The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union

Sacha Garben*

An assessment of the balance between 'the market' and 'the social' by reference to the areas of social policy, the internal market and economic governance – Imbalance resulting from a consitutional displacement of the legislative process (EU and national) and instead decision-making by the judiciary and the executive – Proposals to address the imbalance by reinforcing the role of the EU legislative process and limiting other forms of European integration.

Introductory remarks

The EU's social objectives feature prominently in the Treaties: in the TFEU's preamble as the resolve to ensure the 'social progress of their States by common action to eliminate the barriers which divide Europe', in the TEU's preamble in its reference to 'fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers' and the promotion of 'social progress', and in the EU Charter of Fundamental Rights that recognises a wide range of social rights. Article 3 TEU conceptualises the EU as 'a social market economy' aiming at full employment and social progress, and provides that it 'shall combat social exclusion and discrimination, and shall promote social justice and protection'. These objectives are furthermore mainstreamed across all EU policies, in accordance with Article 9 TFEU which provides that 'in defining and implementing its policies and activities, the Union shall take into account

*Professor of EU Law, College of Europe, Bruges. The views expressed in this article are entirely personal and do not in any way reflect the views of the European Commission. The author wishes to thank the participants of the GOLEM session at the London School of Economics on 1 December 2015 and the MCEL seminar at Maastricht University on 24 May 2016 for their useful comments, as well as three anonymous reviewers.

European Constitutional Law Review, 13: 23–61, 2017

doi:10.1017/S1574019616000407

requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion […]'.

This mainstreaming clause especially touches on a crucial issue. While the TFEU's Social Title grants a significant measure of law-making and other competences to pursue these objectives, resulting in a rich social *acquis*, the most important part of the EU's 'social question' actually concerns the effects of *other* policies. This is where significant tensions have arisen in recent years and where the EU is currently at a crossroads. Or rather, where it finds itself stuck between various rocks and hard places. Firstly, the Union faces enormous political and public pressure to stabilise the Eurozone and to prevent further economic destabilisation across Europe. At the same time, it has met with unprecedented criticism as to the social consequences of the political choices that have been made to remedy the crisis in the form of controversial austerity policies and labour market reforms across the Member States. Secondly, the internal market project, from which the EU has traditionally drawn impetus in troubled times, has steadily been losing force. While some actors therefore point at the need to finally complete the services market, others consider the current interpretation of the market freedoms to be an important cause of the EU's social problem. In addition, the free movement of persons – often considered the most social of the market freedoms – is increasingly opposed.

Apparently, the question of where the EU strikes the balance between 'the market' and 'the social' is becoming an increasingly contested issue. This is not only an issue of politics, or of substantive EU law, but it also raises profound constitutional questions. As a first step, this paper will investigate how that balance is struck in the crucial areas of social policy, the internal market and economic policy, by whom, and whether there is an imbalance in the overall outcome. Secondly, the extent to which that outcome can be legitimised will be considered. For the purposes of assessing legitimacy, we use the yardsticks of input and output as well as 'throughput' legitimacy, as formulated by Schmidt, where input legitimacy is about citizens expressing demands institutionally and deliberatively through representative politics, 'throughput' legitimacy is about governance processes that work with efficacy, accountability, transparency, inclusiveness and openness, and output legitimacy is about policies resonating with citizens' values and identity.[1] After this assessment, the separate threads will be drawn together to analyse the differences and commonalities between these areas. This analysis will show that the EU's current constitutional configuration poses legitimacy problems in the internal market and in economic policy. This is mainly due to the structural limitation of the role of the legislator in deciding on the crucial normative balance

[1] V. Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"', 61 *Political Studies* (2013) p. 2.

in the EU's output and impact in those two areas. Finally, this insight will be used to formulate potential avenues for future reform.

The constitutional balance between 'the market' and 'the social' in the EU

EU social law

The EU boasts an important social *acquis*, consisting of a rich body of legislation concerning *inter alia* non-standard employment, information and consultation of workers, health and safety at work, working time, protection of workers in the event of structural changes in the company, as well as maternity and parental leave, non-discrimination, and mobile citizens and their families.[2] Some of these measures were adopted on the general internal market mandate (Article 114 TFEU), but the bulk of this *corpus legi* has been developed on the basis of the now fully-fledged Social Title. This allows for the adoption of directives on a number of (employment-related) social issues in Article 153 TFEU, and for the conclusion of Social Partner Agreements that can be implemented by a Council directive in accordance with Article 155 TFEU. While some commentators have highlighted the relatively meagre output of new legislation in this area over the past years,[3] there are nevertheless some interesting recent developments, such as the adoption of a platform on undeclared work,[4] and the launch of a Pillar of Social Rights.[5]

A balanced constitutional configuration

We posit that because of the specific constitutional configuration of the Social Title, it leads to results that, by and large, strike a fair balance. Firstly, while perhaps more tangibly political than many other areas of EU law, the objectives for which the Social Title permits the adoption of EU legislation are generally not of a re-distributive nature and thereby deny the EU the power to take the most consequential decisions on 'the social' and 'the market' from the outset. The protection of workers' health and safety, improvement of working conditions,

[2] For a discussion of the social *acquis*, *see* S. Garben, 'Social Policy', in P. Kapteyn and P. verLoren Van Themaat, *European Union Law*, 5th edn (Kluwer Law International, 2017), forthcoming.

[3] Barnard has argued that 'EU employment law is going nowhere very fast' due to a crisis of regulation: C. Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future', 67 *Current Legal Problems* (2014) p. 199.

[4] Decision (EU) 2016/344 of the European Parliament and of the Council of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work, OJ L 65, 11.3.2016, p. 12.

[5] European Commission Communication, Launching a consultation on a European Pillar of Social Rights, COM(2016) 127 final.

protection in the case of termination of employment, information and consultation of workers, gender equality as regards employment and the other fields listed in Article 153(1) TFEU are social in nature, but can still be conceptualised as correcting (internal) market failures, particularly the risk of a race to the bottom, information and power asymmetries between workers and employers and societal externalities.[6] By contrast, the more sensitive issues of combating social exclusion and modernising social protection systems cannot be pursued through legislation on the EU level,[7] and the issues of wage-setting, collective action and the right to strike are excluded from any action under Article 153 TFEU.[8] While these limitations may seem regrettable to those in favour of Social Europe, it can also be argued that the authority to take decisions of such re-distributive impact are rightly withheld from the EU institutions, in light of their limited democratic legitimacy.[9]

Moreover, the provisions of the Social Title contain safeguards ensuring that the measures adopted on this basis are not overly biased towards either 'the economic' or 'the social'. On the one hand, the EU may only set 'minimum requirements', which 'shall not prevent any Member State from maintaining or introducing more stringent protective measures'.[10] If, for instance in view of internal market objectives, the EU wants to fully harmonise a certain issue of labour protection, thus capping levels of social protection, it will have to use another legal basis. Furthermore, in providing that 'the Union and the Member States […] shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained', the first paragraph of Article 151 TFEU could be argued to express a non-regression principle for EU social law.[11] According to some, this entails that Member States and the Union are bound to

[6] On the market correcting rationale of labour law *see* H. Collins, 'Justification and Techniques of Legal Regulation of the Employment Relation, in H. Collins et al., *Legal Regulation and the Employment Relation* (Kluwer Law International 2003) p. 3. For criticism on how the EU limits its social and employment policy to the existence of (internal) market failures *see* C. Barnard, 'Regulating Competitive Federalism in the European Union? The Case of EU Social Policy', in J. Shaw, *Social Law and Policy in an Evolving European Union* (Hart 2000) p. 49.

[7] Art. 153(1)(j) and (k), jo. (2)(b) TFEU.

[8] Art. 153(5) TFEU.

[9] For a comprehensive overview of the debate about the EU's legitimacy *see* A. Føllesdal and S. Hix, 'Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik', 44 *JCMS* (2006) p. 533.

[10] Art. 153(b) and (5) TFEU.

[11] E. Ales, '"Non regresso" senza dumping sociale ovvero del "progresso" nella modernizzazione (del modello sociale europeo)', 15 *Diritti, lavori, mercati* (2007) p. 1; B. Bercusson, 'The Lisbon Treaty and Social Europe', *ERA Working Paper* (2009); L. Corazza, 'Hard Times for Hard Bans: Fixed-Term Work and So-Called Non-Regression Clauses in the Era of Flexicurity', 17 *European Law Journal* (2011) p. 385.

progressive harmonisation and would be precluded from lowering existing levels of protection either in national or EU law. While the Court has to date not explicitly recognised this principle, many secondary legal instruments in this area do contain so-called 'non-regression clauses', which stipulate that the implementation of the measure may not be a reason to lower the previous level of protection.[12]

On the other hand, the Social Title also contains safeguards ensuring that its measures are not overly biased towards 'the social'. Article 153(2)(b) TFEU provides that directives adopted on this basis 'shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings'. The General Court held in *UEAPME* that this 'lays down a substantive obligation, compliance with which is subject to review by the Community judicature'.[13] Admittedly, the Court is reluctant to actively review successfully adopted legislation against this requirement,[14] which is understandable in light of the political nature of the criterion. However, concern for economic competitiveness, for small and medium-sized enterprises in particular, has become a key element of the Better Regulation Agenda,[15] which entails an assessment of all prospective and existing EU rules to ensure that they do not impose disproportionate regulatory burdens on undertakings. While there has been some criticism about the impact of this agenda on rules of public interest,[16] such as labour protection,[17] the Better Regulation Agenda indisputably serves to operationalise the 'market-safeguard' of Article 153(2)(b) TFEU in a prominent way.

[12] The ECJ has given a restrictive interpretation of these clauses, denying direct effect, applying a wide definition of the 'general level of protection' and not prone to establish a lowering of that level: Cases C-378/07 to C-380/07, *Angelidaki et al.* v *Organismos Nomarkhiaki Aftodiikisi Rethimnis* [2009] ECR I-3071; Corazza, *supra* n. 11; S. Peers, 'Non-regression Clauses: The Fig Leaf Has Fallen', 39 *Industrial Law Journal* (2010) p. 436.

[13] ECJ 17 June 1998, ECLI:EU:T:1998:128 *UEAPME* v *Council of the European Union*, para. 80.

[14] *See* in particular: ECJ 26 June 2006, ECLI:EU:C:2001:356, *R and Secretary of State for Trade and Industry, ex p Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)*, paras. 57-61, ECJ 9 September 2004, ECLI:EU:C:2004:497, *Kingdom of Spain and Republic of Finland* v *European Parliament and Council of the European Union*, paras. 70-75. *See*, however, Opinion of AG Trstenjak in ECJ 7 July 2011, ECLI:EU:C:2011:465, *KHS AG* v *Winfried Schulte*, paras. 62-65.

[15] *See* Mandelkern Report on Better Regulation, 2001 available at <ec.europa.eu/smart-regulation/better_regulation/documents/mandelkern_report.pdf>, visited 12 December 2016; Commission communication, Better Regulation in the European Union, COM(2010)543; Commission Communication, EU Regulatory Fitness, COM(2012)746 final; and the recent interinstitutional agreement on better law-making, OJ L 123, 12.5.2016, p. 1.

[16] Sixty-four NGOs have established a Better Regulation Watchdog concerned about deregulation: <www.betterregwatch.eu/Open_Letter_to_EP_on_IIA.pdf>, visited 12 December 2016.

[17] *See* e.g. ETUI, 'REFIT – a breakthrough toward a strengthened and more encompassing deregulatory agenda?' 20 *Transfer* (2014) p. 305; ETUC, 'Declaration on "Better Regulation"', 18 June 2015, <www.etuc.org/documents/etuc-declaration-better-regulation>, visited 12 December 2016.

