Member States’ Sovereignty in the Socio-Economic Field: Fact or Fiction?

The Clash between the European Business Freedoms and the National level of Workers’ Protection

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Abstract
The author assesses the case law of the Court of Justice of the European Union (the Court) in which the European business freedoms collide with national labour law. The approach of the Court will be scrutinised with the aim of discovering the extent to which the Court encroaches upon the Member States’ autonomy in the field of labour law. This topic became popular directly after the landmark decisions in Viking and Laval of December 2007. Both cases addressed conflicts that were related to socio-economic diversity in the European Union following the enlargements. In the end, the Court decided where the balance between the conflicting economic and social values had to be struck and, by doing so, did not grant any room of discretion to the Member States. Since then, the freedom of establishment and the freedom to provide services have obtruded themselves into the sphere of national labour law. The Court has broadened its jurisdiction in the socio-economic field not only in cross-border situations but also in internal situations via its interpretation of social policy Directives by virtue of Article 16 CFREU. The research shows that the Court is assessing the legitimacy of restrictions imposed by national labour law in seemingly different distinguishable ways since 2007. Although the Court does not seem to aspire to a uniform labour law system throughout the European Union, its approach applied in Viking and Laval cannot be considered a thing of the past. Due to poor reasoning, it is not clear when and where the Court draws the line. Since its rulings cannot readily (or even at all) be subject to political review, the ensuing legal uncertainty leads to anxiety about the Court being the ultimate decider in the socio-economic field.

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Introduction and Research Question

The European Union (hereafter: EU) is based on the economic freedoms of movement and a system to prevent distorted competition. Originally, social harmonisation was not part of the European project. Even today the European legislator has limited possibilities for reconciling conflicting economic and social values through a process of harmonisation. Besides that, efforts to adopt European social policies are politically impeded, given the diverse national welfare systems of the current 28 Member States. As a result, labour law is often considered to be an area reserved to the Member States and the level of workers’ protection differs throughout the EU.

However, appearances can be deceptive. In practice, it seems that hardly any area of national labour law escapes from the application of the European internal market. This takes place not through legislation, but through preliminary rulings by the Court of Justice of the European Union (hereafter: Court). The freedom of establishment and the freedom to provide services allow companies to invoke their free movement rights directly under EU law. As soon as a national labour law rule hinders their cross-border movement, the freedoms are triggered and the Court might be asked to what extent national labour rules are allowed to restrict the well-rooted economic values of the EU. In that case, the Court has to conduct a balancing test with regard to the conflicting values. The Treaty does not contain concrete directions about which interest prevails. It is therefore left to the Court to decide. The same is true for the interpretation of European social legislation. Primary law and secondary law are not separate worlds but enjoy a complicated interrelationship in which the former influences the latter in several ways. Moreover, the Court takes the freedom to conduct a business as laid down in Article 16 Charter on Fundamental Rights of the EU (hereafter: CFREU) into consideration when interpreting social policy Directives. Interestingly, as the Court pointed out, Article 16 CFREU refers to the freedom of establishment and contains similar rights. As a result, the Court has to conduct the same balancing test with regard to social policy Directives but this time without the need of a cross-border element.

The purpose of this paper is to look into the case law of the Court to find out to what extent its rulings can be seen as threatening the ability for Member States to maintain existing levels of workers’ protection. To put it differently in the form of a question: does the Court settle questions in the socio-economic field that should be weighed and balanced on the national political, and not the European judicial, scale? The conflict between market freedoms and national labour law was a popular topic right after the Viking and Laval judgments in 2007. This paper will discuss whether the Court’s approach in Viking and Laval has been followed up in case law. The research is limited to rulings where the Court had to strike a balance between the freedom of establishment, the freedom to provide services and/or Article 16 CFREU on the one side; and national labour law measures on the other.2 The free movement of workers has generally not been considered as a threat to the level of workers’ protection under national legislation as it grants foreign workers the

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2. The term ‘labour law’ is used to describe guarantees surrounding employment which are aimed at the protection of the employee as the weaker party.
same rights as nationals.3 This freedom is therefore not the centre of attention, yet is mentioned when it provides added value in light of the research question.4

In order to assess the research question, three aspects are scrutinised. Firstly, the role social values play at the European level and the effect thereof on the division of competences (par. 2). Secondly, the way the Court interferes with Member States’ possibilities to create and maintain their chosen level of workers’ protection. In approaching this aspect, a distinction is made between case law relating to the freedom of establishment and the freedom to provide services (par. 3) and case law in the field of social policy Directives and their interpretation by virtue of Article 16 CFREU (par. 4). In both paragraphs, I start with the scope of the European rules and then switch to the balancing act conducted by the Court. Thirdly, I will look at whether the division of competences between the European and national legislator obstructs the possibilities of political correction when national socio-economic values are jeopardised (par. 5). The paper ends with a final analysis (par. 6) and a conclusion (par. 7).

EU Powers, State Autonomy and the Role of the Court of Justice

At the national level, economic policy and social protection policy have the same constitutional status. A balanced equilibrium between the two types of interests can be established by political consensus. In that respect, welfare states have dealt with negative externalities of the market mechanism by providing for workers’ protection through labour law legislation and support for collective bargaining systems.

The situation at the European level is different. Up to this point, there has been an uneasy compromise between Union law and the law of Member States in the socio-economic field. The design of the European project has been characterised by Sharpf as the decoupling of the economic and social sphere.5 Where economic values were extensively regulated by the four market freedoms, the principal responsibility for making labour law rules remained with the Member States. This decoupling does not mean that the EU did not keep in mind the social values surrounding employment. Since the early days of the then European Economic Community, migrant workers were guaranteed free movement rights and social entitlements in the host Member State on the basis of equal treatment (now Article 45 TFEU).6 This market freedom has had beneficial consequences for the availability of employment and has served the employee as the weaker party looking for valuable opportunities on the EU market. The same holds for the subject of equal pay for men and women (now Article 157 TFEU). Be that as it may, the European legislator only had limited regulatory competences in social policy. The six founding fathers decided against the harmonisation of national labour law markets as a precondition for the integration of industrial

3. An exception can be found in CJEU 8 July 2017, case C-566/15 (Erzberger/TUI). This was, however, an atypical case as a stakeholder invoked the free movement of workers in an (failed) attempt to set aside the German co-determination system. Importantly, the Court made clear that Art. 45 TFEU does not grant the worker the right to rely, in the host Member State, on the conditions of employment that he enjoyed in the Member State of origin under the national legislation of the latter Member State (para. 35).
4. This is particularly the case when dealing with the scope of the freedom of establishment and the freedom to provide services (paragraph. 3.1.) and the scope of social policy Directives (paragraph. 4.1.).
5. Scharpf F.W. (2002), ‘The European Social model: Coping with the challenges of diversity’, Journal of Common Market Studies 40(4), pp. 646-670.
6. Later on, these rights were defined more precisely in secondary law. See Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement of workers within the Union.
This changed with the Maastricht Treaty through which social regulatory competences were introduced alongside a mechanism for European social dialogue (now Articles 153-155 TFEU). However, in practice, it has been difficult to adopt regulation due to the diversity of national welfare systems. The European social dialogue was designed to overcome the political stalemate in European social policy, but this method has fallen into disuse after some successes in the early 1990s. As a result, any actual harmonisation in labour law has been limited to the restructuring Directives of the 1970s, and several Directives on the subjects of equal treatment, health and safety in the workplace, transparent working conditions, and consultation rights. These measures touch on a small part of the range of topics covered by labour legislation. For all other topics, Member States remain responsible for safeguarding appropriate levels of employment protection. It’s mainly a matter of political preference as to which social policy measures are chosen.

The ever-existing institutional asymmetry in the socio-economic field can cause problems. Article 26(2) TFEU defines the EU’s internal market as ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty’. Market freedoms traditionally have a strong central position and are directed at the elimination of national barriers. This aim for de-regulation is hard to reconcile with the social values delivered by Member States, which require market-correcting policies. An inherent tension exists: policies in one sphere have consequences for the other and vice versa. When the Court held that the provisions relating to the market freedoms enjoy direct applicability, it thus became clear that market freedoms and national labour laws would clash with each other. These clashes occur especially with regard to the freedom of establishment (now Article 49 TFEU) and the freedom to provide services (now Article 56 TFEU), which can be invoked by EU companies before the national court to challenge national labour law measures that protect employees. Due to the principle of supremacy, national labour law measures are set aside when in conflict with these market freedoms.

