**Regulation and enforcement of economic freedoms and social rights:**

**a thorny distribution of sovereignty**

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**1 Introduction**

The Treaty of Lisbon considerably strengthens the social face of the EU, for example, through the inclusion of the aim to establish a social market economy (Article 3 TEU), through the integration clause of Article 9 TFEU requiring the EU to pursue a high level of employment and to guarantee adequate social protection, or through the incorporation of the non-discrimination principle as contained in Article 10 TFEU. In addition, the legally binding nature of the EU Charter brings the protection of fundamental rights, including social and economic rights, at the level of the European Union to a climax. But do these changes entail that the EU institutions will be able to genuinely advance the EU’s social dimension, particularly in the light of the well-rooted economic values of the EU that are represented by the four Treaty freedoms?

Where economic values are extensively regulated at the EU level, this is still much less the case for social values. In terms of citizenship, EU citizens have relatively strong economic rights, which find their roots in the internal market, vis-à-vis social rights. In other words, the concept of EU citizenship continues to carry therein a form of market citizenship.[[1]](#footnote-1) In the EU Charter social values are included in a rather eclectic way. It is unclear to which extent social rights or principles are judicially cognisable, or, in other words, have direct effect. Furthermore, the Union’s shared competences in the field of social policy are limited. The EU has legislative powers to protect some social values, such as equal treatment, health and safety at work or workers’ representation, whereas for others the harmonisation of national laws is expressly excluded (Article 153(5) TFEU – pay, the right of association and the right to take collective action). The background of this provision is that Member States wish to retain autonomy in areas of social policy, particularly where domestic budget policies are affected or national industrial relations systems are concerned.

The asymmetrical division of sovereignty between the EU and its Member States in the socio-economic field - the Single Market is ‘European’ whereas the regulation of workers’ protection by the support of industrial relations systems is mainly national – may be problematic. Where national social laws conflict with EU law, due to the principle of supremacy, national social provisions are set aside.

Sometimes, conflicts between national social provisions and EU law result in a victory for the social dimension of the EU. These particularly concern cases where national social legislation excludes certain (groups of) citizens from its scope of protection on the basis of discriminatory grounds (e.g. gay couples, persons of a certain age, the handicapped etc.).[[2]](#footnote-2) But in other cases, the conflict between economic values and specific social values, for instance the right to collective bargaining and action, or between economic values and other sources of national labour regulation, such as collective agreements, is more problematic. Because collective labour agreements restrict competition on the labour market and strike action restricts entrepreneurial freedom, the regulation in the field of management and labour requires a constant balancing of conflicting values. At the EU level the possibilities to reconcile conflicting economic and social values are severely limited by the fact that the EU does not have the competence to enact binding laws in the fields of collective bargaining and the right to strike. And at national level, economic values represented by the four Treaty freedoms are applied by the European Court of Justice (hereafter: CJEU) to strike down specific national social rights. National trade unions must respect the Treaty freedoms on establishment and services in exercising their right to collective bargaining and action.[[3]](#footnote-3) And, although there are limits to the application of the Treaty freedoms – they are not absolute – , the way in which the CJEU balances economic values and social values has been strongly criticized.[[4]](#footnote-4)

The query that is central to this paper is therefore: what are the main reasons for this conflict of social and economic values within the EU, how does this conflict distinguish itself from ‘natural’ controversy between social and economic interests at the national level, and, given these reasons, (how) can it be overcome, or at least mitigated, in order to prevent (national) social values becoming wholly subsumed under (European) economic values and more account can be taken of the social dimension of the EU?

In order to answer these questions we first identify the core values of the EU economic and social dimension. What is their role and place at the European level and why are they deemed to be ‘fundamental’ within the Union’s legal order (section 2)? We will then turn to the institutional arrangements for the operation of social policy in the context of a single European market and its development over time. The asymmetrical distribution of sovereignty and competences in the economic and social fields, mentioned above, appears to be a source of conflict here, with repercussions for the balanced regulation of social systems as a result (section 3). In section 4 we will address how, within this seemingly ‘flawed’ institutional setting, the problem of reconciling economic and social values has been handled so far. In that respect, future prospects arising out of the integration of (social) human rights in the EU Charter will be taken into account in section 5. In the last section some conclusions are drawn.

**2 EU economic and social values**

* 1. The core values identified: economic freedoms

At the national level economic rights have traditionally been identified as those rights pertaining to market activities, and that are concerned with the regulation of factors of production (capital and labour). Property, labour and economic enterprise are the three main areas in which economic rights can be recognized. But economic rights are not a ‘stable’ category of rights as their legal recognition and/or constitutional status very much depends on the economic order in the Member State and, related to this, historical developments.

At the European level, the then young European Economic Community defined its ‘Principles’ in Part I of the corresponding Treaty of 1957 not so much in terms of economic rights or values, but in terms of an economic project. It stated as its objectives: the harmonious development and expansion of economic activity, more stability and the improvement of living and working conditions by creating a common market and furthering the approximation of national economic policies.[[5]](#footnote-5) The tools to achieve the common market were the Treaty freedoms, *i.e.* the free movement of goods, workers, services and capital, as well as a common agricultural, transport and competition policy.[[6]](#footnote-6) During the following, gradual process of the ‘juridification’ of the European market-building project, starting with the principal *Van Gend & Loos* and *Costa v. Enel* decisions,[[7]](#footnote-7) the seemingly political-technical commitments of Member States were transformed into (economic) principles and accompanying substantive rights. In the seminal Van *Gend & Loos* case the Court held that ‘the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals’. This ‘new legal order’ allowed the CJEU to postulate the principle of direct effect, introducing substantive rights for individuals, and, in the Costa v. Enel case, the principle of the primacy of Community law over national law.

As a result of this ‘integration through law’,[[8]](#footnote-8) political-economic values, such as the furthering of the market economy, the opening up of national markets by anti-discrimi­nation rules and the commitment to a system of undistorted competition, were now supported by, what has been called by some, an European economic ‘constitution’.[[9]](#footnote-9) That is to say, a law-based order that guarantees economic freedoms and protects competition by supranational institutions, which is not only independent from political decision, but also trumps national (constitu­tional) law. In this process of the ‘constitutionalization’ of economic policy and law, the economic freedoms, that lay at the heart of this new legal order, acquired what may be called a fundamen­tal status, for they represent rights that constitute the basic framework conditions for the making of a single market economy.

When we look at the four economic freedoms in the case law of the CJEU we can find various references to the fundamental character of the freedoms.[[10]](#footnote-10) The Court itself uses words like fun­da­mental freedom,[[11]](#footnote-11) one of the fundamental principles of the Treaty,[[12]](#footnote-12) or fundamental Com­munity provision.[[13]](#footnote-13) The ‘fundamental nature’ of the freedoms can furthermore be deduced from the substantive scope of the Treaty freedoms, whose dogmatic foundation is provided for in *Dassonville,* defining measures having equivalent effect to quantitative import restrictions very broadly.[[14]](#footnote-14) The very fact that an indirect and potential effect on trade or free movement suffices for the national measure to fall within the scope of Articles 34, 49 or 56 TFEU, means that EU citizens have a far-reaching right to challenge national legislation which they find in their way and which restricts their (economic) rights.[[15]](#footnote-15) Economic rights continue to constitute an indispensable element of European citizenship. In a similar vein, Article 34 TFEU has been described as a ‘fundamental political right’, or as ‘subjective public rights’.[[16]](#footnote-16)

The fundamental nature of the Treaty freedoms also appears, although in an indirect fashion, from their institutional dimension, where some provisions have (a limited form of) horizontal direct effect.[[17]](#footnote-17) Interesting in this respect is the Opinion of Advocate General Maduro in the *Vodafone* case arguing in favour of, more generally, a horizontal application of the free movement rules, as a consequence of which the scope of Article 114 TFEU – the legal basis for internal market legislation – could be extended to the regulation of private behaviour as well.[[18]](#footnote-18)

Other arguments to support the fundamental character of the freedoms are that, firstly, the freedoms have played a vital role in building Europe’s economic constitution. According to the Ordo-liberal school, which originates from the German town of Freiburg in the 1930s, the constitution should protect the economic freedoms, ‘which are as integral to the protection of human dignity, and as indicative of a free society, as political freedoms, which are themselves liberal in nature and which therefore underscore individual economic freedoms’.[[19]](#footnote-19) Secondly, the economic freedoms can often be defined in terms of the freedom to pursue a trade or profession, which is a fundamental right laid down in the Charter.[[20]](#footnote-20) Interestingly, in a number of cases the Court has confirmed this view by making clear that the economic Treaty freedoms could also be seen as a specific amplification of the Charter.[[21]](#footnote-21) Certain Charter provisions, i.e. Article 15(2) on the freedom of every EU citizen to exercise the right of establishment and to provide services in any Member State, Article 16 on the freedom to conduct a business and Article 17 on the right to property, may reinforce the free movement rules and thus the market integration process. According to the CJEU in the *Sokoll-Seebacher* case “[…] Article 16 of the Charter refers, inter alia, to Article 49 TFEU, which guarantees the freedom of establishment”.[[22]](#footnote-22) And in *Gardella* the Court held that “Article 15(2) of the Charter reiterates inter alia the free movement of workers guaranteed by Article 45 TFEU”.[[23]](#footnote-23)

The question that may arise in this context is whether the four freedoms – and the economic rights contained in the Charter - have gained more importance at the expense of other funda­mental rights enshrined in the Charter (see hereafter). But where the Charter provisions can be applied alongside the free movement rules, the Court will normally focus on the latter.[[24]](#footnote-24) A last point that illustrates the fundamental nature of the four freedoms is that rights, which are implicit in the economic freedoms, such as the right to equal treatment (non-discrimination) on grounds of nationality, the right to move and reside in another Member State, transcend beyond the economic dimension of the free movement rules. The principle of non-discrimination on grounds of nationality is in fact transformed into a fundamental right for European citizens to protect individual personality and human dignity.[[25]](#footnote-25)

2.2 The core values identified: social protection

Social policy, or social protection, generally stands for values such as solidarity, equality and social justice. From a socio-economic perspective, the social policy of welfare states addresses the social integration of capitalist societies by coping with the negative externalities of market mechanisms. These externalities may consist of all kinds of societal costs, which are not taken into account by the ‘invisible hand’ of undisturbed markets.[[26]](#footnote-26) In respect of the functioning of the labour market social costs may flow, for instance, from unemployment or health and safety risks at work. Social policy, therefore, involves redistri­butive transfers, social protection and social services which the market cannot provide. In respect of sustainable employment and income this may require social insurances against risks such as unemployment or disability, social assistance and (tax-based) transfers to combat social inequality and exclusion.

