

How do Social and Economic Rights Relate to Each Other in the Social Market Economy: An Introduction to this Special Issue

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1. Introduction

When the Lisbon Treaty was adopted, some of my colleagues working in the area of economic law at my university were puzzled by its new Article 3(3) Treaty European Union (TEU):

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.

It was, in particular, the term *social market economy* that created confusion. What meaning does this term have?

Colleagues working in the area of European labour law were less confused by this article – earlier treaties on the EEC/EC and EU - mentioned social objectives – but they also wondered what (new) meaning this provision could have. This question became the more relevant when the Court of Justice of the EU (CJEU) issued a couple of judgments in which the social seemed to lose from the economic; in particular, the *Laval* judgment¹ and the *Viking* judgment² attracted a lot of attention (we will discuss these cases below in more detail).

Since expertise on economic freedoms and social policy had already been combined in the Europa Institute of Utrecht University (now in the Renforce research programme) for more than five decades, we took the opportunity to benefit from this combination and started, together with invited external colleagues, a research project on the tensions between social and economic values in some important areas. The present Special Issue of the *Utrecht Law Review* is the product of this project.

In this contribution I will examine the relationship between economic rights and social rights. Are they mutually exclusive, do social rights always loose from economic rights or do they have a different relationship? This discussion is an introduction to this Special Issue and gives background information to readers not familiar with social policy issues. It is, however, an issue on which opinions can differ, as can be seen in the following contributions.

In this article first an overview is given of how social policy has acquired a place within European Economic Community law (Section 2). Subsequently, the tensions between economic and social interests are discussed

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1 Case C-341/05, *Laval*, ECLI:EU:C:2007:809.

2 Case C-438/05, *Viking*, ECLI:EU:C:2007:772.

including how the various interactions between the EU and national level are relevant (Section 3). Section 4 will give an outlook to the articles of this Special Issue.

2. How social rights and values acquired a place in the European Economic Community

The Treaty of the European Economic Community of 1957 (EEC) served exclusively economic objectives, i.e. it established a common market to further the economic progress of the then six Member States. The provision on the free movement of workers (Article 48 of the EEC, now Article 45 of the Treaty on the Functioning of the European Union (TFEU)) was primarily meant as an economic freedom, even if it can be said that it has also a social objective: it allowed workers to move to areas where there is a need for them without the barriers of visas and work permits. Employers could thus more easily attract workers if there was a shortage in their own country. However, Article 48 also had a social dimension: workers from other Member States must not have worse employment conditions (including wages) than national workers, i.e. discrimination on ground of nationality was forbidden. This provision made movement of workers more attractive, and it also protected the social systems of the host States, whose level of social protection might otherwise be under pressure if employers could employ cheap workers from abroad (sometimes this is called ‘social dumping’, even by the CJEU itself, e.g. in the *Laval* judgment).³

The CJEU issued a large number of rulings, in which it interpreted Article 48 and its successors very broadly, thus allowing also workers with a low income and/or a low number of working hours to benefit from the equal treatment rules. By this interpretation it also allowed workers in small jobs access to the full welfare system of the host State (see the contributions by Jacqueson and Pennings, and by Barnard and De Vries in this Special Issue). The CJEU’s case law has also contributed to strong enforcement of Article 48 and its successors, by deciding that this article has horizontal direct effect. As a result, a worker is not dependent on the host State for ensuring his or her freedom of movement and equal treatment but can go to court directly to force the employer to follow the rules.

Still, this social effect is a direct corollary of the economic right of free movement. The only ‘real’ social policy article of the EEC concerned equal pay of men and women (Article 119 of the EEC, now Article 157 TFEU). This article was not introduced for social reasons, but because some signatory countries that were bound by ILO Convention 100 requiring equal pay of men and women feared that countries not bound by the Convention could be ‘better off’ by having cheaper workers.⁴ Preventing competition by unequal pay for men and women was the objective of this article.

Thanks to the CJEU, Article 119 of the EEC acquired much more impact than could be expected on the basis of this origin. In the *Defrenne II* judgment the CJEU held that Article 119 of the EEC is not only based on an economic objective, but ‘this provision 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’.⁵ Social market economy *avant la lettre*. The CJEU introduced these objectives on its own account and deduced from its interpretation that it has two objectives that the principle of equal pay forms part of the foundations of the Community. Thus, even though the text of Article 119 of the EEC is vague and not unconditional (‘Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers’) the double objective was the basis for the court to conclude that Article 119 of the EEC has direct effect and can be invoked in horizontal relations (employee versus employer) before the national courts. As in the case of free movement, by this case law the CJEU increased the enforcement possibilities of this provision significantly and this can without doubt be seen as a strong motor for the development of the social dimension of the EEC.

³ Case C-341/05, *Laval*, ECLI:EU:C:2007:809, paras. 103 and 113.

⁴ See also C. Barnard, *EU Employment Law* (2012), p. 643.

⁵ Case 43/75, *Defrenne II*, ECLI: EU: C:1976:56.

Although unfair competition could also result from other differences between social systems, the founding Member States could not reach consensus to create powers in the EEC to harmonise social systems. Instead, a compromise text was laid down in Article 117 of the EEC, that provided that:

Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, to make possible their harmonisation while the improvement is being maintained. They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.

This provision expressed a belief but did not give any powers for improvement of the living standards. However, at that time a creative use was made of Article 100 of the EEC that enabled the approximation of national provisions which directly affect the establishment of functioning of the common market. This article was used, after the groundbreaking *Defrenne* judgment on equal pay of men and women, as the basis for several directives on equal treatment of men and women.⁶ These had a huge impact on Member States who often had to change their systems radically in order to treat men and women equally.

