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EDITORIAL
EUROPE’S CRISIS-LAW AND
THE WELFARE STATE
A CRITIQUE*

Stefano Giubboni**

Abstract

This article explores the constitutional dimension of the new European crisis-
management-law. The author’s critical stance is that the new architecture of the
European economic governance deepens the well-known asymmetries between
supranational market forces and national Welfare State arrangements. A convergent
process of de-politicisation and de-legalisation takes place at EU level, with dramatic
implications for the viability of the so-called European social model.

Keywords: European economic governance; European social model; financial crisis;
welfare state

1. INTRODUCTION

The great economic crisis – the worst and longest at least of the post-war period,
which is still holding a large part of Europe in an unequal grip – has a constitutional
dimension that has certainly been overlooked, compared to other more direct and
visible repercussions. In recent years the measures put into force by supranational
institutions, both outside and within the traditional channels of EU law, to counteract
the sovereign debt crisis by deeply modifying the economic governance of the Union,
have in fact ended up questioning some of the most established paradigms that have
historically forged – and constitutionally legitimised – the process of ‘integration
through law’. According to the most credited of these paradigms, European
integration should be conceived – particularly in its foundation – as a political project,
the implementation of which is essentially left to economic processes mediated by the law. The German ‘Ordoliberal’ theorists grasped the meaning of this project better than others, identifying the constitutional anchorage of the newly-born European Economic Community (EEC) with the fundamental economic freedoms and with the system of undistorted competition established by the 1957 Treaty of Rome. Economic and monetary Union (EMU) would have had to refine this project by bringing it to completion; but as is well known the foundation of the whole edifice started to erode soon after its construction (§2).

The financial and sovereign debt crisis has dramatically revealed the fragility of the EMU and the substantial erroneous basis of the constitutional premises on which it was built according to the Maastricht Treaty, with a fundamental decision to create a ‘currency without a sovereign’. The response to the crisis pursued by the EU unsuccessfully aimed at compensating these original defects of construction, by introducing regulatory mechanisms which, in practice, have deprived national democratic institutions (primarily parliamentary) of their budgetary powers (at least in the debtor states) and constraining the residual autonomy of the Eurozone Member States as to their choices regarding fiscal and social policies. The most vulnerable countries are now subjected to unsustainable semi-permanent austerity constraints, set by European level mechanisms according to an ideologically uniform approach (a rigid ‘one-fits-all-approach’), that consequently increases the powerfully divisive effects of the economic crisis, at the risk of (political) disintegration.

The new European crisis-management-law, therefore, triggers apparently contradictory processes that actually coalesce into a questioning of the original constitutional assumptions of European integration. On one hand (§3), we are witnessing a shift in the locus of core decisions regarding essential aspects of state policies from the national to the supranational level. The Treaty on Stability, 


2 That is, to institutionalise a monetary policy fully withstanding the principle of price stability (whose management is to be entrusted to a fully independent central bank), although not supported by the creation of an adequate central (federal) budget (and therefore of a political fiscal-union) (J.-P. Fitoussi, Il teorema del lampione, o come mettere fine alla sofferenza sociale (Italian translation), Torino, Einaudi, 2013, 120 ff.).

3 The crisis has re-emphasised the already large economic disparities, especially within the Eurozone, mainly burdening the debtor countries and advantaging the creditors and Germany in particular (e.g. see A. Quadrio Curzio, ‘Quei vincoli di Bruxelles pagati dai giovani’, Il Sole 24 Ore of Sunday 12 January2014). Indeed, it has resulted in a massive redistribution of wealth, but in an exact reverse sense to the one accredited by the clichés of the austerity supporters, given that the flow of such transfer clearly goes from the Southern countries to the Northern ones. Hence, as effectively observed, a transfer-Union has actually operated in these years in the Eurozone: ‘though contrariwise, and the Northern countries are the main beneficiaries’ (J.-P. Fitoussi, Il teorema del lampione, o come mettere fine alla sofferenza sociale (Italian translation), Torino, Einaudi, 2013, 123).
Coordination and Governance of the Economic and Monetary Union (an unprecedented example of Ersatzunionrecht)\(^4\) has firmly placed at its core the new ‘golden rule’ of a balanced budget. On the other hand (§4), the very same process of ‘dethroning politics’\(^5\) has been entrusted to governance mechanisms – broadly defined outside the perimeter of the classic Community method and even of EU law – that hand over decisions to be taken by opaque and unaccountable technocratic élites and which, by definition, evade the traditional constraints of Community rule of law by putting it beyond the reach of an effective judicial review.

A double (and only apparently contradictory) process of de-politicisation and de-legalisation is therefore taking place within a new EU constitutional setting. The technocratic acquisition of fundamental political decisions, which in the European constitutional model was reserved to national democratic processes, especially with reference to policies affecting the Welfare State systems,\(^6\) takes place within an institutional framework that has moved away from the classic realm of the EU rule of law. The formula coined by Habermas\(^7\) of a ‘post-democratic executive federalism’ effectively depicts this dual dimension of the new European crisis-management-law. The category of ‘authoritarian managerialism’ evoked by Joerges\(^8\) is even more tranchant\(^e\) in denouncing the non-democratic traits (and the Schmittian ascendancy) of the new European economic governance. But regardless of the redolent power that these expressions or other similar ones have,\(^9\) what we want to highlight here is the emergence of a new phenomenon that we might explain as a constitutional paradigm-change underlying the new European economic governance, which goes beyond the seeming emergency requirements of the austerity policies of fiscal consolidation conducted in recent years. In this new framework, the original ‘Ordoliberal’ normative ideal of a formal constitutional order of the European economy is disregarded at

\(^{4}\) That is, an international-intergovernmental surrogate of EU law, according to the figurative expression used by the German Constitutional Court, although in a different context, in its decision of 7 September 2011 on the measures of financial assistance to Greece (2 BvR 987/10 – 2 BvR 1485/10, 2 BvR 1099/10).

\(^{5}\) As Supiot wrote evoking the famous Hayekian expression (A. Supiot, L’esprit de Philadelphie. La justice sociale face au marché total, Paris, Seuil, 2010, 33).


\(^{7}\) J. Habermas, Questa Europa è in crisi, (Italian translation), Roma-Bari Laterza, 2011.


\(^{9}\) See now W. Streeck, Tempo guadagnato. La crisi rinviiata del capitalismo democratico (Italian translation), Milano, Feltrinelli, 2013, 119 ff., speaking of technocratic neutralisation of politics and of a new fiscal-consolidation state in Europe.
the very moment in which the ineffective answers given to the economic-financial crisis through the ‘neo-monetarist medieval medicine of austerity’ contribute to undermine the very democratic legitimacy of the Union, openly questioning the constitutional embedding of the several Sozial-Staat democratic traditions on which, in the mid-fifties, the Communities were originally rooted.

The crisis of the so-called ‘European social model’ has constitutional roots in the new economic governance of the Union: a constitutional dimension which is worth exploring in more depth before attempting to set out some concluding remarks on the uncertain prospects of the Welfare State in Europe (§5).

2. ‘INTEGRATION THROUGH LAW’ AND ITS CRISIS

The term ‘Community of law’, which has been adopted over a long period by the case law of the Court of Justice, owes its success to the first president of the European Commission. In a Community based on law, it represents, at one and the same time, ‘the object and the agent’ of the integration process. Since the very beginning of this process there was, without doubt, a decisive reliance on law and on its resources, especially for the building of the common market: the founding stone of the entire Community project.

The celebrated formula of ‘integration through law’, established in the 1980s as a successful motto due to the seminal work of the most influential scholars on the European scene, has represented the most proficient and advanced attempt to rationalise the whole European project, as it synthesised (better than through any other conceptualisation) the specific balance between law, politics and economy – on which the whole integration process was built in its founding stage. The constitutionalisation of the Treaties – carried out by the Court of Justice through the inventio of a new type of autonomous legal order, distinct both from the law of the Member States and from international law – was a key concept within this paradigm.

Nevertheless, on the long path that travelled from the Community of 1957 towards an ever closer union among its people, Europe has continuously renewed what Ipsen called its Wandelverfassung. And along this path, some of the main tenets of the


'integration through law' paradigm have been progressively weakened and eroded. The actual integrity of those principles is now being challenged, as never before, by the Union’s ’existential crisis’. Upon a closer inspection, we might assume that even the original plan for a monetary union, as had been envisioned under the Maastricht Treaty, appears to be incompatible with the fundamental principles of the role of law within the European integration process, as conceived under that model.

Monetary union was not conceived as a political union; on the contrary, it was bound to a rigid system of supranational legal rules which were aimed at compensating for the void of political budgetary solidarity among the Member States. Monetary policy was thus entirely subjected to the European constitutional rules and, at the same time, almost entirely isolated from the political process. And this could fit the normative requirements of an ’Ordoliberal’ European economic constitution. However, from the outset, this construction reveals a crucial difference compared to the classic paradigm of ’integration through law’. The essential difference, with respect to the function assigned to law in the European integration process, is that, in that conceptualisation, supranational law and intergovernmental policymaking must maintain a balance. The ’dual character’ of the Community system in that model implies a necessary dynamic equilibrium between law and politics in the European integration process. Supranational law neither should, nor could, have entirely replaced the intergovernmental political process, given that, in such a theoretical framework, the overall balance of the Community system depends on the mechanisms of adaptation and mutual balancing among the two subsystems.

The monetary union conceived by the Maastricht Treaty, instead, disrupts this balance. Beneath the dominant function assigned to law in the implementation of this political project we can in fact retrace the legacy of another categorisation of the Community system, the one attributable to the German ’Ordoliberal’ tradition, much more demanding and prescriptive regarding the functions of European economic law. The EMU’s constitutional architecture was actually meant to comply with these prescriptions by giving the EMU a configuration capable of immunising it once and for all from possible Keynesian distortions in the European macro-economic management. Nevertheless, the reforms of the economic and monetary governance of the EMU, introduced as of 2010 onwards in an attempt to mitigate the effects of the financial crisis which had spread to the sovereign debts of the Member States of the Eurozone’s periphery, have come to sever the ties also within this normative tradition, when Europe’s new management-crisis-law entered the unexplored constitutional territories of ’post-democratic executive federalism’.

17 J. Habermas, Questa Europa è in crisi (Italian translation), Roma-Bari Laterza, 2011.
3. DE-POLITICISATION, LOSS OF NEUTRALITY OF THE EUROPEAN ECONOMIC CONSTITUTION AND DESOCIALISATION PROCESSES

Evidently, the European economic and monetary Union – as it was devised in Maastricht – was not able to cope with the devastating effects produced by the financial crisis: it had been founded on assumptions that did not contemplate such a systemic crisis and, more importantly, it did not have the tools to manage it.\(^{18}\) That is why, at the beginning of 2010 the reaction to the crisis had begun in an unusually rapid way with respect to the usual slow pace of the Community decision-making process, although nevertheless with a fatal delay compared to what would have been necessary to ease the tensions originating from the unruly financial markets. This was carried out with unprecedented and ever more inventive regulatory techniques that became necessary and urgent – or at least were justified as such – due to the concrete risk of the imminent tightening of the crisis with the possible breakdown of the Eurozone.

A quick chronology of events can remind us of the hectic pace eventually taken by the emergency measures adopted by the Union: ‘Europe 2020’ strategy (March 2010); European semester (May 2010); framework agreement on the establishment of a European stability fund (June 2010); Euro-Plus Pact (March 2011); Six Pack (December 2011); Two Pack (proposed by the European Commission on November 2011 and adopted with Regulations No. 472 and 473 of 2013); European Stability Mechanism (February 2012); Fiscal Compact (March 2012). The cornerstone of this complex weaving of emergency tools is the Fiscal Compact, which introduces the previously evoked clause of the public debt-brake, modelled on the German constitutional experience, compliance to which is eventually left to a sort of extra-ordinem supervision of the Court of Justice as it is designed outside its ordinary jurisdictional competence under EU law.\(^{19}\) Access to financial support given by the European Stability Mechanism (ESM) is only permitted to those Member States of the Eurozone that have signed the Fiscal Compact and have therefore transposed into national law – preferably at constitutional level – the golden rule of balanced budgets.

At the same time, in order to provide a less questionable legal basis than the one outlined by the Treaties at the time of the negotiation of these tools, the simplified revision procedure, introduced by the Lisbon Treaty, was activated, as provided for in Article 48, paragraph 6 of the TEU, with the addition of a new paragraph 3 to Article 136 of the TFEU that permits – as of 2013 – the establishment of (conditional) mechanisms of financial emergency, similar to the ones that have already been implemented. From a strictly technical-legal standpoint, these measures offer a

\(^{18}\) Cf. e.g. J.-P. Fitoussi, Il teorema del lampione, o come mettere fine alla sofferenza sociale (Italian translation), Torino, Einaudi, 2013, 120 ff.

wide range of reasons and themes for debate, and not surprisingly the debates on the limits of action guaranteed to the Union by the Treaties, especially prior to the amendment of Article 136 of the TFEU, are still ongoing, and among many legal scholars there has been a growing criticism and a questioning of the overall legality of this creative institutional infrastructure. However, the true issue here is not so much the occurrence of more or less creative interpretations of the text of the Treaties, as much as the deep constitutional change that has taken place around these reforms, so that the legal paths determined by the classic canons of the Community rule of law are, to an ever greater extent, being superseded by discretionary measures marked by contingency and conditionality that are entrusted to the discretionary governance of a distant multilateral administration. These measures revolve around some sort of new-fangled supranational functional administration, apparently fashioned on the model of independent agencies, but intended to take action in areas that fall outside the sphere of the formal competences of the Union and characterised by a wide-ranging political discretion.

However, before addressing this issue, it is necessary to focus to a greater extent on the other side of the coin of this constitutional transformation realised by the new European crisis-management-law. Considered together, these measures assault the Eurozone with binding detailed rules aimed at limiting and – more or less strictly – conditioning the sphere of macroeconomic discretion left to the Member States. As has been observed in practice, the reason why ‘the Eurozone is governed by rules is that few of its Member States – least of all its wealthier North European ones – have any appetite for fiscal union. Crudely, rules (governance) exist because common fiscal institutions (government) do not. And tighter rules do not amount to greater fiscal integration. The hallmark of fiscal integration is mutualisation – a greater pooling of budgetary resources, joint debt assistance, a common backstop to the banking system, and so on. Tighter rules are not so much a path to mutualisation, as an attempt to prevent it from happening.’

This massive juridification, resulting from the appropriation by the new European crisis-law of the (already heavily constricted) sphere of discretion of macro-economic governance by Member States in the Eurozone, occurs in the context of an attempt at the technical neutralisation of the political decisions regarding very delicate redistribution issues – now placed precisely inside the sharp-eyed mechanisms for surveillance and punishment of the economic governance of the Union – which is clearly anything but neutral in its consequences. The pervasive juridification of decisive aspects of macroeconomic governance, along with the juxtaposition of rules
and sanctions to ‘intelligent discretion’,\textsuperscript{23} which national governments were previously permitted to apply (at least partially) has resulted in a permanent loss of neutrality for the economic constitution of the EMU.\textsuperscript{24} This results in the incorporation of neomonetarist precepts into European higher law, causing highly asymmetrical impacts on the very different economies of the Eurozone’s countries. Rules of this kind, in fact, not only refute the prospects of a greater fiscal integration and of a political solidarity on occasion (and futilely) evoked in these past years, but they actually establish a regime from which the ‘virtuous’ and wealthier Northern countries, led by Germany,\textsuperscript{25} systematically benefit compared to the Southern ones, especially when – as in Italy – these bear the historical burden of high public debt.

Although in a highly asymmetrical way and depending on the starting point of the Member States of the Eurozone, the ‘constitutionalisation of austerity’\textsuperscript{26} deriving from the new European crisis-law, and particularly form the Fiscal Compact, has deep and in some cases direct, implications for national Welfare State systems. In fact, it establishes a sort of permanent constitutional pressure towards a flexible (i.e. de-regulated) labour market (both in terms of fostering the use of non-standard types of employment and reducing protection in the event of dismissal, especially with regard to economic lay-offs), a decentralised collective bargaining system (specifically encouraged by the Euro Plus Pact) and consequently a downgrading of the overall weight and role granted to public social security, and in particular state pension systems.\textsuperscript{27} Such a constitutional grounding of the most ideal-typical neo-liberal political and economic doctrines\textsuperscript{28} installs the logic of permanent competition within the system between the several national social models, creating a situation in which the Member States of the Eurozone are urged to manage their disparities and gain efficiency and competitiveness by basically utilising the only leverage remaining, which is, broadly speaking, the ‘structural reform’ of their own welfare systems.

Naturally, I am aware that this sketchy and stylised description of the new neo-liberal economic constitution of the EMU deliberately emphasises a singular

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\bibitem{24} On the matter \textit{cf.} Countouris and Freedland 2013a, p. 6, who emphasise how ‘the monetarist dogma of fiscal austerity is being institutionalised and entrenched in the European constitutional framework with provisions such as the Euro Plus Pact and the new Treaty on Stability, Coordination and Governance in the EMU’.

\bibitem{25} U. Beck, \textit{Europa tedesca. La nuova geografia del potere} (Italian translation), Rome and Bari Laterza, 2013.


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determinism that in the real world is hopelessly lacking. The reality is obviously much more complex and intricate, and the mechanisms of resilience variously activated by the several national systems – especially by the industrial relations sub-systems – show how the legislative responses given by the Member States do not follow a logic of linear and deterministic de-structuring of those widespread and deep-rooted social and labour protection arrangements that we usually encapsulate in the – increasingly less evocative – formula of the 'European social model'. However, we cannot deny the presence of very strong forces towards a de-regulative competition (in the sense of a 'race to the bottom') between systems of labour law and social security in the Member States (not only) in the Eurozone and the occurrence of a significant acceleration in what Baccaro and Howell called the convergence towards a common 'neo-liberal trajectory' of the collective bargaining systems.

4. DE-LEGALISATION OF THE ECONOMIC AND MONETARY GOVERNANCE OF THE UNION

As already mentioned, the constitutional direction given to the Union by the new European crisis-law is not even compatible with the classical precepts of German 'Ordoliberalism', fundamentally because it extends the sphere of the European economic constitution to areas that we may define as ontologically imbued with a concentrated dose of political discretion and therefore not likely to be reducible to immediately definable and legally predetermined rules of action that are capable of being 'subjected to constraints by constitutional rules based on justiciable criteria'.

In the 'Ordoliberal' constitutional ideal, those rules may (and in fact must) be confined to the sphere of the formal-rational prerequisites for the functioning of the common market (including the institutionalisation of the fundamental economic freedoms, of undistorted competition and of the principle of monetary stability entrusted to the technocratic government of an independent central bank that is isolated from political pressure), but they cannot go as far as to touch the sphere of macroeconomic

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policies that presuppose contingent and discretionary decisions. This sphere must remain a prerogative of national governments and their parliaments, as it has not been possible to remove them from democratic political debate.

For this same reason, in the original constitutional framework of the Treaties establishing the European Community, and fully consistent in this regard with the requirements of ‘Ordoliberalism’, social policy was to remain assigned to national democratic sovereignty, in particular so as to ensure the necessary respect for the private-collective autonomy of trade unions. The underlying reason for this choice of maintaining a distinct functional separation (the ‘de-coupling’ according to Scharpf)33 between the building of the common market, within the remit of the Community economic constitution, and the sphere of social policies, a prerogative of national democratic political and social processes, evidently lies in the fact that the latter belong to the realm of discretionary-politics.

None of this can be observed in the complex regulatory machine of the new European economic governance which, on the contrary, can claim to be intruding deeply into the sphere of the discretionary politics of the Member States, typifying notions that are characterised – beyond the effort of introducing ‘objective’ numerical parameters34 – by a compelling ambiguity and a great elasticity (we can just think of concepts such those of serious or excessive macroeconomic imbalance). In such a context, the role of judicial review, entrusted by EU law (Article 263 of the TFEU) to the Court of Justice, becomes so crucial in theory but unfeasible in practice. Firstly, it is not very likely that those defined as the interested parties by paragraph 2 of that provision – namely the Member States, the Council, and the Commission – might effectively question those measures in which they themselves are so deeply involved, especially in the likelihood of an economic-financial crisis such as the current one, and that the Court may, then, effectively exercise its review functions. But, perhaps, what is most important is the fact that the Court would find itself adjudicating quintessentially political issues and consequential decisions made in light of elastic and indeterminate notions which cannot be scrutinised, as such, within the parameters of a properly defined judicial review. The two very well-known disputes on the ESM so far deliberated upon before the German Constitutional Court35 and the Court of Justice36 have visibly demonstrated the essentially untreatable nature of these issues before the courts, revealing that the European economic constitution is dangerously lacking in a ‘guardian’.37

35 Bundesverfassungsgericht, decision of 12 September 2012 and ruling of 18 March 2014.
36 Court of Justice of the European Union, 27 November 2012, Case C-370/12, Thomas Pringle v. Ireland.
37 Moreover, the methodological nationalism of the German Constitutional Court prevents it from being a guardian of the European constitution and particularly a guarantor for what Rödl (F. Rödl,
On the other hand, the answers given by the Court of Justice within preliminary ruling proceedings by which some judges of the debtor states of the Eurozone have raised questions of the compatibility of the austerity measures adopted by their national governments in implementing supranational commitments with the Troika with the EU Charter of fundamental rights have to date at best been elusive. So far, the Court has rather easily and hastily managed to declare that it does not have jurisdiction to rule on such matters, thus avoiding, thanks to a decision on inadmissibility, a review on the merit of the (obviously problematic) relations between these measures of fiscal consolidation and the fundamental principles of European social law, as enshrined in the Charter of Nice/Strasbourg. We do not know the extent to which the Court will maintain this elusive strategy (depending for the most part on how the preliminary reference will be formulated); nonetheless, we are not confident that the Luxembourg judges will actually be able to consider the merits of these untreatable political issues reaffirming the constitutional logic of fundamental social rights.

On the whole, this case law demonstrates a fairly accurate picture of the new European constitutional constellation in times of crisis. The philosophy of the prohibition of bailout, along with its appeal to Member States’ autonomy and responsibility, is replaced by a new system of collective governance in situations of crisis. However, the law delegates the management of these situations to an unaccountable supranational technocratic authority, without worrying about the problems of democratic legitimacy arising from the new decision-making processes, especially those that take place within the ESM. This generates an apparent contradiction: on one hand, the new crisis-management-law over-regulates European economic governance in order to tighten the macroeconomic and fiscal conduct of the Member States within a dense texture of rules, assisted by a strong semi-automatic supranational sanctioning system. On the other hand, we are witnessing a creeping de-legalisation, in so far as the key concepts of the new governance – starting with notions like excessive deficit or serious imbalance – create the space for discretionary political evaluations made by

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The best known of these preliminary rulings is the one decided by the Court of Justice in Case C-128/12, Sindicato dos Bancários do Norte et al. For a complete listing of these cases and for a careful recognition of the limits of the Court’s case law, cf. C. Barnard, ‘The Charter in Time of Crisis: A Case Study of Dismissal’ in N. Countouris and M. Freedland (eds.), Resocialising Europe in a Time of Crisis, Cambridge, Cambridge University Press, 2013, 250 ff.
the post-democratic technocratic bodies in charge of their implementation.\(^\text{39}\) The first facet is only apparently in line with the ‘Ordoliberal’ requirements of an economic policy that is bound by legal rules. In contrast, the second is openly in contradiction with such a normative ideal-type in that it recalls the Schmittian propensity to replace law with the sheer, unrestrained governmental political-discretionary decision.\(^\text{40}\)

5. THE UNCERTAIN SCENARIOS OF THE WELFARE STATE IN EUROPE

The European crisis-law has thus deeply modified the economic constitution of the EMU. At the same time it is evident that the crisis of the European social model has itself a precise constitutional dimension in this new context. The link between these aspects is very evident: the impact caused by the measures adopted by the Member States of the Union, and especially of the Eurozone, over national systems of labour law and social security, for the implementation of policies that are more or less directly attributable to the pervasive deployment of the new economic governance of the crisis, already offers plentiful confirmation of this tight relationship.\(^\text{41}\) Nor is it a coincidence that the ambitious agenda for re-socialising Europe, suggested by the eminent group of European intellectuals gathered in London by Nicola Countouris and Mark Freedland,\(^\text{42}\) pleads for a substantial inversion of the constitutional trajectory imprinted on the Union by the new crisis-management-law.

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These proposals for re-socialising Europe contain indeed a very detailed and path-breaking programme for reforms and there is not the space in this paper to give appropriate attention to their technical-legal aspects. In line with the general and critical analysis carried out so far, we would rather like to suggest a more modest attempt to set out the possible scenarios for the Welfare State in Europe, in the light of models of economic and social constitution that are available or may be simply foreshadowed (or desirable).

