UNIVERSITY OF CAMBRIDGE

Collective Labour Rights As An Element Of The Substantive Constitutionalisation Of EU Law After The Treaty Of Lisbon

This thesis is submitted for the degree of Doctor of Philosophy in Law

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PREFACE

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the preface and specified in the text.

It is not substantially the same as any work that has already been submitted before for any degree or other qualification except as declared in the preface and specified in the text.

This thesis, including footnotes, does not exceed the permitted length/word limit for the Law Degree Committee (100,000 words for the PhD in Law).

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ABSTRACT / SUMMARY

The thesis focuses on core collective labour law rights and institutions as integral parts of the EU legal order, approached through the hermeneutical lens of the Union's suggested 'substantive constitutionalisation'. It seeks to establish labour law in general as an integral part of not only the internal market but the EU's constitutional architecture as such, and collective labour rights in particular as a means to realise the Union's socioeconomic objectives and an impetus for its democratisation.

First, the thesis discusses the concept of constitutionalisation, its roots and various theoretical formats, and argues that the EU, following the Lisbon Treaaty, has reached a point where it can be examined through the tools provided by its own 'substantive constitution'. Fundamental values and objectives that form the normative foundation of the Union's constitutional architecture are examined, to reveal a mutli-layered and pluralist coherent framework. Within it, it is argued, labour law and collective labour institutions are to be placed and their role and function reconsidered accordingly.

Second, focus turns on the substantive economic constitution of the Union and on collective labour institutions. The origins, nature, and essence of the 'social market economy' objective that sits at its core are explored, and a holistic understanding of the role and function of collective labour law and collective autonomy within it and as integral elements of a similarly holistic construction of the (aspired) political and the (existing) socioeconomic aspects of the EU is proposed. Consequently, the relevant jurisprudence of the CJEU, including case law related to EMU measures and mechanisms and euro crisis-induced interventions, is critically approached.

The thesis ultimately aims to establish two propositions: first, that collective labour institutions and mechanisms are not antithetical to economic freedoms, but an integral condition for their effective exercise; second, that they are (constitutionally protected) institutions that serve the realisation of the multi-faceted normative goals, principles and aspirations of the EU, in pursuit of not just a common economic sphere, but more importantly, the establishment and development of a democratic and equitable polity, promoting participation and, thus, democratisation of the market and of EU constitutional perceptions.

To Markos, Sofia and Vassiliki, for always being there,

to Eliza for carrying me through to the finish line,

and

to Catherine and Simon for putting up with me.

There and back again.

It only took a village (or three),

a few historical turns and major crises,

a rupture, and a global pandemic.

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INTRODUCTION

The wrinkles on the face of Manolis Glezos, Europe's 'first partisan'[1] and the oldest MEP to be voted in at the 2014 European Parliament elections, traced the twists and dramas of more than 70 years of European history. A firm antifascist and the perpetrator of the first recorded defiant act of resistance against Nazi occupation across Europe, for much of his long life he suffered political prosecution that amounted to years of imprisonment and exile during the turbulent post-Greek Civil War decades and the years of the Greek junta. A few years after the restoration of democracy in the country, he was among the first group of MEPs to represent Greece following its accession to the EU. The Eurocrisis had found him marching alongside workers once more, active as ever in grassroots movements[2]. As fate would have it, he returned to the European Parliament in the twilight of his years.

Aged 92 at the time, and still vibrant as ever, he stood in the Strasbourg plenary at the height of a crisis that had shaken the foundations of the EU, testing not just its economy and financial structures, but the very normative core and identity of the Union. In his penultimate address to the European Parliament, the very next day of the Greek referendum that had overwhelmingly rejected mainstream Eurozone policies and ideological fixations, he chose to describe what the dream that was Europe actually is.

He did not discuss numbers and mechanisms. He did not elaborate on details of legal texts and economic reports. Instead, he opted to take a breath, allow himself to be removed from the turmoil of the moment, and go back to the basics of what European commonality was supposed to represent. To that end, he returned to the roots of what has been most commonly identified in popular and civic imagination as the shared European cultural tradition that defines what 'being European' means: classical antiquity and the European philosophical tradition rooted in the Classics which began to take shape in late medieval times leading to the

[1] *Souvlis, George*, Manolis Glezos, 1922–2020 (Jacobin 1 April 2020) https://www.jacobinmag.com/2020/04/manolis-glezos-obituary-greece-nazi-resistance (accessed 19-4-2020).

[2] *Leontidou, Lila*, 'Athens in the Mediterranean 'movement of the piazzas': Spontaneity in material and virtual public spaces' (2012) City 16(3), 299 (300,310).

Renaissance, the Enlightenment, and, eventually, modern philosophical and political thought. His entire speech, attempting to remind Europe and its EU institutional vehicles of what they are founded upon, was given solely in ancient Greek and Latin.

First, an excerpt from Euripides' 'The Suppliants', where Theseus describes the political and social organisation of Athens: '*Your address to us, stranger, was mistaken in seeking a lord here; for this city is not ruled by a single man, but it is free. It is the people (the demos) that rule, alternating in public offices every year; they do not give more to the rich, but the poor have the same as (*or: *are considered equal to) them*'[3]. In a single passage, the ideas of democracy, accountability, solidarity and equality emerge.

Then came just a brief phrase, simple yet seminal, attributed to Thomas Aquinate, that complemented these values by adding a single warning: '*Timeo hominem unius libri' ('I fear the single book man')*. The social and political values and ideals Euripides had pointed to are enriched by this crucial principle that encapsulates both the foundations of rational thought and part of the basis of the structural core of European collaboration itself: open-mindedness, diversity and pluralism, ideological and systemic.

In a two-minute address, a call-back to two simple excerpts from the wealth of European cultural tradition, Glezos was able to essentially answer the question that has been tormenting academics, jurists, politicians and the EU institutions themselves for years. What is the EU about? What are its foundations and the principles upon which it functions, and where does it go from here?

These are questions that have been plaguing the systemic understanding of the Union, with increasing intensity as the integration project evolved. Especially since the mid noughties, these debates became part of the constitutional discourse that arose. The discourse was fuelled by the legal and political debate on a Constitution for Europe and the desire for ever deeper integration, as well as the judicial understanding of the EU legal order as autonomous and undergoing a constitutionalisation process, albeit one driven 'from above'. Academics and critics have engaged in exploring the supposed constitutional potential and

[3] Euripides, The Suppliants (Ἱκέτιδες), lyrics 403-408.

structure of the Union, attempting to transplant traditionally national concepts and processes in the transnational context.

However, much of that endeavour has been diverted. Normatively it has steered towards the theoretical exploration of a suggested clash between the national and the transnational, and of the subsequent hypothetical potentials of the Union as an entity that would transcend the divide. Ontologically, it has narrowed down to meticulously analysing the construction of Institutions and the details of Treaty provisions. That ontological, positivist analysis, however, has been unfolding mostly in a manner that follows pre-existing EU scholarship and appears to overlook the supposed constitutionalisation process the Union has been undergoing. Most notably, scholarship has failed to come up with a coherent understanding of the overall system that would take into account its pyramidal, albeit multi-layered, constitutional structure, and the normative values upon which it rests.

On the other hand, the evolution of the monetary union project and, especially, the unfolding of the Eurozone crisis further sidelined the discussion on the normative principles and the interconnectivity of the multiple layers and functions of the EU legal order. On the contrary, focus once again shifted to economic rationales and considerations that, moreover, were now contained in a very specific unitary theoretical and ideological narrative: that of budget discipline, austerity and, ultimately, a contemporary European version of neoliberal economic policies, not unlike those pursued since the 1970s in developing countries. In other words, diversity appears to have been sacrificed at the altar of a singular ideal: the myth of the self-regulating market served by a monetary union that, absent political or even economic unification, will lead to perpetual prosperity. The European project has been hijacked by single book men.

It is this lack of understanding of the EU system as a coherent, pluralistic whole, under the influence of particular political ideologies and economic dogmas, that has also defined the EU institutional stance vis-à-vis labour rights and freedoms, and, more generally, social protection. This stance has been particularly notable with regards to collective labour law and its processes and mechanisms. They are not only approached with distrust by the Court and contemporary

political and economic analyses, seen as an anomaly in the presumed purity of a neoclassical common market model. More importantly, they have openly become the target of deregulatory attacks by EU Institutions, especially in countries on the receiving end of 'bail-outs' administered by ad hoc mechanisms on the fringes of EU law.

What is overlooked in both cases is that collective labour law institutions do not operate in a normative vacuum. They are substantively and systemically integrated in the constitutional architecture of the EU, constituting seminal pieces of the puzzle. That constitutional architecture is not theoretical or hypothetical; it exists. It is evident in the Treaties themselves, providing the blueprint for the function of the EU 'social market economy', and defining the market's role as only one of the aspects of an organisation that aspires to become a polity. Within that context, the complex role and multiple functions of collective labour institutions are apparent, and should be taken into consideration in legal, economic and political analyses.

The aim of this thesis is to contribute to weaving the contextual normative thread that most analyses tend to overlook when attempting an in depth, yet ultimately fragmented, examination of pieces of the overall EU systemic structure. The intention is to go back to the normative basics and examine the hypothesis of the Union's constitutionalisation, by shedding light on the meaning of the concept and exploring the potential effects of the process in understanding and applying EU law. Moreover, in reconnecting with these apparently forgotten normative values and principles of the Union, the thesis will attempt to show how collective labour institutions can become a vehicle for their effective realisation.

To that end, Part I of the thesis will be devoted to discussing the concept of constitutionalisation, its roots and various theoretical formats, and will argue that the EU has reached a point where it can be examined through the tools provided by its own 'substantive constitution'. It will be suggested that, albeit not themselves a 'capital C' Constitution, the Treaties provide the normative and substantive framework for a principled approach of the Union's functions, including its economic and monetary aspects. They set clear goals and provide coherent standards that are to be applied within a pluralistic, multilayered constitutional system, to induce accountability and to delimit both institutional

interventions and the otherwise free operation of the internal market. This normative framework, defined by the fundamental values and objectives of the Union, is given substance by reference to specific rights, included most notably in the EU Charter of Fundamental Rights, and to certain systemic principles, most notably that of pluralism.

Consequently, it will be argued that it is within this context that collective labour institutions should be placed and judged. The assumptions of the Court, of certain scholars, and of the EU institutions about the nature and function of collective labour law have been increasingly steeped in pure economic analyses, predominantly influenced by neoclassical and neoliberal theory. At best, labour law and collective labour institutions are approached as tools of (state) intervention in the unrestrained self-regulation of the market, hence as obstacles to the exercise of economic freedoms. In that respect, only the economic function of collective labour institutions is examined, while their other, social and democratic, aspects are overlooked. Even that economic function is again viewed through the prism of very specific schools of economic thought, or approached entirely superficially, with minimal understanding of its complexity. The result is that, even the economocentric approach that is often adopted by scholars and EU institutions alike, including the Court, is not entirely consistent with economic theory itself and the complicated nature of collective rights and structures as vehicles for the realisation and enjoyment of workers' economic freedoms and as integral elements of the particular market model the EU declares to be promoting.

In that respect, building upon the assumption of a coherent, substantive constitutional context, as presented in Part I, Part II examines the substantive economic constitution of the Union, as the aspect of the EU constitution that seeks to transplant its overall normative framework on the economic structures. It is argued that it is upon the normative basis of the economic constitution that the internal EU 'social market economy' is to be constructed and function as the environment where labour institutions operate. Beyond the economic, however, it will be shown that there is an inherent interconnectivity with the social and political aspirations of the EU, to which collective institutions also play a significant role.

Part III examines how the CJEU has (not) acknowledged the normative change brought about by the Lisbon Treaty, particularly as regards collective labour rights and processes. Moreover, it will consider whether, even under a pure economic approach of such rights, the Court has been inconsistent or superficial in its application of economic reasoning.

It is not the intention, at least in the narrow confines of a PhD thesis, to provide readers with yet another description and exposition of the substance of various specific collective labour law rights under EU law. Though this thesis will engage with core collective labour freedoms and rights of association, collective bargaining and industrial action, including strike action, it will not focus extensively on their content, nor will it attempt a more detailed explanation of the Social Dialogue mechanisms. There are others that have done that wonderfully, over the years[4]. The aim is to dive into the functional essence of these rights, freedoms and mechanisms, and explore their normative role and effect within the EU constitutional system and the market that is defined and bound by it. The positivist content of these rights will be only briefly presented, to be shown to be part of the material constitution of the EU, inherently connected to the overall substantive EU constitution. More extensive analysis belongs to a longer piece of work, not delimited by the word limits and constraints of a PhD thesis, that the present dissertation aspires to grow into in the near future.

The wish, therefore, is to attempt to use the full extent of a doctoral dissertation, to bring back to the fore what Glezos recalled in a simple, yet powerful, two minute speech. We will try to remind those speaking of constitutionalisation of the values of democracy, equality, constitutional accountability, social cohesion, and diversity that derive from the Treaties and define the Union, its internal market included. Moreover, to that end, it will be suggested that ‘single book’ approaches are inapplicable, undesirable, and, ultimately, incompatible with the ideal of substantive diversity and a constitutional structure of multilayered pluralism.

[4] See inter alia *Barnard, Catherine*, EU Employment Law (4th ed.; OUP, Oxford 2012), 699-726; *Nielsen, Ruth*, EU Labour Law (Djøf, Copenhagen 2013), 115-165; *Ales, Edoardo/Novitz,Tonia* (eds) Collective Action and Fundamental Freedoms in Europe (Intersentia, Antwerp 2010); *Franssen, Edith*, Legal Aspects of the European Social Dialogue (Intersentia, Antwerp 2002).

It is within that context that our theoretical discussion of collective labour institutions will be placed. They will be shown to be just one of the means that are to be used for the realisation of the normative goals, principles and aspirations of the EU, in pursuit of not just a common economic sphere, but that which Theseus describes in the Euripides passage: a polity, to the service of its people.

PART I:
European constitutionalism and substantive constitutionalisation of EU Law

I. Introduction

A good part of the discourse and analysis of critical questions on EU law has been dominated at a certain point by two great ironies: constitutionalisation without a Constitution and collective labour rights with no means for their effective exercise. What is perhaps even more ironic is that an answer to the first question might solve the conundrum of the second, ushering in a new era of EU polity.

In its *Viking/Laval* jurisprudence the European Court of Justice performed a teasing dance; one step forward, one back again. It recognised collective action as a fundamental right, only a few sentences later to narrow its substance so greatly that essentially negated its very effectiveness and purpose. The Court however did nothing more than follow its established market access approach, founded upon the initial framework of the EU as a supranational economic cooperation project with primarily economic values and objectives. A system where supposedly economic freedoms enjoy absolute primacy, sometimes as an end in themselves, while social objectives play at best a supporting role. However, that framework exists no more. The dance cannot last.

The EU has been slowly undergoing a process that has transformed it into a supranational entity governed by rules and principles akin to constitutional legal orders. Constitutionalisation of EU law has proven a controversial topic since it challenges established conceptions and touches upon sensitive issues of sovereignty. Its great moment, the adoption of a formal Constitution, was doomed in part precisely because of those established preconceptions. However, despite the fate of the Constitutional Treaty, the changes brought upon the formal

framework of EU primary law by the Lisbon Treaty have indeed transformed its normative foundations introducing a true constitutional architecture.

This in turn would suggest that a different approach to labour rights is in order within this autonomous legal order where economic values are no longer supreme and where balance between the social and the economic has become the centre point. This very balance is what should be acknowledged and respected by any novel approach of labour rights within the EU legal system, allowing them to produce fully their effect, systemic, legal and even political. In turn that could contribute to the very building of a new civic identity.

This part attempts mainly to explore the concept of EU constitutionalisation and constitutionalism and their place within the established notions and aspects of a constitution. It is argued that the EU has become an autonomous legal order that shows elements of substantive constitutionalisation. Consequently, a new internal normative hierarchy demands a new approach to social rights and labour rights in particular as prima facie equal to economic rights and freedoms.

II. Constitutionalism, constitutionalisation and the EU

1. Basic concepts

1.1. Constitutionalism: Legal and political

Hurdin, building upon Hobbes and Rawls, refers to constitutionalism, liberalism and democracy as 'mutual advantage theories'[1] to emphasise their interrelation. None of these theories or the subsequent analysis and the practical political choices they produce can exist in the absence of the other two members of the triad. Constitutionalism, liberalism and democracy exist in a coherent whole of comprehensive social organisation, complementing and enhancing each other, Constitutionalism, in that tripartite scheme and as is came to emerge from the

[1] *Hurdin, Russel, Liberalism*, Constitutionalism, and Democracy (2nd edn OUP, NY 2003).

western liberal political and philosophical tradition[2], is essentially the formal mantle of political and legal state organisation that encapsulates the tenets of substantive, hence somewhat more elusive, democratic and liberal concepts and ideals. Its simple objective is the restriction of sovereign power[3] by reference to higher norms it is bound by, in order to prevent abuse.

In the absence of a single all-encompassing format for a 'capital C' Constitution, the study of constitutionalism is not merely restricted to identifying the external characteristics associated with a specific concept or paradigm of constitution[4], though it does encompass that aspect as well. It also entails investigating and attempting to reflect on the ideological, political and philosophical context of constitutions[5], searching for the justification of and rationale for particular constitutional arrangements[6]. Hence, from a normative perspective, Feldman defines constitutionalism as commitment to a rational legal and political public justification of actions and policy[7]. As such, it is not static, but entails processes of institutions' conflict resolution and of wider consensus building[8].