More specifically, welfare states have furthered the ‘decommo­dification’[[27]](#footnote-27) of human labour by providing for workers’ protection through labour law and support for collective bargaining systems. Industrial relationships in the labour market are predominantly regulated in social market economies by restoring equal bargaining power to dependent wage earners, in order to ensure fair outcomes of the market’s negotiations on terms of employment, including, most importantly, the price of labour. This is done by legally guaranteeing employers and employees the possibility to associate and to further their respective interests collectively, while the – voluntary in nature - process of collective bargaining is held up by the recognition of the right to collective action and – predominantly in continental Europe – by legal mechanisms for the extension of the applicability of agreements to non-signatory parties. The latter is often executed at the joint request of employers and employees, because it protects against undercutting the negotiated employment standards and, by the same token, creates a level playing field for economic competition with regard to unorganized firms.

It can be derived from the foregoing that the promotion of social values can require market-correcting policies, whereas economic values are promoted by market-making policies. Between social and economic values there exists, therefore, an inherent tension. Still, according to different economic theories and philosophies, their interaction may, nevertheless, have impeding as well as reinforcing economic effects. While at the one end Hayekian (liberal) economics may perceive income and employment protection as a distortion of competition, burdening the market with unjustifiable costs and rigidities, at the other end Keynesian (social-democratic) economics may perceive it as enhancing consumption. The point to be made is that the social and economic spheres of welfare states are, in the least, severely intertwined and highly interdependent, in that policies in the one sphere have consequences for the other and vice versa. This holds true when applying an economic perspective, but also a sociological perspective. If markets are not woven into the fabric of societies, as already observed by Polanyi, this may arouse social dislocation and spontaneous movements. In the end this could threaten political stability, as was witnessed with the initial process of industrial revolution. Therefore, markets necessarily have to be ‘socially embedded’, according to Polanyi.[[28]](#footnote-28) At the national level of capitalist welfare states, where social and economic values are on an equal footing, this implies that an equilibrium between these values must be established by (democratic legitimized) political consensus. But how about the European level?

Given the European heritage of ‘welfarism’, one might expect the interconnection of the economic and social ‘spheres’ to return at the level of the Treaties, which are devoted to European market building. In 1957, the European welfare state was still at a developing stage. Still, the six founding, continental states at the time, had relatively homogeneous social structures in place that were based on, mostly, Bismarckian systems of social security and comparable systems of industrial relations. Not surprising, therefore, is the historical observation by Sharpf that ‘if the French Prime Minister Guy Mollet, supported by French industry, had had his way, the harmonization of social regulations and fiscal burdens would have been a precondition for the integration of industrial markets’.[[29]](#footnote-29) Instead, in return for the opening up of European markets to French agriculture, Mollet obtained the political commitment of other govern­ments to increase social protection nationally.[[30]](#footnote-30)

Although social harmonization at the European level was not part of the European market project (see infra, section 3), traces of the political perception of the intertwine­ment of the social and economic spheres can nevertheless be found in the original Treaty texts. The objectives of the Community (termed ‘principles’) at the time, already included, next to the expansion of economic activity and stability, ‘the improvement of the living and working conditions’ (see supra, section 2.1). Part III of the Treaty of 1957 on the Community’s policies, as a consequence, contains a chapter on economic policy and one on social policy. In this, the need for ‘the improvement of the living and working conditions, so as to make possible their harmonization while the improvement is being maintained’ is recognised.[[31]](#footnote-31) The Commission is entrusted to further ‘close cooperation’ in social policy, especially in the fields of employment, labour law, social security, health and safety and - remarkably in view of present-day conditions - the right to associate in trade organizations and collective bargaining.[[32]](#footnote-32)

Even though regulatory competences in social policy were absent (see infra, section 3), one notices that (work-related) social policy goals were recognized as part and parcel of economic integration at an early stage. This was confirmed and reinforced by the CJEU, most notably, in the *Defrenne* decision of 1976. The case dealt with article 119 EEC on equal pay for men and women (now article 157 TFEU), a provision which, according to the Court, ‘forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples’.[[33]](#footnote-33) With the successive Treaty reforms the initial social objectives and tasks of, what is now, the Union have been formulated more boldly. The Member States managed to write the commitment to create a European social market economy into the hard letter of article 3(3) TEU, including the aims of promoting social justice and protection.

To conclude, social values had and still have their formal place within the objectives of the European Union. Whether they could be properly implemented will be addressed in the next section. At this instance, however, it is important to recall that in the field of workers’ protection, the regulation of industrial relations at the national level commonly makes use of instruments guaranteeing the freedoms of association, collective bargaining and the right to strike (see supra). After initially being developed and promoted as international labour standards by the ILO, these ‘social’ fundamental rights found their way into international and European human rights documents in the 1960s and, eventually, also into European Community law. Whereas in *Defrenne* the principle of equal pay was already considered to be part of ‘the foundations of the Community’, the Court came to recognise fundamental human rights, even though not explicitly expressed in the Treaty, as general principles protected in the Community legal order.[[34]](#footnote-34) These principles included the rights of association, collective bargaining and to strike,[[35]](#footnote-35) now all inserted in the EU Charter.[[36]](#footnote-36) While social progress and protection are substantive goals of the Union, it turns out that vital rights applied and protected at the national level to this end, enjoy respect as human rights by the Union’s legal order. Whether the Charter repositions the balance of economic and social freedoms at the European level will be elaborated later on.

**3 Institutional impediments for the reconciliation and coherent regulation of the Union’s social and economic values**

3.1 ‘Decoupling’ of the economic and social spheres in the formative stage of the European common market

Although it appears it was the belief of the founding fathers of the Community that economic integration could and should not go without social integration, they also believed that this would ensue mainly from the functioning of the common market itself.[[37]](#footnote-37) At first glance this seems rather naïve. Although competing national social systems are, admittedly, under pressure from convergence in the context of a common economic market, this can, however, be either in an upward or downward direction, which would not necessarily coincide with the goal of the ‘improvement’ of living and working conditions. Yet, taking into account the tradition of the rather homo­geneous, social market economies of the six founding states at the time, it also cannot be assumed that this ‘belief’ of the founding fathers was merely based on the politics of (orthodox) liberalism, instigating that social values should best be left to unlimited market forces. Instead, as the story of the French Prime Minister Guy Mollet informs us (supra, 2.2), it seems likely that it was much easier to reach political consensus on negative integration by means of legal rules requiring the abolition of barriers to trade, than on the positive integration of social and tax systems.

Through this, Europe was in fact constituted as a dual polity. It was accepted that the economic dimension was furthered by an ‘economic constitution’ - after the groundwork by the Court in this respect (see supra) -, safeguarding economic freedoms and undistorted competition by way of law and its principles of direct effect and primacy. The social dimension, however, belonged to the realm of ‘political legislation’ and, therefore, had to remain national or, at most, be the subject of political intergovernmental bargaining.[[38]](#footnote-38) Fritz Sharpf famously framed this as the ‘decoupling’ of the economic and social spheres.[[39]](#footnote-39) The selective Europeanization of policy functions introduced an important ‘constitutional’ asymmetry between (the regulation of) economic and social policy. At the national level, economic policy and social policy had and still have the same constitutional status – with the consequence that any conflict between these two types of interests could only be resolved politically. At the European level, however, national social (market-correcting) policy, in case of conflict, will be constrained by economic (market-building) law of a higher constitutional status.[[40]](#footnote-40)

For almost two decades the division of economic and social competences over the different levels worked out well in practice. In fact, national systems of social protection could, and did, expand rapidly in this episode. Still, these were times of economic growth and economic integration did not exceed the level of a customs union.