The strong position of economic values at the European level does not mean that the business freedoms automatically prevail over national labour law. The Court is empowered and constrained by formal rules, such as the exceptions to market freedoms and the rights laid down in the CFREU. Moreover, social values have gained importance since the Treaty of Lisbon. With the inclusion of Article 3(3) TEU, the internal market is now supposed to contribute, simultaneously to

7. Scharpf, supra note 4. This compromise originated in the Spaak Report, which rejected the idea of a European-wide labour code as misconceived.
8. This was first accomplished through a social protocol (with the UK opting out) and incorporated later on in the Treaty itself (Treaty of Amsterdam).
9. Article 153 TFEU requires unanimity or a qualified majority in order to adopt European legislation on the social protection of workers. The subjects that require unanimity have never been used so far. Moreover, the paramount issues of minimum wages, the right of association and the right to strike are excluded from the EU’s regulatory competences.
10. Successes included parental leave and equal treatment of flexible workers.
11. There can be different objectives for the EU’s institutions to interfere with national labour law. The market freedoms are aimed at the establishing and proper functioning of the internal market and negative integration should, therefore, be placed in the context of the integrationist objective. See about the rationales for EU intervention in national labour law in more detail: Syrpis P. (2007), EU Intervention in Domestic Labour Law, (Oxford, OUP).
12. ECJ 5 February 1963, case C-26/62 (Van Gend and Loos).
13. Leczykiewicz D. (2014), ‘Conceptualising Conflict between Economic & Social in EU Law’, in Freedland M. & Prassl J., Viking, Laval and Beyond, (Oxford, Hart Publishing), pp. 307-322.
the elimination of obstacles to economic free movement, to social protection. Additionally, Article 9 TFEU requires the EU to pursue a high level of employment\textsuperscript{14} and to guarantee adequate social protection. These principles have been elaborated in the European pillar of social rights, which was solemnly proclaimed by the European Parliament, the Council and the European Commission at the Social Summit for fair jobs and growth in Gothenburg on 17 November 2017.\textsuperscript{15} In short, social values have their formal place within the objectives of the EU. However, their impact on the normative understanding of the market freedoms remains unclear. As a result, the Court fulfils an important role in the balancing act when it is competent to answer preliminary questions in the field of free movement law.\textsuperscript{16} This is also true in the field of social policy Directives. Of course, the influence of free movement law decreases after EU legislation has been adopted. However, most social policy Directives set minimum standards to avoid the worst excesses of a race to the bottom, thus giving Member States the freedom to level up social standards. Where Member States regulate above the ‘floor’, the national provisions will still be subject to free movement law. Additionally, provisions of secondary EU law are often vague and will have to be interpreted. The Court shall do this, inter alia, in light of the basic principles of the internal market\textsuperscript{17} and Article 16 CFREU. This means that the Court has to strike a balance between the economic values and the interests connected with the protection of employees also when dealing with subjects covered by social policy Directives.

\textbf{Member States’ Sovereignty in Areas not regulated at EU Level}

\textit{Scope: The expanding outer limits of the economic freedoms}

When a matter falls within the scope of directly effective EU law provisions, the competence to decide on the desirability of national social policy is allocated to the Court in last resort in lieu of national legislators. It is therefore of the utmost importance to properly determine the scope of the freedom of establishment and the freedom to provide services. In the landmark cases \textit{Viking} and \textit{Laval}, it was argued that the said freedoms should not apply to the right to strike since their application may undermine the Member States’ competences in this area.\textsuperscript{18} After all, the EU lacks legislative competence with regard to the right of association and the right to strike (now Article 153(5) TFEU). Both the Advocate Generals as well as the Court rejected this argument. Therefore, the fact that a restriction on freedom of movement arises out of the exercise of a fundamental right or of conduct falling within the ambit of the Member States’ sovereignty in the field of social policy does not render the provisions on freedom of movement inapplicable. In other words: where

\begin{itemize}
  \item \textsuperscript{14} This aspect can also be seen as an economic objective.
  \item \textsuperscript{15} See, about the European pillar of social rights: Hendrickx F. (2017), ‘The European pillar of social rights: Interesting Times ahead’, \textit{European Labour Law Journal} (3), pp. 91-92.
  \item \textsuperscript{16} Veldman A. & De Vries S. (2015), Regulation and enforcement of economic freedoms and social rights: a thorny distribution of sovereignty, in Van den Brink T., Luchtman M. & Scholten M. (eds.), \textit{Sovereignty in the Shared Legal Order of the EU}, (Brussels, Intersentia), pp. 65-92, specifically para. 4.2.
  \item \textsuperscript{17} Syrpis P. (2015), ‘The Relationship between Primary and Secondary Law in the EU’, \textit{Common Market Law Review} (52), pp. 461-488, specifically para. 3.2.
  \item \textsuperscript{18} ECJ 11 December 2007, case C-438/05 (\textit{Viking Line}), para. 40; ECJ 18 December 2007, case C-341/05 (\textit{Laval un Partneri}), para. 87. Another example of a similar formula can be found in ECJ 19 May 2009, joined cases C-171 and 172/07 (\textit{Apothekerkammer des Saarlands/Doc Morris}), para. 18 concerning social security systems.
\end{itemize}
the Treaty states that the EU should respect the Member States’ sovereignty in certain areas, it addresses EU legislative competence and not free movement law.

Since Viking and Laval, the economic freedoms have begun to obtrude themselves into the sphere of national social policy. It is a relatively easy step to find that national labour law constitutes a restriction on the market freedoms. Direct, indirect or non-discriminatory measures which hinder or create an obstacle to market access are considered to be a breach of free movement.19 Whilst the discriminatory approach looks at how nationals and foreigners are treated and, accordingly, a potential illegality exists only when there is a difference in treatment, the market access approach considers the perspective of the out-of-state actor and his ability to access the market of another Member State.20 Consequently, there is no need to show that the foreign economic actor is being treated differently. This broad approach easily brings national labour law within reach of the market freedoms. Indeed, national labour law rules in general might discourage foreign companies from providing a service or setting up an establishment in another Member State. This is especially true for businesses that seek to provide a service or set up an establishment in a Member State with a higher regulatory standard than the one applicable in their home State.21 The fact that the indirect and potential effect on cross-border trade suffices for a national measure to fall within the scope of the market freedoms, means that businesses, simply because they are foreign, have far-reaching rights to challenge national legislation which they find in their way.

That possibilities are not unlimited has been illustrated in the Erzberger/TUI decision, which was delivered on 18 July 2017.22 The case concerned the German co-determination system, which stipulates that only employees employed on national territory have the right to elect and to stand for election as employees’ representatives on the company’s supervisory board. The German system was challenged on the grounds of the free movement of workers. The Court held that there was no impediment to the exercise of the free movement of workers. In support of its decision the Court referred to the fact that there is no European law on the subject of co-determination. Member States have different laws and to be subject thereto is a consequence of the freely made decision to work in another Member State. The question arises whether the decision would be the same if the German co-determination system were challenged on the grounds of the freedom of establishment. The freedom of establishment can be triggered if the foreign parent undertaking argues that it is hindered by the co-determination system to conduct its business in the German subsidiary undertaking as it pleases. Indeed, workers rather than shareholders appoint half of the members of the German subsidiary’s supervisory board, which can be said to render the freedom of establishment less attractive. In its AGET Iraklis decision, delivered on 16 December 2016, the Court qualified the Greek substantive rules on collective redundancies as a serious obstacle to exercising the

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19. The Court has interpreted the term ‘restriction’ very broadly. See ECJ 11 July 1974, case C-8/74 (Dassonville); ECJ 30 November 1995, case C-55/94 (Gebbard); ECJ 15 December, case C-415/94 (Bosman). For some rare examples where there was no restriction, see ECJ 27 January 2000, case C-190/98 (Graf): the effect on free movement was ‘too uncertain and indirect’; CJEU 15 April 2010, case C-542/08 (Barth): the measure did not affect free movement at all.

20. The fundamental freedoms are not only concerned with market access, but also with market exit (companies that want to move out of a certain jurisdiction). This was the case in Viking where the industrial action was aimed at preventing a ferry from re-flagging to a country with lower social standards.

21. It should be noted that the freedom of establishment is not limited to the sole right for undertakings to establish themselves in other Member States. This freedom also gives any cross-border economic group the right to scale down and even dissolve an establishment in a Member State. See Opinion of A-G Wahl 9 June 2009, case C-201/15 (AGET Iraklis), para. 65.

22. CJEU 8 July 2017, case C-566/15 (Erzberger/TUI).
freedom of establishment. The fact that there was no European law on the subject was not mentioned in this respect. This is strange; one could argue that it is the company’s choice to set up an establishment in another Member State, just as much as it is a worker’s choice to move. However, it seems that the Court more readily presumes a restriction in the context of freedom of establishment than in the context of free movement for workers. Therefore, it cannot be ruled out that the decision in Erzberger/TUI would be different when challenged on the freedom of establishment.