It emerges that the primary objective of holding power at check is not to be served by legal means alone. Constitutionalism is not, nor should it be, understood as limited to the suggestion or the subsequent analysis of settled legal arrangements that give rise to particular systemic formulations of a polity restrained by legal principles and mechanisms[9], the review of proper application and operation of which is left to the judiciary (*legal constitutionalism*). It also entails political relationships, conceptions and dynamics that lead to the same

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[2] *McIlwain, Charles Howard*, Constitutionalism: Ancient and Modern (Revised edn, Cornell University Press, Ithaca NY 1947), 21-22 ; *O'Neill, Michael*, The struggle for the European Constitution - A past and future history (Routledge 2009) , 31-32.
[3] *McIlwain, op.cit.* .
[4] *Craig, Paul*, Constitutions, constitutionalism and the European Union, (2001) 7(2) ELJ, 125 (127).
[5] *Everson, Michelle*, Beyond the Bundesverfassungsgericht: On the necessary cunning of Constitutional Law, (1998) 4 (4) ELJ 389 (389).
[6] *Feldman, David*, "Which in your case you have not got" :Constitutionalism at Home and Abroad, (2011) 64 CLP, 117(121-124).
[7] ibid, 124-125.
[8] ibid, 123. For alternative definitions see *Shaw, Jo*, Postnational constitutionalism in the European Union, (1999) 6 (4) JEPP 579, 582-584.
[9] For an analysis of the concept of legal constitutionalism in the UK context see inter alia *Allan, Trevor R. S.*, Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism (Clarendon Press, Oxford 1994). cf. *Tomkins, Adam*, Our Republican Constitution (Hart, Oxford 2005), 10-31.

constraining and counterbalancing effects vis-à-vis sovereign power[10] while springing out of the very same belief in the existence of normative fundamentals that define and regulate its processes[11] (*political constitutionalism*). In the latter construction these standards are used to hold the sovereign politically, rather than legally, accountable[12], focusing on the democratic process instead of relying on the judicial system and its inherent limitations[13]. In a mutually complementing process, that seeks to counter Hobbesian 'arbitrary rule'[14], legal constitutionalism aims to depoliticise the constitutional phenomenon, while political constitutionalism aims to 'dejuridify' it.

It is impressive, yet not unsurprising, that the rich literature on political constitutionalism evolved from a single lecture delivered by J.A.G. Griffith in 1979 on the nature, philosophical background and evolution of the British constitution[15]. Despite the appearance that the British paradigm is unique, accompanied occasionally almost with an implied perception of exceptionalism[16], the historical institutional processes that led to emergence of this paradigm find their parallels in the supranational scenario of the EU. The republican constitution of the UK is not a child of immaculate conception[17] nor a result of direct popular participation and expressed consensus. Its principles and arrangements were the product of institutional interaction between the Crown, the courts and the legislature[18] and the reaction to the perceived failure of the judiciary to regulate the basic constitutional arrangements of the polity through common law. Ultimately, the legal order that arose, with the sovereignty of parliament at its pinnacle[19], rested upon just a political fact[20]: the agreement between the three

[10] *Griffith, J.A.G*., The Political Constitution (1979) 42 MLR 1.
[11] *Bellamy, Richard*, Political Constitutionalism: A republican defence of the constitutionality of democracy (CUP, Cambridge, 2007); See also the allusion to normative fundamentals as 'principles' and manifestations of an overarching morality in *Dworkin, Ronald*, Taking Rights Seriously (HUP Cambridge 1977), 22-23, 71-80.
[12] *McIlwain*, op.cit., 146.
[13] *Bellamy, Richard*, Political constitutionalism and the Human Rights Act (2011) 9 (1) ICON, 86 (88); *Bellamy 2007* , n.11, 26-48.
[14] *Bellamy 2007*, n.11, 57-66 (esp. 65).
[15] *Griffith*, n.10.
[16] *Tomkins 2005*, n. 9.
[17] ibid, 68.
[18] ibid, 67 ff.
[19] *Dicey A.V.*, An introduction to the study of the law of the Constitution (Liberty Fund, Indianapolis 1982) 36-39.
[20] *Wade, H.W.R.*, The basis of legal sovereignty (1955) CLJ 13, 172 (188).

branches of government to accept Parliament's supreme legislative power as the principle source of law and authority and to refrain from challenging it. Furthermore, it is this 'agreement' that also designates what is to be perceived as Parliament created legislation[21].

In an interesting analogy, the basic principles and characteristics of the EU legal order came to be through a process of institutional exchange, at first spearheaded by the CJEU and its jurisprudence, and with minimal popular participation. The Court, attempting to render the new organisation effective, cherry-picked principles and tools from both international law and national constitutional traditions, often operating outside the Treaties, though not precluded by them. This in turn caused the reaction of national constitutional courts. Through this judicial exchange emerged the basic characteristics of the EU system that were initially tolerated and finally accepted by judicial, political and bureaucratic elites alike, before evolving into Treaty provisions and encompassing wider representative democratic structures. Indeed, some of the seminal EU law principles are still dependent on the political fact of their toleration by national actors in a manner analogous to Hart's and Wade's 'political facts' that dominate the British constitution. The fact that citizens, today democratically represented in the European Parliament, were only indirectly involved in the EU evolution and operation process, does not render it less valid as a political process[22]. It remains a deeply political process, integrated in a broader institutional order which is capable of being assessed through political means and thus suitable to be approached through the lens of political constitutionalism as much as it is suitable to be assessed as a phenomenon of legal constitutionalism.

1.2. Transnational Constitutionalism, Constitutionalisation, and the EU: Approaches and Issues

[21] *Hart H.L.A.*, The concept of law (2nd ed OUP Oxford 1994), 100-124.
[22] *Wilkinson, Michael*, Political Constitutionalism and the European Union (2013) MLR 76 (2), 191 (214).

The very nature and substance of constitutionalism[23] in the context of a supranational organisation such as the EU is still vague and highly contested. Definitions and interpretations vary from attempting to apply national constitutional law concepts, to devising complex theories that try to explain and rein in the EU phenomenon by reconceptualising constitutionalism, to adhering to international public law concepts. It is impossible and beyond the purposes of the present thesis to analyse the vast array of arguments on the matter. It ought to be noted, however, that 'constitutionalisation', within the EU context, has come to reflect the Union's evolution from an intergovernmental organisation based on international law to an autonomous constitutional legal order[24]. The notion has been used to describe not a grand constitutional moment but rather a process[25] towards a post-national EU level form of constitutional governance.

The fact that the concept of constitutionalism has been traditionally linked to the state[26] as an entrenched entity, and the consequent notions of national self-determination and sovereignty, have affected both the acceptance of the very possibility for the existence of a transnational autonomous constitutionally governed legal order and the theoretical approach of such an entity, should it be identified as such. At the extremes of the spectrum of opinion, two camps arose: '*integrationists*'[27], fiercely in support of the notion of a post-national entity

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[23] *Charles Howard McIlwain,* Constitutionalism: Ancient and Modern (Revised edn, Cornell University Press, Ithaca NY 1947), 21-22.

[24] *Chriastiansen, Thomas/Reh, Christine*, Constitutionalising the European Union (Palgrave Macmillan, Basingstoke, 2009), 4; *Craig 2001*, n.4, 128.

[25] *Snyder,Francis*, 'The unfinished constitution of the European Union: Principles, processes and culture' in *Weiler, J.H.H./Wind, Marlene (eds.)*, European Constitutionalism beyond the State, (CUP, Cambridge 2003), 55 (59 and 62-63); *Von Bogdandy, Armin*, The prospect of a European Republic: What European Citizens are voting on (2005) CMLR 42, 913 (915. cf. *Joerges, Christian*, Das Recht im Prozess des Kosntitutionalisierung Europas,Florence, EUI Working Paper, 2001.
For a comprehensive description of the evolutionary process see *Weiler*, The transformation of Europe (1991) YaleLJ 100(8), 2403.
cf. *Loughlin, Martin*, 'What is Constitutionalisation?' in Dobner, Petra/ Loughlin, Martin (eds), The Twilight of Constitutionalism? (OUP, Oxford 2010), 48 (59-69).

[26] See *Walker, Neil*, EU Constitutionalism in the State Constitutional Tradition (EUI Working Paper, Florence 2006), (1); *Walker, Neil*, The idea of constitutional pluralism, (2002) MLR 65(3), 317 (320-324).

[27] See, for example, *Mancini,G.F.*, Europe:The Case for Statehood in Mancini G.F., Democracy and Constitutionalism in the European Union (Hart Oxford 2000), 51 (64-66); *Fischer,Joschka*, From Confederacy to Federation: Thoughts on the Finality of European Integration (Speech at the Humboldt University in Berlin, 12 May 2000), Federal Trust, London, 2000; *von Bogdandy,Armin*, European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty(2000) Colum.J.Eur.L. 6, 27 (28, 33, 35-36, 52); *Schmitter, Phillip*, Imagining the Future of the

comprising both the EU and national legal order, integrated in a unified constitutional legal order in which EU law takes precedence; and '*intergovernmentalists*'[28], holding on to the orthodoxy of the established dogma of constitutionalism[29], essentially denying the possibility of post-national formulations of the concept. Though these two extremes ought to be noted, it is argued that they are essentially inadequate to reflect the complexity of the Union's normative framework.

Despite the 'cosmopolitanism'[30] integrationists might assert for themselves, both of those opposing approaches are essentially monist and founded upon statist

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Euro-Polity with the Help of New Concepts in *Marks/Scharpf/Schmitter/Streeck (eds.)*, Governance in the European Union (Sage, London 1996) 121(122-123, 131, 136).

[28] See, for example, *Lindseth, Peter*, Democratic Legitimacy and the administrative character of Supranationalism: The example of the European Community, (1999) Colum.L.Rev. 99, 628 (734); *Moravcsik, Andrew*, The EU ain't broke, [2005] Prospect (March issue), 38; *Moravcsik, Andrew*, Conservative Idealism and International Institutions, [2000] Chi.J.Int'l.L. 1, 291; *Grimm, Dieter*, Does Europe need a Constitution? (1995) ELJ 1(3), 282 (283); *Neyer, Jürgen*, The justification of Europe: A political Theory to Supranational Integration (OUP Oxford, 2012), 14; *Petersmann, Ernst-Ulrich*,From State Sovereignty to the Sovereignty of Citizens' in the International Relations Law of the EU, in *Walker, Neil (ed.)*, Sovereignty in Transition, Hart, Oxford, 2003, 145.

[29] Note their valid focus on the issues of the EU lacking both a constituent demos and Kompetenz-Kompetenz.

For the **no demos** thesis, see inter-alia, *Lindseth, Peter*, 'Of the People: Democracy, the Eurozone Crisis and Lincoln's Threshold Criterion' (2012) Berlin Journal 22, 3-4; *Kuo, Ming-Sung*, From Myth to Fiction:Why a Legalist-Constructivist Rescue of European Constitutional Ordering Fails, [2009] O.J.L.S. 29(3), 579-602; *O'Neill,* n.2, inter alia 27, 51-52, 59, 194, 466-467; *Weiler J.H.H.,* 'Epilogue. Fischer: The Dark Side' in *Joerges, Christian/Meny, Yves/Weiler, J.H.H.(eds.)*, What kind of constitution for what kind of polity?: responses to Joschka Fischer (Harvard Law School, 2001), 235 (239-240); *Zielonka,Jan*, Enlargement and the Finality of European Integration, in *Joerges, Christian/Meny, Yves/Weiler, J.H.H.*(eds.), op.cit., 151(160). See also *Grimm, Dieter*, 'The Achievement of Constitutionalism' in *Dobner, Petra/Loughlin*, Martin 'The Twilight of Constitutionalism?' (OUP Oxford 2010), 3 (22).

cf. Cases 2 BvR 2134/92 & 2159/92 Manfred Brunner and Others v. The European Union Treaty [1994] 1 CMLR 57, para. 51. ***Contra***, *Habermas, Jürgen* 'The crisis of the European Union in the light of a constitutionalisation of international law – An essay on a Constitution for Europe' in 'The Crisis of the European Union – A response' (*Ciaran Conin tr*., Polity, Cambridge 2012) 1-70 (34-44) [Also published in [2012] E.J.I.L. 23(2) 335-348; original in German in *Habermas, Jürgen*, Zur Verfassung Europas: Ein Essay (Suhrkamp, Berlin 2011) 39-96]; *Halberstam,Daniel/ Möllers,Christoph*, The German Constitutional Court says "Ja zur Deutschland!", [2009] German Law Journal 10,1242(1249) and *Lock,Tobias*, Why the European Union is not a State:Some critical remarks, (2009) EuConst 5, 407 (418); *Peters, Anne*, A Plea for a European Semi-Parliamentary and Semi-Consociational Democracy (2003) (EIoP) 7 N° 3, 7 <http://eiop.or.at/eiop/texte/2003-003a.htm> (last accessed 23/10/2019)

For the **lack of Kompetenz-Kompetenz**, see inter alia, *Grimm 1995*, n.28, 290; *Bellamy,Richard/Castiglione,Dario*, Legitimising the Euro-"polity- and its "Regime':The normative turn in EU studies, [2003] EJPT 2(1), 7(23); See also Case 2 BvR 2134, 2159/92 *Maastricht*, [1993] BVerfGE 89, 155; in English [1994] CMLR, 57, paras.90, 112, 116 and 122-135; Case 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 *Lisbon*, judgement of 30/6/2009, paras.322, 328 and 332; *Beck,Gunnar*, The Lisbon judgment of the German Constitutional Court, the Primacy of EU law and the problem of Kompetenz-Kompetenz:A conflict between right and right in which there is no praetor, (2011) ELJ 17(4), 470).

[30] *Habermas, Jürgen*, Towards a cosmopolitan Europe, (2003) Journal of Democracy 14(4), 86-100.

concepts of what a sovereign state[31], and, hence, what a constitutional legal order is or ought to be. The emergence of more nuanced approaches that choose to describe the EU-Member States nexus as one of 'constitutional tolerance'[32] or that ascribe to theories of multi-level constitutionalism[33] or constitutional pluralism[34], suggest that the statist conceptions of constitutionalism and constitutionalisation are outdated, at least as regards the value of using constitutional theory to examine the internal workings of the Union's primary normative framework.

The EU itself has long understood itself as an entity that deserves to be analysed in constitutional terms and judged against the relevant standards. For the CJEU the Union is not only 'a new legal order'[35] with 'its own legal system'[36]. Further, it is a '*community based on the rule of law*'[37], founded on a '*basic constitutional charter'*[38], its Treaties, against which actions of Member States are to be measured[39]. To dispel any doubts that the wording used was merely a literal description that did not necessarily allude to a constitutional polity, the Court in its subsequent *Opinion 1/91* reaffirmed that the Treaties, as a constitutional charter, are supported by the principles of primacy and direct effect, emerging from consensual limitations of national sovereignty and covering Member States'

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[31] *Lock*, n.29, 408; *Barents,Rene*, The Precedence of EU Law from the Perspective of Constitutional Pluralism, [2009] EuConst 5,421(435).
[32] *Weiler 2001* 'Epilogue. Fischer: The Dark Side', n.29, 235 *and* 244-247; *Weiler*, 'In defence of the status quo: Europe's constitutional Sonderweg*'* in *J.H.H. Weiler/Marlene Wind (eds.), European Constitutionalism beyond the State, (CUP, Cambridge 2003)*, 7 (18-21).
[33] Inter alia, see *D'Atena, Antonio*, 'The European Constitution's Prospects' in *Blanke, Hermann-Josef/Mangiameli, Stelio (eds)*, The European Union after Lisbon: Constitutional basics, economic order and external action (Springer, Heidelberg, 2012), 3 (12); *Mayer,Franz/Wendel,Mattias*, Multilevel constitutionalism and constitutional pluralism in *Avbelj /Komarek* (eds), Constitutional Pluralism in the European union and Beyond (Hart, Oxford 2012), 127-152; *Börzel,Tanja/Risse,Thomas*, Who is Afraid of a European Federation? How to Constitutionalise a Multi-Level Governance System, in *Joerges/Meny /Weiler*, n.29, 45.
[34] *Avbelj,Matej/Komarek,Jan*, Constitutional Pluralism in the European Union and Beyond (Hart, Oxford, 2012); Avbelj/Komarek, Four visions of constitutional pluralism, [2008] EuConst, 524. cf. Crisis and Constitutional Pluralism in the EU (Special Issue) CYELS (2019), https://www.cambridge.org/core/journals/cambridge-yearbook-of-european-legal-studies/crisis-and-constitutional-pluralism-in-the-eu (First View Online, last accessed 12/11/2019).
[35] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.
[36] Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585.
[37] Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339, para. 23.
[38] ibid.
[39] ibid.
See also Order of the Court of 13/7/1990 in C-2/88 Imm. *J.J. Zwartveld and others/.Request for mutual assistance: Rechter-commissaris bij de Arrondissementsrechtbank Groningen* [1990] ECR I-3365, par.16-18, C-314/91 *Beate Weber v European Parliament* [1993] ECR I-1093, para.8.

nationals as its subjects[40]. This position ultimately evolved into its comprehensive expression in *Kadi/Al Barakaat*[41]. In reviewing the relationship between internal and external measures (in this case a Regulation and a UN resolution), the Court reiterated that the EU is a community based on the rule of law, endowed with an *autonomous legal system*[42], founded upon certain *constitutional principles* which act as *constitutional guarantees*[43], amongst which liberty, democracy and respect for human rights and fundamental freedoms are considered rudimentary[44] (Art. 6(1) TEU). The Court, therefore, confidently cemented its position that the EU is endowed with a constitutional framework that defines a distinct and novel supranational entity that challenges and transcends longstanding traditional concepts of constitutionalism that tended to confine[45] the constitutional phenomenon within the boundaries of the nation-state[46]. The Union has embraced that position. As recently as July 2019[47], the Commission asserted for the Union the role of guardian of the Rule of Law[48], seemingly having embraced[49] a definition of the concept that implies that it is essentially to be identified with constitutional coherence and consistency.

Regardless of the nature of the Union and the relationship between the EU and its constituent Member States, therefore, this thesis accepts that constitutional theory can be applied to establish and comprehend the principles the EU ought to operate under if it is to be understood as a coherent, consistent and principled 'new legal order'- if not one that aspires to the status of a transnational polity. It is

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[40] Opinion 1/91 on Draft Agreement on the creation of the EEA [1991] ECR I-6079, para.21.
[41] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the EU and the Commission of the EC,* [2008] ECR I-6351.
[42] ibid,para.282 and 316.
[43] ibid,para.285 and 316.
[44] ibid,para.303-304 and 316.
[45] *Albi, Anneli*, 'Constitutions in the Face of Europeanising Governance: Falling Behind Times?' in Closa, Carlos (ed.) The Lisbon Treaty and National Constitutions: Europeanisation and Democratic Implications (Arena, Oslo 2009), 119 (135-136).
[46] *de Wet,Erika,* The role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalisation?, (2009) EuConst 5, 284 (286).
[47] Commission, Communication, ' Strengthening the rule of law within the Union: A blueprint for action' COM(2019) 343 final.
[48] On the challenges of attempting to develop an all-encompassing 'Rule of Law' standard that would apply both to the EU itself and used to assess Member States see Eppler, Annegret/ Hackhofer/ Andreas/ Maurer, Andreas, 'The Multilevel Rule of Law System of the European Union: Eked Out, Contested, Still Unassured' in Antoniolli, Luisa/Bonatti,Luigi/Ruzza,Carlo, Highs and Lows of European Integration (Springer 2018),65-82.
[49] Commission, Communication, 'Further strengthening the Rule of Law within the Union State of play and possible next steps', COM (2019) 163 final, 1.

within this context that the attempt to suggest that the Union analysed through the prism of substantive constitutionalisation, as a means of providing a standard for reviewing legislative action and institutional conduct that could ameliorate popular perceptions as to the Union's legitimacy, is to be situated.

