of establishment'.[96]

3.3.2.4 Balancing of conflicting interests

If a collective action ultimately triggers EU internal market law, the court dealing with such a case needs to balance the two conflicting rights, in this case, freedom of establishment or freedom to provide services and the (social) right to collective action. In the cases of *Laval* and *Viking*, the Court stated that if a national policy restricts a Treaty freedom, that policy is only acceptable 'if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest'. [97] Furthermore, the Court also clarified that even if a restrictive national policy would fulfil this requirement it 'would still have to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it'.[98] In other words, the restriction needs to be both justifiable and proportionate in order to be lawful.

As to the question of justification, the ECJ started by recognising the fundamental character of the right to take collective action. In *Viking*, the ECJ also clarified that embodied in the fundamental right to take collective action is the right to strike.[99] After this pronouncement, the Court stated that 'the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty'.[100] Thus, the right to collective action could be viewed as a justified restriction per se.

Although the right to collective action could be qualified as a justified restriction, it also needed to pass the proportionality assessment. In relation to this, the ECJ stated that national courts should examine whether a trade union had 'other means at its disposal which were less restrictive of freedom of establishment […] and […] whether that trade union had exhausted those means before initiating

[96] C-438/05, *Viking Line*, para. 73.
[97] C-341/05, *Laval un Partneri*, para. 101 and C-438/05, *Viking Line*, para. 75.
[98] C-341/05, *Laval un Partneri*, para. 101 and C-438/05, *Viking Line*, para. 75.
[99] C-341/05, *Laval un Partneri*, para. 91 and C-438/05, *Viking Line*, para. 44.
[100] C-341/05, *Laval un Partneri*, para. 93 and C-438/05, *Viking Line* para. 45.

such actions'.[101] Thus, the ECJ subjected the right to collective action to a strict test of proportionality, only justified as a last resort of action.

In my opinion, the ECJ's ruling in *Laval* and *Viking* illustrates the difficulty in reconciling conflicting interests. On the one hand, trade unions and national governments wanted the Court to respect national autonomy and prioritise collective social rights and the protection of workers. On the other hand, the Court was faced with two cases in which a national policy restricted a Treaty freedom and thus, constituted a barrier to the internal market. The Court balanced these two conflicting interests but chose to prioritise the interests of the European integration project, i.e. the Treaty freedoms, at the expense of national labour systems and ultimately, the protection of workers.[102] The strict test of proportionality has been especially criticised by scholars. For example, Professor Diamond Ashiagbor states that '[t]he effect of the standard of scrutiny in such cases is to negate the very substance of one of the rights that the Court is seeking to balance'.[103] According to Professor Stefano Giubboni, the proportionality assessment was constructed in such a manner to guarantee the economic freedom of the employers.[104]

The fact that the Court acknowledges the right to collective action as a fundamental right should be viewed as an important pronouncement from a worker protection perspective. However, a closer look at the Court's reasoning shows that the value of this recognition is questionable. Even though the cases of *Laval* and *Viking* concerned two conflicting rights of *fundamental* character, the fundamental right to collective action was classified as a restriction to the fundamental freedoms,[105] i.e. the Treaty freedoms, indicating its inferior position in the EU legal hierarchy. By doing this, the EU clearly prioritised the interests of the European integration project and companies'/employers' freedom of establishment and freedom to provide services over workers' right to collective action.

[101] C-438/05, *Viking Line*, para. 87.
[102] GARBEN (2017), 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union', p. 34.
[103] ASHIAGBOR (2013), 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration', p. 313.
[104] GIUBBONI (2018), 'Freedom to conduct a business and EU labour law', p. 181.
[105] The fundamental character of the Treaty freedoms has been discussed in several cases, *inter alia*, Schmidberger (goods); Angonese (workers); Laval (services) and Omega (services).

According to Professor Anne Davies, this type of reasoning serves to 'reconceptualise employers' interests in a way which presents them as at least as weighty as, if not more so than, the fundamental social rights of workers'.[106]

3.3.3 Rüffert and Commission v Luxembourg

In 2008, the Court decided two cases in which worker protection and interests of the European integration project once again needed to be balanced.

In *Rüffert,*[107] the ECJ had to decide on the legality of a national German law concerning public contracts. According to this law, only companies that were willing to pay their employees equivalent wages to those laid down in the applicable sectoral collective agreement, i.e. the collective agreement in force at the work place, were eligible for public contracts in a public procurement procedure. The ECJ held that this type of requirement could constitute a restriction to the freedom to provide services since undertakings from other Member States with lower wages would face an 'additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State'.[108] Furthermore, the ECJ addressed the question of a possible justification and concluded that the restriction cannot be considered as necessary to ensure the protection of workers. The Court explained this by referring to the sectoral application of the requirement and the fact that the wages would exceed the minimum rate of pay as determined by national legislation, stating that if this requirement would be necessary from a worker protection perspective, the same rate of pay would also be required for the private sphere and/or for the whole relevant sector.[109]

Shortly after the ruling in *Rüffert*, another case was brought before the Court of Justice. The case of *Commission v Luxembourg*[110] was one out of several infringement proceedings driven by the Commission to affirm the Court's market-oriented approach to cases in which worker protection and interests of the European integration project clashed. In the present case, the ECJ gave a restrictive

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[106] DAVIES (2018), 'How has the Court of Justice changed its management and approach towards the social acquis?', p. 163.
[107] C-346/06, *Dirk Rüffert* v *Land Niedersachsen,* Judgment of the Court (Second Chamber) of 3 April 2008, EU:C:2008:189.
[108] C-346/06, *Rüffert*, para. 37.
[109] C-346/06, *Rüffert*, paras 38-40.
[110] C-319/06, *Commission of the European Communities* v *Grand Duchy of Luxemburg,* Judgment of the Court (First Chamber) of 19 June 2008, EU:C:2008:350.

interpretation of the social policy derogation in the Posting of Workers Directive, limiting the Member States' possibility to require higher social standards based on public policy grounds.[111]

3.4 Case law post-Lisbon

3.4.1 Commission v Germany

In 2010, the ECJ decided another case affecting the already constrained relationship between fundamental freedoms and worker protection. In the *Commission* v *Germany*[112] judgment, the European Commission brought infringement proceedings against Germany, claiming non-fulfilment of obligations under two EU directives regulating public procurement. The directives required Member States to put out a call for tenders at the EU level, and not only domestically which local authorities in Germany had failed to do with certain contracts for pension services. The authorities had awarded the public contracts directly to bodies and undertakings referred to in a collective agreement, resulting in the Commission's infringement claim.[113]

Of relevance for this thesis is the Court of Justice's discussion concerning the applicability of the public procurement directives to the contract awards in the case. Germany claimed, in reference to the judgement in *Albany*, that the awarded contracts should fall outside the scope of the directives, since these contracts 'implemented a collective agreement negotiated between management and labour'.[114] In the case of *Albany*, the Court concluded that agreements, negotiated between management and labour, should be exempted from judicial examination under a competition provision in the Treaty since the social policy objectives pursued by such an agreement otherwise would be 'seriously undermined'.[115]

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111 GARBEN (2017), 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union', p. 35.
112 C-271/08, *European Commission* v *Federal Republic of Germany*, Judgment of the Court (Grand Chamber) of 15 July 2010, EU:C:2010:426.
113 C-271/08, *Commission* v *Germany*, paras 1-2.
114 C-271/08, *Commission* v *Germany*, para. 36.
115 C-67/96, *Albany* v *Stichting Bedrijfspensioenfonds Textielindustrie*, paras 59-60.

The Court started out by once again recognising the right to collective bargaining as a fundamental right, explicitly referring to Article 28 of the Charter of Fundamental Rights of the EU and emphasising that the Charter enjoys the same legal value as the Treaties. However, the Court continued by stating that the social objective pursued by the collective agreement in addition to the fundamental character of the right does not mean that the local authorities, i.e. the employers, automatically fall outside the scope of the directives, which implement the freedom to provide services as well as the freedom of establishment in public procurement procedures.[116]

In paragraphs 45 and 46, the Court responds to Germany's main argument and reference to the judgment in *Albany*. According to the Court, the reasoning in the *Albany* case does not apply, since the main question concerns the fact that local authorities decided to award public contracts directly to bodies and undertakings in Germany, contrary to the public procurement directives which implement the freedom to provide services and the freedom of establishment. Thus, the Court did not accept the analogy between competition law and the Treaty freedoms, as presented by Germany. The ECJ further stated that the process of awarding public contracts to certain bodies and undertakings 'does not affect the essence of the right to bargain collectively', in contrast to the social objective pursued by a collective agreement.[117] Based on this, the Court concluded that 'the fact that the contract awards at issue follow from the application of a collective agreement does not, *in itself*, result in the present instance being excluded from the scope'.[118]

This conclusion led to another question being raised, namely the one about reconciliation of conflicting interests. In the case at hand, the Court stated that the fundamental right to collective bargaining 'must be exercised in accordance with European Union law'[119] and thus, 'reconciled with the requirements stemming from the freedoms protected by the […] Treaty',[120] which the directives aim to implement. It also needs to be 'in accordance with the principle of proportionality'.[121] Further down in the judgement, the ECJ again refers to the reconciliation of conflicting interests, this time between 'the requirements related to at-

[116] C-271/08, *Commission* v *Germany*, para. 41.
[117] C-271/08, *Commission* v *Germany*, para. 49.
[118] C-271/08, *Commission* v *Germany*, para. 50. [emphasis added]
[119] C-271/08, *Commission* v *Germany*, para. 43.
[120] C-271/08, *Commission* v *Germany*, para. 44.
[121] C-271/08, *Commission* v *Germany*, paras 43-44.

tainment of the social objective pursued here by the parties to the collective bargaining with the requirements stemming from [the] Directives […]'.[122] In the following paragraph, the Court stated that this assessment contains a 'verification' as to whether:

> [A] fair balance was struck in the account taken of the respective interests involved, namely enhancement of the level of the retirement pensions of the workers concerned, on the one hand, and attainment of freedom of establishment and of the freedom to provide services, and opening up to competition at European Union level, on the other.[123]

Without getting into the details of the proportionality assessment conducted by the Court in paragraphs 53 to 65 of the judgement, the overall conclusion was that 'compliance with the directives concerning public service contracts does not prove irreconcilable with attainment of the social objective pursued by the signatories of the [collective agreement] in the exercise of their right to bargain collectively.'[124]

