PART III

REGIONAL COMPARISONS
12. European Union labour law and the European Social Model: A critical appraisal

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INTRODUCTION

The European Union context of labour law has been a focal point of attention, debate and criticism in legal scholarship for quite a while. Labour law scholarship has been struggling with the notion of the ‘European Social Model’ and the role and position of labour law in the EU context. In current times, characterized by globalisation, agendas for economic competitiveness, financial market volatility and pressures on European welfare systems, the debate has only intensified.

In the EU, labour law is deeply rooted in state tradition, national policy, institutional settings and historical pathways. However, after more than half a century of European integration, the autonomy of EU states has severely diminished. It seems to put the integration process, including the European social dimension, at a crossroads. The mutually reinforcing contexts of globalization, the economic and financial crisis and the pressures on welfare states, require a higher relevancy of transnational and regional (European) action. However, due to the specific dynamics in the EU legal and policy order, there seems to be a growing gap between the respective understandings of labour law when EU and member states are offset.

On a deeper level, labour law as it has grown and evolved in European states, is under pressure. Academic labour law debate has increasingly become fundamental, questioning boundaries, future and goals or idea of labour law, in European terms often brought under the rubric of ‘modernization’ of labour law. It is not just a coincidence that the European Commission launched a Green Paper on Modernising Labour Law in 2006 ‘to meet the challenges of the 21st century’. Furthermore, the issue of transnational worker mobility and the case-law of the Court of Justice (CJEU) in Viking and Laval, have pulled a legal problem into a debate about the economic

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and social purposes of the European project. Furthermore, the evolving European ‘governance’ of the financial and economic crisis, brings up the question of how far member state social and welfare policies can and will be brought in line in financial stability and economic competitiveness.

In this chapter, we aim to provide a critical analysis of EU labour law. We have been assigned to show an understanding of the ‘European Social Model’. Does it exist and if so, what characterizes it? Can it be qualified as a market-driven system? Looking at the interplay between the Union and the member states, does European law inhibit or advance a social model in the member states?

Taking into account European labour law’s dynamic and evolving character and to improve its disclosure to a readership that may be unfamiliar with it, our methodological choice is to deliver our analysis through an examination of the development and evolution of EU labour law, referring to its origin, critical junctures and major steps. This allows us to disclose the broad field of European labour law while, going into the steps of European labour law’s own development in different areas of Union action, making an attempt to find the paths and trails of a European Social Model, or just not yet.

We will start from the position that, if it exists, there is most likely no single view on the ‘European Social Model’. Moreover, it probably has a unique outlook. In order to speak of a European Social Model, Blanpain has assumed the existence of a ‘model’ (explained as a vision, competences and actors), which is ‘European’ (seen as the EU level) and ‘social’ (explained as focused on labour issues and democracy). We find this a useful approach but wish to take it a step further. We assume that, in order to be ‘European’, Union action would need to take account of (common) European ‘state’ traditions (e.g. in the field of labour law), and in order to be ‘social’, it would need to envisage the advancement of social rights and values, strike a balance between market-making and social progress, develop social citizenship and promote solidarity, democracy and legitimacy within a European society. We, therefore, do not only assume a balance between the economic and social dimension of European integration, but also expect a promotional ‘social’ goal in Union action.

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1. FREE MOVEMENT OF WORKERS: SOCIAL GOALS FROM EARLY MARKET MAKING

If one looks for an early social policy perspective, let alone a ‘plan’, it must be noted that social policy goals, such as worker protection or the creation of a social welfare regime, as an explicit objective of the EU, has been controversial since the very beginning of the European project. It is well known that the original Treaties only aimed at the creation of an ‘economic community’ of European states that had a rather well developed social policy model. In the European project, however, social policy initiative would come from the spill-over effect of economic integration.

Nevertheless, little by little, ways were paved for social policy. An important landmark was the Social Action Programme (SAP), which was adopted by the Council in a resolution of 21 January 1974.10 It underlined the necessity to take measures towards realizing priorities such as full and better employment, the improvement and harmonization of living and working conditions, and increased involvement of management and labour in the economic and social decision-making process both at the European level as well as in undertakings. The document reflected high and broad ambitions and the SAP was seen as announcing a ‘golden period of harmonisation’.11 However, the labour law legislation that followed was important but remained limited to well-defined and specific areas.12 Many legislative proposals failed to obtain approval in the Council, including the notorious Vredeling proposal regarding information and consultation of workers in undertakings, as well as proposals on part-time work, temporary work and working time. It were signs of how ideologically laden the issue of European labour law actually is.

While there remained a gap between ambition and reality, it is striking that the 1974 Social Action Programme already contained the important consideration that ‘it is essential to ensure the coherence of social and other Community policies so that measures taken will achieve the objectives of social and other policies simultaneously’. The necessity of coherence between the original economic purposes of European integration and the spill-over fields was thus already seen.

In this early period of European integration with a perhaps limited context of social rights, an important impetus came from the Court of Justice of the European Union (CJEU). Using doctrines of direct and horizontal effect, articles in the early Treaty (i.e. Treaty of Rome of 25 March 1957) which could originally be understood as market ordering principles, became strong motors of social rights. The abundant case-law concerning the principle of equal pay (nowadays art. 157 Treaty on the Functioning of the EU (TFEU)) and the free movement of persons (nowadays art. 45 TFEU), were

12 Cf. equal treatment, collective dismissal, transfer of undertakings, employer insolvency, health and safety.
originally seen as economic rights but became real and enforceable social rights, enshrining social citizenship and solidarity.\(^{13}\)

In its free movement of persons’ case-law, the CJEU has always assured the highest effet utile to migrant workers’ entitlements to social integration within the host state. Such a guarantee of socio-economic integration served as a means for the full deployment of one of the fundamental freedoms enshrined in the Treaty and, at the same time, it was harmoniously included in a model for the construction of an integrated market based on the full preservation of the autonomy of national social protection systems. Equal access of migrant workers to the social rights laid down by the host member state, did not merely interfere with the ‘social sovereignty’ of the member states, but it helped to assure full territorial application of national labour law and social welfare. This explains why such a guarantee has been precociously interpreted extensively by the case-law of the Court of Justice starting from the early 60s of the last century. This well-known case-law does not need to be analyzed in this context.\(^{14}\) Here, it is sufficient to recall how, on one hand and in absence of an express legal definition, the Court has adopted a very broad notion of employee, up to and encompassing in such a definition all activities, having any minimal effective economic consistency, carried out under the direction of another person. It allowed the holders of this fundamental freedom of movement, and their families, to access the whole panoply of social rights guaranteed to the citizens of the host state in conditions of full equality, even beyond situations and entitlements linked to the protection of the employment relationship.