In the mid-1970s with the first oil crisis, the Member States, however, were confronted with the phenomenon of transnational enterprises that, in respect of the restructuring of their workforce, could evade strict national social protection by resorting to a national system of a lower level. The Commission and the member states reacted promptly with the adoption of the ‘restructuring directives’ harmonizing the protection of workers.[[41]](#footnote-41) In the case of collective redundancies the employer is obliged to consult trade unions beforehand ‘with the view of reaching an agreement’. Due to the lack of competence for social European legislation, the directives are based upon article 100 EEC (now 115 TFEU). Social protection, hence, cannot be regulated in its own right, but is derived from the need for fair economic competition within a common market. In order to adopt social regulations on the basis of Article 115, which requires unanimity, states must share a common socio-political philosophy on the necessity of creating a level playing field by state intervention in the market, as well as, in certain issues, on the role of trade unions in regulating labour. In the 1970s this was still the case. But with the accession of especially Great Britain and Ireland and later southern states like Greece and Portugal, the heterogeneity in this respect increased.[[42]](#footnote-42) Since 1980, article 115 has no longer been used for social policy measures.

3.2 The complementation of the internal market and the endeavour for a social Europe

The rather strict lines between the economic and social spheres, as result of the ‘constitutional asymmetry’ at the European level, started to have more serious consequences when economic integration in the mid-1980s was greatly deepened and widened by the internal market program­me and the Single European Act (1986), and it came to matter even more when the Maastricht Treaty committed Member States to create an Economic and Monetary Union in the 1990s. Though enhancing the economic integration process, the liberalization and deregulation strategies that have been applied greatly reduced the sovereignty of Member States to influence national economic growth and employment and to realize self-defined socio-political goals.[[43]](#footnote-43) In short, European liberalization and deregulation policies have, for example, eliminated the possibility of using public-sector industries as an employment buffer and forced welfare costs to meet the constraints on the public sector deficits imposed by the Stability Pact, whereas the extended reach of economic freedoms and the principle of undistorted competition to all national policies, threatened to, or did, restrict social policy options in numerous fields (e.g. public placement services, national health insurance, retail price maintenance for books, public transport, state monopolies in order to combat alcohol or gambling addiction, etc.). The point to be made is not whether or not this has been beneficial for economic growth, employment and the ‘modernisation’ of national welfare systems, but to show the magnitude of the effects of market integration – the outer reaches of EU economic law are ambiguous[[44]](#footnote-44) - on the politically agreed multi-level distribution of powers in the social and economic fields.

In response, particularly Member States with generous welfare state transfers and services expected the European Union to address - what was perceived at the time as - the ‘social deficit’ of the EU, as was promised by the Delors Commission with the deepening of the internal market. The ‘European social model’ was to reinstall ‘market-making’ and ‘market-correcting’ policy purposes on the same constitutional footing, as had existed at the national level before the take-off of economic integration.[[45]](#footnote-45) And, indeed, with the Maastricht Treaty social regulatory competences were introduced at the European level next to a mechanism for European social dialogue between management and labour, first by way of a social protocol (with the opt-out of the UK) but later on, in Amsterdam, incorporated in the Treaty itself.

The social competences and dialogue of articles 153-155 TFEU formerly seemed to blur the strict division of tasks, by which the European market was to be ‘socially embedded’ by differen­tiated policies at the national level. In practices, however, the road taken turned out to be foreclosed by, exactly, this diversity of national welfare systems, reinforced by the successive enlargements of the Union. At the one hand, there was a divergent development of social systems in terms of socio-political ideologies and cultures, while the increased differences in the economic development of the member states, especially after the accession of Middle and Eastern States, influenced the levels of affordable welfare.[[46]](#footnote-46) These structural dif­ferences were, moreover, of highly political salience: the radical political reform of welfare arrangements and correlated tax burdens would meet fierce opposition by nationals.[[47]](#footnote-47) On the other hand, harmo­nizing European legis­lation on, *i.a.*, social security and the social protection of workers, including the termination of employment contracts, required, according to article 153 TFEU, an unanimous Council vote. And the para­mount issues - in the field of industrial relations - of pay, the right of association and the right to strike were altogether excluded from the Union’s compe­tences.[[48]](#footnote-48)

After the insertion of social legislative competences, the actual harmonization of national social policy - besides the ‘restructuring directives’ of the 1970s - has been limited to equal treatment, health and safety in the workplace (including working time and leave) and to, albeit in a much more cautious way, employees’ consultation rights and equal treatment in employment conditions for flexible workers. The subject-matters of Article 153 TFEU that require political consensus have never been used so far.

**4 The way the reconciliation problem has been handled so far**

4.1 New modes of governance

Considering the above-mentioned institutional impediments, there are very limited possibilities to reconcile conflicting economic and social values through the process of harmonization. Confronted with this dilemma, the Union opted at the outset for new modes of governance, such as the social dialogue and the Open Method of Coordination (hereafter: OMC), to promote social Europe.

The social dialogue according to articles 154-155 TFEU was destined to transpose negotiated solutions between the European social partners into directives, precisely to overcome the political stalemate in European social policy. But after some early successes in respect of parental leave and equal treatment of flexible workers, the employers’ side soon realized that the cross-sectoral dialogue was not to be disciplined by the risk of alternative, legislative solutions by the EU institutions and, hence, pulled out.[[49]](#footnote-49)

The mode of OMC still lasts and even expands. It applies, by an institutional way, to the coordination of national employment policies (article 2(3) TFEU) and, by a more informal way, to, inter alia, national policies on social inclusion. However, notwith­standing its benefi­ciaries’ effects, the OMC still has to operate in the shadow of ‘constitu­tionalized’ European law on the internal market and monetary union. In case of European employment policy, for example, this seems to leave just the supply side of the labour market. Thus, European employ­ment guidelines focus on, for instance, ‘employability’ (improving a skil­led workforce and increasing the work incentives of the unemployed) or the ‘adaptability’ of labour markets (flexibilisation of regular employment protection).[[50]](#footnote-50) The OMC therefore allows national welfare systems, at most, to adjust in an optimal way to economic integration, but cannot properly reconcile or balance conflicting (European) economic policy values and (national) social policy values. [[51]](#footnote-51)

4.2 Integration through law: a pivotal role for the CJEU

As a result of the foregoing, conflicts between economic values vested in the European fundamental freedoms and the system of undistorted competition, and social values vested in self-determined national policies, are necessarily left to the European Court of Justice to decide.

*Balancing public interests with the Treaty freedoms*

Although the ‘economic constitution’ in principle subjects any national social policy to the legal and economic constraints of market freedoms and undistorted competition - leading to the ‘constitutional asymmetry’ between economic and social values (supra, section 3) - that is not to say that the Court is not at liberty - or is even required - to balance these values. Whereas the internal market originally seemed to be mainly concerned with the abolition of trade barriers, later a broader conception of the internal market can be found, conceptualised in more holistic terms, including public interests like consumer safety and environmental protection. For that matter, the realisation of an internal market and the liberalisation of trade are not ends in themselves, but important tools to increase welfare and promote sustainable development.[[52]](#footnote-52) The fact that market integration is not pursued in isolation but must be counterbalanced by social considerations and public interests is ‘confirmed’ by the concept of social market economy introduced by the Lisbon Treaty.

In the case law of the CJEU we see that EU free movement and competition law is indeed receptive to considerations of a non-economic nature.[[53]](#footnote-53) First, in some rather exceptional cases the Court of Justice has classified certain activities as non-economic, thereby excluding the applicability of the Treaty rules on free movement and competition. The sale of soft drugs in coffee shops in the Netherlands, for instance, fell, according to the CJEU, outside the scope of the Treaty rules on services, since the trade in soft drugs is prohibited in all Member States.[[54]](#footnote-54) Second, as from the *Dassonville* and *Cassis de Dijon* judgments, the Court has accepted that Member States may rely on mandatory requirements – next to the Treaty exceptions – to justify national measures that restrict trade and free movement.[[55]](#footnote-55) The four freedoms are not absolute, which is essential as this underlines their relative importance in the Treaty.[[56]](#footnote-56) In balancing public, non-economic, interests as well as fundamental rights with the economic freedoms, the proportionality principle plays a key role. The Court particularly focuses on the existence of a causal connection between the restriction and the aim pursued and the fact that there is no alternative to it that is less restrictive to trade. In some cases the Court adopts a third element of the proportionality test, a ‘true balancing approach’ or proportionality stricto sensu, which requires an assessment of whether the restriction is not out of proportion to the aim sought or the result brought about.[[57]](#footnote-57) In addition, the Court may opt for a rather procedural approach to proportionality, which entails an examination of the thoroughness of the decision-making procedure and whether procedural guarantees have been taken into account – principles of good governance – by the regulating state.[[58]](#footnote-58) An example is offered by the *United Pan-Europe Communications* case, where the CJEU also took a deferential approach.[[59]](#footnote-59)

The ways in which the Court applies the proportionality test depends on a number of factors, *inter alia* the public interest involved. In areas which are more sensitive or where the Member States have retained regulatory powers, the CJEU generally seems to allow the regulatory state to have a greater margin of discretion.[[60]](#footnote-60) In the field of consumer policy, for instance, the Court has always departed from a reasonable level of consumer protection and from the notion of the consumer as a beneficiary of the internal market process.[[61]](#footnote-61) But in some cases the Court has been willing to accept that certain groups of consumers need more protection, because they are particularly vulnerable[[62]](#footnote-62) or because of the sensitive nature of the activity, like gambling, where Member States have an adequate degree of latitude to determine what measures are required, and the Court leaves it to the Member States as whether less restrictive means are available.[[63]](#footnote-63) In the field of public health or the environment, the Court points out that these interests are important and grants Member States a considerable margin of discretion to pursue these interests.[[64]](#footnote-64)

*Balancing fundamental rights with the Treaty freedoms*

Before turning to the ways by which the Court deals with conflicts between economic freedoms and social values like workers’ protection or social justice, it must be recalled that one of the pillars of national social policies in this field consists of the support for industrial relations systems. By rendering legal effect to instruments that allow workers to represent and defend their interests collectively, a level playing field is established between both sides of industry when negotiating terms of employment (supra 2.2). As trade unions’ rights are accorded fundamental status, it is of interest whether the CJEU in general balances the protection of human rights against the Treaty freedoms differently from other public interests.