From a worker protection perspective, this judgement can be considered to contain both positive and negative elements. First of all, national labour law and the social objectives pursued by a collective agreement once again had to give way to the Treaty freedoms. The balancing test exercised by the Court was, just like in the cases of *Laval* and *Viking*, highly one-sided, taking the view that it is the Treaty freedoms that have priority over social rights and a restriction needs to be both justified and proportionate. This approach gives rise to another question, namely, why the proportionality assessment always takes the economic perspective. Take this case for example, why does not the requirements stemming from the public procurement directives need to be justified and proportionate? The treaty freedoms and fundamental rights carry the same weight and are to be seen as equals, especially since the EU Charter was granted the same legal value as the Treaties. Why is this not reflected in the Court's adjudication?[125]

Advocate General Trstenjak discusses this question to some extent in her Opinion, and her words seems very promising from a worker protection perspective. She recognises the necessity of a more symmetrical approach when reconciling conflicting interests in cases where fundamental freedoms and fundamental

[122] C-271/08, *Commission* v *Germany*, para. 51.
[123] C-271/08, *Commission* v *Germany*, para. 52.
[124] C-271/08, *Commission* v *Germany*, para. 66.
[125] SYRPIS (2011), 'Reconciling Economic Freedoms and Social Rights—The Potential of Commission v Germany (Case C-271/08, Judgment of 15 July 2010)', p. 224.

rights clash. She advocates for an approach where the Treaty freedoms enjoy the same legal status as social rights and a proportionality test with a different starting point. In paragraph 190 she states that:

> A fair balance between fundamental rights and fundamental freedoms is ensured in the case of a conflict only when the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom.[126]

This 'double proportionality test'[127] means that just as a restriction of a Treaty freedom needs to be proportionate, a restriction of a fundamental right needs to be proportionate, even if this means limiting a Treaty freedom.[128] The Opinion seems thus far promising from a social perspective and has the protection of workers in mind. The actual assessment of proportionality does, however, fall short since the AG does not conduct such a 'double proportionality test' as she advocates for in her Opinion. Instead, the AG conducts a proportionality assessment where she examines whether the restriction of the Treaty freedoms is 'appropriate and necessary'. She ultimately comes to the same conclusion as the Court, namely, that the right to collective bargaining cannot justify the restriction on the Treaty freedoms resulting from the German system, since it is not proportionate. Her advocation in favour of a more symmetrical approach is thus not shown in the actual assessment of the case.[129]

Despite the Court's rather one-sided balancing test and the fact that the AG does not follow through on her idea of a 'double proportionality test', the judgment also contains some promising elements, at least in comparison to previous judgments in cases like *Viking* and *Laval*. The reference to a 'fair balance' is one example, as well as the need for reconciliation of conflicting interests. This could mean a possibility for litigants to concentrate on presenting facts that show how internal market rules restricts social rights, indicating that the social objectives behind a national policy are irreconcilable with the requirements stemming from,

[126] AG Trstenjak in C-271/08 *Commission* v *Germany*, para. 190.
[127] DE VRIES (2013), 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', p. 191.
[128] AG Trstenjak in C-271/08 *Commission* v *Germany*, para. 84.
[129] AG Trstenjak in C-271/08, *Commission* v *Germany,* EU:C:2010:183, para. 233.

for example, a directive implementing the freedom to provide services and/or freedom of establishment.[130]

3.4.2 Santos Palhota and Others

A few months after the *Commission* v *Germany* ruling, the ECJ decided the case of *Santos Palhota and Others.*[131] The case concerned the issue of posted workers, as discussed in *Laval* and *Viking*.

As to the background, the case concerned a Portuguese company posting workers to a shipyard in Belgium. The company had failed to meet some of the obligations stipulated in Belgian law concerning social documents with the objective of protecting workers' rights. On the basis of the freedom to provide services, the company challenged the national law by claiming infringement of their rights.[132] The Court of Justice had to decide on two specific obligations, namely, the obligation for employers to send a prior declaration of posting to the Belgian authorities and also the obligation to keep documents that are comparable with the Belgian individual accounts or pay slips.[133]

The Opinion of Advocate General Cruz Villalón is particularly relevant due to his call for a Union that lives up to the normative social commitments made by the EU. In the Opinion, the AG started by stressing that the case of *Santos Palhota and Others* 'brings to light once again the inherent tension between the construction of the internal market and the protection of social values'.[134] He then reiterated the premises of EU internal market law, namely, that 'The Court […] uses a broad definition of 'restriction' in relation to freedom to provide services, ranging from the actual prohibition of an activity to merely reducing its appeal.'[135] In terms of justification on the basis of overriding requirements relating to the public interests, in this case protection of workers, he stated that such a justification must be strictly interpreted as well as proportionate.[136] In the following paragraph, the AG addressed the Treaty of Lisbon and presented a reasoning that

[130] FEENSTRA (2017), 'How Can the Viking/Laval Conundrum Be Resolved? Balancing the Economic and the Social: One Bed for Two Dreams?', pp. 335-336.
[131] C515/08, *Santos Palhota and Others,* Judgment of the Court (Second Chamber) of 7 October 2010, EU:C:2010:589.
[132] AG Cruz Villalón in C-515/08, *Santos Palhota and Others*, paras 13-15.
[133] AG Cruz Villalón in C-515/08, *Santos Palhota and Others*, para. 16.
[134] AG Cruz Villalón in C-515/08 *Santos Palhota and Others*, para. 38.
[135] AG Cruz Villalón in C-515/08 *Santos Palhota and Others*, para. 49.
[136] AG Cruz Villalón in C-515/08 *Santos Palhota and Others*, para. 50.

was rather unique and promising from a social perspective. He stated that since the entry into force of the Lisbon Treaty five months earlier, it is 'necessary to take into account a number of provisions of primary social law which affect the framework of the fundamental freedoms.'[137] He explicitly referred to Article 9 TFEU, describing it as a '"cross-cutting" social protection clause' and then turned to the Union's objectives as stated in Article 3(3) TEU, emphasising that 'the construction of the internal market is to be realised by means of policies based on "a highly competitive social market economy, aiming at full employment and social progress"'.[138] In the following paragraph, the AG stated that this 'social obligation' can also be found when looking at the EU Charter and more specifically, Article 31 of the Charter. This provision provides that '[e]very worker has the right to working conditions which respect his or her health, safety and dignity.'[139] The AG's criticism and advocation for a fairer balance between the Treaty freedoms and social values followed, and in paragraph 53 he presented his thoughts on the issue:

> As a result of the entry into force of the Treaty of Lisbon, when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly. 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.[140]

In other words, AG Cruz Villalón argues that the protection of workers no longer constitutes a derogation to the Treaty freedoms due to the social, normative commitments made by the EU in the Treaty of Lisbon. This social obligation has, according to the AG, fundamentally altered the premises of EU free movement and internal market law.

[137] AG Cruz Villalón in C-515/08 *Santos Palhota and Others*, para. 51.
[138] AG Cruz Villalón in C-515/08 *Santos Palhota and Others*, para. 51.
[139] AG Cruz Villalón in C-515/08 *Santos Palhota and Others*, para. 52.
[140] AG Cruz Villalón in C-515/08 *Santos Palhota and Others*, para. 53.

However, the Court of Justice mentioned neither the social provisions introduced by the Treaty of Lisbon nor did it address the question of whether these provisions have resulted in changes to the construction of primary law. The Court instead applied the traditional approach where it found that the obligations in the Belgian law constituted a restriction to the freedom to provide services, which might be justifiable on the basis of worker protection if it is shown to be proportionate. The Court ultimately found that the obligation to send a prior declaration of posting went beyond what was necessary and was therefore not justified. The obligation to keep certain social documents, comparable to documents required in Belgium, available for the authorities and to send these at the end of a posting was seen as proportionate and hence, a justified restriction.[141]

Even though the Court did not follow the Advocate General's proposal, I believe that the AG's Opinion could function as a trajectory for future changes of the EU legal order. He showed that there is an alternative and a more balanced way of adjudicating cases in which worker protection and Treaty freedoms conflict. Professor Stephen Weatherill argues that '[there] are aspects of the Lisbon Treaty that serve to strengthen the argument that free movement law must be more attentive to (in short) non-economic objectives'. [142] However, he also states that '[t]he Lisbon Treaty does not make a qualitative change to the structure and scope of the law governing free movement',[143] indicating that we cannot automatically expect that a change of primary law, i.e. a treaty reform, will change the fundamental premises of internal market and free movement law.

Nevertheless, this does not mean that the Court cannot, if it really wants to, change its approach and management of cases where interests of the European integration project clash with, for example, worker protection. Professor Jukka Snell emphasise this by stating that '[t]he balance between the differing interests is not set in the Treaty, but needs to be established in political and judicial arenas'.[144] This shows what an important role the Court has in the strive towards a 'Social Europe', especially considering the difficulties in reaching consensus among the Member States due their diversity and deviating opinions regarding social matters.

[141] C-515/08, *Santos Palhota and Others*, paras 44, 52, 57-61.
[142] WEATHERILL (2012), 'From Economic Rights to Fundamental Rights', pp. 35-36.
[143] WEATHERILL (2012), 'From Economic Rights to Fundamental Rights', pp. 35-36.
[144] SNELL (2016), 'Economic Justifications and the Role of the State', p. 30.

3.4.3 Alemo-Herron and Others

In 2013, the Court decided the case of *Alemo-Herron and Others.*[145] Criticism soon followed due to the Court's lack of regard for the social protection of workers. However, in this case it was not a fundamental freedom that prevailed, but a fundamental right. Namely, the freedom to conduct business in Article 16 of the EU Charter.[146]

The underlying dispute concerned dynamic clauses in employment contracts referring to collective agreements, and whether they were compatible with the 'Acquired Rights Directive',[147] 'relating to the safeguarding of employees' rights in the event of transfers of undertakings […]'.[148] Alemo-Herron and his work colleagues were employed in the leisure department at the Lewisham London Borough Council, i.e. the public sector, when the department was contracted out to a private company and later sold to Parkwood, another private undertaking. A dynamic clause was contained in the employment contracts of the employees, stating:

> During your employment with [Lewisham], your terms and conditions of employment will be in accordance with collective agreements negotiated from time to time by the [NJC] ..., supplemented by agreements reached locally through [Lewisham]'s negotiating committees.[149]

This contractual term thus granted Alemo-Herron and his colleagues the terms and conditions stipulated in the collective agreement negotiated by the NJC, the local government collective bargaining body. After Parkwood acquired the leisure department, negotiations with the NJC resulted in a pay increase. Due to Parkwood being a private undertaking, it did not participate (or had the possibility of participating) in the negotiations. Parkwood therefore claimed that the newly negotiated terms, granting an increase in pay, was not binding upon them and refused to pay the increased salary. Consequently, Alemo-Herron and his

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145 C-426/11, *Mark Alemo-Herron and Others* v *Parkwood Leisure Ltd***,** Judgment of the Court (Third Chamber) of 18 July 2013, EU:C:2013:521.
146 C-426/11, *Alemo-Herron and Others,* para. 36.
147 BARTL & LEONE (2015), 'Minimum harmonisation and Article 16 CFR: Difficult Times Ahead for Social Legislation?', p. 1.
148 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ 2001 L82/16 (Hereinafter referred to as the 'Acquired Rights Directive').
149 C-426/11, *Alemo-Herron and Others,* para. 10.

colleagues brought proceedings against Parkwood in order to get the Court to recognise the increase in salary.[150]

The question for the national court to decide was how the abovementioned contractual term should be interpreted. Parkwood argued for a 'static interpretation' of the clause, which incorporates the collective agreement *in force* at the time of the transfer, whereas Alemo-Herron and his colleagues argued for a 'dynamic interpretation', incorporating also future collective agreements as negotiated by the NJC. The national court ultimately found that the contractual term constituted a dynamic clause.