Still, equal treatment of men and women was only a small part of the total area where social policy was considered desirable and the lack of such social policy was increasingly seen as unsatisfactory. This appeared, in particular in the 1970s, when the economic recession and the development of the common market had the effect that companies sometimes restructured themselves and moved (partly or fully) to Member States where wages and other employment conditions were at a lower level. The effects of these developments and the protests against them were a reason to adopt a number of directives on, *inter alia*, health and safety, collective redundancies, insolvency of the employer and transfer of undertakings;⁷ also these were based on Articles 117 juncto 100 of the EEC. The Health and Safety and Working Times Directives were based on the idea that it was undesirable that employers could have a better competitive position by applying lower health and safety standards and to have lower conditions on maximum working times than those of other countries. The Directive on Transfer of Undertakings had to prevent workers from being simply dismissed or being made subject to worse employment conditions when their firm was taken over. This Directive provided that the working conditions must not change as a result of the transfer and that dismissals due to the transfer were not allowed. This was an important restriction of the powers of enterprises, not only applicable in cross border situations, but also in purely internal affairs. The Directive on Collective Redundancies restricted the freedom of the employers less, but imposed on them the obligation to consult employees' organisations and notify the employment authorities on the dismissals and to take a waiting period into account before the actual dismissal takes place.

In the 1980s and 1990s the European Commission and some Member States wanted to develop social policy further and argued for more competences for social policy instruments in the Treaty of Maastricht that was under preparation. However, no consensus could be reached; instead, a Social Policy Protocol was signed by 11 of the then 12 Member States (as the UK refused to do so). This Protocol mentioned several areas on which minimum provisions of social policy could be made, allowing for qualified majority voting with respect to some of these. Subsequently new labour law directives were adopted, including the Directives on Part-Time Work (Directive 97/81) and Parental Leave (Directive 96/34).

When a Labour Government came to office in the UK, the powers mentioned in the Protocol could be transferred to the Treaty of Amsterdam (1997) and included in its title on social policy. In (what is now numbered) Article 153 of the TFEU, areas are mentioned in which the EU has specific power to regulate: these are health and safety, working conditions, information and consultation of employees and equality between men and women regarding labour market opportunities and treatment at work. For this issue the ordinary legislative procedure

6 Examples are Directive 76/207 on equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions; Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. For an overview, see F. Pennings, *European Social Security Law* (2015), ch. 20.

7 Currently their successors: Directive 89/391 on safety and health of workers at work; Directive 2003/88 on working times; Directive 98/59 on collective redundancies; Directive 2001/23/EC on transfers of undertakings.

suffices. In four other areas directives can be adopted as well, but only after a special procedure in which unanimity in Council voting is required, as in these areas Member States wanted to maintain their veto right. These four areas are social security and protection of workers; protection of workers where their employment contract is terminated; representation and collective defence of the interests of workers and employers, including co-determination; and conditions of employment for third-country nationals legally residing in EU territory.

Article 153 of the TFEU has also restrictions for adopting social policy instruments. Its Section 4 provides that directives shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof. Section 5 mentions explicitly in which labour law areas the EU does *not* have any legislative powers at all: pay, the right of association, the right to strike and the right to impose lock-outs.

So far only limited use has been made of Article 153, since it is not easy to obtain support of the Member States for social policy measures at EU level. Instead, the European Commission developed some new soft law instruments, including the Open Method of Coordination and the European Pillar of Social Rights.⁸

A milestone in the integration of fundamental rights in the EU legal order was the acceptance of the Community Charter of the Fundamental Social Rights of Workers in 1989 (Community Charter). The Lisbon Treaty recognises the rights, freedoms and principles set out in the Community Charter and makes its provisions legally binding (Article 6(1) of the TEU). The Community Charter not only leads to stronger social rights, but it mentions also economic rights that must be reconciled with social rights. An important example is Article 16 of the Community Charter that reads that ‘The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.’

To conclude, social policy has gradually obtained a certain place within EU law and restricts the discretion of powers of employers in some areas. The CJEU has interpreted some Treaty provisions, although of purely economic origin, extensively in order to give them a social meaning. It developed specific interpretations to ensure that Member States and employers cannot escape their responsibilities.

However, social rights and values can also be confronted by economic rights and values, requiring a decision on how to weigh these values and reconcile the rights. Some of the judgments discussed in the preceding sections could lead to higher costs for employers, for instance when they have to pay higher wages to a foreign worker than they intended as a result of the equal treatment rule, or if they have to pay women the same wage as men. However, these issues did not constitute a tension with economic *rights*. Such tensions occur, however, where economic freedoms of the Treaty are invoked. In such cases social and economic values are confronted and a solution has to be found. This will be discussed in the next section.

3. Where economic and social rights and values are confronted with each other

At first sight one may expect that the outcome of a confrontation between economic and social rights depends on the level where the rights originate from: the EU or national level. That does, however, not necessarily have to be the case, since some of the EU and economic rights are implemented in national law, which can make it hard to determine the origin of the right.

It is therefore more appropriate to describe the interaction of social and economic rights at the level where they confront each other.

1. This can be where economic and social rights laid down in the Treaty meet each other (Section 3.1) (horizontal dimension).
2. This can be where economic rights laid down in the Treaty may affect social systems of Member States (Section 3.2) (diagonal dimension).
3. This can be a social policy directive implemented in national law that is confronted by economic rights laid down in the Treaty (Section 3.3) (vertical dimension).
4. This can be an attempt to include social values in an economic EU instrument, for example public procurement (Section 3.4) (vertical dimension).

⁸ COM(2017) 251, OJ 2017, L 113/56.

The rights can interact (or not) in various ways. We will categorise these according to the typology developed by Freedland:⁹

- (a) The exclusion type, where EU internal market law does not have an impact on EU and domestic labour law;
- (b) The reconciliation type, where EU internal market law functions in tandem with EU and/or domestic labour law;
- (c) The supersession type, where EU internal market law is so extensively superimposed on labour law that it has to be regarded as having superseded European labour law, and consequently also domestic labour law.

