Freedom to conduct a business and EU labour law

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Critical-contextual analysis of case law of the European Court of Justice on employers' contractual freedom – Fundamental right to be immunised against the alleged disproportional protection enjoyed by employees – Progressive ideological overthrow of the original constitutional assumptions of the founding treaties – Prominent example of 'displacement of social Europe' – Court of Justice's case law on the relationship between freedom to conduct a business and labour law – Neoliberal understanding of the freedom of enterprise – Alternative interpretation of Article 16 of the EU Charter of Fundamental Rights

Setting the scene

'The European Union is based on a free market economy, which implies that undertakings must have the freedom to conduct their business as they see fit. What are the limits, then, to Member State intervention in order to ensure the job security of workers? That is the issue which the Court is called upon to resolve in the present preliminary ruling procedure'.[1] In relation to the preliminary ruling on the compatibility of the Greek legislation on collective dismissals with the freedom to conduct a business within the internal market, the issue at stake in constitutional terms was expressed by Advocate General Nils Wahl in the most eloquent and trenchant way possible in the *incipit* of his Opinion dated 9 June 2016 in *AGET Iraklis*. What is at stake here is, in fact, nothing less than the 'place' of labour law in the allegedly free market economy as constitutionally grounded on the founding treaties. And it is not a coincidence that such a crucial constitutional question – so radical in its basic and brave formulation – is raised in the context of a case concerning the limits on Member State intervention aimed at ensuring workers' job security, i.e. in the domain of the regulation of employers'

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[1] AG Wahl, para. 1 of the conclusions delivered on 9 June 2016 in ECJ 21 December 2016, Case C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis)* v *Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*.

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power to dismiss workers: the very essence of the classic protective function of labour law.

The stakes of the request by the Greek Council of State for a preliminary ruling appeared to be clear also to the Grand Chamber of the European Court of Justice (henceforth: the Court or the Luxembourg Court), which, in its judgment dated 21 December 2016, although softening the boldly and sometimes even provocatively neoliberal stance adopted by Advocate General Wahl, essentially endorsed his conclusions. In an irretrievably bourgeois ruling, the Court declared the incompatibility with Article 49 TFEU (read in conjunction with Article 16 of the EU Charter of Fundamental Rights) of the Greek legislation transposing Directive 98/59 on collective redundancies.

AGET Iraklis, therefore, offers an unmissable opportunity to retrace the neoliberal constitutional trajectory that made it possible to formulate (and answer), in such a radically biased way, a question concerning – in essence – the place of labour law in a free market economy, i.e. the legitimacy of and limits on Member State intervention aimed at guaranteeing appropriate job security standards without infringing an economic constitution based on the fundamental principle of business freedom. By reversing such a neoliberal drift, it will be argued that the legitimacy of the question itself may only appear admissible provided a radical rupture is accepted, along with an almost complete overthrow of the normative assumptions on the place originally assigned to labour law in the common market by the founding treaties in the mid-fifties and for a long period of the European integration process. Such a rupture implies a paradigm change, which has occurred only in recent times, essentially starting with the (in)famous quartet inaugurated by *Viking* and *Laval* on internal market freedoms.[2] In the Court's most recent case law, this new theology of free markets is backed by a totally unprecedented – and fully unacceptable – reinterpretation of the freedom to conduct a business as a fundamental right protected by Article 16 of the EU Charter of Fundamental Rights.

In the context of the original constitutional assumptions of the founding treaties of the European Communities in the mid-fifties, such a question would not have been legitimate: the matter of which place labour law would be given in the new common market could not have been couched in the terms used today by Advocate General Wahl and the Court. According to those assumptions, as explicitly set out in the 1956 Ohlin and Spaak reports and then coherently

[2] ECJ 11 December 2007, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti*; ECJ 18 December 2007, Case C-341/05, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*; ECJ 3 April 2008, Case C-346/06, *Dirk Rüffert* v *Land Niedersachsen*; ECJ 19 June 2008, Case C-319/06, *Commission of the European Communities* v *Grand Duchy of Luxemburg*.

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transposed into the Treaty establishing the European Economic Community (henceforth: TEEC) of 1957, the building of a transnational market could not, and should not, legitimately interfere with the protective functions carried out by the labour law systems of the founding Member States, which, in fact, were responsible – in full autonomy – for setting their own limits on interventions aimed at guaranteeing job security for workers, in accordance with their constitutional and social systems.

At the moment of the creation of the common market, the original point of view was, in fact, exactly the opposite of the one that today appears almost natural in light of the new 'economic theology' adhered to by Advocate General Wahl and the Court. The expression 'embedded liberalism', which labour law scholars have borrowed from John Gerald Ruggie to concisely describe the meaning of those original constitutional assumptions,[3] effectively epitomises such a point of view: the legitimacy of labour law – which in that vision is and must remain essentially national – cannot depend on the functioning of the common market. Instead, the ways that lead to the integration of national systems into a common market through (Community) law shall preserve the autonomy of national labour systems. Only under exceptional circumstances would a supranational regulatory intervention be deemed a legitimate means for restoring autonomy after any distortion of competition caused by the market process, thus pursuing the upward harmonisation of national social systems (according to the wording of Article 117 TEEC). From this perspective, the formal legitimacy of the integration of the common market through European (economic and competition) law is firmly embedded in the material legitimisation guaranteed by the labour and social constitutions of the various Member States. The rather scant social competencies granted by the TEEC to the European Economic Community were essentially framed in order to preserve the autonomy of national labour law systems, while at the same time ensuring their interdependence within the common market.