Since the Acquired Rights Directive harmonised certain aspects of transfers of undertakings on the basis of worker protection, an interpretation by the ECJ was subsequently necessary when the national court was uncertain if dynamic clauses were compatible with the Directive. In the case of *Werhof,*[151] the ECJ had provided an interpretation of Article 3(1) of the Acquired Rights Directive, which stated that employer's rights should be transferred to the new employer at the event of a transfer. In *Werhof*, the Court found that Article 3(1) does not preclude the transferee from not being bound by dynamic clauses. In other words, the Directive does not require the new employer to be bound by a dynamic clause, thus, allowing for a static interpretation per se. The ambiguity of the *Werhof* ruling led to diverging opinions of its meaning, which ultimately resulted in the dispute between Alemo-Herron, his colleagues and Parkwood.[152]

Since the Acquired Rights Directive was a minimum harmonisation directive and thus, allowed Member States to introduce higher levels of protection[153] and had the objective 'to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded',[154] the logical answer would be that the Directive allows dynamic clauses. Nevertheless, the ECJ found that dynamic clauses were incompatible with the Acquired Rights Directive and based this conclusion on two things. Firstly, dynamic clauses would undermine the fair balance between competing interests which the Directive aimed to achieve. Secondly, dynamic clauses would 'adversely affect the

150 C-426/11, *Alemo-Herron and Others,* paras 13, 19.
151 C-499/04, *Werhof*, Judgment of the Court (Third Chamber) of 9 March 2006, EU:C:2006:168.
152 C-426/11, *Alemo-Herron and Others,* para. 19.
153 Article 8 of the Acquired Rights Directive.
154 Recital 3 of the Acquired Rights Directive.

very essence of the transferee's freedom to conduct a business'[155] since an undertaking, such as Parkwood, was not able to participate in the negotiations.

The case of *Alemo-Herron and Others* contains several interesting aspects that have been discussed extensively by legal scholars. Such critical analysis usually revolves around three components of the Court's reasoning, which Professor Marija Bartl and Candida Leone summarised well in their research paper:

1) reinterpreting the Directive's telos, in order to overcome the "employee interest" clause;
2) down-playing the relevance of the Directive's minimum harmonisation approach by reference to the Charter;
3) introducing a normative standard – the freedom to conduct business and, with it, freedom of contract.[156]

These three steps can be deduced from the Court's reasoning in *Alemo-Herron* and provide a clear example of the Court's approach towards the relationship between the internal market and the protection of workers. In the following, I will analyse the case on the basis of these three components in order to shed some light on why the case of *Alemo-Herron* is problematic from a worker protection perspective.

3.4.3.1 Fair balance

The first step of the Court's reasoning concentrated on reinterpreting the objective of the Acquired Rights Directive to better fit the Court's desired outcome. As stated above, the Directive was aiming at safeguarding the rights of employees in the event of a transfer and the rationale was consequently to function as a counterweight by ensuring a minimum level of worker protection.[157] However, the Court presented an alternative objective and argued that:

> Directive 77/187 does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a *fair balance* between the interests of those employees, on the one hand, and those of the transferee, on the other. More particularly, it makes clear that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations.[158]

[155] C-426/11, *Alemo-Herron and Others*, para. 36.
[156] BARTL & LEONE (2015), 'Minimum harmonisation and Article 16 CFR: Difficult Times Ahead for Social Legislation?', p. 2.
[157] BARTL & LEONE (2015), 'Minimum harmonisation and Article 16 CFR: Difficult Times Ahead for Social Legislation?', p. 2-3.
[158] C-426/11, *Alemo-Herron and Others*, para. 25. [Emphasis added]

By this statement, the Court changed the perception of what the Directive's objective entailed. Bartl and Leone states that the result of this reinterpretation was that 'the balance should no longer be struck on a structural level, where legislation tries to offset certain socio-economic changes, but within the Directive itself'[159] and hence, between employees and employers. The Court argued that '[s]ince the transfer is of an undertaking from the public sector to the private sector, the continuation of the transferee's operations will require significant adjustments and changes, given the inevitable differences in working conditions that exist between those two sectors.'[160] This was used to legitimise the Court's finding that dynamic clauses undermined the fair balance between the employer and the employees.

As stated above, the Directive harmonised rules on worker protection in a specific situation and the objective was thus to protect the rights of such workers. By using the notion of a 'fair balance' as an interpretative basis, the Court disregarded this objective and chose to safeguard the contractual freedom of the employer at the expense of workers. Professor Stephen Weatherill's case note describes the doings of the Court by stating that '[i]t is a radical twisting of the rationales behind the EU's intervention. It priorities the flexibility of employers in a situation where what is plainly at stake is precisely damage to the interests of employees.'[161] Furthermore, Weatherill argues that the Court, by '[c]laiming to pursue a fair balance but not articulating what weightings apply on that balance where employee and employer interests collide, it has in fact preferred a distinctively pro-employer interpretation of an ambiguous text'.[162]

Notwithstanding the inaccuracy of reinterpreting the objective of the Directive, the search for a 'fair balance' sounds like a promising standard from a worker protection perspective. Especially considering previous cases in which the Court prioritised interests of the European integration project over social values and rights.[163] However, when the Court decided the case of *Alemo-Herron*, it paid no regard to the interests of the employers. Instead it focused on safeguarding the private company's contractual freedom and provided a ruling that demonstrates, what I believe to be, nothing but a fair balance.

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159 BARTL & LEONE (2015), 'Minimum harmonisation and Article 16 CFR: Difficult Times Ahead for Social Legislation?', p. 3.
160 C-426/11, *Alemo-Herron and Others*, para. 27.
161 WEATHERILL (2014), 'Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of 'freedom of contract', p. 174.
162 WEATHERILL (2014), 'Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of 'freedom of contract', p. 174.
163 For example *Laval*, *Viking*, *Rüffert*, *Commission* v *Luxembourg* etc.

3.4.3.2 Minimum harmonisation

The second step of the Court's reasoning is connected to a discussion about the meaning and effects of minimum harmonisation. The case of *Alemo-Herron* identifies a constitutional issue, namely, whether national measures going beyond the minimum level of a directive should be considered to fall within the scope of EU law, in particular, the EU Charter?[164]

The ECJ believed that the answer to this question was affirmative and consequently assessed the national measure's compatibility with fundamental rights, more specifically, the freedom to conduct business.[165] This line of action was questionable since a fundamental rights violation not automatically brings a question within the scope of EU law, in contrast to a violation of the Treaty freedoms.[166]

Bartl and Leone discuss this aspect of the ruling in their article and emphasise the peculiarity of conducting a fundamental rights review of protective measures adopted within the Member States' area of legislative discretion, i.e. above the EU minimum level. This entails that such measures would fall within the scope of EU law, an assertion which the Court did not substantiate further in the *Alemo-Herron* ruling. However, what is clear is that when a Member State introduces protective measures above the minimum level of a EU directive, such policies might fall within the scope of EU law and accordingly, within reach of the ECJ. According to Bartl and Leone, this constitutes an expansion of the ECJ's competence in regard to fundamental rights review, at the expense of national autonomy and the legitimacy of minimum harmonisation as a legal instrument.[167]

3.4.3.3 Freedom to conduct business

The final step of the Court's reasoning relates to the normative standard used in their fundamental rights review. The Court started by stating that an interpretation of the Acquired Rights Directive must be in compliance with the fundamental rights of the EU Charter of Fundamental Rights. In this case, the right

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[164] BARTL & LEONE (2015), 'Minimum Harmonisation after *Alemo-Herron*: The Janus Face of EU Fundamental Rights Review', p. 146.
[165] Article 16 of the EU Charter.
[166] BARTL & LEONE (2015), 'Minimum Harmonisation after *Alemo-Herron*: The Janus Face of EU Fundamental Rights Review', p. 146.
[167] BARTL & LEONE (2015), 'Minimum harmonisation and Article 16 CFR: Difficult Times Ahead for Social Legislation?', p. 7.

to conduct business, incorporating the freedom of contract, which can be found in Article 16 of the EU Charter.[168]

In its judgment, the Court presented what it believed to be the 'essence' of the right to conduct business. The Court argued that 'the transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity'.[169] Since Parkwood was not able to partake in the collective bargaining process, the right would be 'seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business'[170] if EU law allowed dynamic clauses to be enforceable. This assertion becomes more interesting when compared to the Advocate General Cruz Villalón's Opinion, which contradicts the Court's ruling in this aspect. He stated that the Court's case law has not elaborated on the actual content of the freedom to conduct business and concluded that 'the freedom to conduct a business protects economic initiative and the ability to participate in a market, rather than the actual profit, seen in financial terms, that is earned in that market'.[171]

From a worker protection perspective, this ruling is not only problematic in respect of its outcome, i.e. the unenforceability of dynamic clauses against a new employer after a transfer, but also *how* the Court came to this conclusion. The Court did not examine whether there are other interests and rights that could potentially function as a justification of the limitation of the employer's freedom to conduct business. The value of protecting the rights of workers, such as Alemo-Herron and his colleagues, was overlooked which consequently made it possible for the Court to reach its conclusion. In addition, the Court did not conduct a balancing exercise where it weighed different interests against each other, nor did it apply a test of proportionality. Thus, the Court did not utilise any of the available tools that the Court is supposed to use in its legal reasoning when doing a fundamental rights review.[172]

Furthermore, the judgment in the case of *Alemo-Herron* suggests that a fundamental rights review does not automatically lead to socially sensitive outcomes.

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168 C-426/11, *Alemo-Herron and Others* paras 30-31.
169 C-426/11, *Alemo-Herron and Others*, para. 33.
170 C-426/11, *Alemo-Herron and Others*, para. 35.
171 AG Cruz Villalón in C-426/11, *Alemo-Herron and Others*, para. 51.
172 BARTL & LEONE (2015), 'Minimum harmonisation and Article 16 CFR: Difficult Times Ahead for Social Legislation?', p. 8.