Apart from the restriction there is another proviso to be addressed: the cross-border element. The wording of the freedom of establishment and the freedom to provide services make it clear that both freedoms are aimed at eliminating obstacles to the economic free movement between Member States. Consequently, practices of a purely internal nature should not fall within the supervisory reach of free movement law. Be that as it may, case law shows that the Court has been readily accepting the cross-border element. According to settled case law, the existence of a cross-border element is determined on the basis of the geographical criterion. What matters is whether the factual situation is linked to more than one Member State. However, the Court already qualifies an indirect link as sufficient and, for this reason, has relaxed the geographical element over the years.

The ruling in Laval on the free movement of services has illustrative value. The case concerned a Swedish undertaking (Baltic), whose share capital was held entirely by its Latvian parent (Laval). The contract involving building work was between Baltic and the town of Vaxholm. Laval hired out its personnel to Baltic to perform building work. The Swedish construction workers’ trade unions took industrial action with the aim of persuading the Latvian parent to sign a collective agreement in respect of the building work done by its employees in Sweden. The strike was held at the premises of Baltic. Although no one questions the transnational element, it is not clear from the case what exactly constituted the transnational dimension. The answer depends on which service was restricted. The strike was directed against Laval, the principal party to the Swedish litigation. Therefore, one possibility is that the strike restricted Laval’s ability to provide services to its own subsidiary in Sweden (the posting of its workers). The downside of this line of reasoning is that the strike was aimed at the building work being carried out at a lower wage. As mentioned above, the building contract was between Laval’s Swedish subsidiary and the Swedish town of Vaxholm. Another possibility is that the building work itself had been restricted. In that case, one might argue that the Court found the cross-border element in the fact that Baltic’s share capital was held entirely by its foreign parent company, even though Laval itself was not the service provider. Or too put it differently: Laval acted through a local subsidiary over which it had full control, and that alone was reason enough to constitute a cross-border element, even though there was no contractual relationship between Laval and the party for whom the services were intended. If this is the correct interpretation, the Court gave the cross-border element a very broad meaning in Laval.

23. CJEU 21 December 2016, case C-201/15 (AGET Iraklis), paras. 55-57.
24. It was, however, mentioned later on in relation to the proportionality test (see para. 92).
25. This is true with the exception of the provision on free movement of workers (Article 45 TFEU).
26. In a purely national situation, the Member States seem to maintain their freedom. Nevertheless, the free market rules may indirectly play a role through the concept of reverse discrimination. See, about this subject in general: Tryfonidou, A. (2009), Reverse discrimination in EC Law, Alphen aan den Rijn: Kluwer Law International.
27. See also Deakin S. (2008) ‘Regulatory Competition in Europe after Laval’, working paper series: REFGOV-FR-18, pp. 1-42.
The latter view is not by any means implausible. Recent case law in the field of the freedom of establishment, which uses the same formula for the cross-border element as the freedom to provide services, has consolidated this interpretation. The abovementioned AGET Iraklis case concerned an appeal brought by a Greek company against the application of the Greek substantive rules on collective redundancies.28 All parties to the dispute were Greek. The Court seems to have thought that it was almost beyond argument that there was a cross-border element in this scenario; this conclusion was simply asserted by the fact that AGET Iraklis formed part of a French multinational group. The fact that the French parent company itself was no party to the dispute before the Greek court and had not invoked the freedom of establishment, seemed to make no difference.29 This approach is characterised by discord between the subject who invokes rights under EU law and the party whose actions bring the case within the scope of EU law.30 The market freedoms are thus covering cases where the cross-border element is tangential to the dispute at issue.31

Additionally, the Court seems to be moving away from its traditional geographical approach. Under some circumstances, the Court is willing to review national measures applicable to a purely internal case when the substance of the national rule has a potential external effect. The RegioPost case provides an example of this approach in a labour law context.32 The case itself did not entail any cross-border elements. It involved a German service provider who participated in a German public tender. The Court took the view that the requirement to pay minimum wages could restrain service providers in other Member States from tendering. The distinction between what is potential or merely hypothetical is not exactly clear, as the Court sets forth the idea that the mere existence of possible future recipients suffices. This approach might have far-reaching consequences. National labour law legislation can always be said to have an effect on employers and employees from another Member State. Workers potentially seek jobs abroad or companies may seek to expand to another Member State. There is a very thin line between a potential link and a test case without any direct link to the market freedoms.

The combination of a broad restriction test and the readily-made assumption of a cross-border element has the consequence that almost all national labour law measures are liable to be challenged under free movement law.

Balancing act: Workers’ protection in the proportionality test

When the internal market’s broad reach was established, the Court located within it a demonstrated respect for concerns other than those related to trade liberalisation. Indirect discriminatory and non-discriminatory measures that may impede or make the exercise of market freedoms less attractive can be saved not only through the express derogations found in the Treaty, but also

28. AGET Iraklis supra note 23, para. 74.
29. Rüffert stands in the same line; the foreign provider was contracted to supply the services, yet he was not a party to the dispute before the national court (ECJ 3 April 2008, case C-346/06).
30. A parallel development has occurred with regard to the free movement of workers. CJEU 11 July 2002, case C-60/00 (Clean Car Autoservice GmbH): the employer could rely on the free movement of workers while he himself could not be considered as a worker; CJEU 11 January 2011, case C-208/05 (ITC): a private sector recruitment agency could rely on the free movement of workers since there is nothing in the wording of the provision to indicate that those rights may not be relied upon by others.
31. See De Sousa P.C. (2011), ‘Catch Me If You Can? The Market Freedom’s Ever Expanding Outer Limits’, European Journal of Legal Studies (2), pp. 162-191.
32. CJEU 17 November 2015, case C-115/14 (RegioPost).
by means of a broader category of objective justifications, i.e. public interest requirements. This exception acknowledges the existence of certain national interests that are worthy of protection and should prevail over market freedoms. In labour law cases, Member States frequently offer workers’ protection as a ground of justification, which the Court has recognised as a ground of public interest.\(^{33}\) Other accepted public interest justifications are the prevention of social dumping or unfair competition and avoidance of labour market disturbances. The Court has been generous in accepting these justification grounds with reference to the fact that the EU not only has an economic but also a social purpose. The \textit{AGET Iraklis} judgment demonstrates clearly this line of reasoning.\(^{34}\) The Court ruled that a restriction on the freedom of establishment might be justified by overriding requirements in the public or general interest, such as ‘the protection of workers’ or ‘the encouragement of employment and recruitment’. It is noteworthy that the Court digressed to the social policy objectives pursued by the Treaties, thereby discussing Articles 3(3) TEU, 151 TFEU, 147 TFEU and 9 TFEU at some length. It further noted that the Member States have a wide margin of discretion in choosing the measures capable of achieving the aims of their social policy.

This approach suggests that Member States have maintained their freedom to regulate matters in the field of social policy. However, the existence of a justification ground alone does not suffice. Any justification ground offered by the Member State must satisfy the final analysis concerning proportionality. This implies that the restrictive measure (which is justified by imperative requirements in the general interest) is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it.\(^{35}\) The Court handles the necessity test in various ways. It can be very thorough which means that the Court comes up with what it considers as less restrictive measures. This requires the Court to strike a balance between the conflicting interests at stake (proportionality in the strict sense). It is also possible that the Court finds the measure proportionate, despite the fact that other Member States regulated the field with measures that are less restrictive on the respective market freedom, thereby granting Member States a broad margin of appreciation. How the Court decides to interpret the necessity test depends, inter alia, on the market freedom where it is utilised and the justification ground that is offered.\(^{36}\)

In \textit{Rush Portuguesa}, the Court held that posted employees are regarded as part of the cross-border service provided by their employer (now Article 56 TFEU).\(^{37}\) Until then, all types of workers, whether working temporarily or permanently in a host Member State, fell under the scope of the freedom of workers (now Article 45 TFEU).\(^{38}\) The latter provision gives foreign workers the right to be treated equally to national workers during the employment relationship. Member States were therefore obliged to apply their national labour law rules to workers from

\(^{33}\) See in particular ECJ 23 November 1999, joined cases C-369/96 and C-376/96 (\textit{Arblade and others}); ECJ 13 December 2005, case C-411/03 (\textit{SEVIC Systems}); \textit{Viking Line} supra note 13; \textit{AGET Iraklis} supra note 23.

\(^{34}\) \textit{AGET Iraklis} supra note 23, paras. 71-78. The Viking case stands in the same line, \textit{Viking Line} supra note 18, paras. 78-79.