This approach maintained its normative coherence and rationale for quite a long time. Upon closer examination, it had not been abandoned even when – starting from the mid-eighties – the original balance between internal market and

[3] *See* J.G. Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order', 36(2) *International Organization* (1982) p. 379, who borrowed from the classic economic sociology of K. Polanyi, *The Great Transformation. The Political and Economic Origins of Our Time* (Farrar & Rinehart 1944) (Beacon Press 2001 with a preface by J.E. Stiglitz and an introduction by F. Block). Among EU labour law scholars, *see* e.g. S. Giubboni, *Social Rights and Market Freedom in the European Constitution* (Cambridge University Press 2006); D. Schiek, *Economic and Social Integration: The Challenge for EU Constitutional Law* (Edward Elgar 2012); D. Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration', 19(3) *ELJ* (2013) p. 303.

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Member States' labour law systems had visibly started to falter, with an increasingly evident tendency of the free competition principle and of market freedoms to 'infiltrate' the territories that were once well-protected by national labour constitutions.[4] From that perspective, it is significant that, still in 1993, when that trend had already clearly showed up in the famous Sunday Trading jurisprudential saga, Advocate General Tesauro warned the Court against the perils of transforming the freedom protected by Article 30 TEC[5] into some sort of constitutional meta-parameter against which any national measure would have to be scrutinised. He raised the same constitutional question as in the *incipit* of Advocate General Wahl's Opinion in *AGET Iraklis*, but in terms that are exactly reversed: 'Is Article 30 of the Treaty a provision intended to liberalize intra-Community trade or is it intended more generally to encourage the unhindered pursuit of commerce in individual Member States?'.[6]

This article will retrace the steps of the progressive ideological overthrow of those original constitutional assumptions as a prominent example of displacement of social Europe,[7] critically reviewing key moments in the Court's case law dealing with the relationship between the freedom to conduct a business and labour law in the legislative framework of the EU.[8]

Embedded liberalism

The freedom to conduct a business is quite rarely mentioned, and then only in a very carefully circumscribed manner, in the case law dating to the foundational period of the common market. The first ruling in which the Court had an opportunity to recognise property rights and business freedom as rights common to the constitutional traditions of the Member States and protected by the Convention for the Protection of Human Rights and Fundamental Freedoms is *Nold*[9] of 1974, which, along with *Internationale Handelsgelsellschaft*[10] of 1970, is

[4] G. Lyon-Caen, *L'infiltration du Droit du travail par le Droit de la concurrence, Dr. ouvrier* (1992) p. 313.

[5] Now Art. 34 TFEU.

[6] AG Tesauro, para. 1 of the conclusions delivered on 27 October 1993 in ECJ 15 December 1993, Case C-292/92, *Ruth Hünermund* v *Landesapothekerkammer Baden-Württemberg*. Similarly, AG Van Gerven, conclusions delivered on 29 June 1989 in ECJ 23 November 1989, Case C-145/88, *Torfaen Borough Council* v *B & Q plc*.

[7] C. Kilpatrick, 'The Displacement of Social Europe', introduction to this special issue.

[8] *Cf also* M. Markakis, 'Can Governments Control Mass Layoffs by Employers? Economic Freedom vs Labour Rights in Case C-201/15 *AGET Iraklis*', 13(4) *ECLR* (2017) p. 724.

[9] ECJ 14 May 1974, Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung* v *Commission of the European Communities*.

[10] ECJ 17 December 1970, Case 11/70, *Internationale Handelsgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*.

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the leading and most celebrated case of judge-made recognition of fundamental rights in the Community legal order.

In that ruling, as well as in the case law that followed it,[11] the recognition of the freedom to conduct a business is indeed vigorously delimited by the strong emphasis put on the limits that Member States and Community law could set forth with a view to protecting the public interest and to pursuing the social goals of property rights. For the first time, this judgment implements a purposive formulation – subsequently consolidated in the Court's case law – according to which the freedom of economic initiative protected by Community law does not represent an absolute right but is subject to those limitations reflecting the public interest. These limitations are the result of the social function that characterises (and at the same time limits) its recognition, according to the constitutional traditions common to Member States. The decision in *Nold* is emblematic of the depth potentially reached by such limitations, especially in the highly regulated and *dirigiste* apparatus of the common market for coal established by the Treaty establishing the European Coal and Steel Community of 1951.

Recognition of both the freedom to conduct a business and inherent property rights in light of the social function carried out in the common market integration process must be considered within the context of the 'embedded liberalism' model. Recognition of the social function inherent to the freedom to conduct a business and the right of ownership (in line with the constitutional traditions common to the six founding States of the European Coal and Steel Community and the European Economic Community) is undoubtedly coherent with the main assumption of that model – that the creation of the common market is a project centred on the common economic freedoms guaranteed by Community law at the transnational level and also strongly embedded in the social institutions of Member States at the national level.

The recognition of this social function, protected by Community law because of its close functional connection to the free movement of goods in the common market, may be seen in this sense as a form of paying constitutional deference to the Member States' social institutions. By this logic, the social function acknowledged by the Court in *Nold* complied with the choices made by the national constitutions, adapting to them; thus, in the Italian legal system it could undoubtedly be considered fully in accordance with the limit set by the common good (*utilità sociale*) in Article 41, paragraph 2 of the Constitution – along with respect for safety, liberty, and human dignity. It is significant that, almost up to the

[11] *Cf* A. Usai, 'The Freedom to Conduct a Business in the EU, Its Limitations and Its Role in the European Legal Order: A New Engine for Deeper and Stronger Economic, Social, and Political Integration', 14(9) *German Law Journal* (2013) p. 1867.

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late 1980s in Italy,[12] the whole doctrinal and jurisprudential debate on the meaning of constitutional recognition of the freedom of private economic initiative could fully take place within the perimeter outlined by Article 41 of the Constitution.