The reconceptualisation of capitalist principles as fundamental rights becomes a powerful tool to promote freedom of contract and safeguard private parties' commercial freedom and flexibility, at the expense of worker protection.[173] Weatherill argues that:

> Alemo-Herron […] stands not for a 'social softening' of EU law nor even for (my preferred interpretation) a re-affirmation of pre-existing patterns of sensitive 'balancing'. Instead, and in quite the opposite direction, it stands for a newly energised deregulatory thrust driven by Article 16 of the Charter.[174]

According to Weatherill, inherent in the *Alemo-Herron* ruling is a legitimate legal basis for striking down social regulations protecting workers at the national level and thus, to pursue further deregulation which is in the interest of the internal market.

3.4.4 Elektrobudowa

In 2015, the Court decided the case of *Elektrobudowa*[175] and yet again provided an interpretation of the Posted Workers Directive. The case concerned Polish workers posted to Finland, who had not received the minimum wage as established by relevant collective agreement. The workers subsequently assigned their wage claims to the trade union in Finland in order to recover the amount that they believed to have the right to. The Polish company disagreed and argued that the action should be dismissed based on a prohibition of the assignment of wage claims, pursuant to Polish law. The case eventually reached the Court of Justice to which the national court asked for guidance of what the employer could be obliged to pay their workers.[176]

The Court of Justice found that the posted workers could assign their wage claims to a trade union in the host country, if the law of that country allowed this, notwithstanding the legality of such an action in the sending country. The ECJ thus allowed Finnish trade unions to get involved in order to safeguard the

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[173] WEATHERILL (2014), 'Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of 'freedom of contract', p. 176.
[174] WEATHERILL (2014), 'Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of 'freedom of contract', p. 179.
[175] C- 396/13, *Sähköalojen ammattiliitto ry* v *Elektrobudowa Spółka Akcyjna*, Judgment of the Court (First Chamber) of 12 February 2015, EU:C:2015:86.
[176] C- 396/13, *Elektrobudowa*, paras 12-16.

interests of posted workers.[177] The Court's decision was consequently beneficial for the Polish workers and the protection of them.

Another positive aspect from a worker protection perspective was the interpretation of Article 3(1) of the Posted Workers Directive. In its ruling, the Court clarified that Article 3(1) of the Directive clearly stipulates that the meaning of the concept of 'minimum rates of pay' is governed by the law of the host State, i.e. Finland, even if the employment relationship in other cases is governed by the law of the sending State.[178] In addition to this, the ECJ had to decide whether certain elements of pay, as prescribed by Finnish collective agreements, could constitute 'minimum pay'. The Court gave a broad interpretation of what could be included in the notion of 'minimum pay' and found that host States could, when calculating the minimum wage, categorise workers into pay groups on the basis of experience, qualifications, relevant training and what type of work it concerned. The Court also held that the 'minimum wage' includes a daily allowance and compensation for daily travelling time. Accommodation costs and meal vouchers were not regarded to fall within the 'minimum wage', but should not to be subtracted from it either.[179]

The judgment in the case of *Elektrobudowa* has been considered to reflect an important change in the Court's previously criticised approach towards national labour regimes. In contrast to the case of *Laval*, the Finnish trade union received the Court's full support in respect of its involvement.[180] However, when one examines the reasoning of the Court, and in particular the Opinion of Advocate General Wahl, the alleged shift in approach becomes questionable. This is best shown by reference to AG Wahl's *obiter dictum* in respect of the Finnish system, which was not the subject matter of the proceedings. He stated that:

> […] a system such as the Finnish one in which (domestic) undertakings may 'circumvent' the applicability of the universally applicable collective agreement by concluding another — possibly more specific and even, in some cases, less favourable to the workers — collective agreement does not seem to be entirely unproblematic from the perspective of the provision of services across national borders.[181]

[177] C- 396/13, *Elektrobudowa*, para. 71.
[178] C- 396/13, *Elektrobudowa*, para. 23.
[179] C- 396/13, *Elektrobudowa*, para. 71.
[180] GARBEN (2017), 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union', p. 38.
[181] AG Wahl in C- 396/13, *Elektrobudowa*, para. 63.

This statement shows that the protection of fair competition between foreign and domestic undertakings was the fundamental concern at issue here, similarly to the case of *Laval*. Consequently, it is questionable whether the Court has changed its underlying rationale and approach in cases where the protection of workers conflict with the interests of the European integration project.

Despite this, the Court's ruling in the case of *Elektrobudowa* demonstrates 'great consideration for the social dimension of the issue'[182], as stated by Pieter Pecinovsky, and indicates a softened stance towards protective labour standards at the national level which should not be disparaged.

3.4.5 Regiopost

In the end of 2015, the Court of Justice delivered its judgment in *RegioPost.*[183] The case concerned public procurement and the enforceability of national labour standards in cross-border situations.

The town of Landau, Germany, had put out a call for tenders at the European level regarding a public contract connected to postal services. In the contract notice it was stated that a tender needed to comply with Article 3 of the regional law ('the regional provision') to be eligible for the contract award.[184] The regional provision stipulated that 'public contracts may be awarded only to undertakings which, at the time of submitting their tender, undertake in writing to pay their staff, for performing the service, wages of at least EUR 8.50 gross per hour (minimum wage) […]'.[185] If such a written declaration was not submitted, the tender would be excluded from the selection process. At the time of the proceedings, there was no general law or collective agreement in Germany that determined the mandatory minimum wage for the workers.

In the present dispute, RegioPost had failed to submit a written declaration and was consequently excluded.[186] RegioPost challenged this decision and claimed that the obligation infringed on their freedom to provide services. The German court submitted a request for a preliminary ruling to the Court of Justice, asking

[182] PECINOVSKY (2016), 'Evolutions in the Social Case Law of the Court of Justice: The Follow-Up Cases of the Laval Quartet: ESA and RegioPost', p. 305.
[183] C-115/14, *RegioPost GmbH & Co. KG* v *Stadt Landau in der Pfalz,* Judgment of the Court (Fourth Chamber) of 17 November 2015, EU:C:2015:760.
[184] C-115/14, *RegioPost,* paras 19-22.
[185] C-115/14, *RegioPost,* para. 13.
[186] C-115/14, *RegioPost,* paras 25-26.

whether the regional provision was in conformity with EU law. Specifically, Article 26 of Directive 2004/18, which granted Member States the possibility to 'lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law'.[187]

Thus, the Court of Justice had to assess whether the regional provision was 'compatible with Community law' and, in particular, Article 56 TFEU (freedom to provide services) and Article 3(1) of the Posted Workers Directive. Article 3(1) provided that host countries need to ensure that companies guarantee their workers the terms and conditions of employment in respect of certain matters, which are laid down by 'law, regulation or administrative provision' and/or 'collective agreements or arbitration awards which have been declared universally applicable' in the host state. 'The minimum rates of pay' constituted one of these matters.[188]

The ECJ found that the regional provision constituted a 'law' that stipulated 'a minimum rate of pay' within the meaning of Article 3(1) of the Posted Workers Directive. This interpretation was, according to the Court, in line with the freedom to provide services. The ECJ also clarified that even though a wage requirement can constitute a restriction to the Treaty freedoms, the objective of protecting workers can function as a justification.[189] The wage requirement in the regional provision was thus in conformity with EU law.[190]

When providing arguments to support its finding, the Court made several references to *Rüffert*. Since the Court had reached a different conclusion in *Rüffert*, i.e. the wage requirement had not been compatible with EU law, it focused on emphasising the differences between the cases in order to justify its decision and avoid changing its stance. In respect of this, the Court stated:

> […] [A]lthough the Court concluded, in the context of the examination of the national measure at issue in the case that gave rise to that judgment in the light of Article 56 TFEU, that that measure could not be justified by the objective of the protection of workers, it based that conclusion on *certain characteristics specific*

[187] Article 26 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.
[188] Article 3(1) of Posted Workers Directive.
[189] C-115/14, *RegioPost,* paras 67, 70.
[190] C-115/14, *RegioPost,* para. 88.

> *to that measure*, which clearly distinguish that measure from the national measure at issue in the main proceedings.[191]

In *Rüffert*, the wage requirement was laid down in a sectoral collective agreement that only applied to the construction sector and public contracts. It had not been declared universally applicable and exceeded the minimum pay stipulated by law. Thus, it constituted an unjustified restriction to the freedom to provide services. In *RegioPost*, the wage requirement was provided for in a regional law, it was generally applicable to public contracts in the specific region and there was no general law or collective agreement that determined the mandatory minimum wage.[192]

It has been argued that the ruling in *RegioPost* reflects a shift in the Court's previously restrictive approach towards national measures that could restrict the interests of the European integration project, i.e. the Treaty freedoms.[193] In *RegioPost*, the Court reiterated that the protection of workers constitutes a possible justification but since the wage requirement only applied to public contracts, it was reasonable to think that the Court would come to the same conclusion as in *Rüffert*, i.e. that this requirement was not effective to protect workers. However, the ECJ stated that it did not matter that the obligation to pay a minimum wage was only applicable to public contracts, since the condition of universal application was only relevant when wage requirements are laid down in collective agreements, as stated in Article 3(1) of the Posted Workers Directive.[194] Consequently, the assertion that a wage requirement was not an effective measure to protect workers because it was only applicable to the public sector, as argued by the Court in *Rüffert*, was not used in the case of *RegioPost*.

This observation indicates that the Court has adjusted its restrictive approach as established in *Rüffert*. Professor Anne Davies argues that the ruling in *RegioPost* 'suggests some, albeit rather limited, softening in the Court's approach towards

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191 C-115/14, *RegioPost,* para. 73. [Emphasis added]
192 GARBEN (2017), 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union', pp. 38-39.
193 DAVIES (2018), 'How has the Court of Justice changed its management and approach towards the social acquis?', p. 166; GARBEN (2017), 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union', pp. 38-39 and FEENSTRA (2017), 'How Can the Viking/Laval Conundrum Be Resolved? Balancing the Economic and the Social: One Bed for Two Dreams?', p. 322.
194 C-115/14, *RegioPost,* para. 63.

social justifications for infringements of the free movement rules'.[195] This is supported by Professor Sacha Garben who states that "even if the extent to which Laval, Rüffert, Luxembourg […] have been overturned is open to discussion, the permissive signal to Member States and their courts is a strong one'.[196] However, as both Davies and Garben implies, the Court's ruling should not be expected to fundamentally change the Court's restrictive approach towards national labour standards, as established in its case law. Especially considering the fact that the case of *RegioPost* concerned a minimum wage requirement laid down in a regional law. Consequently, the ruling of *Rüffert* is still relevant, at least in respect of the legal effects of collective agreements in a situation concerning posted workers.