A legitimate constitutional configuration

An important additional safeguard is procedural in nature. The Social Title features two methods for the adoption of EU social law measures: the conventional Community Method and the distinctive 'Social Method', which both serve to ensure an overall balanced outcome through their structural involvement of a wide range of representative institutions. The 'Social Method' allows the European Social Partners, i.e. representatives of management and labour at EU level, to conclude an agreement between themselves and to have it subsequently implemented by the Council on a proposal from the Commission (Article 155 TFEU). In this unique exception to the Commission's monopoly on legislative initiative, the Social Partners can thereby actually draft the content of EU legislation.[18] Alternatively, the Community Method, with its in-built checks and balances, can be used to pursue the objectives of the Social Title. Following Article 153(2)(b) TFEU, measures are adopted following either the ordinary or the special legislative procedure, depending on which particular objective listed in Article 153(1) the initiative relates to. While under the special legislative procedure the role of the European Parliament is limited to consultation, the unanimity rule in the Council imposes high consensus requirements. Furthermore, national parliaments are now always involved in the Community Method through the Early Warning System.[19] Moreover, for any measures adopted based on Article 153 TFEU, there is privileged involvement of the EU Social Partners through a two-stage consultation (Article 154 TFEU).[20]

The structural representation of a wide range of interests is likely to be reflected in the outcome. In particular, the close cooperation with and between the representatives of management and labour in the context of EU social law-making under both methods can be expected to foster balanced results. But perhaps even more importantly, the outcomes can be considered legitimate, as they have been achieved through a transparent, democratic and inclusive process. In addition to the increased transparency of decision-making[21] and engagement to public consultation

[18] Four such directives have been adopted: the Fixed-Term Work Directive 1999/70/EC, the Part-Time Work Directive 97/81/EC, the Temporary Agency Work Directive 2008/104/EC and the Parental Leave Directive 2010/18/EU.

[19] Protocol on the application of the principles of subsidiarity and proportionality, Arts. 6 and 7. For a detailed analysis *see* P. Kiiver, 'The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity', 15 *Maastricht Journal of EU Comparative Law* (2008) p. 1.

[20] In this consultation, they can decide to take over and negotiate an agreement between themselves instead (Art. 154(4) TFEU).

[21] On this 'transparency shift' in the Council *see* M. Hillebrandt et al., 'Transparency in the EU Council of Ministers: An Institutional Analysis', 20 *European Law Journal* (2014) p. 1. For proposals for further improvement *see* D. Curtin and P. Leino-Sandberg, 'Openness, Transparency and the Right of Access to Documents in the EU', *European Parliament Research Paper* (2016), <www.europarl.europa.eu/supporting-analyses>, visited 12 December 2016.

in the conventional EU legislative process in recent years, the active involvement of target groups in the substantive decision-making process in the context of the Social Title is conducive to 'throughput' legitimacy, and in turn is likely to induce a relatively high measure of cross-spectrum political support for the eventual outcomes and thereby output legitimacy. And indeed, while concerns about the EU's democratic deficit continue to persist, in terms of input legitimacy the EU legislative process is the most accountable form of international cooperation,[22] reinforced by many reforms over time to enhance the role of both the European Parliament and national parliaments. This must therefore fundamentally limit our concern with any perceived imbalance between 'the market' or 'the social' anyway, as such can be assumed to reflect a conscious political choice, which moreover can be contested and adapted through that same process if the political orientation changes subsequently.[23] While it would be naïve to portray this area of EU law as consensual and to deny the existence of any political difficulties, the argument is that the typically political and contested nature of the socio-economic questions underlying this area at any level are appropriately accommodated in the EU constitutional framework, leading to, overall, balanced and legitimate outcomes. As such, it is important not to automatically conceptualise 'no EU action' as a failure, as that can itself be a legitimate and balanced outcome.

The role of the European Court of Justice

Does the European Court of Justice's case law in this area affect the above conclusion? While, as in any other area of EU law, the Court will generally interpret EU legislation constructively in light of the main objectives pursued by the measure, which in this area would be a social one, it can be noted that particularly as regards the labour law directives, the Court has been remarkably careful not to upset the delicate compromises between 'the market' and 'the social' arduously crafted in the political process.[24] One exception in this regard is perhaps

[22] S. Garben, 'Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Powers', 1 *Oxford Journal of Legal Studies* (2015) p. 14.

[23] A note of nuance is warranted, as EU legislative measures are notoriously difficult to amend. *See* R. Zbiral, 'Restoring tasks from the European Union to Member States: a bumpy road to an unclear destination?', 52 *Common Market Law Review* (2015) p. 51.

[24] For instance, the Court has interpreted the Insolvency Directive 2008/94/EC requiring Member States to protect occupational supplementary pension entitlements not to oblige a 'full' guarantee (ECJ 25 January 2007, ECLI:EU:C:2007:56, *Carol Marilyn Robins* v *Secretary of State for Work and Pensions*); it has left it to the national level to determine whether the Part-Time Work Directive applied to a zero-hours contract (ECJ 12 October 2004, ECLI:EU:C:2004:607, *Nicole Wippel* v *Peek & Cloppenburg GmbH & Co KG*); it has held that the Fixed-Term Work Directive 1999/70/EC does not require the automatic conversion of fixed-term contracts into a permanent position (ECJ 4 July 2006, ECLI:EU:C:2006:443, *Konstantinos Adeneler* v *Ellinikos Organismos Galaktos (ELOG)*); that successive fixed-term employment of 11 years could be justified in

the Working Time Directive. Although it is, on the one hand, one of the rare instances where the Court has partially annulled a legislative measure for having been adopted *ultra vires*,[25] the Court has also interpreted some of its provisions widely. As regards the definition of working time, for the purposes of the application of the minimum rest periods and maximum average working hours, the Court has held that it includes all on-call time served at the workplace even if the worker can rest on-site, such as hospital doctors on night shifts.[26] Furthermore, the Court has held that the right to paid annual leave should be maintained also in cases of long-term sick leave.[27] Both lines of case law have been criticised by some, for arguably preferring workers' interests over those of employers.[28] It should nevertheless be questioned whether, objectively, these judgments actually lead to unbalanced outcomes. The Court has held that stand-by time at home does not have to be counted as working time,[29] and the Working Time Directive contains many derogations, particularly for sectors where on-call time is common,[30] including an 'individual opt-out' when the worker is willing to work in excess of the Directive's limits.[31] The impact of the case law on annual

certain situations; and has accepted a wide range of objective justifications for otherwise unlimited fixed-term employment (ECJ 26 January 2012, ECLI:EU:C:2012:39, *Bianca Kücük* v *Land Nordrhein-Westfalen*; ECJ 13 March 2014, ECLI:EU:C:2014:146, *Antonio Márquez Samohano* v *Universitat Pompeu Fabra*). It has accepted an interruption of 60 days as sufficient to break the link of continuous fixed-term employment (ECJ 17 September 2014, ECLI:EU:C:2014:2044, *Maurizio Fiamingo et al*).

[25] The UK challenged the Working Time Directive for having been wrongly based on Art. 118a TEC, arguing that the link between the regulation of working time and the health and safety of workers was too tenuous. While the Court disagreed, and upheld the measure for the most part, it annulled the provision that weekly rest be preferentially taken on Sundays: ECJ 12 November 1996, ECLI:EU:C:1996:431, *United Kingdom of Great Britain and Northern Ireland* v *Council of the European Union*.

[26] ECJ 3 October 2000, ECLI:EU:C:2000:528, *Sindicato de Médicos de Asistencia Pública (Simap)* v *Conselleria de Sanidad y Consumo de la Generalidad Valenciana*; ECJ 9 September 2003, ECLI:EU:C:2003:437, *Landeshauptstadt Kiel* v *Norbert Jaeger*; ECJ 1 December 2005, ECLI:EU:C:2005:728, *Abdelkader Dellas* v *Premier Ministre and Ministre des Affaires sociales, du Travail et de la Solidarité*.

[27] ECJ 20 January 2009, ECLI:EU:C:2009:18, *Gerhard Schultz-Hoff* v *Deutsche Rentenversicherung Bund and Stringer* v *Her Majesty's Revenue and Customs*.

[28] Especially in the UK. For an overview, *see* K. Barysch, 'The Working Times Directive – What's the fuss about?' *Centre for European Reform Paper* (2013), <www.cer.org.uk/sites/default/files/publications/attachments/pdf/2013/pb_workingtimedir_kb_26april13_bl-7268.pdf>, visited 12 December 2016.

[29] *Simap*, *supra* n. 26, para. 50.

[30] E.g. Art. 17 of the Directive allows derogations from the minimum rest provisions and the reference period to calculate average weekly working time for activities involving the need for continuity of service.

[31] Art. 22 of the Directive, conditional on the worker's consent.

leave has been mitigated by the Court itself, allowing the right to carry-over leave not taken due to illness to be capped at 15 months.[32]

The Court has taken a more unequivocally active stance as regards the principle of equal treatment. Already in the early days of European integration, the Court gave a wide interpretation of the equal pay provision in the Treaty,[33] and on those foundations an important non-discrimination *acquis* has been built. While the Court's approach in this area has been validated by the Masters of the Treaty through an expansion of EU competences, and by the European legislator in secondary law, the *Mangold* judgment should be mentioned as an exception to the finding that the Court in this area is deferential to compromises forged in the democratic process.[34] The Court held that the prohibition of age discrimination was a general principle of EU law and therefore already bound the Member States before the expiration of the transposition deadline of the non-discrimination directive.[35] Nevertheless, even though the judgment was important in terms of legal principle and prompted a flurry of academic analysis,[36] its actual impact in terms of balancing 'the market' and 'the social' has arguably been rather limited. The transposition deadline of the non-discrimination directive eventually expired, so the Court's judgment merely advanced the application of the legal norms legitimately decided in the legislative process.

Interim conclusions

The foregoing discussion leads to the conclusion that in the area of EU social law, the balance between 'the social' and 'the economic' is generally being decided through democratic, transparent, inclusive and accountable procedures. Partly because of that, and partly because of a number of counterbalancing constitutional safeguards, the overall outcome is, by and large, fairly balanced and, in political terms, centrist.[37] A relatively restrained role by the

[32] ECJ 22 November 2011, ECLI:EU:C:2011:761, *KHS AG* v *Winfried Schulte*.

[33] ECJ 15 June 1978, ECLI:EU:C:1978:130, *Defrenne* v *Sabena*.

[34] Case C-144/04, *Mangold* [2005] ECR I-9981. *See also* ECJ 19 January 2010, ECLI:EU:C:2010:21, *Seda Kücükdeveci* v *Swedex GmbH & Co KG*.

[35] Paras. 74-77 of the judgment.

[36] For an interesting discussion *see* M. Dougan, 'In defence of Mangold?', in A. Arnull et al. (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011) p. 219.

[37] This therefore seems to corroborate the findings of Moravcsik, at least in the context of the Social Policy Title, that 'Constitutional checks and balances, indirect democratic control via national governments, and the increasing powers of the European Parliament are sufficient to ensure that EU policy-making is, in nearly all cases, clean, transparent, effective and politically responsive to the demands of European citizens': *see* A. Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union', 40 *JCMS* (2002) p. 605.

European Court of Justice serves to reinforce that conclusion. The Court's activism in this area has generally been limited to securing the right to equal treatment. In a constitutional democratic system, such active judicial protection of fundamental human rights – sometimes at the expense of the legislator – can be defended as legitimate. Overall, using the legitimacy vocabulary developed by Schmidt, this means that EU social law benefits from a relatively high degree of input, output and 'throughput' legitimacy,[38] or 'a Triple A legitimacy rating'.