\(^{35}\) ECJ 30 November 1995, case C-55/94 (\textit{Gebhard}). The proportionality test was introduced in the \textit{Cassis de Dijon} case (ECJ 20 February 1979, case C-120/78). However, in \textit{Gebhard} the criteria were set out more clearly and in a sophisticated way.

\(^{36}\) Harbo T-I. (2010), ‘The Function of the Proportionality Principle in EU Law’, \textit{European Law Journal} (2), pp. 158-185.

\(^{37}\) ECJ 27 March 1990, case C-113/89 (\textit{Rush Portuguesa}), and subsequently confirmed in further case law.

\(^{38}\) The freedom to provide services has a complementary character. See also Regulation 1612/68 (now Regulation 492/2011). The fifth Recital to this Regulation explicitly refers to workers ‘who pursue their activities for the purpose of providing services’.
another Member State. The Court’s decision in *Rush Portuguesa* rendered this approach inoperative and has had fundamental legal consequences. Article 56 TFEU is written from the perspective of the service provider. The presumption is that the law of the country of origin applies. For this reason, the application of labour law rules of the host Member State is considered to be an obstacle to the free movement by the employer concerned. When the host Member State wants to apply its labour law rules to posted employees working in its territory, it has to offer a justification ground which satisfies the test of proportionality.

In *Rush Portuguesa*, the Court allowed the host Member State to apply all its labour laws to posted workers. The Court retreated from this approach in its post *Rush Portuguesa* cases. The Court found that the freedom to provide services protects the rights of the foreign service provider to apply the law of its home state in preference to the law of the host state that imposes a higher regulatory burden, unless the law of the latter can pass a justification test. In its assessment of the justification test, the Court takes into account whether the interest has already been protected in the Member State where the company is established (the principle of mutual recognition). The case law shows that this hurdle is a fairly stiff one to take and, besides that, it has to be determined on a case-to-case basis. Interestingly, the Services Directive was amended in its final draft stages in order to ensure that none of its provisions would undermine the territorial application of labour law rules and provisions of collective agreements. However, the *Laval* and *Rüffert* rulings in 2007 and 2008 revived the country of origin principle in relation to labour law with the sole exception of the hardcore minimum rules as laid down in the Posted Workers Directive. Altogether, the Court’s decision that a posted employee is excluded from the application of the provisions relating to the

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39. The Court assumes that the company’s place of establishment determines which labour laws apply to the employee(s) it employs. That assumption is not necessarily true. Under the Rome I Regulation, labour laws are generally applied on a territorial basis, at least as far as mandatory rules are concerned. Article 8(2) Rome I Regulation states that the employment contract is subject to the law of the Member State in or from which the employee normally or habitually carries out his work, even if he is temporarily employed in another country. Only when a habitual work place cannot be established, should one use the place of establishment of the agency or branch that hired the employee to determine which labour law is applicable. When dealing with posting, the habitual workplace will in most cases coincide with the company’s place of establishment, especially under the rule that the habitual workplace does not change if the employee is temporarily working in another country. However, this could be different when a company chooses to incorporate in a Member State that is entirely separate from the one in which it is doing business. This is possible by virtue of several judgments of the Court in the field of freedom of establishment (see ECJ 9 March 1999, case C-212/97 (*Centros*); ECJ 5 November 2002, case C-208/00 (*Überseering*); ECJ 30 November 2003, case C-167/01 (*Inspire Art*); SEVIC Systems supra, note 24.

40. ECJ 25 October 2001, joined cases C-49, 50, 52, 54, 68 and 71/98 (*Finalarte et. seq.*), paras. 31 and 45; *Arblade et. seq.* supra, note 33, paras. 50-51; ECJ 9 August 1994, case C-43/93 (*Van der Elst*), para. 15.

41. A number of cases focused on the procedural safeguards that host Member States applied in posting situations. Procedural rules as such do not affect social policy decisions made by the host Member State; they only impose additional requirement rules on the posting companies. National social policy is affected when the Court decides on the application of substantive employment law by the host Member State, e.g. *Finalarte et. seq.* supra, note 40. The Posted Workers Directive from 1996 has been conceived as both a response to and a clarification of this jurisprudence (see par. 3.3.)

42. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 20116 on services in the internal market.

43. See also Barnard C. (2008), ‘Employment Rights, Free Movement under the EC Treaty and the Services Directive’, in Rönnmar, M. (ed.), *EU Industrial Relations and National Industrial Relations: Comparative and Interdisciplinary Perspectives*, (Deventer, Kluwer), pp. 137-168, specifically para. 4.4.
free movement of workers has restricted the Member States’ autonomy in applying their national labour law to all those working within their territory.

The proportionality test is conducted differently in respect of the freedom of establishment. When a company invokes its freedom of establishment in a labour law context, its employees are working for branches or agencies established in the host Member State. Although the company’s place of establishment has no intrinsic connection to the labour laws to which it is subject, its employees regularly work in the host Member State and are consequently subject to its labour laws. Therefore, the question whether the same interest has already been protected in another Member State is non-existent: the law of the host Member State (and not the Member State of origin) regularly applies to these employees. The freedom of establishment is directed mainly to ensuring that foreign companies are treated in the host Member State in the same way as nationals of that State. However, it also prohibits the Member State from hindering the cross-border group to establish, scale down and even dissolve an establishment in that Member State. National social policy without discriminatory aspects might be questioned on the freedom of establishment, as was the case in Viking.

The facts of Viking are fairly well known. The case concentrated around a ferry ship that planned to reflag from Finnish to Estonian law in order to compete with Estonian ferry ships. The Court was required to rule, inter alia, on a collective action initiated by the Finnish trade unions with the support of an international trade union organisation in order to prevent the reflagging. In broad terms, the Court was asked to assess the Finnish model, since on the basis of the facts it seemed that, if it were not for the impact on the freedom of establishment, the collective action would have been lawful from a Finnish perspective. The Court accepted the protection of workers as a legitimate justification if the jobs and workers’ conditions were under serious threat.

44. The indication ‘host Member State’ is based on the perspective of the company that invokes the freedom of establishment.
45. This is at least true in regard to the mandatory rules (Article 8(2) Rome I Regulation). The Rome I Regulation only applies when there is a transnational element.
46. Viking Line supra, note 18. The question was also addressed in Laval supra, note 18. It is important to keep in mind, however, that the proportionality principle was applied in a very different context in the Viking and Laval cases. In Laval, the application of the proportionality principle was strongly influenced by a combined interpretation of relevant ‘minimum’ harmonisation rules as laid down in the Posted Workers Directive. For that reason, the Laval case will be discussed in para. 4.2.
47. Viking shows that not only national labour laws but also actions by private associations are caught within the scope of the market freedoms. Most cases on ‘horizontal’ effect concentrate on the indirect effect of market freedoms on private persons to whom the national labour legislation at stake may or may not be applied. In Viking, however, it was not the legality of a national law but the legality of a private action that was under direct scrutiny under the freedom of establishment. This approach is in line with Bosman, ECJ 15 December 1995, case C-415/93. In Raccanelli the Court extended the scope of the free movement of workers (Art. 45 TFEU) even to provisions in employment contracts between individuals, ECJ 17 July 2008, case C-94/07, para. 45.
48. Article 13 of the Finnish constitution confers on all individuals the freedom to form trade unions and the freedom of association in order to safeguard other interests. This provision has been interpreted in Finnish case law as allowing trade unions to initiate collective action against companies in order to defend workers’ interests.
49. In assessing the justification ground, the Court made a distinction between actions aimed at the protection of jobs at risk (these are justified) and actions aimed at restricting access of foreign workers (these are not justified). Therefore, it should not be assumed that the need to protect employees is the genuine objective of a measure in all cases where Member States or, in this case, trade unions, present their labour law measures as forming part of their social policies. Protectionist rules that are intended to safeguard the economically advantageous position of domestic workers can easily be presented as labour protection rules. It is up to the national court to determine the genuine goal of the
Whilst the right to strike could be relied on to achieve this objective, based on the facts of the case it is arguable that the strike had not been necessary in the eyes of the Court. The reason is that the strike had likely gone beyond what was necessary to ensure the workers’ rights, not least since the trade union may well have had other, less restrictive, means at its disposal. Although the Court referred the case back to the national court for final analysis, one may conclude that the proportionality test amounted to a strict test requiring alternative means to be exhausted. Three years later, A-G Trstenjak proposed revising the *Vikings* approach and suggested a framework based on equal ranking. The Court did not follow the A-G’s suggestion.