On the face of it, the Court follows the same approach. The protection of fundamental rights in cases where a conflict with economic freedoms arises, therefore, must be *justified* in the light of the economic freedoms. As Brown observed: ‘the language of prima facie breach of economic rights suggests that it remains something which is at the heart wrong, but tolerated, which sits rather uneasily with the State’s paramount constitutional obligation to protect human rights’.[[65]](#footnote-65) The first step for the Court was to consider fundamental rights as an exception, or a mandatory requirement. In the case of *Schmidberger* the Court seemed to regard fundamental rights as a self-standing category of grounds for an exception.[[66]](#footnote-66) In *Omega* and *Sayn-Wittgenstein* the Court referred to the concept of public policy, which, though strictly interpreted, could be applied in these cases where Member States enjoy a wide margin of discretion to protect fundamental rights, which have a particularly national constitutional dimension.[[67]](#footnote-67) In the *Dynamic Medien* case the Court classified the protection of the child as a legitimate interest, which must meet the proportionality requirement.[[68]](#footnote-68)

In balancing conflicting fundamental rights and economic freedoms, the Court has, similar to its case law on mandatory requirements, favoured the use of a proportionality test, but is *struggling* to find the ‘right’ test. The *Omega* case concerned a restriction on the free movement of services by means of a German measure prohibiting laser games as these games were considered to constitute a danger to public order. The Court held that the free movement of services was affected but could be justified. According to the Court it was clear that the commercial exploitation of games involving the simulated killing of human beings infringed a fundamental value enshrined in the German Constitution, namely human dignity. The Court held that the ‘Community legal order undeniably strives to ensure respect for human dignity as a general principle of law’ and that it is immaterial that in Germany respect for human dignity has a particular status as an independent fundamental right. The Court did not only limit its proportionality review of the German ban on laser games to the first element, suitability, we can also discern a rather state-centric approach by the Court, accepting a German particularity of human dignity. In the United Kingdom and many other states these laser games are lawful. It has been argued after *Omega* that this decision of the Court is illustrative of the judicial deference in sensitive areas of national constitutional law, which lie outside a nucleus of shared values and where the CJEU should respect constitutional pluralism.[[69]](#footnote-69) Hence, the CJEU did not wish to impose a common legal conception of human dignity on the Member States. The ‘soft’ application of the proportionality test employed by the Court allowed the national court to protect a national constitutional standard vis-à-vis the EU interest of free movement. This is referred to as the ‘integration model based on value diversity which views national constitutional standards not as being in a competitive relationship with the economic objectives of the Union but as forming part of its polity’.[[70]](#footnote-70)

This approach was endorsed by the Court in the case of *Sayn-Wittgenstein*, which concerned an Austrian law prohibiting the use of noble titles. Here the Court fascinatingly also referred to Article 4(2) TEU by stating that ‘in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic’.[[71]](#footnote-71) By referring to Article 4(2) TEU, the CJEU on the one hand embraced the idea that Member States have considerable leeway in protecting their national constitutional space and identity, yet on the other that national identity is subject to a balancing approach where tensions arise with the economic freedoms.[[72]](#footnote-72)

In *Schmidberger* the Court used a kind of double proportionality test as the Austrian authorities were given the discretion in authorizing a demonstration to consider the impact of the protection of the fundamental free movement of goods by banning the demonstration based on the fundamental rights of assembly and speech. According to the CJEU ‘the competent national authorities were entitled to consider that an outright ban on the demonstration would have constituted unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion in public’.[[73]](#footnote-73) This proposal bears traces of the third element of the proportionality test, proportionality *stricto sensu*, without only weighing the protection of fundamental rights with the free movement of goods, but also the free movement of goods with the interest of protecting fundamental rights. It thus reflects a true balancing approach.

*Balancing fundamental social rights with the Treaty freedoms*

In cases like *Schmidberger* or *Omega* the Court has shown its willingness to take fundamental rights seriously and to put them on an equal footing with the EU rules on free movement. Due to the fundamental rights’ character of trade unionism (a species of the right to association), collective bargaining and action, the Court could apply a similar approach and, thereby, possibly overcome the constitutional asymmetry of economic and social values by putting ‘market-making’ and ‘market-correcting’ policy purposes on the same footing.

In the early Albany case dealing with the infringement of undistorted competition by collective labour agreements, the Court did not refer to the fundamental right’s character of autonomous collective bargaining.[[74]](#footnote-74) Interesting though, it was considered ‘beyond question that certain restrictions of competition are inherent in collective agreements between organizations representing employers and workers’, but it added that ‘the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to (the Treaty provisions on competition law) when seeking jointly to adopt measures to improve conditions of work and employment’.[[75]](#footnote-75) By this, the Court grants ‘immunity’ from European competition law to collective labour agreements pursuing the improvement of employment conditions, and as a consequence of this also to the mechanism to extend the applicability of the agreement to non-signatories by state decision. The justification given boils down to the inherent incompatibility of a (national) market-correcting mechanism as collective bargaining with (European) market-making policy, since it is one of the express purposes of collective agreements, and the extension of its scope by state decision, to curtail competition on employment conditions. The Court derived in its conclusion ‘from an interpretation of the provisions of the Treaty as a whole’.[[76]](#footnote-76) By referring to the objectives of the Treaty in the social sphere and the European social dialogue in the social policy agreement, the right to collective bargaining is raised to a legitimate European social value, which trumps the application of EU competition rules.

In the later Viking and Laval decisions,[[77]](#footnote-77) the Court adopted, however, a completely different approach. Although the freedom of collective bargaining and the right to strike were expressly acknowledged as funda­mental rights, the social policy objectives pursued by collective bargaining – generally accepted in *Albany* – were seriously questioned. These objectives, in the first place, did not lead to the exclusion of these rights from the scope of application of EU law, due to the functional breadth of the Treaty freedoms.[[78]](#footnote-78) And while the improvement of working conditions has been one the Treaty’s objectives since 1957, the Court required ‘a serious threat’ to employment in order to justify an infringement of economic freedoms by exercising the right to collective bargaining, streng­thened by collective action.[[79]](#footnote-79) In *Viking* this was doubted because the Finnish seamen in question had not yet been dismissed in order to be (gradually) replaced by a cheaper Estonian crew. It also shows the exercise or protection of the fundamental right as such does not qualify but needs to pursue a wider legitimate aim. In this, trade unions appear to have less leeway compared to public authorities. With regard to the applicability of the free movement provisions, the Court, on the one hand, puts them on the same plane because trade unions are deemed to be ‘capable of regulating the provision of services collectively’.[[80]](#footnote-80) But on the other hand, they are considered private persons ‘that cannot avail themselves of public policy’[[81]](#footnote-81) and, thus, of a margin of discretion. The proportionality test applied, therefore, does not constitute a true balancing of fundamental principles but amounts to a strict test requiring suitability, a causal link between the restriction and the aim pursued and alternative means to be exhausted,[[82]](#footnote-82) as is commonly applied to any more regular restriction of trade.

The Court appears to put the fundamental economic freedoms and thereby political economic values as its first point on the agenda, notwithstanding the sensitivity of the area and the fact that the national policy interest at stake (workers’ protection) coincides with the Union’s objectives. It may even appear that the ‘shared’ social value of workers’ protection - contrary to the singular, national policy interests in *Omega* or *Sayn-Wittgenstein* – represented a drawback for a more lenient proportionality test.[[83]](#footnote-83) Contrary also to *Albany*,in which the Treaty’s social policy objectives and European social dialogue ‘boosted’ the social value of collective bargaining, in the case of *Laval* preciselyUnion law posed an obstacle for this. In respect of posted workers, the Swedish tradition of collective bar­gaining, as well as the content of the prospective collective agreement, were not considered to be in conformity with the Posting Directive.[[84]](#footnote-84) Yet, this Directive is without prejudice to national collective action.[[85]](#footnote-85) Besides, in the Court’s interpretation of the Directive, also more generally, the balance seems to be again tilted towards the economic values. Relying on the freedom of services, the CJEU sidelined in several cases the minimum character of the Directive, which lays down minimum requirements of protection and expres­sly allows for employment conditions that are more favourable to workers.[[86]](#footnote-86) In the same vein, also in the case of *Alemo Herron* minimum requirements of European social policy were turned into maxi­mum ones.[[87]](#footnote-87) In this case relying on the (economic) freedom to conduct a business, protected by article 16 of the Charter (see also infra, 5.2), the Court ruled that so-called dynamic clau­ses of collective agreements were not enforceable against the transferee in case of the transfer of an under­taking, notwithstanding the fact that also the Transfer of Undertaking Direc­tive allows member states to enact laws or to promote/permit collective agreements which are more favourable to em­ployees.[[88]](#footnote-88)

Are cases like Viking, Laval and Alemo Herron out of play because they sit uneasily with the Court’s willingness to accommodate public interests in EU free movement law?[[89]](#footnote-89) Compared to established case law it appears they are. Possibly the fact that these interests are not furthered by states but by unions - bodies of a private legal nature - plays a role in this. Yet, with regard to the reconci­liation of economic and social values, especially *Viking & Laval* cannot be completely disregarded because these cases so pre-eminently represent the classical tension between market-making and market-correcting policies.