3.1. Where economic or social rights meet each other in the Treaty

Suppose that a Polish company brings its workers ('posts' them) to build a school in the Netherlands. Does this situation fall under the free movement of workers or under the free movement of services (of the employer)? The answer to this question is important: if it falls under the former freedom, equal pay of these workers is required with the national workers. If that is the case for service providers from a lower wage country, the costs of the project are significantly higher than if they have to pay only the wages applicable in the country of origin.

In 1990 the CJEU decided, in the *Rush Portuguesa* case, that posting of workers is governed by the free movement of services rules (currently Article 56 of the TFEU).¹⁰ The Court followed this approach in order to come to the conclusion that a fine imposed on the employer for not having work permits for his employees was not allowed. The dispute in this case occurred due to the fact that during the transitional period of accession of Spain and Portugal to the EC, the workers of these countries did not have the right to free movement yet. However, the company could already make use of the right to free movement of services, but now it was imposed fines for having employed workers without a permit. The CJEU was not asked questions on the position of the workers concerned; still, in response to concerns of some Member States it considered in its judgment that Community law does not preclude Member States from extending their legislation or collective labour agreements to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established. In later case law, the Court set restrictions to imposing national labour law rules of the host State, since such rules can infringe the free movement of services, as it can make it more expensive or some conditions are difficult to fulfil.¹¹

In this way a choice had to be made between an economic right and a social right and the outcome has had important effects. The economic right does not allow unjustified restrictions and equal treatment with national workers can be seen as such an unjustified restriction. Had equal treatment been chosen as the legal basis for posting, then there is no restriction that has to be justified.

Underlying this choice lies a big dilemma. On the one hand side, equal treatment of posted workers with workers in the host State leads to higher costs for the service provider and that can make the right to free movement of services obsolete. After all, foreign service providers have additional costs compared to national service providers, such as for transport and accommodation of the workers, and the cumulation of costs may make providing cross-border services unattractive. For many service providers established in the Accession States (accession to the EU in 2004 and later), the major, if not only, competitive advantage in the host countries is the wage difference. On the other hand, wage competition has always been seen as undesirable within the framework of freedom of movement of workers. Such competition often leads to negative effects, such as unemployment of national workers and a downward pressure on wages and other employment conditions.

9 M. Freedland & J. Prassl, *Viking, Laval and Beyond* (2014), p. 15.

10 Case C-113/89, *Rush Portuguesa*, ECLI:EU:C:1990:142.

11 Case C-43/93, *VanderElst*, ECLI:EU:C:1994:310; Case C-49/98, *Finalarte*, ECLI:EU:C:2001:564; Case C-445/03, *Commission v Luxembourg*, ECLI:EU:C:2004:655; Case C-244/04, *Commission v Germany*, ECLI:EU:C:2006:49; Case C-168/04, *Commission v Austria*, ECLI:EU:C:2006:595.

Since there was considerable legal uncertainty as to which restrictions to free movement of services were allowed and which were not, and since a certain level of social protection was deemed necessary, a compromise was laid down between equal treatment with domestic workers and the interests of the service providers in the Posting of Workers Directive, adopted in 1996.¹² This Directive provides that protection by labour law of the host State is restricted to the areas mentioned in Article 3. Thus, the Posting of Workers Directive defines precisely which parts of the host State's labour law can *and* have to be imposed (the so-called core labour law) on employers established in another Member State who post workers to this host State. The minimum wage of the host State is the most important part of the core labour law that can be imposed. However, the Directive only allows imposing a minimum wage on foreign employers if that is regulated in statutory law or collective agreements with general applicability; in this way it wants to ensure that for foreign companies no higher demands apply than for national companies.

In the *Laval*¹³ and other judgments¹⁴ the CJEU decided that the host country cannot impose more of its labour law on foreign companies than the core labour law mentioned in the Directive. In this dispute it was argued that Article 3(7) provides that paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers. However, the Court decided that this provision applies only to more favourable provisions in the law or collective agreements of the Member State of origin (§ 81 of *Laval*). An interpretation that would allow host Member States to impose more of its labour law than the core provisions would amount to depriving the Directive of its effectiveness, the Court added.

A second complication following from the Directive is that only the core provisions laid down in law, regulation or administrative provision, or by collective agreements that have been declared generally binding (or have a comparable system in which it is clear that they apply to all comparable employers)¹⁵ can be imposed. Thus, not all minimum provisions in collective agreements can be imposed. Countries which have a decentralised system of making collective labour agreements cannot always ensure that a particular collective labour agreement applies to all comparable employers. If they do not have a statutory minimum wage, they do not have any instrument to impose minimum wages to employers of posted workers.

In respect of this confrontation of economic and social rights, it cannot be said that social rights are *completely* superseded by economic freedoms. After all, the minimum wage of the host country, if determined according to the rules of the Directive, has to be paid to posted workers. However, the restriction to the minimum wage enables service providers to compete on wages in the host country, and, in some sectors (e.g. construction, building) this has led to substitution of domestic workers by posted workers. This effect can pose a considerable downward pressure on the wages of the domestic workers and the outcome of this confrontation can be categorised as a supersession type.

A remarkable development took place in 2018, however, that shows that the outcome of the confrontation of social and economic rights and values does not have to remain always the same. Some of the countries that received considerable numbers of posted workers required a revision of the Posting of Workers Directive in order to restrict the wage competition made possible by the Directive.¹⁶ The revised Directive will require (it has to be implemented by 30 July 2020) equal payment of domestic workers and posted workers, provided that the wages have been regulated according to the systems mentioned supra. For some countries this will still cause problems, as they do not have such systems or are not able to make use of these. However, from the perspective of the relationship between social and economic rights it can be said that social rights and values will be much less superseded by economic rights than before. The circumstance that this change was instigated by not only social, but also economic interests of some of the

12 Directive 96/71.

13 Case C-341/05, ECLI:EU:C:2007:809.

14 See Case C-346/06, *Rüffert*, ECLI:EU:C:2008:189.

15 More precisely: collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory, provided equality of treatment on the core provisions of Art. 3 is guaranteed (Art. 3(8)).