After *Vikings* the question arises as to what extent non-discriminatory differences in national labour laws have to be considered, in and of themselves, as unlawful restrictions to free movement. To put it differently in the form of a question: do Member States have to fear that the Court will decide what they can and cannot regulate in the field of labour law? There is no convincing reason to conclude from *Vikings* that the Court aspires to a uniform labour law system throughout the European Union. This has been demonstrated in the *AGET Iraklis* ruling already mentioned, in which a company challenged the compatibility of Greek legislation relating to collective redundancies with, inter alia, the freedom of establishment. The Collective Redundancies Directive is intended to strengthen the protection of employees but focuses on the information and consultation rights. If parties do not reach consensus, the Greek law confers upon a public authority the power to prevent collective redundancies, taking into account the conditions on the labour market, the situation of the undertaking and the interest of the national economy. The Greek company argued that this rule infringed the freedom of establishment. The Court noted that the decision to effect collective redundancies is a fundamental decision in the life of an undertaking and renders the exercise of the freedom of establishment less attractive. In its assessment of the proportionality, the Court accepted the first two criteria to which the Greek law refers as justification grounds. Subsequently, it balanced the freedom of establishment and the freedom to conduct a business against the public interests relating to the protection of workers and their employment. The Court held that Member States enjoy a wide margin of discretion in choosing the measures capable of achieving the aims of their social policy, especially in the absence of any rules of European Union law on the subject. That the Greek law was, nonetheless, disproportionate had to do with the fact that the criteria were formulated in very general and imprecise terms.

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50. *Vikings* Line supra, note 18, para. 87.
51. Opinion A-G Trstenjak 14 April 2010, case C-271/08 (*Commission/Germany*), paras. 179-199.
52. CJEU 15 July 2010, case C-271/08 (*Commission v. Germany*). The question remains whether a framework based on equal ranking would have led to a different outcome in the *Vikings* case.
53. Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.
54. The Court also rules that domestic measures may not deprive Directive 98/59/EC of its practical effect. This is the case when the domestic measures in effect rule out any real possibilities for employers to effect collective redundancies (see in more detail par. 4.2.).
55. As is apparent from established case law, the criterion of ‘interests of the national economy’ cannot constitute a reason of public interest that justifies a restriction to a fundamental freedom guaranteed by the Treaty.
56. A-G Saugmandsgaard OE repeated this approach to proportionality in its opinion as regards the *Erzberger/TUI* case (Opinion A-G Saugmandsgaard OE 4 May 2017, case C-566/15 (*Erzberger/TUI*). The Court, however, did not have to
Member States' Sovereignty in Areas covered by Social Policy Directives

Scope: Worker concept subject to and shaped by free movement law

The Directives regulating working conditions refer to national law for a definition of the concept of worker (e.g. Transfer of Undertakings Directive, Temporary Agency Work Directive and Fixed-term Work Directive, Pregnant Workers Directive), or contain no indication at all (e.g. Collective Redundancies Directive, Working Time Directive). The wordings of these Directives imply that the national concepts determine the personal scope, not only of national employment law but also of the concerned Directive. However, the Court’s reading of the Directives seems to imply otherwise. In several cases, the Court held that Member States are not allowed to diminish the scope of the Directives below the EU limits as laid down in its landmark decision Lawrie-Blum based on Article 45 TFEU.57 The essential feature is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.58

The Court expressed no hesitation in the Kiiski case on the Pregnant Workers Directive59 where it stated that the Community legislator intended to give the concept of ‘pregnant worker’ a Community meaning, even if the Directive itself refers back to national legislation and/or national practices.60 This approach was extended for the purpose of interpreting the concept of worker as laid down in the Working Time Directive.61 Outside the field of health and safety, the Court has been more cautious. In the O’Brien case regarding the Part-time Work Directive,62 the Court pointed out that the concept of ‘worker’ was to be interpreted in accordance with national law, yet that the discretion granted to the Member States was not without boundaries and found its limits in the application of rules that jeopardised the effectiveness of the Directive.63 In this respect, Member States could not remove at will from the scope of the protection offered certain categories of persons. In the Ruhrlandklinik case on the Temporary Agency Work Directive,64 the Court went a step further and held: ‘(…) the concept of “worker” as referred to in Directive 2008/104 must be interpreted as covering any person who carries out work, that is to say, who, for a certain period

57. ECJ 3 July 1986, case C-66/85 (Lawrie-Blum), para. 17. The EU concept of ‘worker’ determines the scope of the fundamental principle of free movement yet does not affect the interpretation of the concept in national law.
58. The Court has since refined its case law on the concept of ‘worker’ in respect of the provisions shaping the law on the free movement of workers. The autonomous EU definition of ‘worker’ has also spread to the provision of equal pay (Article 157 TFEU), see ECJ 13 January 2004, case C-256/01 (Allonby).
59. Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)
60. ECJ 20 September 2007, case C-116/06 (Sari Kiiski), paras. 23-25.
61. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time. The case concerned CJEU 14 October 2010, case C-428/09 (Union Syndical Solidaires Isère), para. 28.
62. Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.
63. CJEU 1 March 2012, case C-393/10 (O’Brien), paras. 28-35.
64. Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.
of time, performs services for and under the direction of another person, in return for which he
receives remuneration, and who is protected on that basis in the Member State concerned, (…)’.  
\(65\) (Underlining: FL)

The underlined phrase is arguably due to the rather strong textual argument reserving the
definition to the domestic legal systems of the Member States (see Art. 1(1) Directive). However,
the underlined phrase does not more than pay lip service as the Court did simultaneously define the
concept of a worker. In doing so, the Court specifically referred to the concept in the case law
concerning free movement and with that effectively imported the concept of worker in the area of
free movement into the Temporary Agency Work Directive. Additionally, the Court ruled that the
legal characterisation of the employment relationship under national law, the nature of the legal
relationship between those two persons and the form of that relationship, was of no relevance. This
approach is also in conformity with case law on the free movement of workers. The Court based the
latter on the fact that the Directive applies not only to workers who have concluded a contract of
employment with a temporary-work agency, but also to those who have an employment relation-
ship’ with such an undertaking.\(66\) Although \(Rurhlandklinik\) concerned an atypical case, the Court’s
approach indicates that also bogus self-employment falls within the scope of the Directive and
other Directives that refer to the term ‘employment relationship’. This is in line with the \(FNV/Kiem\)
case in which the Court held that the classification of a ‘self-employed person’ under national
law does not prevent that person from being classified as a worker within the meaning of EU law if
his independence is merely notional, thereby disguising an employment relationship.\(67\) Although
this case concerns EU competition law, I can think of no reason why the Court would go for
another approach with regard to the social policy Directives that use the term ‘employment
relationship’.\(68\) Bogus self-employment can therefore not be used to circumvent harmonised
national employment legislation, as long as the work is done in subordination.

What about the upper limits of the worker concept? Unlike some Member States (e.g. Italy,
Spain and Germany), the Court’s case law does not seem to contemplate self-employed persons on
the sole ground that they are economically dependent. The minimum character of the social policy
Directives leave it up to the Member States to extend the scope of the Directives beyond the
Court’s definition of a worker. Does this mean that Member States have the right to extend the
personal scope of labour law provisions to self-employed persons that are economically dependent
but lack subordination? I suggest the answer to be negative. By imposing harmonised labour law

\(65\). CJEU 17 November 2016, case C-216/15 (\(Rurhlandklinik\)), para. 43. A similar approach was followed in the \(O’Brien\)
case for the purpose of the Part-time Work Directive 97/81, supra note 55, paras. 34-51.

\(66\). The \(Albron\) ruling on the Transfer of Undertakings Directive (2001/23/EC) made clear that the term ‘employment
relationship’ does not even require a legal contract between the worker and the party for whom the work is done, CJEU
21 October 2010, case C-242/09 (\(Albron\)), paras. 23-24. This case differs from the examples given before as the
discussion was not about whether the person could be considered a worker, but was related to the question of whether
the worker could be held to be employed by a non-contractual employer even in the presence of a contractual employer.
However, the ruling indirectly interferes with the concept of ‘worker’ since it stipulates that the term ‘labour rela-
tionship’ is equivalent to the term ‘labour contract’, which broadens the scope of the concerned Directive.

\(67\). CJEU 4 December 2014, case C-413/13 (\(FNV/Kiem\)), paras. 33-36.

\(68\). From the case law of the Court it seems to me that any person that qualifies as a bogus self-employed person should be
considered a worker within the meaning of EU law. However, it is possible that a bogus self-employed person is hired
as a self-employed under national law. In such a case, the person can only fall within the scope of the social policy
Directives when the wording of the Directive refers to the term ‘employment relationship’ next to the term
‘employment contract’.