More generally, it might be assumed that the labour law model that was to inspire Community social policy and the case law of the Court during the peak of the 'social democratic consensus'[13] in the 1970s was a classically protective one, based on mandatory rules that conformed with the foundational idea famously summarised by Otto Kahn Freund: 'The main object of labour law has always been […] to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.'[14]

Theoretical conflicts and practical convergences

The framework described so far rapidly changed in the mid-1980s. The turning point is conventionally identified as the entering into force of the Single European Act, although it is quite evident that the key factors of change are numerous and have much deeper roots. Descending from an overall reorientation of the integration process towards the liberalisation of the internal market and the dismantling of the regulatory obstacles to the freedom of movement of productive factors, these changes have already been largely anticipated by the Court's case law on the freedom of movement of goods in the well-known *Dassonville* and *Cassis de Dijon*[15] judgments.

According to this analysis, the most significant change should be found in the transformation of the relationship between internal market rules and national labour rights, with the progressive loss of autonomy of national systems to the advantage of the dictates of the new economic rationality embodied by the principle of mutual recognition and the ban on the introduction of non-discriminatory obstacles to the free movement of productive factors,[16] in terms of increasingly strong competition

[12] This approach is adopted also by Massimo Luciani, who – in denying the autonomy of the concept of economic constitution – recalls how 'the economic structure model outlined in the Constitution is […] tightly linked to the constitutional system of social and political relationships': M. Luciani, 'Economia nel diritto costituzionale', 5 *Digesto delle Discipline pubblicistiche* (1990) p. 373 at p. 376.

[13] R. Dahrendorf, *The Modern Social Conflict. An Essay on the Politics of Liberty* (Weidenfeld & Nicolson 1988) p. 116.

[14] O. Kahn Freund, *Labour and the Law*, 2nd edn. (Steven & Sons 1977) p. 6.

[15] This refers to the famous judgments delivered by the Court in ECJ 11 July 1974, Case 8/74, *Procureur du Roi* v *Benoît and Gustave Dassonville*, and ECJ 20 February 1979, Case 120/78, *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein*, respectively.

[16] This aspect is very well described by P. Syrpis and T. Novitz, 'The EU Internal Market and Domestic Labour Law: Looking beyond Autonomy', in A. Bogg et al. (eds.), *The Autonomy of Labour Law* (Hart Publishing 2015) p. 291.

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between legal systems in the common economic space.[17] While ensuring the negative integration of market rules – and especially of fundamental freedoms – in accordance with the primacy of the higher economic law, EU law is structurally unfit to provide protective compensatory measures that shall restore, at EU level, the autonomy that labour law has lost within national legal systems. Indeed, the constitutional asymmetry between negative and positive integration has undergone little more than marginal rectification by the extension of the legislative competencies of the EU in the field of social policy, as initiated by the Single European Act and completed by the Lisbon Treaty; this is especially true given the reinforcement of the legal basis of the founding treaties, which historically coincided with the EU's great enlargement and the entry into the internal market, of countries that had only recently adopted a capitalist economic system. However, there is no doubt that, at least until the turning point represented by the *Viking* and *Laval* quartet, the Court made careful use of the wealth of argumentative strategies deriving from the abundance of references to principles, values, and goals of a broad social nature that were consolidated in primary EU law starting with the Amsterdam Treaty, with a view to smoothing over and to a larger extent neutralising the effects of deregulation on national labour law systems, potentially propelled by the structural excesses of negative integration. Metaphorically speaking,[18] the Court avoided a theoretical conflict (and the risk of a constitutional collision) potentially inherent to the asymmetry between negative and positive integration, regaining areas of autonomy for national labour law systems through wise balancing techniques aiming to restore a practical convergence between internal market imperatives and the normative expectations for safeguarding Member States' social protection systems.

As aptly noted,

> Over the second half of the last century, just up to some ten years ago when the first decision of the quartet was rendered, the main thread of the case law of the Court of Justice of the European Union consisted of making free movement and undistorted competition effective so that protectionism was ruled out from the internal market, while, at the same time, respecting (or encroaching as little as possible upon) national social policies. The European Court of Justice tended to protect individual rights (economic freedoms) in key domains (free movement and competition law) of market integration, considering them to outweigh any conflicting collective (including governmental) interests – while, conversely, exercising caution in implementing any such individual rights whenever that would have entailed the sacrifice of a specific set of collective (including governmental) interests, those

[17] *Cf*, among others, A. Supiot, 'Le droit du travail bradé sur le "marché de normes"', 12 *Dr. Soc.* (2005) p. 1087, and 'Law and Labour', 39 *New Left Rev.* (2006) p. 109.

[18] *Cf* S. Giubboni, 'Social Insurance Monopolies in Community Competition Law and the Italian Constitution: Practical Convergences and Theoretical Conflicts', 7(1) *ELJ* (2001) p. 69.

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> involving the regulation of social policy, which were considered to be, comparatively speaking, of greater importance than the EU rights *qua* economic freedoms.[19]

In this sense, *Rush Portuguesa* offers a paradigmatic example of such a conciliatory orientation.[20] The judgment in fact marks a turning point in bridging the original gap between the spheres of economic and social integration, as it tears down the wall between national labour law and internal market rules in the crucial field of the free movement of services. However, in the wake of the reconfiguration of the relationship between internal market rules and national labour law, in *Rush Portuguesa* the Court is also careful to neutralise the deregulation potential of this innovative interpretative choice, giving Member States the power to enforce their own legislation and collective bargaining machinery, in order to ensure adequate protection for posted workers, thus preserving an almost full regulative autonomy for the countries where the service shall be provided.