The internal market

The internal market has always been the EU's flagship project. Even in recent years, where the EU's activities have grown to include high-profile policies such as the Euro, the Area of Freedom, Security and Justice and the Common Foreign and Security Policy, the internal market's place in the EU construct remains a central and prominent one. The internal market has many faces. It comprises the four freedoms, each with its own dynamic and interpretation, even if the Court attempts to adopt a convergent approach.[39] The role of 'the social' varies significantly across these areas. Free movement of persons is traditionally considered to have added an important social dimension to EU law, which has been reinforced by the introduction of EU citizenship, but other areas of the internal market also have a certain social dimension. The general internal market competence of Article 114 TFEU has over time provided a platform for the adoption of various public interest measures, including worker protection. This interplay between the internal market and 'the social' is explicitly foreseen by the Treaty where it states that the harmonisation of living and working conditions will ensue from the internal market's functioning, and that it will favour the harmonisation of social systems.[40] While some may perceive such use of Article 114 TFEU to be the essence of competence creep, others will consider it a necessary corollary to regulatory competition resulting from the creation of an internal market or required as a response to the Court's negative integration. Indeed, it is arguably in the latter balance between de-regulation and re-regulation through negative and positive integration that the balance between 'the market' and 'the social' is decisively struck in this area. It is also where the support, or at least permissive consensus, for the internal market project has started to falter.

[38] Schmidt, *supra* n. 1.

[39] For an exhaustive discussion, *see* N. Nic Shuibne, *The Coherence of EU Free Movement Law – Constitutional Responsibility and the European Court of Justice* (Oxford University Press 2013).

[40] Art. 151 TFEU.

Bias towards 'the market'?

For a long time, the degree of negative integration of national social and labour standards remained rather limited. Firstly, where it was held that social standards can imply a restriction on companies' free movement rights, such as certain labour rules, the Court conducted a relatively relaxed proportionality review, upholding most measures as justified.[41] Secondly, it should be kept in mind that the majority of national social protection measures are redistributive benefits and services provided by the state, which by their nature are not liable to be qualified as restrictions to the internal market provisions, leaving these measures outside the reach of negative integration.[42] To the extent that Article 48 TFEU on the free movement of workers and the provisions on EU citizenship do demand that such social benefits and services are, under certain circumstances, made available to mobile EU citizens and their families on equal terms, this actually contributed to the EU's social dimension.

The situation changed with the *Laval* and *Viking* judgments,[43] and libraries have been filled with critical commentary.[44] Pointing to the horizontal application of the internal market provisions to organised labour, the wide definition of

[41] *See* e.g. ECJ 17 December 1981, ECLI:EU:C:1981:314, *Criminal Proceedings against Alfred John Webb*; ECJ 3 February 1982, ECLI:EU:C:1982:34, *Société anonyme de droit français Seco and Société anonyme de droit français Desquenne & Giral* v *Etablissement d'assurance contre la vieillesse et l'invalidité*; ECJ 27 March 1990, ECLI:EU:C:1990:142, *Rush Portuguesa Ld*ª v *Office national d'immigration*; ECJ 28 March 1996, ECLI:EU:C:1996:147 *Criminal proceedings against Michel Guiot and Climatec SA, as employer liable at civil law*; ECJ 23 November 1999, ECLI:EU:C:1999:575, *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL*; ECJ 15 March 2001, ECLI:EU:C:2001:162, *Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL, as the party civilly liable, third parties: Eric Guillaume*.

[42] As Dawson and de Witte note, 'welfare services other than healthcare are not so "fully" covered by internal market law. The Court tends to find a restriction of the freedom to provide services only where the national welfare system is organized in such a way that it provides services which could equally be offered by a commercial provider based in another EU state': M. Dawson and B. de Witte, 'Welfare policy and social inclusion', in A. Arnull and D. Chalmers (eds.), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) p. 973.

[43] ECJ 18 December 2007, ECLI:EU:C:2007:809, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*; ECJ 11 December 2007, ECLI:EU:C:2007:772, *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti*.

[44] C. Joerges and F. Rodl, 'Informal Politics, Formalised Law and the "Social Deficit" of European integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*', 15 *European Law Journal* (2009) p. 18; O. de Schutter, 'Transborder provision of Services and "Social dumping": Rights-Based Mutual Trust in the Establishment of the Internal Market', in I. Lianos and O. Odudud (eds.), *Regulating Trade in Services in the EU and the WTO. Trust Distrust and Economic Integration* (Cambridge University Press 2011) p. 346; A. Bücker and W. Warnek, *Reconciling Fundamental Social Rights and Economic freedoms after Viking, Laval and Rüffert* (Nomos 2011);

restrictions to economic freedom, and the priority accorded to this freedom over the right to take collective action, the majority of commentators agree that in these judgments the Court gave preference to the market freedoms at the expense of social objectives. Also, international organisations have weighed in, most notably with the Council of Europe's European Committee of Social Rights condemnation of the Swedish legislation implementing the *Laval* ruling, and thereby indirectly the European Court of Justice's ruling itself, for breaching the European Social Charter.[45] The *Laval* and *Viking* rulings were followed, and their effects strengthened, by a third landmark case. In *Rüffert*, the Court held that EU law precluded Member States from requiring, in public procurement, that contractors pay their employees the remuneration prescribed by the collective agreement in force at the place where those services are performed.[46] The Court's reasoning was especially striking as regards the possible justification on grounds of worker protection: to require a level of remuneration exceeding the minimum rate of pay applicable pursuant to national legislation cannot be necessary for the protection of workers – otherwise, the same rate of pay would be required nationally and/or for the whole sector.

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'[47] 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,[48] 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. First of all, these cases are game-changers. Judgments like *Viking, Laval,* and *Rüffert* inform the Commission's subsequent infringement actions not only against the country to which the judgment related, but also other Member

A. Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ', 37 *Industrial Law Journal* (2008) p. 126.

[45] *European Committee of Social Rights, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO)* v *Sweden*, Complaint No. 85/2012, Decision of 3 July 2013. *See* M. Rocca, 'A Clash of Kings. The European Committee of Social Rights on the "Lex Laval" … and on the EU Framework for the Posting of Workers', 3 *European Journal of Social Law* (2013) p. 217.

[46] ECJ 3 April 2008, ECLI:EU:C:2008:189, *Dirk Rüffert* v *Land Niedersachsen*.

[47] Advocate General Tizzano in ECJ 5 October 2004, ECLI:EU:C:2004:187, *Caixa Bank*, para. 63 of the Opinion, describing in disapproval an approach that catches non-discriminatory measures that do not affect access to the market in any other way than to reduce the economic attractiveness of pursuing a particular activity.

[48] C. Barnard, 'Restricting Restrictions: Lessons for the EU from the US?', 68 *Cambridge Law Journal* (2009) p. 575.

States,[49] and they inform national courts and authorities, who adapt their action accordingly in the affected areas and beyond. This means that these 'few' judgments become the hard and fast norm for all pay standards in public procurement across Europe, on all labour standards imposed in (potential!) temporary cross-border service provision, and on all collective action undertaken against companies' market freedoms. On the European level, these judgments change the terms of the argument about the market-social balance, providing one side of the argument significant leverage over the other, within the EU institutions, between the institutions and vis-à-vis national actors. Economic actors seek to exploit this new legal landscape to the fullest by bringing new claims to national courts, inviting even further market-favouring expansion of these doctrines.[50]

Secondly, *Laval*, *Viking* and *Rüffert* are not just occasional 'lapses' by the Court. Less high-profile but equally significant judgments carry forward this same trend, somewhat under the radar. A good example is the C-576/13, *Commission* v *Spain* judgment.[51] The Court held that the Spanish dock work system, which required all companies wishing to perform cargo handling services to register with the dock workers' company and to hire, with priority, workers from that company, amongst whom a certain number on permanent contract, constituted an unjustified restriction of the freedom of establishment. In rejecting the justifications that were *inter alia* based on worker protection, the Court followed a lowest common denominator approach, pointing to other Member States' more liberal systems as proof that the measures were not necessary for the protection of workers. The ruling puts pressure on social standards in a sector that is highly symbolic of the power of unionisation, where in the face of harsh and precarious working conditions workers' solidarity has been able to procure high standards of protection through a variety of complex systems in ports across Europe. This social organising power was able to block the EU's attempts to liberalise port services in 2001[52]

[49] The *Commission* v *Luxembourg* judgment is an example of the Commission pushing the new market-oriented doctrine further. While *Laval* departed from the previously-held assumption that the host state standards listed in Art. 3(1) of the Posting Directive were minimum standards, it did not explicitly exclude the possibility of higher standards being imposed on public policy grounds based on Art. 3(10). The Commission actively sought to limit this possibility, opening infringement proceedings against Luxembourg for imposing a range of social standards in reference to public policy grounds. *See* C-319/06, *Commission* v *Luxembourg*, ECLI:EU:C:2008:350.

[50] F. Scharpf, 'The Socio-Economic Asymmetries of European Integration or Why the EU cannot be a "Social Market Economy"', 1 *SIEPS* (2010) p. 4, referring to R. Kelemen, 'Suing for Europe. Adversarial Legalism and European Governance', 39 *Comparative Political Studies* (2006) p. 101.

[51] ECJ 11 December 2014, ECLI:EU:C:2014:2430.

[52] Proposal for a Directive of the European Parliament and of the Council on Market Access to Port Services, COM/2001/0035 final.

and 2004,[53] with fierce union protest actions leading the European Parliament to an unprecedented vote-down of the proposed directive after having already reached a compromise in the conciliation phase.[54] A new proposal for a regulation is pending, but it excludes cargo handling from being opened up to the market.[55] The *Commission* v *Spain* judgment, rendered without the Opinion of an Advocate General and available only in Spanish and French, now does just that, thereby showcasing the surreptitious power of negative integration, achieving outcomes that would be more difficult to procure in a democratic arena.

Moreover, beyond the specific area of port labour, this judgment could be used as a precedent for the finding that all restrictions on the type of labour contract that companies can use is a restriction on the free movement provisions. National provisions limiting the use of precarious and temporary contracts would be caught, at least to the extent that they (may?) apply to foreign companies. Taking this logic to its extreme, Member States would have to defend why they do not allow, for instance, the unlimited use of zero-hours contracts. And, even if justification is possible in theory, this does not save all measures.[56] Indeed, as Barnard has pointed out, 'the ECJ's "restrictions" analysis gives primacy to the economic freedoms […] and creates a presumption that the national rule is unlawful. This puts the defendant, usually the state, on the back foot, defending national social policy choices and showing that the legislation is proportionate'.[57] This proportionality assessment imposes unrealistic rationality requirements on the national democratic process ('policy perfection'),[58] and, since *Rüffert*, the acceptable standard of social protection is low. Furthermore, it leaves the defence of hard-fought social protection achieved on the national level in the hands of national governments, who are not necessarily the owners of these standards, or even in favour of them. It thereby gives governments a tool to eliminate social rules that they do not support, without having to face the normal political contestation at the national level. This leaves social rules systematically vulnerable to attack at both the European and the national level.

[53] Proposal for a Directive of the European Parliament and of the Council on market access to port services, COM/2004/0654 final.

[54] P. Verhoeven, 'Dock Labor Schemes in the Context of EU Law and Policy', *European Research Studies* (2011).

[55] Proposal for a Regulation establishing a framework on market access to port services and financial transparency of ports, COM/2013/0296 final.

[56] Advocate General Kokott in her Opinion on the *Wippel* case has already given a view on the benefits of zero-hours contracts: *see* Opinion of 18 May 2004, ECLI:EU:C:2004:308, *Nicole Wippel* v *Peek & Cloppenburg GmbH & Co KG*, paras. 83-87.

[57] Barnard, *supra* n. 48, p. 576.

[58] F. de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015) p. 212.

Political re-balancing?