16 European Commission, Proposal for a Directive amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM(2016) 128 def. The new text is Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, *OJ L* 173, 9 July 2018.

host Member States, may be an important explanatory factor in this shift of the balance between economic and social rights.

3.2. EU economic rights affect social systems of Member States

Member States have the freedom to organise their own labour market and welfare systems; however, these have to be consistent with EU law, including the provisions on economic freedoms and internal market law. In this sense there can be confrontations between national social systems and economic rights. An important example of such confrontation is that where collective labour agreements were claimed as being inconsistent with competition law rules. They indeed constitute a restriction on competition between employers, since employers falling under the same collective labour agreement have to pay workers wages according to the rates laid down in that collective labour agreement. The issue was brought before the CJEU when it was disputed whether the obligatory membership of a pension fund that followed from a collective agreement was consistent with competition law (currently Article 101 of the TFEU). This led to the *Albany* judgment,¹⁷ in which the Court ruled that the social objectives laid down in the Treaty (in the predecessor of what is now Article 3 of the TEU on the social market economy) have to be taken into account when answering the question whether collective labour agreements are consistent with competition law. Article 3 provides that a particular task of the Community is ‘to promote throughout the Community a harmonious and balanced development of economic activities’ and ‘a high level of employment and of social protection’. The CJEU further referred to (what are now) Articles 151 ff of the TFEU, which require that the Commission is to endeavour to develop the dialogue between management and labour at European level and the system of social dialogue laid down in this title. The Court admitted that it is beyond question that certain restrictions of competition are inherent to collective labour agreements. Therefore, the Treaty provisions on competition are not applicable to collective labour agreements meant for the improvement of working conditions; the Court thus created immunity of collective labour agreements from competition law. An essential condition for immunity is that the collective labour agreement is the result of collective bargaining and that its provisions have the objective to improve the working conditions of *workers*. In the *FNV-Kiem* judgment, the Court emphasised that the immunity of collective agreements from competition law does not extend to others than workers, such as the self-employed.¹⁸

Thus in this area, EU internal market law is barred from having an impact on EU and domestic labour law and we can reckon this relationship between social and economic law to the first type: the exclusionary type. So far this is the only part of social policy that has been made immune from the rules of economic law, or more precisely, from competition law.

Another area where economic and social values are confronted with each other is that of the right to strike and the exercise of the free movement of services. This dispute was the topic of the *Laval* judgment, already discussed in Section 3.1. In this case the Swedish trade unions organised a strike in order to force a Latvian service provider (a construction company) to join the Swedish collective labour agreement. The core question was whether the strike was allowed now it infringed the free movement of services.

The trade unions involved in the case argued that, like in the *Albany* case, the right to strike has immunity from the application of economic rights. After all, as we saw in Section 2, the right to strike is excluded from the powers of the EU legislature (Article 153 of the TFEU).

The CJEU did not follow this argument. It considered that a collective action meant to force a foreign undertaking which posts workers to Sweden to apply a Swedish collective agreement has to be assessed in the light of Article 56 of the TFEU. This is necessary, since even though in the areas in which the Community does not have competence and the Member States remain, in principle, free to lay down the conditions for the existence and exercise of the rights at issue, they must exercise that competence in consistence with Community law. The fundamental nature of the right to take collective action is not such as to render

17 Case C-67/96, *Albany*, ECLI:EU:C:1999:430; see also Case C-115/97 and 117/97, *Brentjens*, ECLI:EU:C:1999:434; Case C-219/97, *Drijvende Bokken*, ECLI:EU:C:1999:437.

18 Case C-413/13, *FNV Kiem*, ECLI:EU:C:2014:2411.

Community law inapplicable to such action; it still has to be exercised in accordance with EU law. As a result, the outcome of this confrontation does not belong to the exclusionary type.

The CJEU considered that the right to take collective action is recognised both by various international instruments which the Member States have signed or cooperated in (e.g. the European Social Charter of the Council of Europe and ILO Convention 87 concerning Freedom of Association and Protection of the Right to Organise) and the Charter of Fundamental Rights of the European Union (Charter of Fundamental Rights). It therefore considered the right to take collective action as a fundamental right which forms an integral part of the general principles of Community law. However, the exercise of this fundamental right must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality. It continued to argue that a restriction on the freedom to provide services is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest. If that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it. The right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest which, in principle, justifies a restriction of one of the economic freedoms guaranteed by the Treaty. Since the Community has not only an economic, but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy.

In this way the CJEU recognised the right to strike as a fundamental right, but it takes the right to freedom of services as the main right. Striking is an infringement of that right and has therefore to be justified.

Although the CJEU mentioned several criteria for justification of the infringement of the right to free movement of services, in the judgment itself it made the actual assessment easy by its decision, mentioned in Section 3.1, that the core labour law provisions mentioned in the Posting of Workers Directive are the minimum, but also the maximum that can be imposed on foreign service providers. Since the trade unions required more favourable provisions, they wanted to have more than allowed by the Posting of Workers Directive and therefore their strike was not a justified infringement of the right to provide services.