The scenario that Deakin and Koukiadaki effectively define of ‘regulated austerity’ is the mere projection of the existing one, with some timid tempering of the harshness of austerity/conditionality policies constitutionalised by the ‘Stability Compact’, for example through the flanking of (moderate) policies for growth and employment, a bit more effective than those foreshadowed by the anaemic ‘Growth Compact’. This scenario would essentially confirm the current trends towards deregulative competition and internal devaluation through a (further) flexibilisation of labour markets and the reduction of wage levels by means of the marginalisation of the role of (especially national) collective bargaining. In this kind of scenario, any encouragement of practices of social dialogue, even at European level, would constitute hardly more than a ‘travesty of the real thing’, as its value would essentially be functional to the strengthening of the strategies of ‘competitive solidarity’ among national systems.

Not even the scenario of a ‘two-speed Europe’ as defined by the same authors – with a division of the Eurozone in a core group of virtuous Northern European countries led by Germany and a Southern periphery of weak economies, which are intended to go along the downside routes of competitiveness, based on the systematic compression of labour costs – evidently gives rise to optimistic outlooks on the possible dynamics of the Welfare State in the new European constitutional framework. A very different

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scenario is the one that Deakin and Koukiadaki term as ‘solidaristic integration’, to which the two authors attribute (along with their explicit normative preference) a degree of probability that is more or less equivalent to the one defined as ‘regulated austerity’. Therefore, attention must be drawn to this scenario, in order to outline a possible strategy of the re-constitutionalisation of social Europe that follows a path that is the opposite of the (de-legalised and de-socialised) one enshrined in the new economic governance of the EMU.

Deakin and Koukiadaki suggest three convergent routes for such a re-socialisation, based respectively: a) on the expansion of the European central-budget in order to perform tasks of fiscal transfer re-directed in favour of peripheral countries and actually adjusted to meet their needs (thus accessible beyond the suffocating conditionality requirements contemplated today by the ESM); b) on replacing the regime competition among national labour law systems with new social harmonisation policies (or rather, more likely, with the fixing a minimum floor of social and labour standards); c) on the rethinking of the role of the ECB, with the assignment of a broader mandate that explicitly takes into account (and therefore systematically balances) price stability, employment growth and social cohesion.

‘Vaste programme’, one might say, in relation to which it is hard to foresee who might be the social and political actors (the ‘material forces’, to use an old-fashioned expression) that can operate with realistic prospects of (even just partial) success. However, the merit of this proposal is to clearly put into evidence how an effective prospect of the Union’s re-socialisation implies, on one hand, a greater political investment in the new ‘European social question’, and on the other, a constitutional reform of the Union. We could say it implies a re-politicisation and a re-constitutionalisation of the social question on a European and transnational scale at the same time.

Defensive responses at the national level – basically a return to the original division of labour between the Union and the Member States that returns national welfare policies to the narrow boundaries of national social sovereignty – appear simply illusory. Certainly, this does not mean that there is no need to restore a greater margin of autonomy into the hands of the Member States for the determination of their social and labour policies. However, in order to do so, it is necessary to re-construct a

50 A less ambitious perspective was outlined in C. Joerges and S. Giubboni, ‘Diritto e politica nella crisi europea’, Rivista critica del diritto privato 2013, 343 ff.
European social policy, both by establishing minimum protection standards, which would channel regulatory competition among the national legal systems above a common floor of rights, and also by strengthening transnational social solidarity ties, for example through auxiliary legislation aimed at fostering and coordinating autonomous collective bargaining processes at European level.\(^{53}\) Time will show how much of this scenario is wishful thinking, or if it has even a minimal possibility of being pursued in a future European political agenda.

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‘PROTECTION OR PROTECTIONISM?’
A LEGAL DECONSTRUCTION OF THE EMERGING FALSE DILEMMA IN EUROPEAN INTEGRATION

NICOLA COUNTOURIS and SAMUEL ENGBLOM

Abstract
This article engages critically with an emergent rhetoric suggesting that Member States and trade unions seeking to apply their domestic social standards to foreign service providers, in the context of what EU lawyers refer to as ‘Free movement of Services’, engage in practices amounting to economic protectionism. To counter this rhetoric, the paper revisits some of the regulatory principles and rationales underpinning the law on ‘Free Movement of Workers’ and draws a number of parallels between them and the principles that regulate, or ought to regulate, other freedoms that de facto involve the free circulation of working persons in Europe, albeit under the guise of ‘Free movement of Services’ or ‘Freedom of Establishment’. It asserts that all market freedoms affecting the free movement rights of working persons in Europe, ought to be regulated by reference to what the paper describes as the ‘Equal treatment Principle’, and should distance themselves from any ‘Country of Origin’ rationale.

Keywords: Equal Treatment Principle; EU law; free movement of services; free movement of workers; Posted Workers Directive; protectionism; social dumping

1. INTRODUCTION

This article engages critically with an emergent rhetoric suggesting that Member States and trade unions seeking to apply their domestic social standards to foreign service providers, in the context of what EU lawyers know as ‘Free movement of services’.

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Services’ (FMS), partake in practices amounting to economic protectionism. We are referring to statements and arguments developed both in business circles and in legal ones claiming that ‘trade unions and non-governmental organisations are operating in order to prevent flow of goods and services from countries of origin where work conditions are worse than in destination countries’, or that ‘The Viking Line and Laval case as well as former case law on the posting of workers show that social policy goals can be used as a pretext for protectionism’. This article argues that presenting the complex processes stemming from the cross-border provision of services in Europe simply in terms of a ‘protection vs. protectionism’ dilemma may be overly simplistic and even misleading. This (false, in our view) dilemma acts as a distraction and obscures some peculiar dimensions of FMS, which, if adequately explored, ought to suggest a reconceptualisation of the rules shaping some areas of FMS and their progressive alignment to the EU principles applying in the context of ‘Free movement of Workers’ (FMW). Under EU FMW law, ‘A migrant worker is subject to the laws and collective agreements of the host Member State when exercising his profession [and] must enjoy equal treatment as regards remuneration, stability of employment, prospects of promotion, and dismissal’, a fact that is widely accepted and has never given rise to any protectionist claims. We believe, and the article will argue, that some services that are particularly labour intensive (such as those typically associated with the construction, caring, or security services sectors), or particularly personal, in that they are provided personally or mainly personally by sole-entrepreneurs, or self-employed persons without employees, ought to be regulated on the basis of the rules and rationales applying to the free movement of workers, and in particular by reference to what the article refers to as the ‘Equal Treatment Principle’ (ETP).

In order to advance this claim, the article revisits, and at times engages critically with, two fairly consolidated orthodoxies in EU free movement law, which, in our view, have underpinned and reinforced the status quo with which this article engages critically and normatively. The first orthodoxy, or dominant view, is that only one of the fundamental free movement rights protected by the Treaties, that is to say free movement of workers, deals with the rights of EU citizens to move to another EU Member State (EU MS) for work related purposes. To quote a recent EU Commission document, ‘Freedom of movement for workers is one of the four fundamental freedoms of the internal market’ (2010) COM (2010) 373 final, at 12 (emphasis added, footnotes omitted).


3 European Commission, ‘Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Reaffirming the free movement of workers: rights and major developments’ COM (2010) 373 final, at 12 (emphasis added, footnotes omitted).
on which the Single Market is based. ... Article 45 TFEU enshrines the right of EU citizens to move to another Member State for work purposes. Free movement of workers is, no doubt, one of, and even the main, Treaty freedom regulating the rights of EU citizens to pursue work related activities in other MS, but there is a tendency to overstate its role and forget that ‘freedom of establishment’ (FES) and ‘freedom to provide services’ (FMS) are also important vehicles to that effect.5

The second dominant view that we seek to engage with is that the law regulating the main EU free movement rights, that is to say the law interpreting the TFEU provisions dealing with free movement of workers (FMW, under Article 45), the right of establishment (FES, Article 49), and free movement of services (FMS, Article 56), is inexorably converging towards a ‘market access’ (MA) test where all freedoms are interpreted in a parallel, if not identical, way.6 There is no denying that the interpretation of the EU fundamental market freedoms has been converging towards ‘market access’.7 But we fear that by emphasising the common threads of this convergence process, EU law is beginning to overlook some minute – but very important – differences in the way in which the relationship between Host MSs and Home MSs regulatory standards is squared across the four freedoms, and in particular the residual but extremely critical role of the Equal Treatment Principle (ETP) in the free movement of workers context in particular.

This contribution seeks to elaborate on the three interlinked issues introduced above – the false ‘protectionism vs. protection’ dilemma, ‘free movement of workers’ as the seemingly exclusive vehicle for EU citizens to move to other MSs for work purposes, and the hegemonic role of ‘market access’ – through four separate but interlinked steps, appearing below in the four following sections. Section 2 below, briefly explores ‘free movement of workers’ and the continuing relevance of the ETP in this area of EU law, in spite of the presence of the ‘market access’ principle. This is then followed, in Section 3, by an analysis of the law on the FES of natural persons (FES/NP), where we discuss the extent to which some of the ETP elements explored in the previous parts have been increasingly overshadowed by a strong ‘market access’ principle that tends to prioritise the rules of the country of origin of the service provider.

5 The draft instrument in COM(2013) 236 final (above) explicitly states that FMW ‘needs to be distinguished from the freedom to provide services’, which includes the right of undertakings to provide services in another Member State, for which they may send (‘post’) their own workers to another Member State temporarily to carry out the work necessary to provide these services there’, ibid. p. 16 (emphasis added). Our view is that this distinction is, to put it mildly, overstated.
provider over the rules of the Host Member state. Section 4 carries out a similar analysis in respect of ‘free movement of services’, particularly by reference to the case law on the posting of workers under Directive 96/71, and concludes that the ETP is completely marginalised in this area of EU law, which is almost entirely dominated by a ‘Country of Origin Principle’ (COP) that was, in our view, never intended to have such a hegemonic role. Section 5 brings the many threads of the article together in order to reassess the ‘protection vs. protectionist’ dilemma in light of the normative suggestion advanced in the article, that is to say, that if one is willing to embrace some of the less obvious similarities existing between some areas of ‘free movement of services’ and ‘freedom of establishment of natural persons’ and ‘free movement of workers’, the dilemma, and the rhetoric underpinning it, quickly dissolves.

2. FREE MOVEMENT OF WORKERS AND THE ETP

As noted above there is an area of EU free movement law that, in our view and in the view of many, is fundamentally shaped by the ETP, namely the area of ‘free movement of workers’ (FMW). By ‘fundamentally’ we mean that ETP is the foundational principle underpinning the freedom of EU workers to ‘access’ and ‘participate’ in the labour markets of EU MSs other than their own. Not only is the ETP the dominant regulatory principle of ‘free movement of persons’ but, we will go on to suggest, it is considered as the normative cornerstone of this area of EU law, enjoying a degree of cogency that few other EU legal principles have. This degree of cogency has only increased since the emergence of the notion of European citizenship in the ‘free movement of workers/persons’ context, a notion that is in many ways founded on the ETP. We believe that at a normative level ETP plays, or ought to play, an equally central role as far as freedom of establishment of (natural) persons (FES/NP) is concerned. Admittedly in both areas of law, and perhaps more visibly in FES/NP, the application of the ETP has recently become more nuanced and partly concealed by the growing hegemonic role of the ‘market access’ principle. But, while this shift does pose some challenging questions to our argument, we would maintain that, in spite of this move, the ETP has anything but disappeared. In this section we start by outlining briefly the relevance, role, and rationales of the ETP, its

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9 And which can be sometimes referred to as the principle of ‘portability of home state legislation’, e.g. by V. Hatzopoulos, Regulating Services in the European Union (OUP, 2012), p. 225.
10 Hatzopoulos makes a very strong case for ETP playing an important role in freedom of establishment in general, see his perceptive comment in V. Hatzopoulos, ‘Forms of mutual recognition in the field of services’, in in I. Lianos and O. Odudu (eds.), Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration (CUP, 2012), at 89.
11 Since Case C-55/94 Gebhard the ECJ has indeed started engaging more systematically with the ‘market access’ principle in this area of FMP, by suggesting that even non-discriminatory measures may hinder market access, and thus fall short of EU law requirements.
relationship with the MA and COP concepts, and argue in favour of its suitability as the key regulatory principle in the ‘free movement of workers’ context.

In the ‘free movement of workers’ context, the ETP receives a broad recognition as a fundamental principle from primary and secondary sources alike. It is strongly anchored to the ‘non-discrimination’ principle contained in Treaty provisions and ‘entail[s] the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment’,12 with the ECJ clarifying that it ‘prohibits not only overt discrimination … but all covert forms of discrimination which … in fact achieve the same result’.13 This has long been reflected in EU secondary legislation, with old Reg. 1612/68 providing that EU workers ‘may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration’.14 So, to begin with, the ETP imposes a strong ‘non-discrimination’ requirement on EU Member States but – and this is a crucial contention in our argument – and one which we further develop below in subsection 2.b – also goes beyond a de minimis notion of non-discrimination by requiring a Host MS to apply to EU migrant workers its domestic rules exclusively and exhaustively, that is to say while effectively disregarding any labour standards of the workers’ country of origin.

The development of the EU citizenship concept, and the adoption of the Citizenship Directive, have arguably reinforced the ETP in the ‘free movement of workers’ context by strengthening its ‘non-discrimination’ dimension and, we will contend in the next section, ought to have expanded it to the broader area of free movement of persons, including to ‘self-employed persons’, since most Free Movement rights included in the Directive apply equally to workers or self-employed persons.15 The ECJ famously posited in Martinez Sala that ‘the Treaty attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right … not to suffer discrimination on grounds of nationality’.16 Unsurprisingly, Part Two of the TFEU refers to ‘Non-discrimination and Citizenship of the Union’, making an ‘express linkage between the prohibition on nationality discrimination, action to combat other forms of discrimination, and the primary rights of EU citizenship’.17

We should note that EU law is not the only legal system which includes a principle of equal treatment for migrant workers. For instance, both ILO Conventions dealing with migrant workers expressly contain provisions regarding equal treatment. Article 6 of

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12 Article 45(2) TFEU.
14 See, in particular, Article 7 of old Reg. 1612/68, now effectively reproduced by A 7 of Reg. 492/2011 (our emphasis).
15 E.g. Article 7 of the Directive.
16 Case C-85/96, Martinez Sala, para. [62].
Convention No. 97 stipulates that members for which the Convention is in force undertake to apply to immigrants lawfully within their territories treatment no less favourable than that which is applies to their own nationals in respect of e.g. remuneration, hours of work, paid holidays, memberships of trade unions and enjoyments of the benefits of collective bargaining. Part II of Convention No. 143 goes further, requiring not only the repeal of statutory provisions or administrative practices that are discriminatory, but the positive action by the public authorities to promote equality of opportunity and treatment in practice. As we will discuss further in the conclusion of this article, under Article 19(4) of the Council of Europe’s European Social Charter (Revised) the parties undertake to secure for ‘workers lawfully within their territories’ treatment ‘not less favourable than that of their own nationals’ in respect of e.g. remuneration and other employment and working conditions, membership of trade unions and the enjoyment of the benefits of collective bargaining. An important difference between these provisions and Article 19 TFEU is, of course, that the latter only applies to EU citizens, excluding third-country nationals. Finally, and going back to the EU legal order, it is worth recalling the private international law approach endorsed by Articles 8 and 9 of the Rome I Regulations (RIR) in the case of ‘individual employment contracts’. While Article 8 embraces, in the first instance, a ‘choice of law’ approach and, failing that, a COP approach, Article 9 provides that, ‘irrespective of the law otherwise applicable to the contract’, any ‘overriding mandatory provision’ will have to be applied. As noted by Merrett, ‘This provision is particularly important in employment cases because the statutory employment rights granted to employees are “mandatory rules”.’ Barnard rightly notes that both the RIR and its predecessor the Rome Convention 1980, ‘appears to endorse this position in respect of migrant workers and possibly in respect of posted workers’, though – as will be discussed below – ‘the Posted Workers Directive […] casts serious doubt on the territorial application of national labour law to posted workers’, and in her work aptly contrasts the ‘labour law perspective’ traditionally adopted under the Rome Convention, with the ‘single market’ approach currently endorsed by the CJEU.

2.1. THE RATIONALE OF THE ‘EQUAL TREATMENT PRINCIPLE’ IN THE ‘FREE MOVEMENT OF WORKERS’ CONTEXT

There are a number of justifications explaining the dominant role of the ‘equal treatment principle’ (ETP) in the ‘free movement of workers’ (FMW) context. Some of them are economic or political while some others are more principled in nature. To begin with,
the ETP has been both an economic and political precondition for the introduction and functioning of FMW, and the common market at large. To borrow the words used in the 1956 Spaak Report the ETP was one of the ‘conditions économiques générales qui permettront ouvrir largement les portes aux travailleurs’ in that

‘if on the one hand, every discrimination between national workers and immigrant workers is effectively prohibited, and if, on the other, either by the law of the State, or through the action of trade unions, any kind of fall of wages is in principle excluded, the employers will have no incentive to request more migrant labour force than what is actually needed to fill the available vacancies. In this way, any pressure on the level of wages is avoided and the labour market tends to adjust by itself’.22

Thus the ETP was, right from the beginning of the process of European integration, a precondition for the process itself, in that it made sure that the functioning of the host MS’s labour market would not suffer any significant distortion as a consequence of an increase in the supply of migrant labour. Of course, as the quotation above reminds us, the precondition to the precondition was that the law of the State and trade union action had to uphold the ETP.23 At the same time, the ETP serves to support the mandatory nature of host MS labour law. So, to sum up, strong labour market institutions and the ETP were almost seen as an economic and political precondition to the free movement of workers.

The ETP also has a strong dignitarian justification, further corroborated by the recognition of the concept of equality as a general principle of EU law, and of the concept of non-discrimination as the main building block of EU Citizenship. We are all familiar with the assertion by the Court that ‘the economic aim pursued by Article [157] of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right’.24 This line of reasoning applies not just to the sphere of sex equality, but to the ETP in general, and the ETP in the free movement of workers context in particular. As noted by McCrudden and Prechal,

‘While equality and non-discrimination, in particular non-discrimination on grounds of nationality, began as a means of securing market integration, by now it has also become a

22 Our translation of the original Rapport Des Chefs De Délégation Aux Ministres Des Affaires Etrangères Brussels, 21 April 1956, at page 89. The quote refers to equal treatment in the context of salaries, but we suggest that it can equally apply to labour costs at large.

23 Unsurprisingly, Article 7(4) of Reg. 1612/68 provided that ‘Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States’.

24 Joined Cases C-270/97 and C-271/97 Deutsche Post AG para [57].
method to deliver social policies. Relatively early in the case law of the ECJ, in particular in cases involving individuals, the nexus between economic integration and non-discrimination has been weakened in the sense that social considerations have also been taken on board.\footnote{C. McCrudden and S. Prechal, The Concepts of Equality and Non-Discrimination in Europe (EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY, 2009) page 6.}

To put it simply, just as it is offensive to a woman’s dignity to receive a lower salary than a man for doing ‘work of equal value’ so is offensive to a migrant worker’s dignity to receive a lower wage than a domestic worker for doing the same job.

2.2. ‘FREE MOVEMENT OF WORKERS’ AND THE RISE OF ‘MARKET ACCESS’

It has long been argued that ‘free movement of workers’ (FMW) has been subject to the increasingly hegemonic influence of the emerging ‘market access’ (MA) approach whereby even non-discriminatory measures that ‘directly affect … access to the employment market in other Member States’\footnote{Case C-415/93, Bosman, para 103.} or are ‘liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty’,\footnote{Case C-55/94 [1995] ECR I 4165, Gebhard, para 37.} will be seen as contravening the Treaty, unless otherwise justified. Barnard has rightly pointed out that this shift ‘may well be deregulatory if a national rule is found to obstruct trade’.\footnote{C. Barnard, The Substantive law of the EU (OUP 2010) 263.} In our attempt to address this point we will develop a number of arguments that seek to advance the descriptive claim that, in the ‘free movement of workers’ field at least, the ‘market access’ principle does not necessarily posit a radical departure from the ETP, as admittedly it appears to have done in other contexts, and in particular in the ‘free movement of services’ context.\footnote{Case C-255/04, Commission of the European Communities v French Republic [2006] ECR I-05251, is arguably one of the best examples of this trend as applicable to self-employed professionals offering temporary services in a Host MS, though more examples are discussed below.} In the following Section 3, we will also suggest that much of what we advance in respect of ‘free movement of workers’ also applies to the freedom of establishment of natural persons, although admittedly in this area of free movement the Court of Justice’s jurisprudence has sought to dismantle some host-state non-discriminatory measures much more vigorously, thus pulling ‘freedom of establishment of (natural) persons’ more forcefully towards a ‘country of origin principle’ (COP) approach.

First and foremost, the introduction of the MA test in the ‘free movement of workers’ (FMW) field has not, in our view, displaced the ‘equal treatment principle’ (ETP). If a discriminatory measure were to be in place in the Host Member State it would equally engage the ETP and the MA test, in fact it would engage the latter a
fortiori (since a discriminatory measure would a fortiori cause a hindrance to MA). The ‘access test’ lowers the threshold where a domestic measure is likely to be caught by EU law, but certainly does not remove the ETP from the FMW regulatory equation. So at a basic level, ‘market access’ is not incompatible with the ETP, but actually builds on it. Secondly, we feel we can confute the suggestion that the MA test is inherently linked to the nemesis of the ETP, the ‘country of origin principle’. This is not just because ultimately, non-discriminatory measures hindering market access are always susceptible to a relatively broad range of justification,30 nor is it because of the more cautious approach adopted by the Court in Graf.31 But, most importantly, because even in the presence of COP, a national measure of the home Member State could end up hindering ‘market access’, as the Bosman32 and Olympique33 cases themselves amply demonstrate.

At a deeper level however, the emergence of a ‘market access’ test may be seen as challenging our argument in a different way. It could be argued that ‘market access’ also engages national labour standards of the Host MS that, while non-discriminatory in law or practice, act as a barrier to the entry of foreign workers by restricting their freedom to sell their labour through contracts or relationships contemplating terms and conditions of employment that, while in line with their ‘country of origin’ standards, fall below the ones prevailing in the Host MS. Here, the ETP is implicitly approached as a minimalistic non-discrimination obligation for the employer/Host MS, and one that the worker ought to be able to opt out from under EU law for the sake of market access. This is a hypothetical scenario so far unaddressed by the Court of Justice, but, ex hypothesis this could be applied to the situation of, say, a Greek university lecturer who is so keen to find a better source of income that she may be willing to move to, say, Stockholm, and work as an employee of the University of Stockholm for less than the level of pay set for equally qualified and senior Swedish academic lecturers by the relevant Swedish collective agreement.34 The one million Krona question under the MA test is, should the collective agreement be set aside for her sake (and the sake of ‘market access’)? Or should the ‘equal treatment principle’ prevail in the sense that the terms of the collective agreement ought to be applied to

30 See the more recent Case C-325/08, Olympique Lyonnais SASP v Bernard [2010] ECR I-2177, paragraphs 38–50 of the judgment.
31 Case C-190/98, Graf v Filzmoser Maschinenbau GmbH [2000] ECR I-493. See the insistence on the measure causing an ‘actual’ rather than a hypothetical or ‘uncertain and indirect’ possibility of hindering market access, at paragraphs 22–25.
32 The transfer fee rule being imposed by the Belgian FA and Mr Bosman being a Belgian national playing for a Belgian team and seeking to transfer to a French team.
33 The ‘compensation’ rule being a French rule imposed against a French player seeking to exit his Home MS to sign a contract with a UK football team.
34 It should be noted at this point that Swedish law allows trade unions and employers to enter into collective agreements (and the use collective action on either side to persuade the other to sign such agreements) and that employers are typically obliged to apply the collective agreement to all employees.
her (even enforced against her) as to any comparable Swedish worker? Despite recent case law in the area of services, it is highly implausible that the CJEU would consider the scenario described here, or, say, the high minimum wage in one country or lower weekly working times, as an unjustifiable barrier to ‘free movement of workers’ (and indeed as a barrier to ‘free movement of workers’ **tout court**). The answer to the question would probably not be affected by the duration of the Greek academic stay in Sweden either. Even a worker providing her labour for just a few weeks, say, under a short fixed-term contract, would be captured by the ETP. We should reiterate that although we are advancing this analysis of EU law as the descriptively correct one, it must be pointed out that, given the absence of any precedent elaborating on this set of issue, we are talking both **de jure condito** (in that we do not think that *Bosman* would require setting aside the collective agreement in question) and, to a certain extent, **de jure condendo**, in that the Court had yet to adjudicate on a reference where the worker posited that the Host State’s higher labour standards operated as a restriction to her ‘free movement of workers’ rights.