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\(Laagland\) 63
rules on self-employed persons, Member States run the risk of conflicting with the limits set by free
movement law. In other words, an uninhibited extension of the concept of worker might be
irreconcilable with the market freedoms, more specifically the freedom to provide services. The
maximum scope of national labour law is created by the difference between the free movement of
workers and the free movement of the self-employed to provide services in another Member State.
When making this distinction, the Court almost always refers to the abovementioned Lawrie-Blum
judgment in which it held that ‘an economically active person who is not working in subordination
qualifies as self-employed’. Hence, Member States are not allowed to apply harmonised national
employment legislation to (foreign) economically active persons who perform their work without a
relationship of subordination, not even when they are economically dependent.

Interestingly, the interpretation of the upper limits has many similarities with the interpretation
of the lower limits of the worker concept as laid down in the social policy Directives. Both times,
the Court refers to the criteria established in Lawrie-Blum. As a result, the lower limits seem to be
equal to the upper limits of the concept. With this in mind, it may be argued that the Court
effectively imported the EU concept of worker in the area of free movement into the area of social
policy Directives. Thus, de facto, the Court has intervened quite directly in casting the personal
scope of application of various social policy Directives, whereas it may be submitted that the Court
lacks competence where the Directives appear to confine this competence to the Member States
themselves.

Balancing act: Interpreting the level of workers’ protection

Secondary legislation as such restricts the competence of Member States to pursue their own goals
in regard to social policy. However, Directives in the field of social policy grant a minimum level
of workers’ protection. This means that Member States are allowed to grant more protection for
workers if they please. The minimum character follows from the legal basis of the Treaty and/or is
laid down in the concerned Directives. In this context, too, free movement law has found its way in.

This happened for the first time in the Laval case related to the Posted Workers Directive. The
Posted Workers Directive was enacted on an internal market legal basis. As a basic principle, the
Directive requires Member States to apply certain hard-core labour law rules and, in the case of
the building industry, hard-core provisions of universally applicable collective agreements to
employees who are temporarily posted to work within their territories. The hard-core rules are

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69. Van Peijpe T. (2012), ‘EU Limits for the Personal Scope of Employment Law’, European Labour Law Journal (3), pp.
35-53, at p. 53.
70. However, as explained in paragraph 3.1., a conflict with the market freedoms requires a cross-border element. In a
purely national situation, the Member States seem to maintain their freedom. Nevertheless, the free market rules may
indirectly play a role through the concept of reverse discrimination. Additionally, Art. 16 CFREU might have an effect
on the concept of ‘worker’ when the Court interprets the scope of the social policy Directives in a purely internal
situation.
71. Lawrie-Blum supra, note 57.
72. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of
workers in the framework of the provision of service.
73. For an account of the history of the Posted Workers Directive, see: Davies A.C.L. (1997), ‘Posted workers: Single
Market or protection of national labour law systems’, Common Market Law Rev. (34), p. 571.
74. The Posted Workers Directive carves out an exception to the rules contained in the Rome I Regulation about the
applicable law.
listed in Article 3(1)(a)-(g) of the Directive. A Member State may adopt more protective measures under Article 3(7) of the Directive. The Swedish Court referred a preliminary question to the Court of Justice with regard to a strike dispute brought before it. The Swedish construction workers’ trade union took industrial action to try to force a Latvian service provider to sign a collective agreement. The Latvian service provider argued that the industrial action was prohibited under the freedom to provide services. I previously discussed the cross-border element in paragraph 3.1. Here, I would like to focus on the application of the Posted Workers Directive. While the preliminary question concerned the freedom to provide services, the Court of Justice focused its attention on the Posted Workers Directive to an even greater extent. In the end, the Court found that the Posted Workers Directive prohibits all union activities for essential working conditions that are better than those enumerated in Article 3(1) of the Directive. Allowing national variation would amount to depriving the Posted Workers Directive of its effectiveness, according to the Court. Since the trade unions used the strike to force Laval to join a collective agreement that went beyond the minimum level, the strike – which seemed to be allowed under Swedish law – contravened the freedom to provide services and the Posted Workers Directive.

It is not entirely clear whether the Court was giving a reading to the Posted Workers Directive in the light of (now) Article 56 TFEU or, rather, interpreting (now) Article 56 TFEU with regard to the Posted Workers Directive. Given the clear wording of Article 3(7) of the Directive, the freedom to provide services arguably supplied the context for the Posted Workers Directive being interpreted as setting maximum standards. This approach has been confirmed in Rußert where the Court underlined that ‘the interpretation of Directive 96/71 is confirmed by reading it in the light of [now Article 56 TFEU], since that Directive seeks in particular to bring about the freedom to provide services, which is one of the fundamental freedoms guaranteed by the Treaty’.

The Court’s reading of the minimum character of Directives in the context of free movement law does not only apply where there is a cross-border element. The Court achieves a similar result in internal situations with the application of the freedom to conduct a business as laid down in Article 16 CFREU. This provision entails an explicit notion of individual economic freedom

75. Recital 17 of the Posted Workers Directive endorses this interpretation.
76. The problem was that Sweden intended to apply the special provision in Article 3(8), second paragraph, of the Posted Workers Directive according to which generally binding wage standards may be equipped with international applicability. The Court, however, ruled that such an intention had to be made explicitly within the legislative Act implementing the Directive. The trade unions were therefore not entitled to force Laval to apply, inter alia, the minimum wages laid down in the collective agreement in question. Meanwhile, Swedish law has been modified. See: Rönßmar M. (2010), ‘Laval Returns to Sweden. The Final Judgment of the Swedish Labour Court’, Industrial Law Journal (39).
77. Member States’ attempts at gold-plating workers’ rights are thus cut across. The one exception is when workers already enjoy more favourable terms and conditions of employment according to the law or collective agreements applicable in the Member State of origin.
78. The Court had not addressed the issue of the trade union’s liability for damages. On 2 December 2009, the Swedish Labour Court delivered its final judgment in the Laval case and held that the breach of EU law and Swedish law gave rise to liability for damages. The judgment has been criticized in Swedish literature for establishing liability for damages between private parties on ground of a violation of Article 49 EC (now Article 56 TFEU) and for not taking into account the unclear legal situation. See Apps, K. (2009), ‘Damages Claims against Trade Unions after Viking and Laval’ EL Rev. (34); Malmberg, J. (2012), ‘Trade Union Liability for “EU-Unlawful” Collective Action’, European Labour Law Journal, pp. 5-18.
79. Deakin supra, note 27, pp. 24-25.
80. Rußert supra, note 29. In Rußert the Court confirmed its rigid interpretation of the minimum character of the Posted Workers Directive.
within the European order. The freedom to conduct a business refers to the freedom of establishment{81} and entails, inter alia, the freedom to exercise an economic or commercial activity and the companies’ right to contract. Article 16 CFREU becomes relevant within the judicial setting when implementation acts are interpreted by the Court and does not hinge on a cross-border situation. In other words, through the freedom to conduct a business, the freedom of establishment has an impact even without a cross-border element when interpreting social policy Directives. The Court applies the proportionality principle when assessing whether national measures with a higher level of workers’ protection than the level guaranteed in the Directive are suitable and necessary in light of the freedom to conduct a business. Although the approach differs, the substantive question for the Court to decide remains the same as in free movement law.

The impact of the freedom to conduct a business was vividly shown in the Parkwood ruling on the Transfer of Undertakings Directive, delivered in 2013.{82} The Court clarified that so-called ‘dynamic’ clauses incorporating future collective agreements into individual contracts could not bind the transferee of a business when the transferee lacked the possibility to join the negotiations. The minimum of workers’ protection as provided for in the Directive had to be understood as a firm ceiling on Member States’ attempts to grant workers more rights in a situation as presented in Parkwood. The Court reached its decision by interpreting the minimum character as laid down in Article 8 of the Directive in virtue of the freedom to conduct a business. The ruling caused turmoil in literature.{83} The main focus of critique was the fact that the Court had used Article 16 CFREU to limit the possibilities of the Member States to grant more protection to workers. The critique seemed unfounded. In the Asklepios ruling, delivered in March 2017, the Court clarified that the firm ceiling only applies where Member States’ regulations totally blocks the freedom to conduct a business.{84} The transferee in this case was obliged to respect amendments to the collective agreement subsequent to the transfer, provided that the national law allowed the possibility for the transferee to make adjustments both consensually and unilaterally. Where adjustments are not possible – as was the case in Parkwood – the freedom to conduct a business trumps the minimum character of the Transfer of Undertakings Directive. Under such circumstances, it is arguable that the very essence of Art. 16 CFREU is at stake. A similar approach was conducted in AGET Iraklis with regard to the minimum character of the Collective Redundancies Directive, only this time without reference to Article 16 CFREU.{85}