The trade unions argued, as we have seen, that the right to strike belonged to the exclusionary sphere, whereas the CJEU developed a conciliatory approach. At first sight such conciliatory approach seems reasonable; after all, the Court recognised the right to strike as a fundamental right. However, in the international conventions on the right to strike, mentioned by the Court itself, economic reasons are not acceptable as a restriction of this right. Only very few restrictions are allowed under these conventions (e.g. Convention 87).¹⁹ Therefore, in this conciliatory approach much more room is given to economic interests than is consistent with the fundamental character of the right to strike. This is not so much the case in the final outcome of *Laval* itself – if unions wanted to strive for an aim not allowed under EU law, then the strike is against the law and prohibition is acceptable. However, by the criteria the CJEU mentioned for the objective justification of the right to strike, it creates considerable room for economic interests to restrict the fundamental right to strike.²⁰

Thus there are two major problems with the *Laval* case: the decision that the minimum of labour law that can be imposed on the basis of the Posting of Workers Directive is also the maximum; and the argument that the freedom to provide services is the main right and that the objective of the strike has to be balanced with the economic right of freedom to provide services. This second problem is fundamental, since it means that the right to strike is considered as of lower value than an economic right.

19 Committee of Experts on the Application of Conventions and Recommendations of the ILO considered that 'it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services. (...) The Committee thus considers that the doctrine that is being articulated in these Court's judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention', Report of the Committee of Experts on the Application of Conventions and Recommendations 2010, p. 109.

20 C. Barnard, 'The calm after the storm: Time to reflect on EU (labour) law scholarship following the decisions in *Viking* and *Laval*', in A. Bogg et al. (eds.), *Research Handbook on EU Labour Law* (2016), p. 342.

An explanation for this is that the right to strike is not laid down in the Treaty itself, whereas the right to free movement of services is one of the economic freedoms in the Treaty. This is an unequal battle. Article 28 of the Charter of Fundamental Rights provides that:

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

However, this provision did not persuade the CJEU in *Laval* not to take the economic right as the basis right, since ‘according to Article 28 the right to strike is to be protected in accordance with Community law and national law and practices’ (§ 91 of the *Laval* judgment).

In the *Viking* case²¹ the infringement of a collective action on an economic right was to be assessed by the Court. The CJEU considered that:

‘In the present case, first, it cannot be disputed that collective action such as that envisaged by FSU [the union] has the effect of making less attractive, or even pointless, as the national court has pointed out, Viking’s exercise of its right to freedom of establishment, inasmuch as such action prevents both Viking and its subsidiary, Viking Eesti, from enjoying the same treatment in the host Member State as other economic operators established in that State.’

A Treaty provision ensuring the right to strike in a more absolute sense would certainly lead to a different approach to the right to strike, since in that situation it would no longer be subject to an economic right. It is, however, not to be expected that such a proposal to revise the Treaty will be accepted by the Member States.

There is also another reason for not accepting an exclusionary domain for the right to strike. Immunity from competition provisions, relevant in the *Albany* case, means that certain agreements and behaviour are allowed, but immunity of collective labour agreements from competition law does not affect an economic right of a third party. In contrast, free movement of services is an economic freedom, guaranteed by the Treaty, of one of the parties. This makes it much more difficult, if not impossible, to accept immunity for the right to strike. As a result this confrontation is an example of the conciliatory type.

Another example is the *AGET Iraklis* judgment²² that concerned the impact of the Greek system of dealing with collective dismissals on the freedom of establishment (Article 49 of the TFEU and Article 16 of the Charter of Fundamental Rights). *AGET*, the company that was involved in this case, of which a French company was a main shareholder, adopted a restructuring plan providing for the permanent closure of a plant, with mass redundancies as a result. It invited the trade union to meetings for the purpose of providing information on the restructuring and for consultation as to the possibilities for avoiding or reducing those redundancies and their harmful consequences. As the union did not take up either of those invitations, *AGET Iraklis* submitted a request for approval of the projected collective redundancies to the responsible Minister of Labour. The employment directorate of the Ministry of Labour drew up a report taking into account the conditions in the labour market, the situation of the undertaking and the interests of the national economy and recommended that the request be refused because there was no plan for relocating the workers concerned to other plants belonging to *AGET Iraklis* and because the statistics of the Greek Manpower Employment Organisation indicated an ever higher unemployment rate. The minister decided not to authorise the projected collective redundancies. Subsequently, the Greek court, to which *AGET* appealed, asked questions to the CJEU.

The Court first considered that the Greek system, which made it very difficult to dismiss employees, infringed the right of establishment. This is a limitation on the exercise of the freedom to conduct a business enshrined in Article 16 of the Charter of Fundamental Rights. Limitations, however, may be imposed on the exercise of rights enshrined by the Charter as long as the limitations are provided for by law, respect the

21 Case C-438/05, *Viking*, ECLI:EU:C:2007:772.

22 Case C-201/15, *AGET Iraklis*, ECLI:EU:C:2016:972.

essence of those rights and freedoms and, in accordance with the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others. It was explained by the national court that the public interest objectives that were pursued by the disputed legislation related both to protecting workers and combating unemployment and to safeguarding the interests of the national economy.

The CJEU did not accept promotion of the national economy or its proper functioning as justification for obstacles prohibited by the Treaty. However, the protection of workers and encouragement of employment and recruitment which, being designed in particular to reduce unemployment, constituted a legitimate aim of social policy, it decided.²³ In this respect, the CJEU referred to the social market economy as a basis for this judgment. Subsequently the appropriateness and proportionality tests had to be satisfied. The Court considered that Member States have a broad discretion when choosing the measures capable of achieving the aims of their social policy, but that discretion must not have the effect of undermining the rights granted to individuals by the Treaty provisions in which their economic freedoms are enshrined. The Court concluded that the fact that a Member State provides, in its national legislation, that projected collective redundancies must, prior to any implementation, be notified to a national authority, which has the power to oppose the projected redundancies on grounds relating to the protection of workers and of employment, cannot be considered contrary to freedom of establishment as guaranteed by Article 49 of the TFEU or the freedom to conduct a business enshrined in Article 16 of the Charter of Fundamental Rights. The freedom to conduct a business is not absolute but must be viewed in relation to its social function. The Greek system does not have, in any way, the consequence of entirely excluding, by its very nature, the ability of undertakings to effect collective redundancies, since it is designed solely to impose a framework on that ability. Therefore, such a regime cannot be considered to affect the essence of the freedom to conduct a business.