If we read it in light of the historical evolution, starting from the leading case Martínez Sala to the more recent Zambrano judgment,\(^{15}\) through which the Court has extended the principle of equal treatment in the access to social rights recognized in the host country to all economically inactive European citizens, then it seems fair to say that this case-law does nothing but generalize the status of social integration already widely acquired by EU law on the free movement of workers. By considering being a citizen of the Union as the fundamental status of a person in the supranational order,\(^{16}\) this case-law undoubtedly has the merit of universalizing\(^{17}\) the social integration logic hitherto anchored to the functioning of the internal market, also including people who do not carry out an economic activity in its protective reach. One may say that the


\(^{15}\) See respectively Case C-85/96, María Martínez Sala vs. Freistaat Bayern, and Case C-34/09, Gerardo Ruiz Zambrano vs. Office national de l’emploi.

\(^{16}\) According to the well-known formula consolidated by the judgment of the Court of Justice in Case C-184/99, Rudy Grzelczyk vs. Centre public d’aide sociale Ottignies-Louvain-la-Neuve.

\(^{17}\) In some cases, far beyond what a literal interpretation of secondary law, and particularly of Directive 2004/38/EC, would allow, but – obviously – still within the scope of the European membership, which requires the possession of the citizenship of a member state of the Union (and, therefore, excludes citizens of third countries).
innovation in this case-law is the universal projection of the transnational model of social solidarity already foreshadowed by the Rome Treaty in favour of migrant workers within the Community in a way that, as such, was still related to the actual functioning of the common or internal market.

In this free movement case-law some commentators have recognized a change in the legal paradigm of European social solidarity. If the access to social protection systems in the member states was initially functional to the effectiveness of the common labour market, according to this case-law, it now becomes a self-constitutive element of Union citizenship. The status of social integration becomes separated from a market-rationale and from the original idea of homo economicus. According to this analysis, a paradigm-shift has to be detected from a selective and category-based model of ‘market solidarity’ to the recognition of ‘a transnational personal status’, which establishes a general claim of social integration in the member state of the Union in which the European citizen freely decides to move to, not unlike what happens in federal-polities.

2. A ‘SOCIAL POLICY CHAPTER’: COUNTERBALANCING THE ECONOMIC DIMENSION

Social policy discussion received a renewed impetus under the Commission Presidency of Jacques Delors. European political leaders felt that a stronger emphasis on social policy was needed and Delors had a strong ambition to realise a Europe with a human face, creating ‘l’Europe sociale’. This happened in the context of the 1980’s in which a quest for more flexibility and deregulatory forces came through. This setting was symptomatic of the tension between economic and social progress in EU integration policies. At the time, deregulation and in particular flexibility became important slogans in the fight against the economic and social crisis, in order to address the issues of decreasing economic growth and rising unemployment. Neo-liberal ideologies of deregulation clashed with social democratic viewpoints. Many proposals for EU labour law directives failed to obtain approval in the Council.

In a legal sense, the Single European Act of 1986 brought an important change. It originated from the opinion that Europe needed to be more than what the predominantly economic dimension of the Communities had shown so far. Its Preamble announced the wish to ‘improve the economic and social situation by extending

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22 President of the Commission of the European Communities (1985–95).
common policies and pursuing new objectives’. It left European social policy with a mixed result. On the one hand, new competences were included to take initiatives in the area of health and safety. But on the other hand, it confirmed member states’ national sovereignty over ‘rights and interests of employed persons’, which required, at European level, unanimous voting in the Council.

The changes did not support the view that social policies were as important as economic and monetary matters, or that a ‘common’ European social policy would become a central issue. Voices in favour of a social dimension of the internal market were still heard. At the 1989 Madrid Summit, the European Council repeated the 1972 principle that as much importance must be given to the social dimension as to economic policies. But it could be questioned whether the Single European Act did not actually support the economic integration most of all. The pre-dating White Paper on the completion of the internal market (14 June 1985) addressed the issue of harmonization. It stated that unifying the European market presupposes the abolition of barriers of all kinds and harmonization of rules. However, the document did not refer to the harmonized development of labour law or a project for a European social model. Instead, it aimed at the liberalization of the internal market and reaching the stage of a ‘single European market’.

Only later in the 1980’s was the social dimension somehow compensated. On 15 March 1989, the European Parliament adopted a resolution on ‘the social dimension of the single market’. It called for ‘the adoption at Community level of the fundamental social rights which should not be jeopardized because of the pressure of competition or the search for increased competitiveness, and could be taken as the basis for the dialogue between management and labour’ and expressed the need to ensure the social dimension of the internal market by implementing a programme of concrete measures.

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25 Article 21 of the Single European Act provides that: ‘the EEC Treaty shall be supplemented by the following provisions: Article 118a 1. Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization of conditions in this area, while maintaining the improvements made.’
26 Article 18 of the Single European Act reads:
   The EEC Treaty shall be supplemented by the following provisions: ARTICLE 100a 1. By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 8a. The Council shall, acting by a qualified majority on a proposal from the Commission in co-operation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. 2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.
27 Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28–29 June 1985) COM(85)310final, 6: ‘unifying this market (of 320 million) presupposes that Member States will agree on the abolition of barriers of all kinds, harmonization of rules, approximation of legislation and tax structures’. 
European Union labour law and the European Social Model

comprising a timetable. On 9 December 1989, at the Strasbourg Summit, the Heads of State of Government of 11 Member States (all except the U.K.) finally adopted, in the form of a declaration, the text of the Community Charter. The Charter, although not seen as a legally binding instrument, paved the way for a renewed and social rights-based view on European integration. The Charter was followed by an Action Programme relating to its implementation by European action. It contained a number of measures proposed by the Commission to be developed in order to implement the core of the Charter. The Charter thus seemed to be an important step in the search for a more legitimate and socially driven Europe and it gained momentum for political will in favour of European social policy. But the political will was not unanimous. As is well known, only 11 of the then existing 12 member states were willing to subscribe to it. The same happened with the attempts to incorporate a ‘social chapter’ in the Treaty. Nevertheless, when during the Maastricht Summit in December 1991, the famous Social Protocol was agreed upon, whereby the 11 member states could pursue social policies (the U.K. opting out) on the conditions laid down in the annexed Social Policy Agreement, a start was made with a ‘constitutionally’ recognized role for the social partners in the Union’s legislative process, and there was a major legal basis for action in the field of labour law. As is well known, the social chapter, as annexed to the Maastricht Treaty (1992) was later incorporated in the EC Treaty (with the U.K. opting in) via the Amsterdam Treaty (1997) and is currently found back in articles 151–161 TFEU.