2. EU Constitutionalisation and the role of the Court of Justice (CJEU): Judicial Constitutionalisation Process and Milestones

In any narrative of the evolution of the European project, the role of the CJEU takes centre stage. Since the beginning of what had seemed to be merely a rather regular intergovernmental project, the Court has often essentially circumvented political stalemate and rigidness to take the lead in advancing the European project, in what has been suggested to be merely the fulfilment of its obligation as an EU institution[50]. However, the Court's active use of constitutional law discourse[51] to boldly[52], and despite the pre-emptive reaction of Belgian[53] and Dutch[54] governments, declare[55] and affirm[56] the sui generis nature of the EU (then European Economic Community) 'new legal order', as that of an entity that transcended common conceptions of an international treaty-based organisation, was anything but a simple act to be expected at the time of the institution of a transnational organisation. In *Costa v ENEL* the Court elaborated on its *Van Gend en Loss* declaration, proclaiming that the EEC Treaty differed from common international treaties in that it had created '*its own legal system*'[57], an '*independent source of law*'[58] for an autonomous Community with '*real powers'* deriving from

[50] *Mancini, Federico/Keeling, David*, 'Democracy and the European Court of Justice' (1994) M.L.R. 57, 175 (186). See also Case 26/62 *van Gend en Loos,* n.35, 10-11.
cf. *Hartley, Trevor,* The European Court, judicial objectivity and the constitution of the European Union, (1996) LQR 112, 95 (107).
[51] *Chriastiansen /Reh*, n.24, 63.
[52] Notably Weiler has characterised the Court's declaration as 'something of a stretch'. See *Weiler, Joseph*, 'Revisiting Van Gend en Loos: Subjectifying and Objectifying the Individual' in Tizzano,Antonio/Kokott,Julianne/Prechal,Sacha '50th anniversary of the judgment in Van Gend en Loos 1963-2013' (Publications Office of the EU, Luxembourg 2003), 11.
[53] Case 26/62 *van Gend en Loos,* op.cit., 6 under II 'Arguments and observations'.
[54] ibid, 5-6.
[55] ibid, 12.
[56] Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585 (593).
[57] ibid.
[58] ibid.

a permanent limitation of national sovereignty[59] in certain fields, a system that had nevertheless become an integral part of the Member States' national systems. Having willingly accepted this transfer of power, the Member States were consequently bound to apply EU law.

Through these decisions the Court alluded to a legal order that was autonomous in the sense that it was able to produce law and determine the scope of its effect independently, using its own instruments, irrespective of any other order's law or institutions[60]. It was through these declarations that the Court hinted at its future view of the Union as a distinct entity with its own constitutional framework and citizens, essentially paving the way not just for the recognition of citizenship rights but for the emergence of a new polity.

Importantly, the Court enhanced its early declarations by endowing the Union with tools that would render its new legal order effective[61], but would also endow it with a functional framework that accommodates constitutional analysis. In that respect, the Court took upon itself to devise the complementary[62] principles of direct effect[63] and supremacy[64] (which were not mentioned in[65], but also not

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[59] ibid.

[60] *Prechal, Sacha*, "Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union", in *Barnard Catherine (ed)*, The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate (OUP, Oxford, 2007), 35 (38).

[61] Case 41/74 *Yvonne Van Duyn v Home Office* [1974] ECR 1337, para.12 ; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629; C 213/89 *Factortame Ltd* [1990] ECR I-2433.
cf. *Skouris,Vassilios*, Effet Utile versus legal certainty: The case-law of the Court of Justice on the Direct Effect of Directives (2006) EBLRev 17(2), 241; *Weiler* linking the concepts of direct effect and supremacy as necessary to achieve efficiency of EU law with the doctrine of implied powers in *Weiler, J.H.H.*,The transformation of Europe (1991) YaleLJ 100 (8), 2403 (2415-2416).

[62] *Rosas,Allan/Armati,Lorna*, EU constitutional law:An introduction, (Hart Oxford, 2010), 63; *Weiler*,op.cit. 2424; *Habermas, '*An essay on a Constitution for Europe', n.29. 25-26.
cf. *Sabel, Charles F./Gerstenberg,Oliver*, Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order, (2010) ELJ 16(5), 511 (519).

[63] Case 26/62 *van Gend en Loos*, op.cit.; cf. *Nergelius, Joakim*, The constitutional dilemma of the European Union (Groningen, 2009), 12. See also, inter alia, *Dougan,Michael*, When worlds collide! Competing visions of a relationship between direct effect and supremacy, (2007) CMLRev 44, 931; *Lenaerts,Koen/Corthaut,Tim*, Of birds and hedges: the role of primacy in invoking norms of EU law, (2006) ELRev, 287 (310, 314-315); *Prechal*, n.60, 37-38.
cf. *de Witte, Bruno*, 'Direct Effect, Supremacy and the Nature of the Legal Order', in *Craig,Paul/de Burca,Grainne*, 'The evolution of EU Law' (OUP, Oxford 1991) 177 (187); *Timmermans, C.W.A.*, 'Directives: Their Effect Within the National Legal System', (1979) CMLRev. 16, 533 (537-9).

[64] Case 6/64 *Costa v ENEL, op.cit;* Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermitte [1970] ECR 1125; C-224/01 Kobler [2003] ECR I-10239; C-173/03 Traghetti del Mediterraneo [2006] ECR I-5177; *Weiler, Joseph*, The Community System: The dual character of supranationalism (1981) Yearbook of European Law 1, 267-306; *Barents,Rene*, The Precedence of EU Law from the Perspective of Constitutional Pluralism, [2009] EuConst 5,421. See also *Franzius, Claudio*, Europäisches Verfassungsrechtsdenken (Mohr Siebeck Tubingen 2010), 38 ff;

precluded by[66], the Treaties), turned attention towards protecting fundamental rights[67] and even explicitly deemed primary law as the 'constitutional' foundation of the Union.

Through the evolution of this new order, which, to a large extent, has been construed judicially, the Court moved to bolder statements. In *Les Verts*[68] the Court asserted the EEC to be a '*community based on the rule of law*'[69], founded on a '*basic constitutional charter'*[70], its Treaty, against which actions of Member States are to be measured[71]. To dispel any doubts that the wording used was merely a literal description not alluding to a constitutional polity, the Court in its subsequent *Opinion 1/91* reaffirmed that the Treaty, as a constitutional charter, is supported by the principles of primacy and direct effect, emerging from consensual limitations of national sovereignty and covering Member States' nationals as its subjects[72]. It was thus made obvious that the Court was referring to an emerging constitutional framework encompassing a distinct and novel supranational entity with its own evolving polity, challenging ordinary notions and structures of national constitutionalism.

This stance ultimately matured into the comprehensive, all-encompassing position expressed in *Kadi/Al Barakaat*[73]. In reviewing the relationship between internal and external measures (in this case a Regulation and a UN resolution), the Court reiterated that the EU is a community based on the rule of law, endowed

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Preuss, Ulrich 'Disconnecting constitutions from statehood' in *Dobner, Petra/Loughlin*, Martin 'The Twilight of Constitutionalism?' (OUP Oxford 2010), 23 (39); *Joerges, Christian,* Deliberative Political Processes Revisited: What have we learned about the legitimacy of supranational decision making, [2006] JCMS 44(4),779 (792-796); *Prechal*, n. 60,53.
cf. *Dederer,Hans-Georg*, Die Architectur des europaischen Grundrechtsraums, (2006) ZaoRV 66, 575 (582); *Sieberson, Stephen*, Dividing lines between the European union and its Member States - The Impact of the Treaty of Lisbon, (Asser, The Hague, 2008), 144; *Habermas*, An Essay on a Constitution for Europe,n.29,24.

[65] *Hartley*, n.50, 96-98 as to direct effect.

[66] *Weiss, Friedl*, 'Self Executing Treaties and directly applicable EEC Law in French Courts' (1979) Legal Issues of Economic Integration 6 (1), 51.

[67] *Mancini/Keeling*, n.50, 186-188; *Alter, Karen*, Establishing the Supremacy of European Law (OUP Oxford 2001), 1-2.

[68] Case 294/83 *"Les Verts"*, n.37.

[69] ibid, para. 23.

[70] ibid.

[71] ibid.
See also Order of the Court of 13/7/1990 in C-2/88 Imm. *J.J. Zwartveld and others/.Request for mutual assistance: Rechter-commissaris bij de Arrondissementsrechtbank Groningen* [1990] ECR I-3365, par.16-18, C-314/91 *Beate Weber*, n.39, para.8.

[72] Opinion 1/91 on Draft Agreement on the creation of the EEA [1991] ECR I-6079, para.21.

[73] Joined cases C-402/05 P and C-415/05 *Kadi*, n.41.

with an *autonomous legal system*[74], founded upon certain *constitutional principles* which act as *constitutional guarantees*[75], amongst which liberty, democracy and respect for human rights and fundamental freedoms are considered rudimentary[76] (Art. 6(1) TEU). Th EU internal legal order, therefore, is not simply 'autonomous', but constitutionally safeguarded and not to be prejudiced by external factors such as international agreements[77] or, as could be deduced given the self-asserted primacy of EU law, even national provisions. *Kadi/Barakaaat*, as the culmination of the Court's jurisprudence, illustrates the confidence the Court has built up. Through the evolution of its own case law but, arguably, also due to the evolution of the EU itself, the CJEU now feels it can safely affirm the EU as a legal order that challenges and transcends longstanding traditional concepts of constitutionalism that tended to confine[78] the constitutional phenomenon within the boundaries of the nation-state[79].

It was probably not audacity in the face of inaction by the political actors that prompted the judges to take the reins so much as the Court's long and careful[80] effort for self-preservation vis-à-vis national constitutional courts, while trying not to ignite judicial revolt by national judges. That strand of judgments and the backlash they created earned the 'notoriety'[81] of the Court as an actor that led the transformation of an international organisation to a complex legal entity that challenges conventional constitutional theory. Moreover it instigated a heated academic debate[82] that ultimately helped mould political perceptions and action, even if the latter meant simply acceding to the judicially-created principles.

It could thus be argued that the Court pioneered the *judicialisation* of constitutionalism within the EU legal system, forming the basic principles and

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[74] ibid,para.282 and 316.
[75] ibid,para.285 and 316.
[76] ibid,para.303-304 and 316.
[77] ibid,para.316; cf. Opinion 2/13 (Full Court) *Accession of the EU to the ECHR*, ECLI:EU:C:2014:2454, paras.157-158.
[78] *Albi*, n.45, 135-136.
[79] *de Wet*, n.46, 286.
[80] *Alter*,n.67, 64-123 (for German courts) and 124-181 (for French courts) for a thorough discussion of this process.,
[81] *Everson, Michelle/Eisner, Julia*, The making of a European Constitution: judges and law beyond constitutive power (Routledge, London, 2007), 4.
[82] Inter alia see *Alter*, n. 67, 21.

subtext and managing to achieve acceptance and compliance by national courts[83], assert its own authority[84], while also setting the agenda, influencing the strategies of Member States and the Commission and compelling them to act[85]. Maybe this was the inevitable but unintended by-product of the Court's inherent duty to interpret Union law so as to give effect to the original objective of a common market[86]. What is crucial is the product of that endeavour: the judicially constructed notion of a sui generis legal order that is the seed of the whole constitutionalisation discourse.

III. Constitutional elements of the autonomous EU legal order and substantive constitutionalisation

1. Elements of a constitution: the formal/normative/material aspects

Terminologically, the idea of 'substantive constitutionalisation' of the EU draws upon the Fossum/Menendez taxonomy of the elements that can be identified in any constitutional framework. In line with Raz's work on the integral characteristics of a constitution, in its suggested 'thin'[87] and 'thick' sense[88], Fossum and Menendez proposed that any constitution can be roughly deconstructed into its formal, normative and material elements[89]; the last two,

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[83] For a thorough discussion of this process see *Alter,* n.67, 64-123 (for German courts) and 124-181 (for French courts).

[84] *Mancini,* The Making of a Constitution for Europe in *Mancini*, n.27, 1(9).

[85]In what Alec Stone Sweet would deem, respectively, '*judicialisation of dispute resolutions*' and '*judicialisation of politics*'; see *Stone Sweet, Alec,* Judicialisation and the Construction of Governance, (1999) Comparative Political Studies 32 (2), 147–184. See also *Alter, Karen,* Tipping the Balance: International Courts and the Construction of International and Domestic Politics (2011) CYLS 13, 1 (9).

[86] *Everson/Eisner*,n.81, 49; *Maduro, Miguel Poiares,* We, the Court: the European Court of Justice and the European Economic Constitution: a critical reading of Article 30 of the EC Treaty (Hart Oxford 1998), 8-10.

See also the more thorough analysis of the CJEU as a 'Trustee', in *Stone Sweet,* Alec, The Judicial Construction of Europe, (OUP, Oxford 2004), 17; 27-30;. cf. *Cohen/Vauchez* denying that as an overly legalistic "rational choice" theory that implies the deliberate push of a certain agenda. He suggests a more complex sociological explanation in *Cohen, Antonin/Vauchez, Antoine*, The Social Construction of Law: The European Court of Justice and its Legal Revolution Revisited, (2011) AnnuRevLawSocSci 7, 417 (420).

[87] *Raz, Joseph*, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Alexander Larry (ed), Constitutionalism: Philosophical Foundations (CUP, Cambridge 1998), 152.

[88] ibid, 153-154.

[89] *Fossum, John Erik / Menendez, Augustin Jose*, The Constitution's Gift: A Constitutional Theory for a Democratic European Union, (Rowman, Plymouth 2011), 20-27; *Eriksen, Erik Oddvar/Fossum,*

taken together, constitute the constitution's substantive part[90]. The *formal* aspect of the constitution refers to its codified formulation, the unique document or compilation of documents[91] in which it is enshrined and which is in practice perceived as the fundamental and supreme law of that legal order[92]. Turning to the substantive elements, the *material* aspect of the constitution refers to those norms that are considered fundamental according to social practice[93]. In that respect, in a modern constitutional legal order, a polity governed by the rule of law, these norms are identified by their incorporation into legal norms[94]. Thus, the material constitution in its narrow sense encompasses the fundamental and hierarchically superior legal norms that govern institutional and political structure[95], legitimise and regulate the exercise of governmental organs' power[96] and manage conflicts between institutions[97]. Moreover, it contains the constitutional provisions that bestow basic rights, freedoms and respective obligations upon the subjects of law[98]. Finally, the *normative* notion of the constitution mirrors Raz's 'common ideology' element[99]. It refers to values and ideas, procedural[100] or substantive[101] to which the polity aspires and that underpin the constitutional structure[102], reflecting a certain political, philosophical or economic ideology that is essentially enshrined as a reflection of the 'common beliefs'[103] of the constituent demos.

1.1. The formal constitution of the EU

John Erik/Menendez, Augustin Jose (eds), Developing a constitution for Europe, (Routledge, London 2004), 4.

[90] *Peters, Anne*, "The Constitutionalisation of the European Union-Without the Constitutional Treaty" in *Puntscher/ Riekmann /Wessels (eds.),* The making of a European constitution, (Wiesbaden 2006), 35 (41-13).

[91] E.g. the case of the French constitution, which also encompasses the Declaration of the Rights of Man.

[92] *Fossum/Menendez*, n.89, 20-21; *Peters*, op.cit., 38-39.

[93] *Fossum/Menendez*, n.89, 22-23.

[94] ibid, 23; *Snyder*, n.25, 56.

[95] ibid, 22.

[96] *Peters*,n.90, 41.

[97] *Feldman*, n.6 (123).

[98] *Fossum/Menendez*, n.89, 22.

[99] Raz, n.87, 154; cf. *Dworkin*, Taking Rights Seriously, n.11, 71-80 and 133-134.

[100] E.g. the democratic principle.

[101] E.g. human dignity as a fundamental overarching value.

[102] *Fossum/Menendez*, n.89, 24.

[103] *Raz*,n.87, 154.

The incorporation into a codified form, though common, is not a necessary element of a constitution[104]. Nor is a 'constitutional moment', a *grande* instance of democratic epiphany, where 'The People' come together to formally express their will to create a constitutional framework for their self-governance, bestowing rights and obligations and reflecting the communal aspirations and values[105].

Though missing a 'capital C' constitution, however, the Union is not devoid of a formal feature of its constitutional system[106], despite some hesitations expressed in the literature to acknowledge that fact. Reservations stem from simply a supposed lack of social or even juridical perception of such a formal constitution[107], to the lack of a common constitutional process that can be attributed to the sovereign demos, to the politically symbolic gravitas that such a recognition would entail[108].

Regardless of such hesitation, it is not difficult to identify the formal constitution of the EU with the Treaties that constitute its primary law (TEU, TFEU), including the Charter of Fundamental Rights of the EU (CFEU), now binding since the adoption of the Lisbon Treaty. Though perhaps not as appealing in form and structure[109] as the failed Constitutional Treaty, the post-Lisbon arrangement still presents a comprehensive enough set of documents[110] that determine the scope of the Union's power (including by more comprehensively than ever before outlining its competences)[111], govern the fundamental arrangement of the exercise of executive, legislative and judicial power, establishing and delimiting the powers of the relevant institutions, and recognising fundamental rights for EU citizens[112]. As such, it appears that following the

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[104] *Feldman*,n.6,139; *Craig, Paul*, The Lisbon Treaty: law, politics, and treaty reform (OUP, Oxford 2010), 127; *Everson*,n.5,408; *Seurin,Jean Louis*, Towards a European Constitution? Problems of political integration, [1994] P.L., 625 (625). cf.*Weiler 2003*,n. 32, 7 and 13 doubting the very value of a EU formal constitution.