3.4.6 AGET Iraklis

The judgement in *AGET Iraklis*[197] was delivered in the end of 2016 and concerned Greek legislation with a worker protection objective in the context of collective redundancies.

The disputed law required employers to reach an agreement with representatives of the workers or to receive authorisation from the competent authority before a collective redundancy, i.e. dismissing several employees.[198] AGET Iraklis, a Greek company, planned collective redundancies and since it had not reach an agreement with the workers' representatives it submitted a request for authorisation from the relevant authority. When the request was denied on the basis of it being insufficiently justified, AGET Iraklis launched an action for annulment of that decision.

The ECJ was subsequently asked to examine whether the national measure, requiring authorisation by the competent authority in the absence of an agreement with the representatives of the workers, complied with EU law. The Court started out by interpreting Directive 98/59[199] and concluded that Member States

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195 DAVIES (2018), 'How has the Court of Justice changed its management and approach towards the social acquis?', p. 166.
196 GARBEN (2017), 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union', pp. 39-40.
197 C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis)* v *Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, Judgment of the Court (Grand Chamber) of 21 December 2016, EU:C:2016:972.
198 C-201/15, *AGET Iraklis*, para. 24.
199 Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies.

have the possibility of adopting protective legislation, such as the legislation at issue in the proceedings, since the Directive only partially harmonise the situation of projected collective redundancies. However, such national rules may not deprive the Directive, in particular Articles 2 through 4, of their 'practical effect'.[200] This would be the case if 'any actual possibility for the employer to effect such collective redundancies were, in practice, ruled out' by the Greek legislation.[201] Consequently, Directive 98/59 did not preclude protective legislation like the one at issue in the proceedings, provided that it did not deprive the Directive's provisions of their practical effect.[202]

The Court of Justice then turned to the question of whether the national legislation restricted the freedom of establishment, as claimed by AGET Iraklis. It provided a description of what the exercise of the freedom of establishment entailed, stating that:

> [T]he freedom to determine the nature and extent of the economic activity that will be carried out in the host Member State, in particular the size of the fixed establishments and the number of workers required for that purpose, and also […] the freedom subsequently to scale down that activity or even the freedom to give up, should it so decide, its activity and establishment.[203]

After considering the Greek legislation's restrictiveness the ECJ concluded that it constituted a 'serious obstacle to the exercise of freedom of establishment in Greece'.[204]

Nevertheless, a national regime can be allowed if it is *justifiable*, i.e. 'justified by overriding reasons in the public interest'[205] and *proportionate*, i.e. 'appropriate for ensuring the attainment of the objective in question and not go beyond what is necessary to attain that objective'.[206] In respect of the legislation's justifiability, the Court emphasised that the objective of protecting workers is a possible ground for justification.[207] An uncommon but beneficial reasoning followed where the ECJ made several explicit references to the social provisions of the Treaty. It highlighted the social objectives enshrined in Article 3(3) TEU and stressed that the EU has a twofold purpose. An economic purpose focused on

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[200] C-201/15, *AGET Iraklis,* paras 34-37.
[201] C-201/15, *AGET Iraklis,* para. 38.
[202] C-201/15, *AGET Iraklis,* para. 44.
[203] C-201/15, *AGET Iraklis,* para. 53.
[204] C-201/15, *AGET Iraklis,* para. 57.
[205] C-201/15, *AGET Iraklis,* para. 61.
[206] C-201/15, *AGET Iraklis,* para. 61.
[207] C-201/15, *AGET Iraklis,* para. 73.

establishing an internal market *and* a social purpose with the aim to secure a sustainable development of the Union and Europe at large.[208] The Court continued to state that this twofold purpose entails that the Treaty freedoms have to be balanced against the social objectives[209] and underlying social policy measures.[210] The Court also emphasised that the EU has an obligation to 'contribute to a high level of employment' and that this objective needs to be considered when formulating and implementing the EU's policies and activities, as provided in Article 147 TFEU. In addition, the ECJ referred to the horizontal social clause in Article 9 TFEU, which requires the EU to consider social issues such as the 'promotion of a high level of employment' and 'guarantee of adequate social protection' when defining and implementing its policies and activities. [211]

Furthermore, the Court reiterated that a justification must comply with fundamental rights enshrined in the EU Charter. In this case, the relevant right was the freedom to conduct a business.[212] The Court held that the Greek legislation constituted a 'interference in the exercise of the freedom to conduct business and, in particular, the freedom of contract'.[213] However, limitations can be accepted if it is 'provided for by law, respect the essence of those rights and freedoms and, in accordance with the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others',[214] as provided in Article 52(1) of the EU Charter. The Court made a reference to Article 30 in which it is stated that '[e]very worker has the right to protection against unjustified dismissal the right to protection'.[215]

The Court then proceeded to the question of proportionality and whether the national legislation was justified, despite its restrictive effect to the freedom of establishment and freedom to conduct business. In respect of this, the Court emphasised that the national legislation must 'seek to reconcile and to strike a

[208] C-201/15, *AGET Iraklis,* para. 76.
[209] According to Article 151 TFEU this includes 'the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.
[210] C-201/15, *AGET Iraklis,* para. 77.
[211] C-201/15, *AGET Iraklis,* para. 78.
[212] C-201/15, *AGET Iraklis,* paras 65-66.
[213] C-201/15, *AGET Iraklis,* para. 69.
[214] C-201/15, *AGET Iraklis,* para. 70.
[215] C-201/15, *AGET Iraklis,* para. 89.

fair balance' between the protection of workers and the employer's right to freedom of establishment and freedom to conduct a business.[216] The Court ultimately found that the Greek legislation was not justified due to a lack of proportionality and thus infringed Article 49 TFEU and Article 16 of the EU Charter.[217] The Court based this conclusion primarily on the fact that the legal criteria in the Greek legislation used by the authority to oppose collective redundancies was to imprecise and general.[218]

As discussed above, the ruling in *Alemo-Herron* generated a discussion about the Court's libertarian adjudication and disregard of the protection of workers. In *Alemo-Herron*, it seemed like the Court was willing to do anything in its power to secure the employer's commercial freedom. This is why the advocates of 'Social Europe' was hoping for a revised approach reflecting a more socially sensitive Court in *AGET Iraklis*. Whether the Court struck a fairer balance in *AGET Iraklis* is up for discussion.[219] In comparison to *Alemo-Herron*, the judgment has been considered to show a significant higher level of fairness. Due to, *inter alia*, the Court's conclusion that the Greek legislation did not affect the essence of the freedom to conduct business, contrary to its finding in *Alemo-Herron*.[220] It also recognised that the Greek labour regime could *in principle* be regarded as a proportionate measure and thus, comply with the freedom of establishment and freedom to conduct business.[221]

According to Professor Stefano Giubboni, the ruling of *AGET Iraklis* demonstrates how national labour standards can be used to access the market, as well as a judicial tool to safeguard the commercial freedom and undisrupted activity of employers within that market.[222] To strike down national labour regimes using a Treaty freedom is far from novel. However, to interpret this freedom in light of the freedom to conduct business has been considered a new and innovative tool used by the Court to scrutinise any measure that constitute an obstacle to employers' contractual freedom. By conducting a fundamental rights review, the

[216] C-201/15, *AGET Iraklis,* para. 90.
[217] C-201/15, *AGET Iraklis,* paras 102-103.
[218] C-201/15, *AGET Iraklis,* para. 99.
[219] MARKAKIS (2017), 'Can Governments Control Mass Layoffs by Employers? Economic Freedoms vs Labour Rights in Case C-201/15 AGET Iraklis', p. 734.
[220] C-201/15, *AGET Iraklis,* para. 88.
[221] C-201/15, *AGET Iraklis,* para. 94.
[222] GIUBBONI (2018), 'Freedom to conduct a business and EU labour law', pp. 188-189.

Court try to reconceptualise their underlying economic objective in order to legitimise its decisions.[223]

Nevertheless, *AGET Iraklis* is not all bad news for Social Europe. The ECJ emphasised that the Union, in addition to an economic purpose, has a social purpose and made several explicit references to the social provisions of the Treaties. This is very rare and should not be neglected. However, Professor Dagmar Schiek stresses that the references to social policy objectives in the judgment loses any potential impact since they are not connected to their 'fundamental rights basis', which leaves the superiority of Article 16 of the EU Charter unquestioned.[224] The Court did refer to Article 30 of the EU Charter, enshrining the right to protection in the event of unjustified dismissal, but stopped at a mere reference. Despite this, it indicates that the Court tried to consider whether there were other rights at stake. An element clearly lacking in *Alemo-Herron*.[225]

Furthermore, the Court left it to the national court to decide whether the Greek legislation would deprive the Directive of its practical effect, which is beneficial since social concerns are often better examined on the national level. The court also recognised that the Member States have a 'broad discretion when choosing the measures capable of achieving the aims of their social policy',[226] a positive acknowledgement granting Member States some leeway when formulating their policies. The Court's finding that the Greek legislation was too imprecise and general should not receive significant criticism since the intelligibility of legal criteria is important from the perspective of ensuring legal certainty. The Court also applied a less strict test of proportionality, in comparison to AG Wahl who also questioned the Greek legislation's appropriateness. Lastly, the judgment in *AGET Iraklis* does not prohibit Greece and other Member States to adopt a similar system, compatible with EU law.[227]

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[223] GIUBBONI (2018), 'Freedom to conduct a business and EU labour law', p. 183 and ROBIN-OLIVER (2018), 'Fundamental Rights as a New Frame: Displacing the Acquis', pp. 108-109.
[224] SCHIEK (2017), 'Towards More Resilience for a Social EU - the Constitutionally Conditioned Internal Market', p. 23.
[225] MARKAKIS (2017), 'Can Governments Control Mass Layoffs by Employers? Economic Freedoms vs Labour Rights in Case C-201/15 AGET Iraklis', p. 734.
[226] C-201/15, *AGET Iraklis,* para. 81.
[227] MARKAKIS (2017), 'Can Governments Control Mass Layoffs by Employers? Economic Freedoms vs Labour Rights in Case C-201/15 AGET Iraklis', pp. 734-735.