Another exemplary case of openness of labour law systems towards market rules is offered by the equally famous *Albany International*[21] judgment, in which the constitutional essentials of those social systems, as well as unions' collective autonomy, were preserved. The Court defined a broad sphere of immunities from competition rules in favour of unions' collective autonomy, nonetheless clarifying that this would not remove the prohibition for the pension fund to abuse its dominant position in the common market. On the one hand, therefore, the Court preserved a broad area of collective autonomy: an ambit of union action that is free from the obligations deriving from the principles of free competition in the internal market, as it aims to protect workers' fundamental social interests. On the other hand, however, although identifying the pension fund as an undertaking operating in the insurance market and, in principle, subjected as such to competition rules, the Court excluded that there had been an abuse of dominant position. This conclusion was based on the nature of the mission of general interest pursued by the supplementary pension plan, as well as on the true nature of the solidarity-based redistributive tools used for this purpose.

Neoliberalism

Viking and *Laval* inaugurate the season of the Court's dominant neoliberal dogmatism. These judgments undoubtedly mark a break with the normative

[19] L. Niglia, 'Eclipse of the Constitution (Europe Nouveau Siècle)', 22(2) *ELJ* (2016) p. 132 at p. 134.

[20] ECJ 27 March 1990, Case C-113/89, *Rush Portuguesa Ld^a* v *Office national d'immigration*.

[21] ECJ 21 September 1999, Case C-67/96, *Albany International BV* v *Stichting Bedrijfspensioenfonds Textielindustrie*. In a similar vein, *see also* ECJ 21 September 1999, Joined Cases C-115/97, C-116/97, and C-117/97, *Brentjens' Handelsonderneming BV* v *Stichting Bedrijfspensioensfonds voor de Handel in Bouwmaterialen*.

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models analysed up to now. The ideological revision of the relationship between the internal market and labour law appears to be evident, and the introduction of the entrepreneurial contractual freedom as a fundamental right protected by Article 16 of the EU Charter of Fundamental Rights – which could appear almost provocative in *Alemo-Herron*[22] and is based on well-thought-out arguments in *AGET Iraklis* – now finalises the explicitly neoliberal restyling regarding the internal market doctrine initiated by the famous quartet.

From this point of view, the coessential protective and emancipating function carried out by labour law loses its original autonomous legitimisation, subsequently finding its area of legitimacy insofar as it passes the proportionality test, to be carried out in any situation (even though entirely internal as in *Alemo-Herron*) where EU law is applicable pursuant to the innovative interpretation of Article 16 of the EU Charter of Fundamental Rights. All of this implies that the greater the degree of protection guaranteed by domestic labour law legislation, the stronger the pressure on national systems to justify the adoption of any rules limiting entrepreneurial freedom.

The conceptual pillars of this new doctrine are clearly outlined by the *Viking* and *Laval* case law.

The first aspect is the enshrining of economic freedoms (freedom of establishment and freedom to provide services) as fundamental rights,[23] leading to a conceptual juxtaposition between the two terms, which had already made its way into the Court's case law.[24] As a result, the fundamental collective rights of workers (the rights to strike and to engage in collective bargaining) are converted into private powers that tend to encroach upon those freedoms insofar as they hinder access to the internal market. And while rights must be guaranteed, at least as to their essential content, powers must be limited accordingly. As Azoulai noted, 'Recognition of the right to strike implies, in principle, conferring on collective action a certain judicial immunity. On the contrary, power implies

[22] ECJ 18 July 2013, Case C-426/11, *Mark Alemo-Herron v Parkwood Leisure Ltd. Cf* S. Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of Freedom of Contract', 10(1) *ERCL* (2014) p. 167. *See also* J. Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfer of Undertakings and the Protection of Employer Rights in EU Labour Law', 42(4) *ILJ* (2013) p. 434.

[23] As noted by E. Christodoulidis, 'The European Court of Justice and the "Total Market" Thinking', 14(10) *German Law Journal* (2013) p. 2005 at p. 2006, 'the neoliberal move […] collapses the competition – between rights and freedoms – and […] smoothes over their friction by elevating market access as underlying premise, underwriting and providing the measure of the "reconciliation" of social rights and economic freedoms on a common register'.

[24] *Cf* V. Trstenjak and E. Beysen, 'The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU', 3 *ELR* (2013) p. 293; F. De Cecco, 'Fundamental Freedoms, Fundamental Rights, and the Scope of Free Movement Law', 15(3) *German Law Journal* (2014) p. 383.

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control. And it involves the responsibility to take account of the interests of the undertakings and those of workers from other Member States'.[25]

This reversal of the traditional constitutional perspective is made possible by a second conceptual passage of the *Viking* and *Laval* case law. In fact, in the traditional interpretation of the treaties, fundamental economic freedoms – with the significant exception of the free movement of workers – have not been considered to be applicable horizontally in relationships between private individuals. However, the circumstance that a fundamental economic freedom can be invoked against a strike or labour action alters the collective conflict pattern to the advantage of the transnational undertaking, as it obligates the union to take on responsibility for the employer's interest in exploiting the opportunities offered by the internal market (for instance, by delocalising the productive activity, by transferring the registered office to 'jurisdictions' considered to be more advantageous in terms of lower labour costs, or by resorting to posting workers in the opposite direction).