[105] *Christodoulidis,Emilios*,European constitutionalism:The improbability of self-determination, (2008) NoFo 5,71 (75-76).

[106] *Griller,Stefan*, 'Is this a constitution? Remarks on a contested concept' in *Griller,Stefan/Ziller,Jacques(eds.)*, The Lisbon Treaty:EU constitutionalism without a constitutional treaty? (Springer, New York, 2008) 21(32).

[107] *Fossum/Menendez*,n.89, 21-22; *Menendez,Jose*, Three conceptions of the European Constitution in *Eriksen/Fossum /Menendez*,n.89,110(121); *Christiansen/Reh*,op.cit.,43-44.

[108] cf *O'Neill*, n.2, 19.

[109] See *Craig 2010*, n.104, 25-26.

[110] *Piris,Jean-Claude*, The Lisbon Treaty: A legal and political analysis (CUP, Cambridge, 2010),69-70

[111] *Craig 2010*, n.104, 25-26.

[112] Menendez, n.107, 121.

Lisbon Treaty the EU has been endowed with a coherent enough formal architecture that would allow its primary law the perceived status of a solid 'written constitution'. Indeed, this is how the Court has treated it[113] and how national courts have described it within the internal context of the EU legal order[114].

In any case, even if the premise that the Treaties constitute a 'written Constitution' is deemed unacceptable, it can hardly be suggested with any seriousness[115] that they merely amount to a 'golf club constitution'[116]. Within the internal context of the Union's autonomous legal order, treaty provisions undoubtedly enjoy primacy, in the sense that they are accepted and treated as encapsulating its supreme law. Being endowed with this perception and value is the critical element that elevates a document or a set of documents to the status of a formal constitution[117] and distinguishes it/them from any other text of legal normative importance within a certain legal order. The Treaties and the CFREU are perceived as constituting the unique source of EU primary law, enjoying hierarchical primacy over all other EU law[118] and constituting both its foundation and the standard for its review. The competences with which they endow the Union are far reaching. Within their remits, the Union enjoys powers that, to an extent, can be effectively indistinguishable in practice from those that a state derives from sovereignty; such powers are highly uncharacteristic of any 'golf club'.

Therefore, the Treaties and the equally binding CFREU (Art 6(1) TEU), as a comprehensive compilation of documents, could be understood from the internal point of view of the EU legal order as incorporating the formal element of the EU

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[113] Case 294/83 *"Les Verts"*, n.37; Opinion 2/13, n.77, para.163.
[114]Already since 1967 the German Constitutional Court had recognised the EC treaty 'sort of the constitution' of the EC legal order (*'gewissermaßen die Verfassung dieser Gemeinschaft'*): BVerfG Order of 18 October 1967, 22 BVerfGE, 293, para. 13
[115] *Weiler 2003*,n.32, 30-31 footnote 12, dismissing such characterisations as attempts of 'symbolic trivialisation' of the Union.
[116] *Straw, Jack*, 'A constitution for Europe' The Economist (London, 10 October 2010) http://www.economist.com/node/1378559 (last accessed 16/3/2014). It is ironic though that most of the characteristics Straw referred to as indicative of a constitution actually exist in the current constitutional architecture of the Union.
[117] *Fossum/Menendez*, n.89, 20-21; *Peters*, n.90, 38-39.
[118] See Joined Cases C-402/05 P and C-415/05 Kadi, n.41, para.305.

constitution[119], despite the intergovernmental process for their adoption and amendment[120] or the fact that they are not commonly referred to as a 'capital C' Constitution.

2. Substantive constitutionalisation of EU law: its Normative and Material components

Before discussing the normative and material elements of the Union's constitutional framework, that together constitute its substantive constitution, it is important to briefly note the alterations brought about by the Lisbon Treaty that enhanced the coherence of the primary law framework, reinforcing its substantive constitutional characteristics. Of those, we will focus on the normative foundations (values, objectives and principles) of the EU, rearranged by the Lisbon Treaty, and those aspects of the material constitution that recognise fundamental rights, particularly those relevant to collective labour law. It is also useful to note, though, that the Lisbon Treaty introduced an architecture that formally unified the internal legal order of the Union, into a formally coherent and consistent[121] system, by merging its former distinct legal personalities[122] into a single successor[123] (that of the EU) and by abolishing the systemic fragmentation expressed by the pillars structure.[124]

This appearance of structural systemic coherence, has been jeopardised by the adoption of measures that relate to contemporary EU economic governance. The Growth and Stability Pact[125] in conjunction with the Euro Plus Pact[126] and related

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[119] *Griller*, n.106.
[120] See *MacCormick, Neil*, Questioning Sovereignty (OUP, Oxford, 2002), 118 and his analogy to the 1706 Treaty of the Union that created the UK.
[121] *Shaw*, n.8, 584.
[122] See *Thürer,Daniel/Marro,Pierre-Yves*,'The Union's Legal Personality:Ideas and questions lying behind the concept' in *Blanke/Mangiameli(eds)*, n. 33,47(48-49 and 53-56).
cf. *Sieberson*,Dividing lines, n.64,88-89.
[123] *Thürer,Daniel/Marro,Pierre-Yves*,op.cit., 58-59.
[124] See *Piris*,n. 110, 66-68; *Craig 2010*,n.104,27-28.
[125] Resolution of the European Council on the Stability and Growth Pact, 17 June 1997, [1997] OJ C 236/1; Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L 209/1 as amended; Council Regulation (EC) 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L/209/6 as amended.
[126] Conclusions of the Heads of State or Government of the euro area of 11 March 2011, PCE 67/11, Annex I.

innovations, such as the Six Pack[127] and Two Pack[128] bundle and the European Semester[129], have come to muddy the waters vis-à-vis 'normal' EU law and processes. Together, they have created a monitoring and sanctioning mechanism to review Member States' fiscal policy and a parallel process of negotiation and policy development on the basis of certain rather rigid macroeconomic criteria that eventually lead to respective obligations on the part of the Member States. This trend was reinforced by the adoption of the Treaty on Stability, Coordination and Governance (TSCG), aiming to embed fiscal discipline[130] within the EMU as a response to the Eurozone crisis[131].

However, it would be a stretch to suggest that these initiatives have effectively created a new pillar, once more fragmenting the cohesion of the EU system. They are all creatures of EU law, adopted on the basis of primary law provisions and following the legislative and administrative processes prescribed therein. The coherence of primary law remains unaffected. If anything, it should be the basis and yardstick to review the legality vis-à-vis EU law of all these secondary economic governance instruments and mechanisms and the policies and actions they promote.

This view is further reinforced by the requirement of Art. 7 TFEU which prescribes consistency as a primary objective of the Union in adopting its policies and exercising its institutional competences across the board. This provision

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[127] See European Commission - MEMO/11/898 12/12/2011.The Six Pack contains Regulation No. 1173/2011 on the implementation of efficient budgetary surveillance in the euro area; Regulation (EU) No. 1174/2011([2011] OJ L306/8-11) and Regulation (EU) No. 1176/2011 ([2011] OJ L306/25-32) on the prevention and correction of macroeconomic imbalances and establishing enforcement measures; Regulation (EU) 1175/2011 amending the surveillance procedures of budgetary positions [2011] OJ L306/12-24; the Regulation (EU) 1177/2011 amending the procedure concerning excessive deficits [2011] OJ L306/33-40; Directive 2011/85/EU on requirements for budgetary frameworks of the Member States [2011] OJ L306/33-40.

[128] Regulation (EU) No 472/2013 of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, [2013] OJ L140/1-10; Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L140/11-23. See also COM/2013/0490 final, 'Harmonized framework for draft budgetary plans and debt issuance reports within the euro area'.

[129] See the Commission's Europe 2020 website, http://ec.europa.eu/europe2020 (last accessed 17/4/2014).

[130] Or neoliberalism; see inter alia *van Apeldoorn, Bastiaan* 'Transnationalization and the Restructuring of Europe's Socioeconomic Order: Social Forces in the Construction of "Embedded Neoliberalism"' (1998) International Journal of Political Economy 28(1), 12-53.

[131] Not to mention, clearly intergovernmental mechanisms on the fringe of EU law such as the ESM.

maintains the idea of the EU framework as a cohesive whole that is underpinned by the full spectrum of the normative foundations of the EU constitution. Thus, concerns about the suitability of a once fragmented system to be considered in constitutional terms should now be deemed unwarranted.

2.1 Normative elements of the EU constitution

Perhaps one of the greatest, though understated, contributions of the Lisbon Treaty has been the endowment of the now coherent autonomous legal system of the EU with a new overarching normative understructure. The system is now founded upon, and defined by, specific internal values and is set to accommodate an array of reshuffled fundamental objectives that are pursued to reflect these fundamental values and translate them into tangible effects[132]. These values and rearranged Union objectives reflect common aspirations of the EU polity embodying the constitutional 'common ideology'[133]. They constitute the basis and the justification of the Union's very existence as well as the standard for review of all subsequent EU law norms and provisions[134].

The Constitutional Treaty (CT), the great and ambitious integrationist project[135], suffered a premature death but its spirit, as envisaged by the Convention, remains[136]. The Lisbon Treaty transposed the normative foundation of the failed Constitution to the TEU, repeating the relevant provision (Art. I-2) word for word. Furthermore, the LT followed the constitutional architecture of the CT by moving the declaration of the fundamental values to the top of the TEU (Art.2), as opposed to former formulations of the TEU or the TEC before it. The TEU under Nice included a much thinner, almost commonplace declaration, which had

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[132] *Dorssemont, Filip*, 'Values and Objectives' in Bruun, Niklas/Lörcher, Klaus/Schömann, Isabelle (eds.) The Lisbon Treaty and Social Europe (Hart, Oxford 2012), 45 (50-51).
[133] See above, under. III.1.
[134] It is for this reason that supporters of integration consider them EU's 'homogeneity principle' (*Homogenität*). However, since this is a federalist concept, which highlights the federal constitution's primary role as the expression and the enforcer of federal unity and homogeneity, we refrain from using it in the present analysis. See *Mangiameli,Stelio*,'The Union's Homogeneity and its common values in the Treaty on European Union', in *Blanke/Mangiameli(eds)*,n. 33, 21-46
[135] cf *Piris*, n. 110, 48.
[136] On the evolution of EU values from the Treaty of Rome to the Constitutional Treaty see *Brunet,Ferran*,'The European Economic Constitution:An analysis of the Constitutional Treaty' in *Laursen,Finn (ed.)*,The rise and fall of the EU's constitutional treaty (Martinus Nijhoff, Leiden, 2008), 51(54-57).

been placed only after the statement of the Union's objectives and the fundamental institutional provisions. The new arrangement is not a coincidence; it underlines the overarching importance of the declared fundamental values of the Union as the normative compass of the whole system. Consequently it signals a passing from a neofunctionalist phase, where splintered interests that happen to coincide are moving the integration process ahead[137], to a phase where a Razian common ideology of values seems to be emerging. That is a typical characteristic that tips the balance of the viewpoint of examination, from that of an intergovernmental project, judged primarily as an international law animal, to a constitutional analysis of a potential polity. The paramount position of fundamental values is affirmed by the fact that their respect is deemed a prerequisite for both acquiring (Art. 49 TEU) and fully enjoying (Art. 7(2) TEU) EU membership status. Hence it has been argued that they constitute an unamendable part of EU primary law[138].

Former Art.6(1) TEU looked like a presumably toothless[139] superficial repetition of the bare fundamentals of any western democracy, namely liberty democracy, respect for human rights and fundamental freedoms and the rule of law. However, Post-Lisbon Art.2 TEU, crafted not by intergovernmental bargaining but in essence through an elite-driven[140] Convention process, adds more substance to the provision. According to Art.2 TEU the Union is firstly founded upon '*the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'*. It should be noted that respect for human dignity has been added and furthermore placed before all others. Equality, an established fundamental principle in EU practice, now makes an explicit entrance. However the Lisbon Treaty goes even further, adding to the initial general set of values '*pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men'*. It should be noted that although this first group of general values is commonplace in modern western constitutions, the same cannot be said

[137] *Schmitter, Philippe*, 'Examining the present Euro-Polity with the help of past theories' in *Marks, Gary/ Scarpf, Fritz/ Schmitter, Philippe/ Streeck, Wolfgang* Governance in the European Union, (Sage, London, 1996), 1-14 (5).
[138] *Rosas/Armati*,n.62, 38
[139] cf *Sieberson*, n. 64.,87
[140] *Longo, Michael*, Constitutionalising Europe: Processes and Practices (Ashgate Hamphsire 2006), 5.

for the second set. It is of particular importance that a social value like solidarity attains the status of one of the Union's fundamental values.

Values are complemented by the rearrangement of the Union's objectives, set out in Art.3 TEU. Restructuring the constitutional architecture of the Treaties to attain consistency and coherence, the Lisbon Treaty merges the objectives of the former EU and EC. It should be noted that the purely economic goal of the establishment of a common market, which previously enjoyed absolute primacy, is now downplayed, placed third in line. The new primary goal is the promotion of the Union's foundational values stated in Art.2 and the '*well-being*' of the peoples of Europe (Art.3(1) TEU). Moreover, the economic goals are themselves reorganised, slightly in wording but significantly in essence and effect.

Once more, the relevant provision of the Constitutional Treaty is almost exactly repeated with the addition of the establishment of an 'internal market' objective and –more importantly – the exclusion of the 'competition objective'. What is also to be noted, though, is the differences with the formulations of the TEC. Gone is the fostering of '*a high degree of competitiveness*' per se, while the provision of the failed CT elevating the attainment of free and undistorted competition to an objective of the Union [Art. I-3(2)] is not repeated. Reference to undistorted competition is placed to a Protocol (No.27) and, though the Protocol's provisions enjoy the same legal effect as those of the Treaty, the change in constitutional architecture is not to be overlooked. Furthermore, the Union now chooses to promote '*development'* in every sense as opposed to merely and only the development '*of economic activities*'.

The economic goals have been infused with social ones, resulting in a 'competitive *social* market economy' being essentially just the tool to attain the aim of full employment and social progress, thus inserting more balance in the social/economic goals dichotomy. We will return to explore the concept of a social market economy and its relation with labour law in the second part of the thesis, examining the Union's substantive economic constitution. It should however be noted, as a preliminary point, that the current prescribed formulation of the common market requires for a balanced approach that will take into account primarily the promotion of the Union's values, including dignity and solidarity,

and also social considerations which are at least on an equal footing with economic ones.

The Union's objectives constitute the second level of the EU constitution's normative elements, complementing the fundamental values. Together they are to be taken into consideration and to guide the actions of all EU institutions, legislative, executive or judicial, effectively setting the direction of EU law[141]. Moreover, they are the basic standard for review of all EU legislation and thus also relevant in guiding the conformity of national implementing legislation with EU law[142]. In addition, since the duty of consistent interpretation with fundamental constitutional values is inherent within all constitutional systems[143], the CJEU is under a mandate to interpret all EU law provisions through the lens of the fundamental values and with the promotion of EU objectives in mind[144].

2.2 The CFREU as the material aspect of the EU constitution

The material element of the substantive aspect of a constitution complements and concretises the normative element, giving flesh to its communal aspirations by formulating the fundamental legal provisions that reflect them and are to be used for their attainment. Amongst others, the material constitution entails the recognition of fundamental rights and obligations for the subjects of the constitutional legal order. In that respect, the inclusion of a binding CFREU in primary EU law (Art. 6 (1) TEU) is arguably the greatest contribution of the Lisbon Treaty to the substantive constitutionalisation of the EU[145].

The Charter is the culmination of the long fundamental rights narrative of EU law[146] that owes much of its very existence to the Court's jurisprudence[147], if

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[141] *Mangiameli*,n.134,25.
[142] See Joined Cases C-402/05 P and C-415/05 P *Kadi/Al Barakaat*,n.41, para 303.
[143] *Rosas/Armatti*,n.58, 61.
[144]*Mangiameli*,n134,25; C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU*, [2008] ECR I-271,para.68.
[145] Point V of the Resolution of the European Parliament on the Drafting of a European Union Charter of Fundamental Rights (C5-0058/1999-1999/2064(COS)), 16 March 2000, asserted that the Charter should be considered '*a basic component of the necessary process of equipping the European Union with a constitution*'.
[146] The Charter has in fact been called 'the first constitutionalising narrative of fundamental rights' within the EU by *Christina Blasi Casagran* in ' The reinforcement of Fundamental Rights in the

anything as a source of inspiration for the members of the Convention that drafted it[148]. It could be suggested that it was essentially a by-product of the Court's ultimately successful attempts to establish the principles of autonomy and primacy of EU law and appease national constitutional courts[149] as regards its self-asserted authority[150]. From the early milestones of *Stauder*[151], *Internationale Handelgesellschaft*[152] *and Nold*[153], in which respect for fundamental rights was deemed to be an integral part of the recognised general principles of law, an elaborate jurisprudence developed[154]. The Court effectively created the fundamental legitimising and constitutionally paramount 'myth'[155] of the EU being a legal order that had always been founded upon the recognition and respect of fundamental human rights, an inherent characteristic of a constitutional polity based upon the rule of law.

The juridical myth, however, became a self-fulfilling prophecy, prompting institutional response. The Charter is the latest result, although its journey, from the 'Convention' process[156] to the Lisbon Treaty, was adventurous. Even before being given full binding effect, the Charter was used as an interpretative tool, though hesitantly at first, initially by the General Court[157] and the Advocate Generals and ultimately by the ECJ[158] . The Court has now reached a stage where

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Lisbon Treaty', in *Dosenrode, Soren* (ed) The European Union after Lisbon – Polity, Politics, Policy (Ashgate, Surrey 2012), 75 (77).

[147] *Alter, Karen*, n.67, 1-2.

[148] *Kaila, Heidi*, 'The scope of application of the Charter of Fundamental Rights of the European Union in the Member States', in *Cardonnel, Pascal/Rosas, Allan/ Wahl, Nils (eds),* Constitutionalising the EU judicial system: Essays in honour of Pernilla Lindh (Hart, Oxford 2012), 291 (296).