It can be argued that this period, and the results it produced, marked a time in which the need was felt to address the tension between economic and social integration in Europe with treaty amendment and hard law initiative. The resulting synthesis can be described as a political view defending ‘socially acceptable economic integration’. What seemed important, is that Delors’ views on the involvement of management and labour in social policy-making, confirmed a European ‘tradition of inclusion of unions and workers’ interests in the shaping of industrial relations and political regulations in general’. Likewise, the Delors’ strategy accommodated a tradition of government activity and social policy intervention in the (integrating) economy in Europe. To a certain extent, these elements can be viewed as traces of an early growing ‘social model’ at European level.

Nevertheless, when the introductory article of the Treaty’s social chapter (art. 151 TFEU, former art. 136 of the EC Treaty) is viewed, the difficult tension between economic and social integration remains apparent. It provides, first of all, that in making social policy, the Union and the member states ‘will have in mind’ fundamental social rights. This seems designed to align social policy intervention with the

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28 O.J. 17 April 1989, C96, 61.
29 COM(89)568final.
fundamentals of labour law, at least as it is understood in the member states. As we have indicated before, this would fit with ‘social’ aspirations of any European Social Model, if it were envisaged.

Article 151 TFEU (still) makes reference to the goal of harmonization, combined with a belief that the functioning of the internal market will favour (but not necessarily automatically lead to) the harmonization of social systems. While harmonization would in theory seem a sound and useful approach to labour law at the EU level, the element of harmonization is nevertheless interesting, seen in the reference above to the ‘golden period of harmonization’ in the 1970’s, which became a name for something that did not actually come about. Harmonization would lay the ground for convergence in national policy choices and, potentially, in member states’ labour law systems. It might be able to address pressures from social dumping or forces of deregulation. It would fit a ‘European Social Model’ idea. However, in the European social policy context, the element of diversity takes a strong place. Article 151 TFEU confirms that European measures shall ‘take account of the diverse forms of national practices’ and ‘the need to maintain the competitiveness of the Union’s economy’. European labour law initiatives are therefore understood for purposes of harmonization at a minimum level of protection (only). It might seem that a general resistance against harmonization came specifically in the second half of the 1980’s. A strategy of harmonization of labour law was likely to be more realistic within the context of relatively compatible labour law and welfare systems, like those of the founding member states in the early times. However, arguments contra harmonization seem often politically or insufficiently founded and the question remains whether European labour law harmonization has really no potential to go further than the current status quo.

Nevertheless, even in a system where member states remain relatively important social policy actors, a European social model remains a possible idea. Furthermore, the Treaty setting of the ‘social chapter’ provisions, also would suppose active steps at EU level. Article 151 TFEU expresses the belief that social development requires positive regulation as it ‘will ensue not only from the functioning of the internal market’, but also – and necessarily so – ‘from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action’. Initiatives based on the social chapter have been significant, and have produced a large variety of European labour law legislation, including subjects such as, for example, health and safety, working time, part-time work, fixed-term work, temporary work, European works councils, information and consultation. It may, however, be discussed how much social policy compared to market concern (be it the internal market, the economic market or the labour market) has been a reason for Union action.

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3. ECONOMICALLY ACCEPTABLE SOCIAL INTEGRATION IN THE RUNNING UP TO THE ‘EMPLOYMENT TITLE’

The adoption of the 1989 Charter of Fundamental Rights and the introduction of the Maastricht Protocol on Social Policy in 1991, undoubtedly marked a major development for European labour law and social policy. However, three sets of policy papers would mark a new era, in which views on economic and social progress can be seen to start moving forward in a slightly, or is it a significantly, different way. It concerns the adoption of the ‘Green Paper on European Social Policy – Options for the Future’, presented by Commissioner Flynn on 17 November 1993; the White Paper on Growth, competitiveness, and employment, adopted on 5 December 1993; and the White Paper on European Social Policy, adopted on 27 July 1994.

According to the 1993 Green Paper, European social policy entered a ‘critical phase’. The existing social action programme was reaching its natural end; the entry into force of the Treaty on European Union opened up new possibilities for European action in the social field, and the changing socio-economic situation, reflected notably in the serious levels of unemployment, required, as the Green Paper explained, a new look at the link between economic and social policies, both at national and at European level. The Commission considered that this situation required the launching of a wide-ranging debate about the future direction of social policy (and that would include labour law).

The 1993 Green Paper was not only important for the development of European social policy in general. The reflection that it stimulated debate about the future direction of labour law also displayed a concern for the reconciliation of labour laws and labour markets with economic objectives. Although the Green Paper rejected the idea that ‘social progress must go into retreat in order for economic competitiveness to recover’ and that ‘the Community is fully committed to ensuring that economic and social progress go hand in hand’, it nevertheless indicated that Europe is characterized by ‘its capacity to combine wealth creation with enhanced benefits and freedoms for its people’. The Green Paper gave all the signs that the phrase that economic and social progress goes hand in hand, first seen as ‘socially acceptable economic integration’, could now be explained as ‘economically acceptable social integration’. The White Paper on Growth, Competitiveness and Employment (1993) confirmed this new blue print view. This paper suggested that labour law as well as labour markets needed modernization, and mentioned issues such as flexibility of enterprises, training and modernized social protection systems. The White Paper clearly suggested that the economic problems and the high unemployment figures throughout Europe could be

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38 COM(93)700final, 11: ‘Our employment systems have aged: by this term we mean the whole complex of issues made up nowadays by the labour market, labour legislation,
explained by the inflexibility of the labour market and specific institutional, legal (labour law and social security law) circumstances in each country.\textsuperscript{39}

The 1994 White Paper did not conceal the real issue:

A substantial base of labour standards has been consolidated in European law. The question of where to go from there is complex and controversial because the issue of labour standards is at the heart of the debate about the relationship between competitiveness, growth and job creation. (...) It must be said that there is no clear consensus on this point and that Member States and others remain divided in their opinions about the need for further legislative action on labour standards at European level.\textsuperscript{40}

The development of a ‘European Social Model’ was not only hampered by the lack of consensus. The role of labour law in a market-making legal order, was at stake.

The issue of the role of labour law in light of an economic performance agenda was also reflected in the exercise by the Union of its hard European social policy competences. Under the rubric of ‘economic issues’, the conclusions of the Essen European Council (9–10 December 1994) emphasized the need to take steps to improve the employment situation, and called for measures aimed at ‘increasing the employment-intensiveness of growth, in particular by more flexible organisation of work in a way which fulfils both the wishes of employees and the requirements of competition’. The Commission decided to initiate the procedure under the Maastricht Agreement on Social Policy in order to regulate fixed-term work, part-time work and temporary work, which were evolving as new and flexible forms of employment. From this, the view on ‘social model’ seemed to receive body. The hard law method had the advantage of improving ‘social legitimacy and involvement’ of the European social partners through the newly available forms of European ‘bargaining’ and European ‘tripartism’\textsuperscript{41} on subjects that would support the economic aspirations of the Union.

employment policy, the possibilities of flexibility within or outside enterprises, the opportunities provided or not provided by the education and training systems, and social protection.’