The Court applied the freedom to conduct a business once more in 2017, this time in its interpretation of the Equality Framework Directive. This occurred in the Achbita ruling.{86} The case concerned a Muslim woman who was dismissed by her employer for refusing to remove her headscarf, contrary to the employer’s policy of neutrality, which included a ban on wearing

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81. CJEU 13 February 2014, case C-367/12 (Sokoll-Seebacher), paras. 20-22.
82. CJEU 18 July 2013, case C-426/11 (Alemo-Herron and others v. Parkwood Leisure Ltd.).
83. Prassl J. (2013), ‘Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law’, Industrial Law Journal (42), pp. 434-446.
84. CJEU 27 April 2017, joined cases C-680 and 681/15 (Asklepios Kliniken Langen-Selligenstadt GmbH v. Feija and Graf).
85. AGET Iraklis supra, note 23, paras. 37-38. The Court held that national rules that provide more protection for workers could not have the consequence of depriving the Directive of its practical effect. This meant that Member States are not allowed to enact legislation that in practice rules out the possibility for companies to conduct a collective redundancy.
86. CJEU 14 March 2017, case C-157/15 (Achbita v. G4 S Secure Solutions). For a more general discussion of this case, see: Vickers L. (2017), ‘Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace’, European Labour Law Journal (3), pp. 232-257.
relational symbols. In dealing with the justification ground, the Court held that the goal of neutrality is to protect the economic interests of businesses in not offending or disturbing their customers. The Court ruled explicitly that the goal of ‘neutrality’ towards customers ‘must be considered legitimate’ and that prohibiting signs of belief ‘must be considered strictly necessary’ for achieving this, if applied with some caveats. By doing so, the Court explicitly referred to the freedom to conduct a business. With this reference, the Court does not just allow Member States to permit employers to exclude religious clothing, but also appears to have denied them the option of providing more extensive protection to ensure that employees are not indirect discriminated against on the grounds of religion. Should a Member State wish to adopt legislation that regulates that under no circumstances employers are allowed to forbid their employees to wear a headscarf, it might be prevented from doing so since the legislation can be said to infringe the companies’ freedom to conduct a business pursuant to the Achbita ruling. The Court thereby interpreted the Equality Framework Directive’s minimum character as a maximum level.87 In contrast to Parkwood, Asklepios and AGET Iraklis, the Court left the Member States with no margin of discretion whatsoever.

The case law shows that the Court’s interpretation of secondary law is capable of having a decisive impact on the extent to which there is room to act as Member State. What is the danger that the Court sees when Member States go beyond what the Directives require? Its interpretation conflicts with what the Directives clearly indicate and is in contrast with the nature of these Directives which do not seek to lay down uniform laws. The Court’s reasoning is, however, consistent with its case law in the context of free movement law: the minimum character of social policy Directives applies to the European legislator, yet does not exclude national rules from free movement law and, in internal situations, the freedom to conduct a business. That Directives are based on the Treaty’s social policy provisions does not seem to make a difference.88 Of course, it is plausible to see all social policy Directives as striking a balance between the freedom to conduct a business and the protection of workers, but this in itself need not require the conclusion that the Directives imposes a maximum level of protection on the Member States. It can be submitted that this balancing exercise has been provided for by the legislature with the adoption of the said Directives. From this standpoint, the right to pursue a business has been subjected to basic constraining norms for workers’ protection, just as it is subjected to the burdens of taxation, social costs, and so on. Be that as it may, the Court seems to have chosen an alternative standpoint, in which the two rights must be balanced when interpreting provisions – taking account of the demonstrable impact on the business of allowing more workers’ protection than the standard set out in the concerned Directives.

**Constitutional and Political Limits on EU Legislative Action**

The application of free movement rights to national law affects policies across different areas and normally helps create political impetus for harmonisation. In other words, where primary law goes European legislation often follows. This argument does not hold for labour law. The Court’s interference in the name of free movement and the freedom to conduct a business cannot readily

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87. See Recital 28 and Article 8 Equality Framework Directive.
88. In Laval one might argue that the Court took the view that the Posted Workers Directive’s main purpose was to protect the rights of service providers since the Directive’s Treaty base is to be found in the free movement provisions. However, this is not explicitly made clear by the Court’s reasoning.
be adjusted through the legislative process. This is due not only to the constitutional limits placed by the Treaties on EU legislative action in these areas (see para. 2), but also because of the difficulty in finding political consensus, especially since the enlargements of 2004 and 2007. Harmonisation would not have been hopeless in the beginning of the EU. The original six founding fathers were rudimentary in quantitative terms and structurally much more similar to each other than the current 28 Member States. Today, it takes much more of an effort to harmonise labour laws in the face of quantitative and structural heterogeneity among the Member States, which have deviating interests and goals. This difficult task becomes almost impossible when the Court delivers clear-cut decisions firmly settling, as a matter of principle, which interest should prevail over the other. Both in Viking on free movement law as well as in Laval and Achbita on secondary law, the Court did not use the margin of appreciation to restrain the de-regulatory potential of free movement law (and in the same vein the freedom to conduct a business). In doing so, the Court granted absolutely no leeway for the possibility of political contestations and legislative re-appraisal at the European level. This leaves the European legislator with a difficult job, as Member States have different views, and some are not quick to please with an adjustment of the Court’s case law.

The Commission’s proposal for a Regulation on the exercise of the rights to take collective action within the context of the freedom of establishment and the freedom to provide services (‘Monti II’) is a clear demonstration of the lack of EU legislative power. The proposed Regulation can be seen as the European legislator’s attempt to respond to Viking and Laval. The proposal aimed at achieving a clarification of the topic, but even this modest proposal generated sufficiently fierce political resistance from the Member States. Ten National Parliaments issued their yellow card under the subsidiarity protocol, forcing the Commission to withdraw its proposal. This was the first successful use of the early-warning mechanism. The subsidiarity mechanism was granted to national parliaments by the Lisbon Treaty and was intended to get national parliaments involved and the EU more politicised in order to tackle its democratic deficit. It is striking, when you think about it, that the procedure was used with regard to the Monti II proposal, as the Viking and Laval cases are the best proof that cross-border strikes should be the subject matter of EU regulation because factually it already is. This is where ‘positive integration’ could actually have counterbalanced the Court’s perceived opinion of the common market.

The yellow card procedure was again used in 2016. Thirteen national parliaments raised the yellow card concerning the proposal to adjust the Posted Workers Directive. This proposal can be seen as a specific reaction to Laval. The key provision states that foreign agency workers are to be treated equally to nationals. As a result, foreign agency workers shall be subject to the law of the host Member State, not only as to the hard-core provision but also in regard to all mandatory labour law rules. The Commission dismissed the objection and persisted in its proposed changes. The Commission’s attitude has had the desired result. On 24 October 2017, the Council came to an agreement about the revision of the Posted Workers Directive. With the agreement the Council

89. European Commission, ‘Proposal for a Council Regulation on the exercise of the rights to take collective action within the context of the freedom of establishment and the freedom to provide services’, COM (2012) 130 final. For more details regarding the proposal, see: Rocca M. (2012), ‘The Proposal for a (so-called) “Monti II” Regulation on the Exercise of the Rights to Take Collective Action within the Context of the Freedom of Establishment and the Freedom to Provide Services’, European Labour Law Journal (3), pp. 19-34.
90. It remains possible to make a choice of law in regard to the non-mandatory rules (Article 3 Rome I Regulation).
91. Council of the European Union, Brussels 24 October (13612/17), procedure 2016/0070/COD (see: http://data.consilium.europa.eu/doc/document/ST-13612-2017-INIT/en/pdf).
can start negotiations with the European Parliament. This example shows that the Member States are still capable of achieving a broad enough political consensus within the European institutions for the adoption of legislation to temper, or correct, judicial decisions. The European pillar of social rights might also be helpful in this respect. Although the document recognises that most of the principles and rights are in the hands of the Member States, it also highlights the fact that the EU should help in setting new frameworks and giving directions. The Council endorsed the European pillar of social rights in November 2017. The 20 principles and rights, which are not directly enforceable, might stimulate Member States to find consensus on subjects that are essential for a fair and well-functioning labour market in 21st century Europe and stimulate future European legislative action. This might even be true with regard to possible attempts to revise a EU Directive on the concept of ‘worker’, which could potentially expand the protection that current social policy Directives afford to categories of workers. Rumour has it that the Commission is contemplating the adoption of such a Directive.