[149] BVerfG Order of May 29, 1974 *Solange I*, 37 BVerfGE 271.

[150]ibid, 292; *Mancini/Keeling*, n. 50, 187.

[151] Case 29/59, *Stauder v. City of Ulm* [1969] ECR 419,para.7, recognising fundamental human rights as general principles of Community law.

[152] Case 11/70, *Internationale Handelsgesellschaft,* n.64.

[153] Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491, para.13.

[154] e.g. see the incorporation of proportionality and balancing in C-112/2000, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich,* (2003) ECR, I-5659 and C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn,* (2004) ECR, I-9609.

[155] *Smismans,Stijn*, The European Union's Fundamental Rights Myth, (2010) JCMS, 45 (47-49).

[156] Inter alia see *de Burca, Grainne*, The drafting of the European Union Charter of Fundamental Rights, [2001] ELRev, 126; *Douglas-Scott, Sionaidh*, The Charter of Fundamental Rights as a constitutional document,(2004) EHRLR 37(40-41).

[157] T-177/01 *Jégo-Quéré & Cie SA v Commission of the European Communities* [2002] ECR II-02365.

[158] C-540/03 *European Parliament v Council of the European Union* ('*Family Reunification Rights'*) [2006] ECR I-05769. See also its inclusion by the ECJ in what it considered to be the constitutional framework of the EU legal order in Joined Cases C-402/05 P and C-415/05 *Kadi,* n.41.

it clearly approaches the Charter, rather than the indirect sources that are the ECHR and relevant case law or the 'common constitutional traditions' of the Member States[159], as the main basis for its judicial review of EU actions on the basis of compliance with the fundamental rights and freedoms it contains[160]. In other words the CFREU, despite its limitations, seems to have become the internal equivalent to the EU legal order of a constitutional bill of rights.

This approach was explicitly proclaimed and made expressly clear by AG Bot when he asserted, in his *Scattolon* Opinion, that post-Lisbon the Charter '*occupies a central place in the system of protection of fundamental rights in the Union*' and thus '*it must constitute* ***the reference legislation*** *(*emphasis added*) each time the Court is called upon to rule on the compliance with an EU measure or a national provision with the fundamental rights protected by the Charter*'[161]. Almost immediately, AG Cruz Villalón also adopted this position in his Opinion in *Scarlet v SABAM* where he declared the Charter and its rights, freedoms and principles to enjoy the highest level of legal value within the EU legal system[162]. Consequently, according to AG Villalón, recourse to the general principles of EU law is not necessary insofar as Charter rights and freedoms can be identified with them, nor is it necessary to resort to the ECHR as the basis or even the guide for review. This is the approach which the Court subsequently embraced and implemented in the *Scarlet v SABAM* judgement[163].

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[159] See inter alia C-400/100 *J. McB. v L. E.*, [2010] ECR I-08965, para. 53; C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland,* [2010] ECR I-13849, paras. 30-36; Joined Cases C‑444/09 and C‑456/09 *Rosa Maria Gavieiro Gavieiro and Ana Maria Iglesias Torres* [2010] ECR I‑14031, para. 75; Joined Cases C-356/11 *O and S* v. *Maahanmuuttovirasto* and C-357/11 *Maahanmuuttovirasto v L.*, [2012] ECLI:EU:C:2012:776, paras. 76-77**;** cf. C-243/09 *Günter Fuß v Stadt Halle*, [2012] ECR I-09848, para.66.

[160] Opinion 2/13, n.77, paras.169-174; *Lazowksi, Adam/Wesse, Ramses*, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR', (2015) GLJ 16(1), 179 (208); *Skouris, Vassilios*, The ECJ: A Judiciary in Transformation in Cardonnel, Pascal/Rosas, Allan/ Wahl, Nils (eds), Constitutionalising the EU judicial system: Essays in honour of Pernilla Lindh, Hart, Oxford, 2012, 3 (7).

[161] AG Bot (5/4/2011) in C-108/10 *Ivana Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca*, [2011] ECR, I-07491, para. 108.

[162] AG Cruz Villalón (19/4/2011) in C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* , [2011] ECR I-11959 para. 30.

[163] C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* , [2011] ECR, I-11959, paras. 41-49 and 50-54; cf. Also see *H.C.H. Hofmann/C. Mihaescu*, The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case, (2013) EuConst 9 (1) 73.

The Court subsequently built upon the foundations laid in *Scarlet v SABAM*, not merely to confirm the newly ascribed value to the Charter, but, arguably, to enhance it. Having established the Charter's elevated status, the Court went as far as asserting that, as the manifestation of general principles and the basis of fundamental rights guaranteed by the Union, it is essentially placed above even national constitutions[164], providing both the ceiling and the floor of protection[165]. This suggestion could extend the reach of the Charter even on purely domestic issues on the basis of this new EU constitutional document being at the centre of the Union polity as a 'community of values'[166], enjoying supremacy as part of the 'very essence of EU law[167]'.

Specifically, *Melloni* seems to add a slight but significant change to the *Solange* balance of power between the standards of protection of EU primary law and those prescribed by national constitutions. *Melloni* declared that in all circumstances not only ought the principles of unity and effectiveness of EU law be respected by national courts but '*the level of protection provided for by the Charter, as interpreted by the Court 'is not to be compromised*[168] by potential application of relevant national standards. The Court, in other words, seems to imply that the Charter standards now supersede even national constitutional law[169]. A narrower reading of the decision limits the marginalisation of national constitutions only to those instances where EU law has 'occupied the field', absolutely covering and regulating national action[170], leaving no room for the effect of any national

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[164] C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECR-00000, paras. 56-58.
cf. C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR-00000, paras. 45-48.
[165] *Fontaneli, Filippo*, 'Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog: Court of Justice of the European Union: Judgment of 26 February 2013,Case C-617/10 *Åklagaren v. Hans Åkerberg Fransson'* (2013) 9 EurConst 315, 332.
See the relevant 'prediction' made in 1995 by Besselink, combining hierarchical view of supremacy and a binding Charter of Union rights in *Besselink, Leonard*, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union' (1998) CMLR 35 (3), 629 (644).
[166] *Jakab, András*, Supremacy of the EU Charter in National Courts in Purely Domestic Cases, www.verfassungsblog.de/en/hungary-taking-action-andras-jakab/ (last accessed on 20 February 2019).
[167] C-617/10 *Åkerberg Fransson*, n.164, para. 46; cf C-106/77 *Amministrazione delle finanze dello Stato v. Société anonyme Simmenthal* [1978] ECR 00629, para. 22; C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd et als* [1990] ECR I-02433, para.20; Joined Cases C-188/10 and C-189/10 Aziz Melki and Sélim Abdeli [2010] ECR I-05667, para. 44.
[168] C-309/11 *Melloni*, n.164, para. 60.
[169] Above, n.165.
[170] C-617/10 *Åkerberg Fransson*, n.164, para. 9.

legislation of whatever status[171]. However the principle remains the same; higher protection on the basis of national constitutions is precluded.

The ramifications of adopting this interpretation would be extraordinary from an EU constitutional law perspective. The Charter, whenever applied, would take centre stage as the main source and instrument of protection of fundamental rights, appearing in effect as the hierarchical superior constitutional bill of rights for the Union. Given the wide reading of the term 'implementation' as to be identified with every situation 'falling under the scope of'[172] or '*governed by'*[173], EU law (requiring just minimal or even potential connection with it) national constitutions would be effectively cornered and overshadowed, with all the political and legal consequences that would ensue[174]. In turn, that would validly and understandably reignite questions as to legitimacy of a constitutional bill of rights that is essentially self-asserted as such, lacking the consent of its *pouvoir constituant*, not to mention missing, to begin with, the very subject that would be capable of consenting, namely a supranational demos. The legitimacy issue would be particularly intense since the portion of 'traditional' national constitutional law that refers to fundamental rights of the polity's subjects is arguably closely related to that particular community's shared history, morality, traditions, culture and ethos[175]. It mirrors its relevant 'common ideology', despite the universality that certain rights enjoy[176] especially among legal orders that share the western liberal tradition. In contrast, the Charter's content as a definitive bill of rights could be perceived as the product of the deliberation of elite groups, if not the judges themselves. Thus, an absolute dominance of the Charter would only fuel the

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[171] *van Bockel, Bas/Wattel, Peter* 'New wine into old wineskins: the scope of the Charter of Fundamental Rights of the EU after Akerberg Fransson' [2013] ELRev 866, 879 and 883; *Franssen, Vanessa*, 'Melloni as a wake-up call – Setting limits to higher national standards of fundamental rights' protection', 10 March 2014 European Law Blog, http://europeanlawblog.eu/?p=2241 (last accessed 25-3-2019).

[172] C-617/10 *Åkerberg Fransson*, n.164, para.19.

[173] C-176/12 *Association de médiation sociale v Union locale des syndicats CGT et als* (*AMS*), ECLI:EU:C:2014:2, para. 42.

[174] *EuConst Editorial*, 'After Åkerberg Fransson and Melloni' (2013) EuConst 9 (2), 169 (171).

[175] AG Bot (2/10/2012) in C-399/11 *Melloni v Ministerio Fiscal* ECLI:EU:C:2012:600, para. 109. See also *Carozza, Paolo*, Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights (1997-1998) Notre Dame L.Rev. 73, 1217 (1235).

[176] *Cartabia, Marta*, Europe and Rights: taking dialogue seriously (2009) EuConst 5, 5 (20-21). Cartabua nevertheless recognises the historical/cultural dimension of fundamental rights alongside their universal one.

perpetual clash between integrationists and intergovernentalists and reignite fierce resistance by national constitutional courts[177], thus potentially denying the Charter not only legitimacy but also potential.

An alternative interpretation, which regards the Charter as the safety net that provides the definitive floor of possible protection of the rights therein, but allows for stronger protection by national constitutions, would be compatible with the Union's pluralistic constitutional arrangement. The idea of pluralism is based on the respect and co-existence of multiple diverse constitutional polities[178] that nevertheless share certain values, objectives and rights as a minimum of the overarching normative agreement that regulates and defines their relationship. In this context, the Charter constitutes the EU standard of protection of fundamental rights[179], to be respected every time EU law comes into play, without prejudice to the diversity of the relevant constitutional traditions[180] and thus any potentially additional protection prescribed by national constitutions[181]. The defining factor should be the subject of review in each case. If an EU measure or actions of EU institutions are under scrutiny, the Charter is to provide the sole definitive standard of review, as setting the standard for the self-contained 'internal' constitutional legal order of the EU. However, if national legislation or measures are also involved to implement EU law or to pursue objectives set by it, national courts should not be precluded from applying the standards prescribed by the applicable national constitution to improve upon[182] those of the Charter.

The overlap of the central (EU) and the peripheral (Member States) constitutional levels is not only consistent with the pluralistic nature of the EU but compatible with its normative objectives that pursue the protection and advancement of EU citizens' rights and standards of living. The Charter sets the

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[177] *EuConst Editorial*, n.174, 171-172.
[178] See *Cartabia 2009*, n.176, 16; 21.
[179] *Weiler, Joseph*, Fundamental Rights and Fundamental Boundaries: On standards and values in the protection of Human Rights in Neuwahl, Nanette/Rosas, Alan (eds.) The European Union and Human Rights (Kluwer, The Hague 1995), 51 (66).
[180] See *Cartabia2009*, n.176, 23. cf *Weiler1995*, ibid.
[181] This suggestion does not necessarily contradict Weiler's apparent opinion that national constitutions could only be invoked when Member States retain some discretion. Weiler's view is to be judged upon its basic premise, which is precisely the respect of the multiplicity and diversity at the heart of the complex constitutional arrangement between the Union and its constituent States that defines the EU legal order. See *Weiler1995*, op.cit., 72-73.
[182] cf. *Widmann, Anne-Marie*, 'Article 53: undermining the impact of the Charter of Fundamental Rights', (2002) Colum.J.Eur.L. 8 (2), 342 (353).

'internal' standard for the autonomous constitutional legal order of the EU. However it is not the sole or paramount source of rights, nor does it call for the centralisation of the rights' interpretation, culture and ethos in what could amount, at most, to a usurpation of constitutional primacy and, at least, a risk for what Cartabia calls 'juridical colonialism'[183], meaning the self-affirmation of the CJEU as the supreme constitutional court in a quasi-federal manner.

The extent of the ways the Court has used this new found tool for essentially constitutional judicial review has progressively widened and the respective effects alongside it. At the one extreme lies using the Charter not only to review but to actually strike down EU legislation, be it a Regulation[184] or provisions of a Directive[185], due to non-compliance with its standards. Moreover the Court has employed the Charter to review national legislation implementing secondary EU law[186]. Further still, the Charter has been invoked to essentially even indirectly review national policy albeit in itself beyond Union competences and the scope of EU law[187]. At the other end of the spectrum lies a more subtle effect that the Charter has had apparently on Court judgements, where, although not explicitly mentioned or referred to, it has nevertheless obviously influenced their rationale and train of thought as to the interpretation of other provisions of EU law[188], alluding to the interconnectivity of primary law provisions in a single coherent constitutional architecture.

It is evident from this that the Charter may be used as an instrument of judicial review both of EU legislation, initiatives and institutional action as well as of

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[183] *Cartabia 2009,* n.176, 17.

[184] Joint Cases C-92/09 *Volker und Markus Schecke GbR* and C-93/09 *Hartmut Eifert v Land Hessen (*the "Volker and Schecke case"*)*, [2010] ECR I-11063; Joint Cases C-293/12 Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and C-594/12 Seitlinger and Others, ECLI:EU:C:2014:238.

[185] C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

[186] See Joined Cases C-356/11 and C-357/11 O. S. v Maahanmuuttovirasto and Maahanmuuttovirasto v L., ECLI:EU:C:2012:776, according to which a compatible to EU law interpretation of national legislation must be based on an interpretation of secondary EU legislation that is in turn itself compatible with the Charter.

[187] Joined Cases C-411/10 and C-493/10 *NS* v. *Secretary of State for the Home Department et ME and others* [2011] ECR I-000, paras. 80 and 86 as to the immigration policy and respective treatment of asylum seekers in Greece; C-279/09 *DEB v Bundesrepublik Deutschland*, [2010] ECR I-13849.

[188]e.g. C-34/*09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm*), [2011] ECR, I-01177. cf. AG Sharpston (30/9/2010) in C-34/09 Ruith Zambrano, [2011] ECR I-01177, where the fundamental rights rationale is elaborately analysed, without anything of that analysis explicitly appearing in the judgement itself, though its influence is apparent.

national policies. By implication, it should also be accepted as a primary tool for the interpretation, if not a critical factor in the very development[189], of EU strategies and 'packages', including soft law coordinative measures, and of their national implementation. Consequently, when it comes to effects on the rights and freedoms of individuals within the EU, the Charter is the yardstick by which to hold the EU politically and legally accountable. All EU initiatives not only may, but in fact should, be put to the test against the standards the Charter sets.

This conclusion is not precluded by the restrictions placed upon the Charter by virtue of its scope (Art. 51 CFREU) or its prescribed limitations (Art. 52 CFREU). Art. 51(1) CFREU is not merely declarative or of limited normative importance, especially when it comes to EU institutions, bodies, authorities and their respective officers.

As creatures of EU law, every possible conduct of EU institutions inadvertedly falls within the scope of the Charter, which is explicitly addressed to them (Art 51(1) CFREU), without qualifications. This rule applies even when they are acting beyond their normal duties or indeed at the borders or even outside of the EU legal system's mechanisms[190] (such as in the case of the ESM). The same would more generally apply for whenever a coordinative, adjudicating or even decisive role is reserved for the EU institutions, even when that could potentially refer to situations or relationships completely outside their normal duties within the Union system.

In this context, Member States actions would also most probably be caught by the scope of the Charter, even when they might be following soft law Union policies and measures or implementing schemes and conditions relevant to such quasi-EU law mechanisms. However, as opposed to the Charter shackles that tie EU institutions, the answer in this case is less straightforward[191]. For Members States to be covered by the scope of the Charter Art. 51(1) CFREU demands that they are 'implementing EU law', though the interpretation of that requirement is

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[189] *De Schutter*, Olivier, 'The CFREU and its Specific Role to Protect Fundamental Social Rights' in *Dorseemont, Filip/Lörcher, Klaus/Clauwaert,Stefan/Schmitt, Melanie (eds)* The Charter of Fundamental Rights of the European Union and the Employment Relation (Hart, Oxford 2019).9-38.
[190] C-370/12 *Pringle*, [2012] ECLI:EU:C:2012:756, paras. 158, 164.
[191] cf. *Kaila*, n.148, 294; *Eeckhout, Piet*, The EU Charter of Fundamental Rights and the federal question, (2002) 39 CMLRev 945 , 954.

far from clear. The Explanations to the Charter[192], though not binding themselves, albeit relevant in the interpretation of Charter provisions, have attempted to shed some light on the matter by referring to the relevant jurisprudence of the CJEU[193]. Based on this body of case law, the conclusion is that Member States are bound not merely when they are implementing[194] EU law or derogating[195] from it but, more broadly, insofar they operate within the scope of EU law[196], or, as *AMS* put it, in any situation 'governed by EU law'[197].

The substance of this latter interpretation is somewhat ambiguous. What seems to be at the very least required for a situation to fall within the scope of EU law is '*a presence (of EU law) at the origin of the exercise of public authority*'[198]. Thus, the existence of even a minor connection with EU law, albeit just appearing in the scene as the governing law or the legal basis of a mechanism or of a certain strategy's formulation that coerces Member States to exercise their public authority, suffices for the Charter to come into play as a source of protected rights and a standard of review. In this case, a window opens even for the horizontal application of the Charter in cases that fall within its thus designated scope[199]. Recent case law seems to affirm the Explanations to the Charter[200] implying that this broadened juridical view of the scope of EU fundamental rights encompasses not only those contained in the CFREU but extends to rights and principles that are currently regarded or might be identified in the future in the Court's jurisprudence as general principles of EU law[201]. However, this refers only to the lowest common denominator of the scope of general principles and Charter rights.