The political process has been unable to readjust the balance. Importantly, this is not because the outcome of the case law coincides with the majority political view, but instead because there is a structural incapacity of the political process either at national or European level to correct the negative integration resulting from European Court of Justice case law. As Scharpf has argued, the constitutionalisation of the market freedoms, applied by the Court in a rigorous way severely limiting the Member States' regulatory capacity in all policy areas regardless of whether they fall within an area of Member State autonomy, accompanied by the relative political and legal weakness of EU legislative abilities to set social standards at the European level, has had deregulatory effects.[59]

Laval is the textbook example: national social standards laid down in collective agreements could not be protected by trade unions through collective action as this limited companies' freedom to provide services across borders. The EU legislator in turn could not fill this social gap, partially because legislation itself is subject to the fundamental freedoms laid down in the Treaties, and partially because (national parliaments considered that) the EU lacked legal competence to act on this issue.[60] Moreover, even if the legislative proposal passed review by national parliaments, it is not at all certain that the Council would have reached agreement. Negative integration favours the negotiation position of Member States with a 'Liberal Market Economy' who have no incentive to legislate upward to change the liberalised status quo.[61] This structural asymmetry has worsened since the accession of Central Eastern Member States that tend to favour the Liberal model, making it even more difficult to pass social legislation at the EU level.[62] The one measure that was eventually adopted after an arduous legislative process, the Posted Workers Enforcement Directive, only serves to prove this point. The sole compromise that

[59] F. Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"', 8 *Socio-Economic Review* (2010) p. 211; F. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity', 40 *Journal of Common Market Studies* (2002) p. 645.

[60] In response to the (critical reception of the) judgments, the Commission proposed a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and services. However, in June 2012, the Commission received the first-ever 'yellow card'. Twelve national parliaments expressed subsidiarity-related concerns regarding this so-called 'Monti II Regulation' amounting to 19 votes. Upon the mandatory revision of the proposal, the Commission decided to withdraw it. *See* 'Commission decision to withdraw the Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services – COM (2012) 130'.

[61] Scharpf, *supra* n. 59, p 226.

[62] P. Copeland, 'EU enlargement, the clash of capitalisms and the European social model', 10 *Comparative European Politics* (2012) p. 476.

could be reached was to allow host States more effective methods of policing their legitimately imposed labour standards, rather than broadening the scope of these standards themselves.[63]

The way that European Court of Justice case law structurally influences political outcomes can also be seen from more recent developments in the area of posted workers. Perhaps in response to the criticism levelled at its hardened stance toward labour standards, the Court readjusted its position to the benefit of national social regulatory autonomy in two recent rulings. In *Elektrobudowa*, the Court was again asked to interpret the Posting of Workers Directive.[64] The case concerned 186 Polish workers posted to Finland, who considered that they had not received sufficient wages. They assigned their claims to a Finnish trade union, which seized a national court, which in turn asked the European Court of Justice for guidance on what the employer could be obliged to pay the workers under host State rules. The Court, in a remarkably generous judgment, sided with the trade union, confirming the possibility of workers to assign their wage claims to unions if the host Member State law so provides, regardless of whether home State law permits this. Even more importantly, the Court gave a broad interpretation of what host States could consider as constituting the mandatory 'minimum rates of pay' under Article 3(1) of the Directive. Contrary to the Advocate General, the Court held that the minimum wage could be calculated by categorising workers into pay groups based on criteria such as qualifications, training, experience and type of work (if this is done transparently), and that it could include a posting-specific flat-rate daily allowance applicable for the entire duration of the posting. Similarly, it could include a reimbursement for daily travelling time. The Court also considered that the cost of accommodation provided by the employer and meal vouchers could not be deducted from the minimum rates of pay payable to the workers.

This important shift was followed in the highly anticipated *Regiopost* ruling.[65] Contrary to the position of the Commission, the Court held that the award of public contracts may be made subject, by law, to a minimum wage. In particular, the Court accepted the requirement of *Stadt Landau* for tenderers to commit to paying (sub-)contractors an hourly wage of €8.50 as stipulated in the regional public procurement law. Regiopost, one of the three German tenderers to provide municipal postal services, had argued that this requirement was incompatible with Article 56 TFEU, and could not be authorised under the Posting Directive or the Public Procurement Directive 2004/18, in reference to the *Rüffert* and

[63] Directive 2014/67/EU, OJ L 159, 28.5.2014, p. 11.

[64] ECJ 12 February 2015, ECLI:EU:C:2015:86, *Sähköalojen ammattiliitto ry* v *Elektrobudowa Spółka Akcyjna*.

[65] ECJ 17 November 2015, ECLI:EU:C:2015:760, *RegioPost GmbH & Co KG* v *Stadt Landau*.

Bundesdruckerei judgments.[66] While in *Rüffert* the collective agreement in question had not been declared universally applicable as required under Article 3(8) of the Posting Directive, and the Public Procurement Directive 2004/18 (which allows the imposition of special social conditions)[67] was not yet applicable, and while the *Bundesdruckerei* case involved the rather special situation where the work was to be carried out in the home state, Regiopost appealed to the underlying reasoning of the Court in these two cases, where it subjected both directives to the interpretation of Article 56 TFEU as primary law and held that wage requirements could only be justified in the name of worker protection if constituting the absolute minimum applicable in the most general terms, and so not including higher levels of protection set by public procurement.

The Court disagreed, considering the regional provision a 'law' that lays down a 'minimum rate of pay' under Article 3(1) of the Directive. The fact that the law only applied to public contracts did not make any difference, since the Directive makes the criterion of 'universal application' only applicable to collective agreements. This interpretation was 'confirmed […] by a reading […] in light of Article 56 TFEU'.[68] The Court reiterated that while wage requirements can constitute a restriction of the freedom to provide services, they may be justified by the objective of protecting workers. The fact that the requirement only applies in the context of public contracts again did not matter. While thereby departing from the *Rüffert* approach, the Court does not explicitly reverse its stance but instead goes to great length to distinguish it, stating that its ruling was based 'on certain characteristics specific to th[e] measure [in question]'.[69] The measure in *Rüffert* was a collective agreement applying solely to the construction sector, which did not cover private contracts and had not been declared universally applicable, and the pay set by that collective agreement exceeded the minimum pay applicable to that sector under the German Posted Workers Law. By contrast, the minimum pay imposed in *Regiopost* is laid down in a legislative provision, which applies generally to the award of public contracts in the Land Rhineland-Palatinate, irrespective of the sector, and (at the time of the facts) no other minimum wage provisions applied. To avoid an explicit and principled reversal of its case law, the Court confines the ruling to the specific facts, thereby leaving a number of burning questions unanswered.[70] But even if the extent to which *Laval*, *Rüffert, Luxembourg* and *Bundesdruckerei* have been overturned is open

[66] ECJ 14 September 2014, ECLI:EU:C:2014:2235, *Bundesdruckerei GmbH* v *Stadt Dortmund*.
[67] Art. 26 of the Public Procurement Directive.
[68] Para. 67 of the ruling.
[69] Para. 73 of the ruling.
[70] Firstly, it is not clear whether in the event of a generally applicable minimum wage, Member States can impose higher minimum standards by law in the specific context of public procurement. Secondly, the difficult relationship between the Posting Directive and Art. 56 TFEU is not fully clarified. Finally, it is unclear whether the same outcome can be expected in situations of

to discussion, the permissive signal to Member States and their courts is a strong one.

The judgments may thereby already go a long way toward addressing the political concerns about social dumping since *Laval* and *Rüffert*, although the stakeholders involved can be expected to remain insistent in their desire to see the text of the Directive itself revised.[71] It is understandable that they do not feel confident leaving their fate in the hands of sometimes unpredictable and volatile case law. President Juncker campaigned on a strong social message, prominently including commitments to bolster the right of host States to enforce their labour standards through revision of the Posting of Workers Directive following an 'equal pay for equal work' principle[72] to address the political fallout after *Laval* and *Rüffert*.[73] The Commission had indeed already announced a 'targeted review' of the Directive. The proposal envisages, *inter alia*, to replace the notion of 'minimum rates of pay' of Article 3(1)(c) with 'remuneration', and to allow social standards to be imposed through other collective agreements than those that have been declared universally applicable in the context of subcontracting.[74] With the now reinforced power of the Member States under Article 3(1) of the Directive since *Elektrobudowa* and *Regiopost*, the bargaining position of the 'Social Market Economy' Member States has significantly improved, meaning that the political likelihood of such a revised Directive being agreed upon in the Council has become higher (although, ironically, less necessary). However, the proposal has received the required number of negative

cross-border service provision that imply the use of home state workers in a host state, but that for one reason or another do not fall under the Posting Directive.

[71] As Kilpatrick has pointed out, there are several advantages to settle these issues of services regulation through legislation rather than judicial Treaty elaboration, namely to offer a structure for market participants, to offer detail and certainty, to allow for adaptation to national specificities, to consolidate the case law but also to react to it. Finally, as she points out, 'legislation has a *democratic imprimatur*': C. Kilpatrick, 'Internal Market Architecture and the Accommodation of Labour Rights', 4 *EUI Working Paper Series LAW* (2011) p. 2.

[72] *See* European Parliament, 'Parliament elects new European Commission', <www.europarl.europa.eu/news/en/news-room/content/20141016IPR74259/html/Parliament-elects-new-European-Commission>, visited 12 Decmber 2016; 'Juncker defines 10 priorities for EU, seeks inter-institutional support', *Euractiv.com*, 14 November 2014, <www.euractiv.com/sections/eu-priorities-2020/juncker-defines-10-priorities-eu-seeks-inter-institutional-support>, visited 12 December 2016.

[73] *See*, for instance, the letter from seven EU Member States ministers to EU Employment Commissioner on the exploitation of posted workers, 18 June 2015, <www.gmb.org.uk/assets/media/gmbbrussels/EU%20Government%20ministers%20letter%20to%20Commissioner%20Thyssen%2018%20june%202015.pdf>, visited 12 December 2016.

[74] Proposal for a Directive of the European Parliament and 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.

opinions from national parliaments to trigger the yellow card procedure for the third time in history,[75] sending the proposal back for consideration to the Commission, a development which underlines once again the difficulty of (re-)regulating an area covered by EU case law.

Constitutional imbalance: the excessive role of the judiciary

Of course, for those in favour of high social standards, the Court's recent re-adjustment of the balance between 'the economic' and 'the social' in the internal market is all the more welcome in light of these continuing political difficulties. Further examples of this recent recalibration can be mentioned, such as the *AKT* ruling[76] on the Temporary Agency Work Directive.[77] And while the recent case law on access to benefits for non-economically active EU migrants may by contrast be considered a less social turn, it could also be argued to fit the new trend that respects national regulatory autonomy (who to include *and* to exclude) on social questions.[78] All these recent judgments show that the Court is, to a certain extent, responsive to societal concerns about its case law. But on a more fundamental level, the foregoing lays bare the remarkably decisive role that the case law plays in these essentially political questions, making one wonder whether it is acceptable that the Court (pre)determines political outcomes to such an important degree.

[75] For a discussion, *see* 'EU-Level: Posted workers proposal gets "yellow card" from Member States', Eurofound, <www.eurofound.europa.eu/observatories/eurwork/articles/industrial-relations/eu-level-posted-workers-proposal-gets-yellow-card-from-member-states>, visited 12 December 2016

[76] ECJ 17 March 2015, ECLI:EU:C:2015:173, *Auto- ja Kuljetusalan Työntekijäliitto AKT ry* v *Öljytuote ry and Shell Aviation Finland Oy*.

[77] This Directive was adopted based on Art. 153 TFEU, allowing minimum harmonisation for the protection of workers. However, in line with the 'flexicurity' approach, the Directive also contains Art. 4, stipulating that 'prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented'. This clearly evokes other prohibitions in the Treaty, looking like a directly effective right to challenge national restrictions on temporary agency work. This was indeed advocated by a company, in defence against an enforcement action of a trade union for breaking a provision in the applicable collective agreement specifying that agency work would only be used to cover temporary needs. If this interpretation were followed, temporary agencies and user undertakings could challenge all kinds of restrictions on temporary agency work. This would, furthermore, apply in wholly internal situations meaning a complete liberalisation of this precarious type of employment, brought about by means of an EU labour law directive. The AG supported this approach, arguing that the substantive obligation of Art. 4 was already contained in Art. 56 TFEU. The ECJ disagreed, denying direct effect to Art. 4, and thereby arguably prevented another *Laval*.

[78] ECJ 11 November 2014, EU:C:2014:2358, *Elisabeth Dano and Florian Dano* v *Jobcenter Leipzig*; ECJ 15 September 2015, ECLI:EU:C:2015:597, *Jobcenter Berlin Neukölln* v *Nazifa Alimanovic*.