Finally, it had to be established whether the particular detailed Greek rules — and especially the three criteria which the competent public authority was called upon to take into account for the purpose of deciding whether it opposes collective redundancies — were such as to ensure that the requirements were in fact complied with. The criterion of ‘interests of the national economy’ to which that legislation refers could not be accepted, the CJEU ruled. The other two assessment criteria, namely the ‘situation of the undertaking’ and the ‘conditions in the labour market’, were acceptable. However, these criteria were formulated in very general and imprecise terms. Where the powers of the minister were not qualified by any condition, save for very general ones and no indication of the specific objective circumstances in which those powers are to be exercised is given, this resulted in serious interference with the freedom concerned, the CJEU considered. This may have the effect of excluding that freedom altogether, since the employers concerned did not know in what specific objective circumstances that power may be applied. The final conclusion of the CJEU was that such criteria go beyond what is necessary in order to attain the objectives stated and cannot therefore satisfy the requirements of the principle of proportionality.

As a result, social policy systems that subject dismissals to authorisations are allowed, but the criteria that are used have to be precise. Otherwise the freedom to exercise a business may disappear completely. In this way the CJEU balanced the economic right to establish an enterprise and the social right of protection against dismissal.

3.3. The interpretation of a social policy directive is influenced by economic values

In Section 2 it was mentioned that in the 1970s directives were adopted on collective redundancies and transfer of undertakings. The main objective of the mentioned directives is to ensure protection to workers in the event of restructuring, but the preambles also refer to the existing differences among the Member States, which could ‘have a direct effect on the functioning of the internal market’. Thus the directives have both a social and an economic meaning.²⁴ The reference to the economic meaning was used to restrict the social protection mentioned in the directive.

²³ The CJEU referred to the *Viking* judgment in order to support this argument.

²⁴ See also N. Bruun & S. Laulom, ‘Restructuring of companies’, in A. Jaspers et al. (eds.), *European Labour Law* (2019).

An example is the *Alemo-Herron* judgment²⁵ that concerned a situation where a public authority privatised its leisure services to a private undertaking. For the workers collective labour agreements were applicable that were binding as a result of a reference clause included in the individual contracts of employment. After a second transfer of the undertaking, this time to Parkwood, some years later, a new collective agreement was adopted in the public sector. Parkwood argued that the new agreement did not bind it.

The Transfer of Undertakings Directive provides that 'The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee' (Article 3(1)). It is clear that this provision refers to the rights following from the collective labour agreement applicable at the moment of the transfer. However, does the provision in the individual labour contract only refer to that collective agreement (static interpretation) or also to its successors (dynamic interpretation)? Article 8 provides that this Directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees.

The CJEU considered that the aim of the Directive is not only to safeguard the interests of employees in the event of a transfer, but it seeks to ensure a fair balance between the interests of the employees and the transferee. The Directive must be interpreted in a manner consistent with the Charter of Fundamental Rights of the EU, in particular in this case, Article 16, laying down the freedom to conduct a business. The CJEU considered that by reason of the freedom to conduct a business, the transferee must be able to assert its interest effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions for its employees with a view to its future economic activity. Since the transfer is of an undertaking from the public sector to the private sector, the continuation of the transferee's operations will require significant adjustments and changes, given the inevitable differences in working conditions that exist between those two sectors. A dynamic clause referring to collective agreements negotiated and agreed after the date of transfer of the undertaking concerned that are intended to regulate changes in working conditions in the public sector is liable to limit considerably the room for manoeuvre necessary for a private transferee to make such adjustments and changes. In such a situation, such a clause is liable to undermine the fair balance between the interests of the transferee in its capacity as employer, on the one hand, and those of the employees, on the other.

In the light of Article 3, it is apparent that, by reason of the freedom to conduct a business, the transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity. However, Parkwood was unable to participate in the collective bargaining body on these agreements, since this collective agreement was made between public authorities and public union, and Parkwood was a private enterprise. In those circumstances, the transferee's contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business. Thus Article 8 cannot be interpreted as entitling the Member States to take measures which, while being more favourable to employees, are liable to adversely affect the very essence of the transferee's freedom to conduct a business, the CJEU ruled.

Whereas the judgment of the Court is understandable in this individual case – if a transfer is a form of privatisation, it is a bit odd to keep the enterprise subject to public collective agreements – it had a broader scope by not recognising the dynamic character of the reference to collective agreements and by the argument that this follows from the freedom of enterprise.

3.4. Insertion of social policy values in an economic instrument

The last area to be discussed here is that of an economic area in which national authorities want to insert social values. We take as example public procurement law, whose objective is to create a fair playing field for

25 Case C-426/11, *Alemo-Herron*, ECLI:EU:C:2013:521.

companies interested in tendering for a public contract. For this reason, a detailed system of rules has been developed, currently laid down in Directive 2014/25, that is implemented in national legislations.

Governments and other national contracting authorities sometimes want to include *secondary policy objectives* in a procurement procedure that are not directly connected with the actual purchase that is the subject of the procedure. An example is that of a local government requiring a contracting party building a new municipality library to create work for a number of disabled and/or long-term unemployed workers. Such demands are looked at with suspicion by procurement lawyers, since such secondary policy objectives are often believed to prefer domestic suppliers and products over those from other Member States. That could conflict with one of the main objectives: create a fair European playing field.