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[192] 2007/C 303/02, Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C 303/17.
[193] Case 5/88 *Wachauf*, [1989] ECR, 2609; C-260/89 *ERT* [1991] ECR I-2925; C-309/96 *Annibaldi*, [1997] ECR I-7493.
[194] Case 5/88 *Wachauf*, op.cit; C-309/96 *Annibaldi*, op.cit..
cf. C-345/06 *Heinrich* [2009] ECR I-1659. Para. 45; Joined Cases C-378/07, C-379/07 and C-380/07 Angelidaki et als [2009] ECR I-3071.
[195] C-260/89 *ERT*, op.cit.; C-368/95 *Familiapress*, [1997] ECR I-3689, para. 24; C-60/00 Carpenter, [2002] ECR I-6279, para. 40.
[196] *Craig, Paul*, The ECJ and ultra vires action: A conceptual analysis, (2011) 48 (2) CMLR 395, 430. See inter alia C-617/10 *Åkerberg Fransson*, n.164, para.19; C-176/12 *AMS*, n.173, para. 42.
[197] C-176/12, n.173, para.42.
[198] AG Cruz Villalon in C-617/10 *Åkerberg Fransson* ECLI:EU:C:2012:340, para.33.
[199] See AG Cruz Villalon (18/7/2013) in C-176/12 AMS, ECLI:EU:C:2013:491, paras.29-31.
[200] Explanations Relating to the Charter, op.cit., Explanation on Art. 51, para.2: the stipulation of the Charter as to the determination of its scope '*follows unambiguously from the case-law of the Court of Justice*' as regards fundamental rights as general principles of EU law.
[201] C-617/10 *Åkerberg Fransson*, n.164, paras.18-20.

In *Åkerberg Fransson* the Court strongly emphasised the value of the Charter as the primary tool and source of fundamental rights protection within EU law, declaring that the scope of the Charter is identical to that of EU law[202].Thus, it affirmed its status as the bill of rights of the autonomous EU legal order within the pluralistic constitutional 'compound' that contains the EU and national constitutional orders[203], more specific than the rather vague judicially construed and thus potentially easily qualified general principles of EU law.

Though this interpretation does widen the scope vis-à-vis the narrow wording of Art. 51(1), it still requires some connection to EU law. It would seem that identifying even a weak or implied connection is enough, if *Åkerberg Fransson* is to be used as an indication. Despite the reluctance of AG Cruz Vilallon in the absence of a perfectly clear link between EU law and domestic (tax) law in that case, the Court managed to conjure one. The AG was doubtful both of the content of the *ne bis in idem* principle under EU law[204] but also, importantly, of the state power to impose penalties originating in EU law. He did not consider the mere obligation to render a particularly broad Directive effective to suffice nor to be determinative of the optimum national recourse[205]. However, the Court found the rather ambiguous principle of effectiveness of EU law to be sufficient, even when the relevant EU provision does not explicitly transfer regulatory capacity to the Union or stipulate a particular mode of action for the Member States to attain a certain goal. Under this rationale, the proclaimed EU objective is enough to trigger the obligation of its effective pursuit and thus justify the application of EU law at large and the Charter more specifically.

It is however regrettable that the Court refused to follow the same reasoning when it was confronted with claims of infringement of labour rights[206] in pursuit of obligations laid down by the Stability and Growth Pact (SGP) in the *Sindicato dos Bancários do Norte case*[207]. Denying its jurisdictional competence, the Court dismissed the case due to the absence of 'specific evidence' that the national

[202] ibid, para.21.
[203] AG Cruz Villalon in C-617/10 *Åkerberg Fransson*, n.198, para. 35.
[204] ibid, para.48-49.
[205] ibid, paras.57-64.
[206] Right to fair remuneration (salary cuts).
[207] Order of the Court in C-128/12 *Sindicato dos Bancários do Norte and Others v BPN - Banco Português de Negócios, SA* [ECLI:EU:C:2013:149].

legislation in question was 'implementing' EU law[208]. It essentially refused to mirror the *Åkerberg Fransson* rationale and apply the same level of scrutiny as to the effectiveness of the Stability and Growth Pact and its stated relevant objectives which had led to the adoption of the piece of national legislation under review,. Arguably if the vague principle of effectiveness is enough to trigger the review of the rather broad objectives of a Directive, which by nature allows for flexibility in its implementation, the same should apply for national legislative measures directly attributed to the Growth and Stability Pact and adopted to pursue its more specific objectives[209], despite the specific action the relevant Member State might have chosen to take within its margin of discretion.

The same should apply for obligations based on negotiations with EU institutions that have resulted in an agreement that includes these obligations as conditions for loan instalments by the Troika (EU/IMF/World Bank), despite these processes having a weaker link to EU law than the SGP. They nevertheless include the use of EU Institutions, namely the Commission, which are always under an obligation to uphold EU law including Charter provisions. However, the two relevant Romanian *Corpul Naţional al Poliţiştilor* cases[210] brought before the Court have suffered the same fate as *Bancarios* and have been dismissed as inadmissible without substantive review of their facts and context[211].

There appears to be no reason for the different interpretative behaviour adopted by the Court in these cases[212] other than their subject matter. That could potentially have brought the judges up against the substance of EU monetary

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[208] ibid, para. 12.
[209] See *Fontanelli*, Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog (case comment) (2013) EuConst 9 (2), 315 (327; 333-334) on the value of 'implementing intention' on the part of the Member State.
[210] Order of the Court of 14/12/2011 in C-434/11 *Corpul Naţional al Poliţiştilor v Ministerul Administraţiei şi Internelor (MAI) et als* [2011] ECR I-00196; Order of the Court of 15/11/2012 in C-369/12 *Corpul Naţional al Poliţiştilor - Biroul Executiv Central v Ministerul Administraţiei şi Internelor et als* ECLI:EU:C:2012:725.
[211] Regulation (EC) No 332/2002 that led to Council Decision 2009/459/EC [2009] OJ L150/08 and to the Supplemental MoU with Romania of 25/2/2010 (http://ec.europa.eu/economy_finance/articles/financial_operations/pdf/2010-02-25-smou_romania_en.pdf), Annex I;
of 29/6/2012 (http://ec.europa.eu/economy_finance/eu_borrower/balance_of_payments/pdf/2012-07-02-romania-mou_en.pdf) , para 37;
and of 27/12/2011 (http://ec.europa.eu/economy_finance/articles/financial_operations/pdf/2011-12-27-smou-romania-en.pdf) , paras. 35-37 (all last accessed on 24/4/2019).
[212] *van Bockel/Wattel*, n. 171, 878.

policy, and thus in the politically awkward position of having to review its implementation. The suggested risk of breaching the subsidiarity principle by submitting 'every national cutback and maybe every national tax law'[213] to scrutiny under the Charter did not for a minute seem to hinder the Court in *Åkerberg Fransson* from taking into account the full facts and context of the case, before determining that Swedish tax law penalties were indeed linked to obligations under EU law and reviewing them on the basis of the Charter. If the Charter is indeed to be seen as the backbone of fundamental rights protection within the EU and the standard for constitutional review of action or exercise of power originating in EU law, its interpretation, the determination of its scope and, hence, its application should at the very least be consistent, regardless of the subject matter or the potential political backslash to an intervention by the Court. It remains to be seen whether the Court will be more brave in the future, at the very least approaching subsequent cases[214] with the same rigour of examination of their context and facts as in *Åkerberg Fransson.*

As a result of the coordinative or limited complementary nature of EU competences on matters of social policy or labour market regulation, most of the policy measures and specific actions prescribed under relative soft-law EU initiatives would either require the exercise of national competences or would fall entirely under the regulatory powers of the Member States. Therefore a connection with EU law in the form of specific substantive applicable rule of EU law[215] would be more difficult to establish as would be the definition of the scope and effect of the Charter vis-à-vis Member State actions.

Nevertheless it is suggested that the broader reading of Art.51(1) CFREU, that extends the effect of the Charter whenever Member States operate within the realm of EU law[216], would allow for them to be covered when directly implementing such soft-law prescribed strategies or fleshing out proposed

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[213] ibid.
[214] See cases C-655/13 and C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins v. Fidelidade Mundial - Companhia de Seguros, SA* as to the same measures repeated in subsequent Portuguese legislation (adopted in 2013 and 2012 respectively) under the obligations of both the SGP and the Memorandum of Understanding attached to Portugal's loan agreement (bail-out)
[215] *Kaila*, n. 148, 306.
[216] *Craig 2011*, n.196.

measures. The same would apply for those strategies and measures that constitute conditions for the participation in certain mechanisms such as the ESM.

In that case, though the ESM stands on the brink of normal EU law, perhaps even beyond its boundaries, a connection to the 'realm' of EU law can be established. The ESM is directly linked to the EMU and is seen as complementary to its structure and essential for the survival and the stability of the Eurozone, in itself of course an integral piece of the EU architecture and the internal market, hence subject to the Union's constitution. Moreover, it makes use of the EU institutions, which are endowed with duties as regards drafting and monitoring conditions on the relevant Memoranda of Understanding (MoU) that are a requirement of ESM released funding to Member States. Even in that capacity, EU institutions themselves remain subject to EU law and the Charter, a principle noted by the Court in *Pringle*. Consequently, the Charter should also apply when Member States would be implementing the respective negotiated agreements, even if that would require the exercise of national competences.

The use of mechanisms, schemes and agreements that stem from, or rest upon, EU law created and regulated initiatives or measures and rely upon EU institutions actions should inevitably be considered within the scope of EU law. Otherwise paradoxical conclusions would be reached. For example, we could have certain mechanisms established on the basis of the Treaties and through EU law structures and processes in order to support the objectives or the stability of the Union, if not its very existence. Within this, EU institutions that might be involved as instruments of such mechanisms would be susceptible to being held accountable for potential infringements of fundamental rights and freedoms caused by their actions even in extra EU law situations, according to the relevant principle set in *Pringle*. The paradox would emerge by also accepting that Member States, in making use of these very same mechanisms and everything that flows from them, would be allowed to breach CFREU rights.

Furthermore, even if one concedes that the CFREU limitations would apply, it should be noted that fundamental freedoms, rights and principles the Charter contains also constitute general principles of EU law. Drawn from the common constitutional traditions of the Member States and inspired by the commonly

accepted provisions of the ECHR, the majority of them had been identified as such in the Court's case law before being essentially codified via the Charter[217], encapsulating the European *acquis* the Charter's Preamble affirms. As to those provisions in the Charter that introduce 'new' rights or principles that had not been mirrored in CJEU jurisprudence, their adoption by the Member States through drafting and ratifying the Charter as a binding element of the primary law signifies a consensus on the identification of the essence of the rights and principles therein as common to them and their legal traditions and contemporary needs and values[218]. Any different interpretation would completely disconnect the Charter from general principles of EU law, though it is itself built upon them[219], and effectively create a two-tier system of fundamental rights protection within Union law according to whether they derive from the Charter or general principles of EU law, thus diluting and diminishing their protection[220]. Furthermore, such an interpretation would be contrary to the Charter itself which in Art. 53 proclaims that nothing within it, including its limitations, shall be interpreted as '*restricting or adversely affecting human rights and fundamental freedoms as recognised in their respective field of application, by EU law*'. Hence, Charter provisions provide a snapshot of general principles of EU law identified as such at the moment of the Charter's creation; they retain their character as general principles of EU law should need be[221].

In their incarnation as general principles of EU law the Charter's provisions, as guides for interpretation[222] rather than bases for positive action, are not subject to limitations[223] and are to be respected by Member States as part of their obligation to act without prejudice to EU law in its entirety[224]. In other words, the second nature of the provisions of the CFREU as incorporating general principles of EU

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[217] *Rosas/ Armati,* n.62, 45. Also see C-540/03 European Parliament v Council, [2006] ECR I-05769, para. 38.
[218] *Tridimas, Takis,* The General Principles of EU Law, (Oxford: OUP 2006), 358.
[219] *Rosas/Armati,* n.62, 308.
[220] AG Bot in *Scattolon*, supra n. 50, para. 120; *Kaila*, n.148, 307.
[221] *Hofmann, Herwig/ Mihaescu, Bucura,* The relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU law: Good Administration as the test case (2013) EuConst 9(1), 73 (74-83; 100-101).
[222] cf. Lenaerts, Koen/ Gutierrez-Fons, Jose, A., The constitutional allocation of powers and general principles of EU law, (2010) 47 CMLR, 1629 (1650-1651).
[223] cf. *Eeckhout,* n.191, 977.
[224] cf. *Lenaerts/Gutierrez-Fons,* op.cit.,1650-1652.

law would 'take over'[225] beyond the strict remits of its formal scope. Thus, the Charter, in any case, does cover in spirit all Member States actions that would be connected to their EU law obligations, indirectly extending the protection of the rights and freedoms protected even vis-à-vis the exercise of national competences.

In that respect, Member States' actions, strategies or national legislation dictated or influenced by soft-law Union measures or adopted for the implementation of potential ESM agreements would need to respect the core essence of rights and freedoms within the Charter regardless of what it might be understood as, be it a binding set of primary EU law provisions or an affirmation of general principles of EU law. Such actions would thus have to be interpreted in the light of the CFREU with the end of protecting the rights and freedoms it contains. Henceforth, beyond the Charter's obvious political value[226], not least as a standard of accountability of EU institutions in the political sphere, its legal role and value as an integral part of the Union's substantive constitution is also rather obvious and seminal.

2.3 Interim Conclusions: The value of the Charter

It is clear, in any case, that the Charter provides specific content to rights that existed up until now in the EU legal order only by reference to external sources and turns their interpretation and future evolution[227], as well as the filling of conceptual gaps, into an internal constitutional issue[228]. Thus, the Charter establishes a level of transparency, clarity and legal certainty that is crucial not just for the protection of fundamental rights[229] but perhaps more importantly for firmly anchoring the legitimacy[230] of the Union to the rule of law, thus enhancing the EU's constitutional aspirations and characteristics. Consequently, the Charter allows the CJEU to take a more active and aggressive position in protecting

[225] ibid, 1659.
[226] cf. *Kaila*, n.148,308-310.
[227] *Contra Goldsmith*, The Charter of Rights-a brake not an accelerator, [2004] EHRLR 2004, 473
[228] *Bercusson, Brian*, European labour law (CUP, Cambridge, 2009), 207-208.
[229] *Skouris 2012*, n.160, 7.
[230] ibid.

fundamental rights[231] and re-establishing a balance *vis-à-vis* the economic freedoms[232] by, inter alia, utilising it to strike down EU acts. Moreover, Charter provisions put the rights ethos on a firm constitutional footing, right at the core of the EU legal system. Thus, they require policy making and the exercise of EU competences and powers to be infused by this ethos and be judged against it. Lastly, through Art. 52 (1) CFREU and the imposed application of the proportionality test in reviewing the legality of restrictions of protected rights, the Charter guarantees the survival of the core of each right (*narrow proportionality*), hence their very existence.

All these contributions become all the more important as regards social rights, and especially labour rights, including those related to collective labour law. They elevate them to constitutional status as integral manifestations of the normative foundations of EU law, effectively demanding the 'mainstreaming' of respect for those rights in the law and policy making processes of the Union[233].

The Charter presumably lacks full[234] horizontal direct effect. The Court , referring to the limitations under Art.51(1) CFREU, has indicated that such effect between private parties, 'where appropriate'[235], should not be precluded. 'Appropriateness', however, seems to be judged by whether the provision in question refers to limits imposed by national and/or EU law on the right[236], which would render most social rights in the Charter 'inappropriate' for horizontal direct effect[237]. Regardless, we should recognise the incidental horizontal effect of EU law rights[238] by analogy with *Familiapress*[239] or *Mangold*[240] , the potential full

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[231] ibid; *Douglas-Scott 2004* ,n.156,44.
[232] *Menendez,* Chartering Europe: Legal Status and policy implications of the CFREU (2002) JCMS 40 (3),471 (477).cf. *Habermas Jürgen,* Why Europe needs a Constitution (2001) NLR 11, 5-26 (21).
[233] *Ashiagbor,Diamond*, 'Economic and social rights in the European Charter of Fundamental Rights' [2004] EHRLR 1, 62 (72).
[234] cf. Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v M.E.Bauer and Volker Willmeroth v M.Broßonn* ECLI:EU:C:2018:871.
[235] C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V.v Tetsuji Shimizu* ECLI:EU:C:2018:874,para.76.
[236] ibid,para.73.
[237] cf.C-176/12 *AMS*, n.173.
[238] *Spaventa, Eleanor,* 'The horizontal application of fundamental rights as general principles of Union law', in A constitutional order of states: Essays in honour of Alan Dashwood' (Hart, Oxford 2011), 205-208.
[239] C-368/95 *Vereinigte Familiapress Zeitungsverlags und vertriebs GmbH v Bauer Verlag* [1997] ECR I-03689.
[240] C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-09981. See also C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG* [2010] ECR I-00365.

horizontal effect of Charter rights as general principles of EU law[241], as well as its indirect effect as a hermeneutical compass[242] . However, in the internal context of EU law the Charter does guarantee the existence of the protected rights (Art. 52(1) TFEU) and sets limits on the action of both individuals and Union institutions as well as constituting a hermeneutical guideline for the review of their actions[243].

Thus, the incorporation of CFREU in its current incarnation in EU primary law is an invaluable element of, and evidence of, substantive constitutionalisation and another milestone in an ongoing journey.

IV. Conclusions – Value of substantive constitutionalisation

To address the issues regarding rights as guarantees of social coherence, democratic legitimacy and balance within the European project one must first turn to what is and not to what ought to have been. The constitutional debate that sprung out of the Convention process, and continues in a heated fashion today, tends to focus on the theoretical concepts and aspects of constitutionalisation and its transposition to the transnational level. Scholars, clinging to predominantly national historical concepts of constitutionalism either attempt to identify missing elements in what is described as the 'EU constitution', such as the lack of a demos or more importantly the lack of a State to be kept under guard, or embark on analysing the underlying ideology and agendas of the European project.

By doing so however, they tend to overlook the obvious; there already exists a legal framework that governs the workings of the EU and the lives of its citizens. That framework includes a 'primary law' embodied in the coherent compilation of documents after the Lisbon Treaty that displays the substantive attributes of a constitution; therefore it should be interpreted and applied accordingly regardless of the underlying holes in the evolving EU constitutional theory.