As stated before, it is the express policy purpose of national collective labour law to curtail competition concerning employment conditions. And by granting the fundamental right to take collective action, the bargaining positions of workers and employers are levelled in order to ensure fair terms of employment. Both necessarily restrict trade and business severely in any given case and irrespective of whether it concerns domestic or foreign firms. In social market economies, the inherent incompatibility of market-making and market-correcting policies, therefore, implies that at most an equilibrium can be established. This would normally belong to the realm of political legislation, but because of the EU institutional impediments in the socio-economic field, the buck is passed on to the Court. One could say that the Albany decision represents in this the one far-end solution a court of law can possibly reach: the incompatibility of collective bargaining and free markets makes collective bargaining fall outside the scope of the Union’s economic law. *Viking & Laval* represent the other far-end solution that can be reached by law; opting for a strict scrutiny of any restriction of cross-border trade according to the applicable law.

**5 EU Charter: new horizon for reconciling social and economic values?**

Free movement law, as can be concluded from the above, can accommodate public interests that are furthered by national policy. It is clearly acknowledged, starting already in the 1970s with *Defrenne,* that the EU is not merely an economic union, but at the same time is intended to ensure the social progress of its peoples. For that matter, the realisation of an internal market and the liberalisation of trade are not ends in themselves, but important tools to increase welfare and promote sustainable development.[[90]](#footnote-90) Nonetheless, the fact that market integration is not pursued in isolation does not always necessarily guarantee that economic and social values are weighed on an equal footing, as is shown by the case law discussed above.

Could new prospects arise out of the EU Charter on human rights in this respect? On the face of it, the Charter can strengthen fundamental social rights vis-à-vis conflicting EU free movement law with a view to enhancing and protecting national social policies, exactly because the Charter places social rights in principle on an equal footing with economic, civil and political rights. It certainly requires more engagement on the part of the Court on issues related to the Charter’s social rights.

Of course, the case law on the reconciliation of economic and social values discussed in section 4 showed us that, already before the entry into force of the Charter, human rights for long formed part of the Union’s constitutional architecture. Still, this architecture originates from economic integra­tion, whereby the internal market has provided the very foundation of the autonomous inter­pretation of fundamental rights, including social rights. Should this be seen as problematic, also in the light of other, international regimes, like the ILO or the Council of Europe?[[91]](#footnote-91) Could the Court’s mentality in this respect be characterised as being too instrumental or market-led? Should the Court now, as a result of the entry into force of the EU Charter, move beyond this mentality and develop ‘a mature conception of fundamental rights as goods in themselves’?[[92]](#footnote-92)

For the Court to be able to do so, however, this will highly depend on the content of the rights afforded by the Charter, their liability to judicial review and, especially when industrial relations are involved, their potential horizontal effect. Possibly with regard to all three aspects, the Charter shows an ambivalent relationship with social rights.

First, in respect of the content and selection of especially social and economic rights, the Charter shows a miscellaneous set of rights accepted in international human rights law, while their phrasing is often supplemented or adjusted from an autonomous Union law perspective. The right to work under Article 15, for example,[[93]](#footnote-93) reinstates in section 2 for EU citizens the economic (cross-border) freedoms of workers, services and establishment (see also supra, 2.1), whilst the same right recognized in ILO, Council of Europe and UN instruments tend to emphasize the freedom of coercion, the state’s duties to maintain a high and stable level of employment and the right to decent work and fair working conditions.[[94]](#footnote-94) Article 16 on entrepreneurial freedom, to give another exam­ple, is controversial in itself.[[95]](#footnote-95) This economic right is sourced, not from among inter­national human rights standards, in which it is noticeably absent, but from the CJEU’s founding human rights jurispru­dence, based on the constitutional traditions of some of the Member States.[[96]](#footnote-96)

In *Alemo Herron*, already discussed above, the freedom to conduct a business was relied upon by the Court to give a very narrow interpretation of the Transfer of Undertaking Directive’s provision allowing for laws or collective agreements which are more favourable to employees. Although the particular outcome may appear to be acceptable because the court did not prevent the safeguarding of the rights of workers in case of a transfer of an undertaking, but only the progress of these rights (especially an increase in wages) flowing from any successive collective agreement concluded by the trans­feror after the date of transfer. Never­the­less, cases like *Alemo Herron* and also *Scarlet Extended[[97]](#footnote-97)* might suggest that funda­mental economic freedoms, such as the freedom to conduct a business, are being overstretched.[[98]](#footnote-98) In *Alemo-Herron* the Court ruled that Article 16 precluded a national law without considering whether funda­mental social rights of the Charter could serve as a counter­weight. Then again, the miscel­laneous set of rights offered is not very helpful in this respect. The right to fair and just working conditions (Article 31) could come to mind, but, despite its broad label, the provisions seem to be limited to working conditions in the one area harmonised by EU law (health and safety), thereby omitting other employment conditions, most im­portantly remuneration.

Second, in respect of the liability of the Charter’s fundamental rights to judicial review, there is, according to Article 52(5) of the Charter, a distinction between ‘rights’ and ‘principles’:

‘[T]he provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be *judicially cognisable* *only* in the interpretation of such acts and in the ruling on their legality [emphasis added].’

This much debated and contentious provision perhaps seeks to differentiate between ‘negatively-oriented civil and political rights and positively-oriented economic and social rights, with a view to rendering the latter largely non-justiciable’.[[99]](#footnote-99) The classification of certain social (and economic) ‘rights’ as principles rests upon the Member States’ fear that ‘the recognition of particular economic and social rights would result in the judicialisation of public policy, particularly in areas of significant budgetary importance’.[[100]](#footnote-100) Some Member States expressed serious doubts as to whether social and economic rights should be included in the Charter in the first place.[[101]](#footnote-101)

The impact of Article 52(5) of the Charter may, however, be limited in so far as ‘principles’ normally have to be further elaborated by the legislature and as the courts are not really capable of reviewing such principles extensively.[[102]](#footnote-102) Eventually, it amounts to the question of whether certain provisions are capable of having direct effect or not. This also seems to be the message of the Court in its judgment in *Association de Mediation Sociale*.[[103]](#footnote-103) In this case the question arose as to whether Article 27 of the EU Charter, which laid down the workers’ right to information and consultation within an undertaking, by itself or as implemented by Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, could be relied upon in a horizontal dispute between an employee and his employer so as to set aside a national law implementing the Directive. One of the questions was whether Article 27 should be qualified as a principle or a right within the meaning of Article 52(5) of the Charter. The CJEU did not refer to Article 52(5) of the Charter at all, but simply held that  “It is […] clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law”.[[104]](#footnote-104) Contrary to the Court was Advocate General Cruz Villalon, who extensively embroidered upon the concept of principles and the meaning of Article 52(5).[[105]](#footnote-105)

Whatever approach is taken, the legal effects of the seemingly more programmatic ‘social’ provisions of the Charter that have no direct effect, remain limited. It follows from this that the question whether a particular provision of the Charter provides a ‘right’ or a ‘principle’ could be decisive for its legal effectiveness. In that regard it might be troublesome that ‘principles’ tend to be easily equated with ‘social rights’ generally - instead of programmatic rights - even when neither the Charter itself nor the explanatory notes indicate which provision is a ‘principle’ or not.

According to Advocate General Cruz Villalon it is ‘clear’ that the authors of the Charter referred to social and employ­ment rights.[[106]](#footnote-106) In the same vein, the Advocate General considered that there is ‘a strong presum­p­tion’ that the group of rights included under the title ‘Solidarity’ belong to the category of ‘principles’.[[107]](#footnote-107) This *general* division into social and civil rights is, how­ever, disputed by academia, as social rights can further negative state obligations and civil rights can further positive state obligations.[[108]](#footnote-108) For instance, Article 28, on the right to collective bargaining and collective action, is headed under the title ‘Solidarity’. Yet, due to its close nexus to the right to association, it encompasses ‘classical’ freedoms that are not programmatic in nature but, on the contrary, require pre­dominantly ab­sten­tion by the State.[[109]](#footnote-109) Labelling these rights as ‘principles’ would, moreover, have the remar­kable effect, due to Article 52(5), that these Charter’s rights cannot be judicially reviewed, nor implemented by Union law, since Article 153(5) TFEU prevents this.

Third and final, also the issue of horizontal effect could matter in answer to the question whether the Charter could reposition the balance of economic and social values at the European level. This would specifically be relevant in the case of work-related social rights that see to the relation­ships between workers (or their representatives) and employers.