The role of any judiciary in balancing 'the market' and 'the social' is a thorny enough issue, let alone in the EU's constitutional order, where the 'correction' by the political process of such judgments is exceedingly difficult. As discussed above, the EU may lack the competence altogether to 're-regulate' the issue, or it must rely on the internal market legal bases which lead to an economic bias by demanding that the measure serve the functioning of the internal market.[79] The EU legislator is subject to high consensus requirements, that is must fulfil in the context of a very diverse EU28, with national parliaments posing an additional hurdle. The effect of the case law on the bargaining conditions in the Council makes it difficult for the legislator to deviate from that case law in practical terms. Moreover, a fundamental deviation is difficult also in legal terms, as the Court's interpretations of the internal market provisions are of a constitutional nature. The legislative process is powerless in that case to alter the interpretation given by the European Court of Justice; only a Treaty revision would suffice. Of course, ultimately, the final power therefore lies with the Masters of the Treaties, but the picture clearly emerges that it is the Court that, to a very large extent, decides on the political question of the place of the market in our societies, and on the power of our societies to regulate the market.

The integration process owes a great debt to the Court's case law, especially where it bypassed precisely these political stalemates of the past through landmark judgments like *Cassis*. Nevertheless, this very case law has also created a debt of its own – not just a social one, but ultimately a democratic one. Through its wide interpretation of indirect and potential restrictions *prima facie* caught by the Treaty market freedoms and its configuration of the rule of reason, the Court has placed itself structurally in a position where it scrutinises and second-guesses sensitive and re-distributive political choices made both on the national and the European level. The results of such intensive review can only benefit 'the market' at the cost of other public interest concerns, including social ones. The stakes are such that 'the market' has much less to lose than 'the social' here: a judgment accepting a national social 'restriction' as justified still allows Member States to adopt more market-friendly rules, but a judgment condemning a national social rule prohibits all Member States from adopting or maintaining such rules. Hence, more judicial restraint is in order. Therefore, the recent case law in this area should be welcomed, although it seems insufficient to resolve the deeper, constitutional asymmetry that makes the judiciary omnipotent, renders the European legislator ineffective and leaves the national legislator vulnerable and powerless. Indeed, judgments such as *Commission* v *Spain* show that the same dynamic continues in remarkably unnoticed ways. While, as Kilpatrick rightly points out, we should be

[79] G. Davies, 'Democracy and legitimacy in the shadow of purposive competence', 21 *ELJ* (2015) p. 2.

equally careful not to sanctify the legislative process,[80] its legitimacy to decide on the fundamental balance between 'the market' and 'the social' must be accepted as being significantly higher than the judicial process. Judicial law-making on these issues possesses only low levels of input and throughput legitimacy, and the fierce reactions to the *Viking* and *Laval* judgments show its doubtful output legitimacy.

Interim conclusion

The foregoing leads to the conclusion that in the internal market, the balance between 'the social' and 'the economic' has been decided in favour of the latter. The *Viking*, *Laval* and *Rüffert* judgments are of fundamental importance in that respect, as they altered this balance by widening the interpretation of potential restrictions and narrowing the scope for social justification. Even if recent case law suggests a more cautious approach, the problem lies deeper. In the current legal framework governing this area, the odds are not only systematically stacked in favour of 'the economic', but these decisions of high political importance are not being taken by the democratic process either on the national or on the European level, but instead by the judiciary. While this is arguably the natural consequence of the constitutionalisation of the free movement provisions and the hierarchy of norms, this finding should argue in favour of a relatively restrained approach by the European Court of Justice. However, rather to the contrary, the internal market freedoms are probably where the case law has traditionally been most activist. The current doctrines of market access and potential hindrance, and the proportionality test with its component of (strict) necessity, are almost entirely the Court's making, quite far removed from the Treaty text. However useful this has proven to further the European integration process, the outcome is difficult to defend from a legitimacy point of view. Judicial review is a normal part of constitutional democracy with its intent being to insulate certain overriding values from the majoritarian democratic process, but the balance between 'the social' and 'the market' should not be such a value – instead it is, and should be, the bread and butter of the political process.

Economic policy

Tension between the need for containment and for conferral of the EU level underlies EU economic policy. On the one hand, in light of its pervasive nature, Member States are legitimately concerned about granting the EU a hard competence in this area, as they fear it may become a blank cheque for the EU to decide on highly sensitive decisions of a re-distributive nature at the core of their

[80] The legislative process and output can be sub-optimal: 'slow or absent responses to changing circumstances, entrenched positions, the construction as addressees rather than as producers of norms of key actors and unclear and contradictory legislative bargains are central and well-known problems': *see* Kilpatrick, *supra* n. 71, p. 19.

sovereign powers and, arguably, beyond the EU's limited legitimacy. Yet, the closely intertwined European economies and the common currency would seem to necessitate a strong European-level capacity to decide on the crucial elements of this economic and monetary union. In the wake of the crisis, this latter consideration has become particularly poignant, and alongside monetary policy, economic policy coordination at the European level has gained in importance and intensity. In this, it is affecting a wide range of other policy areas in unprecedented ways, with important social consequences. If there is any decisive battle ground for Europe's social question, it is that of economic policy.

The social impact of the Euro-crisis measures and the European Semester

The economic and sovereign debt crisis threatening the stability of the Eurozone and the EU economy more generally has led to the adoption of harsh austerity measures in the affected countries. The Commission, through the European Stability Mechanism and its siblings,[81] coordinates the financial support provided by Euro countries and the International Monetary Fund in the form of economic adjustment programmes, requiring reforms to address economic imbalances, specified in Memorandums of Understanding. Such Memoranda have been signed under the European Stability Mechanism, the European Financial Stability Facility and earlier financial assistance agreements, with Cyprus, Greece, Hungary, Ireland, Latvia, Portugal, Romania and Spain. The detailed conditionalities specified therein have resulted in a significant and widely reported reduction of health,[82] social

[81] The European Stability Mechanism and the European Financial Stability Facility are intergovernmental support mechanisms created by the Euro Member States in response to the financial crisis. The European Financial Stability Facility was created as a temporary rescue mechanism, following the decisions of 9 May 2010 within the framework of the Ecofin Council. In October 2010, it was decided to create a permanent rescue mechanism, the European Stability Mechanism, based on an international Treaty, entering into force on 8 October 2012. The ESM, taking the form of an intergovernmental organisation under public international law, is now the main instrument to finance new programmes. Parallel to the European Stability Mechanism, the European Financial Stability Facility continued with the ongoing programmes for Greece, Portugal and Ireland. Before the European Stability Mechanism and European Financial Stability Facility, so-called Balance-of-Payments programmes had been agreed between the International Monetary Fund and the EU with Latvia, Hungary and Romania.

[82] As reported by the International Labour Organization, 'the European Centre for Disease Control warned that serious health hazards are emerging because of the fiscal consolidation measures introduced since 2008. More specifically, in Greece, Spain and Portugal citizens' access to public health care services has been seriously constrained, to the extent that there are reported increases in mortality and morbidity'. In January 2013, doctors from Portugal, Spain, Ireland and Greece sent an open letter in which they deplored the effects that financial and economic decisions were having on the health of the populations of their countries calling for immediate action to reverse

protection[83] and labour standards. For instance, the various Memoranda signed with Greece require *inter alia* an increase in 'flexible' forms of work, such as fixed-term work and temporary agency work, extended probation periods, decreased protection against collective redundancies, reduction in pay, increased working time and allowing wage growth below sectoral agreements, increased retirement age, and decreased holiday pay.

The negative social impact of the reforms is uncontested, and deplored.[84] Furthermore, the legality of these measures is in dispute.[85] The Greek reforms have been condemned by the European Committee of Social Rights, concluding that it had not been established 'that efforts have been made to maintain a sufficient level of protection for the benefit of the most vulnerable members of society, even though the effects of the adopted measures risk bringing about large scale pauperisation of a significant segment of the population'.[86] Due to the cumulative effect of the restrictive measures and the procedures adopted to put them in place, they constituted a violation of Article 12(3) of the 1961 European Social Charter.[87] Also the International Labour

the situation: <http://epha.org/european-doctors-send-open-letter-on-the-effects-of-austerity-on-the-health-of-people/>, ILO, *World Social Protection Report*, 2015, p. 135.

[83] The 2015 ILO Report provides a comprehensive, damning overview. For instance, it indicates that in the EU, 'cuts in social protection have already contributed to increases in poverty which now affects 123 million people or 24 per cent of the population, many of whom are children, women, older persons and persons with disabilities'. 'In Ireland, Greece, Portugal and Cyprus, where some of the boldest structural reforms have taken place as part of the terms agreed under the different economic adjustment programmes adopted by these countries since 2008, disposable household incomes have declined in consequence, as a result of high unemployment, lower wages and social protection expenditure cuts, and this in turn has led to lower consumption'. '[…] curtailments informed by fiscal consolidation objectives have reduced social protection expenditure by more than 12 per cent in real terms since 2008 […]. Inevitably, poverty in Greece rose to a historically high level, exceeding 35 per cent of the population in 2013, inflicting intense human suffering as many families found themselves unable to access any longer the basic necessities for a life in dignity. Trade union activists speak of "a programmed impoverishment of the population"': *see* ILO Report, *supra* n. 82, pp. xxv, 9, 24 and 137.

[84] E.g. C. Kilpatrick and B. de Witte, 'Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges', *EUI Working Paper LAW* (2014); F. de Witte, 'EU Law, Politics and the Social Question', 14 *European Law Journal* (2013) p. 581; A. Koukiadaki and L. Kretsos, 'Opening Pandora's Box: the Sovereign Debt Crisis and Labour Market Regulation in Greece', 41 *Industrial Law Journal* (2012) p. 276; H. Augusto Costa, 'From Europe as a Model to Europe as Austerity: the Impact of the Crisis on Portuguese Trade Unions', 14 *European Law Journal* (2012) p. 397.

[85] Barnard, *supra* n. 3, p. 203.

[86] *Federation of Employed Pensioners of Greece (IKA-ETAM)* v *Greece, European Committee of Social Rights*, Decision on the Merits, Complaint No. 76/2012, paras. 81 and 83.

[87] *See* M. Salomon, 'Of Austerity, Human Rights and International Institutions', *LSE Working Paper* (2015).

Organization's Committee on Freedom of Association condemned certain austerity measures taken in Greece under Troika auspices. 'While deeply aware that these measures were taken within a context qualified as grave and exceptional, provoked by a financial and economic crisis', the Committee found that there were 'a number of repeated and extensive interventions into free and voluntary collective bargaining and an important deficit of social dialogue'.[88] The Committee warned that 'the elaboration of procedures systematically favouring decentralized bargaining of exclusionary provisions that are less favourable than the provisions at a higher level can lead to a global destabilization of the collective bargaining machinery and of worker's and employers' organizations and constitutes in this regard a weakening of freedom of association and collective bargaining contrary to the principles of Conventions Nos 87 and 98'.[89] While formally the European Committee of Social Rights and International Labour Organization do not hold the EU responsible for these transgressions, but instead only the Member State itself, they clearly do call into question the legitimacy of the EU's Euro-crisis policy.

Furthermore, the crisis has given momentum to the so-called European Semester, in which the Council, upon Commission proposal, adopts country specific recommendations as part of the coordination of Member States' economic and employment policy. As Zeitlin and Vanhercke note, the Semester brings together within a single annual policy coordination cycle a wide range of EU governance instruments with different legal bases and sanctioning authority, from the Stability and Growth Pact, the Macroeconomic Imbalances Procedure, and the Fiscal Treaty to the Europe 2020 Strategy and the Integrated Economic and Employment Policy Guidelines.[90] Under the Excessive Deficit Procedure and the Excessive Imbalance Procedure, the recommendations are backed up by the possibility of financial sanctions if Member States repeatedly fail to take action on public finances or macroeconomic imbalances.[91] There have been highly detailed country specific recommendations concerning a range of labour market and social standards in a great number of Member States.[92] While some of these recommendations encourage Member States to increase social inclusion and worker protection,[93] many others entail

[88] ILO press release, 'ILO calls on Greece to bring its labour relations system back to fundamental rights', 15 November 2012, <www.ilo.org/brussels/press/press-releases/WCMS_193308/lang–en/index.htm>, visited 12 December 2016.