We should note that, in the realities of labour markets, the link between being allowed to work for wages and in working conditions below those commonly applied in the Host MS and market access is not as direct as one could think in abstract. Individuals are often willing to adapt and to sacrifice pay or seniority for the purposes of, say, working closer to home, or moving to a different, new workplace that offers better career prospects in the longer run, or more job satisfaction. These strategies are also used by foreign workers who wish to penetrate the labour markets, e.g. through applying for less senior positions. This is fully compatible with the ‘equal treatment principle’ and has little to do with the ‘market access’ test. The employer – once the decision about the appointment is made – is not able to treat the foreign worker less favourably than the domestic one, precisely by reference to the standards on domestic labour sources, be they statutory or collective.

3. **FREEDOM OF ESTABLISHMENT OF NATURAL PERSONS, THE ‘EQUAL TREATMENT PRINCIPLE’ AND ‘MARKET ACCESS’.**

While, in our view, ‘free movement of workers’ (FMW) remains fairly stably anchored in the ‘equal treatment principle’ (ETP), the situation regarding the freedom of establishment of natural persons (FES/NP), is admittedly more complex. We try to assess the extent to which FES/NP remains influenced by the ETP but our analysis of the case law concedes that this area of EU Free Movement law is increasingly drifting away from the ETP and has been attracted quite visibly within the sphere of influence of the ‘country of origin principle’ (COP), in a way that – in our view – is at odds with what we see are the original rationale and role of the ETP in the ‘freedom of establishment of (natural) persons’ context.
3.1. THE RATIONALE OF THE 'EQUAL TREATMENT PRINCIPLE' IN THE 'FREEDOM OF ESTABLISHMENT OF (NATURAL) PERSONS' CONTEXT

In arguing this point, we need to begin by acknowledging that in the early years of European integration, the treatment of the self-employed (in the context of freedom of establishment) may not have been perfectly aligned to that applicable to workers under the ‘free movement of workers’ law. In fact, the Spaak Report sought to ‘distinguish free movement of workers from the free movement of persons exercising independent professions’, which appeared to its authors as more ‘closely linked to [the provisions] of services’,35 but for the fact that, presumably, the latter are by their nature temporary in character. This close link is partly still reflected in the way the Treaty – in Article 62 TFEU – applies the exceptions to freedom of establishment to the freedom of services context.

But it seems to us that, in other crucial aspects, the regulation of freedom of establishment of persons exercising independent professions has been decoupled from that of services and has been more closely, albeit not fully, aligned to that of ‘free movement of workers’ and to the ‘equal treatment principle’. The Court, in cases like Konstantinidis, has clarified that national rules applying to the exercise and provision of self-employed activities would be caught by EU law when they place a foreign self-employed worker ‘at a disadvantage in law or in fact, in comparison with the way in which a national of that Member state would be treated in the same circumstances’.36 Perhaps most importantly, with the adoption of the Citizenship Directive in 2004, it is now undisputable that free movement rights apply equally to ‘workers or self-employed persons’37 and this aspect of the ETP actually applies to ‘all Union citizens residing on the basis of this Directive in the territory of the host Member State’. Arguably, over the years we have seen a growing – and fully justifiable – conceptual (and regulatory) separation between the sources regulating the freedom of establishment of natural persons, and the self-employed in particular, and that of legal persons, with the former category being progressively approximated to the ‘free movement of workers’ regulatory scheme, at least in EU secondary legislation such as Directive 2004/38, and to a certain extent in provisions such as Article 15(2) of the Charter of Fundamental Rights of the EU (which crucially also refers to ‘citizens [that] provide services’). A number of EC/EU secondary instruments introduced to regulate particular categories of ‘freedom of establishment of (natural) persons’ beneficiaries, have also sought to align more markedly their treatment to that of workers by reference to the application of Host Member State rules, and to the exclusions of the ‘country of origin principle’. For instance, as noted by Wyatt, ‘national rules requiring registration with an appropriate

37 E.g. Article 7 of the Directive.
trade or professional body are presumptively not applicable to those providing services, but applicable to those established in the Member State in question.38

We feel that this separation of ‘freedom of establishment of (natural) persons’ from ‘free movement of services’ in general is a welcome development, in that it recognises that the personal provision of a certain service, especially when that provision is of a stable and continuous nature, ought to be regulated along the lines of ‘free movement of workers’ and its underlying rationales. On the other hand, while the legislative institutions of the EU have, in our view, sought to approximate the free movement rights of self-employed professionals to the ones of dependent workers, the CJEU’s jurisprudence has instigated an opposite jurisprudential dynamic whereby the regulation of ‘freedom of establishment of (natural) persons’ is increasingly, though in our view not systematically or coherently, aligned to the ‘country of origin principle’, a point that we will further elaborate on below in subsection b.

3.2. FREEDOM OF ESTABLISHMENT OF (NATURAL) PERSONS AND THE RISE OF MA

This subsection seeks to elaborate further on the precise location of freedom of establishment of (natural) persons on the ETP-COP spectrum, mostly by reference to the Court’s analysis of the impact that non-discriminatory Host MS’s professional standards on the establishment of persons exercising independent professions. In a way we are trying to find an answer to the equivalent ‘freedom of establishment of (natural) persons’ hypothetical scenario discussed in the last paragraph of the previous section 2, in the context of free movement of workers (the Greek university lecturer moving to Sweden scenario). We ought to note that, in a number of MSs, self-employed professionals are generally allowed to compete on price in the provision of their services, and minimum wage legislation does not normally apply to them. However, many Member States still regulate, to various extents, the activities of self-employed workers, particularly in such matters as occupational health and safety,39 but also, as the recent Konstantinides40 dispute reminds us, in respect of the charges that they are allowed to apply to customers or clients.

For the purpose of our present enquiry, this hypothetical scenario or question could be structured in the following terms. Could a German professional seeking

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to establish herself (as opposed to offer temporary services under a ‘free movement of services’ arrangement) in MS X argue that the (non-discriminatory) professional tariffs or fees introduced by the relevant national professional body of the Host MS hinder her access to the market, and that she should be free to either ‘undersell’ or ‘overprice’ her personal work or services for the sake of market penetration/access? We will see that the answer to this question differs, in our view somewhat unexplainably, from the one provided in the ‘free movement of workers’ context.

We should begin by noting that the question of the compatibility with EU law of professional fees and tariffs set by national professional bodies is not really a hypothetical question, although it seems to us that the question has mostly arisen, and has thus been mostly addressed by the CJEU, in a ‘free movement of services’ context (i.e. when a professional was established in its country of origin and sought to provide temporary services in the Host MS) rather than in a ‘freedom of establishment of (natural) persons’ (FES/NP) context. A suitable starting point for our enquiry ought to be the Court’s judgment in Cipolla,41 which is in fact a case decided in a ‘free movement of services’ context rather than in a FES/NP one. The dispute in question arose due to the expectation by a number of Italian lawyers to be paid by their (Italian) clients the minimum fees set by the Consiglio Nazionale Forense tariffs, the Italian equivalent of the Law Society of England and Wales. This dispute led to a reference to the ECJ seeking to ascertain whether ‘the principle of free movement of services … also appl[ied] to the provision of legal services [and] if so, [whether] that principle [was] compatible with the absolute prohibition of derogation from lawyers’ fees’,42 or, rather, had ‘the consequence of hindering other lawyers’ access to the Italian services market’.43 The Court had no doubts that ‘the prohibition of derogation … from the minimum fees set by a scale such as that laid down by the Italian legislation [was] liable to render access to the Italian legal services market more difficult for lawyers established in [another MS] … [and] therefore amount[ed] to a restriction within the meaning of’ what is now Article 56 TFEU (then Article 49 TEC), the key ‘free movement of services’ Treaty provision,44 unless, of course, the Host MS could justify that restriction as an ‘overriding requirement relating to the public interest’.45

This was an important precedent in respect of the application of the market access test to the free provision of services by self-employed professionals although, we would

42 Ibid., paragraph 15.
43 Ibid., paragraph 14.
44 Paragraph 58 of the judgment. It is worth mentioning that the Opinion of AG Maduro in this case made a lot of the convergence of the four freedoms in respect of the ‘market access test’, also by reference to the case of Caixa bank v France, which is a FES case, however one where the establishment of a company rather than that of a self-employed natural person, was at stake (see para. 64 of his opinion).
45 See paragraphs 64–69 of the judgment.
maintain, a non-conclusive one in respect of the field of ‘freedom of establishment of (natural) persons’. In fact, we would argue that the rationale advanced by the ECJ to justify the restriction of ‘free movement of services’ (FMS) by a minimum fee regime could hardly apply to a situation where ‘foreign’ legal service providers are permanently established in the Host MS, in that the newly established foreign provider would be on a par with a newly established national provider, say, a young solicitor trying to make himself known in the local national market.

However, in contrast with Cipolla, the more recent case of C-565/08, Commission v Italy (‘lawyers maximum fees tariffs’) engaged with the issue of fees set by national legal professional bodies in respect of both ‘free movement of services’ and ‘freedom of establishment of (natural) persons’, with the Commission explicitly arguing that Italy had ‘adopted, in breach of Articles 43 EC and 49 EC, provisions requiring lawyers to comply with maximum tariffs for the calculation of their fees’. In this case, the Court ultimately ruled that the maximum fee tariffs were actually compatible with both ‘freedom of establishment’ and ‘free movement of services’, but it is important to follow the Court’s reasoning to appreciate what kind of principles are guiding its action.

In paragraphs 45–51 of the judgment, the Court relied on a number of its precedents in the areas of FMS and FES of legal persons (FES/LP), including Cipolla, to suggest that while ‘measures taken by a Member State which, although applicable without distinction, [could] affect access to the market for economic operators from other Member States’, it was also important to bear in mind that rules of a Member State do not constitute a restriction within the meaning of the EC Treaty solely by virtue of the fact that other Member States apply less strict, or more commercially favourable, rules to providers of similar services established in their territory, and that therefore the Commission’s argument that [maximum tariffs] constitute a restriction within the meaning of the abovementioned articles in that they are liable to subject lawyers established in Member States other than the Italian Republic, who provide services in Italy, to additional costs resulting from the

46 ‘that [the] prohibition deprives lawyers established in a Member State other than the Italian Republic of the possibility, by requesting fees lower than those set by the scale, of competing more effectively with lawyers established on a stable basis in the Member State concerned and who therefore have greater opportunities for winning clients than lawyers established abroad’. Paragraph 59 of Cipolla (emphasis added).
48 Ibid., paragraph [23].
49 Ibid., paragraph 46.
50 Ibid., paragraph 49 (emphasis added).
application of the Italian system of fees, as well as to a reduction in profit margins and therefore a loss of competitiveness\(^{51}\)

had no automatic purchase, and could only apply if those rules were demonstrable, such as to deprive foreign service providers from accessing the market under conditions of 'effective competition',\(^{52}\) which could not be suggested in that particular case as the Italian fees were sufficiently flexible to allow adequate remuneration for the various types of services provided by lawyers.

So to summarise this part of our analysis, the Court established in *Cipolla* that minimum fees for legal services set by a competent national body result in a restriction of free movement of services (FMS), and that – unless that restriction can be justified – foreign legal service providers ought to be allowed to charge lower fees for the sake of market penetration. The analysis in the 'maximum fees tariffs' case, however, clarified that while the *Cipolla* reasoning applied beyond the FMS context to the FES (presumably 'freedom of establishment of (natural) persons' and 'freedom of establishment of (legal) persons') context, maximum tariffs that did not impede effective competition, but simply produce 'a reduction in profit margins'\(^{53}\) for foreign service providers, do not necessarily conflict with EU law.

On the basis of our analysis we can provisionally and tentatively conclude that our answer to the hypothetical question explored in this section of the article could be partly different from the one offered to the hypothetical question explored in the previous section. While the 'academic-employee' discussed above (in section 2(b)) would not be permitted to undercut wages collectively (or statutorily, for that matter) agreed within the Host MS for the sake of market penetration, it cannot be ruled out that the CJEU may permit such an undercutting dynamic in the FES context, under the reasoning adopted in *Cipolla*. The latter judgment is, of course, a FMS cases, but the Court – regretfully, in our view – appears to have conflated the reasoning applying to FMS and FES cases in this domain, even though the 'lawyers maximum fee tariffs' case could be read as suggesting that when it does so it is a bit more attentive in assessing whether the domestic rule in the Host MS is sufficiently flexible,\(^{54}\) and is such as to 'adversely affects access to the [Host MS] market for the services in question under conditions of normal and effective competition'.\(^{55}\) In this respect, and as far as personal service providers are concerned, it is also worth mentioning a less well known case, *Commission v France*, where the French présomption de salariat for (foreign and domestic) performing artists (then contained in Article L-762–1 of the French labour Code), was held to be in breach of what was then Article 49 of the ECT.

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\(^{51}\) Ibid., paragraphs 48.

\(^{52}\) Ibid., paragraphs 51–53.

\(^{53}\) Ibid., paras. 40 and 48.

\(^{54}\) As it was not found to be in the recent Case C-475/11, *Konstantinides* (of 12 September 2013).

4. FREE MOVEMENT OF SERVICES AND THE POSTING OF WORKERS

We have so far conceded, and taken for granted, that ‘free movement of services’ (FMS) is anchored to the COP principle. But in this section we go on to illustrate a few key precedents and, in particular, we move on to analyse the Court’s trajectory in the context of the posting of workers to suggest that the move to COP has partly been the result of a slow process facilitated, if not triggered, by the Court’s interpretation of the primary and secondary FMS provisions. In our view, the original approach of the Treaty of Rome in the FMS context was arguably at least partly reliant on the ETP as a (minimum) requirement of non-discrimination, in that every service provider could ‘temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals’.56 The Treaty also provided a (rather basic and non-exhaustive) list of types of services, such as activities of an industrial character, activities of a commercial character, activities of craftsmen, and activities of the professions. In this respect, it is important to recall the fairly obvious point that the notion, indeed the very understanding, of ‘services’ in 1957 must have been dramatically different from the one we have these days. The six founding MSs were predominantly industrial economies and the very idea of a ‘service economy’ would have appeared to be rather fanciful. Unsurprisingly, their appreciation of services was relatively narrow, and the idea that some services could have a significant cross-border dimension could not reflect our current, online era, understanding. Services, we would readily concede these days, are much more than the four examples mentioned in old Article 60 of the Treaty of Rome, and one could wonder if, in the era of the Carrefour, Amazon, Skanska, UBS, Group4S, and Vodaphone, that list reflects the realities of our service societies.

Eventually, the realities of a more complex services market caught up with the Treaty. In Rush Portuguesa, the Court found that a company established in one MS providing services in another MS must not be prevented from doing so by bringing its own workforce. It also noted however, at paragraph 16, that ‘an undertaking engaged in the making available of labour, although a supplier of services within the meaning of the Treaty, [can carry] on activities which are specifically intended to enable workers to gain access to the labour market of the host Member State’, and therefore, ‘Host Member States must in such a case be able to ascertain whether a [foreign] undertaking […] is not availing itself of the freedom to provide services for another purpose, for example that of bringing his workers for the purposes of placing workers or making them available’.57 In these circumstances, and as long as the Host Member State’s actions were not such as to render free movement of services rights ‘illusory’, Community law did not preclude the Host MS from extending their legislation or

56 Article 60 of the Treaty of Rome.
57 Case C-113/89, Rush Portuguesa, para 17.
collective agreements ‘to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established’, nor from ‘enforcing those rules by appropriate measures’.58 The decision guaranteed service providers access to the Host MS, but at the same time provided the latter with a possibility to impose ETP.59 De Schutter has rightly noted that Rush ‘was a source of considerable legal uncertainty at the time it was delivered, for it did not make clear which of the laws of the Host Member State the service provider established in another Member State had to comply with’.60

A decade later, the Court, however started veering in the direction of COP. In Finalarte, for instance, it found that the Treaty did not preclude a Host MS from imposing national rules guaranteeing entitlement to paid leave for posted workers, but only on the two-fold condition that (i) the workers do not enjoy an essentially similar level of protection under the law of the MS where the employer is established, and (ii) that the application of those rules by the host MS is proportionate to the public interest objective pursued.61 In Mazzoleni and Portugalia, the imposition of host country minimum wages was tolerated, but only insofar as they – if considered objectively – provided for the protection of posted workers.62

The adoption, in 1996, of the Posted Workers Directive (PWD),63 sought to clarify the situation. A product of many compromises, it can be questioned whether it ever did. On the one hand, it introduced not just a possibility, but a duty, to ensure that workers posted from other MSs complied with and enjoyed Host MS rules and treatment in a number of areas, thus bearing a number of ETP traits. On the other hand, it was never quite clear what would apply to areas of labour law outside of the list of areas referred to in Article 3(1) of the Directive. According to the wording of paragraph 13 of the Directive’s Preamble, its provisions laid down a ‘nucleus of mandatory rules for minimum protection’, with Article 3(7) adding that this nucleus did ‘not prevent application of terms and conditions of employment which are more favourable to workers’. The natural assumption, it seems, would have been to consider this Directive a ‘minimum harmonisation’ type of instrument, and it was explicitly provided that its adoption was ‘without prejudice to the law of the Member States concerning

58 Case C-113/89, Rush Portuguesa, para 18.
60 See the lucid analysis by O. De Schutter, ‘Transborder provision of services and ‘social dumping: rights-based mutual trust in the establishment of the Internal Market’ in I. Lianos and O. Odudu (eds.), Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration (CUP, 2012), 349–380, at 351.
61 Case C-49/98, Finalarte.
62 Cases C-165/98, Mazzoleni and C-164/99 Portugalia.
collective action to defend the interests of trades and professions’. So it may not be
inaccurate to describe the PWD as a mixed instrument in which dominant elements
of ETP coexisted (perhaps unhappily) with some ECJ backed features of ‘managed
mutual recognition’ to use the expression coined by Nicolaïdis and Schmidt, but as
severely qualified by a robust, non-exhaustive, and ‘minimum harmonisation’ list of
mandatory requirements, contained mainly in Article 3(1).

As noted above however, Laval, and shortly thereafter Rüffert, changed the
nature of the PWD by transforming it into a de facto ‘maximum’ or ‘exhaustive
harmonisation’ instrument, and by anchoring it to the centrifugal force pulling ‘free
movement of services’ (FMS) away from its original ETP and increasingly towards
a MA with COP rationale. Oddly enough, the same COP rationale that MEPs – and
the European civil society – had opposed during the negotiations of the Service
Directive, but that the CJEU keeps pursuing through its interpretation of EU primary
and secondary legislation in the FMS context. The move to the COP approach, we
concede, has not been finalised yet, and MSs are to apply Article 3(1) of the PWD to
extend the protections and rights of their domestic labour laws to posted workers. But
the range of rights and their ability to enforce them is no doubt diminishing. Barnard
has also noted the extent to which the interplay between this socially regressive and
market oriented interpretation of the PWD by the CJEU and the Rome I Regulations
can further limit the ability of Host MS to apply their domestic labour legislation to
foreign service providers.

If our assessment of the interpretation of the PWD is correct, it is difficult to
see what the recently adopted ‘Enforcement Directive’ could contribute beyond
applying some paper over the cracks opened by the Court of Justice. It is worth
noting that Paragraph 23 of the Preamble explicitly recalls and endorses the CJEU

64 Para. 22 of the Preamble.
65 We readily acknowledge that in the realities of EU secondary legislation, and in the context of the
PWD, MR may take the form of one or more variants of what Nicolaïdis and Schmidt have aptly
defined as ‘managed mutual recognition’, somehow distancing itself from pure COP, as long as
‘mandatory requirements’ are taken seriously, cf. K. Nicolaïdis and S. Schmidt, ‘Mutual Recognition
“On Trial”: The Long Road to Services Liberalisation’, (2007) 14(4) Journal of European Public Policy,
717–34.
66 In spite of the controversy caused by the COP in the so-called ‘Bolkestein’ draft Services Directive,
it is arguable that the final versions of the Services Directive maintained strong elements of the
principle. See, in particular, R. Craufurd Smith, ‘Old Wine in New Bottles?’ From the “Country
of Origin Principle” to “Freedom to Provide Services” in the European Community Directive
on Services in the Internal Market’, Mitchell Working Paper Series, 6/2007 1–24 (University of
C. Barnard, ‘The UK and Posted Workers: The Effect of Commission v Luxembourg on the Territorial
Application of British Labour Law – Case C-319/06 Commission v Luxembourg, Judgment 19 June
enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the
provision of services and amending Regulation (EU) No. 1024/2012 on administrative cooperation
through the Internal Market Information System (‘the IMI Regulation’), [2014] OJ L 159/11.
jurisprudence, while Paragraph 19 even seems to impose a new requirement on Host Member States that: ‘Where terms and conditions of employment are laid down in collective agreements which have been declared to be universally applicable, Member States should ensure … that those collective agreements are made generally available in an accessible and transparent way’. Similarly, it is difficult to see what changes could derive from the new Public Procurement Directive69 that, while mentioning in Article 18(2) that Member States shall ‘ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions’, also states, in Paragraph 98 of its Preamble, that these social aspects ‘should be applied in accordance with Directive 96/71/EC, as interpreted by the Court of Justice of the European Union and should not be chosen or applied in a way that discriminates directly or indirectly against economic operators from other Member States or from third countries parties to the GPA or to Free Trade Agreements to which the Union is party.’ In our view, none of these instruments challenge the reading that the CJEU has given to the PWD, effectively transforming it into a vehicle for the application of the COP in the cross-border provision of work related services.

In the following section we offer a critical analysis of the approach adopted by the CJEU against the spirit, if not also the letter, of the PWD, and offer a number of reasons why some areas of ‘free movement of services’ (as well as ‘freedom of establishment of (natural) persons’) ought to be regulated by reference to the same principle underpinning ‘free movement of workers’, and in particular by reference to a strong ‘equal treatment principle’.


As mentioned in the previous section, the Treaty of Rome provided a conceptualisation of ‘services’ that was at best narrow and that, read in 2014, struggles to reflect a number of developments and nuances emerging from the progressive move of Western

70 This section of the paper partly draws on some arguments that have been developed in discussion with Professor Mark Freedland, and are embodied in M. Freedland and N. Kountouris, The Legal Construction of Personal Work Relations (OUP, 2011). Although we are solely responsible for any errors and omissions in the present article, we gratefully acknowledge his invaluable contribution to the development of these arguments.
Europe towards an increasingly service oriented society. We conceded that, for all its limitations, that list also has some benefits and provided some relevant insights into the world of services, on which the CJEU has, however, failed to capitalise. The major benefit, for the purpose of our argument in this article, is that it offered an initial embryonic distinction between services provided by companies and services provided by persons, essentially activities of craftsmen and the professions. In spite of this important early intuition of the Treaty drafters, as noted in the previous section, not much has resulted in terms of an ad hoc set of rules applying in a distinct manner to personal service providers as opposed to corporate service providers. Cases like Laval and Commission v France seem to be premised on the same basic rationales underpinning judgments like Sager and Alpine Investments. So the regulation of ‘free movement of services’ (FMS) has developed as rather unitary reflecting a rather monolithic understanding of services. We have contrasted this approach with the one adopted by the ECJ/CJEU, and described in section 2, in the free movement of workers context. We have also argued that the EU legislature, most visibly in the European Citizenship Directive, has identified some pockets of regulation of the ‘freedom of establishment’ area affecting self-employed persons and aligned them with the ‘equal treatment principle’ (ETP) rationale prevailing in the ‘free movement of workers’ context, although we noted that the Court’s activity in the ‘freedom of establishment of (natural) persons’ area has sought to pull this area of EU law away from ETP and to anchor it increasingly to the ‘country of origin principle’ (COP) prevailing in the ‘free movement of services’ (FMS) context.

What we will argue in this section is that both the regulation of ‘freedom of establishment of (natural) persons’ and of some areas of FMS ought to be rebalanced in favour of the ETP principle prevailing in the ‘free movement of workers’ context to reflect the realities of modern labour and service markets, and the dignitarian concerns affect 21st century Europe. What we begin to propose in these pages is a different approach to the understanding of services, and one that builds on the original distinction between corporate and personal service providers in a more meaningful and purposive manner. We argue, admittedly against the current state of CJEU’s case law, that, firstly, the regulation of the freedom of establishment of self-employed professionals ought to be aligned to ‘free movement of workers’, as analysed above in Section 3 of this article, to form a coherent area of ‘Free movement of persons’ law (FMP). And secondly, this time against the current state of both EU law and the Court’s case law, that some service provision currently regulated along the lines of mainstream EU ‘free movement of services’ FMS law, should be carved out of this area of the law, and be allowed to follow the rules and rationales developed in


72 The only exceptional treatment may arise in the contexts where FMS clashes with domestic taxation. See Case C-234/03, Viacom [2002] ECR I-8287.
the ‘free movement of persons’ context, to form a broader area of ‘Free movement of personal work and service’ providers (FMPWS). This, by reason of either the fact that the provision of the services in question is mainly personal in character (and here the examples of the activities of craftsmen of the professions come to mind) or by reason of the fact that they involve the cross-border provision of a ‘labour intensive’ service, that is to say of a service where the cross-border movement of workforce from the home to the Host MS constitutes the predominant element of the service provided.