\textsuperscript{39} COM(93)700final, 16:

In a general manner, they show that growth is not in itself the solution to unemployment, that vigorous action is needed to create jobs. However, such action must take account of national circumstances. More specifically, the inflexibility of the labour market, which is responsible for a large part of Europe’s structural unemployment, can be traced back to specific institutional, legal and contractual circumstances in each country. The educational system, labour laws, work contracts, contractual negotiation systems, the social security system, and business management (including internal work management) form the pillars of the ‘employment environment’ in each Member State and combine to give each of them a distinctive appearance. In each case, the entire environment must be mobilized to improve the functioning of the labour market. This goes to show, once again, that there is no miracle solution; nothing short of coordinated action by the various players responsible for the components of these environments can effect the necessary transformation. Moreover, in each country the methods of social dialogue will reflect national traditions.

\textsuperscript{40} COM(1994)333final, 23.

An agreement with the social partners was reached on fixed-term work and part-time work.\textsuperscript{42} As is well known, the social partners’ negotiations on temporary work did not produce any agreement, the most severe problem being the concept of ‘comparable worker’ in the context of the principle of equal treatment. The European Commission, nevertheless, pushed further for a legislative instrument,\textsuperscript{44} but it came about only in 2008.\textsuperscript{45} The context of adaptability also required an instrument dealing with working time arrangements. An instrument was adopted, but the discussion on its revision is still running.\textsuperscript{46}

The European initiatives were explained as accommodating the need for flexibility (of employers) and security (of workers).\textsuperscript{47} Steps towards the development of a policy concept of flexicurity were enabled via the European employment policy. In adopting the 1997 Amsterdam Treaty, the title on employment was inserted in the Treaty. Considering the text of its provisions, the Employment Title conferred employment policy competences to the European level, but it did not change the basic starting point that the member states would have the sole competence for employment policies, leaving a more coordinated role for EU institutions. It would be an ‘open method of coordination’. The Union would formulate guidelines. The member states would remain full actors, only sending in reports for evaluation, in a system of mutual learning and peer review. But the ambiguity of this ‘new mode of governance’\textsuperscript{48} was observed from the start:


\textsuperscript{48} According to Caroline de la Porte and Philippe Pochet: ‘New modes of governance can be referred to as “the range of innovation and transformation that has been and continues to occur in the instruments, methods, modes and systems of governance in contemporary polities and economies, and especially within the European Union (EU) and its member states (both current and prospective)”’, C. DE LA PORTE and Ph. POCHET, ‘The European Employment Strategy: Existing research and remaining questions’, (2004) \textit{Journal of European Social Policy}, 71.
if we were to describe this new Title on employment as yet another example of proceduralisation in the field of social policies, we would say too little and too much at the same time: too little, because this matter goes beyond the domain of social policies, too much because procedures, as they are known in European labour law tradition, must disclose a legally meaningful outcome.\textsuperscript{49} 

The EU strategy with regard to employment policies brings thus the issue of Europe’s approach towards legal intervention in the field of social policy to the forefront. Arguing that the European Employment Strategy (EES) has contributed to a new pattern of regulation would be right, but it might as well be responsible for a degressive (hard law) intervention of the European Union in the social policy field,\textsuperscript{50} although also that can be doubted. What has become clear is that the diversity and innovation in approaches portrayed in the EES, can be seen as a reflection of the (lack of) political will within the European institutions and the member states regarding EU social policy-making. Because it attempted to reach a synthesis of economic and social progress, some have labelled it as ‘Third Way’ – thinking.\textsuperscript{51}

4. MARKET MAKING VERSUS SOCIAL PROGRESS IN HIGH CONTROVERSY

It is almost paradoxical in se that, when looking at the provisions on free movement of workers, internal market rights have been seen as promoting social rights, basically through European Court case-law. At the same time, the internal market provisions increasingly have been viewed as the biggest enemy of social development in Europe. The case-law of the European Court in \textit{Viking}\textsuperscript{52} and \textit{Laval}\textsuperscript{53} is often taken as a departure point of the debate. The matter shows that the ‘European’ social model discussion also involves a viewpoint on how to reconcile EU action with national social models in the European member states.

The potential clash of promoting internal market freedoms with nationally rooted social and labour policy authority, became clear with the adoption of the European Services Directive.\textsuperscript{54} On 14 February 2006, when the European Parliament held its plenary session, Evelyne Gebhardt, the rapporteur of the European Parliament’s Internal Market Commission, commented: ‘We are dealing with the most important


\textsuperscript{52} See note 6 above.

\textsuperscript{53} See note 7 above.

piece of EU legislation apart from the Constitution.\footnote{Press note of the EP, n° 20060210/IPR05172.} The Services Directive caused broad public debate on the European social model. It also made clear that the ‘European model’ was a matter of preserving ‘national’ social models.

Based on its 2002 report concerning the state of the internal market for services, on which the first proposal of the Services Directive broadly relied,\footnote{COM(2002)441final.} the European Commission proposed\footnote{COM(2004)2,final/2.} to apply the ‘country of origin principle’, according to which a service provider would be subject only to the law of the country in which it is established. The country of origin principle would imply that a service provider in one member state would not need to adapt itself repeatedly to the local rules and regulations in another member state where the services are delivered.

It triggered a ‘social dumping alarm’. The country of origin principle was seen as putting strong pressure on the high-level social protection systems present in various countries in the EU. It was called a radical change in EU labour law.\footnote{N. BRUUN, ‘The proposed directive on services and labour law’, 58 B.C.L.R. (2006), 24.} Clearly, from a traditional labour law point of view, the services directive was ‘unsolicited’ and undesirable. The Services Directive, therefore, now underlines that its provisions do “not affect labour law”,\footnote{Cf. arts 1, 6 Services Directive.} but this is not a technique of exclusion of labour law, which remains not immune from internal market principles.