[89] 366th Report of the Committee on Freedom of Association, paras. 784-1003.

[90] J. Zeitlin and B. Vanhercke, 'Socializing the European Semester? Economic Governance and Social Policy Coordination in Europe 2020', *SIEPS* (2014) p. 7.

[91] No sanctions have been imposed to date.

[92] 16 Member States in 2015.

[93] For instance, Poland has been criticised for its high share of temporary contracts. However, the proposed solution is to facilitate dismissals. *See* COM(2015) 250 final.

the opposite.[94] In fairness, steps have been taken to 'socialise' the European Semester in response 'to rising social and political discontent with the consequences of post-crisis austerity policies'.[95] The 2016 Semester promises closer engagement with civil society, including the Social Partners. Nevertheless, the process still challenges national social and labour standards and subjects them to a logic of economic stability and competitiveness.

Lack of politics, lack of law, or lack of democracy?

The balance between 'the economic' and 'the social' has thus clearly been decided in favour of the former in EU economic policy. Perhaps this is only natural, considering the nature and objectives of this policy area. But the effects are so wide-ranging and intrusive, subjecting all other policy areas to this singular logic and these one-sided objectives, that it fundamentally affects the *overall* socio-economic balance in the EU polity, giving decisive precedence to economic concerns over social ones. Is this imbalance justified and legitimised as a conscious choice made by the citizens of Europe through their representatives and with their active participation and deliberation, and can they subsequently change their choice through national and European elections? While complex and not unequivocal, the answer to all these questions seems to be in the negative.

The country specific recommendations, adopted by the European Council upon Commission proposal, are non-binding and thereby leave the ultimate decision to be taken at the national level. Nevertheless, the political pressure they exert on national standards should not be underestimated, especially as they take place in a structured framework with an eventual possibility for sanctions. Admittedly, country specific recommendations are followed only in a minority of

[94] For instance, in 2015, Belgium was to reduce 'align wage growth more closely with productivity and to make wage-setting more flexible', the Commission criticised Bulgaria (which has the lowest minimum wage in the EU) for the 'substantial' increases since 2011 as such 'sharp discretionary shifts in the Government's wage-setting policy could be distortive for the labour market', although the Council watered this down in the final recommendation, Croatia was asked to 'tighten the definition of arduous and hazardous professions' for the purpose of retirement and to increase flexibility in wage-setting, Finland was asked to eliminate early retirement, France was to lower its minimum wage and to increase working time, Italy should promote 'second-level bargaining, which could help to better align wages with productivity and encourage the adoption of innovative solutions within firms', Luxembourg was to reform its wage-setting system so as to reduce wages in all sectors apart from the financial sector, and Portugal was criticised for its minimum wage that 'has risen significantly faster than the average wage in nominal terms since 2008' and needs to ensure that collective bargaining 'allows firms to adjust to specific circumstances'. *See* <ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/2015/index_en.htm>, visited 12 December 2016.

[95] Zeitlin and Vanhercke, *supra* n. 90.

https://doi.org/10.1017/S1574019616000407 Published online by Cambridge University Press

cases[96] perhaps because national parliaments can indeed refuse to legally implement them. Nevertheless, governments can play into a lack of transparency and sense of urgency to (selectively) push through the implementation of the reforms, arguing that 'international obligations' have to be met, perhaps pointing at the threat of sanctions or reduced EU-level funding. Indeed, it is especially national executives that are empowered in such intergovernmental settings. As Moravcsik has argued, 'international cooperation redistributes domestic power in favour of national executives by permitting them to loosen domestic constraints imposed by legislatures, interest groups, and other societal actors'.[97] These concerns apply especially to EU soft law, in which the substantive decision-making is limited to (national and supra-national) governmental officials and where the involvement of parliaments, as well as civil society actors and the Social Partners, is marginal. Furthermore, the country specific recommendations' lack of direct legal effect does not make them inconsequential. Soft norms construct a narrative and influence institutional actor's behaviour in subtler ways,[98] and although difficult to establish empirically, a certain opportunity cost is involved, in that a number of potential policies on the European and national level may not be initiated.

Furthermore, the fact that country specific recommendations are non-binding means that they are not reviewable under the EU Charter of Fundamental Rights,[99] and that they can circumvent the EU's social legal basis of Article 153 TFEU and its safeguard principles of social dialogue, minimum harmonisation, non-regression and the exclusion of issues such as pay, with impunity. Compared to the Social Title, the legal framework of economic policy coordination seems to lack the appropriate constitutional safeguards to ensure balance and/through inclusion, accountability and legitimacy. Is the conclusion then that the problem with the country specific recommendations is a lack of law? It should be emphasised that the European Semester does have a legal mandate, a formal basis in the Treaties, and an elaborate framework of

[96] According to the European Parliament, only 'around 9 % of the country specific recommendations were fully implemented by the Member States in 2013', European Parliament resolution of 11 March 2015 on the European Semester for economic policy coordination: Annual Growth Survey 2015.

[97] A. Moravcsik, 'Why the European Union Strengthens the State: Domestic Politics and International Cooperation', 52 *Harvard University Centre for European Studies WPS* (1994) p. 1.

[98] M. Dawson, 'Integration through Soft Law: No Competence Needed? Juridical and Bio-Power in the realm of Soft Law', in S. Garben and I. Govaere (eds.), *The Division of Competences between the European Union and its Member States: Reflections on the Past, Present and Future* (Hart 2017), forthcoming.

[99] This could be different if sanctions were imposed for non-compliance, as indicated by Koen Lenaerts, President of the ECJ, in a lecture in Leuven on 26 April 2013, reported by Zeitlin and Vanhercke, *supra* n. 91, p. 57.

secondary legislation.[100] Economic policy coordination itself is thus firmly rooted in EU primary and secondary law. However, the actual, substantive decision-making by contrast takes place in an intransparent, exclusionary and undemocratic way, between the Commission and the Council. The problem is that the role of law in this case is to legalise the 'outsourcing' of highly sensitive, political questions that from a democratic perspective should be taken through the legislative process, to an executive, intransparent forum. The parliamentary complicity in setting up the framework is understandable in light of the crisis situation at the time, but cannot validate the indefinite displacement of substantive decision-making on highly crucial issues, locating it outside the democratic safeguards embedded in the legislative process.

What of the Euro-crisis measures? The 'first generation' of financial assistance programmes was adopted based on Article 122(2) TFEU, as a stop-gap, until the adoption of the European Stability Mechanism Treaty was made possible by Article 136(3) TFEU through a Treaty revision. Indeed, it has been correctly pointed out that Member States in their handling of the Euro-crisis have in fact resorted to legal measures to a much greater extent than could perhaps be expected and than sometimes seems to be suggested.[101] Moreover, the most important Euro-crisis decisions were taken by Heads of State, which undeniably enjoy an important measure of legitimacy, and politicians of the highest level remain involved in the follow-up processes alongside the Commission, the European Central Bank and the International Monetary Fund, and in the formulation of the concrete financial assistance measures and their conditionalities. Nevertheless, as Scharpf notes, 'these conditionalities were not defined by European legislation under the Community Method or through consensus-oriented voting in the Council but through extremely asymmetric bargaining between creditor and debtor governments that resembled conditions of an unconditional surrender'.[102] Furthermore, the international European Stability Mechanism Treaty is not reviewable under the EU Charter,[103] and the Memoranda much like the country

[100] The TFEU provides the three central provisions: Art. 121 on multilateral surveillance, Art. 126 on excessive deficits, and Art. 136 on specific economic policy guidelines for the Euro-area. These provisions have allowed the adoption of secondary legislation, elaborating the framework and providing further legal basis for action in the European Semester, such as the Stability and Growth Pact, the Six-pack and Two-pack regulations. The intergovernmental Fiscal Compact Treaty lays down the 'balanced budget' rule.

[101] B. de Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?', 11 *EuConst* (2015) p. 434.

[102] F. Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy', 21(3) *European Law Journal* (2015) p. 389.

[103] As regards the European Stability Mechanism, the Court confirmed this in the *Pringle* judgment: ECJ 27 November 2012, ECLI:EU:C:2012:756, *Thomas Pringle* v *Government of Ireland, Ireland and The Attorney General*.

specific recommendations allow 'circumvention' of the EU's social legal basis of Article 153 TFEU and its social safeguard principles, thereby undermining the division of national and European competences.[104] The legal status of these Memoranda is unclear,[105] which is troublesome in light of their scope and breadth, 'including very detailed instructions regarding the state budgets both on the revenue and on the spending side' 'affect[ing] policy choices in areas which are not within the EU legislative competence'.[106]

In social terms, the only constitutional safeguards applicable to (the national implementation of) these Memoranda are, firstly, the social *acquis*, such as the minimum standards laid down in the Working Time and Fixed-Term Work Directives, and, secondly, the fundamental social rights laid down in international law. Regrettably, neither have proven sufficiently effective to remedy the social crises that have emerged in certain Member States. While, as Lenaerts points out, Regulation 472/2013 now requires that the draft macroeconomic adjustment programme implemented in a Member State in receipt of financial assistance 'shall fully observe Article 152 TFEU and Article 28 of the [Charter]' and that '[t]he Commission shall ensure that the [Memorandum of Understanding] is fully consistent with the macroeconomic adjustment programme approved by the Council',[107] this provides a social safeguard only in a very indirect and minimal way. So, while Euro-crisis governance could be argued to be generally founded on a legal framework of EU primary and international law which certainly benefit from a degree of democratic legitimacy, much like in the case of economic governance the effect of the framework has been to authorise the 'outsourcing' of substantive questions balancing 'the economic' and 'the social' to be taken in the actual management of the Euro-crisis, most saliently the Memoranda, to an executive, intransparent and exclusive forum. Although national parliaments have had to sign off on much of the implementation of the conditionalities, it is not credible to claim that this reflected a genuine exercise of democratic authority. At best, all this complies with a very formalistic, thin notion of democratic legitimacy.

Interim conclusions

EU economic governance is affecting a wide range of other – highly sensitive – policy areas in unprecedented ways. The old concerns about competence creep,

[104] M. Dawson and F. de Witte, 'Constitutional Balance in the EU after the Euro-Crisis', 76 *Modern Law Review* (2013) p. 817.

[105] C. Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They are Not EU Law?', 10 *EuConst* (2014) p. 393; M. Schwarz, 'A Memorandum of Misunderstanding', 51 *CMLR* (2014) p. 398.

[106] de Witte, *supra* n. 101, p. 452.

[107] K. Lenaerts, 'EMU and the EU's constitutional framework', 39 *European Law Review* (2014) p. 758.

subsidiarity and the protection of national regulatory autonomy in the context of 'over-expansive and intrusive' EU legislation that gave rise to a number of constitutional reforms over the course of various subsequent Treaty revisions seem positively trivial when compared to the competence *coup* taking place through European economic governance. Affected Member States are given detailed instructions about the level of their wages and the procedures for setting them, about their pensions, their health care and education systems, and face political and financial sanctions or bankruptcy if they fail to obey. 'The social' can be broadly defined to encompass all these issues, and the balance between these interests and 'the economic' has unequivocally been decided in favour of the latter. This is all the more worrying considering that these decisions have been and are still taken without the necessary legitimation. As expounded upon by scores of scholars, there are grave concerns 'resulting from the policies, the politics, [and] the processes of Eurozone governance'[108] with all types of legitimacy: input, output and throughput.