This last consideration makes it possible to examine a third innovative aspect of *Viking* and *Laval*. In this way, the employer's interests during a collective conflict are protected in a far broader way than what is guaranteed, for instance in the Italian system, in the traditional case law on the external limits to the right to strike, which are aimed at protecting private economic initiative.[26] Both in *Viking* and in *Laval*, collective action by workers undergoes a strict proportionality test by the Court with a view to guaranteeing the employer's economic freedom, which – unlike in the case law of the Italian Court of Cassation – is protected far beyond the limit (of the mere prohibition) of damage to productivity, which is the very essence of the competitive position of the firm in the marketplace.[27] As Azoulai noted:

> It seems that the Court transposes to trade unions the limits which it imposes on Member States as far as market freedoms are concerned (proportionality, judicial review) but without offering these organizations the counterpart recognized for the State: a broad margin of discretion in defining the social objectives to be protected and the means of ensuring this protection. In other words, it refuses to consider the system of social relations as a constitutional order enjoying the capacity of

[25] L. Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realization', 45(5) *CMLRev* (2008) p. 1335 at p. 1345.

[26] In the Italian system, the seminal distinction between damage to production and damage to productivity applies. The distinction was introduced in Italian Court of Cassation, judgment No. 711 dated 30 January 1980, which represents 'a true watershed in the orientation of the case law on the subject': G. Giugni, *Diritto sindacale*, updated by L. Bellardi, P. Curzio, and V. Leccese (Cacucci 2014) p. 279.

[27] *Cf* A. Portuese, 'The Principle of Proportionality as a Principle of Efficiency', 19(5) *ELJ* (2013) p. 612.

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> self-determination. This system is put under the supervision of the legislature and the courts. This analysis amounts, in fact, to denying the choice of social organization based on freedom of negotiation between both sides of industry.[28]

Perhaps, this is the aspect that best defines *Viking* and *Laval* ideologically; recalling a classic piece by Hermann Heller,[29] critical scholars rightfully evoked the 'spectrum of authoritarian liberalism'.[30] This ideological consideration, in fact, leads to the de-politicisation of collective conflict and to the de-collectivisation of labour law, complying with dictates clearly arising from the new European economic governance and from the crisis management tools that the EU, and more specifically the Eurozone, has adopted in recent years.

In more technical and specific terms, moreover, this aspect evokes a further significant passage of the case law, which can be found – to an even greater extent – in the *Alemo-Herron* and *AGET Iraklis* judgments, as the result of the emphasis given to the employer's contractual freedom as a fundamental right protected by Article 16 of the EU Charter of Fundamental Rights. In *Laval*, the Court interpreted Directive 96/71 on the posting of workers in the framework of the provision of services, as a tool for the coordination of national labour law systems that, in an attempt to protect posted workers, aims to identify a minimum set of imperative rules. However, in order to protect the entrepreneur's economic freedom, it also establishes a maximum level of protection applicable in the hosting Member State. As noted, this interpretation 'implies that there might be a right of economic actors to access the laws of this least restrictive State regardless of the precise location of their own activities, as long as those activities have a loose connection with the jurisdiction concerned or there is some transnational element involved in the issue at stake'.[31] In this way, '*Laval* and *Rüffert* between them establish a presumption of regime portability: Article 49 protects the right of the foreign service provider to apply the law and/or agreements of its country of origin, that is to say, the law of the home state, in preference to that of the host state, where the latter imposes a higher regulatory burden, unless those laws can pass a justification test'.[32]

Nevertheless, in *Laval* this effect is still confined to the realm of economic transactions occurring at the transnational level, which fall within the scope of

[28] Azoulai, *supra* n. 25, p. 1350-1351.

[29] Originally published in 1933, it has been recently republished in English: H. Heller, 'Authoritarian Liberalism?', 21(3) *ELJ* (2015) p. 295.

[30] M.A. Wilkinson, 'The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union', 14(5) *German Law Journal* (2013) p. 527; M.A. Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?', 21(3) *ELJ* (2015) p. 313. Similarly, *cf* W.E. Scheuerman, 'Hermann Heller and the European Crisis: Authoritarian Liberalism Redux?', 21(3) *ELJ* (2015) p. 302; A. Somek, 'Delegation and Authority: Authoritarian Liberalism Today', 21(3) *ELJ* (2015) p. 340.

[31] S. Deakin, 'Regulatory Competition after Laval', 10 *CYELS* (2007-2008) p. 581 at p. 582.

[32] Deakin, *supra* n. 31, p. 587.

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application of Directive 96/71 and Article 56 TFEU. The rising star of Article 16 of the EU Charter of Fundamental Rights aims to overcome the applicative limits of the freedom to conduct a business, eventually allowing for the questioning and scrutiny of the obstacles, embodied by labour law provisions, that prevent the full enjoyment of the entrepreneur's contractual freedom, also in merely internal situations.[33] *Alemo-Herron* is the first test setting a benchmark for this new interpretative approach, which, in essence, overturns the traditional function carried out by partial-harmonisation directives in the social field, extending the 'pre-emption effect' beyond the scope of application of Directive 96/71.

This paradigmatic case marks the Court's new approach to the interpretation of Directive 2001/23 on the protection of the rights of workers in the event of a transfer of undertakings. The transferor was bound to comply with the wage increases set by a collective bargaining body in accordance with dynamic clauses referring to collective bargaining in the public sector, which the undertaking was deemed to be party to. However, the transferee, while bound to apply those clauses under common law principles, was not actually party to such a collective bargaining sector and body. The Court's motivation is particularly assertive. Since the fundamental right enshrined in Article 16 refers to contractual freedom,

> In the light of Article 3 of Directive 2001/23, it is apparent that, by reason of the freedom to conduct a business, the transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity. However, the transferee in the main proceedings is unable to participate in the collective bargaining body at issue. In those circumstances, the transferee can neither assert its interests effectively in a contractual process nor negotiate the aspects determining changes in working conditions for its employees with a view to its future economic activity. In those circumstances, the transferee's contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business.[34]

Similarly, the Court overcomes the obstacle set forth by Article 8 of Directive 2001/23, which expressly authorises Member States – when transposing it – to introduce or maintain a more favourable treatment for workers, also allowing for or encouraging the implementation of collective bargaining agreements or of agreements entered into by social partners, which are more favourable to them. The dynamic clauses referring to future collective bargaining would not fall under

[33] *Cf* R. Babayev, 'Private Autonomy at the Union Level: On Article 16 CFREU and Free Movement Rights', 53(4) *CMLRev* (2016) p. 979, and 'Contractual Discretion and the Limits of Free Movement Law', 23(5) *ERPL* (2015) p. 875.