4 The rise or demise of 'Social Europe'

4.1 Introduction

Ever since 1957 when the Treaty of Rome was signed, the European integration project's primary objective has been to establish a common market. Consequently, libertarian values such as commercial freedom, free trade, undistorted competition and freedom of movement was given a superior position in the EU's constitutional foundation in order to facilitate economic integration.[228] In recent years, we have witnessed an increasing criticism of the EU, both in respect of the interests it represents and the policies it produces. The criticism revolves around the claim that the Union suffers from a 'social deficit' with an apparent disregard for social concerns and a disruptive effect on national regimes in the domains of employment and social policy. From this criticism, a call for an improved and more social Europe has emerged and the notion of 'Social Europe' has since then guided the EU in its endeavour to reorient the European integration project. One of the main underlying reasons behind the EU's 'social deficit' is the inherent tension between social values, such as worker protection, and the interests of the European integration project. On account of this, the EU has made several normative commitments to guarantee that the Union moves beyond economic integration and also respects and promotes social values. Such commitments are primarily made through the Treaty of Lisbon.[229]

The inherent tension between the interests of the European integration project and the EU's social aspirations give rise to disputes which need to be resolved through adjudication. Professor Jukka Snell states that "[t]he balance between the differing interests is not set in the Treaty, but needs to be established in political and judicial arenas'.[230] Thus, it is up to the Court of Justice to interpret EU law and strike a balance between conflicting interests.

In the following section, I intend to reiterate some of my conclusions from the case law study conducted in the previous chapter. By doing this, I will be able to

[228] GRÖNING & ZETTERQUIST (2010), *EU: konstitution, institution, jurisdiktion,* p. 27.
[229] See section 2.4.
[230] SNELL (2016), 'Economic Justifications and the Role of the State', p. 30.

analyse if the Court's approach has shifted due to the introduction of social provisions in the Lisbon Treaty and ultimately answer my second research question. Namely, *Does the Court of Justice's adjudication reflect a commitment towards the realisation of 'Social Europe'?*

4.2 Pre-Lisbon

The legitimacy of the European Union depends on the social compromise agreed upon in the early days of the European integration project. Embodied in this compromise is the idea that national labour systems and its protective functions should not be affected by the Union's market building efforts. This compromise constitutes a crucial component in the constitutional framework of the Union and was necessary in order to turn the dreams of a united and prosperous Europe into reality.[231]

By applying a particular sense of caution in cases where national labour standards conflicted with interests of the European integration project, the social compromise was respected by the Court of Justice for many years. The Court focused on ensuring undistorted competition and freedom of movement but made sure to avoid any unnecessary disruption of labour systems at the national level. By applying this method of adjudication, the Court managed to tear down national barriers and promote the interests of the European integration project without upsetting the initial social compromise. Cases like *Rush Portuguesa* and *Albany* are good examples of the Court's delicate balancing act in its early case law.[232]

The balance struck in *Rush Portuguesa* indicates that the Court was careful not to upset the social compromise and dedicated to finding an outcome that preserves the autonomy of the Member States and the protection of workers while, at the same time, safeguarding the undertaking's freedom to provide services. This was accomplished by allowing the host country to extend its protective labour standards to workers posted to their territory but precluding the country to restrict the undertaking's possibility to take on a contract in that Member State. Same goes for *Albany*, in which collective agreements were excluded from the scope of a Treaty provision regulating competition. However, the Court also made clear that the provisions regulating abuse of dominant position still applied and

[231] See section 2.2.
[232] GIUBBONI (2018), 'Freedom to conduct a business and EU labour law', pp. 178-179.

that the pension fund needed to comply with these rules.[233] Once again, the Court struck a balance between competing interests which I believe to be reasonable and that reflect a socially sensitive Court.

In 2007 and 2008, the Court's approach towards the relationship between the interests of the European integration project and worker protection shifted. The judgments in *Laval*, *Viking*, *Rüffert* and *Commission* v *Luxembourg*, also referred to as the 'Laval quartet',[234] reflect a Court that was prone to protect the supremacy of the Treaty freedoms, at the expense of national labour regimes and social rights.[235]

Legal scholars have discussed and criticised these cases extensively and their opinions often coincide in terms of the Court's market-friendly approach. One may argue that these cases reflect a Court that was biased in favour of the commercial freedom of undertakings, to the detriment of workers' rights. This assertion is often explained by reference to certain elements of *Laval* and *Viking*. Namely, the application of the Treaty freedoms in horizontal situations, i.e. between trade unions and foreign undertakings, the broad interpretation of what could constitute a restriction to the Treaty freedoms and the superiority of these freedoms over the right to take collective action.[236]

The right of collective action was recognised as a fundamental right in the EU legal order in both *Laval* and *Viking*, an acknowledgement that should not be disregarded. However, it has been argued that despite this recognition, the social right lacks teeth and was merely a rhetorical move by the Court to ensure that it is exercised in accordance with EU law.[237] In respect of this, Professor Azoulai states that:

> Recognition of the right to strike implies, in principle, conferring on collective actions a certain judicial immunity. On the contrary, *power implies control.* And it

[233] See section 3.3.1.
[234] The 'Laval quartet' is used in reference to four cases, namely, *Laval*, *Viking*, *Rüffert* and *Commission* v *Luxembourg*. See for example SCHIEK (2017), 'Towards More Resilience for a Social EU - the Constitutionally Conditioned Internal Market', p. 3.
[235] FEENSTRA (2017), 'How Can the Viking/Laval Conundrum Be Resolved? Balancing the Economic and the Social: One Bed for Two Dreams?', pp. 325-326.
[236] GARBEN (2017), 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union', pp. 33-34 and FEENSTRA (2017), 'How Can the Viking/Laval Conundrum Be Resolved? Balancing the Economic and the Social: One Bed for Two Dreams?', p. 310.
[237] GIUBBONI (2018), 'Freedom to conduct a business and EU labour law', p. 180.

> involves the responsibility to take account of the interests of the undertakings and those of workers from other Member States.[238]

Despite the recognition of the right to take collective action as a fundamental right, the Court clarified that this right needs to be examined in light of the Treaty freedoms. The Court subsequently found that the action in the present case constituted a restriction to the Treaty freedoms and thus, needed to be both justifiable and proportionate in order to be lawful.[239] The consequences of this is, to put it in plain language, that workers who want to engage in collective action must justify their 'infringement' of the economic freedom of employers as guaranteed by the Treaty freedoms, by showing that it is an appropriate line of action, which does not go beyond what is necessary to protect the interests of workers.[240] Consequently, collective action is to be regarded as an action of last resort. When considering the fact that the power of using collective action in a bargaining situation depends on the potential economic loss that such action may cause the employer, it becomes clear that the Court chose to guarantee the employer's economic freedom by reinforcing the superiority of the Treaty freedoms, at the expense of worker protection.[241] Furthermore, the Court emphasised the need to strike a balance between the Treaty freedoms and worker protection, since the Union has 'not only an economic but also a social purpose'.[242] However, when the Court actually struck that balance, it left only a small margin of appreciation for the trade unions to justify their collective actions.[243]

In *Rüffert*, the Court found that a wage requirement, established by a collective agreement, could not be imposed on an undertaking since it did not apply universally and thus, was not necessary to protect workers.[244] The rejection of the worker protection justification and the reasoning behind it has been widely criticised.[245] It reflects an approach that is sceptical towards applying national labour

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238 AZOULAI (2008), 'The Court of Justice and the social market economy: The emergence of an ideal and the conditions for its realization', p. 1345. [Emphasis added]
239 SHUIBHNE (2017), 'Fundamental rights and the framework of internal market adjudication: Is the charter making a difference?', pp. 4-5.
240 DAVIES (2018), 'How has the Court of Justice changed its management and approach towards the social acquis?', p. 164.
241 DAVIES (2018), 'How has the Court of Justice changed its management and approach towards the social acquis?', p. 165.
242 C-341/05, *Laval un Partneri*, para. 105 and C-438/05, *Viking Line* para. 79.
243 DE VRIES (2013), 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', p. 182.
244 See section 3.3.3.
245 FEENSTRA (2017), 'How Can the Viking/Laval Conundrum Be Resolved? Balancing the Economic and the Social: One Bed for Two Dreams?', p. 322.

standards, such as obligations with the objective of worker protection, to cross-border situations.

Conclusively, the rulings of *Laval*, *Viking* and *Rüffert* can attest to the ECJ's aspiration to establish an internal market without obstacles. In respect of this, Professor Sacha Garben argues that:

> This trilogy of judgments thereby simultaneously widened the already broad definition of potential restrictions on the free movement provisions, seemingly embracing a full 'market without rules' approach qualifying all national legislation applicable to foreign companies (as well as collective agreements, and collective action by workers aimed at procuring such agreements) as prima facie restrictions, while also narrowing the scope for justification on social grounds. Thereby, the Court fundamentally altered the balance between 'the economic' and 'the social' in the context of the internal market, with real and non-negligible consequences.[246]

Thus, the burden of proof in terms of the justifiability and proportionality of national labour systems was ascribed to the state. This particular order is problematic if the state has no interest in protecting the national regime at dispute. In that case, a state could circumvent the democratic process at the national level and manage to abolish protective social rules at the European level instead.[247]

The cases of *Laval*, *Viking* and *Rüffert* were followed by several infringement proceedings such as the *Commission* v *Luxembourg*. It established that the rulings of the 'Laval quartet' were the applicable norm for a large number of situations within the EU. At least in situations that concerned wage requirements in public procurement procedures, imposition of national labour standards to foreign undertakings and collective actions that potentially infringe on undertakings' economic freedom in cross-border situations.

4.3 Post-Lisbon

Shortly after the 'Laval quartet', the Treaty of Lisbon entered into force and the prospect of change was a fact. The introduction of social provisions, such as the social objectives in Article 3(3) TEU, implied that the EU had listened to the critique about its alleged 'social deficit'. Whether these social innovations would

[246] GARBEN (2017), 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union', p. 34.
[247] GARBEN (2017), 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union', p. 36.

be enough to reorient the European integration project towards a more social Europe became a disputed and interesting topic of discussion. Today, almost 9 years after the entry into force of the Lisbon Treaty, this particular question is still relevant, and something I aim to discuss in the following section.