The cases of \textit{Viking}\footnote{See note 6 above.} and \textit{Laval}\footnote{See note 7 above.} similarly represent the key issue of reconciling labour law (and social policy goals) with European internal market freedoms. However, both cases are as much about European ‘internal market law’ as about trade union and strike law. Both cases deal with the right to collective action under member state law, which is a matter of national jurisdiction and excluded from the Treaty’s social chapter.\footnote{Cf. art. 153, 5 TFEU.} This has left member states with relative respect to their national traditions guided by the principles of the International Labour Organisation and the European Social Charter, two frameworks that recognize the fundamental right to strike, vested under the supervision of authoritative expert bodies.\footnote{Cf. The ILO’s Committee on Freedom of Association and the Council of Europe’s European Committee of Social Rights.}

In the two cases the Court did not provide for immunity of the right to take collective action from the operation of the fundamental Treaty freedoms reflecting the internal market objectives; the Court took the view that trade union rights cannot be excluded from article 49 TFEU (free establishment) and article 56 TFEU (free services). This implies that, if an exceptional position of collective labour rights is to be granted at all, it will be given only within the scope of application of the Treaty itself.\footnote{Cf. C-309/99 \textit{Wouters}, CJEU 19 February 2002, \textit{E.C.R.} 2002, I-1577; E. SZYSZCZAK, ‘Competition and sport’, (2006) \textit{E.L.R.}, 94–110.} The Court, nevertheless, established the fundamental character of the right to collective action by recognizing it as a fundamental right under EU law, without avoiding the application of
the internal market provisions. On the contrary, fundamental rights and internal market principles have to be reconciled in light of the Schmidberger case-law.\textsuperscript{65}

In \textit{Viking}, the Court found that the right to take collective action for the protection of workers is a legitimate interest, which, in principle, justifies a restriction of one of the fundamental freedoms safeguarded by the Treaty.\textsuperscript{66} To assess this further, the Court looked into the purpose of the collective action and held that collective action aimed at protecting the jobs and conditions of employment of the union members affected by the reflagging plan, would qualify as an acceptable purpose of collective action, namely ‘collective action for the protection of workers’. But this would not be the case, according to the Court, if it were established that the jobs or conditions of employment at issue were not jeopardized or under serious threat.\textsuperscript{67} Furthermore, the Court found it difficult to maintain that a policy of combating outflagging would be pursued through collective action, irrespective of whether or not the employer’s exercise of his right to free establishment is liable to have a harmful effect on the work or conditions of employment of its employees.\textsuperscript{68} With regard to ‘the appropriateness of the action’\textsuperscript{69} and its proportionality, the Court held that a national court must examine whether unions would be able to revert to means that are less restrictive to the freedom of establishment.

The manner in which the Court has examined the right to strike in light of legitimacy and proportionality has raised a lot of criticism.\textsuperscript{70} The European Committee of Social Rights, operating in the framework of the Council of Europe, only allows a proportionality test in so far as the essence of the right to strike is not touched.\textsuperscript{71} This obviously leaves room for interpretation,\textsuperscript{72} but it is clear that the way the internal market principles were applied went straight to the core of a sensitive labour law debate. Also the \textit{Laval} case has put national labour law in a difficult relationship with the European internal market principles. This case must, at least partly, be seen in the specific light of the European Posting Directive (Directive 96/71/EC).\textsuperscript{73}

\begin{itemize}
\item \textsuperscript{66} \textit{Viking}, (note 6 above) para. 77.
\item \textsuperscript{67} Ibid., para. 81.
\item \textsuperscript{68} Ibid., para. 88.
\item \textsuperscript{69} Ibid., para. 86.
\item \textsuperscript{70} \textit{ Cf. A. Davies, ‘One step forward, two steps back? The Viking and Laval cases in the ECJ’} (2008) 37(2) \textit{I.L.J.}, 147:
\item The decisions in \textit{Viking} and \textit{Laval} are not surprising, but they are disappointing. Although the CJEU has recognized the existence of a right to strike in EU law, it has subordinated that right to the free movement rights contained in Articles 43 and 49 EC. This reflects the fact that the ECJ regards its own role as one of protecting and promoting the fundamental principles of Community law.
\item \textsuperscript{71} \textit{European Committee of Social Rights, Conclusions, XVIII-1,} 2006, Germany, 304–5.
\end{itemize}
CJEU, *Rush Portuguesa*, it was accepted that EU law would not prevent member states from applying their own legislation or collective bargaining agreements to employers and their workers, when these employers are foreign service providers and their workers are only temporarily employed on their territory. However, in *Laval*, the Court held that article 3(7) of the Posting Directive cannot be interpreted as allowing a host member state to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection listed in this Posting Directive. The Court, in other words, brought the country-of-origin principle, so much discussed in light of the draft Services Directive, back into the labour law arena. The Court went further in securing internal market principles in the cases *Rüffert* and *Commission vs. Luxembourg*.

The matter makes us reflect on how the role of the CJEU could be reflected with (national) constitutional traditions in the member states. In evaluating the Court’s reasoning in *Viking* and Laval in light of the notion of balancing of rights that is prevalent within highly-developed national constitutional cultures, as well as in the most reliable European theoretical thinking, we cannot find any proper kind of balancing exercise in the two judgments, as the Court’s *modus operandi* did not deviate from the classical logical framework of application of a fundamental economic freedom in (any of) the situations where the national measure that is obstructing its exercise is properly related to (any) interests worthy of protection within the legal order of the member state. In spite of the declared reallocation of the right to strike and to take collective action within the circle of EU fundamental rights, ‘what the Court has accomplished is not a balancing-act between two equally footed rights, but a much more traditional scrutiny of compatibility between national rules and Community law’. And in this logic, the aim is not to carry out a balancing between equally standing rights but, rather, to reaffirm a principle of hierarchy among legal systems according to the classical view of the primacy of Union law affirmed by the CJEU. Some progress on this point could be expected from the new legal framework offered by the Lisbon Treaty.

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75 Ibid., para. 80.
76 C-346/06 *Rüffert*, 3 April 2008.
77 C-319/06 *Commission vs. Luxembourg*, 19 June 2008.
5. THE IMPACT OF LISBON

When the Lisbon Treaty entered into force on 1 December 2009, the European legislative framework received a new Treaty on the European Union (TEU) and the TFEU. Although the first impression is that with this Lisbon Treaty the main outlook of European labour law remained unaltered, its framework has provided for a new set of general clauses and a strong legal basis for the protection of fundamental (social) rights. The EU Charter on Fundamental Rights has now received ‘the same legal value as the Treaties’.

Article 2 of the TEU imbues the Union’s new array of values with a strong social connotation where it states that the Union is founded, above all, on the values of respect for human dignity, freedom, democracy, equality and the safeguard of human rights. This is also true where it recognizes its participation in the values – common to all member states – of pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women. Article 3, paragraph 3 innovates the Union’s objectives with the much-debated and politically challenging formula of a ‘highly competitive social market economy, aiming at full employment and social progress’. This formula, virtually capable of rearticulating the very foundations of European social policies seen in close connection with economic policies, is also endowed with a new operational potential in the no less innovative, all encompassing provision of article 9 TFEU. According to this broad horizontal clause, in the definition and enforcement of its policies and actions, the Union is bound to take into account the fundamental objectives of promoting a high level of employment, the guarantee of adequate social protection, and the fight against exclusion. An analogous horizontal clause in the Treaty endows the Union with a similar duty to mainstream the complex range of anti-discriminatory policies across the entire sphere of supranational social action (art. 10 TFEU).