[34] ECJ 18 July 2013, *supra* n. 22, paras. 33-35.

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Article 8 of the directive because they would alter the appropriate balance of interests determined by the directive itself; despite having the purpose of protecting workers' rights in the event of transfers of undertakings, the directive aims to harmonise the costs shouldered by undertakings operating in the internal market, with a view to ensuring fair competition between them.

In this way, the directive is essentially transformed into a tool for protecting the interests of the transferee employer,[35] with a corresponding limitation of Member States' discretion to introduce provisions that are more favourable for workers. In this reinterpretation of the purpose of the directive, as a 'reversible' protection technique, as Gérard Lyon-Caen would say,[36] Article 16 of the EU Charter of Fundamental Rights plays a crucial role as it promotes 'private autonomy in a liberal sense, understood as freedom from regulation and coercion'.[37] In *Alemo-Herron* the freedom to conduct a business is protected to such an extent as to prohibit regulatory limitations that negatively affect the profitability of the economic activity, namely the advantage expected from the purchase of the undertaking. This is why the interpretation of the freedom to conduct a business adopted in *Alemo-Herron* 'has a distinctly libertarian flavour to it and seems partisan, in the sense that it is difficult to see how a reading not based on a libertarian understanding of liberty could ever yield such an outcome. Indeed, it may be considered – admittedly with some exaggeration – as a European *Lochner*'.[38]

The more recent *Asklepios* ruling fundamentally endorses this liberal line of reasoning of the Court, although from a different angle.[39] Indeed, *Asklepios* only apparently reverses the conclusions of *Alemo-Herron* by stating that dynamic clauses such as the ones allowed by the German Civil Code are compatible with

[35] *Cf* Weatherill, *supra* n. 22, p. 172.

[36] G. Lyon-Caen, *Le droit du travail. Une technique réversible* (Dalloz 1995).

[37] D. Leczykiewicz, 'Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?', in U. Bernitz et al. (eds.), *General Principles of EU Law and European Private Law* (Kluwer Law International 2013) p. 171 at p. 172.

[38] M.W. Hesselink, 'The Justice Dimensions of the Relationship between Fundamental Rights and Private Law', 24(3/4) *ERPL* (2016) p. 425 at p. 447, who obviously refers to U.S. Supreme Court, *Lochner* v *New York*, 198 U.S. 45 (1905). For an analogous criticism, *cf* S. Giubboni, *Diritto del lavoro europeo. Una introduzione critica* (Cedam 2017) p. 79. The implicit and perhaps unconscious criticism of Lochnerism by the Luxembourg Court will be dealt with in the concluding paragraph.

[39] *Cf* ECJ 27 April 2017, Joined Cases C-680/15 and C-681/15, *Asklepios Kliniken Langen-Seligenstadt GmbH* v *Ivan Felja* and *Asklepios Dienstleistungsgesellschaft mbH* v *Vittoria Graf*, which also deals with the question of whether Article 3 of Directive 2001/23 allows national legislation (in the case at hand, the German Civil Code) to authorise the incorporation of dynamic clauses into an employment contract, i.e. clauses referring dynamically to collective agreements even after the date of the transfer of the undertaking.

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Article 3 of Directive 2001/23 read together with Article 16 of the EU Charter of Fundamental Rights. The very reason for such a statement is that the employment contract is 'characterised by the principle of freedom of the parties to arrange their own affairs, according to which, in particular, parties are free to enter into obligations with each other'.[40] Accordingly, if the transferor and the employees have freely consented to a dynamic clause and if that contractual clause is in force at the date of the transfer, 'Directive 2001/23 and in particular Article 3 thereof must be interpreted as providing, in principle, that that obligation arising from the employment contract is transferred to the transferee'.[41]

But such a statement, which is per se totally and coherently based on the very principle of freedom of contract, is decisively limited by the Court for the sake of providing the transferee's business freedom with effective (and prevailing) judicial protection. The Court makes it clear that 'the transferee must be in a position to make the adjustments and changes necessary to carry on its operations'.[42] In such a way, as in *Alemo-Herron*, the transferee's freedom to run its business ends up prevailing over the employees' conflicting interest in enforcing the dynamic clauses freely agreed upon with the transferor.

In fact, 'In the present case, it is clear from the decision to refer and, in particular, from the wording of the questions referred for a preliminary ruling that the national legislation at issue in the main proceedings provides for the possibility, after the transfer, for the transferee to adjust the working conditions existing at the date of the transfer, *either consensually or unilaterally*'.[43] This is why there is no need for the Court to subject the compatibility of the national legislation at issue with Article 16 of the EU Charter of Fundamental Rights to any further examination.

Asklepios does confirm the new course of the Court.