We begin developing this argument by suggesting that, right from the establishment of the EEC, it was – or at least it should have been – obvious, that not all services were identical and the cross-border provision of some services raised a number of issues and sensitivities that were similar to the ones raised by ‘free movement of workers’. For instance, when discussing services, the Spaak Report highlighted the sensitivity of ‘transport services’ which were characterised by the fact that, almost by definition, ‘they bring on the territory of another country the conditions of pay, cost, taxation, that prevail in another [country]’.73 In our view this quote provides an early recognition of the fact that the provision of certain cross border services can entail a number of challenges for the Host MSs that cannot be addressed merely by the respect and enforcement of ‘the conditions and charges provided by the regulations in force in the country in question’,74 let alone by the adoption of a ‘country of origin principle’ (COP) test, and we like to see these concerns as an early warning of the problematic that, some fifty years later, materialised in the context of the Laval dispute and litigation, and that the ‘equal treatment principle’ (ETP) is best suited to address. For the purposes of our argument, ‘transport services’ ought to be seen as an example of a wider class of services in which are, by their nature, labour intensive and that ought to be treated by reference to the ETP rather than COP.

Needless to say, the concept of ‘labour-intensive service’ is unclear and debated. A good starting point, however, could be found by recognising as labour-intensive those services that the EU itself treats as such in the context of EU VAT rules.75 This could be further enriched by adding those services of a commercial or industrial character where, according to Eurostat, labour costs constitute a considerable share of overall costs.76 A much richer, articulate, and reasoned list of LIS can be found in the 1998 Report of the UK Low Pay Commission, which included sectors such as cleaning, security, residential care.77 While regional and sub-sectoral variations are likely to occur, construction, we maintain, ought to qualify as a LIS.78

73 Rapport des chefs de délégation aux ministres des Affaires étrangères, Brussels, 21 April 1956, at page 43.
74 Ibid., 42.
75 See the original list contained in Directive 1999/85. Subsequently this was incorporated in Articles 106–108 & Annex IV of Directive 2006/112/EC.
76 Eurostat relevant stats can be found at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Labour_cost_atRegional_level.
77 Www.dti.gov.uk/files/file37987.pdf.
We finish this section by tentatively suggesting that the PWD may have been originally conceived precisely to address some of the challenges arising from the provision of what we have termed here as personal and labour-intensive services, although ultimately – partly because of its drafting, partly because of its interpretation by the Court – it has failed to do so. The Directive, while a ‘free movement of services’ instrument, was not dealing with any kind of services, but precisely with those services whose performance and delivery required the cross-border movement of workers. Undoubtedly, the fact that the workers were moving across the border to provide a service on a temporary basis, rather than a permanent one, meant that some of the ‘free movement of workers’ ETP requirements had to be suitably attuned. But the idea that the integration in the Host MS was temporary is, we believe, quite different from the disingenuous suggestion that ‘posted workers who are sent to another country to perform a service return to their country of origin after completing their mission, without at any time joining the labour market of the host Member State’. Surely enough their participation in the Host MS’s labour market (and indeed in the Host MS tout-court) is of short duration, but there is no doubt in our mind about their joining, with a number of implications in terms of their displacement effect on alternatively available domestic labour. The more intellectually honest view is the one submitted by Commissioner Spidla, noting that the PWD seeks ‘to ensure the freedom to provide services and to prevent social dumping’.

6. THE EQUAL TREATMENT PRINCIPLE – PROTECTIVE OR PROTECTIONIST?

As already remarked, the move away from the ‘equal treatment principle’ (ETP) and in the direction of the ‘country of origin principle’ (COP) as the governing principle for regulating ‘free movement of services’ (FMS) has been motivated by a desire to promote market access. Imposing ETP for the workers of foreign companies providing cross border services has been seen as hampering the trade in services and, as reported in the introduction, been equated to ‘protectionism’. The proponents of the ‘protection equals protectionism’ axiom usually run their argument in two ways. Firstly, they argue that the additional administrative burden of having to comply with host country labour laws makes it ipso facto less attractive and more expensive for service providers to sell their services across borders. In addition, they suggest that

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79 And we can see a reflection of this in provisions such as Article 3(2)-(5).
81 Commission promotes jobs in services sector: posting of workers – less bureaucratic and quicker IP/06/423, Brussels 4 April 2006.
ETP deprives these service providers of their main competitive advantage – lower unit labour costs.

Differences in unit labour costs are undoubtedly one of the drivers of trade today, not just trade in services but also trade in general, and trade in goods in particular. For instance, companies will often relocate to countries where producing goods is relatively cheaper partly because of lower labour costs resulting in lower production costs. Even though the movement of production from one country to another sometimes generates protests, the purchasing of cheaper goods imported from other (low wage) countries is generally accepted, and indeed practiced, by most ‘developed countries’ consumer bases.

Economists tend to analyse trade in services in a similar way to trade in goods, or at least using trade-in-goods analogies. One such example, useful in the present context, is to make a distinction between traded goods (mainly manufactured goods) and non-traded goods (mainly services). Technological change, allowing more and more services to be delivered at a distance, has turned many services that traditionally have been non-traded goods into traded goods. Legal developments, such as the EU freedom to provide services and the GATS treaty, have further increased the range of tradable goods. From this perspective, arguing that different principles should guide the regulation of trade in goods and trade in services, or at least certain parts of the latter, may seem odd, in particular as trade theory has long seen the export of goods as a way of indirectly exporting labour. From this economic perspective, buying cheap goods from low-wage countries, off-shoring services and allowing workers from other companies to cross borders to perform services at wage levels that deviate from those in the country of work are comparable acts. Applying the ETP to one but not the others would thus be a double standard. Playing devil’s advocate, we could say that if we accept competition by means of unit labour costs in the case of trade in goods and for some services, why should it not be allowed in other areas?

This presupposes, however, that trade in goods and commodities is the relevant term of comparison. As we have been submitting in this article, in the case of cross-border provisions of services including the posting of workers, an equally or more relevant term of comparison is ‘free movement of workers’. The response to the rhetorical question above can therefore be another question: if we accept the equal treatment principle as the dominant regulatory principle in the case of ‘free movement of workers’, why should it not also apply to foreign workers performing

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83 EU lawyers will be familiar with the issues arising from the Doc Morris litigation, Case C-322/01, primarily a case about goods but with strong ‘on-line service’ implications.

84 Some economic research has gone as far as suggesting that having more negative attitudes to wage competition from posted workers is more common among respondents that are less ‘rational’ Calmfors et al (2009), “Trade in Services and in Goods with Low-Wage Countries – How do attitudes differ and how are they formed?” SIEPS Report 2009:6.
Nicola Countouris and Samuel Engblom

exactly the same type of work and services as comparable domestic workers, with the only difference being the country of establishment of their employing company?

Imagine two neighbours, Titius and Caius. They are both construction workers in Member State A, with the same skills and experience. Both go for six months to MS B to work at the same construction site, under the same main contractor. The only difference between the two is that Titius is hired by a subcontractor in Host MS B while Caius is hired by a subcontractor in their home, MS A, and then posted to Host MS B. Under the current state of EU free movement law, the Host MS is, to a large extent in the name of market access, obliged to ensure the equal treatment of Titius, who will thus receive the same pay and other working conditions as other MS A domestic workers. In the case of Caius, however, in a scenario similar to Laval, MS A is prevented from ensuring equal treatment, as this would be considered an undue interference with Caius employer’s market access. So, but for the fact that they are employed by companies registered in different MSs, Titius and Caius receive different wages in spite of doing exactly the same type of work.

Support for applying the ETP rather than the COP in the situations we describe can also be found in a number of ‘market shaping’ rationales. Labour law not only sets the standards for the relationship between employers and workers. It also sets standards for the competition between different employers and between different workers, as it regulates what means of competition can be used to compete for business and jobs. In the case of competition between firms, ‘the ability of one firm to adopt a high-productivity route to competitive success is limited if its rivals are able to compete on the basis of low pay and poor working conditions’. Labour law and social security set a floor under which wages and working conditions are not allowed to fall, forcing firms to improve and invest in product development, technology or management practices. Supiot, referring to the concept of l’égalité entre employeurs, points to placing different firms on an equal footing as concerns unit labour costs as one of the essential functions of labour law. In the case of competition between workers, labour law works in essentially the same way, preventing underbidding and making it easier for workers to enter a high-productivity route, for example through investing in training. As Barnard has suggested in the context of EU free movement rules, this type of non-discriminatory labour laws should be understood as rules that merely ‘structure the market’, and ought to be treated along the way of other rules,

85 A study produced by Swedish LO revealed that the take-home pay of the posted workers involved on three major projects fell in the range of 55–80 per cent of the pay given to workers that were employed by analogous national companies performing similar tasks. See C-M Jonsson, T. Pettersson, H. Lofgren, and K. Arvidsson, När arbetskraftskostnaderna pressar priset – en genomlysning av offentliga investeringar i infrastruktur (Stockholm, LO, 2010).


88 C. Barnard, EU Employment Law (OUP, 2012), 201.
such as tax rules, seen as performing similar functions. Providing, through the ‘free movement of services’ road, what in practical terms amounts to a possibility of avoiding Host MS mandatory regulation is therefore highly problematic. It is particularly so when this can be combined with arrangements aimed at finding the tax and social security regimes that are most favourable to the employer.

Furthermore, as already suggested, we do not believe that categorising the imposition of the ETP as protectionist per se is warranted. Clearly, the application of labour law has an effect on the demand for certain services. Actually, as we have just discussed, that is one of the things that it is supposed to do. The ETP does not exclude foreign service providers from the market, it merely requires that they follow the same rules as other actors in the market, establishing the aforementioned ‘égalité entre employeurs’.

Finally, we believe that the argument that in the absence of ‘a bit of dumping’ the employees of foreign service providers would be even worse off, as they would have no work whatsoever, is deeply problematic. It is as unconvincing as the argument that was often aired, in the 1970s and 1980s, against the introduction of equal pay laws – that ‘equal pay legislation acts to the disadvantage of women and creates unemployment among them’. Since the introduction of equal pay legislation women’s labour market participation has only increased, and to the extent that women continue to suffer labour market disadvantages, the solution is unlikely to be found in more discrimination, but is likely to be achieved by taking equality issues seriously. Prior to Laval, the ECJ approach appeared to be more sympathetic to this kind of concern and reasoning, accepting the imposition of host MS labour law, at least as long as it, considered objectively, provided for the protection of posted workers. In Wolf & Müller, a case in which the court upheld a German system for joint and several liability in the constructions sector, the referring court (Bundesarbeitsgericht) raised the issue whether the analysis of the protective intent of the measures should be affected by the fact that the ‘protection … becomes less valuable economically if any real chance of

91 We know, in any case, that posted workers are subjected to various treatments that many would see as indecent and often unlawful, see A. van Hoek and M. Houverzijl, Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union (European Commission, 2011) and S. McKay, Study on Precarious work and social rights (Working Lives Research Institute, 2012), 41–44.
93 C-165/98 Mazzoleni and C-164/99, Portugaia.
obtaining employment in the Federal Republic of Germany is significantly reduced’.\(^{94}\) The Court answered that ‘it is none the less the case that a provision [such as the one in the main proceedings] benefits posted workers on the ground that, to the advantage of the latter, it adds to the primary obligant in respect of the minimum rate of pay, namely the employer, a further obligant who is jointly liable with the first debtor and is generally more solvent’.\(^{95}\)

A more recent example of this kind of reasoning is a March 2013 ruling from the Norwegian Supreme Court, regarding, among other things, the compatibility of certain supplements stipulated in a collective agreement that had been made generally binding with the PWD and the article of the EEA-agreement which corresponds to article 56 TFEU. Justice Matheson wrote:

‘A weaker labour market due to higher costs will always be a risk with measures that are aimed to give increased social protection, regardless of whether it takes the form of hourly pay, overtime supplements or additional pay for work away from home. In my view it is self-evident that such supplements do not lose their character of objective advantage for the worker even when the increased cost run the risk of reducing the demand for the service in question.’\(^{96}\)

Phrased differently, the argument that an equal treatment guarantee applicable to workers posted to another MS would amount to protectionism and act against workers’ interests (perhaps on the basis of a pseudo-Rawlsian reasoning that inequality is permissible to the extent that it can benefit the ‘worse offs’, a point that we feel adequately addressed by those arguing that ‘equality is better for everyone’)\(^{97}\) is closely related to the Epsteinian argument that labour law and social protection unduly interfere with the market and, as such, harm workers.\(^{98}\) Even though the latter argument does have its proponents, it is far outside the mainstream debate in Europe and is hardly consistent with the ‘social market economy’ aspirations enshrined in the EU treaties.

7. CONCLUSIONS

The present article has advanced a simple yet highly contested argument, that is to say that certain types of cross-border provisions covered by EU law on FMS should be

\(^{94}\) C-60/03, Wolf & Müller, [2004] ECR I-9553 paras 17 and 39.

\(^{95}\) C-60/03, Wolf & Müller, para 40.

\(^{96}\) STX OSV AS et al vs Staten v/Tariff nemnda Norwegian Supreme Court 5 March 2013 para 115.


regulated by reference to the ‘equal treatment principle’ (ETP), rather – as it is the case at present – than by reference to a ‘market access’ (MA) principle that increasingly leans towards a misguided ‘country of origin principle’ (COP). We have argued that ETP still plays a central role in the ‘free movement of workers’ context, in spite of the emergence of MA, and that this reflects the economic and dignitarian preoccupations underlying the creation of an internal market regulated by different sets of labour laws and standards and where labour is in free circulation. We have moved on to suggest that the area of ‘freedom of establishment of (natural) persons’ is contested between ETP based arguments (mostly put forward by the EU legislative institutions) and some COP elements (mostly endorsed by the CJEU), and that this area of EU free movement law ought to be more securely anchored to the ‘equal treatment principle’ regulating ‘free movement of workers’. We have also put forward the more general argument that those trans-frontiers services that are characterised by their personal provision or by a certain degree of labour intensiveness ought to be regulated along the same lines of ‘free movement of workers/persons’, partly as a reflection of their sharing similar economic and dignitarian rationales. It seems to us that the current development of ‘free movement of services’ law and the general interpretation of the PWD run contrary to these arguments, with EU law moving in a direction where the COP is the key regulatory principle.99

An application of the ‘equal treatment principle’ to the provision of personal and labour intensive services is more capable of taking into account the economic and dignitarian concerns that we have explored in this paper. It is suitably capable of ensuring market access by prohibiting any form of direct and indirect discrimination and acts as a market regulatory device that encourages economic and business models premised on productivity and investment in human capital, rather than the exploitation of cheap labour force. It does, of course, require the CJEU to look beyond the strict dichotomy of ‘free movement of workers vs. free movement of services’, and look behind the corporate veil of various trans-national provision of (labour intensive) services, to appreciate that what the various ‘Lavals’ are actually doing is to act as legal vehicles for the free (and unprotected) movement of migrant labourers. We do understand that this statement may come as an anathema to many. We draw some (limited) comfort from the fact that, in recent months, the Council of Europe’s European Committee of Social Rights has effectively embraced the normative approach suggested in this article, by recalling

134. […] that posted workers are workers who, for a limited period, carry out their work in the territory of a State other than the State in which they usually work, which is often their national State. The Committee is aware that, in terms of length and stability of presence in the territory of the so called “host State”, as well as of their relationship with such State, the situation of posted workers is different from that of other category of migrants workers, and in particular from the situation of those foreign workers who go to another State to

99 See for instance Article 8(2) of the Rome I Regulation.
seek work and to be permanently embedded there. Nonetheless, the Committee considers that, for the period of stay and work in the territory of the host State, posted workers are workers coming from another State and lawfully within the territory of the host State. In this sense, they fall within the scope of application of Article 19 of the Charter and they have the right, for the period of their stay and work in the host State to receive treatment not less favourable than that of the national workers of the host State in respect of remuneration, other employment and working conditions, and enjoyment of the benefits of collective bargaining (Article 19§4, a and b [of the European Social Charter]).

Questions remain as to whether a similar set of policy goals could be achieved by other means, for instance through the better drafting or better enforcement of the PWD, by means of less draconian restrictions on the exercise of the right to strike than the ones implicit in Viking and Laval, or through a more socially attuned appreciation on the part of the CJEU of national labour standards as an objective justification for limiting ‘free movement of services’. Our view is that none of these alternative or additional strategies are likely to succeed in the absence of the regulatory compass that we have argued for in the present article, the ‘equal treatment principle’. We have sought to liberate the ‘equal treatment principle’ from various yellow and red cards that, from time to time, its detractors seek to flag up to argue against its legal suitability (for instance for being irreconcilable with ‘market access’), its moral or political appropriateness (by reason of being inherently ‘protectionist’), or its economic desirability (by preventing ‘emerging’ European countries, and the European economy at large, to grow). Equal treatment has really never harmed anyone, other than those who, for whatever reason, believe in inequality. It is time, we think, that both the CJEU and the EU law-making institutions started appreciating it more.

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100 European Committee of Social Rights, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden Complaint No. 85/2012, Decision on Admissibility and Merits, 3 July 2013. Available at www.coe.int/T/DGHL/Monitoring/SocialCharter/Complaints/CC85AdmissMerits_en.pdf.


102 See the now repealed Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final.
IMMUNITY AND THE PUBLIC/PRIVATE BOUNDARY IN EU EMPLOYMENT LAW

Lisa Rodgers

Abstract

The doctrine of ‘immunity’, whether considered in terms of state immunity (the immunity of the state against claims by embassy employees), or diplomatic immunity (the immunity of diplomatic agents against claims by their own employed staff) acts to block employment law claims and therefore prevent access to justice for certain employment law groups. This article discusses recent developments in the doctrine of immunity in the context of the jurisdictional scope of EU (employment) law. In particular, it considers two recent trends in the development of the immunity doctrine. The first trend is the erosion of the ‘absolute’ nature of state immunity and an increased willingness at both EU and national (UK) levels to consider state immunity as just one factor in the ‘balancing’ exercise associated with human rights. The second trend considered in this article is that associated with diplomatic immunity. Whilst there have been signs of a relaxation of the strict operation of this doctrine in some cases, there is also evidence of a judicial reluctance to erode diplomatic immunity in others. The article discusses the arguments put forward in both (state and diplomatic immunity) cases, and particularly what they reveal about the current understanding of the jurisdictional scope and public/private divide in EU employment law.

Keywords: access to justice; diplomatic immunity; jurisdiction; State immunity

1. INTRODUCTION

Employment law has always occupied a rather indeterminate position on the public/private law divide. On the one hand, employment law is an element of private law, concerned with the regulation of (individual) employment contracts, and redressing inequalities of bargaining power between employers and employees as and when they arise. On the other hand, employment law has a number of public functions which set it apart from other areas of private law. It is policy driven or political in a way
that private law is not thought to be. For example, employment law may be viewed as functioning to protect the fundamental social rights of workers. It may also be viewed as supporting the efficient and productive operation of economies through its influence on labour market function.

This duality of employment law raises interesting questions, particularly when it comes to the operation of (EU) employment law at the public/private boundary. In general terms, it is possible to determine a blurring of that boundary and an increase, over time, in the number of both public and private employers coming within the scope of EU employment law. This may be viewed as a reflection of the operation of the EU principle of effectiveness (that (national) courts give adequate protection to individual rights arising from EU law) as the connection between employment law and fundamental rights has been increasingly recognised. For example, the possibility of horizontal direct effect has been raised in relation to EU employment law Directives underscored by fundamental rights. In addition, it has been possible for courts to apply indirect effect to allow EU employment law rules to influence both public and private employment relationships.

Until recently, this jurisdictional ‘creep’ did not extend to employment contracts under the auspices of state or diplomatic immunity. These immunities responded to customary international law (enshrined in national statutes) and were therefore viewed as too public to warrant judicial interference at either EU or national level. However, even these immunities are now being eroded and the reach of EU (private) law is expanding into these public areas. Certainly, it is now possible that an embassy employee can gain access to important employment rights (as far as they are recognised in EU law). This in itself appears a favourable development for employees, and a victory for the effectiveness of EU law in the field of fundamental rights. That said, caution must be exercised in declaring a victory for individual rights as a result of these trends. First, the reliance on the principle of effectiveness and general principles of EU law argument to allow state immunity rules to be overruled, means that only those employment rights considered fundamental at EU level will be enforceable. Second, this increased ‘privatisation’ of EU employment law appears to be accompanied by an increased protection of private aims under the auspices of public function. This blurring of public/private function can actually be a disadvantage to individuals seeking to enforce employment rights. Tribunals remain reluctant to interfere in diplomatic (as opposed to state) immunity on the grounds that the public function of diplomats warrants special private protection.

This article proceeds first with an overview of the jurisdictional expansion of EU employment law. The focus will be on the recent judicial changes which have opened up the possibility of individual employment Claimants enforcing the provisions of

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employment law Directives against their private employers. In particular there will be a discussion of the use of ‘general principles of EU law’ to effect this change, as these general principles are relevant to the considerations of the application of state and diplomatic immunity later in the article. Second, the article will proceed to discuss the development of the case law on state immunity at EU and national level, and the trend within the case law towards overriding state immunity considerations so that a greater number of individual Claimants can have their employment claims heard. The third section of the article will discuss the opposite trend towards jurisdiction in employment claims apparent in the case law on diplomatic immunity. It will discuss the difficulties faced by employees of diplomats in having their employment claims, as a result of the particular status of diplomatic agents at the public/private divide.

2. EXPANSION OF JURISDICTION AND THE BLURRING OF THE PUBLIC/PRIVATE DIVIDE

Originally, the EU was established as an economic union to foster the freedom of movement of goods, people and capital across Member States. As a result, early manifestations of employment law at EU level aimed to aid economic integration between Member States, and to provide protection against unfair competition caused by specific market distortions (for example, the unequal treatment of labour on the grounds of sex). This employment law was therefore designed to serve public (economic) ends such as the equalisation of costs and the creation of a level playing field for economic actors. It was not designed to impose high social standards per se; it was thought that those standards would flow automatically from the increases in efficiency engendered by market integration. It was also not designed specifically on the basis of the promotion of individual (private) rights. Indeed, it was felt that this kind of intervention formed part of the ‘social dimension’ of economic integration and was therefore a matter for member states.

Over time, the EU has become more willing to interfere in the social policy of Member States. This has been reflected in the expansion of the number of employment law instruments, and the locus of justifications for those provisions in the field of (human) rights. However, it is clear that this interference remains controversial, and that there remain fears that the expansion of EU employment law instruments could lead to the EU having too great an influence on individual employment relationships. As a result, employment law is a field of negotiation and compromise, and continues to take effect mainly through the use of EU Directives, as opposed to more stringent (EU) legal instruments. These Directives give considerable flexibility to Member States in both the timing and substance of transposition, and allow for some adjustments in

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line with national (economic) sensitivities. Furthermore, Directives have traditionally been deemed not to have direct effect in the same way as Treaty Articles or Regulations. On this understanding, Directives can be relied on against a state (or emanation of the state) but they cannot be relied on in disputes between private individuals. The understanding that Directives have only vertical direct effect has provided further reassurance that EU employment law would not unduly interfere in either national sovereignty or national economic functioning.

Two developments have eroded the distinctiveness of the vertical direct effect of Directives. The first is the increasingly broad definition of the ‘state’ or ‘emanation of the state’ for the purposes of determining who can be sued under a particular (employment law) Directive. A broad range of bodies have now been deemed to satisfy the criteria under the test in Foster v British Gas; including: local authorities, regions, nationalised industries, privatised undertakings and universities. A pertinent example in the employment law context is the case of Georgiev v Technicheski universitet-Sofia. In this recent case, the Court of Justice held that the provisions of the Equal Treatment Directive (ETD) could be relied upon by an individual against a university. The Court stated that the university was a public institution which satisfied the Foster criteria, and that it was then irrelevant whether the claim was against the university acting as a public authority or an employer.