In *Commission* v *Germany*, the Court rejected Germany's line of argumentation based on the case of *Albany* and found that the public contracts fell within the scope of the public procurement directives and thus, needed to comply with the Treaty freedoms. Despite the Court's finding that the German national policy constituted an unjustified restriction, the case does indicate a higher level of awareness in respect of social concerns. The Court made references to the need of reconciling conflicting interests as a way to verify that a fair balance had been struck, which indicates that the Court tried to consider the social objectives underlying the national policy, i.e. worker protection, as well as the Treaty freedoms. However, this attempt falls short since the balancing test subsequently applied by the Court was highly one-sided and reflected a preference of the interests of the European integration project.[248]

The Opinion by Advocate General Cruz Villalón in *Santos Palhota,* offered an alternative and promising reasoning in respect of the balance between worker protection and the Treaty freedoms. The AG emphasised the significance of the normative commitments made by the EU through the Treaty of Lisbon and argued that the introduction of social provisions had altered the premises of internal market law by reconfiguration of the 'right broadly/justifications strictly paradigm'.[249] He stressed that a national rule with a worker protection objective should not be regarded as a 'simple derogation' from the Treaty freedoms and consequently not undergo a strict test of proportionality, as the one applied in, for instance, *Laval* and *Viking*. The recurring references to the social provisions of the Lisbon Treaty and his call for a Union that lives up to its social obligations clearly indicate that the AG wanted to guide the Court in a direction that reflects a more social Europe. This endeavour was already apparent in the Opinion of AG Trstenjak in *Commission* v *Germany*, in which the AG presents a symmetrical approach to the reconciliation of conflicting interests, referred to as a 'double proportionality test', as an alternative method of adjudication. These attempts to

[248] See section 3.4.1.
[249] SHUIBHNE (2017), 'Fundamental rights and the framework of internal market adjudication: Is the charter making a difference?', p. 15.

steer the Court in a more socially sensitive direction have, however, been unsuccessful.[250]

The case of *Santos Palhota* was subsequently decided by applying the traditional method of adjudication and without any references to the social primary law of the Union.[251]

So far, the ECJ had primarily used the Treaty freedoms in its endeavour to establish an internal market without obstacles. However, in 2013 the Court delivered its judgment in the case of *Alemo-Herron* which contained a new innovative way of prioritising economic interests. Namely, by introducing the freedom to conduct business as a normative standard when conducting a fundamental rights review in order to safeguard the commercial freedom of employers.[252]

At stake in *Alemo-Herron* was not national labour law, but an EU directive with a worker protection objective. The Court reinterpreted this objective by stressing that the Directive in fact seeks to ensure a 'fair balance' between the interests of the employees and the employer. By this reinterpretation, the ECJ established a legal basis that allowed the Court to protect the flexibility of employers, to the detriment of worker protection. When the Court ultimately interpreted the Directive at issue, it clarified that this interpretation needs to comply with Article 16 of the EU Charter, i.e. the freedom to conduct business. By reference to the essence of this right, the Court held that dynamic clauses in employment contracts was not compatible with EU law. From a worker protection perspective, this ruling is not only problematic in respect of its outcome, i.e. the unenforceability of dynamic clauses against a new employer after a transfer, but also due to the apparent lack of consideration for employees' rights and interests.[253] In my opinion, the reasoning in *Alemo-Herron* reflects a Court that is prone to favour the contractual freedom of employers at the expense of worker protection.

Conclusively, after the judgment in *Alemo-Herron*, Article 16 of the EU Charter constituted a possible basis for challenges to legislation that restricted the commercial freedom of undertakings, both at the European and national level. So far there was no indication that the changes to primary law, i.e. the introduction of social provisions, would bring about any substantive change to the Court's

[250] WEATHERILL (2017), *The Interal Market as a Legal Concept*, p. 128.
[251] See section 3.4.2.
[252] See section 3.4.3.
[253] See section 3.4.3.

market-friendly approach. However, the Union's social aspirations was reinvigorated by the case of *AGET Iraklis,* decided in the end of 2016.

The reasoning in *AGET Iraklis* implies that the Court tried to take an approach that was more sensitive towards social concerns. In the case at issue, national legislation regulating collective redundancies with a worker protection objective was at stake. The Court reiterated that national legislation has to be examined in light of the freedom of establishment and the freedom to conduct a business and if it constitutes a restriction it needs to be justifiable and proportionate. In respect of this, the judgment of *AGET Iraklis* followed the Court's traditional methodology. Nevertheless, the Court then explicitly referred to the social objectives in the Lisbon Treaty and pronounced that the Union has an economic *and* a social purpose, which means that Treaty freedoms have to be balanced against the social objectives of social policy measures. The reasoning shows a significant change of approach and reflects a more progressive Court in terms of the strive towards 'Social Europe'. However, legal scholars have questioned the actual effect of these references.[254] Professor Dagmar Schiek claims that the references to social policy objectives in the judgment loses any potential impact since they are not connected to their 'fundamental rights basis', which leaves the superiority of Article 16 of the EU Charter unquestioned.[255]

The judgment in *AGET Iraklis* indicates that the Court's approach towards the tension between worker protection and interests of the European integration project had shifted due to the introduction of social provisions. At least on a rhetorical level. The Court still applied the same method of adjudication with the premise that national legislation constitutes a restriction in need of justification. However, the proportionality assessment conducted in *AGET Iraklis* was less strict and the Court also emphasised that the Member States have a 'broad discretion' when formulating their national policies. Conclusively, *AGET Iraklis* has to be considered as principally beneficial from a worker protection perspective, even if the Court applied its 'traditional' methodology as established in its jurisprudence.[256]

[254] See section 3.4.6.
[255] SCHIEK (2017), 'Towards More Resilience for a Social EU - the Constitutionally Conditioned Internal Market', p. 23.
[256] See section 3.4.6.

The case of *Elektrobudowa* concerned the debated issue of posted workers, similarly to the cases of *Laval* and *Viking*. It has been considered to show an important shift in the Court's previously restrictive approach towards national labour standards, in this case, a minimum wage requirement. The ECJ provided a broad interpretation of what minimum wage could entail and allowed posted workers to assign their wage claims to the relevant trade union in the host country. Consequently, the judgment was beneficial for the protection of workers. However, it is possible to question whether the case should be regarded as reflecting a shift in the Court's approach, since the fundamental concern in *Elektrobudowa* seemed to be the question of protecting fair competition between companies from different Member States. It is impossible to know for sure what the motivation behind the Court's judgment was and whether it would choose to prioritise worker protection if it did not coincide with the interests of the European integration project.[257]

In *RegioPost*, the Court was faced with a similar situation as in *Rüffert*. It concerned a regional provision stipulating a wage requirement in public procurement procedures and whether that provision infringed on the freedom to provide services. Contrary to *Rüffert*, the Court found that the regional provision was in conformity with EU law since it qualified as a mandatory requirement that host countries have to guarantee posted workers, as stated in Article 3(1) of the Posted Workers Directive. The Court's finding was thus beneficial from a worker protection perspective since the Court allowed a national labour standard to be enforceable in a cross-border situation. However, the Court went to great lengths to differentiate the situation in *RegioPost* from the one in *Rüffert*, possibly to avoid overturning its restrictive stance in *Rüffert* and to prevent protectionist measures from being introduced at the national level as a result of its ruling. Despite this, the judgment does reflect a different approach to the question of enforceability of national labour standards, suggesting that the Court of Justice has become more sensitive to social concerns.[258]

Conclusively, the question of whether the introduction of social provisions in primary law has changed the Court of Justice's approach in cases where worker protection conflicts with the interests of the European integration project is difficult to answer. On the one hand, there are cases which suggest that the Court has changed its approach substantially. In cases such as *RegioPost*, *AGET Iraklis* and *Elektrobudowa,* the Court took social concerns into consideration in a manner

[257] See section 3.4.4.
[258] See section 3.4.5.

that it had not done when adjudicating cases in the pre-Lisbon era. On the other hand, there are cases like *Alemo-Herron* in which the Court's approach clearly reflects a bias towards the market and a disregard for the issue of worker protection. Thus, the Court's jurisprudence is incoherent and sometimes even contradictive.

Case law from the post-Lisbon era shows that the Court is trying to find a more nuanced method of adjudication. References to social primary law, the acknowledgement of the Union's social purpose in addition to the economic, the aim to reconcile conflicting interests and strike a fair balance and the general receptiveness of national labour standards does reflect a change of approach. From a general point of view, these new aspects of the Court's adjudication are highly positive and indicate that the Court has committed itself to the reorientation of the European integration project towards 'Social Europe'. However, when reviewing the cases and the Court's reasoning in detail this becomes debatable. Primarily due to the fact that they do not change the fundamental structure of internal market law and the method of adjudication applied by the Court. The balance struck in *Laval*, *Viking* and *Rüffert* is still the applicable norm. In other words, the Court still adjudicate cases on the basis of a broad conception of possible restrictions in combination with a narrow scope for justifications on social grounds. The recent cases might have introduced beneficial exceptions to this order, but it has not changed the fundamental structure of it.

Moreover, the development in respect of the freedom to conduct business does not reflect a commitment towards realising 'Social Europe'. Rather, it seems to be the Court's new and innovative way to continue to safeguard interests of the European integration project, such as the contractual freedom of undertakings. To reconceptualise the interests of employers as a fundamental right, protected by the EU Charter, sends a strong message concerning the Court's priorities. Even if the decision in *AGET Iraklis* reflects a more socially sensitive Court than in *Alemo-Herron,* it is the general development that is worrying. The Court did not need additional tools that benefit the process of European economic integration. It already had the superiority of the Treaty freedoms, the restrictions broadly/justification strictly paradigm, the strict proportionality assessment and the conception that national rules with a worker protection objective and social rights are *prima facie* restrictions. They all serves to ensure the supremacy of the economic, capitalist order that the EU is founded upon.

The Lisbon Treaty provided the Court with sufficient legal basis to change its adjudication and interpret EU law in a manner that coincides with the social aspirations of the Union. The ECJ's case law in the post-Lisbon era is volatile and unpredictable and the small changes in approach that I have identified are not enough to rebalance the relationship between the 'social' and the 'market' and to fix the EU's social deficit. Consequently, the ECJ needs to revise and adapt its approach further if it wants its case law to reflect the values inherent to 'Social Europe', that is, a Union with an economic *and* a social purpose. The ultimate goal of such changes is to ensure that the Court's approach and method of adjudication shows consideration and a sensitivity towards social concerns, no matter if it is a social right or a national measure with a worker protection objective at stake.

Bibliography

Literature

CRAIG, PAUL (2010), *The Lisbon Treaty: Law, Politics, and Treaty Reform.* Oxford: Oxford University Press.

BARNARD, CATHERINE (2012), *EU Employment Law,* fourth edition. Oxford: Oxford University Press.

BLANPAIN, ROGER (2012), *European Labour Law.* Alphen aan den Rijn: Kluwer Law International.

DAVIES, PAUL & FREEDLAND, MARK (1983), *Kahn-Freund's Labour and the Law,* third edition. London: Stevens & Sons.

FEENSTRA, SJOERD (2017), 'How Can the Viking/Laval Conundrum Be Resolved? Balancing the Economic and the Social: One Bed for Two Dreams?' in *A European Social Union after the Crisis,* edit. Frank Vandenbroucke, Catherine Barnard & Geert De Baere. Cambridge: Cambridge University Press. 309-343.

GRÖNING, LINDA & ZETTERQUIST, OLA (2010), *EU: konstitution, institution, jurisdiktion.* Stockholm: Liber.