Dismissing in Chalcis

The name 'Chalcis' has not yet lost all the evocative strength of a glorious past, leading our ancestral memory back to the origins of western civilisation. But today Chalcis is a mid-sized town in central-eastern Greece, which – like many others – has been impoverished by the ravaging economic crisis. For this reason, Anonymi Geneki Etairia Tsimenton Iraklis (henceforth: AGET Iraklis) – an undertaking active in the production, distribution, and marketing of concrete, and controlled by Lafarge-Holcim, a Franco-Swiss giant in the sector – decided to decommission

[40] ECJ 27 April 2017, *supra* n. 39, para. 19.
[41] ECJ 27 April 2017, *supra* n. 39, para. 21.
[42] ECJ 27 April 2017, *supra* n. 39, para. 22.
[43] ECJ 27 April 2017, *supra* n. 39, para. 23 (emphasis added).

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the plant, dismiss all the employees, and concentrate the residual activity in the region within the productive units located in Agria Volou and Aliveri.

In his conclusions, Advocate General Wahl suggested that the Court answer the request of the Greek State Council for a preliminary ruling, pursuant to Article 49 TFEU, interpreted according to Article 16 of the EU Charter of Fundamental Rights, by stigmatising the incompatibility of national labour law with the very essence of the EU free-market constitution. Both those EU constitutional provisions prevent the application of national legislation, such as the one at stake, requiring employers to obtain prior authorisation for collective redundancies, subjecting it to labour market conditions, the undertaking's situation, and the interest of the national economy. He also stressed that the fact that Greece was facing a severe economic crisis – paired with extremely high and unprecedented unemployment rates – had no bearing on this conclusion. Indeed, in applying Greek Law No. 1387/1983, which transposed Directive 75/129 on collective redundancies (today recast in Directive 98/59), the Greek Ministry of Labour – after obtaining the opinion of the Supreme Labour Council – denied the authorisation requested by AGET Iraklis, on the assumption that the collective redundancy plan following the closure of the plant in Chalcis had not been appropriately motivated, as the arguments put forward by the company were allegedly too vague.

It is useful here to briefly analyse the arguments advanced by Advocate General Wahl to motivate his conclusion, also in order to assess the differences between them and the motivations put forward by the Grand Chamber of the Court in the judgment of 21 December 2016, which, however, comes to the same result.

As mentioned above, the Court states that Article 49 TFEU prevents the application of such a national law on the assumption that the existence, in the Member State concerned, of a situation characterised by a strong economic crisis and by a particularly high unemployment rate is not likely to affect that conclusion. In relation to the alleged violation of Article 49 TFEU, the difference between the Court's reasoning and Advocate General Wahl's approach is therefore not to be found in the findings of the judgment but, as explained below, in the actual structuring of the proportionality test concerning the national measure.

The conclusion adopted by the Court on the interpretative issue regarding Directive 98/59 is far more significant for our purposes – the difference with the approach taken by Advocate General Wahl pertains to the findings of the judgment. Unlike Advocate General Wahl, who excluded the possibility that the national law could be in contrast with the directive, the Court's judgment excludes such a contrast only in principle, but recognises it – exceptionally (and based on an assessment to be performed by the national court) – in the event that the effective application of the Greek legislation may have the consequence of depriving the provisions of the directive of their 'practical effect'.

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As a matter of fact, Advocate General Wahl definitely rejected the notion that Directive 98/59 could be interpreted as forbidding a legislative provision like the one at stake. At least in these terms, he somehow endorsed a rather orthodox interpretation of the directive on collective redundancies and the provision in Article 5, which – as is the case with Article 8 of the directive on transfers of undertakings – empowers Member States to apply or introduce more favourable provisions for workers. Moreover, he tackled the problem posed by Article 5 of the directive with a clever interpretative stratagem, assuming that the national legislation does not fall within the scope of application of the directive as the latter does not establish any rule on the internal organisation of enterprises or on human resources management, nor does it limit the employer's power to effect collective dismissals.[44] In limiting the employer's power to implement collective dismissals, the authorisation procedure regulated by the Greek law would fall outside the scope of application of the directive. Therefore, it would not even be considered 'a statutory provision more favourable to workers (an instance of "over-implementation") within the meaning of Article 5 of that directive'.[45]

The Court's reasoning on that point is slightly different. Although such a contrast of national law with the directive must be excluded in principle, the Court points out that 'the position would, exceptionally, be different if, in the light of its more detailed rules or of the particular way in which it is implemented by the competent public authority, such a national regime were to result in Articles 2 to 4 of Directive 98/59 being deprived of their practical effect'.[46] And in fact,

> whilst it is true that Directive 98/59 harmonises only partially the rules for the protection of workers in the event of collective redundancies, the fact remains that the limited character of such harmonisation cannot have the consequence of depriving the provisions of the directive of practical effect […]. Therefore, a Member State cannot, in particular, adopt a national measure which, although ensuring an enhanced level of protection of workers' rights against collective redundancies, would, however, have the consequence of depriving Articles 2 to 4 of Directive 98/59 of their practical effect [and basically excluding] any actual possibility for the employer to effect such collective redundancies […].[47]

Thus, a significant difference with Advocate General Wahl's approach clearly emerges. On the one hand, according to him, the fact that the provision, being a source of partial harmonisation, does not encroach upon the employer's freedom to effect collective

[44] AG Wahl, *supra* n. 1, para. 27.

[45] AG Wahl, *supra* n. 1, para. 32.

[46] ECJ 21 December 2016, Case C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis)* v *Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, para. 35.

[47] ECJ 21 December 2016, *supra* n. 46, paras. 36, 37, and 38.