Be it as it may be, the fact remains that legislative reform is hard to achieve when the Court’s judgments are plain and clear. A margin of appreciation is in many respects exactly what is needed, as it gives the Commission room to manoeuvre and thereby the opportunity to build consensus among Member States. The more sensitive the subject, the more deserving it is of a conscientious examination by the Court. The *Viking*, *Laval* and *Achbita* rulings are, in light of this, cause for concern.

**Final Analysis – Should Viking and Laval be considered a thing of the past?**

The market freedoms have the intrinsic potential to be brought to bear on the de-regulation or re-regulation of collective and individual relations between employers and employees, which are the very subject matter of national labour law. The combination of a broad restriction test and the readily-made assumption of a cross-border element has the consequence that almost all national labour law measures are liable to be challenged under free movement law. By virtue of the application of Article 16 CFREU, free movement law has also found its way into the interpretation of social policy Directives. It therefore occurs more often than before that market freedoms and national labour law measures clash with each other.

When the Court is asked to rule on conflicting interests, it often comes down to the proportionality test, more specifically the extent to which the Court accepts the justification grounds offered by the Member States in the context of necessity. In labour law the element of necessity can be considered very delinquent since Member States have different opinions on the required level of worker’s protection. To put it differently, there might always be a Member State that employs measures that are economic less restrictive. It is submitted that the Court should refrain from using a strict proportionality test. It follows from, first, the decoupling of the social sphere from the economic sphere in the European integration project and, second, the obstacles to the establishment of a comprehensive European welfare state, that market freedoms should leave the Member States’ socio-economic choices untouched when the intervention does not add value to the improvement of the functioning of the internal market. Article 5(4) TEU states that ‘*Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives*
of the Treaties’. This provision applies to all EU institutions, including the Court. In this respect, the Court’s proper function is to enable the EU market to function as a single integrated market and, in the same vein, to define the outer boundaries of national labour law which is where national practices bite at the very essence of the market freedoms. For the rest, the Court should respect European diversity in the field of labour law, the measures of which have undergone a political bargaining process subject to national constitutional requirements.

In Viking and Laval, however, the Court interpreted the supremacy claim of European law in a very broad way. With its clear-cut decisions, the autonomy of the Member States’ strike laws has been undermined. As pointed out, the legal and constitutional aspects of this approach seem rather weak. The developments since then raise the question whether the outcome in Viking and Laval would still be the same in 2017. The Court applied a different approach to proportionality in AGET Iraklis. The Court refrained from weighing the European economic freedoms against national social values and granted the Member States a wide margin of appreciation. The fact that other Member States employ less restrictive measures will not necessarily lead to the conclusion that a more restrictive measure in another Member State is disproportionate. The same approach can be found in Parkwood and more clearly in Asklepios with regard to Article 16 EU Charter. In these cases, the proportionality principle serves as a guideline for interpreting the minimum character of the Transfer of Undertakings Directive. The outcome, however, is fairly similar as the Court left the Member State’s sovereignty largely intact. Viking, on the other hand, does not fit in with this approach. This is striking, as Viking concerned a fundamental right as opposed to workers’ protection in general. The same is true for Laval.

In this light, it might be argued that the Court’s approach in the field of social policy has been changed, or at least modified, over time. This change of approach could be contributed to the entry into force of the Lisbon Treaty in 2009, which gives more prominence to social values and regulates the future accession of the EU to the European Convention on Human Rights. I am hesitant to endorse this view. It is true that in AGET Iraklis the Court recognised the need to reconcile and balance the competing economic and social objectives of the Union. However, its reference to this balancing is largely rhetorical and seems not to have had a substantive influence on the outcome of the proportionality test. Additionally, the Court seems to apply a strict proportionality test in its Achbita judgment, which was delivered very recently in 2017. Although the Court emphasised the role of the national court in ultimately deciding the case, the margin of

92. Article 1 Protocol (No 2) on the application of the principles of subsidiarity and proportionality, 12008M/PRO/02.
93. The Court applies the proportionality principle in this context when it assesses whether measures with a higher level of workers’ protection are suitable and necessary in light of the freedom to conduct a business (Article 16 CFREU).
94. Weatherill S. (2014), ‘Viking and Laval: The EU Internal Market Perspective’, in Freedland M. & Prassl J., Viking, Laval and Beyond, Oxford and Portland: Hart Publishing, pp. 23-39, at p. 39; Veldman & De Vries, supra note 11, para. 5 which focuses on the CFREU.
95. About this subject in more detail, see: Velyvyte V. (2014), ‘The Right to Strike in the EU after Accession to the ECHR: A Practical Assessment, in Freedland M. & Prassl J., Viking, Laval and Beyond, Oxford and Portland: Hart Publishing, pp. 75-94.
96. Such statements, trying to re-align the social dimension of the Community with its economic rationale, are not without precedent. In the Viking and Laval rulings, the Court also took the social dimension into consideration. Referring to Article 2 EC, the Court stated that ‘the Community is to have as its tasks, inter alia, the promotion of ‘a harmonious, balanced and sustainable development of economic activities and a high level of employment and social protection’. Viking Line, supra, note 18, para. 79; Laval un Partneri, supra, note 18, para. 105.
discretion left to the national court in Achbita is non-existent. Similarly to Viking and Laval, the Court leaves the national courts and national legislators no leeway whatsoever. It is important to keep in mind, however, that the proportionality principle was applied within a different context in Viking on the one hand, and in Laval and Achbita on the other. In Viking the proportionality test was conducted solely on the basis of Article 49 TFEU, while in Laval and Achbita the application of the proportionality test was influenced by a combined interpretation of the relevant minimum harmonisation and Article 49 TFEU/Article 16 CFREU. In spite of these differences, Achbita illustrates that the Court did not abandon the strict proportionality test in the socio-economic field.

Finally, it could be possible that the Court’s approaches to proportionality are not that different after all and should be regarded in the same manner in terms of the reasoning behind them. This would mean that the Court believed that in Viking and Laval as well as in Achbita the essence of the market freedoms were at stake when Member States remained competent in those areas. In Viking and Laval, the action taken was the strongest form of restriction. Trade unions might use the right to strike to force companies to agree to all kinds of employment conditions and, therefore, have the power to totally block the freedom of establishment. Additionally, the interests of particular groups of workers are divided across national borders and different national standards. Relying on subsidiarity (i.e. granting Member States a broad margin of appreciation) in a context like this, would not amount to preserving the power of national legislative bodies but to giving civil trade unions control over employment conditions and opportunities for foreign workers. It is at least arguable that these elements directed the Court to its strict assessment of the proportionality test. However, it is not logical to impose the same line of reasoning upon Achbita, which concerned a purely internal situation. In any case, the Court’s stretching of internal market law into a Member State’s internal affairs is not convincingly explained in all three judgments. The legal reasoning is excessively short, does not take into account possible counter-arguments, and includes views without clarifying which line of reasoning is endorsed by the Court and why.

Conclusion

For now, the case law stands as it is. We can note seemingly contradictory developments: on the one hand a respect for Member States’ sovereignty by giving them leeway, and on the other hand a substantial narrowing down where the Court clearly decides how the conflicting economic and social values have to be balanced. Since the different approaches are hard to fathom, it would be foolhardy to predict the future direction of the case law of the Court. The law in this situation is unpredictable, which, in turn, leads to anxiety that the Court might use market freedoms to intervene with national labour law measures whenever it wishes. If it decides to do so, the European legislator has limited possibilities to respond. The Court maintains this power unless something changes in the distribution of competences. This could be effectuated by adding a Protocol to the Treaty, but this seems highly unlikely to happen. A less radical measure would be to provide the Court with an incentive to explain its reasoning more thoroughly. This might be achieved by granting judges the opportunity to present a dissenting opinion. It has been submitted that the ambiguities in the Court’s decisions could be directly connected with the prohibition of separate opinions. Indeed, the reasoning by the Court may sometimes be difficult to follow precisely because the bench had to incorporate partly diverging views in order to find a compromise between judges. The introduction of separate opinions can thus be considered as a potential
trigger for change. However, also an adjustment like this seems a fairly stiff hurdle to take. Until something changes, Member States are at the mercy of the Court and just have to rely on the Court’s willingness to respect their sovereignty in the field of labour law in cases to come.

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97. A research on behalf of the European Parliament’s Committee on Legal affairs has been conducted in 2012. This research provides an overview of the arguments in favour of and against the introduction of dissenting opinions in the Court, Raffaelli R. (2012), Dissenting opinions in the Supreme Courts of the Member States, pp. 1-53. This document is available on the Internet: www.europarl.europa.eu/studies. To my knowledge, the study has not been followed up in any way.