At the same time, the principle of an ‘open market economy with free competition’, once at the core of the European economic constitution, has been formally expunged from the heart of the values, objectives and general principles of the Union and relegated to an ancillary role in article 119 TFEU (which opens Title VIII on economic and monetary policy) and Protocol No 27 attached to the Lisbon Treaty. The formula of an ‘open market economy with free competition’ would thus seem to be normatively weakened, and practically declassed, from a major finalistic principle to a secondary and instrumental objective: it now merely characterizes the sphere of legislative competences and action to which it specifically refers. Moreover, a new emphasis on the social dimension of the internal market is added in the reformulation of the provision now contained in article 14 TFEU stressing the central place occupied by

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81 The importance of the horizontal social clause and its close connection with the objective of the ‘social market economy’ is acknowledged in the Communication from the Commission, Towards a Single Market Act for a Highly Competitive Social Market Economy, COM(2010)608 final.

services of general economic interest in the shared values of the Union as well as their role in promoting territorial and social cohesion (see also Protocol No 26). In short, the general provisions of the new Treaties reformulated at Lisbon disclose, *in abstracto*, ‘great potential for inverting the relationship between economic and social Europe’. A new set of values, objectives and principles profoundly innovated by the Treaties trace a new trajectory for the Union beyond the functional dimension of market integration towards the recognition of a coessential finalité sociale of the European political project.

Furthermore, article 152 TFEU should be mentioned, as it obliges the Union to recognize and promote the role of social partners at its level by facilitating their dialogue, with due respect for their autonomy, while taking into consideration the diversity of national systems of industrial relations and collective labour law. In agreement with article 11 of the TEU and the instruments of participatory democracy set out therein, article 152 TFEU carries out the function of strengthening the legitimacy of the institutions of social pluralism at the Union level. In this perspective, it increases the relevance of collective ‘involvement’ and bargaining as a method of governance and regulation both at the supranational and transnational level (see art. 155 TFEU), potentially envisaging forms of ‘auxiliary’ legislation at the EU level.

In this sense, article 152 TFEU should be read in close connection with the new provisions of the TEU that, in reshaping the values and objectives of the Union, undoubtedly strengthen the European social dimension endowing it with a relevance unknown to the text of the (former) European Community Treaty. The increased weight of social values and objectives easily emerges from a quick comparison between the text previously in force and the current one set out in articles 2 and 3 of the TEU. It emerges even more clearly still from the comparison between the corresponding provisions regarding the sphere of market integration and what might be called the hard core of the European economic constitution.

The Lisbon Treaty marks a major step in the development of fundamental social rights in the EU. A first important step was made after the adoption of the Amsterdam Treaty. After a long process of preparation, the Charter of Fundamental Rights of the European Union was solemnly proclaimed on 7 December 2000 at the occasion of the Intergovernmental Conference (IGC) held at Nice. It was assumed that the Charter had political rather than legal meaning, but the IGC committed itself to consider its future status after a year as part of a constitutional reform of the Union. The Charter provided a broad range of fundamental rights. It is divided into different chapters, entitled dignity, freedoms, equality, solidarity, citizen’s rights and justice, and takes an

integrated approach, including civil, political, economic and social rights all together. Most, but not all, labour law and social policy provisions are concentrated in the fourth chapter on ‘solidarity’. The legally non-binding character of the Charter was seen to have only a limited effect in the labour law discourse. As a consequence, labour law scholarship seemed to be cautious and avoided overestimating the Charter’s impact. With the adoption of the Lisbon Treaty on 13 December 2007 and its entry into force on 1 December 2009, however, the EU Charter of Fundamental Rights received binding ‘Treaty status’ in the EU legal order.

Fundamental social rights can be seen as conditional for a more complete view of labour law in Europe and as constitutive to a ‘European social model’. Fundamental rights approaches have limitations, but can be perceived as having a proactive and promotional function. There may be an influence on the discussion (and thus also the Court’s case-law) concerning the balance between social rights and market freedoms and there is room for a stronger connection of the EU legal order with traditional European social values, seen the as the EU Charter provides that it needs to be interpreted in accordance with the European Convention on Human Rights (1950). That would, arguably, require that the interpretation of the European Court on Human Rights cannot be neglected by the CJEU, when for example dealing with right to strike issues.

6. ECONOMIC GOVERNANCE

We cannot analyze in detail here the complex measures by which the member states of the Union, particularly those that are part of the Eurozone, have tried to emerge from the financial crisis by reforming the European economic and monetary governance along with the introduction of instruments of financial aid for the countries that are exposed the most, in some cases up to the risk of default. From the initial measures

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taken in 2010 to face up to the crisis of the Greek debt, until the adoption of the Treaty on the European Stability Mechanism (ESM) and the entry into force of the so-called Fiscal Compact, the Union has undoubtedly made a considerable effort to provide appropriate instruments to counter an unprecedented crisis that has put at risk the survival of the single currency project.\footnote{Which has become an essential part of the political project of an ever closer Union among the European people since the nineties: cf. G. Mòro (ed.), \textit{The Single Currency and European Citizenship. Unveiling the Other Side of the Coin}, New York, London, New Delhi & Sydney, Bloomsbury, 2013.}

These reforms – both those implemented within the institutional framework of the Union, and those adopted through recourse to the intergovernmental method and to the subtly revised instruments of international law present a common trait\footnote{See F.W. Schaarff, ‘Monetary union, fiscal crisis and the pre-emption of democracy’, LEQS Paper No. 35, May, London School of Economics and Political Science, 2011; A. Somek, ‘The social question in a transnational context’, LEQS Paper No. 39, London School of Economics and Political Science, June 2011; K. Tuori, ‘The European Financial Crisis – Constitutional aspects and implications’, EUI Working Papers Law No. 28, 2012; F. De Witte, ‘EU law, politics and the social question’ (2013) 14(5) \textit{German Law Journal}, 581–612.} which can be described as the radicalization of the trend to compress the autonomy of the member states (especially those whose common currency is the Euro) in respect of the management of their social policies. This trend is intensified, in particular within the new rules of the Stability Pact and of the Fiscal Compact, for it assumes the shape of a creeping de-politicization of the issues of social and distributive justice that are central in the definition of the very identity of the different welfare systems of the member states.