Substantive constitutionalisation provides the tools and standards for the legal review of institutional conduct within the Union. It weaves a thread that connects

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cf. C-569/16 and C-570/16 Bauer et als,op.cit.
[241] C-68/17 *IR v JQ* ECLI:EU:C:2018:696,para.69.
[242] *Craig 2010*, n.104, 208-209; *Rosas/Armati*,op.cit.,160-162
[243] *Iliopoulos-Strangas* as cited in *Blanke,Hermann-Josef*,'The Economic Constitution of the European Union' in *Blanke/Mangiameli*, n.33, 369 (391).

fundamental rights to normative values and objectives of the Union as well as their crystallisation through the exercise of Union competences. Consequently, these threads present a coherent network of an emerging constitutional system.

Furthermore, substantive constitutionalisation's theoretical construction paints a picture of the nature and substance of that system, raising awareness and framing the political debate. In addition, it creates the conditions[244] for the effective participation in the democratic deliberative processes of political constitutionalism.

European constitutionalisation evidently has been so far firmly based upon, and is an example of, post-national legal constitutionalism. Legal constitutionalism as evolved from its liberal tradition, describes a process based on a commonality of legal values, principles, rights and a judicially guarded notion of an autonomous rule of law polity, which justify and keep in check the exercise of institutional power[245]. The substantive constitution of the Union that emerged through this process, with all its particular ingredients (normative/material)[246], contains what Rawls would call the 'constitutional essentials'[247] of the EU and therefore holds precisely those elements that warrant this fundamental assertion

The values and objectives[248] of the Union that form its normative foundation do not only reflect Raz's 'common ideology' of the polity. They also crystallise the legal order's basic principles that provide an interpretative guidance to judges[249] and hence should also define the conduct of policy makers[250]. Dworkin argues that judicial intervention and review should be anchored in a 'coherent set' of moral overarching principles[251]. In the case of a written constitution these principles also enjoy clarity and legal certainty and are not merely drawn from the judges' own morality[252]. Thus the legal system is endowed with consistency[253](hence,

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[244] *Longo*, n. 140, 6.
[245] *Wilkinson*, Political Constitutionalism and the European Union, n.22, 202.
[246] ibid, 212.
[247] *Rawls, John*, Political Liberalism (Columbia University Press New York 1996), 227-230.
[248] Which include Dworkin's '*collective goals*' ('nonindividuated political aims') and Sumner's '*goal-based constraints*' See , *Dworkin*, Taking Rights Seriously, n.11 , 91-92; *Sumner L.W.* The moral foundation of rights (OUP Oxford 1987), 175 ff.
[249] *Dworkin*, Taking Rights Seriously, n.11, 81-82.
[250] ibid, 84-86; 88.
[251] *Dworkin, Roland*, Law's Empire, (Fontana London 1986), 255.
[252] cf. *Bellamy 2007*, n.11, 75-76.
[253] *Dworkin (1977)*, op. cit., 82 ff.

legitimacy) and the probability of a 'wrong' judgment[254] is reduced. The liberal democratic legitimacy of the system is further cemented by an independent judiciary[255], here in the form of the CJEU, entrusted with safeguarding the material aspect of the EU constitution, that is the fundamental rights of individuals contained in the CFREU, interpreting them through the lens of the normative elements of primary law.

It could even be proposed that some of the CFREU rights could be considered to be 'basic liberties'[256] in the material/normative nexus of the EU polity. Such are all those rights that accommodate and enable political participation with the aim of pursuing social justice[257], organisation, and resistance[258] against arbitrary interventions that hinder the full enjoyment of liberty (political or economical)[259] and induce unfairness. Hence, these rights that reflect 'basic liberties' should be closely protected, and restricted only insofar as they unnecessarily infringe upon other basic liberties, in pursuit of the 'common good' - a pattern that is indeed apparently followed by the limitation provisions of the Charter. Such an assumption, rooted in the liberal underpinnings that legitimise supranational legal constitutionalism, would imply that collective labour rights alongside the freedom of association should functionally be regarded as basic liberties, capable of not merely protecting specific interests or capabilities, but, more generally, allowing for deliberation and hence political activation[260], which in turn ultimately relates to the very idea of self-fulfilment[261].

The exercise of these rights, regarded as concretising fundamental normative values, could have the potential of fuelling the political process that would in turn legitimise[262] and justify the constitutional discourse. Even supporters of the intergovernmentalist camp agree that regardless of the nature of the EU polity and its lack of hierarchical coercive power upon Member States, it is in itself a

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[254] ibid, 86.
[255] cf.
[256] *Rawls,* Political Liberalism, 289-371.
[257] ibid, 300.
[258] *Rawls, John,* A Theory of Justice, (Rev.edn, Belknap Press Cambridge MA 1999), 336.
[259] *Rawls,* Political Liberalism, 293.
[260] *Rawls,* A Theory of Justice, 194-195.
[261] The combination of 'self good' and (social) 'justice': *Rawls,* Political Liberalism, 9.
[262] *Habermas, Jürgen* Between Facts and Norms: Contributions to a discourse theory of Law and Democracy, (W.Rehg tr., Polity Press Cambridge 1996), 450.

hierarchical normative order. In other words it stands upon, and operates according to, a foundational legal framework that prescribes certain primary values, objectives, rights and principles that underpin institutional arrangements. Internal compliance with those fundamentals and consistency as regards the Union's internal constitution, albeit not referred in this case as an equivalent to 'a capital C' Constitution, essentially provides justification to this supranational entity[263]. What Neyer refers to as 'Justice', being more appropriate than democracy as the basis of the EU legitimacy, is nothing more than fairness, in the sense of consistency to the Union's normative foundations. That fairness is to be attained and ensured by providing the tools to individuals to invoke and use those normative foundations. This assertion is built upon the liberal tradition that calls for protection of the individual against arbitrary transgressions by the sovereign, be it the monarch, the nation state or, more fundamentally, any holder of coercive regulatory power. Compliance with the fundamental principles, values and objectives that constitute the substantive constitution of the Union is precisely the 'good reason' that would justify EU-originated restrictions of individual freedom[264]; in other words, it would justify EU hard or soft law legislation and policy.

More importantly though, beyond a Habermasian procedural approach to the democratic process that, at best, ultimately perpetuates a particular arrangement of democracy and polity[265], the increasing exercise of fundamental rights and consequent societal embrace of the Union's normative foundations might lead to the creation of political perception and the realisation of common fate. These two traits are absolute prerequisites both for the emergence of real solidarity among citizens as members of the same community and for a shift in allegiance towards the EU as a polity and the self-realisation of the civic and political responsibilities of citizenship. As a consequence, substantive, EU-focused, bottom-up political process might emerge. Such process, which inherently entails demanding for popular accountability of EU governance, could potentially become the basis of

[263] *Neyer, Jürgen*, The justification of Europe: A political Theory to Supranational Integration (OUP Oxford, 2012), 14-15.
[264] ibid, 8-9.
[265] See *Bellamy (2007)*, n.11, 128-129.

EU level political constitutionalism. Sufficient political integration is after all what arguably precludes the EU from the potential to be judged within the context of political constitutionalism[266].

Bellamy would obviously feel that the EU in its present arrangement is a hostile environment for such a development. The prearranged set of legal values and rules to be followed would constrain democratic debate to very specific preordained boundaries[267]. Furthermore, under the cloak of their supposed universality and abstract nature, established values and rules would essentially recycle the opinions and interests of the majority that had coincidentally existed during their creation. Instead, all possible outcomes of contemporary democratic deliberation and compromise should be allowed, insofar as they achieve consent[268].

However, neither legal nor political processes operate in a vacuum[269], something even the fiercest proponents of political constitutionalism have come to accept[270]. They are inherently connected to one another and are influenced, if not defined, by the legal, social and economic environment in which they operate.

Moreover, democratic participation as an intrinsic gear of political constitutionalism and a barrier against arbitrary exercise of power presupposes political equality[271]. Although doubts have been expressed as to the suitability of a (legal) constitution to ensure political equality and the conditions for fair political participation[272] it could be argued that the suggested alternative 'self-regulating' capacity of any democratic system is far more dubious. Merely setting up rules of democratic procedure, disregarding for the sake of argument that in itself that would have to be achieved through means of legal constitutionalism, amounts to little protection without at least the ultimate recourse of an independent arbitrator. Established majorities and political elites could easily dominate the system and render it ineffective. Further though, the question is again one of perception. A set of normative and substantive rules accessible to all subjects of the polity provides

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[266] *Wilkinson*, n.22, 211.
[267] *Bellamy (2007)*, n.11, 82.
[268] ibid.
[269] *Longo*, n.140, 42.
[270] *Tomkins, Adam*, What's Left of the Political Constitution? (2013) GLJ 14 (12), 2275-2292.
[271] *Richardson, Henry*, Democratic Autonomy: Public Reasoning about the Ends of Policy (OUP Oxford 2003), 85-86.
[272] *Bellamy (2007)*, n.11, 82

them with the awareness of both their own basic rights and the existing prescribed limitations on institutional actors. Consequently, it guarantees at the very least the formal perception of a minimum degree of equality that ruling majorities have thus far accepted to surrender. Moreover it moulds public awareness of the nature and substance of the polity itself, thus informing the debate and allowing for its change through the evolution of the rights themselves or indeed of the polity at large.

The conclusion can only be that political and legal constitutionalism are not mutually exclusive any more than the existence of sovereign national orders is incompatible with an autonomous EU legal system which allows the exercise of Union sovereign power in certain areas in pursuit of common goals and values. Political and legal constitutionalism are as inherently interdependent as the two levels of the pluralist EU structure. As John Peterson has remarked, '*EU scholars need to stop fighting phoney theoretical wars*'[273] if they are '*to synthesise insights from comparative politics, international relations, public policy'*[274] and, we could add, legal theory and philosophy of multiple traditions, to paint an accurate picture of the EU and its evolution.

Therefore, substantive constitutionalisation calls for a systematic reinterpretation of EU law under the light of its reshuffled normative basis, which is one of balance between the social and the economic, the legal and the political, the national and the supranational.

It inherently holds the potential to elevate labour rights in particular to the same level as economic freedoms and to balance the two, bearing in mind the overarching fundamental values and objectives of the Union. However, this potential depends on the specifics of the economic constitution of the Union, which will be addressed in the following part of the thesis.

[273] *Peterson, John*, The choice for EU theorists: Establishing a common framework for analysis, (2001) European Journal of Political Research 39, 289 (313).
[274] ibid.

PART II:
Substantive constitutionalisation and Collective Labour Law

I. Introduction

The idea of substantive constitutionalisation of the EU suggests that the EU 'polity' has reached a point of positivist constitutional development that allows for it to be assessed on the basis of the specific constitutional framework of its legal order. This systemic understanding of the EU substantive constitutional structure leads to repositioning labour rights *vis-a-vis* the traditionally fundamental economic freedoms. It allows for collective labour rights to be connected to the social normative underpinnings of the EU constitution, but also to the idea of widening democratic participatory structures, both prerequisites for the blossoming and legitimacy of a healthy basis upon which political constitutionalism can flourish.

However, we should always remember the dual character of labour rights, as serving both social and economic purposes. It tends to be the instinct of legislators, academics, and labour lawyers alike to put labour law under broad labels that highlight its social aspect. Indeed, the CFREU follows that trend by putting most of its labour law related rights under the 'Solidarity' title. Its social role notwithstanding, labour law also, and perhaps primarily, performs an inherently economic function in providing the basic framework for the functioning of the labour market, itself an integral cog in the economy machine. Furthermore, it concretises the means by which the economic freedom of workers might be exercised and enjoyed, with collective labour law attempting to level the field of power imbalance vis-a-vis employers. Thus, the economic function of labour law makes it also an inherent part of economic regulation.

At the EU constitutional level, the seemingly dubious interrelation between collective labour law and EU primary law can only be unravelled through looking into the Union's economic constitution and the perpetual inherent tensions

between the social and the economic aspects of EU constitutional law[1]. Due to their dual function, labour rights in general and collective labour law in particular cannot be considered to definitively fall only under the 'social' label, and thus necessarily at odds with the 'economic'. Moreover, given the integrated nature of every constitutional arrangement in the final analysis, constitutional socioeconomic rights need to be considered as inherently interconnected in harmony with all parts of the constitutional nexus. Thus, labour rights, more than merely social rights, are themselves also a part of the economic constitution, as a corollary of workers' economic freedoms and a precondition for their full enjoyment. As a consequence, an examination of the economic constitution of the Union is critical to unravel the position of labour rights within it and to assess any potential clashes with the social aspects of the EU constitution, perceived as antagonistic to the economic.

As presented in the first part of the thesis, this analysis follows the Fossum/Menendez categorisation of a constitution's various manifestations and divisions (formal/normative/material) and has adopted a respective reasoning as to the structure of the constitutionalisation of the EU and its identified formal constitution. Subsequently, it should be clarified from the start that the Treaties, encompassing primary law as the formal element of the EU constitution, are to be regarded as the sole vehicle of the Union's economic constitution. Constitutional norms remain relatively stable, regardless of contemporary political or economic development, and function as the normative anchor for relative secondary regulation. Soft law measures and policies of enhanced cooperation pertaining to the economy or complementary arrangements and treaties related predominantly to the EMU, such as the Treaty on Stability, Coordination and Governance in the

[1] This thesis approaches the EU constitution as a unitary and coherent concept. Thus we will refer to its 'economic' and 'social aspects' rather than adopt the terminology describing the various portions of primary law as the 'economic', 'social' (Joerges), 'political', 'juridical' and 'security' constitution (*Tuori, Karlo*, The Economic Constitution among European Constitutions, (2011) Legal Studies Research Paper Series 6 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1844285> last accessed 2/6/2019), which implies inherent fragmentation and tension. When nevertheless used, the terms 'economic' and 'social constitution' will refer to these respective aspects, not to supposedly at odds and potentially of different value comprehensive 'constitutions'.
Furthermore, we understand the term in the sense used by EU and constitutional law authorship and not as equivalent to the similar term employed by Hugo Sinzheimer. For the latter, where relevant, the term 'labour constitution' will be used. See *Dukes, Ruth* , The Labour Constitution: The enduring idea of labour law (OUP, Oxford 2014), 12-32.

Economic and Monetary Union (*TSCG*), though undoubtedly informing and influencing the application and specification of the EU economic constitution, are not regarded legally of constitutional value equal to TEU and TFEU provisions. These should be considered as falling under the broad label of 'economic governance' of the Union[2], which itself needs to be measured against the EU constitution.

Undoubtedly, a substantial part of the legal framework pertaining to the economy is occupied by the constitutional provisions and the respective mechanisms and structures built around and in pursuit of the economic and monetary union (EMU) objective. However, caution should be prescribed. The present overall substantive constitutional framework does not allow us to be overly simplistic or, reversely, overly generous as to the value and role of the EMU objective within the context of an entity that explicitly aspires to be more than a mere economic area. The EMU goal (Art. 3 (4) TEU) is now neither the sole nor the primary objective of the Union. The fact that, as a matter of architecture, the relevant provision as to the EMU follows the declaration of the broad, balanced socioeconomic Union objectives (Art. 3(5) TEU), while being subject to the respect and all-penetrating effect ascribed to the normative values of the EU (Art.2 TEU), indicates that the EMU is now just a piece of the puzzle. The EMU connotes a chosen structure and a strategic formal objective that are just one aspect of a broader, substantive whole. That broader whole also contains the general, substantive fundamental principles that define the market that the EMU is called to serve. These principles constitute the substantive economic constitution of the Union, which is, as we will see, that portion of the constitution that sets out the primary norms and structural guidelines as to the construction, maintenance and regulation of a specific formulation of a market economy and its institutions. This substantive constitutional blueprint is the backdrop and the basis of whatever EMU arrangement might be adopted. As such, it is the substantive aspect of the

[2] Inter alia, *Joerges, Christian*, 'The European Economic Constitution and its transformation through the financial crisis', SSRN paper, 2012 < http://ssrn.com/abstract=2155173> (last accessed 8/6/2019) (forthcoming in Patterson, Dennis/ Soderstn, Anna (eds.), A Companion to European Union Law and International Law (Wiley-Blackwell, Oxford 2014), 1-2 (*Joerges 2012*). cf. *Barnard, Catherine*, The Charter, The Court - and the Crisis, University of Cambridge Faculty of Law Research Paper No 18/2013 <http://ssrn.com/abstract=2306957> (last accessed 5/5/2019), 12.

economic constitution that delimits the extent of the effect and reach the functional part can have, in the form of the EMU and the respective 'economic governance' institutions and measures.

Indeed, it is the adoption of the position that considers the concepts of 'economic constitution' and 'economic governance' as identical[3] that has led to theoretical confusion before the face of the post crisis situation. Consequently, some were left with no option but to refer to the respective 'transformation' of the economic constitution[4]. What has actually transformed, though, is economic *governance*, that is the crisis induced policies that specify constitutional provisions, and not the basic framework and yardstick provided for by the economic constitution of the Union as such. However, it should be conceded that if constitutionalisation of the Union is to be seen as both a legal and a political process, these, largely crisis-provoked, measures and norms mould political constitutional perceptions and allegiances and flesh out the economic aspects of an analysis built around the concept of political constitutionalism.

Therefore, the 'economic constitution' needs to be distinguished conceptually from 'economic governance', and labour law positioned within the framework of the former while also considering the influence it sustains from the latter. In order to illustrate the distinction, in this part of the thesis the origins and substance of the notion and content of the EU economic constitution will we presented. Furthermore, the role of labour law and collective labour rights within the economic constitution and the specific objective of a social market economy will be examined. We will then turn to the effect of EMU structures and the potential impact of the economic governance arrangements introduced into the EU's economic constitution following the crisis. It will thus be shown that the latter, essentially constituting the economic *governance* response to the crisis, should always be subject to the former, which entails the fundamental normative choices that should shape and define any subsequent relevant specific institutional structure and mechanism.

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[3] *Semmelmann, Constanze*, The European Union's economic constitution under the Lisbon Treaty: soul-searching among lawyers shifts the focus to procedure (2010) ELRev 35(4), 516 (517).
[4] *Joerges 2012*, n.2.