Further reflections

Re-empowering the legislative process on the European and the national level

In the foregoing, we have explored three areas of EU law, focusing on how 'the market' and 'the social' are being balanced and by whom, whether there is an imbalance in the overall outcome, and to what extent that outcome can be legitimised. We have concluded that the specific constitutional configuration of the area of social policy ensures balance and legitimacy. In contrast, in the internal market and economic governance, the balance between 'the market' and 'the social' has been decisively struck in favour of the former, to such an extent that it affects the overall balance of these values in the EU polity. Furthermore, we have established that this outcome is not the result of democratically legitimate procedures. It would thus seem that process and substantive outcome are interrelated.[109] But even without such a correlation, these findings are worrying, from a social perspective for some and from a democratic perspective for others, and from a pragmatic perspective for those who would like to see the EU continue to grow and prosper.

[108] V. Schmidt, 'The Eurozone's Crisis of Democratic Legitimacy – Can the EU Rebuild Public Trust and Support for European Economic Integration?', 15 *ECFIN Discussion Paper* (2015) p. 10.

[109] In a similar vein, the current situation has been described as 'authoritarian liberalism'. *See* C. Joerges, 'What is Left of the European Economic Constitution? A Melancholic Eulogy', 30 *European Law Review* (2005) p. 461 and M. Wilkinson, 'The specter of authoritarian liberalism: reflections on the constitutional crisis of the European Union', 14 *German Law Journal* (2013) p. 527.

Indeed, while speculative, it may not be a coincidence that exactly in these two areas where we have established an undemocratic imbalance between central political values, the EU is finding it increasingly difficult to proceed with its 'core business'. The EU is expected to stabilise the Economic and Monetary Union but at the same time the consequences of its policy of doing so has led to fierce push-back. The internal market project should be the EU's comfort zone, but it has become a focal point in national and European elections and in certain strands of eurosceptic debate. This may be because the identified socio-economic imbalance is not just theoretical, but experienced first-hand by people across Europe. Ordinary citizens, during the economic crisis, have felt more keenly than ever the tangible effects that EU action has on their daily lives, livelihoods and wellbeing. This must have contributed to an awareness of the political nature of EU policies, and the need for contestation. And it may very well be that even if the balance were to be restored in terms of output, the genie cannot be put back into the bottle. The EU's typical approach of de-politicisation is unlikely to quell this 'democratic awakening', in which case the EU will somehow have to otherwise accommodate this development. As such, the way the legal and political system balances 'the market' and 'the social' can be expected to play a crucial role. It may not be the outcome (i.e. 'more market' or 'more social') that will be decisive, nor whether this outcome happens to coincide with the majority view, but instead the extent to which the process in which that outcome is achieved is (perceived as) inclusive and representative, democratic and legitimate.

To address this, we should structurally re-empower the legislator vis-à-vis both the executive and the judiciary, at the European and the national level. It is worth insisting upon an answer to the question as to what extent not only European but also national regulatory power is affected by EU action. It is one thing for the EU itself to be imbalanced in terms of the extent to which it engages in economic and social policy, and another to consider to what extent it inhibits the power of the national level to decide on its own socio-economic balance. In social policy, the minimum harmonisation principle ensures that EU positive integration only partially pre-empts national regulatory power. Negative integration based on social provisions is generally limited to the requirement of equal treatment. Thus, in social policy, the national regulator retains most of its powers. By contrast, in the internal market, full harmonisation entirely pre-empts the national legislator (such as in the case of the Posting Directive) and moreover national regulatory power is significantly limited by the Court's negative integration based on companies' free movement – a situation that cannot be altered by the European legislator. In the area of economic governance, national regulatory autonomy is severely constrained through substantive decisions taken by executives at the EU level, outside the systems of checks and balances of the Community Method.

A trait that both economic governance and the internal market have in common, is that the most constraining decisions are taken based on, or in the form of, 'negative' norms: where the EU level disqualifies a specific national rule or practice. This happens in the case law, but also in the Memoranda and country specific recommendations. This is relevant, because it means that the EU thereby reaches outcomes of high socio-economic relevance without having to take an open, principled and mediated decision on a positive norm of common application, which is invariably a more difficult exercise. In both areas, the legal authority to take these individual decisions derives from a very general and vague power-yielding norm, like preventing macro-economic imbalances or excessive deficits, or ensuring market access for all companies. While perhaps the constitutional validity of these authorising norms cannot be contested, as they are included in the Treaty, secondary legislation or established case law, the result is that the authority charged with the implementation and application of these open-ended and all-encompassing mandates is cloaked with an enormous amount of discretionary power. While legally valid, this fundamentally reduces the legitimacy of the decisions in question, and leads to arbitrariness and systematic uncertainty. On a case-by-case basis, national rules and practices are scrutinised against catch-all norms, and whether they will be accepted or condemned depends, in the context of economic governance, on individual Member States' political bargaining power and agenda vis-à-vis the Commission and other Member States, and, in the context of the internal market, on whether the rules happen to be the most 'rational' and limited way to pursue their objective and whether the national government manages to persuade the Court thereof. It is in these 'negotiations' that the consequential decisions are taken, without parliaments or civil society.

Avenues for reform

The internal market

How can the foregoing insights be concretely operationalised, in terms of possible reforms? As regards the internal market, many authors have identified the problematic consequences of the case law since *Viking*, *Laval* and *Rüffert*. For EU lawyers, it is perhaps natural to seek the solution in convincing the Court to change its approach, either in the margins or more fundamentally. Barnard has proposed to 'to restrict restrictions' of the free movement provisions, in order to better protect Member States' regulatory powers.[110] Under this approach, non-discriminatory rules, such as labour laws on salaries and occupational health and safety, would not constitute *prima facie* restrictions of the freedom to provide services or establishment, and are thus spared the proportionality assessment.

[110] Barnard, *supra* n. 48.

https://doi.org/10.1017/S1574019616000407 Published online by Cambridge University Press

In addition, the free movement provisions' reach could be limited by denying that collective action can constitute a restriction. Excluding such private action from the application of the internal market provisions would do justice to the fundamental nature of the rights to collective bargaining, action and freedom of assembly and expression.[111] As regards the justification stage, in cases where the EU lacks competence to harmonise, the national rule should benefit from a 'presumption of compliance'[112] and Member States should be granted a wide margin of appreciation. Such rules are only to be struck down in case of manifest error. This would apply to areas of complementary competence, but also to other areas if harmonisation is excluded, such as pay and the right to strike under Article 153(5) TFEU.

However, it is unlikely that the Court itself would come to this change of heart unprompted, and even if it did, it could change back at any point. The last time the Court did something similar, with the *Keck* doctrine,[113] it found it very difficult to maintain this deferential approach, and many consider *Keck* to have been significantly diminished, if not overturned, by later case law.[114] To take matters out of the Court's hands, the above approach could instead be adopted by means of a Treaty amendment. The free movement provisions could be changed to make clear that they do not apply to non-discriminatory measures, to collective action or lack horizontal direct effect altogether, and that Member States are granted a wide margin of discretion in the assessment of whether the pursuit of a public interest justifies a restriction in areas where EU competence is limited. While this option is perhaps just as unlikely to succeed, it would be the more effective option in the long term.

Perhaps the most effective, albeit difficult, proposal has been made by Scharpf, namely to 'de-constitutionalise' the internal market provisions altogether.[115]

[111] For critical views on this aspect of *Viking* and *Laval see* Davies, *supra* n. 45, p. 136; N. Reich, 'Free Movement v Social Rights in an Enlarged Union: The Laval and Viking Cases before the European Court of Justice', 9 *German Law Journal* (2008) p. 153.

[112] Barnard, *supra* n. 48.

[113] ECJ 24 November 1993, ECLI:EU:C:1993:905, *Criminal proceedings against Bernard Keck and Daniel Mithouard*.

[114] ECJ 10 February 2009, ECLI:EU:C:2009:66, *Commission* v *Italy*. Nevertheless, there are still judgments where the Court carries *Keck* forward: ECJ 29 April 2004, ECLI:EU:C:2004:256, *Weigel* v *Finanzlandes direction für Vorarlberg*; ECJ 8 September 2005, ECLI:EU:C:2005:518, *Mobistar SA* v *Commune de Fleron*. *See* Barnard, *supra* n. 48, p. 601. In tax cases especially: ECJ 12 December 2006, ECLI:EU:C:2006:773, *Test Claimants in Class IV of the ACT Group Litigation* v *Commissioners of Inland Revenue*; ECJ 12 December 2006, ECLI:EU:C:2006:774, *Test Claimants in the FII Group Litigation* v *Commissioners of Inland Revenue*. *See* K. Banks, 'The Application of the Fundamental Freedoms to Member State Tax Measures: Guarding Against Protectionism or Second-guessing National Policy Choices', 33(4) *European Law Review* (2008) p. 504.

[115] Scharpf, *supra* n. 102, p 401.

This would entail removing the four freedoms from the Treaties and the EU Charter as part of a more general 'reduction of the domain of constitutional law in the EU',[116] where the EU legal order would be reorganised with, at the highest level, a lean constitution comprising human (political and social; but not economic) rights, institutional provisions, provisions on competence division and legislative procedures. The internal market would be demoted to a specific policy domain, regulated exclusively by secondary legislation. Lowering the standing of the free movement provisions in the hierarchy of norms, granting priority to certain other rights and objectives, would make the case law concerning the internal market much more adaptable by the European legislator. These changes would have to be made unequivocally and clearly asserted in the text of a new Treaty, if only to prevent the Court from reintroducing the constitutional nature of the four freedoms via the backdoor as 'general principles of EU law'.

Economic and monetary union

Several proposals have been made to increase the social legitimacy of European economic, monetary and employment policy. De Schutter has argued that the EU should accede to the European Social Charter.[117] While this seems unfeasible at the moment, both politically and legally,[118] on its merits a case could be made. Accession would subject the EU, including the European Court of Justice's judgments, directly to the high social standards[119] of the European Social Charter and would constitute a clear political commitment. It is not certain, however, that this would make a real difference in the context of economic, monetary and employment policy. The European Stability Mechanism is, at least formally, an independent international organisation outside the EU legal framework, and the country specific recommendations do not have a binding legal status. And even if the Committee of Social Rights could find a way to apply the European Social Charter nevertheless, its opinions are not binding, and do not have the same standing as that of the European Court of Human Rights, let alone the European Court of Justice.

[116] Ibid.

[117] O. de Schutter, 'The Accession of the European Union to the European Social Charter', <www.coe.int/t/dghl/monitoring/socialcharter/Presentation/PublicationCSEUEODeSchutterJuly2014_en.pdf>, visited 12 December 2016.

[118] Especially since the Court's rejection of the EU's accession to the European Convention of Human Rights, ECJ Opinion 2/13.

[119] On the comparison between the level of protection of the European Social Charter and EU law, *see* O. de Schutter, 'Le statut de la Charte sociale dans le droit de l'Union européenne' and J. Akandji-Kombé, 'Charte sociale et droit communautaire', in J. Akandji-Kombé and S. Leclerc (eds.), *La Charte sociale européenne* (Bruylant 2001).

Barnard has proposed the adoption of a European Social Compact or similar type of protocol, to be adopted as primary law in a Treaty amendment, or as a Decision of the Heads of State and Government meeting within the European Council.[120] As the European Trade Union Confederation has also proposed, such a protocol could pronounce an unequivocal priority of social rights over the economic freedoms and competition law, and could bolster the non-regression principle as currently laid down in Article 151 TFEU, to explicitly provide that 'the Union ensures that improvements are being maintained, and avoids any regression in respect of its already existing secondary legislation'.[121] While this would certainly boost Member States' social regulatory powers in the context of the internal market provisions, it is not clear to what extent such a protocol could prevent the reduction of social standards under the European Stability Mechanism or European Semester, for the same reasons that accession to the European Social Charter would not be effective in this regard: the European Stability Mechanism is not EU law and the country specific recommendations are not legally reviewable acts. Furthermore, it would once again place an important socio-economic question above political contestation, albeit now to the benefit of 'the social' rather than 'the economic', leaving the above-discussed legitimacy questions unaddressed.