The second, and the most important development for the purposes of this article, is the use of general principles to allow jurisdiction to private employment law claims at EU level. The derivation of these general principles is complex, and the number of sources from which general principles can be derived has tended to expand over time. Possibly the first manifestation of the Court of Justice’s reference to general principles in the employment context came in the Defrenne cases. These cases concerned an equal pay claim, which was brought on the basis that a female employee’s contractual provisions breached Article 119 EEC (now Article 157 TFEU). The employee complained that the provisions in her contract which required her to retire at 40 were discriminatory, given that there were no such requirements for men.

3 Case C-188/89 Foster and Others v British Gas Plc [1990] ECR I-3313. The test was stated at paragraph 20 as follows: ‘a body, whatever its legal form, which has been made responsible pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals, is included in any vent among the bodies against which the provisions of a Directive capable of having direct effect may be relied upon’.


7 Georgiev, para 70.

The Court held that Article 157 was directly effective and gave rise to individual rights which the courts had to protect. This implied that Article 157 had both vertical and horizontal effect. Further, in *Defrenne (No. 3)*, the Court elevated the principle of equality (encapsulated in Article 157) to the status of fundamental (human) right. It stated that this fundamental right was one of the general principles of EU law:

> 'The Court has repeatedly stated that respect for fundamental personal human rights is one of the general principles of Community law, the observance of which it has a duty to ensure. There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights.'

The *Defrenne* cases paved the way for the development of the horizontal direct effect doctrine in relation to other Treaty articles, but, more importantly for the purposes of this article, the *Defrenne* cases also allowed consideration to be given to the link between general principles of EU law and the application of Directives. In *Defrenne (No. 3)* it was not suggested that Directives could have horizontal effect. However, it was suggested that Directives could be derived from, or give expression to general principles of law in the same way as Treaty Articles. This principle has been used to argue that Directive provisions which directly implement general principles of law should have horizontal direct effect. On the subject matter of equal pay, it was held in the case of *Brunnhofer* that Article 1 of Directive 75/117 had both vertical and horizontal direct effect. The Court found that Article 1 directly implemented Article 157 without alteration of either its scope or content and so should have direct effect on the basis of the ‘general principle of equality’.

In more recent judgements, there have been further suggestions that the invocation of general principles of law could lead to the ability of private Claimants to rely on the provisions of Directives against private employers. A very significant case in this regard was the 2005 case of *Mangold v Helm*. This case concerned a German law which allowed employers to use fixed-term contracts for employees over the age of 52 without having to provide any objective justification for that use. The Court considered that this provision was incompatible with the ETD and was not objectively justified. However, there were significant problems with giving effect to this finding. First of all, this dispute was between private individuals. This meant that the enforcement of this judgement would fly in the face of the rule that Directives do not have horizontal direct effect. Second, the time limit for implementation of the Directive had not yet passed, and so on the face of it, it did not appear that Germany was duty bound to honour its provisions. However, the Court held that protection against age discrimination was one of the ‘general principles of Community law, which

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9 *Defrenne (No. 3)* para 26–27.

10 OJ 1975 L 45/19.


12 Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.
derived from ‘various international instruments’ and ‘the constitutional traditions common to Member States. According to the Court, it followed that even though the period for transposition of the Directive had not expired, the inconsistent German provisions should be set aside.

At the same time, the Court was keen to point out that the general principles did not create free standing rights. The Court reiterated that the general principles of law were triggered by the (incorrect) implementation of the Directive on Fixed Term Work by Germany. This created the public dimension which necessitated the Court’s interference. Furthermore, it would be a dramatic step to suggest that this decision is authority for the development of a doctrine of horizontal direct effect for Directives.\footnote{M. Bell, Constitutionalization and EU Employment Law, University of Leicester School of Law Research Paper No. 13–05.}

In the Mangold case, the Court stated that its main role was to ‘provide all the criteria of interpretation needed by the national court to determine whether the national rules were compatible with the general principle of law.’\footnote{Mangold (n 10) para. 75.} The decision was directed to the Member State, and it left the Member State to ensure that its rules were fully effective for the purposes of EU law. For this reason, it has been suggested that Mangold laid the foundations for indirect horizontal direct effect, in which general principles of law are not binding, but may ultimately become binding on an individual as a result of public action.\footnote{M. Dougan, ‘The Impact of General Principles of Union Law on Private Relationships’ in D. Leczykiewicz, The Involvement of EU Law in Private Law Relationships (Hart Publishing 2013), 79.}

The Mangold case was followed, two years later, by the case of Kücküdeveci.\footnote{Case C-555/07, Kücküdeveci v Swedex GmbH & Co KG [2010] IRLR 346.} This case again concerned a German law which conflicted with the provisions in the Directive on equality in employment and occupation. This time, the date for the transposition of the Directive had passed, but there remained the complication that the claim was between private parties. Following the orthodox understanding that Directives do not have horizontal direct effect, this claim potentially fell outside of the jurisdiction of the Court. However, the Court proceeded to devise a solution based around the application of the ‘general principle’ of equality in EU law. Its starting point was that the ETD was simply the embodiment of that general principle and the right to non-discrimination in Article 21(1) of the Charter of Fundamental Rights and Freedoms 2000 (the Charter).\footnote{Ibid., para. 21–22.} It therefore followed that the national court must ensure the full effectiveness of that law. This would require a national court to disapply any provision of national legislation in contravention of that principle.

There are two main areas to note in respect of the implications of Kücküdeveci for the purposes of this article. The first is in relation to the relationship between the Charter and general principles. In the Kücküdeveci judgment it was suggested that the Charter was important evidence of the general principle of equality in EU law.
This is important as it may lead to the assertion that the Charter is the conduit for the application of general principles of EU law. If this is the case, and those general principles take effect between private individuals, then this essentially implies that the provisions of the Charter can have horizontal direct effect. This appears to be a dramatic extension of previous understandings of the reach and legal effect of the Charter. However, it is unlikely that the judgement was intended to extend that far. First, the Charter was not considered in isolation from other legal instruments. At each stage the Court reiterated that the source of the general principle of equality was not just the Charter, but also Treaty provisions concerning non-discrimination, and the Court’s interpretation of the principle of equal treatment in the field of employment and occupation in previous case law. Second, it appears that it was the particular nature of the general principle of equality which encouraged the Court to take its rather ambitious approach. Indeed, AG Bot suggested that the particular position of the general principle of equality at the top of ‘the hierarchy of norms in the Community legal order’, meant that its scope should not be restricted by the application of a particular Directive. It was the character of this general principle which meant that a Directive intended to counteract equality could be relied on between private individuals.

This leads to a consideration of the second area of note in terms of the application of the Kücükdeveci judgement. This second area is the extent of operation of the principle of the horizontal direct effect of Directives in the context of general principles of EU law. Following Kücükdeveci, it appears that the general principle of equality can act to set aside any national measure falling within the ‘personal and material scope’ of the relevant Directive. This implies a huge extension of the reach of EU law into national legislature and private relationships, particularly given the width of interpretation which could be applied to some Directives. However, it is again worth noting that there appears to be special weight attached to the particular nature of the equality general principle. Certainly, outside the specific subject matter of the Kücükdeveci dispute, the Court of Justice has specifically stated its commitment to more orthodox

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18 There is some evidence for this suggestion in the subsequent case of Test-Achats (C-236/09 Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des Ministres [2011] 5 CMLR 36). In this case, the Court relied on the provisions in Article 21 and 31 of the Charter to strike down a (discriminatory) provision in the 2004 Equal Treatment Directive as contrary to the general principle of equality.

19 See, for example, the comments of the CJEU that the Charter did not confer any directly effective rights on anyone in European Parliament v Council of the European Union [2006] ECR I-5769.

20 Kücükdeveci (n 16), para. AG70.

21 Ibid.

22 Dougan (n 15) 79.

23 For example, the scope of the ETD is very broad. That scope includes employment, access to employment, vocational training or the organisation of workers, employers and professionals (Article 3 ETD).
interpretations of the scope of the (direct) application of Directives.\textsuperscript{24} Furthermore, even within the subject matter of the Küçükçevici dispute, age discrimination, a number of subsequent cases have revealed a more traditional view of the operation of horizontal direct effect\textsuperscript{25} and have displayed a much more circumspect use of the general principles argument. For example, in \textit{Fuchs},\textsuperscript{26} general principles were referred to in the context of the wide discretion given to Member States in the adoption of measures relating to retirement, rather than as a means to grant rights to individual citizens: ‘in the context of the adoption of measures relating to retirement, EU law does not preclude the Member States from taking account of budgetary considerations at the same time as political, social or demographic considerations, provided that in so doing they observe, in particular, the general principle of the prohibition of age discrimination’.\textsuperscript{27}

3. STATE IMMUNITY AND PUBLIC/PRIVATE JURISDICTION

State immunity exists as a principle of public international law. It is based on the understanding that one state should not be subject to the jurisdiction of another if good international relations are to be maintained.\textsuperscript{28} However, the codification of state immunity principles has been extremely difficult and wracked with controversy. The European Convention on State Immunity which was drawn up by the Council of Europe and opened for signature in May 1972 has, to date, only been ratified by eight Member States. Likewise, the most recent attempt at codification, the United Nations Convention on Jurisdictional Immunities of States and their Properties 2004, has only been signed by 28 signatory parties and has therefore not yet entered into force.\textsuperscript{29} It appears that states are reluctant to commit to these Conventions, on the basis that international rules on state immunity represent an excessive interference in national sovereignty and the ability of nation states to design (or not design) rules which are

\begin{footnotesize}
\begin{enumerate}
\item For example, it was remarked in that Case C-282/10 \textit{Dominguez v Centre Informatique du Centre Ouest Atlantique and another} [2012] 2 CMLR 14 in relation to rights under the Working Time Directive (Council Directive 2003/88 concerning certain aspects of the organisation of working time, OJ 2003 L 299/9) stated that ‘It is true that this Court has consistently held that a Directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual’.
\item For example, the case of \textit{Bartsch: C-427/06 Bartsch v Bosch and Siemens Hausgeräte Altersfürsorge} [2008] ECR I-7245.
\item \textit{Joined Cases C-159/10 and C-160/10 Fuchs and another v Land Hessen} [2011] 3 CMLR 47.
\item Ibid., para 73.
\item \textit{Cudak v Lithuania}, Application No. 15869/02 (2010) 51 EHRR 15, para 60.
\item The instrument enters into force 30 days after the 30th signature is applied. See commentary at https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-13&chapter=3&lang=en accessed 29 January 2014.
\end{enumerate}
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concomitant with national sensitivities. As a result, the rules of public international law on state immunity have been deemed at best ‘vague’ and ‘difficult to anticipate’ and at worst devoid of any content at all.\textsuperscript{30}

That said, it is generally recognised that the doctrine of state immunity has developed from one of absolute immunity towards more restrictive understandings. Originally, the doctrine of state immunity was understood to allow absolute immunity for the state against any claims by private parties (including claims arising from breaches of employment law). This clearly involved a dramatic restriction on access to justice for (employment law) claimants. Over time however, there developed the understanding that there were situations in which the harshness of this rule was not justified. In particular, it was recognised that states could enter into legal relations (with private parties) which were devoid of specific public function. Therefore a distinction could be made between acts \textit{jure imperii}, acts of a sovereign nature which no private person could ordinarily perform, and acts \textit{jure gestionis}, which involved states performing functions which could just as easily be performed by private parties. Acts \textit{jure imperii} were sovereign acts involving public functions which should be subject to state immunity. Acts \textit{jure gestionis} were state acts but were essentially akin to private transactions and so should not attract state immunity from jurisdiction.\textsuperscript{31} Those acts included the state entering into contracts of employment with private individuals.

On the face of it, this ‘restrictive’ immunity approach is represented in the legislation on state immunity in the UK. The State Immunity Act 1978 (SIA) provides that a state is generally immune from the jurisdiction of the UK courts. A number of exceptions are then provided as against that rule, to represent those areas which are deemed to constitute acts \textit{jure gestionis} rather than acts \textit{jure imperii}. In Section 3, it is stated that immunity does not apply to proceedings in relation to any commercial transactions and contracts performed ‘wholly or partly in the United Kingdom’. Contracts of employment are dealt with specifically in Section 4. This section provides that state immunity does not apply where proceedings are brought relating to a contract of employment made in the UK, or ‘wholly or partly performed’ there. There are however a number of limitations to the application of this section in subsection 4(2). This subsection provides that that immunity is reinstated in relation to contracts of employment which concern a national of the (sending)State, or an individual who is neither a national of the United Kingdom or habitually resident there. Subsection 4(2)(c) also allows the parties to contract out of the exception to state immunity by agreement in writing.

Furthermore, the provisions in Section 4 potentially conflict with those in Section 16. According to Section 16, state immunity \textit{does} apply in relation to the employment of members of a diplomatic mission within the meaning of the Vienna Convention

\textsuperscript{30} Case C-154/11 \textit{Mahamdia v People’s Republic of Algeria} [2013] ICR 1, para AG20.

on Diplomatic Relations 1961 (incorporated into UK law as a Schedule to the Diplomatic Privileges Act 1964). This Section applies to all members of a diplomatic mission whether they are high-grade 'diplomatic staff', or lower-grade administrative, technical or service staff. It essentially provides a blanket immunity for states in relation to embassy staff, and has the potential to undermine the provisions in Section 4 SIA. As noted in Ahmed, 'a locally employed person of British nationality without official status [could be] left with no right to complain of unfair dismissal merely because of [their] place of employment. This suggests that in the case of the immunity granted to states in relation to embassy employment, the 'executive's interest in comity towards foreign States has been excessively favoured at the expense of the interest of the employee in obtaining redress'. The interpretation of these sections will be discussed in more detail in the next section.

3.1. STATE IMMUNITY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

State immunity has been challenged by Claimants under Article 6 of the European Convention on Human Rights (ECHR), which determines that everyone has the right to access a court for a fair and proper hearing. However, the ECHR has, until recently, provided little assistance to these Claimants. In the case law of the European Court of Human Rights (ECtHR), it was made clear that Article 6 was not an absolute right and could be subject to certain limitations which would be judged in line with rules on proportionality: 'a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aims sought to be achieved'. Rules on state immunity were found both to pursue a legitimate aim (that of complying with international law to promote comity and good relations between member states), and also to be proportionate to the aim pursued. A good example of this approach is provided by the case of Fogarty v United Kingdom. This case concerned an embassy employee who asserted that as a result of the UK’s state immunity rules she had been denied access to a court to hear her sex discrimination claims. The Court held that a legitimate aim had been pursued and that the restriction was proportionate. In relation to the proportionality claim, the Court relied on the provisions of the Vienna Convention on the Law of Treaties. It argued that as a result of that Convention, the ECHR had to be interpreted in line with 'any relevant rules of international law applicable in the relationship between the parties'. As state immunity rules were part of public international law, and accepted by the international community (including

34 Ibid.
the High Contracting Parties of the ECHR), they could not be regarded as imposing a disproportionate restriction on the right of court access under Article 6.

As noted above, the Fogarty case concerned the invocation of state immunity in relation to a member of embassy staff. This gave the Court the opportunity to consider the UK provisions on state immunity for all diplomatic employees in Section 16 SIA. It noted that those very wide provisions were contrary to the provisions on state immunity in other Member States, and out of line with the general international trend towards the relaxation of state immunity rules in respect of employment-related disputes (in particular, the restriction of state immunity to claims relating to senior diplomatic employees). However, it noted that the UK was not alone in the international community in imposing this blanket immunity, and that this was therefore justified. It also noted that the particular facts of the case meant that this immunity was justified in any event. The case concerned alleged discrimination in the recruitment process to the mission. The recruitment of diplomatic staff had to be viewed separately to claims arising once employed. This was recognised as a point of international law, and stemmed from the sensitive and confidential nature of the recruitment process in this context.36

In the cases that followed, the ECHR was able to limit the Fogarty case to its particular facts, and move towards a more restrictive approach to state immunity (and therefore a more expansive approach to private jurisdiction). In Cudak v Lithuania37 the Court held that the state immunity claim invoked by Poland constituted a breach of Article 6 ECHR. The case concerned a Lithuanian national employed as a (low-grade) secretary at the Polish embassy in Vilnius. She was dismissed following a period of absence from work. She argued that the dismissal was unfair because her absence was a result of sexual harassment by one of her male colleagues. There were two elements of this case which were given particular emphasis by the Court. First, the case concerned dismissal, and so was not subject to the international law concessions towards immunity relating to the recruitment and retention of diplomatic staff (as explained in the Fogarty case). Second, the Claimant was employed in a relatively low-grade position. The Court noted the growing willingness in the international community to separate immunity claims based on diplomatic staff function and rank. In particular it referred to the provisions of the International Law Commission’s 1991 Draft Articles, which formed the basis for the United Nations Convention on Jurisdictional Immunities of States and their Property 2004. The Court emphasised that in Article 11 of the Draft Articles, state immunity is not granted in respect of all diplomatic employees. It is only granted for (senior) employees ‘recruited to perform functions closely related to the exercise of government authority’. Immunity is not granted in respect of lower grade employees who do not have that relationship to government. The Court argued that although the Respondent state had not specifically

36 Fogarty (n 33), para O-13.
37 Cudak (n 28).
ratified the articles, they had not specifically objected to them, and that in any event, they had been adopted as customary international law. The Court was therefore bound to consider them in relation to a claim for breach of Article 6. It concluded that although immunity from jurisdiction continued to constitute a legitimate aim for the purposes of Article 6, the reaction of the Lithuanian courts was disproportionate given that the Claimant’s functions did not impact on Poland’s sovereign interests.

Similar facts arose in the case of *Sabeh-El-Leil v France*. This case concerned an accountant to the Kuwaiti embassy in Paris, who also claimed that he had been unfairly dismissed. Kuwait claimed state immunity as a bar to his claims. The Court found that, as a point of customary international law, the UN Convention on Jurisdictional Immunities of States and their Property 2004 could be directly applied to the case. It considered whether the Claimant could fall within any of the exceptions of Article 11 (that a state has no jurisdictional immunity in relation to employment contracts). It held that none of the exceptions applied, as the Claimant was neither a diplomatic or consular agent (Article 11(2)(b)), nor was he employed to perform any particular duties in the exercise of governmental authority (Article 11(2)(a)). It could not be said that any of his duties as an accountant interfered with Kuwait’s sovereign interests. Furthermore, as this was a matter of dismissal, it did not fall within the exceptions relating to recruitment, and in any event was not a dismissal which would interfere with the security interests of the state (Article 11(2)(d)). The Court concluded that the application of state immunity in this case in relation to the operation of the Claimant’s employment contract represented a disproportionate response by the French courts and a breach of Article 6.

The restrictive immunity approach applied in *Cudak* and *Sabeh-El-Leil* has been referred to outside of the case law on Article 6, and has provided the context for the (further) jurisdictional expansion of public law into private contracts. For example, the case of *Mahamdia v People’s Republic of Algeria* considered whether the German Courts had jurisdiction to hear an unfair dismissal claim brought by an employee of the Algerian embassy in Berlin. The case turned on the provisions of Regulation 44/2001, which provides EU rules on jurisdiction in civil matters. The basic provision of the Regulation is that persons (employers) can only be sued in the courts of a Member State when they are domiciled there. However, in Article 18, there is an exception to that rule in relation to contracts of employment. Article 18(2) provides that even where an employer is not domiciled in a particular Member State, that employer can still be sued in its courts if the contract is performed by a branch, agency or other establishment located in that Member State. The question

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39 Ibid., para. 58.
40 Ibid., para. 67.
41 *Mahamdia* (n 30).
42 OJ 2001 L 12/1.
was whether the Algerian embassy could be considered as a branch, agency or other establishment for the purposes of Article 18(2). As a preliminary point, the Court considered whether Algeria could plead immunity in relation to the Article 18 claims. It followed the reasoning in Cudak and Sabeh that, in the present state of international law, immunity is not considered absolute. It argued that as the embassy was carrying out acts of a private nature in relation to its employment of the Claimant (the acts were *jure gestionis*) and the functions carried out by that employee did not fall within the exercise of public powers, then the employment dispute fell within the material scope of Regulation 44/2001 and was not barred for immunity.

The Court then turned to consider the application and scope of Article 18(2). Interestingly, it favoured a purposive approach to the interpretation of the meaning of ‘branch, agency or establishment’ in line with the Article’s underlying rationale. That rationale was, in general, to protect the weaker party to the contract by means of rules of jurisdiction that were more favourable to his/her interests. In particular, those provisions enabled an employee to sue his employer before a court which was closest or most familiar to him/her. Therefore the Court decided that, despite the public nature of the embassy, it could still be considered an establishment within the meaning of Article 18(2). Although the embassy had certain ‘public’ functions such as representing the sending state, and protecting the interest of the sending state, it still could act and acquire rights of a private nature, in particular as a result of concluding private law contracts. This was particularly the case where those contracts did not involve the exercise of public power by an individual. In addition, the embassy had a sufficient appearance of permanency and sufficient link with the subject-matter of the dispute to fall within Article 18(2). The Court therefore held that the embassy should be subject to the civil jurisdiction of Germany, and be held accountable there for matters relating to the Claimant’s contract of employment.

3.2. STATE IMMUNITY AND THE RECENT CASE LAW OF THE UK

As has been previously mentioned, the statutory law on state immunity in the UK was traditionally interpreted in a way to make it very difficult for private persons to challenge its operation. The Courts showed extreme deference to the principle of state immunity, and emphasised the importance of that doctrine for the protection of state interests. They were very reluctant to interfere in a claim for state immunity by a foreign state, and the provisions of the SIA were given a wide interpretation by the Courts. A good example is provided by the reasoning and decision in *Sengupta*

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43 Ibid., para. 49.
44 Ibid., para. 48.
45 In *Republic of Yemen v Aziz* [2005] EWCA Civ 745, Pill LJ stated at p. 1406 that ‘Section 2(3) [SIA] should, however, be read in the light of authority of long standing establishing the importance of state immunity and the importance of its not being waived except with appropriate authority.’
This case dealt with the position of an Indian national, employed as a low-grade clerical officer at the Indian embassy in London. He was precluded from bringing his unfair dismissal claim against his employer as a result of state immunity. The Court decided that the ‘embassy premises were part of the soil of the foreign sovereign state’. The dismissal of the Claimant was done through the exercise of sovereign public function and outside the jurisdiction of the Court. Any investigation into that dismissal would be an interference in the internal management of the diplomatic representation and ‘wholly inconsistent with the dignity of the foreign state’. Therefore the provisions of the SIA (here Section 16(1)) should be interpreted widely to ensure that sovereign interests were maintained.

More recently, the case law of the UK courts has reflected the more general international and EU trends towards restrictive interpretations of state immunity, to allow a greater number of private parties to be afforded jurisdiction. In Federal Republic of Nigeria v Ogbonna, the court considered the interpretation of various sections of the SIA. The case concerned a member of the diplomatic mission of Nigeria, who worked in the Nigerian High Commission in the UK. She claimed unfair dismissal against her employer and that her dismissal constituted associative discrimination under the rules in Attridge v Coleman. She also claimed that as a result of her treatment she had suffered personal injury, in the sense of harm to both her physical and mental health. Her employer claimed state immunity under the SIA. In particular the state claimed that although the proceedings concerned a contract of employment, a private act which would not normally attract state immunity (Section 4 SIA), state immunity applied because the Claimant was a ‘member of a mission’ under Section 16 SIA. It also argued that it should not be liable for the Claimant’s personal injury, despite the exception to state immunity provided in Section 5 SIA in relation to personal injury proceedings. It argued that the effect of Section 16 (combined with Section 4) was to create absolute immunity for the state in respect of matters relating to a contract of employment. This immunity therefore extended to the provisions in Section 5. The Court rejected this argument, holding that Section 5 was a free standing provision and could be engaged despite the fact that the Claimant fell within the Section 16 (1) exception. The Claimant’s personal injury claim could therefore stand.

The interpretation of the relevant provisions of the SIA was further considered in Benkharbouche. The case concerned the employment claims of a cook at the Sudanese embassy (Ms. Janah) and a member of the diplomatic staff of the Libyan embassy in

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47 Ibid., p. 228.
48 Ibid., p. 229.
51 Ms F A Benkharbouche v Embassy of the Republic of Sudan; Ms. M Janah v Libya (2013) WL 5336838.
the UK. Both of the employers claimed state immunity. In relation to Ms. Janah, the Sudanese employer claimed that although contract of employment proceedings were not normally subject to state immunity (Section 4 SIA), state immunity applied as a result of the operation of Section 4 (2)(b), as Ms. Janah was neither a national of the UK or habitually resident there at the time the employment contract was made. State immunity also applied because Ms. Janah fell within the definition of ‘members of staff of the mission’ in section 16 SIA. In relation to Ms Benkharbouche, she did not fall within the 4 (2)(b) exception, but it was argued that she was a member of diplomatic staff and therefore subject to the provisions in Section 16. The Claimants argued that the application of state immunity was contrary to Article 6 ECHR, and so the SIA should be interpreted to allow those claims to proceed. Alternatively, if it was not possible to meet this interpretation, the provisions of the Charter concerning the right to a fair trial should be applied to this case. They argued that, following the EU case law on general principles (discussed in section 1 of this article), the Court was bound to disapply domestic law in conflict with the Charter even in a dispute between private parties.