The importance of fundamental (social) rights for the European labour law debate, considered in their development as well as in light of the Lisbon Treaty, is discussed below. The single currency project, as conceived by the framers of the Maastricht Treaty, was built on a model opposite to one with a solidaristic nature \textit{sensu lato}, which generally characterizes federal systems, although according to very different variations. The single currency, the stability of which is ensured by the establishment of a European Central Bank, was not based on a partial centralization of competencies regarding fiscal and budget policies at Union level, as in federal entities, nor on a federal budget, as instead was suggested in the 70s by the McDougall Report.\footnote{That in designing a possible path of monetary integration among EEC countries, had suggested a gradual construction of a federal budget in stages that should have been completed, in the final stage, with the allocation of 25 per cent of the European GDP to the Community budget.} The Union is also completely devoid of automatic stability mechanisms that are necessary to cope with asymmetric shocks.\footnote{J.-V. Louis, ‘Solidarité budgétaire et financière dans l’Union européenne’ in C. Boutayer (ed.), \textit{La solidarité dans l’Union européenne}, Paris, Dalloz, 2011, 110.}

A first type of corrective measure, introduced as part of the so-called Stability Compact,\footnote{See the so-called Six Pack (consisting of Regulations 1173, 1174, 1175, 1176, 1177 of 2011 and of Directive 2011/85) and the Fiscal Compact. In November 2011 the European
the Eurozone by strengthening the rules on budgetary constraints and fiscal austerity. The new legislation – partly of a EU law nature, partly of international law character – introduces significant innovations, aimed first at making the limits on deficit and public debt, provided for by the Maastricht Treaty and the Stability and Growth Pact, effectively liable to be sanctioned. On the other hand, the states signatory of the Fiscal Compact are bound to insert the new rigorous golden rule of budgetary balance in their respective legal orders, preferably through rules of constitutional status.97 On the other hand, the procedure concerning excessive deficits – which can be activated also in the event of exceeding the limits of public debt – is decisively strengthened through the introduction of a reverse majority rule. Therefore, a qualified majority in the Council becomes necessary in order to reject a proposal from the Commission, by inverting the voting rule traditionally provided for by Union law and contemplated by the Stability Pact. Thus, once initiated by the Commission, the sanctioning procedure assumes a semi-automatic course of action, making it much more difficult to form blocking minorities for the member state concerned. In addition to the procedure referred to in article 126 TFEU, on the basis of article 121, the 2011 EU law reform also introduces a new procedure for the prevention and correction of macro-economic imbalances. This procedure broadens the power of the Commission to intervene far beyond the borders of fiscal policy, by extending it to the whole range of economic policies of national governments. And even in this case, any failure to comply with the corrective actions planned by the member state, according to the recommendations made by the Commission and the Council, is liable to be sanctioned by a procedure marked by a reverse majority voting.98

By the same token, the Euro Plus Pact,99 although having the nature of a political intergovernmental agreement, essentially ends up integrating those new supranational constraints, given the close bond with the new legislation on macroeconomic surveillance. The Euro Plus Pact intends, inter alia, to have a direct impact on the wage-setting systems that operate at member state level, which are per se excluded from the sphere of legislative competencies of the Union in the field of social policy (art. 153.5 TFEU). In the chapter on productivity, which is central in regard to the general objectives aimed at promoting the increase of competitiveness and employment within the Union, the Euro Plus Pact – while promising to preserve the different national traditions in the field of social dialogue and industrial relations – indicates which are the precise measures that member states should apply in relation to wage-setting arrangements, both in the public and private sectors. Particularly important is the recommendation made to align wages to productivity by proceeding, if


97 See art. 3 of the Treaty on stability, coordination and governance of the economic and monetary Union, to which Italy has proceeded to adapt by modifying art. 81 of the Constitution with the constitutional law No. 1 of 2012. Germany had already introduced the so-called Schuldenbremse in 2009, by modifying arts 109 and 115 of its Fundamental Law.

98 Tuori, The European Financial Crisis, see note 93 above, 17 ff.

necessary, to a decentralization of the systems of collective bargaining and, if appropriate, by reviewing the mechanisms for automatic indexing.

A second and more creative type of legal innovations, totally absent in the structure of the Maastricht Treaty and therefore subject to bitter controversy, concerns the introduction of suitable tools in order to provide the Union, and in particular the Eurozone, with the effective ability for the management of financial crises, through variously devised mechanisms of financial aid to countries in difficulty. Besides the first modest measures adopted within the European Financial Stabilisation Mechanism (EFSM), established with Council Regulation No. 407/2010 according to article 122 TFEU, these instruments of financial assistance all operate outside the institutional framework of the Union. The European Financial Stability Facility (EFSF), precursor of the ESM, lies evidently outside the legal framework of the founding Treaties as it was actually established as a limited company registered in Luxembourg, according to a very inventive and uneven combination between contract and financial-market law and public international law rules.\footnote{TUORI, The European Financial Crisis, note 93 above, 13–14.} On its part, by providing Eurozone States with a fairly strong permanent instrument of financial aid, the ESM was established as a body of public international law, expressly subtracted to the application of EU law.

In the strongly debated Pringle judgment,\footnote{See the judgment delivered by the Court in plenary session on 27 November 2012 in the case C-370/12, Thomas Pringle vs. Government of Ireland. See e.g. the critical comments by Tomkin (J. TOMKIN, ‘Contradiction, circumvention and conceptual gymnastics: The impact of the adoption of the ESM Treaty on the state of European democracy’ (2013) 14(1) German Law Journal, 169 ff.) and Van Malleghem (P.-A. VAN MALLEGHEM (2013), ‘Pringle: A paradigm shift in the European Union’s Monetary Constitution’ (2013) 14(1) German Law Journal, 141 ff.).} delivered by the Court of Justice after the authorization given by the German Constitutional Court (under specific conditions) of the ratification of the ESM by Germany,\footnote{BVerfG, 2 BVR 1390/12, of 12 September 2012. See also S.K. SCHMIDT, ‘A Sense of Déjà Vu? The FCC’s Preliminary European Stability Mechanism Verdict’, 14(1) German Law Journal (2013), 1 ff; M. WENDEL, ‘Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012’, 14(1) German Law Journal (2013), 21 ff.} the Luxembourg judges basically dismissed all the objections raised by the plaintiff in the main proceedings, an independent deputy of the Irish Parliament, regarding the compatibility of ESM with EU law. The most problematic issue – among the several raised by the Irish Supreme Court in its request for a preliminary ruling – concerned the very suspicious compatibility of the ESM with the prohibition to bailout laid down by article 125 TFEU. With an elaborate motivation, the Court of Justice excluded a violation of article 125 of the Treaty thanks to an innovative and restrictive interpretation of the no-bail-out-clause, stating that the (not yet operational) amendment of article 136 TFEU\footnote{Article 136 of TFEU was modified according to Decision 2011/99, not yet in force, using the simplified revision procedure introduced by the Lisbon Treaty for the first time. The amendment was intended to clarify the competence of the member states to adopt an instrument of the type of ESM.} has a merely confirmation value of the competencies of member states in this field. In the Court’s interpretation, article 125 is only intended to prevent member states from relying on a redemption of their public debt by other members of the Eurozone, in
this way, leading them to maintain a sound fiscal policy and, especially, a moderate budget policy. In the terms in which it is set, the ESM does not contradict the rationale and substance of this prohibition, since the financial solidarity that the member states ensure through it to the fellow countries whose difficulties jeopardize the stability of the whole Eurozone, is subordinate to a strict conditionality requirement, as specified by the same reformulation of article 136 TFEU. On one hand, the ESM is fundamentally committed to assuring the European collective interest of protecting the stability of the Eurozone as a whole, without definitely bearing itself with the public debt of the subsidized member states, which will remain individually liable anyhow; on the other hand, the strict conditionality-requirement for acceding to ESM financial aid gives adequate guarantees that this does not result in disincentives to pursue sound fiscal and budget policies, avoiding the temptation of moral hazard by the assisted countries.