However, such requirements may also fit very well in a general social policy, including creating jobs for the local workforce, and/or supporting employment in declining industries or in areas suffering from underemployment or lack of development (sometimes these requirements are called *social return*), for which the local authority often has few or no other instruments than requiring them in a procurement procedure.²⁶

The first judgment in which the requirement on social return was disputed was the *Beentjes* judgment.²⁷ The tender by the Beentjes company was rejected, since the selecting authorities considered *inter alia* that Beentjes did not seem to be in a position to employ long-term unemployed persons, i.e. the workers who were to carry out the work had to consist of at least 70% long-term unemployed who had to be recruited with the help of the employment office. The Public Procurement Directive in force at the time did not explicitly provide for social considerations to be taken into account in selecting candidates. So was this allowed?

The CJEU argued that the Directive did not lay down a uniform and exhaustive body of Community rules. Member States remained free to maintain or adopt substantive and procedural rules with regard to public works contracts subject to the condition that they comply with all the relevant provisions of Community law, in particular the prohibitions flowing from the principles laid down in the Treaty with regard to the right of establishment and the freedom to provide services. The exclusion of a candidate on the ground that it is not in a position to employ long-term unemployed persons is compatible with the Directive only if such a condition complies with all the relevant provisions of Community law. This obligation could *inter alia* infringe the prohibition of discrimination on grounds of nationality if it became apparent that such a condition could only be satisfied by economic operators from the State concerned or indeed that economic operators from other Member States would have difficulty in complying with it. It is for the national court to determine, in the light of all the circumstances of the case, whether the imposition of such a condition is directly or indirectly discriminatory. As can be seen, the CJEU did not exclude social considerations but gave specific criteria in order to maintain a level playing field.

Where *Beentjes* was a case of a firm against a Member State, later landmark cases on social return were most often infringement procedures started by the European Commission. One of these was the European Commission against France, where the French authorities connected conditions on combating unemployment at the local level with a procurement procedure (the *Nord-Pas Calais* case).²⁸ In this judgment the CJEU made clear that the condition to recruit a percentage of long-term unemployed was a condition that can be used as a condition for selecting tenderers.²⁹

The *Max Havelaar* judgment³⁰ was also the result of an infringement procedure. In this case a province of the Netherlands required the Dutch *Max Havelaar* certificate for fairly produced coffee and EKO labels as requirements for the management and supply of ingredients for automatic coffee machines. The European Commission commenced an infringement procedure against the Netherlands on the grounds, *inter alia*, that the reference to the labels as an award criterion for the ingredients to be supplied constituted an

26 See extensively F. Pennings & E. Manunza, 'The Room for Social Policy Conditions in Public Procurement Law' in T. van den Brink et al. (eds.), *Sovereignty in the Shared Legal Order of the EU - Core Values of Regulation and Enforcement* (2015), pp. 173-196.

27 Case 31/87, *Beentjes*, EU:C:1988:422. This judgment was given under an earlier public procurement directive, Directive 71/305.

28 Case 225/98, *Nord-Pas Calais*, ECLI:EU:C:2000:494.

29 See further the *Interpretive communication* by the European Commission (Brussels, 2001, COM(2001) 566 final).

30 Case C-368/10, *Max Havelaar*, ECLI: EU:C:2012:284.

infringement of Article 53(1) of the Directive, according to which the criteria on which contracting authorities have to base the award of contracts are either the lowest price or the most economically advantageous tender. It is forbidden to refer to specific labels and standards, except in the situation where it is impossible to provide a description of the criteria. This part of the argument of the Commission was unsuccessful; the CJEU considered that Article 53(1)(a) of Directive 2004/18 provides a non-exhaustive list, including environmental characteristics and social requirements. The Court confirmed the Advocate General's opinion that:

a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs – defined in the specifications of the contract – of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong.

It is interesting to see that it was the European Commission that started procedures against public authorities that inserted social clauses in their tenders. As a result of the case law of the CJEU, however, there was more room for the Member States than intended by the Commission to realise social objectives.

On 26 February 2014 two new directives on public procurement were adopted after a long-lasting procedure in which, in particular, proposals in the European Parliament to insert social and sustainability criteria in the text of the directive played an important role. These proposals led to important amendments to the draft directives.³¹ The new directives changed the criteria for awarding contracts, which may solve some of the problems connected with social return. This is done by replacing the criterion of the 'most economically advantageous tender' with the new concept of 'best price-quality ratio' (consideration 89). This new concept is much broader than 'most economically advantageous'.

In the context of the best price-quality ratio, a non-exhaustive list of possible award criteria which includes environmental and social aspects is set out in this directive. Consideration 93 is an important one: where national provisions determine the remuneration for certain services or set out fixed prices for certain supplies, it should be clarified that it remains possible to assess value for money on the basis of factors other than solely the price or remuneration. Depending on the service or product concerned, such factors could, for instance, include environmental or social aspects (e.g. whether books were made from recycled paper or paper from sustainable timber, or whether the social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract has been furthered).³² This means that in the new directive social and environmental aspects have been accepted as a core value.

4. Conclusion and outlook to the contributions of this Special Issue

The questions raised in Section 1 were: are social and economic rights mutually exclusive, do social rights always loose from economic rights or do they have a different relationship?

Although the discussions on judgments as *Laval* and *Viking* suggest that economic values have superseded social values, it follows from the historical overview of the place of social values in Section 2 that social values certainly have been given a place in the EU. The CJEU has been a motor in developing equal treatment of workers and equal treatment of men and women; these interpretations have not been restricted by economic arguments. This has led to far-reaching case law and in several judgments the Court has ensured that these rights can be actually enforced. Furthermore, in the *Albany* judgment the Court left the social policy of Member States intact, with reference to the (predecessor of the present provision on) social market economy by ensuring immunity. Therefore it can be concluded that social rights have their own place in the EU and sometimes even a space where they are immune from the impact of economic rights.

31 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94/1).