It would seem that the solution thus does not lie in imposing more balanced outcomes, but in ensuring that the legislative process is the way through which outcomes are achieved. Chances are that such outcomes will be more balanced, but in any event, they would be legitimate. Along those lines, several authors have argued for democratising the Economic and Monetary Union. Maduro[122] and Kumm[123] have made far-reaching proposals that certainly have merits, but as Dawson and de Witte note, their proposals are 'problematic in so far as they call for a democratisation of the *Commission*, but not for a democratisation of the *Union*'.[124] Habermas,[125] Collignon[126] and Hix[127] have proposed genuine democratisation of the EU as a whole, proposing to transform the Union into a

[120] Barnard, *supra* n. 3, p. 224.

[121] At <www.etuc.org/a/5175>, visited 12 December 2016.

[122] M. Maduro, 'A New Governance for the European Union and the Euro: Democracy and Justice', *RSCAS Policy Papers* (2012).

[123] M. Kumm, 'What Kind of a Constitutional Crisis is Europe In and What Should Be Done About It?' *WZB Discussion Paper* (2013).

[124] M. Dawson and F. de Witte, 'Self-Determination in the Constitutional Future of the EU', 21 *European Law Journal* (2015) p. 380.

[125] J. Habermas, *Zur Verfassung Europas. Ein essay* (Suhrkamp 2011).

[126] S. Collignon, *The European Republic: Reflections on the Political Economy of a Future Constitution* (Federal Trust for Education and Research 2003).

[127] S. Hix, *What's wrong with the European Union and How to Fix It* (Polity 2008).

parliamentary democracy, the Commission into a parliamentary government, and to replace the veto positions of national executives through majority rule in a bicameral European legislature, but such majoritarian democracy poses normative problems in the present EU context due to a lack of protection of persistent minorities.[128] While such far-reaching reforms may indeed be necessary in the longer term, in the meantime it may be best to work with the democratic instruments that are already available: the European legislative process.

Indeed, it would seem that any effective change in this respect would have to directly challenge the crucial fact that these processes are allowed to operate outside the EU's legal and/or legislative framework. Admittedly, the Court explicitly validated the legality of the European Stability Mechanism Treaty in *Pringle*,[129] and the country specific recommendations have a legal basis in the Treaty, making it difficult to argue that they are, as such, illegal. But, as discussed above, even if they have formal validation under the Court's current interpretation of EU law, these processes are illegitimate from a democratic and fundamental rights perspective. As Tomkin has argued, 'the creation of a permanent stability mechanism that is liable to have a direct impact on the lives of Union citizens and yet lies outside and beyond the reach of the Union legal order, and is subject neither to general principles nor to the rights enshrined in the Charter of fundamental rights, may be regarded as undermining of the principle of effective judicial protection and democratic accountability'.[130] The same can be said, *mutatis mutandis*, for the country specific recommendations.

It should be recalled that under Article 10 TEU, the functioning of the Union is founded upon representative democracy, with citizens having the right to democratic participation, and with decisions taken as openly and as closely as possible to the citizen. While this provision does not grant citizens a directly effective 'right to democracy', the Court could still use it as a source of interpretation. Furthermore, under the principle of sincere cooperation, Member States are to refrain from any measure which could jeopardise the attainment of

[128] Scharpf, *supra* n. 102, p. 393.

[129] See *Thomas Pringle* v *Governement of Ireland, Ireland and The Attorney General*, *supra* n. 103. B. de Witte and T. Beukers, 'The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle', 50 *Common Market Law Review* (2013) p. 805; P. Craig, '"Pringle": Legal Reasoning, Text, Purpose and Teleology', 1 *Maastricht Journal of European and Comparative Law* (2013) p. 3; D. Thym and M. Wendel, 'Préserver le respect du droit dans la crise; la Cour de justice, le MES et le mythe du déclin de la Communauté de droit (arrêt Pringle)', 3 *Cahiers de droit européen* (2012) p. 733.

[130] J. Tomkin, 'Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy', 14 *German Law Journal* (2013) p. 169 at p. 189. *See also* D. O'Donovan, 'The Insulation of Austerity: The Charter of Fundamental Rights and European Union Institutions', 16 May 2013, <www.humanrights.ie>, visited 12 December 2016.

the Union's objectives. On the basis of these principles, a case could be made that it is not permissible for Member States and EU institutions to engage in parallel action outside the EU legal framework.[131] While the EU legal framework suffers from a democratic deficit, the intergovernmental model is much worse as it 'leads to an even higher executive dominance and even greater parliamentary exclusion'.[132] Therefore, there should be a general principle of precedence of the EU framework over parallel action – as a kind of sibling to the subsidiarity principle.

This argument is, of course, most convincing if the EU itself had the competence to do what the parallel action envisages. In that case, the very decision to operate outside the EU framework, if competence existed to operate inside it, should be considered to be contrary to sincere cooperation and democratic governance. The Court does seem to be heading in that direction in *Pringle*, where after establishing that the stability mechanism does not constitute 'monetary policy' – which lies within the EU's exclusive competence and therefore does not allow parallel action – it examines whether it 'affects the Union's competence in the area of the coordination of the Member States' economic policies'[133] and concludes that, as the EU did not have explicit competence under that header to adopt the stability mechanism, 'the Member States whose currency is the euro are entitled to conclude an agreement between themselves'.[134] This, *a contrario*, implies that if there had been a specific legal basis in the Treaties, the Member States would have had to use Union measures.[135] It is regrettable that the Court did not follow through with this logic, by also applying it to the flexibility clause of Article 352 TFEU. Surely this provision 'does not impose on the Union any obligation to act'[136] but, based on the principles outlined above, it would seem that it should nevertheless be sufficient to trigger the preference for Union action in all areas where it is possible for the EU to act.

What if there is no EU competence at all, even taking Article 352 TFEU into consideration, for example because of a prohibition of harmonisation, such as the exclusion of pay in Article 153(5) TFEU? Article 352(3) TFEU provides explicitly

[131] B. de Witte, 'Internationale verdragen tussen lidstaten van de Europese Unie', in R. Wessel and B. de Witte, *De plaats van de Europese Unie in het veranderende bestel van de volkenrechtelijke organisatie, Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* [*The Place of the European Union in the Changing Order of the International Organization, Announcements of the Dutch Society for International Law*] (Asser Press 2001) p. 104.

[132] D. Chalmers et al., *European Union Law* (Cambridge University Press 2010) p. 132.

[133] Para. 64 of the judgment.

[134] Para. 68 of the judgment.

[135] C. Timmermans, 'ECJ Doctrines on Competences', in L. Azoulai, *The Question of Competence in the European Union* (Oxford University Press 2014) p. 164.

[136] Para. 67 of the judgment.

that measures based on this article shall not entail harmonisation in cases where the Treaties exclude such harmonisation. So, if no other legal basis can be found to use as a 'back door' to establish EU competence (as the prohibitions of harmonisation are not horizontal and only limit the legal basis in which they are included), it would be difficult to deny the Member States the possibility to engage in parallel or soft law action. It could be argued that for that reason, counter-intuitive as it may sound, the EU should be granted a general legislative competence.[137] That would prevent the counter-productive situation that areas of national competence would be more vulnerable to illegitimate European integration than those where the EU has been authorised to harmonise.

More realistically, it would seem that at least some measure of democratisation of the day-to-day operation of the EU's economic, monetary and employment policy is urgently needed. In the first place, the powers and responsibilities of the European Parliament should be drastically enhanced, as should the involvement of the Social Partners. In addition, the measures adopted in this context could be subject to the Early Warning System, where national parliaments are consulted and have a right to vote. It comes down to recognising that posing the question of what is the best solution for the EU's economic problems does not imply a regulatory question with a *Pareto-efficient*"[138] answer, but rather a political and moral question that should be resolved in a democratic forum, not a technocratic one.

Final remarks

In light of its imperfect democratic legitimacy, the EU has often sought to justify its action by reference to its output; as pursuing objectively 'good', evidence-based policies that can, and perhaps should, be removed from the fickle nature of politics.[139] Much of EU policy is therefore 'masked' by economics, law and scientific evidence. Policies are presented not as a political choice, but as being necessary to foster the competitiveness and stability of the EU economy, the respect of individual rights or the implementation of scientific findings. It can, however, be questioned whether any policy area is really suitable for such a

[137] S. Garben, 'Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Powers', 35 *Oxford Journal of Legal Studies* (2015) p. 55.

[138] A situation where some benefit and no one is made worse off. In earlier work, Majone argued that EU policies are generally about regulation addressing market failures, and thus about producing Pareto-efficient outcomes. G. Majone, *Regulating Europe* (Routledge 1996). Majone is highly critical of the current type of monetary integration: G. Majone, *Rethinking The Union of Europe Post-Crisis: Has Integration Gone Too Far?* (Cambridge University Press 2014).

[139] A. Moravcsik, 'In Defense of the "Democratic Deficit": Reassessing Legitimacy in the European Union', 40 *Journal of Common Market Studies* (2002) p. 603.

technocratic approach, and contrary to one of the EU's most basic assumptions, economic questions are almost by definition of high political salience, as they necessarily have important consequences for other policy areas. This means that such depoliticisation strategies can never be fully effective.[140] Ultimately, the political consequences of policy choices will need to be owned, and the varying narratives of EU action will have to be mediated.

Indeed, EU law and policy are now becoming increasingly politicised. This can partially be attributed to the high-profile political decisions that were taken in the context of the Euro-crisis, which persistently dominated newspaper headlines everywhere.[141] It may also be an effect of the Lisbon Treaty reforms that made some elements of EU governance more political, such as the European Parliament's increased involvement in the election of the Commission.[142] And part of the explanation will lie in the fact that ordinary citizens, due to the economic crisis, have felt more keenly than ever the tangible effects of EU action. Thus, notice is (finally) taken of the inherently political nature of EU policies. This means that decisions concerning the Euro and the internal market can no longer be represented as simply pursuing an objective best outcome, because the political implications have become more noticeable, and more noticed.

Whether this 'democratic awakening' is considered to be a good or a bad thing for the EU depends upon one's outlook. In the view of this author, who confesses a political commitment to social democracy, it is indeed desirable. But in any event, it seems to be irreversible, and the EU will have to accommodate it somehow. This paper has argued that the way that the legal and political systems balance 'the market' and 'the social' can be expected to play a crucial role, and that it will not be the outcome that will be decisive, nor whether this outcome happens to coincide with the majority view, but instead the extent to which the process by which that outcome is achieved is inclusive and representative, democratic and legitimate.

The EU's current constitutional configuration is problematic from this perspective. Primary law itself displaces and disempowers European and national legislative processes in the crucial areas of the internal market and economic governance, where instead the judiciary and executives respectively take the salient political decisions – largely outside the reach of meaningful democratic control. We need to reflect on the fundamental constitutional reforms necessary to address this, ensuring that the decisions that matter are taken in the context of a

[140] Føllesdal and Hix, *supra* n. 9.

[141] On the Europeanisation of public opinion in the Euro-crisis, *see* M. Meijers, 'The Euro-crisis as a catalyst of the Europeanization of public spheres? A cross-temporal study of the Netherlands and Germany', 62 *LEQS Paper* (2013), and T. Risse (ed.), *European Public Spheres: Politics is Back* (Cambridge University Press 2014).

[142] Art. 17 TEU.

democratic system, so that unpopular outcomes can be accepted by the losing side as something temporary and reversible. The paper has argued that this should be done by strengthening the position of the EU *and* national legislative process in all areas of European integration, and by limiting such integration by other means such as soft law, parallel integration and case law. Considering the high consensus requirements in the EU legislative process and the very diverse EU28, this approach may very well reduce the overall output of the EU. In that case, it would reinforce national regulatory capacity and may lead to a better respect for national constitutional identity as laid down in Article 4(2) TEU, perhaps finally finding an effective response to concerns about competence creep. But, in any event, it would ensure the democratisation of European integration, which this author considers the only viable way forward.