It fell first to the Court to consider whether the application of the provisions of the SIA did constitute a breach of Article 6. The Court referred to the recent jurisprudence of the ECtHR and the trend towards the interpretation of Article 6 in light of the growing international recognition of the doctrine of relative immunity. In relation to Section 16 SIA, it pointed out the distinction made at EU and international levels between the functions of embassy employees for the purposes of determining whether the imposition of state immunity was justified. In line with that jurisprudence, it held that the lack of public function attached to the Claimants’ work meant any restriction on their claims would be a disproportionate response by the respective states and a breach of Article 6. In relation to Article 4(2)(b), the analysis of the court was more circumspect. It pointed out that during the drafting of the International Law Commission’s 1991 Draft Articles on state immunity it was considered that a distinction could rationally be made between state immunity in relation to host nationals and others with no connection by residence to the host country. It asserted that this distinction could not necessarily be deemed discriminatory.52 However, it concluded that, despite these reservations, there had been an overall breach of Article 6 by allowing Sudan and Libya to claim state immunity as a bar to the employment claims.

The problem that the court then faced was attempting to interpret the SIA so as to give effect to the Article 6 rights. Under Section 3 of the Human Rights Act, the court must interpret UK legislation ‘as far as possible’ in line with Convention Rights. That interpretation might be of an ‘an unusual and far reaching character’, but it did not extend to the adoption of a meaning inconsistent with a fundamental feature of the legislation, or creating new legislation.53 This created considerable
difficulties for the Court in attempting to interpret the immunity exceptions under Sections 16 and 4 SIA in line with Article 6. The Court recognised that such an interpretation would require that the exceptions to immunity be removed, at least in certain circumstances. It argued that this would interfere with the fundamental intent behind the SIA, which was to confer immunity and restrict the right of access to court where it would otherwise be available. Furthermore, amendments to the exceptions in the SIA would ‘cross the critical line between interpretation and legislation’, because those amendments would involve the re-categorisation of some of the exceptions to immunity. This action would therefore be beyond the remit of the court, and would also upset the overall balance struck by the legislature in the design of the legislation.

As an alternative, the Court then considered whether Section 4(2)(b) and 16 SIA could be disapplied by virtue of the operation of the Charter of Fundamental Rights and Freedoms. The Claimants argued that the Charter represented an expression of the general principles of EU law. They further argued that Article 47 represented one of those general principles (the fundamental right to a fair and public hearing). Following Kıcı̇kdeveci, the Charter could have horizontal direct effect for those employment rights within the scope of EU law. As a consequence, the provisions of the SIA had to be disapplied to the extent that they conflicted with the rights under Article 47. The Court accepted that the SIA was in conflict with a right which had been recognised as a general principle of EU law, and that following Kıcı̇kdeveci, those general principles of EU law could have horizontal direct effect within the material scope of EU law. It accordingly held that it was bound to disapply those provisions of national law where they were in conflict with the general principle of right of access to a court, so far as the claims were within the material scope of EU law. Therefore, so far as the working time claims and the claims for discrimination and harassment were concerned (as these claims derived from EU law), Sections 4(2) and 16 were disapplied, and the Claimants were able to argue these claims against their employers.

On the one hand, this judgment can be seen as representing a dramatic extension of the principle of effectiveness of EU law; it appears to offer many more employment law litigants the chance to directly enforce EU fundamental rights. Indeed, if the argument of the Claimants in this case were accepted, and all the provisions of the Charter represent general principles which can have horizontal direct effect, this has the potential to allow private litigants to bypass national provisions completely. However, there are a number of points to make about these assertions. First, the Court was reluctant to accept that all of the provisions of the Charter could have horizontal direct effect without a further link with a general principle of law. It suggested that this would appear to be contrary to the intention behind the Charter, which was ‘expressed to be binding on public authorities, and hence not expressly as between individuals’. Second, it was sceptical about the direct link between general principles and horizontal

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54 Benkharbouche (n 51), para 41.
55 Ibid., para. 63.
direct effect. The Court argued that this link was not easy to reconcile with legal certainty. As general principles of law derive from case law and are unwritten in statute, it is difficult for the parties to a dispute to recognise how they might be applied, particularly where these run counter to the traditions of a particular Member State. This legal uncertainty is a special problem for private litigants attempting to work out the content of a general principle and how it might be subsequently applied. Thirdly, the particular context of this decision must be considered. As emphasised by the Court, state immunity could not be considered a fundamental right and the doctrine was subject to erosion as a matter of customary international law. Therefore, this allowed the Court to act more favourably to the Claimants than might otherwise be possible.56

Finally, it is worth considering that although state immunity is being eroded in relation to embassy staff, the position is not so clear cut in relation to employees at other state owned enterprises. For example, in relation to military establishments, there is some evidence that courts are more willing to consider disregarding immunities in relation to military personnel than was previously the case.57 On the other hand, it appears that the International Convention on Jurisdictional Immunities of States and their Properties 2004 was specifically drafted to allow immunity in relation to the employment contracts of military staff, and the guidance to the Convention stresses that issues of national security can be considered in considering whether state immunity should be upheld. There is also recent jurisprudence at EU level which suggests that even civilian personnel working at military establishments would be subject to state immunity. In the case of USA v Nolan,58 it was suggested that state immunity would have been granted in order to allow the USA to escape any obligations for collective consultation for redundancy under Directive 98/59.59

4. DIPLOMATIC IMMUNITY AND PUBLIC PRIVATE FUNCTION

In the context of state immunity, the concern is the relationship between state-employed personnel and the state as employer. In that context diplomatic immunity may be invoked to avoid jurisdiction as against diplomatic staff. By contrast, the concern of this next section is the relationship, in law, between diplomatic staff and their personal employees. Diplomatic staff who employ individuals personally can

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56 Ibid., para. 66.
57 An important development in this regard is provided by the case of Smith v Ministry of Defence, Alburt v Ministry of Defence, Ellis v Ministry of Defence, Redpath v Ministry of Defence [2013] 3 WLR 69. In this case it was decided that cases brought against the Ministry of Defence by British service personnel whilst serving in Iraq should not be struck out for immunity.
58 Case C-583/10 USA v Nolan (The Commission and the EFTA Surveillance Agency, intervening) [2013] 1 CMLR 32, para 49.
claim immunity from suit (in a similar way to the state as employer in the context of state immunity) and there is some overlap between the legal instruments which govern this kind of diplomatic (personal) immunity and state immunity as a whole. Indeed, the traditional understanding at international level was that diplomatic immunity was purely a state interest: that through diplomatic immunity a state was ‘adopting in its own right to cause of its national’.60 However, there is now considerable divergence between both political and legal attitudes to state as opposed to diplomatic immunity. There also appears to be much less agreement on the future direction of diplomatic immunity in the international community than in the field of state immunity.61 For example, despite the emergence of the UN Convention in relation to state immunity in 2004, no new international instruments have arisen in relation to diplomatic immunity since the Vienna Convention on Diplomatic Relations in 1961.

The divergence between legal attitudes towards state as opposed to diplomatic immunity can be seen as a reflection of general trends in international law. Increasingly, the state has lost exclusivity in the international legal order, and the state is no longer viewed as a sovereign entity in all its dealings (hence the erosion of state immunity). At the same time, the decline in the exclusivity of the state has coincided with a number of different ways to assert international claims. In particular, the international law on human rights has ‘opened up a clear path for the direct access of the individual to international mechanisms for the assertion of claims’.62 Diplomatic immunity accords with this move towards the individual jurisdiction of disputes as a matter of international law, and the rational for diplomatic protection appears to be steeped in the language of human rights. For example, it has been explained that diplomatic immunity exists to protect the freedom of diplomats in exercising their functions. That freedom is necessary because of the particular public function that these diplomats are exercising, but it is also necessary as a matter of human right. The diplomatic functions create a ‘special vulnerability’ amongst diplomatic agents when present in a receiving State.63 That special vulnerability means that ‘inviolability’ is necessary as a matter of personal (human) right.64


61 Indeed, different international attitudes to diplomatic immunity have recently caused a breakdown in international relations between the USA and India. The dispute arose as a result of the arrest of an Indian diplomat, Devyani Khobragade, in the USA. She was accused on visa fraud and underpaying her maid. This action resulted in number of retaliatory actions by the Indian government against US diplomats based in India. Although Khobragade was found guilty of the claims against her, she was eventually granted immunity and sent back to India without facing a jail term. J. Burke and D. Roberts, ‘Indian Diplomat Devyani Khobragade leaves US under Immunity’ in The Guardian (10 January 2014).

62 International Law Association (n 60), para 16.

63 Comments by Langstaff J in Mr Jarallah Al-Malki, Mrs Al-Malki v Ms Cherryllyn Reyes, Ms Titin Suryadi [2013] WL 5338237, at para 34.

64 Ibid.
At international level, diplomatic (personal) immunity is governed by the Vienna Convention on Diplomatic Relations 1961 (an instrument which is also relevant to the status of diplomats within state immunity). This provides that a diplomat has immunity from the civil, administrative and criminal jurisdiction of the receiving state. There are exceptions to that immunity, but these more narrowly defined than for state immunity. In particular, for the purposes of this article, there is no specific exception to immunity in relation to the conclusion of contracts of employment. There is only the provision that a diplomat does not have immunity in respect of 'any professional or commercial activity' exercised outside of his/her official functions. In relation to state immunity, the definition of state (commercial) activity has been approached expansively and this has allowed individuals to gain jurisdiction (on the basis that the state is a private rather than public employer). In the context of diplomatic (personal) immunity, the approach of the Courts has not necessarily favoured Claimant individuals in the same way. Most employees of diplomats have been outside jurisdiction because that employment has been viewed as part of the personal/commercial activity of diplomatic staff, or part of official diplomatic functions, given that those official functions include matters which are ancillary or closely incidental to those purposes. For example, in the Belgian case of Portugal v Concalves a court refused to allow a translator to sue his diplomatic employer on the basis that the contract of employment was within his official functions. A similar line has been taken in the US, as evidenced by the refusal of a court to allow a Filipino domestic servant to bring an action against her Jordanian diplomatic employer in Talbion v Mufti.

In the UK jurisdiction, there is some evidence of a relaxation of this approach. In the very recent case of Abusabib v Taddese the Court referred to a ‘spectrum’ of employment activities by diplomats. At one end of the spectrum were those employees performing services which could rightly be classed as part of, or at least ancillary, to a diplomat’s official function. Those employees (for example, personal assistants involved in official correspondence, organising travel etc.) should be considered within the scope of diplomatic immunity. At the other end of the spectrum would be a domestic worker who performs no task outside the diplomat’s home and would have such little connection with the functions of the missions that he/she could not be considered barred from bringing (employment) claims against the diplomat in a personal capacity. As the Abusabib case concerned a domestic worker who had no discernable connection to the diplomat’s official function, then diplomatic immunity could not apply.

However, the scope of diplomatic immunity was again considered in the case of Mr. Jarallah Al-Malki, Mrs. Al-Malki v Ms. Cherryn Reyes, Ms. Titin Suryadi. In this

65 (1982) 82 ILR 115 (Civil Court of Brussels).
68 Ibid., para. 31.
case, two domestic workers claimed that their diplomatic employers had denied them access to contractually agreed (minimum) wages and had discriminated against them on the grounds of their race. They further claimed that the Respondent’s assertion of diplomatic immunity was a denial of their human right to access to a court under Article 6 ECHR. It therefore fell to the Court to consider whether diplomatic immunity was a legitimate aim, and whether the action of the Court in allowing diplomatic immunity was proportionate in that regard. At first instance, Lewis J decided that diplomatic immunity pursued a legitimate aim, namely the ‘promotion of peace and comity amongst nations and enabling diplomats to discharge the sovereign functions of the sending States’.[70] However, she went on to decide that diplomatic immunity should be denied on the grounds of proportionality. She relied on the Article 6 cases on state immunity, and also the serious nature of the claims made by the Claimants in this case.

On appeal, the Employment Appeal Tribunal rejected Lewis J’s reasoning on a number of counts. First, the EAT argued that the aims of state and diplomatic immunity were separate and that they should be treated differently. Diplomatic immunity was a personal immunity which existed to address the special vulnerability of foreign representatives. Without that immunity, diplomats would be unable to pursue their function. As a result, the inviolability attached to diplomatic immunity was necessary stronger than that attached to state immunity. Second, the EAT argued that state immunity was subject to greater restrictions in law than diplomatic immunity, and those restrictions were a matter of international agreement. It was this international agreement which tipped the scales in the Cudak and Sabeh El-Leih cases towards a finding that allowing state immunity was disproportionate.[71] There was no such international agreement in relation to diplomatic immunity and there should thus be no automatic reliance on the state immunity cases in relation to Article 6. Finally, the EAT disagreed with the trial judge, that the seriousness of the alleged offences served to take the employment outside of the official functions of the diplomat. The EAT argued that the seriousness or otherwise of a particular action was irrelevant to whether the claims fell within the scope of diplomatic immunity. The categorisation of the employment contracts for the purposes of immunity was necessarily prior to a consideration of the facts of the case itself. As a result, the EAT concluded that diplomatic immunity here followed a legitimate aim, and that the interference with the rights under Article 6 was in accordance with the law (the Diplomatic Privileges Act 1964 which incorporated the Vienna Convention into UK law). This interference was therefore proportionate.

This case is interesting because of the way that the public/private boundary is delimited in the context of diplomatic immunity (as opposed to state immunity). The first element to consider is that diplomatic immunity is treated as a personal right

[70] Ibid., para. 31.
[71] Ibid., para. 39.
which achieves close to human rights status. As a result, when diplomatic immunity is considered in the context of another fundamental right, namely Article 6 ECHR, it can be given sufficient weight to deny diplomatic employees access to the court system. Second, the case illustrates that the public functions carried out by a diplomat appear to elevate his/her personal status. This heightened status can be used to deny a diplomatic agent’s employees jurisdiction to bring claims. This appears to be a negative development in the use of the public/private divide as far as employment law is concerned. This use of the public function to elevate private status appears to be a negative development in the use of the public/private divide as far as employment law is concerned. This use of the public function to elevate private status appears to run counter to the (private and public) aims of employment law: to ensure protection for workers from the excessive exertion of private, and indeed public, power. It simply allows the stronger party to gain further strength by having access to a justificatory regime which is outside the weaker party’s orbit. The upshot for Claimants is considerable injustice, because court access depends on the identity of an employer rather than the existence or strength of employment claims.

It is worth noting that diplomatic immunity is not the only field in which the merging of public and private function has a deleterious effect on those employment law is designed to protect. This merging of public/private function has also been used to justify derogations from the laws on discrimination in employment. A good example is provided in the context of age discrimination, where individual actors (employers) have been able to rely on what are essentially public justifications to deny individuals access to employment rights. In the EU, provisions on age discrimination appear under the ETD. These provisions permit derogations from direct discrimination between workers (as well as indirect discrimination). In the ETD, differences in treatment between workers on the grounds of age can be justified for a number of ‘legitimate reasons’ under Article 6(1): ‘employment policy, labour market and vocational training objectives’. These legitimate reasons must be ‘objectively and reasonably justified’ and the means for achieving those aims must be appropriate and necessary. A number of acceptable conditions are given, which essentially fall within the ambit of the social policy of Member States: (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection; (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment; and (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

At EU level, the case of Odar v Baxter Deutschland GmbH72 demonstrates how private bodies can rely on public aims to justify measures which are discriminatory against individual employees. In the Odar case, the CJEU was asked to decide whether

72 Case C-152/11 Odar v Baxter Deutschland GmbH [2013] 2 CMLR 13.
an occupational pension plan operated by the Respondent company breached the rules on age discrimination under the ETD. This occupational pension scheme provided for a less advantageous calculation of compensation for workers older than 54. The Court found that the rules of the scheme were broadly in line with the social policy aims of the German state. They pursued the legitimate aim (expressed by the government) of protecting younger workers and facilitating their integration into employment. They were also appropriate and necessary to achieve that aim. They were appropriate and necessary because those older employees affected by the lower compensation scheme would have the option of claiming an occupational pension and would also be entitled to one half of the standard formula compensation in any event. The relationship of the private rules with public aims therefore justified the discriminatory treatment in this case.

In the UK, the case of *Seldon* was decided on similar grounds. In this case, the Claimant was required to retire when he reached the age of 65, according to a clause in his partnership agreement. The Respondent, a solicitors firm, accepted that he had been differentially treated, but argued that this treatment was objectively justified under Regulation 3 of the Employment Equality (Age) Regulations 2006 (AR) which implemented Article 6 ETD. The Supreme Court referred to the general wording of Regulation 3 which had been sanctioned as consistent with the aims of the ETD in a previous case, referred to as the *Heyday* judgment. In the *Heyday* judgement, it was decided that the width of that wording was not a problem, so long as it was understood that justifications under the scheme of Union age discrimination provision must be within the realm of social policy and have a 'public interest' nature (rather than be purely individual reasons). This did not rule out national rules which recognised a certain 'degree of flexibility for employers'.

In the *Seldon* case, the *Heyday* judgement was interpreted as meaning that Regulation 3 legitimately gave employers the flexibility to choose which objectives to pursue to justify age discrimination, provided that: (i) those objectives counted as legitimate objectives of a public interest nature; (ii) were consistent with the social policy aims of the state; and (iii) the means used were proportionate, that is both appropriate to the aim and reasonably necessary to achieve it. The Supreme Court found that the accepted justifications put forward by the Respondent satisfied all of these criteria. The first justificatory aim was concerned with staff retention: that compulsory retirement was necessary to ensure that associates were given the opportunity to take on partnership after a reasonable time. Like the second aim put...

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74 These Regulations have now been repealed, and the age discrimination provisions are included in the Equality Act 2010.
76 Ibid., para. 46.
forward (that compulsory retirement promoted efficient workforce planning), this was directly related to government’s legitimate social policy of sharing out professional opportunities between generations. The third aim of limiting the need to expel partners by means of performance management, was directly related to the aim of promoting ‘dignity’ for workers. It was argued that avoiding the need for costly and divisive disputes about capacity or underperformance in the name of ‘dignity’ was a legitimate social policy aim according to the jurisprudence of the EU. The Claimant’s case of age discrimination therefore failed.

5. CONCLUSION

The public/private divide acts as a ‘background motif’ to the whole of employment law. It deeply influences both its context and its application. In terms of context, employment law is not completely private (the public rules which affect it being extensive and often politically motivated), but nor is it completely public either (it revolves around the adjudication of private disputes). It exists at the public/private divide. In terms of application, the public/private divide is an ‘essential ingredient in the grounds of decision’ in many employment disputes. As such, the language of the public/private divide can be seen as a useful analytical tool; helpful in deciding which rights should be applied in a particular scenario. On the other hand, the fluidity of the public/private divide can be a problem in the enforcement of employment rights. From the most sceptical viewpoint, the public/private divide can be seen as an ‘after-the-fact rhetorical device used to justify political conclusions’.

The rules on immunity examined in this article provide a very good means through which to assess the development of the public/private divide in (EU) employment law. These rules on immunity are essentially public rules which have, in the past, prevented individual employment Claimants from having their claims heard. However, in the context of state immunity at least, there has been a discernible trend in recent years towards the relaxation of state immunity rules to allow Claimants to bring their employment law claims to court. In particular, it is now possible for the public aims of state immunity to be balanced with the private rights and aims of Claimants. This balance has been considered in the context of Article 6 ECHR. Claimants have successfully argued that the application of rules on state immunity disproportionately affect their (private) rights to court access under Article 6. This balance has also been considered in light of the entry into force of the Charter as a matter of EU law. In this context, rights under the Charter (and particularly Article 47) have been

77 Seldon (n 73), para. 67.
79 Ibid.
80 Ibid., 1362.
Lisa Rodgers

successfully put forward to allow state immunity rules at national level to be set aside. These developments represent a (modest) victory for individual Claimants and for the effectiveness of EU employment law as a whole. Within these developments lies a recognition of the private nature of some (state) public actions, which therefore need to be assessed in a similar way to other private actions if the aims of employment law are to be met.

However, the development of diplomatic (as opposed to state) immunity has not proceeded in the same way. In the context of diplomatic immunity, the consideration is the assignment of public function to private persons (rather than the assignment of private functions to public bodies in the context of state immunity). Diplomatic immunity is considered a private right, albeit imbued with public function. The balance of diplomatic immunity and Article 6 rights therefore amounts to a balance between two fundamental rights of a private nature. There is no public means to decide in favour of the Claimant’s rights. In this context, the existence of employment law at the public/private divide is a disadvantage to Claimants seeking access to a court and a hindrance to the effectiveness of EU law. In fighting diplomatic immunity, Claimants are up against both public and private power, and this makes an employment law challenge to those actions impossible. This development is not out of line with other developments in EU law, but it rather unjust for employment law Claimants. It is unjust because the ability to claim relies on the identification of a Claimant’s employer rather than the validity of the claims themselves. Finally, whilst diplomatic immunity holds strong, there is the possibility that states will manipulate this immunity to serve state goals in light of the erosion of the state immunity doctrine. Although the rights under diplomatic immunity are private, their public context means that these rights are not ring-fenced for eternity. The public/private boundary is wide and fluid and is easily crossed.
THE COURT OF JUSTICE OF THE EUROPEAN UNION AND TRANSFERS OF UNDERTAKINGS
IMPLICATIONS FOR COLLECTIVE LABOUR RIGHTS

Dr Rebecca Zahn*

Abstract

The Acquired Rights Directive has been the subject of much litigation before national courts and the Court of Justice of the European Union since it was adopted in 1977. Its underlying purpose has been to safeguard employees’ rights in cases of transfers of undertakings. The CJEU’s decision in Case C-426/11 Alemo-Herron v Parkwood Leisure Ltd, Judgment of 18 July 2013, however, marks a significant shift in the CJEU’s approach to the Directive from one which seeks to protect employment rights in the case of a transfer to one which requires a balance to be struck between the interests of the transferee and the employee. In doing so, the judgment has the potential to have serious ramifications for British and European labour law.

Keywords: collective labour law; European labour law; trade unions; transfers of undertakings

1. INTRODUCTION

The Acquired Rights Directive (ARD) has been the subject of much litigation before national courts and the Court of Justice of the European Union (CJEU) since it was adopted in 1977. Its underlying purpose has been to safeguard employees’ rights in the cases of transfers of undertakings. The CJEU’s decision in Alemo-Herron v Parkwood Leisure, however, marks a significant shift in the CJEU’s approach to the Directive

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from one which seeks to protect employment rights in the case of a transfer to one which requires a balance to be struck between the interests of the transferee and the employee. The judgment has the potential to have far-reaching consequences for British collective labour law and European labour law. This case note first explores the facts of the case and puts these into the context of relevant legislation and case law before presenting the Opinion of the Advocate General and the CJEU. A final section analyses the effects of the judgment on British industrial relations and places the judgment in the context of the CJEU’s recent jurisprudence in the sphere of collective labour law.

2. THE FACTS

The facts of the case centre on the applicability of a collective agreement following the transfer of an undertaking from the public to the private sector. In 2002 Lewisham London Borough Council contracted out its leisure services to CCL Limited (CCL), a private sector employer, who in turn sold the business to another private sector employer, Parkwood Leisure Ltd (Parkwood), in May 2004. All employees of the Council working in leisure services had their contracts of employment transferred first to CCL and then Parkwood by virtue of the Transfer of Undertakings (Protection of Employment) Regulations 1981. The applicability of TUPE to both transfers was not disputed.

While working for the Council, a clause in all employees’ employment contracts provided that terms and conditions of employment as well as rates of pay were set by the National Joint Council for Local Government Services (the NJC) which comprises local authority employers and relevant trade unions as its members. Neither CCL nor Parkwood are, or can be, represented on the NJC by virtue of their status as private sector employers. A collective agreement setting rates of pay from 1 April 2002 until 31 March 2004, and negotiated under the auspices of the NJC, applied during the period when CCL ran the Council’s leisure services. Between March and 4 June 2004 NJC negotiations took place which resulted in a collective agreement setting rates of pay (and pay increases) to be applied from 1 April 2004 until 31 March 2007. The collective agreement was thus agreed by the NJC after the conclusion of the transfer to Parkwood in May 2004 but was to apply retrospectively to before the transfer taking place. Parkwood refused to grant the pay increases due under the collective agreement. Mr. Alemo-Herron, supported by his trade union

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4 NJCs provide a forum for industry-wide collective bargaining which takes place at a national level; in this case between local authorities and relevant trade unions. Collective agreements negotiated by the NJC apply to all workers in the sector who work for local authorities.
UNISON who was party to the NJC, brought a claim for unauthorised deductions from his wages contrary to Section 13 of the Employment Rights Act 1996 in the Employment Tribunal (ET).