32 This is laid down in Art. 67 on the contract award criteria.

It becomes different where an economic *freedom*, i.e. economic rights of other parties, is involved, in particular the freedom to provide services and the freedom to conduct an enterprise. *Laval*, *Viking*, *Alemo-Herron* and *AGET-Iraklis* are often mentioned as judgments in which the social has been superseded by the economic. In this chapter the considerations of the CJEU have been reproduced extensively in order to analyse these in more detail and it appears that it is not an absolute supersession of the social right by the economic one. Instead, it is a weighing process, although a special one.

We can start by acknowledging that social and economic rights do not have the same place in the hierarchy of rights. In all the judgments discussed, the final outcome was that the social right involved could not be (fully) exercised. These cases have, as Barnard and De Vries put it in their contribution in this Special Issue, produced a bleak picture. Secondly, the CJEU takes the economic freedom (of services, establishment to conduct services) and considers whether the infringement of this right by social policy is justified. This hierarchy suggests that economic rights are given more weight than social rights. This is the result of the fact that only few social rights are laid down in the Treaty and that some social rights are even excluded from the legislative powers of the legislature, such as pay and the right to strike. Therefore the CJEU has to take the economic freedom as the starting point and it has to investigate whether infringement of the right can be justified by objective reasons.³³

However, we can also see that in the tests of the CJEU for justification of infringements of economic rights, it has acknowledged the legitimate interest of defending the interests of workers in all these cases. Sometimes it even referred to the provision on the social market economy (or its predecessor) to underline the relevance of the social values. From this follows, the CJEU argued, that striking is a fundamental right and a system that subjects dismissals to authorisation by public authorities is allowed. However, the Court required a balance between the economic and social rights and also that fundamental rights have to be weighed against economic rights. This makes the process and outcome uncertain and sets the fundamental right lower in the hierarchical order than in international treaties.

Then finally, in all the judgments we discussed, the CJEU came to the conclusion that the disputed social legislation or activity at stake excluded the exercise of the economic right fully or almost fully. Whether that is always absolutely true can be disputed. However, if we accept the argument, we can conclude that the Court did not really balance the rights involved. Instead, it limited itself to concluding that the economic right involved was superseded by the social right in this case. In other words, the economic had become obsolete and therefore this infringement of this right was not allowed. In other words, with adjusted criteria, the Greek system of authorising redundancies (*AGET Iraklis*) could be accepted. Unions are allowed to strike against social dumping by foreign service providers, unless they require conditions not allowed by the Posting of Workers Directive. This means that the outcome of the confrontation of the economic and social rights belongs to the conciliation type. The weighing by the CJEU means that a social right can lose for an economic right or even principle, such as the right to establish an enterprise and that can lead to worries as in this way social protection can be seriously hampered. However, in the actual judgments the balancing by the Court meant that the social right only lost against the economic right since the former made, in the view of the Court, the economic right completely meaningless. It thus remains to be seen how weighing the economic and social right works out where it cannot be said that the economic right has become obsolete as result of the social right.

This introduction is meant to give an overview of the relationship between social and economic rights. It is a topic on which there can be various views and interpretations; this Special Issue includes contributions on the main topics concerning the social market economy.

Jotte Mulder approaches the social market economy from the various liberal concepts by which the EU internal market can be approached and describes from this how the economic and social values can interact. He approaches the topic not from the social side, but from the economic side, but, interestingly enough, the analysis given of the balancing rights in the preceding section seems also the result of his analysis.

³³ Teklè suggests that the approach of the CJEU, in which it does not refer to the opinions of ILO supervisory bodies, can depend on the lack of knowledge of international law or time devoted to deepen such knowledge (T. Teklè, 'Labour rights and the case law of the European Court of Justice', (2018) *European Labour Law Journal*, p. 255. It is, however, much more likely that the interpretation by the CJEU follows from the structure of the Treaty, that, unlike the ILO, lays down economic freedoms, but not fundamental labour rights.

The contribution by *Quentin Detienne and Elmar Schmidt* concerns pensions, which traditionally belong to an area exclusively within the competences of Member States. However, it was the *Albany* judgment that, on the one hand, confirmed that compulsory membership, laid down in collective labour agreements, is of the exclusionary type. On the other hand, the criteria of the CJEU restricted this compulsory membership to the solidarity type of traditional pensions. When new types, either or not promoted by the EU, are admitted, this exclusionary domain can be intruded, which can put solidarity under pressure. The authors thus analyse to what extent EU legislation advances or obstructs the goals of a social market economy.

Anna Gerbrandy, Willem Janssen and Lindsey Thomsin argue that there are differences between these area they deal with: competition, state aid and procurement. Competition law certainly proves, in their view, to be the most rigid in allowing social aspects, whereas state aid law and public procurement law can more smoothly accommodate such objectives. At present, it makes the latter two more suitable to advance social objectives on the national level.

As we have seen, the plea for allowing more social values in procurement law was not without success. The role of the European Commission is remarkable here, as we have seen in Section 3, where it started several infringement procedures against countries that allowed social return in the procedures. It is probably relevant which directorate is responsible for which area. The CJEU followed a nuanced approach and the European Parliament introduced several provisions allowing for social values in the directive. In other areas of law, namely competition law and state aid law, social elements have been admitted and competition law was not allowed to destroy the framework of collective labour relations by prohibiting collective labour agreements.

Catherine Jacqueson and Frans Pennings describe that equal treatment in free movement law varies from category to category and is a highly sensitive issue, as is also pointed out by Barnard and De Vries. They explain the differences in approaches and identify which developments are possible.

Catherine Barnard and Sybe de Vries emphasise the political context of the legislation and judgments that are related to the social market economy. They point out that the competences for social policy are limited, but it is even more of a problem that there is no political will to make use of these powers. Related to the lack of political will is the uncertainty in which social policy should go: the situations and interests of Western and Eastern Member States – to say it briefly – diverge largely. In any case, given these situations, the European Commission should not suggest that it can make more of a social Europe than is actually possible.

By these various views we have included important representations of approaches to the social market economy and for the reader there is now the opportunity to compare these. ■