Interesting is that Advocate General Cruz Villalon expressed in his opinion in the *AMS* case that Article 27 on workers’ rights to informa­tion and consultation within an undertaking, in principle, may be relied upon in a dispute between individuals, since its effectiveness also depends on this under­taking and, therefore, its relevance in relationships governed by private law cannot be de­nied.[[110]](#footnote-110) According to his view, there is nothing in the wording of Article 51(1) – that explicitly addresses the Union and the member states – ‘which suggests that there was any intention, through the language of that article, to address the (..) effectiveness of fundamental rights in relations between individuals’.[[111]](#footnote-111)

The Court in its *AMS* decision also appears to offer an opening for the possible horizontal direct effect of the Char­ter’s rights. It is deemed necessary ‘to ascertain whether the case at hand is similar to *Kü­cük­­deveci*, so that Article 27 of the Charter, by itself or in conjunction with the pro­visions of Directive 2002/14, can be invoked in a dispute between individuals’.[[112]](#footnote-112) *AMS* is then distinguis­hed from *Kücükdeveci* ‘in so far as the principle of non-discrimination on grounds of age, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an indi­vi­dual right which they may invoke as such’.[[113]](#footnote-113) As is known, the right of non-discrimination, being a general principle of Union law, was accorded direct horizontal effect in *Kücükdeveci*.[[114]](#footnote-114) The Court now seems to transpose this to the Charter’s right under Article 21(1). Strictly spea­king, the consideration sees only to the direct effect of Article 21(1) and does not neces­sarily also include its horizontal effect. Nevertheless, the consideration is laid down in the context of ascer­taining whether Article 27, similar to *Kücükdeveci*, can be invoked in a dis­pute between indivi­duals. Further­more, it appears highly problematic when the right of non-discri­mination in its guise as a general principle would have horizontal effect, but not so when it forms a Charter right.

To sum up, the Charter reaffirms the general public interests of the Union and is innovative in that is places social rights and economic freedoms on an equal footing. Whether it rebalances social and economic values compared to the way they are handled in the free movement jurisprudence, re­mains to be seen, however. Some hurdles have to be taken, like in respect of the distinction between ‘rights’ and ‘principles’ and direct and horizontal effect. The *AMS* case might give rise to a hope that the Court will assess direct (and horizontal) effect on the wording of the particular Charter right, irrespective of the category it belongs to. Still, the miscellaneous set of rights contained in the Charter, including economic freedoms raised to the level of human rights, offers the Court the possibility to selectively rely on the Charter, when interpreting European or national social policy regula­tion that disagrees with economic values. In cases in which fundamental freedoms are relied upon by economic actors the Charter is not likely to change the traditional scheme for assessing national measures in the light of free movement. It can even be doubted whether this scheme is upset in cases in which trade unions, for instance, would rely on the Charter’s right to collective bargaining to set aside national acts giving effect to the Viking & Laval jurisprudence.

**6 Conclusions**

Notwithstanding the social purposes of the Union, the multi-level distribution of powers, by which the European market is to be ‘socially embedded’ mainly through differen­tiated policies at the national level, lead to a decoupling of the highly intertwined economic and social spheres of the post-welfare state. Through this, Europe was in fact constituted as a dual polity. Economic values are predominantly furthered by an European law-based order of fundamental freedoms and principles of direct effect and primacy, independent from political decision. Whilst social values must be furthered by national ‘political’ legislation or, at most, secondary European social policy law. As a result of this, (the search for) an equili­brium between conflicting market-making and market-correcting policies, common to social market economies, could no longer be established by political demo­­cratic decision at one and the same level.

In order to prevent the risk of (national) social values becoming subsumed under (European) economic values, European political efforts to reinstall ‘market-making’ and ‘market-correcting’ policy purposes on the same constitutional footing as had existed at the national level, ran counter in the past to the diversity of national welfare systems. Although the strict division of tasks, by which the European market was to be socially embedded by national policy only, was blurred by the Maastricht and Amsterdam Treaties, the social competences inserted in the Treaty are still incomplete and have not been used to their fullest extent.

Nowadays, the structural dif­ferences between national social systems, of which any reform will always have highly political salience, have only but increased after the successive enlargements of the EU. This practically rules out any rebalancing between the EU economic and social dimension by way of political agreement.

This political reality, taken together with the institutional impediments of the Union’s architecture in the socio-economic field, deals the CJEU a pivotal card whenever conflicts arise between economic values vested in the European fundamental freedoms and the system of undistorted com­petition, and social values vested in self-determined national policies or European secondary social policy legislation.

Self-evidently, a court of law is bound to find ‘suboptimal’ solutions. It cannot contribute to positive integration requiring policy choices, and decisions are necessarily delivered on a case-by-case basis depending on the facts of the case and the legal questions which are thereby raised. Within the setting of a multi-level, distributional system of sovereignty in the socio-economic field and in the light of the broad general objectives of the Union, a supranational court, however, is in principle capable of weighing conflicting economic and social values on an equal footing.

It turns out from the case law discussed that the free movement scheme applied by the Court in this respect potentially allows for the consideration of social policy objectives and social rights – similar to other fundamental rights and public interests. It is often the propor­tionality test applied that plays a key role. In spite of ‘the language of prima facie breach of economic rights’ that comes with the free movement scheme, the Court developed marginal or procedural forms of proportionality that in fact can put conflicting human rights’ protection and fundamental freedoms on an equal footing. At the same time, the case law on especially European employment rights (posted workers, the transfer of an undertaking) and the fundamental right to collective bargaining in case of a conflict with fundamental economic freedoms, does not always seem to be consistent in that regard. The Court sometimes raises the suspicion of being inclined to subordinate the former to the latter.

Particularly when the four freedoms clash with fundamental human rights, a procedural review as suggested by Barnard or a true balancing approach as suggested by AG Trstenjak in *Commission v Germany* could be in order.[[115]](#footnote-115) Although the EU Charter on Human Rights, due to some hurdles discussed, will probably not have a major influence on the present ways by which the Court strives for the reconcilia­tion of economic and social values, nevertheless the Charter at least makes clear that there is no hierarchy of norms and, therefore, also social fundamental rights should be assessed on their merits and not subsumed under other objectives.

To conclude, a true balancing approach of fundamental freedoms and (the protection of) funda­mental social rights might lessen the ‘effet utile’ of the economic freedoms to a certain extent. But would this not be counterbalanced by the increased margin of discretion to pursue differentiated, market-correcting policies, at least for as long as the ‘political union’ cannot fully live up to its own commitment to a ‘social market economy’? Still, whether this is all likely to happen in the near future, is another matter. If the Court’s opinion regarding the EU’s accession to the ECHR is any indication, the CJEU is not ready to take the edge off important principles of its self-construed, autonomous legal order, such as supremacy or effectiveness.[[116]](#footnote-116)