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dismissals implies that the national legislator is solely responsible for defining the substantial conditions the legitimacy of the dismissal is subjected to. The legislator can therefore introduce an authorisation procedure as intrusive and limitative as the Greek one, without violating the directive. On the other hand, the Court rules that that same circumstance may take a wholly different meaning since it prevents the national legislator from limiting the employer's freedom by imposing on the entrepreneur the obligation to comply with such onerous substantial conditions, which – although under exceptional circumstances – preclude the employer from extinguishing unnecessary employment relationships. In other words, in addition to the procedural requirements envisaged by Directive 98/59, the national legislator may well introduce substantial limits ('objective requirements') to the entrepreneur's power to effect planned collective dismissals. However, the national legislator will not be able to go as far as to introduce substantive requirements so stringent as to jeopardise – as the Greek legislation appears to do – the employer's fundamental economic freedom. Failing to notice the contradiction in its reasoning, the Court ascribes to the directive on collective dismissals a pre-emption effect that is not different from the one actually ascribed by *Alemo-Herron* to the directive on transfers of undertakings. In this way, the Court radically changes the goal of the directive, or it rather turns the latter into an instrument for the protection (at least in the case under examination) of the employer's interests.

The Court's reasoning deviates from the one adopted by Advocate General Wahl also in relation to the non-compliance of the Greek legislation with Article 49 TFEU. However, as already mentioned, the difference only concerns the argumentation without affecting the conclusions: both Advocate General Wahl and the Court conclude that the national legislation is in breach of the freedom of establishment, interpreted in the light of Article 16 of the EU Charter of Fundamental Rights. In Advocate General Wahl's opinion, the Greek legislation is in contrast with Article 49 TFEU because it fails to protect workers,[48] a purpose of general interest that may, in the abstract, legitimise the restriction of the freedom of establishment (as long as it is pursued by non-disproportionate means). The Court, instead, does not state that the restrictions imposed by the Greek legislation fail to meet the goal – protecting workers – pursued by the legislator. However, it rules that those restrictions do not comply with the justification requirements following from the principle of proportionality.

Unitas in pluralitate: paying due deference to national labour constitutions

As shown by *AGET Iraklis*, the transformation of labour law into a functional tool for accessing the market and into a judicial instrument for enhancing the efficient

[48] *See* AG Wahl, *supra* n. 1, para. 75.

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operation of businesses has immediate implications, especially in the field of economic dismissals: employers' freedom must be protected to the greatest possible extent in the framework of the freedom to conduct a business, while reducing to a minimum any regulatory obstacles.[49] Entrepreneurs must be freed once and for all from the '*psychose du licenciement interdit*'[50] (typically engendered by legislation such as in the Greek example), and their decisions on the optimal size of the workforce must be guaranteed by rules ensuring operational certainty and predictability, reducing transaction costs to a minimum. This ideological move has, at least in theory, far-reaching implications: 'labour law would survive in the EU only as a collection of exceptions to the market freedoms and competition laws, subject always to a test of proportionality.'[51]

In the light of these general implications, as suggested by some scholars when criticising the neoliberal turn taken by the Court,[52] reference should be made to the *Lochner* doctrine of the Supreme Court of the United States (dating to the beginning of the 20th century), despite the obvious differences in historical, political, and constitutional contexts. Beyond such differences, in fact, there is at least one significant aspect of conceptual and ideological consistency with what Cass R. Sunstein famously defined as '*Lochner*'s legacy':[53] 'Market ordering under the common law was understood to be a part of nature rather than a legal construct, and it formed the baseline from which to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship.'[54]

Therefore, the criticism raised by Justice Oliver Wendell Holmes Jr. in his famous dissenting opinion in *Lochner* should also apply to the Luxembourg Court, inasmuch as he blamed the majority for overstepping the limits of the mandate conferred upon the Supreme Court by the Federal Constitution, intruding into merely political issues that fall, as such, under the responsibility of the legislator of the State of New York.[55] In his dissent, Justice Oliver Wendell Holmes Jr.

[49] *Cf* A. Baylos Grau and J. Pérez Rey, *El despido o la violencia del poder privado* [*On dismissal, or on the violence of power*] (Editorial Trotta 2009).

[50] A. Jeammaud, 'Le droit du travail dans le capitalisme, question de fonctions et de fonctionnement', in A Jeammaud (ed.), *Le droit du travail confronté à l'économie* (Dalloz 2005) p. 15 at p. 27.

[51] H. Collins, 'The Impossible Necessity of European Labour Law', in S. Muller et al. (eds.), *The Law of Future and the Future of Law* (Torkel Opsahl Academic EPublisher 2011) p. 453 at p. 464.

[52] *See* e.g. Hesselink, *supra* n. 38, p. 447; and I.H. Eliasoph, 'A "Switch in Time" for the European Community? *Lochner* Discourse and the Recalibration of Economic and Social Rights in Europe', 14(3) *CJEL* (2008) p. 467.

[53] C.R. Sunstein, 'Lochner's Legacy', 87(5) *Columbia Law Review*. (1987) p. 873.

[54] Sunstein, *supra* n. 53, p. 874.

[55] For a more explicit dissertation, *cf* Justices J.M. Harlan, E.D. White, and W.R. Day, *dissenting*, 198 U.S. 65 (1905), in U.S. Supreme Court, *supra* n. 38.

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famously stated that 'a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire'.[56] Indeed, that criticism applies all the more to the Luxembourg Court because – as Joerges noted – it 'is not a constitutional court with comprehensive competences – it is not legitimated to re-organize the interdependence of Europe's social and economic constitutions, let alone to replace the variety of European social models with a uniform Hayekian *Rechtsstaat*'.[57]

[56] Justice O.W. Holmes Jr., *dissenting*, 198 U.S. 75 (1905), in U.S. Supreme Court, *supra* n. 38.

[57] C. Joerges, 'A New Alliance of De-legalisation and Legal Formalism? Reflections on Responses to the Social Deficit of the European Integration Project', 19(3) *Law and Critique* (2008) p. 235 at p. 252.

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