KORLING, FREDRIC & ZAMBONI, MAURO (2013) *Juridisk metodlära*, första upplagan. Lund: Studentlitteratur.

LEBECK, CARL (2016), *EU-stadgan om grundläggande rättigheter*, andra upplagan. Stockholm: Studentlitteratur AB.

SANDGREN, CLAES (2015), *Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation,* tredje upplagan. Stockholm: Norstedts Juridik.

SHUIBHNE, NIC (2017), 'Fundamental rights and the framework of internal market adjudication: Is the charter making a difference?' in *Research Handbook on the Law of the EU's Internal Market. Research Handbooks in European Law,* edit. Panos Koutrakos & Jukka Snell. Cheltenham: Edward Elgar Publishing.

SNELL, JUKKA (2016), 'Economic Justifications and the Role of the State' in *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality,* edit. Panos Koutrakos, Niamh Nic Shuibhne & Phil Syrpis. Oxford: Hart Publishing.

TUORI, KAARLO (2015), *European Constitutionalism.* Cambridge: Cambridge University Press.

WEATHERILL, STEPHEN (2012), 'From Economic Rights to Fundamental Rights' in *The Protection of Fundamental Rights in the EU After Lisbon,* edit. Sybe de Vries, Ulf Bernitz & Stephen Weatherill. Oxford: Hart Publishing.

WEATHERILL, STEPHEN (2017), *The Interal Market as a Legal Concept.* Oxford: Oxford University Press.

Academic Articles

ASHIAGBOR, DIAMOND (2013), 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration', *European Law Journal* 19(3), 303-324.

AZOULAI, LOÏC (2008), 'The Court of Justice and the social market economy: The emergence of an ideal and the conditions for its realization', *Common Market Law Review* 45(5), 1335-1355.

BARNARD, CATHERINE & DEAKIN, SIMON (2000), 'In search of coherence: social policy, the single market and fundamental rights', *Industrial Relations Journal* 31(4), 331-345.

BARTL, MARIJA & LEONE, CANDIDA (2015), 'Minimum Harmonisation after *Alemo-Herron*: The Janus Face of EU Fundamental Rights Review', *European Constitutional Law Review* 11(1), 140-154.

BARTL, MARIJA & LEONE, CANDIDA (2015), 'Minimum harmonisation and Article 16 CFR: Difficult Times Ahead for Social Legislation?', Amsterdam Law

School Research Paper No. 2015-40; *Centre for the Study of European Contract Law Working Paper Series No. 2015-10*.

BLAUBERGER, MICHAEL & SCHMIDT, SUSANNE K. (2017), 'The European Court of Justice and its political impact', *West European Politics* 40(4), 907-918.

DAMJANOVIC, DRAGANA (2013), 'The EU market rules as social market rules: Why the EU can be a social market economy', *Common Market Law Review* 50(6), 1685–1718.

DAVIES, ANNE C. L. (2018), 'How has the Court of Justice changed its management and approach towards the social acquis?', *European Constitutional Law Review* 14(1), 154–171.

DAWSON, MARK & DE WITTE, FLORIS (2013), 'Constitutional Balance in the EU', *Modern Law Review* 76(5), 817-844.

GARBEN, SACHA (2017), 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union', *European Constitutional Law Review,* 13(1), 23–61,

GIUBBONI, STEFANO (2018), 'Freedom to conduct a business and EU labour law', *European Constitutional Law Review* 14(1), 172–190.

JOERGES, CHRISTIAN (2015), 'Social Justice in an Ever More Diverse Union', *ZenTra Working Paper in Transnational Studies* No. 62/2015

JOERGES, CHRISTIAN & RÖDL, FLORIAN (2004), "Social Market Economy' as Europe's Social Model?', *EUI Working Paper LAW* 2004/08.

MARKAKIS, MENELAOS (2017), 'Can Governments Control Mass Layoffs by Employers? Economic Freedoms vs Labour Rights in Case C-201/15 AGET Iraklis', *European Constitutional Law Review* 13(4), 724-743.

MICKLITZ, HANS-W. (2010), 'Failure or Ideological Preconceptions – Thoughts on Two Grand Projects:The European Constitution and the European Civil Code', EUI Working Paper LAW 2010/04.

PECINOVSKY, PIETER (2016), 'Evolutions in the Social Case Law of the Court of Justice: The Follow-Up Cases of the Laval Quartet: ESA and RegioPost', *European Labour Law Journal* 7(2), 294-309.

ROBIN-OLIVER, SOPHIE (2018), 'Fundamental Rights as a New Frame: Displacing the Acquis', *European Constitutional Law Review* 14(1), 96-113.

SCHARPF, FRITZ W. (2010), 'The asymmetry of European integration or why the EU cannot be a 'social market economy'', *Socio-Economic Review* 8(2), 211–250.

SCHARPF, FRITZ W. (2014), 'After the Crash: A Perspective on Multilevel European Democracy', *MPIfG Discussion Paper 14/2*.

SCHIEK, DAGMAR (2017), 'Towards More Resilience for a Social EU - the Constitutionally Conditioned Internal Market', *European Constitutional Law Review* 13(4), 611-640.

SYRPIS, PHIL (2011), 'Reconciling Economic Freedoms and Social Rights—The Potential of Commission v Germany (Case C-271/08, Judgment of 15 July 2010)', *Industrial Law Journal* 40(2), 222-229.

DE VRIES, SYBE A. (2013), 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', *Utrecht Law Review* 9(1), 169-192.

WEATHERILL, STEPHEN (2014), 'Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of 'freedom of contract', *European Review of Contract Law* 10(1), 167-182.

Electronic Sources

ANDOR, LÁSZLÓ (2011), European Commissioner responsible for Employment, Social Affairs and Inclusion, 'Building a social market economy in the European Union', SPEECH/11/695 <http://europa.eu/rapid/press-release_SPEECH-11-695_en.htm>, accessed 15 March 2018.

COUNCIL OF THE EUROPEAN UNION (2017), 'The Rome Declaration', Declaration of the leaders of 27 member states and of the European Council, the European Parliament and the European Commission, 149/17 <http://www.consilium.europa.eu/en/press/press-releases/2017/03/25/rome-declaration/pdf>, last accessed 23 March 2018.

COURT OF JUSTICE, 'Jurisdiction' < https://curia.europa.eu/jcms/jcms/Jo2_7024/en/>, accessed 16 May 2018.

EUROPEAN COMMISSION (2016), Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final. <file:///Users/hannawallstrom/Desktop/COM_2016_128_F1_PROPOSAL_FOR_A_DIRECTIVE_EN_V8_P1_842424.pdf>, last accessed 5 May 2018.

EUROPEAN COMMISSION (2017), 'Reflection Paper on the Social Dimension of Europe'.
<https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-social-dimension-europe_en.pdf>, last accessed 6 May 2018.

EUROPEAN COMMISSION (2018), Joint statement on the revision of the Posting of Workers Directive, 1 March 2018. <http://ec.europa.eu/social/main.jsp?langId=en&catId=471&newsId=9062&furtherNews=yes>, last accessed 10 May.

EUROPEAN PARLIAMENT, COUNCIL OF THE EUROPEAN UNION, EUROPEAN COMMISSION (2017), 'European Pillar of Social Rights'.
<https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf>, last accessed 3 April 2018.

PRESIDENT OF THE EUROPEAN COMMISSION, JEAN-CLAUDE JUNCKER (2015), 'State of the Union 2015: Time for Honesty, Unity and Solidarity' < http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm>, last accessed 25 April 2018.

WORKING GROUP ON SOCIAL EUROPE (2003), 'Final Report of Working Group XI on Social Europe', Brussels, 4 February 2003, CONV 516/1/03.

<http://ec.europa.eu/dorie/fileDownload.do;jsessionid=aA4HGBN8kSzJLmNscHm5_VPD7Za12YrIYI6VSlRQwrRyTqDdJLXR!-898031139?docId=284701&cardId=284701>, last accessed 15 April 2018.

Table of Cases

European Court of Justice

C-113/89, *Rush Portuguesa Ldª* v *Office national d'immigration*, Judgment of the Court (Sixth Chamber) of 27 March 1990, EU:C:1990:142.

C-67/96, *Albany International BV* v *Stichting Bedrijfspensioenfonds Textielindustrie,* Judgment of the Court of 21 September 1999, EU:C:1999:430.

C-499/04, *Hans Werhof* v *Freeway Traffic Systems GmbH & Co. KG*, Judgment of the Court (Third Chamber) of 9 March 2006, EU:C:2006:168.

Case C-341/05, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet,* EU:C:2007:809.

C-438/05**,** *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti*, Judgment of the Court (Grand Chamber) of 11 December 2007, EU:C:2007:772.

C-346/06, *Dirk Rüffert* v *Land Niedersachsen,* Judgment of the Court (Second Chamber) of 3 April 2008, EU:C:2008:189.

C-319/06, *Commission of the European Communities* v *Grand Duchy of Luxemburg,* Judgment of the Court (First Chamber) of 19 June 2008, EU:C:2008:350.

C-271/08, *European Commission* v *Federal Republic of Germany*, Judgment of the Court (Grand Chamber) of 15 July 2010, EU:C:2010:426.

C515/08, *Santos Palhota and Others,* Judgment of the Court (Second Chamber) of 7 October 2010, EU:C:2010:589.

C-426/11, *Mark Alemo-Herron and Others* v *Parkwood Leisure Ltd***,** Judgment of the Court (Third Chamber) of 18 July 2013, EU:C:2013:521.

C- 396/13, *Sähköalojen ammattiliitto ry* v *Elektrobudowa Spółka Akcyjna*, Judgment of the Court (First Chamber) of 12 February 2015, EU:C:2015:86.

C-115/14, *RegioPost GmbH & Co. KG* v *Stadt Landau in der Pfalz,* Judgment of the Court (Fourth Chamber) of 17 November 2015, EU:C:2015:760.

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

Opinions of Advocate Generals

Opinion of Advocate General Trstenjak in C-271/08, *European Commission* v *Federal Republic of Germany,* EU:C:2010:183.

Opinion of Advocate General Cruz Villalón in Case C-515/08, *Santos Palhota and Others,* EU:C:2010:245.

Opinion of Advocate General Cruz Villalón in Case C-426/11, *Mark Alemo-Herron and Others v Parkwood Leisure Ltd,* EU:C:2013:82.

Opinion of Advocate General Wahl in C- 396/13, *Sähköalojen ammattiliitto ry* v *Elektrobudowa Spółka Akcyjna***,** EU:C:2014:2236.

Opinion Advocate General Trstenjak in C-271/08, *Commission v Germany,* EU:C:2010:183.