1. H. VAN EIJKEN, *EU Citizenship & the Constitutionalisation of the European Union*, Europa Law Publishing, Groningen 2015, p. 253. See also N. SHUIBHNE, 'The Resilience of EU Market Citizenship' (2010) 47:6 *Common Market Law Review*, pp. 1597-628. [↑](#footnote-ref-1)
2. C. BARNARD, ‘The Protection of Fundamental Social Rights in Europe after Lisbon: A Question of Conflicts of Interests’ in S.A. DE VRIES et al. (eds.), *The Protection of Fundamental Rights in the EU After Lisbon*, Hart Publishing, Oxford 2013, p. 41. [↑](#footnote-ref-2)
3. Case C-438, *Viking*, ECLI:EU:C:2007:772; Case C-341/05 *Laval*, ECLI:EU:C:2007:809. [↑](#footnote-ref-3)
4. *I.a.*, A. DAVIES, ‘One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ’ (2008) 2 *Industrial Law Journal*, pp. 127-148; P. SYRPIS & T. NOVITZ, ‘Economic and social rights in conflict: Political and judicial approaches to their reconciliation’ (2008) 33:3 *European Law Review,* pp. 411-426; A.G. VELDMAN, ‘The Protection of the Fundamental Right to Strike within the Context of the European Internal Market’ (2013) 9:1 *Utrecht Law Review*, pp. 104-117. [↑](#footnote-ref-4)
5. Article 2 of Part I (‘Principles’) of the Treaty establishing a European Economic Community, 1957. [↑](#footnote-ref-5)
6. Part II (‘Foundations of the Community’) of the EEC-Treaty, 1957. [↑](#footnote-ref-6)
7. Case C-26/62, *Van Gend & Loos*, ECLI:EU:C:1963:1; Case C-6/64, *Costa v. Enel*, ECLI:EU:C:1964:66. [↑](#footnote-ref-7)
8. J.H.H. WEILER, ‘The Community system: the dual character on supranationalism’ (1981) *Yearbook on European Law*, pp. 257-306. [↑](#footnote-ref-8)
9. See for extensive references to the ideas of an economic constitution and the ordo-liberal school, i.a., C. JOERGES and F. RŐDL, ‘On the ‘social deficit’ of the European Integration project and its perpetuation through the ECJ-judge­ments in Viking and Laval’, (2008) *RECON Online Working Paper* 06, <www.reconproject.eu/projectweb/portal project/RECONWorkingPapers.htm*>* accessed on 14.03.2015*.* [↑](#footnote-ref-9)
10. P. OLIVER and W-H. ROTH, ‘The Internal Market and the Four Freedoms’ (2004) 41 *CML Rev*, pp. 407-411. [↑](#footnote-ref-10)
11. For instance, Case C-122/00, *Schmidberger* (goods), ECLI:EU:C:2003:333; Case C-281/98, *Angonese* (workers); ECLI:EU:C:2000:296; Case C-341/05, *Laval* (services), ECLI:EU:C:2007:809; Case C-36/02, *Omega* (services), ECLI:EU:C:2004:614. [↑](#footnote-ref-11)
12. Case C-265/95, *Commission v France* (Spanish Strawberries), ECLI:EU:C:1997:595. [↑](#footnote-ref-12)
13. See Case C-49/89, *Corsica Ferries France*, ECLI:EU:C:1989:649, para. 8: ‘As the Court has decided on various occasions, the articles of the EEC Treaty concerning the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited’. See recently the cases which the Commission has started against a couple of Member States regarding the profession of notaries, such as Case C-50/08, *Commission v France*, ECLI:EU:C:2011:335, para. 67. [↑](#footnote-ref-13)
14. See S.A. DE VRIES, ‘Dassonville’ in T.W.B. BEUKERS, H.J. VAN HARTEN and S. PRECHAL (eds.), *Het recht van de Europese unie*, Boom Juridische uitgevers, Den Haag 2010, p. 90. [↑](#footnote-ref-14)
15. C. BARNARD, *The Substantive Law of the EU: the Four Freedoms*, Oxford University Press, Oxford 2010, pp. 73-74. [↑](#footnote-ref-15)
16. M.P. MADURO, *We the Court. The European Court of Justice and the European Economic Constitution*, Hart Publishing, Oxford 1998, p. 81; T. KINGREEN, *Struktur der Grundfreiheiten des Europäischen Gemeinschaftsrechts*, Duncker & Humblot, Berlin 1999, p. 15; See also OLIVIER and ROTH, *supra* at , p. 410. [↑](#footnote-ref-16)
17. The *Viking* and *Laval* cases confirm this approach in respect of the freedom of establishment and the free movement of services. It is however not clear how broad the scope of horizontal direct effect is; see also S. PRECHAL and S.A. DE VRIES, ‘Seamless Web of Judicial Protection’(2009) *European Law Review*, pp. 5-25. [↑](#footnote-ref-17)
18. Opinion of AG MADURO of 1 October 2009 in Case C-58/08, *Vodafone and others*, ECLI:EU:C:2009:596, paras. 19-22. In this case the validity of a Regulation regulating roaming prices in the telecom sector was at issue. The Court, though, did not follow the Advocate General’s Opinion on the extensive scope of Article 114 TFEU but took another and more cautious approach, Case C-58/08, *Vodafone and others*, ECLI:EU:C:2010:321, para. 46. [↑](#footnote-ref-18)
19. D. CHALMERS, ‘The single market: from prima donna to journeyman’ in J. SHAW and G. MORE (Eds.), *New legal dynamics of European Union*, Clarendon Press, Oxford 1995, p. 57. [↑](#footnote-ref-19)
20. S. PRECHAl and S.A. DE VRIES, 'Viking/Laval en de grondslagen van het internemarktrecht' (2008) *SEW*, p. 434. [↑](#footnote-ref-20)
21. Case C-233/12, *Simone Gardella v Istituto Nazionale della Previdenza Sociale* (INPS) (Gardella), ECLI:EU:C:2013:449, para. 39: ‘[…] Article 12(2) of the Charter reiterates inter alia the free movement of workers guaranteed by Article 45 TFEU […]’; case C-367/12, *Susanne Sokoll-Seebacher* (Sokoll-Seebacher), ECLI:EU:C:2014:68, para. 22: ‘[…] Article 16 of the Charter refers, inter alia, to Article 49 TFEU, which guarantees the fundamental freedom of establishment.’ [↑](#footnote-ref-21)
22. Case C-367/12, *Sokoll-Seebacher*, ECLI:EU:C:2014:68, para. 22. [↑](#footnote-ref-22)
23. Case C-233/12, *Gardella,* ECLI:EU:C:2013:449, para. 39. [↑](#footnote-ref-23)
24. Case C-390/12, *Robert Pfleger and others* (Pfleger), ECLI:EU:C:2014:281. [↑](#footnote-ref-24)
25. PRECHAl and DE VRIES, *supra* at , p. 435. [↑](#footnote-ref-25)
26. C. CROUCH, ‘Labour markets and social policy after the crisis’ (2014) 20:1 *European Review of labour and research,* pp. 7–22. [↑](#footnote-ref-26)
27. ‘Commodification’ relates to the fact that the market, due to its economic rationality, considers labour as any other inanimate commodity in disregard of the qualities it possesses, such as that it involves human beings whose dignity, respect or well-being can be at stake. The term was coined upon the foundation of the ILO, which expres­ses in the preamble to its Constitution that ‘labour is not a commodity’. [↑](#footnote-ref-27)
28. K. POLANYI, *The Great Transformation: the Political and Economic Origins of Our Time*, Rinehart, New York 1944. *Cf.* on Polanyi: JOERGES and RŐDL, *supra* at, p. 5 and CROUCH, *supra* at , p. 10. [↑](#footnote-ref-28)
29. F.W. SCHARPF, ‘The European Social Model: Coping with the Challenges of Diversity’ (2002) 40:4 *Journal of Common Market Studies*, pp. 646–70 at p. 646. [↑](#footnote-ref-29)
30. SCHARPF, *supra* at , referring to H.J. KÜSTERS, *Die Gründung der Europäischen Wirtschafts­gemein­schaft*, Nomos, Baden-Baden 1980; A. MORAVCSIK, *The Choice for Europe. Social Purpose and State Power from* *Mes­sina to Maastricht,* Cornell University Press, Ithaca/New York 1998, pp. 108-150 and W. LOTH, ‘Der Post-Nizza-Prozess und die Römischen Verträge’ (2002) 25:1 *Integration*, pp. 12–19. [↑](#footnote-ref-30)
31. Art. 117 EEC Treaty 1957. [↑](#footnote-ref-31)
32. Art. 118 EEC Treaty 1957. [↑](#footnote-ref-32)
33. Case C-43/75, *Defrenne*, ECLI:EU:C:1976:56, para. 10. The phrase has been reiterated in a long line of case law, more recently also in the Viking and Laval cases. [↑](#footnote-ref-33)
34. See art. 6(3) TEU in respect of the rights of the European Convention on Human Rights. [↑](#footnote-ref-34)
35. Case C-415/93, *Bosman*, ECLI:EU:C:1995:463; Viking*, supra at* ; Laval, *supra at* . [↑](#footnote-ref-35)
36. Resp. articles 12 and 28. [↑](#footnote-ref-36)
37. Art. 117 of the EEC Treaty (1957) and still to be found in art. 151 TFEU. [↑](#footnote-ref-37)
38. JOERGES and RŐDL, *supra* at, p. 3. [↑](#footnote-ref-38)
39. F.W. SCHARPF, *Governing in Europe. Effective and Democratic?*,Oxford University Press, Oxford 1999, chapter 2. An important, but rare, exception was the right to equal pay under article 119 EEC (a French precondition for economic integration in order to prevent other member states, not bound by this social principle, from having a competitive advantage), which, consequently, led to a body of European legislation on gender discrimination in the labour market. [↑](#footnote-ref-39)
40. SCHARPF, *supra* at , p. 647; A. SANGIOVANNI, ‘Solidarity in the European Union’ (2013) 33:2 *Oxford Journal of Legal Studies*, p. 224. [↑](#footnote-ref-40)
41. Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.08.1998; Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, OJ L 061, 05.03.1977 and Council Directive 80/987/EEC of 20 October 1980 on the protection of employees in the event of the insolvency of their employer, OJ L 283, 28.10.1980. [↑](#footnote-ref-41)
42. *Cf*. for differences G. ESPING-ANDERSEN, *The Three Worlds of Welfare Capitalism*, Princeton University Press, Princeton, 1990. [↑](#footnote-ref-42)
43. SCHARPF, *supra* at , pp. 648-649; JOERGES and RŐDL, *supra* at, p. 4; S. LEIBFRIED and P. PIERSON, ‘Social Policy. Left to Courts and Markets?’ in H. WALLACE and W. WALLACE (eds.) *Policy-Making in the European Union*, 4th ed., Oxford University Press, Oxford 2002, pp. 92 – 267. [↑](#footnote-ref-43)
44. S. WEATHERILL, ‘From Economic Rights to Fundamental Rights’, *supra* at , pp. 16-17. [↑](#footnote-ref-44)