3. THE LEGAL CONTEXT

The facts of the case must be considered in the context of differing interpretations given to TUPE and the ARD by the CJEU and the UK courts. In particular, Article 3(1) of the Directive has the effect of transferring employees’ contracts of employment from the transferor to the transferee. Article 3(2) requires the transferee to observe ‘the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.’ Article 7 of the Directive permits Member States ‘to apply or introduce laws, regulations or administrative provisions which are more favourable to employees.’

Article 3(2) has not been clearly transposed into TUPE. Under Regulation 6 of TUPE, a collective agreement was to transfer to the transferee as if ‘the transferee were a party to the original agreement.’ Moreover, under the same provision, a collective agreement:

[I]n its application in relation to the employee, shall, after the transfer, have effect as if made by or on behalf of the transferee with that trade union, and accordingly anything done under or in connection with it, in its application by or in relation to the transferor before the transfer, shall, after the transfer, be deemed to have been done by or in relation to the transferee.

A transferee could thus potentially be bound by obligations arising from a collective agreement even if it had not been involved in its negotiation. This difference in drafting is also evident in the interpretation given to Article 3(2) and Regulation 6

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5 The provisions at issue in this case are identical to those in the earlier Regulations and case law preceding the 2006 Regulations is applicable. As the 1998 Regulations applied to the facts of the case and were considered by the Supreme Court (at paras. 2 and 13) and the CJEU (at para. 21), this article will use TUPE to refer to the 1998 Regulations. All references to regulations are to those in force at the time the transfer from CCL to Parkwood took place.


7 This provision was widened by Directive 98/50: ‘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 same wording is now contained in Article 8 of Directive 2001/23.
in the case law. In *BET Catering Services Ltd v Ball*\(^8\) and *Whent v T Cartledge Ltd*,\(^9\) the UK courts took a dynamic approach\(^{10}\) to the transfer of collective agreements. In *Whent*, where the facts are not dissimilar to those in the present case, the Employment Appeal Tribunal (EAT) found that ‘once it is accepted that [TUPE] applied and that there has been no relevant subsequent variation in the contract of employment, the issue becomes simply one of the true meaning\(^{11}\) of the clause contained in Whent’s contract of employment which provided for the incorporation of the collective agreement\(^{12}\) negotiated by the NJC.\(^{13}\) As there had been no variation in the contract of employment and the clause incorporating the collective agreement fulfilled the relevant criteria, the EAT saw no reason why the collective agreement should not continue to apply following the transfer.\(^{14}\) Comparing this approach to the case at hand, one can only agree with Lord Hope when he points out that ‘had this issue been solely one of domestic law, the question would have been open only to one answer’;\(^{15}\) namely, that Parkwood could be bound by the collectively agreed terms negotiated by the NJC.

The validity of the UK courts’ dynamic interpretation must, however, be questioned in light of the CJEU’s decision in *Werhof*.\(^{16}\) In *Werhof*, the CJEU first looked at the wording and objective of the Directive and concluded that the text ‘was not intended to protect mere expectations to rights and, therefore, hypothetical advantages flowing from future changes to collective agreements.’\(^{17}\) Transferees could therefore not be ‘bound by collective agreements other than the one in force at the time of the transfer.’\(^{18}\) The CJEU then considered the consequences of adopting either a dynamic

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\(^8\) Unreported, 28 November 1996.


\(^10\) The dynamic approach suggests that a clause incorporating a collective agreement transfers under TUPE and continues to bind the new employer even if it is not a party to the collective bargaining process.

\(^11\) Per Judge Hicks QC at para. 9.

\(^12\) Collective agreements in the UK are presumed ‘not to have been intended by the parties to be a legally enforceable contract’ (see s179 Trade Union and Labour Relations (Consolidation) Act 1992). As a result, a collective agreement can only produce normative effects on the employment relationship if it has been incorporated into the individual contract of employment. The most common way this is done is through a ‘bridging term’. For more detail, see B. Hepple, *Individual Labour Law* in G. Sayers,* Industrial Relations in Britain*, Blackwell, Oxford, 1983.

\(^13\) In this case the relevant NJC was the National Joint Council for Local Authorities’ Administrative, Professional, Technical and Clerical Services.

\(^14\) This can be contrasted with *Ackinclose v Gateshead Metropolitan Borough Council* [2005] IRLR 79, where the term incorporating the collective agreement made reference to a specific agreement only and it was thus held that the transferee was not bound by successor agreements which had not been incorporated.

\(^15\) At para. 7.


\(^17\) Para. 29.

\(^18\) Ibid.
or static interpretation in light of the right to freedom of association as protected by the European Convention on Human Rights (ECHR):

If the 'dynamic' interpretation [...] were applied, that would mean that future collective agreements apply to a transferee who is not party to a collective agreement and that his fundamental right not to join an association could be affected. On the other hand, the 'static' interpretation [...] makes it possible to avoid a situation in which the transferee of a business who is not party to a collective agreement is bound by future changes to that agreement. His right not to join an association is thus fully safeguarded.19

On that basis, the Court found in favour of the static interpretation. It is not clear from the judgment, however, whether the decision in Werhof specifically prohibits a dynamic interpretation of the Directive or whether it applied only to the facts in Werhof. The question that thus arose for the UK courts in Alemo-Herron was how the CJEU’s judgment in Werhof was to be reconciled with its domestic case law.

4. DOMESTIC PROCEEDINGS IN ALEMO-HERRON

At first instance, the ET dismissed Alemo-Herron’s claim in reliance on the interpretation given in Werhof by holding that a collective agreement only continued to apply after a transfer until it was terminated or replaced by another agreement. Once this had occurred in the present case in June 2004, Parkwood was no longer bound to abide by rates of pay set by the NJC. The ET’s decision was overturned by the EAT,20 which applied a dynamic interpretation to TUPE by recognising that rates of pay may be set by a third party such as the NJC, even if the employer was not a party to that body. According to the EAT, such an approach followed not only from UK case law21 on TUPE but also from the common law principle of freedom of contract whereby parties can agree to involvement in the employment relationship of a third party. The Court of Appeal22 disagreed and, on the basis of the CJEU’s decision in Werhof, restored the decision of the ET.

The Supreme Court was therefore tasked with resolving this clash between domestic and CJEU case law on the correct interpretation of TUPE. In making a reference to the CJEU, the Supreme Court questioned whether it was ‘prohibited from extending to employees, in the event of a transfer of an undertaking or business,
“dynamic” protection as a result of the application of domestic contract law. In essence, therefore, the Supreme Court was seeking guidance on whether the UK was allowed to continue to apply a more favourable system towards employees – as Article 7 of the Directive suggests – than that required under EU law, or whether it was bound to adopt a static interpretation of the relevant provision of TUPE. In addition, the Supreme Court questioned whether a dynamic interpretation would breach Parkwood’s right to freedom of association under Article 11 of the ECHR.

5. THE ADVOCATE GENERAL’S OPINION

Advocate General Cruz Villalón issued his opinion on 19 February 2013. He clarifies from the outset that he prefers an interpretation by virtue of which ‘there is no obstacle to Member States allowing the transfer of dynamic clauses referring to future collective agreements on the basis of Directive 2001/23.’ In doing so, he makes reference to the CJEU’s recognition of the Directive as intending to achieve only ‘partial harmonisation’ rather than ‘a uniform level of protection throughout the [Union] on the basis of common criteria.’ This approach is also reflected in Article 7 of the Directive, which not only permits Member States to apply more favourable provisions than those contained in the Directive but, in its revised form, encourages the promotion of collective agreements as a source of preferential terms. For the Advocate General, the decision in Werhof was justified on the basis of the particular facts of the case and did not represent a general rejection of dynamic clauses. He therefore concludes that Member States are not precluded, by virtue of the Directive, ‘from allowing dynamic clauses referring to existing and future collective agreements that are freely agreed between the parties to a contract of employment to be transferred as a result of the transfer of an undertaking.’

As to the question of the compatibility of a dynamic interpretation with Article 11 ECHR, the Advocate General argued that freedom of association was not at issue in this case as Parkwood was not being forced to join or to refrain from joining the NJC; due to its status as a private sector employer, Parkwood was not capable of joining the NJC. Article 11 ECHR was not therefore applicable. Instead, the Advocate General examined whether the facts in Alemo-Herron conflicted with Parkwood’s fundamental right to conduct a business under Article 16 of the Charter of Fundamental Rights.

23 Para. 18.
24 Para. 20.
26 See paras. 28–31. In Werhof the applicant’s contract of employment referred to a specific collective agreement only. In addition, German law expressly limited the validity of collective agreements in force at the time of a transfer to one year following the transfer.
27 Para. 41.
The Court of Justice of the European Union and Transfers of Undertakings

(CFR). He concluded that Article 16 CFR had not been breached in this case because the UK’s flexible labour law system in which collectively agreed terms only become legally binding upon their incorporation into the individual employment contract, permitted for dynamic clauses to ‘be renegotiated and amended by the parties at any time during the term of the employment contract.’28 The freedom to contract – an essential element of the right to conduct a business – was thus upheld, which in turn preserves the right granted to businesses under Article 16 CFR.

6. THE CJEU’S JUDGMENT

The CJEU, in a very short judgment issued on 18 July 2013, began its analysis by looking at the underlying aim of Directive 77/187. According to the Court, the Directive not only provides protection to employees in the event of a transfer but also seeks to balance the interests of the transferee with those of the employees. In particular, ‘the transferee must be in a position to make the adjustments and changes necessary to carry on its operations.’29 A dynamic interpretation of Article 3(2) of the Directive would ‘limit considerably the room for manoeuvre necessary for a private transferee to make [significant adjustments and changes to working conditions which are required in the case of the transfer of an undertaking from the public to the private sector]’30 and would upset the balance between the interests of the transferee on the one hand and the employee on the other.31 The CJEU found further support for this conclusion in relying on Article 16 CFR, which makes it:

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\text{[A]pparent 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.}\]

As Parkwood was not represented on the NJC, it could not influence the outcome of the collective agreement. This was deemed to be contrary to its rights under Article 16 CFR. Moreover, Member States were not entitled to rely on Article 7 of the Directive in order to justify a dynamic interpretation as such an approach was ‘liable to adversely affect the very essence of the transferee’s freedom to conduct a business.’33 In support of this claim, the CJEU drew an analogy with its judgment in *Deutsches Weintor*34 a

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28 Para. 56.
29 Para. 25. See also *Werhof* para. 31.
30 Para. 28, with insertion from para. 27.
31 Para. 29.
32 Para. 33.
33 Para. 36.

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case in which a balance had to be struck between rules protecting public health and the freedom to conduct a business. The CJEU had found that an absolute prohibition on a wine producer labelling its wines as being beneficial to a good state of health did not affect the producer’s right under Article 16 CFR. However, the Regulation at issue in Deutsches Weintor aimed at harmonising rules across the Member States on food labelling and did not give Member States the same discretion as that contained in Article 7 of Directive 77/187; which in any case seeks to approximate laws – so to reduce but not abolish differences between the Member States – on the transfer of undertakings. The usefulness of the CJEU’s analogy must therefore be questioned. Moreover, the CJEU in Alemo-Herron did not consider the CFR’s counter provisions contained in Article 12 (freedom of association) or Article 28 (right of collective bargaining). It concluded instead that Member States were precluded from allowing a dynamic interpretation of Article 3(2) of the Directive in cases where the transferee was not represented in the collective bargaining process.

7. ISSUES RAISED

The CJEU’s decision in Alemo-Herron is significant for a number of reasons for UK and European labour law. The judgment marks a clear shift in the CJEU’s interpretation of the ARD. Whereas previous case law has focused on the need for the protection of workers’ rights, Alemo-Herron strikes a balance between the interests of the worker and the transferee. From a British perspective, the judgment poses a challenge to British trade unions and undermines the voluntarist nature of British collective labour law. In the context of European labour law, Alemo-Herron – much like the Viking and Laval line of jurisprudence – fuels ‘a general pessimism about
the prospects for collective labour law in the EU. Each of these issues is discussed in turn in the following sections.

7.1. IMPLICATIONS FOR BRITISH INDUSTRIAL RELATIONS

The CJEU’s decision in Alemo-Herron has the potential to have far-reaching consequences for the British industrial relations system and has been described as presenting a ‘forthright assault on collective bargaining.’ From a legal perspective, the judgment undermines the very nature of British collective labour law in which collective agreements become enforceable through their incorporation – either express or implied – in the individual employment contract. As the Advocate General recognised in his Opinion, such an approach ‘gives the parties a great deal of freedom, even where they agree to be bound by future agreements, since, […] there is nothing to prevent them from renegotiating the clause in the contract that refers to the collective agreement.’ The same reasoning which is based on ordinary principles of contract law can be found in the Supreme Court’s judgment. In requiring the transferee to be able to participate in the NJC before it could be bound by the collective agreement, the CJEU failed to understand the inherently voluntarist and contractual nature of British collective labour law. While the transferee in this case may not have been able to participate in the collective bargaining body, it was not prevented from renegotiating the clause in the contract with the relevant trade union. The transferee’s freedom of contract was therefore assured. However, following the CJEU’s judgment, trade unions and employees can no longer rely on long-standing principles of incorporation of collective agreements in cases of transfers of undertakings.

Moreover, the transferee is free to decide whether to purchase the undertaking. It is clear at the time of the purchase whether terms and conditions of the employment contract are regulated by a collective agreement. The transferee is therefore aware of the potential obligations arising from a transfer and has a choice as to whether to proceed with the transfer. It is difficult to see how the transferee’s freedom to conduct a business is breached if he is required to abide by collective agreements – even ones

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40 Hayes n 37.
41 Ibid., n 12.
43 Para. 36.
negotiated in the future – if he is aware of such an obligation at the time of deciding to take on the transfer.

The CJEU’s decision has significant implications for British trade unions and is of ‘fundamental importance’ for several hundred thousand employees whose rights have been weakened as a result of the judgment. Trade union membership in the UK has declined rapidly since its peak in 1979 and the vast majority of trade union members are concentrated in the public sector where collective agreements are negotiated at a sectoral level. In the private sector, most collective agreements are concluded at company level and often ‘offer no more than a diminished, patchy and highly localized protection to a small and shrinking minority of workers.’ The austerity measures adopted in the UK in response to the current economic crisis focus in part on reducing the size of the public sector. As a result, public services – as in Alemo-Herron – are being transferred to the private sector. It is likely that the appetite for such transfers will increase following the CJEU’s decision in Alemo-Herron. Transferees will no longer be required to abide by collectively agreed terms and conditions of employment concluded after the transfer has taken place where they have not been involved in their negotiation; a scenario which is most likely to occur in transfers between the public and the private sector. The judgment thus arguably removes any uncertainty over future employment costs for private sector employers wishing to bid for public service contracts. In future, once a transfer has occurred, employees will only benefit from collectively agreed terms and conditions of employment if the transferee is willing to recognise and to bargain with the relevant trade union. Recognition of a trade union by an employer in the UK can occur either on a voluntary basis, or, since 1999, within the framework of a statutory procedure.

49 See NUGSAT v Albury Bros Ltd [1978] IRLR 504.
50 This was introduced by the Employment Relations Act 1999 and is contained in Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992.
However, there is no right to recognition as such and, even if recognition occurs, active negotiation is not assured. It is therefore unlikely that employers in the private sector – where trade union membership is already low – will agree to collective bargaining. With an increasing number of services being transferred from the public to the private sector, British trade unions are facing a difficult challenge to secure their relevance in the labour law system.

In response to the judgment, the British government – who supported a static over a dynamic interpretation throughout the proceedings – has amended TUPE by clarifying that ‘any rights, powers, duties and liabilities in relation to any provision of a collective agreement’ will not transfer to the transferee if the collective agreement is concluded after the date of the transfer if ‘the transferee is not a participant in the collective bargaining for that provision.’ In addition, terms and conditions validly incorporated from collective agreements can be varied one year after the transfer. According to the Explanatory Memorandum to the amendments, ‘this will enable employers and employees to consider changes that are mutually beneficial, whilst still affording some protection to employees.’ While the amendments comply with the CJEU’s judgment in Alemo-Herron, they – much like the CJEU’s judgment – no longer reflect the spirit of the ARD. Moreover, the UK’s amendment of TUPE denies employees who are members of a trade union their right to be effectively represented by their union through collective bargaining. Collective bargaining is recognised as an essential form of worker representation and has been described as ‘the most effective means of giving workers the right to representation in decisions affecting their working lives, a right which is or should be the prerogative of every worker in a democratic society.’ It is contained within the ILO’s Convention No. 98 – to which the UK is a signatory – and has been recognised by the European Court of...
Human Rights as constituting an essential element of Article 11 of the ECHR.\textsuperscript{57} The government’s amendment of TUPE denies those workers who are members of a trade union in the public sector their right to collective bargaining in the case of a transfer of undertaking. The decision in \textit{Alemo-Herron} which triggered the change to TUPE has therefore had the undeniable effect of further narrowing the scope of collective labour rights in the UK and may yet be open to challenge.

7.2. IMPLICATIONS FOR EUROPEAN LABOUR LAW

The CJEU’s judgment also has important ramifications for European labour law. In particular, the judgment in \textit{Alemo-Herron} displays the CJEU’s willingness to limit the room for manoeuvre for Member States to safeguard workers’ rights when implementing a Directive. In its judgment, the CJEU makes it clear that Member States, in this case, are not entitled 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.’\textsuperscript{58} A similar approach can be seen in the \textit{Laval} case where the CJEU interpreted Directive 96/71 as providing a maximum rather than a minimum level of protection to posted workers.

Directive 77/187 was adopted with the specific aim of protecting employees’ rights.\textsuperscript{59} This underlying rationale has, however, been unilaterally redefined by the CJEU and the significance of Article 7 as one which grants Member States discretion in their interpretation of the Directive has been set aside. As Hayes points out, ‘now, the CJEU is prepared to set the Directive as a mere starting point from which new balances may be struck, and to use rights set out in the CFR as a mechanism to assert their own judicial will.’\textsuperscript{60} By turning the Directive from one which sets minimum standards for the approximation of laws to one that limits the amount of protection which employees can expect in cases where there is a conflict with economic rights, the CJEU is narrowing ‘the right of Member States to determine their national labour regimes’\textsuperscript{61} and, in repeatedly doing so in its case law, is threatening ‘the social compromise for integration.’\textsuperscript{62}

\textsuperscript{57} See \textit{Demir and Baykara v Turkey} [2009] 48 EHRR 54 where the European Court of Human Rights held at para. 154 that ‘the right to bargain collectively […] has, in principle, become one of the essential elements of […] Article 11 of the Convention’, which enshrined a fundamental right to collective bargaining in the ECHR. See also K.D. Ewing and J. Hendy, ‘The Dramatic Implications of Demir and Baykara’ (2010) \textit{Industrial Law Journal} 2.

\textsuperscript{58} Para. 36.


\textsuperscript{60} Hayes n 37.


On a broader level, the judgment entrenches the CJEU’s recent willingness to adjudicate on collective labour rights to the detriment not only of trade unions and workers, but also of national labour constitutions. The CJEU has historically refrained from pronouncing on collective labour rights, deferring instead to their protection at a national level. In addition, it was long recognised that ‘EU measures [on collective labour law] incorporate in their substantive provisions principles of European collective labour law reflecting national experience.’ Thus, in Albany, the CJEU while recognising that ‘certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers’, found that provided collective agreements pursue social objectives in line with the EC Treaty, such agreements would fall outside the scope of competition law. Writing in reaction to the decision, Rödl argues that:

The outcome of the case could not correctly have been otherwise. It would be unthinkable to interpret national collective agreements as [anti-competitive agreements], which would then only be valid if they exceptionally did not affect the Common Market. It would have meant a blatant revocation of the social compromise for integration which would have demolished the European integration project politically, if the Court of Justice had annihilated the foundation of every national labour constitution by way of attacking collective agreements.

Precisely such a revocation however occurred in the CJEU’s judgments in Viking and Laval. As Fudge explains, ‘the balance [the CJEU] has struck [in these cases] not only encroaches substantially on the workers’ fundamental freedoms, it narrows the right of member states to determine their national labour regimes.’ A similar argument can be made in the case of Alemo-Herron. In applying its case law in Werhof to very different factual circumstances in Alemo-Herron, the CJEU has not only produced a ‘spectacular effect’ but has also moved beyond the approximation of Member State laws in the area of transfers of undertakings to harmonisation. Thus, collective agreements concluded after a transfer can never be binding on a transferee where it has not been involved in its negotiation even if national laws accept the validity of such a situation. Such an interpretation stands in stark contrast to Article 151 of the Treaty on the Functioning of the European Union which requires the Union and Member States, when implementing measures, to ‘take account of the diverse forms of national

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63 For a discussion of this concept in a national and European context see Rödl ibid from p. 371 onwards.
64 Bercusson n 39 at p. 289.
66 Para. 59.
67 Rödl n 62 at p. 412.
68 Fudge n 61 at p. 264.
practices, in particular in the field of contractual relations’. While the Advocate-General in Alemo-Herron recognised the ‘flexible and “contractual” nature’ of the British labour relations system, the CJEU failed to take such nuances into account. The judgment therefore presents ‘a flagrant breach of the principle of the protection of member state labour constitutions against European law’.  

8. CONCLUSION

The CJEU’s decision in Alemo-Herron has been welcomed by many in the UK as clarifying the law on the transferability of obligations under collective agreements while also providing certainty for businesses seeking to bid for public sector services. For trade unions and employees, however, the judgment must be seen as a blatant attack on their collective labour rights. Taken together with the amendments to TUPE, the judgment’s prohibition of dynamic clauses has the undeniable effect of severely restricting the contractual freedom given in British labour law to the parties to a collective agreement. It also changes the underlying rationale of the ARD. By using the CFR as a tool to introduce a requirement for balancing employee and transferee interests, the CJEU has opened up the possibility that such an argument could be applied to all provisions in the ARD to the detriment of employee rights. The case will return to the Supreme Court for a final decision which is likely to relieve Parkwood of any obligations under the collective agreement. For the future of European labour law, the judgment is ‘deeply problematic’ not only because it demonstrates the CJEU’s willingness to use the CFR to restrict collective labour rights but also because it could ultimately ‘constitute a problem for European integration itself, [by feeding] scepticism about Europe as a project.”

70 Rödl n 62 at p. 413.
71 Prassl n 37 at p. 445.
THE COURT AND THE CHARTER
A ‘CONSISTENT’ INTERPRETATION OF
FUNDAMENTAL SOCIAL RIGHTS AND PRINCIPLES

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Abstract

Starting from the judgment of the Court of Justice of the European Union, Association de médiation sociale, of January 2014, this contribution deals with some important issues, such as the distinction between rights and principles protected by the Charter of Fundamental Rights, and, above all, their field of application. With reference to the latter issue, a broad interpretation of Article 51, paragraph 1, of the Charter is suggested, according to which its provisions ‘are addressed to the institutions, bodies, offices and agencies of the Union… and to the Member States only when they are implementing Union law’. Under this interpretation, the rights and principles are applicable in the formation of European Union law, regardless of the field covered by secondary legislation. With reference to the national systems, even the connection with EU law has to be understood in a broad sense, so that the rights and principles shall be respected or observed when Member States are implementing all the secondary sources of the Union and not only those relating to the legal subject to which the right or principle specifically refers.

Keywords: Charter of fundamental rights; EU system; field of application; national systems; principles; rights

1. INTRODUCTION

This contribution considers the judgment of the European Court of Justice of 18 January 2014, Association de médiation social v Union Local des Syndicats CGT, C-176/12† as the right occasion to deal with some important issues that go far beyond

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† See B. Caruso, V. Papa, I percorsi “accidentati” della Carta dei diritti fondamentali dell’UE… Eppur la talpa scava, Rivista giuridica del lavoro, 2014, 2, pages 184 ff; A. Alaimo, Avvocati generali e
the interpretation of Article 27 of the Charter of Fundamental Rights on the right to information and consultation, which is at the root of that judgment. In particular, two different issues seem to be crucial in order to understand the ‘potentiality’ of the social provisions of the Charter: a) the field of application of those provisions; and b) the distinction between fundamental rights and principles.