From the review carried out here, although briefly, it is evident that the reforms introduced within and (especially) outside the structure of the founding Treaties to cope with the financial crisis of the Eurozone, contribute to determine a significant compression of the autonomy of the member states in the field of social and labour law and policy. The new supranational constitutional constraints to fiscal and budget policies of the member states of the Eurozone limit the redistributive options available to the national democratic process, with strong repercussions on the national welfare state arrangements. Overall, the new rigid neo-liberal structure of the European economic and monetary constitution can be characterized as a monumental exercise undertaken by ‘the economic’ to rule ‘the political’, which is unprecedented in the history of democracies, at least for the pervasiveness of its ramifications. Having pushed itself to this point, the Union – as has been critically remarked – is not far from the Hayekian ideal of a ‘limited democracy’ based on dethroning politics in the name of market-discipline as the supreme arbiter.

However, the doubt that such a design is resting on fragile assumptions of democratic legitimacy is dangerously powered by the dramatically ineffective measures adopted by the Union to overcome the economic and financial crisis. The austerity policies, adopted under the pervasive guise of the new European economic and fiscal governance, have so far produced prolonged recession and mass unemployment (especially among young people) in the countries in which they have been more or less mechanically adopted, starting from Greece, while in some cases they have even worsened the ratio between gross domestic product and public debt (as in Italy). In the words of one of the most lucid critics of that disquieting state of affairs, if compared to a fully-fledged, federal-state regime or even with the ‘European Monetary System’ in force until the introduction of the single currency, ‘Member States in the reformed...

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400 Comparative labor law


For an effective definition of the Fiscal Compact as a form of constitutionalisation of austerity see DE WITTE, note 93 above.
Monetary Union will indeed find themselves in the worst of these three worlds. While the EMU does not have the ability to undertake the economic and fiscal manoeuvres that only a truly federal budget allows to draw unto, the Union does not even let its member states autonomously use such residual macroeconomic levers – especially those in the Eurozone, that have lost any competency related to monetary policy. And while the new instruments of economic governance accentuate its institutional fragmentation, the Union is faced with a double deficit of democratic legitimacy, as a direct consequence of such an asymmetry between (poor) ability to give political answers (i.e. positive integration) and (strong) constraints to the autonomy of the member states in the name of the stability of the market’s (negative) integration. The already thin Union’s input-oriented legitimacy (utterly weakened by the marginalization of the European Parliament’s role within the structure of the new economic governance) is further aggravated by a dramatic, and perhaps more serious, crisis of output-oriented democratic legitimacy, as demonstrated by the widespread anti-European resentment shown by the national public opinion of the countries most affected by the crisis.

7. EUROPEAN UNION LABOUR LAW AND THE EUROPEAN SOCIAL MODEL: AN APPRAISAL

Let us refer back to our starting position. The concept of the European Social Model is problematic. There is a broad range of Union interventions in the area of labour law and social policy, but they cannot be seen as unequivocally advancing social rights or social citizenship. As can be understood from our overview of policy areas, the European Social Model seems more an attempt than a realization and, to the extent that it is evolving, being based as a market model, it is very vulnerable. Trails of a European Social Model come down to a combination of (a limited range of) hard law, soft law and governance measures, with market making, corrective and minimum harmonization objectives, causing tensions between negative (de-regulation) and positive (regulation) regulatory strategies, a growing relevance of fundamental social rights, and, in general, attempts to reconcile economic objectives with European (but often mainly national) social policies.

The search for a balance between economic and social progress is a fil rouge in European labour law and social policy development. However, striking a balance seems to be more difficult than ever. Alan Neal concludes that:

the declaration in the Presidency Conclusions to the 1989 Madrid Summit, that ‘in the course of the construction of the single European market, social aspects should be given the same importance as economic aspects and should accordingly be developed in a balanced fashion’ now suffers from a fundamental disequilibrium in favour of the ‘economic dimension’.

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107 SCHARPF, note 93 above.
Our analysis confirms this scepticism. It also confirms that legitimacy remains problematic, as well as the ability of European policies to connect well with traditional labour law and social policy understanding and development in the member states, knowing that, despite common traits, differences in state traditions are quite apparent.

After more than half a century of European integration, there are great achievements. European states have never cooperated before in such an intense and peaceful manner, and we agree with Fritz Sharpf that:

in their own terms, the efforts to complete the internal market and monetary union have succeeded beyond expectations. At the same time, however, the advance of economic integration has greatly reduced the capacity of member states to influence the course of their own economies and to realize self-defined socio-political goals.109

Not only the internal market provisions challenge the capability of the member states to maintain adequate levels of social protection and distributive justice within their borders. At the same time the new economic and monetary constitution of the Union, in responding to the financial crisis, imposes increasingly severe and pervasive supranational constraints on the national democratic welfare state systems. Union law deprives member states of decisive levers of political-democratic control over their welfare systems, without being able to compensate for such a partial loss in delivering distributive social justice at a supranational level. The asymmetry between negative and positive integration has never been thus evident in the history of the integration process. And with the deepening of this asymmetry, the European integration social deficit risks converting into a crucial factor of crisis for the Union’s democratic legitimacy.

There are nevertheless signs that the European Social Model might take more effect and legitimacy in the future. It may be argued that, in the setting of the Lisbon Treaty, the market loses its sovereignty within the EU political horizon and competition is no longer purposefully protected as an end in itself, thereby becoming an instrument for pursuing the overarching objective of a ‘social market economy’. Within this new normative framework, such a general constitutional rebalancing and such a specific strengthening of social values and objectives receive their definitive constitutional consecration by the Charter of Fundamental Rights of the European Union (art. 6, para. 1, TEU). It is in fact in the fully achieved constitutionalization of fundamental social rights and principles as enshrined in the Nice Charter that it is possible for the EU legal order to enter its full constitutional maturity, enhancing and transposing at the supranational level a dimension which is historically typical, in Europe, to the constitutional democratic nation state.