45. European Commission*, White Paper on European social policy*. A way forward for the Union, COM (1994) 333: Jacques Delors coined the term ‘European Social Model’ to designate an alternative to American (liberal) market capitalism. [↑](#footnote-ref-45)
46. *I.a.* M. FERRERA, A. HEMERIJCK and M. RHODES, *The Future of Social Europe. Recasting Work and Welfare in the New Economy,* Celta Editora,Oeiras 2001; P. KURZER, *Markets and Moral Regulation: Cultural Changes in the European Union*, Cambridge University Press, Cambridge 2001; G. ESPING-ANDERSEN, *Social Foun­dations of Post-industrial Economies,* Oxford University Press, Oxford 1999. [↑](#footnote-ref-46)
47. SCHARPF, *supra* . [↑](#footnote-ref-47)
48. Article 153 (5). [↑](#footnote-ref-48)
49. F. DORSSEMONT, ‘Some Reflections on the Origin, Problems and Perspectives of the Social Dialogue’ in M. DE VOS (ed.), *A* *Decade Beyond Maastricht: The European Social Dialogue revisited*, Kluwer Law International, The Hague 2003, pp. 3–32; A.G. VELDMAN, ‘The Quasi-legislative Powers of the European Social Dialogue’ in L. BESSELINK e.a. (eds.), *The Eclipse of the Legality Principle in the European Union*, Kluwer Law International, The Hague 2011, pp. 187-209 at 201-202. The sectoral social dialogue was comparably more successful, dealing mainly with the employment conditions of workers in cross-border sectors (air and rail transport; seafarers, etc.). [↑](#footnote-ref-49)
50. Not surprisingly, the guidelines for employment policies are since 2005 associated with the guidelines for econo­mic policies, *Cf.* J. BARBIER and F. COLOMB, ‘The Janus faces of European policy’ (2014) 20(1) *Transfer*, pp. 23–36, at p. 27. [↑](#footnote-ref-50)
51. SCHARPF, *supra* at . [↑](#footnote-ref-51)
52. This developed over time, see: P. CRAIG, ‘The Evolution of the Single Market’ in C. BARNARD and J. SCOTT (eds.), *The* *Law of the Single European Market – Unpacking the Premises*, Hart Publishing, Oxford 2002, p. 32. [↑](#footnote-ref-52)
53. WEATHERILL, *supra* at , pp. 12, 16-17; S.A. DE VRIES, *Tensions within the Internal Market – The Functio­ning of the Internal Market and the Development of Horizontal and Flanking Policies*, Europa Law Publishing, Groningen 2006. [↑](#footnote-ref-53)
54. Case C-137/09, *Marc Michel Josemans v Burgemeester van Maastricht*, ECLI:EU:C:2010:774. [↑](#footnote-ref-54)
55. Case 8/74, *Procureur du Roi v Benoît and Gustave Dassonville* (Dassonville), ECLI:EU:C:1974:82; Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon), ECLI:EU:C:1979:42. [↑](#footnote-ref-55)
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57. J.H. JANS, ‘Proportionality revisited’ (2000) 27 (3) *Legal Issues of Economic Integrations*, pp. 240-241. [↑](#footnote-ref-57)
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60. DE VRIES, *supra* at , pp. 351-352. [↑](#footnote-ref-60)
61. S.A. DE VRIES, ‘Consumer Protection and the EU Single Market rules – The search for the paradigm consumer’ (2012) 4 *Journal of European Consumer and Market Law,* pp. 228 – 242. [↑](#footnote-ref-61)
62. Case 382/87, *R Buet and Educational Business Services (EBS) v Ministère public* (Buet), ECLI:EU:C:1989:198. [↑](#footnote-ref-62)
63. Case C-275/92, *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* (Schindler), ECLI:EU:C:1994:119. [↑](#footnote-ref-63)
64. DE VRIES, *supra* at , p. 351. [↑](#footnote-ref-64)
65. C. BROWN, ‘Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria. Judgment of 12 June 2003, Full Court’ (2003) 40 *CML. Rev*, p.1499 at 1508. [↑](#footnote-ref-65)
66. Case C-122/00, *Schmidberger*, ECLI:EU:C:2003:333. [↑](#footnote-ref-66)
67. Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (Ome­ga), ECLI:EU:C:2004:614; C-208/09, *Sayn-Wittgenstein*, ECLI:EU:C:2010:806. [↑](#footnote-ref-67)
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73. Schmidberger, *supra* at *,* para 89. [↑](#footnote-ref-73)
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75. Albany, *supra* at , para. 59. [↑](#footnote-ref-75)
76. Albany, *supra* at , para. 60. [↑](#footnote-ref-76)
77. See Viking, *supra* at . [↑](#footnote-ref-77)
78. See also WEATHERILL, *supra* at , p. 17. [↑](#footnote-ref-78)
79. Viking, *supra* at , para. 81. [↑](#footnote-ref-79)
80. Laval, *supra* at , para. 98; Viking *supra* at , para. 33. [↑](#footnote-ref-80)
81. Laval, *supra* at , para. 84. [↑](#footnote-ref-81)
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85. Consideration no. 22 of the preamble to Directive 96/71 concerning the posting of workers in the framework of the provision of services. [↑](#footnote-ref-85)
86. A. BÜCKER & W. WARNECK (eds.), *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert*, 2011; A. VAN HOEK and M. HOUWERZIJL, ‘Loonconcurrentie als motor van de interne markt? Deel II’ (2008) no. 12 *Nederlands Tijdschrift voor Europees Recht,* pp. 337-346. [↑](#footnote-ref-86)
87. Case C-426/11, *Mark Alemo-Herron and others v Parkwood Leisure Ldt.* (Alemo Herron),ECLI:EU: C:2013:52. See also S. WEATHERILL, ‘Use and Abuse of the EU’s Charter of Fundamental Rights: on the improper veneration of freedom of contract’ (2014) 10 *European Review of Contract Law*, p.157; J. PRASSL, ‘Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law’ (2013) 42 *Industrial Law Journal*, p. 434. [↑](#footnote-ref-87)
88. Art. 8 of Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States rela­ting to the safeguarding of employees’ rights in the event of transfers of undertakings. [↑](#footnote-ref-88)
89. DE VRIES, *supra* at , p. 332. [↑](#footnote-ref-89)
90. This developed over time, see: P. CRAIG, ‘The Evolution of the Single Market’ in C. BARNARD and J. SCOTT (Eds.), *The* *Law of the Single European Market – Unpacking the Premises*, Hart Publishing, Oxford 2002, p. 32. [↑](#footnote-ref-90)
91. D. AUGENSTEIN, ‘Engaging the Fundamentals: On the Autonomous Substance of EU Fundamental Rights Law’ (2013) 14 *German Law Journal*, p. 1919. [↑](#footnote-ref-91)
92. S. DOUGLAS-SCOTT, ‘The European Union and Human Rights after the Treaty of Lisbon’, (2011) 11 *Human Rights Law Review*, p. 681. [↑](#footnote-ref-92)
93. ‘Freedom to choose an occupation and right to engage in work’. [↑](#footnote-ref-93)
94. S. PEERS, e.a. (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Hart Publishing, Oxford 2014, pp. 425-431. [↑](#footnote-ref-94)
95. See: *The Future Status of the EU Charter on Fundamental Rights*, Session 2002-03, 6th Report, HL Paper 48; *cf.* PEERS, *supra* at , p. 438. [↑](#footnote-ref-95)
96. Case 4/73, *Nold,* ECLI:EU:C:1974:51. In this case the fundamental status of the right was derived from *inter alia* the German Basic Law. Still, the freedom to conduct a business is recognised by only a few national constitutions, most notably in States with a history of fascist or dictatorial regime, *cf.* PEERS, *supra* at . [↑](#footnote-ref-96)
97. Case C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL* (SABAM) (Scarlet Extended), ECLI:EU:C:2011:771. [↑](#footnote-ref-97)
98. S. WEATHERILL, ‘Protecting the Internal Market From the Charter’ in S. DE VRIES, U. BERNITZ and S. WEATHERILL (eds.), *Five Years Old and Growing - The EU Charter of Fundamental Rights as a binding instrument*, Hart Publishing, Oxford, 2015, *forthcoming*. [↑](#footnote-ref-98)
99. P. CRAIG and G. DE BÚRCA, *EU Law. Text, cases, and materials,* 5th ed., Oxford University Press, Oxford 2011, p. 398. [↑](#footnote-ref-99)
100. Opinion of AG CRUZ VILLALÓN in Case C-176/12, *AMS*, ECLI:EU:C:2013:491, para. 49. [↑](#footnote-ref-100)
101. K. LENAERTS, ‘Exploring the limits of the EU Charter of Fundamental Rights’ (2012) *European Constitutional Law Review*, p. 399. [↑](#footnote-ref-101)
102. R. BARENTS, ‘Een grondwet voor Europa (VI): de grondrechten’ (2005) no. 2 *Nederlands tijdschrift voor Europees recht*, p. 44. See TRIDIMAS, *supra* at 70, pp. 358-359. [↑](#footnote-ref-102)
103. Case C-176/12, *AMS,* ECLI:EU:C:2014:2. [↑](#footnote-ref-103)
104. AMS, *supra* at , para. 45. [↑](#footnote-ref-104)
105. Opinion of AG CRUZ VILLALÓN in Case C-176/12, *AMS*, ECLI:EU:C:2013:491, paras. 50-80. [↑](#footnote-ref-105)
106. Opinion AMS, *supra* at , para. 49. [↑](#footnote-ref-106)
107. Opinion AMS, *supra* at , para. 55. [↑](#footnote-ref-107)
108. See also J.M. SERVAIS, *International labour law*, Kluwer International, The Hague 2014, p. 104. [↑](#footnote-ref-108)
109. This was recognized by the ECtHR in that it acknowledged that the rights to collective bargaining and collective action, though regulated in the European Social Charter, are an essential part of the civil right to associa­tion and, there­fore, are protected by Article 11 ECHR (ECtHR 12 November 2008, Appl. No. 34503/97, *Demir and Baykara v Turkey*; ECtHR, 21 April 2009, Appl. No. 68959/01, *Enerji Yapi-Yol Sen v Turkey*). [↑](#footnote-ref-109)
110. Opinion AMS, *supra* at , paras. 38-41. [↑](#footnote-ref-110)
111. Opinion AMS, *supra* at , para. 31. [↑](#footnote-ref-111)
112. AMS, *supra* at , para. 41. [↑](#footnote-ref-112)
113. AMS, *supra* at , para. 47. [↑](#footnote-ref-113)
114. Case C-555/07, *Kücükdeveci*, ECLI:EU:C:2010:21. [↑](#footnote-ref-114)
115. BARNARD, *supra* at , pp. 50-51; Opinion of AG Trstenjak in Case C-271/08, *European Commission v. Germany*, ECLI:EU:C:2010:183. [↑](#footnote-ref-115)
116. *Opinion 2/13*, ECLI:EU:C:2014:2454. [↑](#footnote-ref-116)