As will be clearer hereafter, these two issues are strictly linked each other. Notwithstanding, the distinction between rights and principles is still very important, the field of application of both the rights and principles is the same and therefore the related problems in the end are quite similar. Three categories of rights and principles will be proposed by looking at the wording of the norms, and a broad interpretation of the field of application of the Charter’s provisions will be suggested, although it will be demonstrated that this interpretation is respectful of the competences of the European Union and of the Member States. As a matter of fact, a broad interpretation of the field of application does not necessarily cause an alteration of the separation of competences provided by the Treaties. Finally, this contribution will focus on the effects that this interpretation has on the EU legal system and on the legal systems of Member States.

2. THE FIELD OF APPLICATION OF UNION LAW: THE THREE UNSATISFACTORY CATEGORIES OF PRINCIPLES AND RIGHTS.

Now it is time to carry out an in-depth analysis of the above-mentioned key issues. As far as the field of application is concerned, it is necessary to note that, according to Article 51, Para 1, the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union and to the Member States ‘only when they are implementing Union law’. This is also mentioned by the Court of Justice, according to which the scope of the rights and principles recognised by the Charter is limited to the ‘situations governed by EU law’.

Therefore, the rights must be respected only if the case falls within the scope of Union law, and it is possible to give to the content of a principle a specific expression through acts of the Union and of the Member States in the transposition of EU law.

As you can see, then, the problems related to the field of application of the provisions of the Charter are valid for rights as well as for principles and, in the end, are similar. In this regard, we wonder what happens to those principles and rights recognised by the Nice Charter, which have not been regulated by a secondary source of Union law either due to a lack of competence (see the right to strike), or because the
European legislature has decided (at least to date) not to intervene in the matter (see individual dismissals).

In addition, the Court of Justice seems to affirm the application of the principles and rights of the Charter within the scope of Union law in the strict sense, i.e. with reference only to the Directive that specifically governs the legal subject to which the provision of the Charter refers. In fact, the Luxembourg Court refers to Directive 2002/14 as an act implementing the principle laid down in Article 27 of the Charter and it refers to Directive 2000/78, defined as the field of application of the right deriving from Article 21 of the Charter.3

Nevertheless, such interpretation would cause unintended consequences in terms of rationality of protections. This is very self-explanatory with regard to the discipline of individual dismissals. It is well known that there is not a specific Directive on the matter, while, in respect of working mothers, Article 11, Directive 1992/85 provides that Member States shall take the necessary measures to prohibit dismissal during the period from the beginning of pregnancy to the end of maternity leave. Therefore, the combined provisions of this rule and of Article 33, para. 1 of the Charter – precisely thanks to the Directive, which demonstrates that the case falls within the scope of Union law – confer on every working mother an individual right which she can invoke as such, while the other workers (men and women) would be denied a similar right against unjustified individual dismissals, since there is not a specific Directive regulating that subject-matter. 

In short, from the interpretation that seems to become established in the case law of the Court of Justice can be drawn, in my view, three categories of rights and principles, of course with partially different effects depending on whether one is referring to a right or a principle, as will be shown afterwards.

The first category includes the rights and principles of full effect (complete rights and principles), i.e. applicable to the institutions, bodies, offices and agencies of the Union, but also to the Member States since a legislation implementing Union law has been passed. The second category includes the rights and principles applicable to the institutions, bodies, offices and agencies of the Union, which are waiting for a secondary source that is able to fully ‘activate’ them (pending rights and principles), or to make them applicable to Member States, as in the case of protection against unjustified individual dismissals. The third category includes the rights and principles which are applicable only at the supranational level (limited rights and principles), i.e. those situations, such as strikes and lock-outs, which, unless the rules of the Treaty are changed, cannot result in an implementation of Union law, as confirmed by Article 51, last sentence of paragraph 1 and paragraph 2, of the Charter.4 Therefore, such rights and principles would be totally inapplicable, at least at first sight, to national legal systems.

3 See, respectively, the judgment Association de médiation sociale and the judgment Kücükdeveci v Swedex GmbH & Co. KG, C-555/07.
4 In fact, the institutions, bodies, offices and agencies of the Union shall respect the rights and observe the principles ‘respecting the limits of the powers of the Union as conferred on it in the Treaties’, since ‘the Charter does not extend the field of application of Union law beyond the powers of the
3. THE DIFFERENCE BETWEEN ‘PRINCIPLES’ AND ‘RIGHTS’.

With reference to the latter issue mentioned at the beginning of this contribution, i.e. the distinction between fundamental rights and principles, it is useful to start with the Opinion of Advocate General Pedro Cruz Villalón, delivered on 18 July 2013 in the Association de médiation social case, which contains general reflections that can be extended to at least all the provisions of Title IV of the Charter – Solidarity. According to Cruz Villalón, there would be a strong presumption that the fundamental rights set out in Title IV of the Charter belong to the category of ‘principles’. The Advocate General points out that, first, ‘the principles imply a mandate to the public authorities, unlike… the rights, the object of which is the protection of a subjective legal situation that has already been defined’. Secondly, ‘the public authorities, and in particular the legislature, are called to promote and transform the principle in a knowable legal reality.’ This promotion and transformation can be carried out by acts of ‘implementation’ to which Article 52, paragraph 5 refers, i.e. ‘legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member States when they are implementing Union law.’ Therefore, according to the Advocate General, a principle must be implemented through a secondary source of EU law. As a result, Cruz Villalón, referring to Article 52, paragraph 5, declares that ‘in spite of the use of the word “may”, it is clear that this is not an absolute discretionary power, but a possibility subject […] to a clear obligation in Article 51(1) of the Charter, requiring the European Union and the Member States to “promote” the “principles”. It is clear that such promotion will be possible only through the “implementing” acts to which Article 52 subsequently refers.’

A good example of ‘acts giving specific substantive and direct expression to the content of a “principle”’, with reference to Article 27 of the Charter, is, according
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again to the Advocate General, the provision of Directive 2002/14 on the scope of the
right to information and consultation. Therefore, the Advocate General asserts that
a principle should be implemented by a secondary source of the European Union and
by an act of the Member States if and when they transpose EU law.

Indeed, the reconstruction proposed by Cruz Villalón proves to be problematic, not
with reference to the distinction between rights and principles which is consolidated,
but as regards their operation, mainly if the protected legal situations are evaluated as
principles. As a matter of fact, the qualification as principles of the right to negotiate
and conclude collective agreements, and of the right to take collective action,
both recognised by Article 28 of the Charter, a key provision of Title IV, would be
significant, albeit for different reasons. In fact, it would be necessary that the right
to negotiate collective agreements be implemented by legislative and executive acts
taken by the Union, in order to give substantive and direct expression to that right.
Unfortunately, there has been no sign of such acts thus far. Of course, the Treaty of
Lisbon has introduced Article 152 TFEU, which, on one hand, is a primary source, and,
on the other hand, does not implement at all the right to negotiate collective
agreements, but assigns to the Union the task to recognise and promote the role of
the social partners at its level. Moreover, even if the right to take collective action,
including strike action, were to be understood as a principle, its implementation in
the European Union would be impossible, since, as is well known, the Union cannot
‘legislate’ on the matter of strikes. As a consequence, the interpretation suggested by
the Advocate General concerning the presumption that the fundamental rights belong
to the category of ‘principles’ cannot be accepted, also because if that interpretation
were related to Article 28, it would disavow the previous case law of the Court of
Justice (Viking and Laval), which, withstanding all the well-known limitations, has
already recognised the strike as a fundamental right of European Union law.

4. AWAY FROM THE PRESUMPTION THAT THE
FUNDAMENTAL RIGHTS BELONG TO THE CATEGORY
OF ‘PRINCIPLES’

For these reasons, the judgment of the Court of Justice, in Association de médiation
sociale, has to be examined carefully. That judgment does not agree with the
aforementioned interpretation of the Advocate General on the presumption of the
presence of only principles in Title IV, and indeed suggests indications to the contrary.
You can see the differentiation, highlighted in the judgment, between the contents of

12 In addition, Article 152 has been provided for in the Treaty of Lisbon, i.e. in the same source of the
law that has given the provisions of the Charter the same legal value as the provisions of the Treaties.
13 ‘Taking into account the diversity of national systems…’ and ‘… respecting their autonomy’.
Article 2114 and of Article 27. As a matter of fact, ‘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’15, provided that, however, the case to which this provision is referred ‘must fall within the scope of Union law’.16 On the contrary, ‘it is not possible to infer from the wording of Article 27 of the Charter or from the explanatory notes to that article that Article 3(1) of Directive 2002/14, as a directly applicable rule of law, lays down and addresses to the Member States a prohibition on excluding from the calculation of the staff numbers in an undertaking a specific category of employees…’17 ‘Accordingly, Article 27 of the Charter cannot, as such, be invoked in a dispute… in order to conclude that the national provision which is not in conformity with Directive 2002/14 should not be applied.’18 The Court of Justice has established that Article 27 is a principle to which Article 52, para. 5, is applicable, and therefore for Article 27 ‘to be fully effective, it must be given more specific expression in European Union or national law’,19 but this does not happen in the present case. However, that does not mean it cannot happen to other provisions of the Charter, regardless of the Title in which they are contained.

In other words, such judgment suggests recognising the rights and principles on the basis of the wording of the rules, distinguishing between two categories of provisions. The first category includes the precise and unconditional provisions of the Charter that confer on individuals an individual right which they may invoke, as such. The second one includes those provisions with a more indeterminate content, which, in order to produce effects, require to be specified through the provisions of European Union law or of national laws implementing Union law.20

Looking at their wording, the following provisions belong to the first category: Article 29, which declares that ‘everyone has the access to a free placement service’,21;

14 This article provides for the prohibition of ‘any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation’.
15 Para. 47. For the analysis of such principle, the Court of Justice refers to the judgment of 19 January 2010, Kücükdeveci v Swedex GmbH & Co. KG, C- 555/07.
17 Para. 46 of the judgment Association de médiation sociale.
18 Para. 48 of the judgment Association de médiation sociale.
19 Para. 45 of the judgment Association de médiation sociale.
and Article 30, since the protection against unjustified dismissal is not recognised ‘in the cases and under the conditions provided for by Union law and national laws and practices’, as for the right to information and consultation contained in Article 27, but ‘in accordance with Union law and national laws and practices’. Therefore, such right must be applied in accordance with the European and national laws and not under the conditions laid down by those laws. Article 33, para. 2, is even clearer, since ‘everyone has the right to protection from dismissal for a reason connected with maternity’; this provision is peremptory, does not need further explanation, and leaves no room for doubt about the classification as a right and not as a principle.

5. BEYOND THE ‘MEANINGLESS’ RIGHTS AND PRINCIPLES? THE MARGINS OF THE EUROPEAN LEGAL SYSTEM…

As said above, the distinction between principles and rights is quite irrelevant as regards the field of application of the Charter of fundamental rights. The real problem is that the explicit and implicit conclusions of the Court of Justice ‘confine’, temporarily or permanently, the application of certain fundamental principles and rights only to the institutions, bodies, offices and agencies of the Union and inhibit their operation even against the Member States. For that reason, such conclusions cannot be considered fully satisfactory.

So the intention is to propose a partially divergent reconstruction, in order to avoid that the pending and limited rights and principles, as they have been defined above, do not become meaningless rights and principles. This reconstruction is independent of the difference between rights and principles, which remains unchanged and produces

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the above-mentioned consequences, and is based on a broad definition of the expressions so far encountered, such as: ‘field of application of Union law’, ‘situations governed by European Union law’, and ‘when Member States are implementing Union law’. It is worth distinguishing between the effects produced by this interpretation on the EU legal system and those affecting the legal systems of Member States.

As far as the EU legal system is concerned, it must be understood how the principles and rights apply to the institutions, bodies, offices and agencies of the Union. There is no doubt that each one of these bodies must respect the rights, must observe the principles and promote the application thereof in the exercise of powers conferred by the Treaties. And this applies primarily, as the European Commission has underlined, to the institutions, bodies and agencies involved in the formation of European Union legislation. Therefore, it is obvious that the provisions contained in secondary legislation (Regulations, Directives, Decisions, but also Recommendations and Opinions), regardless of its subject matter, cannot be contrary to the principles and rights protected by the Nice Charter, and that, however, doubtful cases shall be construed in accordance with those rights and principles.

Coming back to the examples given above, Article 27 (containing what, on the basis of the proposed interpretation, is a complete principle) prevents any Directive from guaranteeing information and consultation, for example, not in good time. With reference to Article 30 (which provides for a pending right), this applies even in the absence of a specific Directive on the matter of individual dismissals. In this regard, as an example, it is useful to note what has been recently argued in Italian doctrine, i.e. that compliance with the right to justify dismissals imposes a limitation to enter into fixed-term contracts. A consequence of this interpretation is the contrast between

23 The rights can be directly invoked as such by individuals, whereas principles require to be implemented by means of acts of European Union and of Member States when they are implementing Union law.


25 The 2010 Communication from the Commission declares that the legal acts of the Commission, Parliament and the Council ‘must be in full conformity with the Charter’ (p. 3).


27 See Saracini, Contratto a termine e stabilità del lavoro, Editoriale scientifica, 2013, p. 50 ff. The author highlights the existence of a functional link between the regulation of fixed-term contracts and the rules on individual dismissal referred to the open-ended contract. So, if there are no rules to ensure the stability of the employment relationship (or to substantially limit free dismissal), the regulation of the term does not require a special protection. On the contrary, ‘where there is legislation to protect the “stability” of the employment relationship, it is necessary to limit... even the possibility of establishing a term to the contract, since the absence of any limit in this regard would render useless the rules for the protection of workers against dismissal’ (pages 16–17: my translation). See also C. Alessi, Flessibilità del lavoro e potere organizzativo, Giappichelli, 2012, p. 57 ff and more generally D. Izzi, Stabilità versus flessibilità nel diritto comunitario: quale punto di equilibrio?, Lavoro e diritto, 2007, p. 386 ff.
Directive 1999/70 and Article 30, since the secondary source does not have a rule that expressly limits the access to the first fixed-term contract; and a second consequence is at least the obligation to interpret the reference to employment contracts of indefinite duration as the ‘general form of employment relationships’, provided for in the same EU source,28 as a prohibition of the liberalisation of access to fixed-term contracts. With regard to Article 28 (within which the right to take collective action is a limited right),29 although it is not possible to enact a secondary source in matter of a strike or lockout, it derives from the suggested interpretation that the conclusions reached by the Court of Justice earlier, concerning the recognition of strike as a fundamental right, are a point of no return, while the problem of how to balance that right with the fundamental freedoms remains unsolved. In addition, Article 28 incentivises the approval of norms that codify what has been ruled by the Court, as evidenced by Article 2 of the Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (which is better known as the failed Monti II Regulation).30 According to that provision, ‘the exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms’. The wording of this rule is different from the corresponding provision of Council Regulation No. 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods between Member States. In fact, this Regulation had been passed before the Court of Justice ruled upon the balance between the right to strike and the fundamental freedoms, and before the Nice Charter had legally binding force. It is no coincidence, in fact, that, according to Article 2, ‘this Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike’. As you can see, there is no trace of the balance issue.

It seems that you cannot say much more about the right to collective action referred to in Article 28, considering that the explanation on Article 51 confirms that the Charter may not have the effect of extending the field of application of Union law beyond the powers of the Union, so that ‘the fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties’,31

28 See the Preamble and General consideration no. 6 of the framework agreement put into effect by Directive 1999/70/EC.
29 Since the same wording provided for in Article 30 has been used, i.e. ‘in accordance with Union law and national laws and practices’.
31 See what is already provided for in Article 6, para. 1 TEU, which states that ‘the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties’.
It should not be forgotten, then, as mentioned before, that Article 28 does not refer only to the right to take collective action, but it also refers to the right to negotiate and conclude collective agreements, which is instead a pending right, since the European Union has competences in that field, though they have not been exercised (yet). So any secondary source of EU law can never intervene denying that right and also the provisions which have been already enacted should be interpreted in this way.

There could be many other illustrations of what has been argued so far. It is better to give at least another example that this time refers to a complete principle, as it will be clear hereafter. Article 15, para. 1 of the Charter, which is not included in Title IV, enshrines everyone’s right to ‘engage in work and to pursue a freely chosen or accepted occupation’. The wording of the provision suggests that it is, in fact, a principle and as such cannot be immediately invoked by the individuals, being applicable the limitations deriving from Article 51. However, this principle must be observed and promoted by the European Union legislature. With regard to part-time work, another legal subject which is also governed at the supranational level, Directive 1997/81 cannot contain provisions that would require the transfer from part-time to full-time and vice versa. In truth, this Directive, although originating before the recognition of the binding legal effect to the Charter, contains a principle which goes exactly in that direction, i.e. the facilitation of the development of part-time work on a voluntary basis. Therefore, this rule has promoted the principle recognised by Article 15 of the Charter in advance. Naturally, if the Directive had not expressly provided for the principle of facilitating the development of part-time work on a voluntary basis, in the absence of rules requiring the transfer from part-time to full-time or vice versa, it would have been equally respectful of Article 15.

The irrelevance of the explanations of the Praesidium, despite the wording of the preamble to the Charter of Fundamental Rights (‘the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of Convention which drafted the Charter’) and Article 6, para. 1 TEU (‘The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter’) is argued by S. Sciarra, Considerazioni conclusive. Metodo e linguaggio multilivello dopo la ratifica del Trattato di Lisbona, p. 85 and G. Bronzini, ‘Happy Birthday; il primo anno di “obbligatorietà” della Carta di Nizza nella giurisprudenza della Corte di giustizia’, p. 41 both in B. Caruso, M.G. Militello (eds.), I diritti sociali tra ordinamento comunitario e Costituzione italiana: il contributo della giurisprudenza multilivello, WP C.S.D.L.E. ‘Massimo D’Antona’, Collective Volumes – 1/2011, in www.lex.unict.it.


33 Clause 1(a) of framework agreement put into effect by Directive 1997/81/EC. For further reflections, see M. Delfino, Il lavoro part-time nella prospettiva comunitaria. Studio sul principio volontaristico, Jovene, 2008, p. 96–102.
6. THE MARGINS OF THE NATIONAL LEGAL SYSTEMS

Finally, it should be noted that the rights and principles must be respected or observed also in the implementation of EU law. Similarly, this reference cannot be (at least almost never) interpreted in a narrow sense. Therefore, it cannot mean that the rights and principles guaranteed by the Charter apply only in the implementation process relating specifically to the legal subject to which the right or principle are referred. The rights and principles must be respected also when all the secondary sources of the Union – mainly the Directives – are implemented.

Even in this case, to support this reconstruction, it is useful to recall the 2010 Communication that was mentioned earlier, according to which the Commission, if it considers that a Member State violates a fundamental right, may intervene bringing an action before the Court of Justice (with an infringement action) provided that, generically, ‘the situation in question relates to Union law’, even though ‘the factor connecting it with Union law will depend on the actual situation in question’. However, the allegations contained in the Communication confirm the sustained reconstruction, which is based on a broad interpretation of the link with Union law.

Therefore, coming back to the above examples, each national provision, implementing any Directive, which regulates information and consultation of employees or their representatives, has to take into consideration the ‘good time issue’, and cannot allow, for example, the involvement (of workers and/or of their representatives) after the decisions have been already taken by employers. Obviously, since Article 27 contains a principle and not a right, no individual can invoke it as such.

On the contrary, it is not possible to argue that the liberalisation of fixed-term contracts – possibly provided for by national legislation implementing Directive 1999/70 – infringes in itself the right to protection against unjustified dismissals. In fact, the reconstruction that connects the discipline of dismissals and the regulation of fixed-term employment, as seen, is founded on the presence of a national law requiring the justification of dismissals and does not operate when the domestic law provides for the freedom of dismissal. On the other hand, Article 30 of the Charter cannot be directly applied to the national legislation on individual dismissals because such legislation is outside the field of application of EU law, since no Directive on

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35 2010 Communication from the Commission, p. 10.
individual dismissals has ever been passed. Therefore, with reference to this subject matter, considering that the restrictions under Article 30 shall apply only in the context of EU law, with regard to the national level, it can be argued that a legislation, providing for the liberalisation of fixed-term contracts, would be contrary to the principle of Directive 1999/70, according to which employment contracts of indefinite duration are the ‘general form of employment relationships’. As mentioned before, by virtue of the presence of Article 30 of the Charter, this principle must be interpreted as a prohibition to liberalise access to fixed-term contracts.

The issue is different for the right to take collective action. It is obvious that if the above-mentioned Monti II Regulation were passed, it would be immediate applicable and, therefore, there would not be an implementing legislation that guarantees the right provided for Article 28. Instead, it seems difficult to argue that the right to take collective action must be guaranteed even in the transposition of Directives on legal subjects not covered by Article 28, but ‘at risk of impacting’ with the provision in question, such as, for example, the posting of workers. In fact, according to the wording of the explanation on Article 51, given that the Charter may not have the effect of extending the field of application of Union law, ‘it goes without saying that the reference to the Charter in Article 6 of the Treaty on European Union cannot be understood as extending by itself the range of Member State action considered to be “implementation of Union law”’. In other words, on the basis of this explanation, the lack of Union competences prevents that the right to take collective action may be directly invoked by individuals in the transposition of EU law, as it would happen in the event that the national legislation implementing the Directive concerning the posting of workers were contrary to Article 28 of the Charter of Fundamental Rights.

The situation is dissimilar, even with reference to the national legal systems, in case of the right to negotiate and conclude collective agreements, which is also provided for in Article 28, thanks to the fact that the Union competences are present in such matter. So that if the legislation which implements whatever Directive expressly infringes such right, it would be possible for an individual worker to invoke Article 28 in a dispute between individuals in order to disapply that national legislation.

Similarly, with regard to Article 15 and to part-time work, the legislation implementing Directive 1997/81 must comply with the principle which is provided for in the Article of the Charter and is promoted by the aforementioned secondary source of EU law. Therefore, he is right who supported the contrast of Article 3, para. 101, Law 247/2007 with Article 15 of the Nice Charter, if it is demonstrated that the 2007 Italian provision implemented the Directive, thus allowing the Member States to apply the articles of the Charter of Fundamental Rights. There are no doubts about the
qualification of the latter provision as an act implementing the Directive on part-time work. Lacking this evidence, however, it seems difficult to sustain that Article 15 of the Charter may be directly invoked in a dispute concerning part-time work and therefore that Member States legislation can breach that provision.

7. CONCLUDING REMARKS. A BROAD INTERPRETATION WHICH RESPECTS THE LIMITS OF THE POWERS OF THE EUROPEAN UNION

It is useful to recall some of the ideas illustrated in this contribution. It has been underlined that the difference between rights and principles contained in the European Charter of Fundamental Rights is based on the wording of the provisions. In short, it is possible to distinguish between the precise and unconditional provisions of the Charter that confer on the individuals a right, and the provisions with a more indeterminate content, which contain a principle. The difference between rights and principles is important, since the object of the rights is the protection of a legal situation that may be invoked as such by the individuals. On the contrary, the principles, in order to produce their effects, require to be specified through the provisions of European Union law or of national law implementing Union law.

All the rights and principles, with the different effects that have just been highlighted, shall apply to the institutions, bodies, offices and agencies of the European Union. This means that all the provisions of the Charter shall apply to EU law, but also to the Member States whenever they pass a legislation implementing Union law. In other words, the European Union and the Member States, exclusively in the legislation transposing EU law, must respect the rights, must observe the principles and promote the application thereof.

As a consequence, the provisions contained in European secondary legislation and the national provisions implementing EU legislation cannot be contrary to the principles and rights protected by the Charter. In both the cases, this happens regardless of the legal subject of the norms. For instance, the right to have a protection against unjustified dismissals must be respected not only by the Directive on collective dismissals and by the national provisions transposing that Directive, but also by all the European secondary legislation and the national provisions implementing EU legislation (as in the case of fixed-term contracts).

This interpretation has to confront with the above-defined category of limited rights and principles. As far as this category is concerned, the presence of some rights and principles in fields where the European Union has not competences implies that

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39 Since it refers to Article 73, Decree-Law 112/2008 (converted into Law 133/2008) – which has amended Article 1, para. 58 of Law 662/1996 that has been preserved by Article 10 of Legislative Decree 61/2000. And such Legislative Decree is exactly the piece of legislation implementing Directive 1997/81.
the EU institutions must respect and observe those rights and principles whenever they decide to regulate other matters that are ‘at risk of impacting’ with such rights and principles (see the right to strike). However, in this case, since it will never be possible to have an implementing legislation, it seems difficult to argue that the limited rights and principles must be guaranteed even in the transposition of Directives on legal subjects not covered by the provisions of the Charter containing either the rights or the principles. A different conclusion would infringe the limits of the powers of the Union and would establish new powers or tasks for the Union itself. Indeed, the Charter of Fundamental Rights certainly does not have the power to extend the field of application of EU law.