II. The Union's normative economic constitution: Origins and content

1. The concept of the economic constitution: ordoliberal roots, neoliberal tarnish, Schmittian affinities

In general terms, the notion of economic constitution alludes to the legal norms that regulate the economic activities of public and private actors[5]. Functionally, however, the concept refers to a set of rules that allow for the construction or the unhindered optimal functioning[6] of a specific formulation of the market[7], and thus for the legal embedding of a specific economic system[8]. Hence, each specific formal variety of an economic constitution is ideologically connected[9] not merely to the liberal origins of the concept but to the specific underlying economic ideology and objectives that have led to the adoption of the respectively accommodating rules.

The relentless confines of a PhD thesis do not allow for a detailed analysis of the ideological, political and economic origins and essence of the concept of the economic constitution. It ought to be noted, however, that the very notion (*'Wirtschaftsverfassung'*) is rooted[10] in the German idea of ordoliberalism[11]. Arguably there is no single definitive form of ordoliberalism nor a respectively ultimate ordoliberal concept of the market[12]. However, at a minimum common denominator, ordoliberals advocated constraining the State within certain predetermined and stable economic parameters, allowing only for minimum

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[5] *Streit, Manfred/Mussler, Werner*, The Economic Constitution of the European Community: From Rome to Maastricht, (1994) Constit.Polit.Economy 5 (3), 319 (320).
[6] *Sauter, Wolf*. 'The Economic Constitution of the European Union'. (1998) Colum.J.Eur.L. 4, 27 (47)..
[7] ibid 29.
[8] *Streit/Mussler*, n.5, 320.
[9] *Sauter*, n.6, 47.
[10] ibid., 46; *Joerges, Christian*, What is left of the European Economic Constitution? A melancholic eulogy, [2005] ELRev, 461 (465-467) (*Joerges 2005*); *Sally, Razeen*. Classical liberalism and the international economic order (Routledge, London 1998), 106-111
[11] *Ptak, Ralf*: 'Neoliberalism in Germany: Revisiting the Ordoliberal Foundations of the Social Market Economy' in *Mirowski, Philip/Plehwe, Dieter* The Road from Mont Pèlerin:The making of the Neoliberal Thought Collective (Harvard University Press, Cambridge MA/London 2009),98 (108-112); *Bonefield, Werner*, Freedom and the Strong State: On German Ordoliberalism (2012) New Political Economy 17 (5), 633; Sauer, op.cit., 46; *Bonefield. Werner*, On the Strong Liberal State: Beyond Berghahn and Young (2013) New Political Economy 18 (5), 779 (780).
[12] *Streit, Manfred/Wohlgemuth, Michael*, 'The Market Economy and the State: Hayekian and Ordoliberal conceptions' in *Koslowski, Peter (ed.)* The Theory of Capitalism in the German Economic Tradition (Springer, Berlin 2000), 225 (226).

intervention[13]. What is seen to be holding the reins of the ultimately self-governing market is state-imposed, and state-protected, free competition[14] among individuals as self-reliant market actors[15] otherwise free from state coercion. Ordoliberalism shares ideological roots with laissez faire (classical) liberalism[16] in putting the free market at the core of its objectives and values[17], while being inherently, and from birth, at odds with both the Keynesian economic theory of intervention or the Marxist centrally planned communist economy[18]. However, it departs from classical liberalism[19] in two ways. First, ordoliberal theory does not consider the free market to be the only, or main, objective, thus having to prioritise its liberation from coercion and distortions. The market is seen as a means to an emancipatory end[20]. Thus, further, orodoliberalism maintains that the State is assigned the task of ensuring undistorted competition by establishing a specific legal framework for that purpose, imposing a specific preordained 'order' on the market[21]. Consequently, the market does not enjoy self-determination[22]. Rather, it is restrained by an order that has been predetermined by the economic constitution[23] as the manifestation[24] of a specific constitutional *choice*[25].

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[13] *Sauter*, n.6, 47.
[14] *Streit/Wohlgemuth*, n.12, 232.
[15] *ibid*, 230.
[16] The minimum tennets of which have accurately been summed by Feulner in the mantra '*free markets, limited governments and personal liberty under the rule of law*'in *Feulner, Edwin J.,* Intellectual Pilgrims: The Fiftieth Anniversary of the Mont Pelerin Society (Edwin J Feulner, Washington 1999), 2.
[17] However, Tribe suggests that this is the only tenet connecting ordoliberalism and classical liberalism. Beyond that, he remarks, ordoliberals could be better described as conservatives with beliefs strongly influenced by Christian faith and philosophy rather than liberalism. See *Tribe, Keith*, Ordoliberalism and the Social Market Economy (2007) The History of Economic Thought 49 (1), 155 (158).
[18] *Ptak*, n.11, 112; *Streit/Wohlgemuth*, op.cit., 247.
[19] *Streit/Wohlgemuth*, op.cit., 247.
[20] *Sally*, n. 10, 106.
[21] *Joerges 2012*, n.2, 2-3; *Joerges 2005*, n.10, 465-467; *Devroe, Wouter/van Cleynenbreuge, Pieter*, Observations on economic governance and the search for a European economic constitution in *Schiek/Liebert/Schneider (eds.)* European economic and social constitutionalism after the Treaty of Lisbon (CUP, Cambridge, 2011) 95 (97). See also *Sally*, n.10, 111.
[22] *Peukert, Helger* Walter Eucken (1891-1950) and the Historical School in *Koslowski*, n.12, 93 (120).
[23] See *Eucken, Walter*, 'Die Wirtschaftsordnung als Zentralbegriff des Wirtschaftsrechts' (1936) Mitteilungen des Jenaer Instituts für Wirtschaftsrecht 31, 3-14; *Böhm, Franz/ Eucken, Walter/ Grossmann-Dörth Hans* (eds), Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung' (Kohlhammer, Stuttgart-Berlin 1937); *Böhm, Franz/ Eucken, Walter/ Grossmann-Dörth Hans* Unsere Aufgabe in *Böhm/Eucken/ Grossmann-Dörth* (eds), n.23, s. VII-XXI (XX).
[24] Also see *Peukert*, op.cit, 121-122
[25] *Vanberg, Viktor*, The Freiburg School: Walter Eucken and Ordoliberalism, (2004) Walter Eucken Institut, Freiburg Discussion Papers on Constitutional Economics 04/11, 5.

It is interesting to note, though, that for the founders of ordoliberalism this 'order' is typically aimed at establishing and securing full competition in the market[26].

Böhm, for example, emphasised the need for structurally securing and maintaining undistorted performance-based competition[27] using private law[28] as a tool [29]. He saw what was dubbed a 'private law society' (*Privatrechtsgesellschaft*), one based on a legal system that guarantees individual economic rights and freedoms (such as property and freedom of contract) and autonomous self-regulation (arbitration)[30], as the prerequisite of free market economy[31]. Moreover, Böhm was the first to transplant constitutional language to the free market analysis[32] and talk of an economic constitution as a programmatic concept[33] to refer to a state's legally pre-determined economic order[34].

Effectively what ordoliberals ultimately aspire to is the de-politicalisation of the economy[35], or, perhaps more accurately, the de-democratisation[36] of economic policy. In essence it is their firm belief that by constraining the State, and thus political actors, within more or less rigid boundaries,shifts in the regulation and hence the functioning of the market that are populist, driven by specific interest groups[37], and potentially violent, can be avoided[38]. Thus, individuals are to be left free from political or ideological coercion to enjoy their liberties and develop their economic activities unhindered, an idea that strikes a chord with the basic

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[26] *Peukert,* n.22, 121-122.
[27] See *Böhm, Franz*, 'Wettbewerb und Monopolkampf' (Heymanns, Berlin 1933).
[28] *Böhm, Franz,* 'Private Law Society and Market Economy' (1966) (trans.) in *Koslowski,* n.12, 161-187.
It is in this piece that *Böhm* predated Margaret Thatcher by almost 20 years in proclaiming '*there is no such thing as a society* which, vis-a-vis the state, might be a body responsible for constitutionally protected rights and powers. Such rights are *only assigned to individual* members of society in so far they are legal entities', op.cit., 164.
[29] *Nörr, Kurt Wolfgang*, 'Franz Böhm and the Theory of the Private Law Society' *in Koslowski (ed.),* op cit., 148 (156).
[30] *Streit/Wohlgemuth,* n.12, 231.
[31] *Böhm 1966*, op.cit., 171.
[32] *Nörr,*op.cit., 157.
[33] *ibid* 160.
[34] *ibid*, 156. See also *Rüstow, Alexander*, 'Interessenpolitik oder Staatspolitik' (1932) Der Deutsche Volkswirt 7, 169-172.
[35] *Sauter,* n.6, 47-48; see also *Bonefield 2012,* Freedom and the Strong State, n.11, 641.
[36] *Peukert*, n.22, 101; *Ptak*, n.11, 111-112.
[37] *Peukert*, n.22, 101.
[38] *Joerges, Christian/Rödl, Florian* '"Social Market Economy" as Europe's Social Model?' in *Magnusson, Lars/Stråth, Bo* (eds) A European Social Citizenship? Preconditions for future policies form a Historical Perspective (P.I,E. Brussels 2004), 125 (130).

premises of classical liberalism. A collateral consequence of this idea would be for economic freedoms to be elevated in constitutional importance at least at an equal level to traditional civil and political rights, as a means to liberate economic activity from political coercion or the bonds of institutional (state) scrutiny.

Nevertheless, ordoliberals, averse as they are to the democratic political process, are not against a powerful state machinery as such[39]. However, they envisage it as a 'watchman'[40], enshrining and ensuring the pre-prescribed order and maintaining its crucial preconditions[41], rather than the core market actor with the power to manipulate and change the economic framework and dynamics according to the contemporary political climate[42].

We could discern a peculiar, yet understandable, kinship of the underlying undemocratic rationale of ordoliberalism with classic (laissez-faire) market liberalism[43] and Carl Schmitt's[44] ideas as to the political[45] and economic[46] aspects of a constitutional polity[47]. The basis of all three rationales lies in the perceived failings of the democratic political establishment[48]. Ordoliberal, classical liberal and Schmittian constitutional ideas essentially lead to the functional sidelining of democratic principles[49] and the diminution of the power granted to popular, legitimacy-dependent institutions.

The substantive similarity of ordoliberal '*ordo*' and Schmitt's '*concrete order*'[50] and '*stable authority*'[51] as the basis of regulatory predetermination lies in

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[39] *Bonefield 2012*, n. 11, 633-656.
[40] *Sauter*, n.6, 46.
[41] *Bonefield 2012*, op.cit., 637-638.
[42] *Goldschmidt, Nils*, Alfred Müller-Armack and Ludwig Erhard: Social Market Liberalism, (2004) Freiburg Discussion Papers on constitutional economics No. 04/12, 2.
[43] *Block, Fred*, Towards a New Understanding of Economic Modernity in *Joerges, Christian/Strath, Bo/Wagner, Peter* The Economy as Polity: The Political Constitution of Contemporary Capitalism (UCL London 2005), 1 (13).
[44] See *Kennedy, Ellen*, Constitutional Failure: Carl Schmitt in Weimar (Duke UP, Durham/London 2004), 18; *Gottfried, Paul Edward*, Carl Schmitt: Politics and Theory (Greenwood Press, Westport 1990), 29-32.
[45] See Schmitt, Carl, The Concept of the Political, (1st ed. 1932; George Schwab tr., 2nd ed. University of Chicago Press, Chicago 2007).
[46] On the similarity of Schmitt's economic ideas with those of some of the founders of ordoliberalism see Haselbach, Dieter, 'Franz Oppenheimer's Theory of Capitalism and of a Third Path' in *Koslowski (ed)*, n.12, 54 (66); also, *Cristi, Renato*, Carl Schmitt and authoritarian liberalism: Strong state, free economy (University of Wales Press, Cardiff 1998), 194 and the references therein.
[47] *Cristi*,, n.46, 176.
[48] *Ptak*, n.11, 111.
[49] *Sauter*, n.6, 48; cf *Ptak*, n.11, 111-112.
[50] *Cristi*, n.46, 159-166.

the marginalisation of meaningful democratic scrutiny[52]. For Schmitt democracy was not to be abolished in theory[53] or as a symbolic source of power[54], but would become authoritarian in practice[55], a pretext for a functionally authoritarian executive[56]; it would be 'relativised'[57]. The central '*concrete order'*, which, as Cristi has interpreted it[58], would amount to the rigid, stable, meta-normative pre-determined core of the polity[59], comprised of the 'ultimate fundamental norms'[60], would be beyond the reach of contemporary politics, democratic processes, and legal scrutiny. Applied in the field of the economy, this nexus of ideas of a '*stable authority*' operating within a 'concrete' order would translate in self-regulation devised by market actors themselves under the auspices of a powerful, yet minimally intrusive[61] central government, which would effectively safeguard the political neutrality of the predetermined free market order[62].

The idea does not seem to be too detached from the ordoliberal notion of a firmly predetermined strict framework for the development of the economic life and the function of the market. It also resonates with the ordoliberal concept of a qualitatively strong state tasked with ensuring and maintaining the competitive order[63]. The difference is that the power of predetermination is placed at the political level of a strong executive, rather than the legal positivist level of a rigid constitutional framework. As regards the maintenance and perpetuation of set market structures, where Schmitt places power at the feet of a powerful and minimally constrained executive, ordoliberals leave it to the unhindered forces of the market, a choice shared by neoclassical economists, as well. In fact, it is no

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[51] S*chmitt*, Carl, Legality and Legitimacy (1st ed. 1932; Jeffrey Seitzer tr., Duke UP, Durham NC 2004), 90.
[52] See inter alia *Schmitt, Carl*, The Crisis of Parliamentary Democracy (1st ed. 1923; *Kennedy, Ellen* tr. MIT Press Boston 1985); *Cristi*, n.46, 21 and 193; *Dyzenhaus, David*, Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar (OUP Oxford 1997), 80-81.
[53] See *Cristi*, n.46, 21.Contra, *Habermas, Jürgen*, Sovereignty and the Führerdemokratie, Times Literary Supplement (London, 26 September 1986) , 1053 (1054).
[54] *Cristi*, n.46, 15-16.
[55] ibid, 23.
[56] ibid, 15.
[57] *Gottfried*, n.44, 4.
[58] *Cristi*, n.46, 159-166.
[59] ibid, 159.
[60] ibid.
[61] *Kennedy*, n.44, 139; *Cristi*, n.46, 5
[62] See *Schmitt, Carl*, Strong State and Sound Economy: An Address to Business Leaders (1st ed. 1932; Renato Cristi tr.) in *Cristi*, n.46,212-232. See also *Cristi*, n.46,33.
[63] *Bonefield 2012*, n.11, 634.

coincidence that the ordoliberal idea of a technocratic grip on the market that minimises political intervention, hence democratic accountability, to what is seen by them as a self-correcting system of attainable equilibrium, appeals to Hayekian[64] and Chicago school neoliberals[65].

Neoliberalism of course is not a definitive or even entirely coherent[66] unitary ideology, but can be more accurately described as a composite[67] ideological[68] 'thought collective'[69], a school of philosophical, economic[70], political[71] and legal thought[72], rooted in the liberal tradition[73]. As a common denominator, though, and evoking ordoliberal rationales[74], Mirowski stresses that neoliberalism presupposes the creation of a specific order to accommodate the free flow of capital[75] and the (supposedly) self-calibrating capacities of the market[76]. Classical liberalism[77] understands free market as a natural rational state based on the unrestrained exercise of individual liberty (*'laissez-faire'*) that has been distorted by interventions and externalities, predominantly attributed to intrusive sovereign state power, which hence needs to be pulled back. Contrary to that idea, the

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[64] cf. *Streit, Manfred*, Economic Order, Private Law and Public Policy: The Freiburg School of Law and Economics in Perspective (1992) Journal of International and Theoretical Economics 148, 675.
[65] *Gill. Stephen* European governance and new constitutionalism: Economic and Monetary Union and alternatives to disciplinary Neoliberalism in Europe (1998) New Political Economy 3(1), 5 (9).
[66] cf. *Thorsten, Dag*, ' The neoliberal challenge: What is neoliberalism?' (2010) Contemporary Readings in Law and Social Justice 2, 188 (205-208); *Streit, Manfred*, '"Der Neoliberalismus – Ein fragwürdiges Ideensystem?' (2006) ORDO 57, 91-98.
[67] cf. *Hayek, Friedrich*, 'Opening Address to a Conference at Mont Pèlerin' in Studies in Philosophy, Politics and Economics (Simon & Schuster, New York 1967), 148 (150).
[68] *Peck, Jamie*, Geography and public policy: constructions of neoliberalism (2004) Prog.Hum.Geogr. 28, 392 (394).
[69] *Mirowski, Philip*, 'Postface: Defining Neoliberalism' in *Mirowski,/Plehwe* The Road from Mont Pèlerin, n.11, 417 (428-429 and 431).
[70] *Thorsten, Dag Einar/Lie, Amund* What is Neoliberalism? (2006) University of Oslo Paper, http://folk.uio.no/daget/neoliberalism.pdf (last accessed 30/6/2014), 15.
[71] *Harvey, David*, A brief history of neoliberalism (OUP Oxford 2005), 2. See also *Thorsten /Lie*, op.cit., 14-15; Thorsten (2010), op.cit.,203-205.
[72] Thus, as Steger and Roy remark, it manifests itself as an ideology, a mode of governance and a policy package, *Steger, Manfred/Roy, Ravi*, Neoliberalism: A very short introduction (OUP Oxford 2010), 11.
[73] Thorsen maintains that neoliberalism should be distinguished from both liberalism and 'economic liberalism' (referring to classical and neoclassical economics), *Thorsen 2010*, op.cit., 190.
[74] While also connecting with Schmitt's idea of a predetermined order comprised of a 'stable authority' operating within an equally stable regulatory framework (his 'concrete order'), as discussed above.
[75] *Mirowski*, n.69, 438.
[76] *Hayek, Friedrich*, 'Chapter 10: The Market Order or Catallaxy' in Law, Legislation and Liberty: A new statement of the liberal principles of justice and political economy, (Routledge, New York 1998; 1st full ed.1983), Vol. 2, 107-132; *Mirowski*, n.69, 439.
[77] See *Michel Foucault* in 1978 as quoted by *Mirowski*, n.69, 434.

market and society neoliberalism envisages need to be constructed[78] through planning and careful rearrangement and use of political[79] and legislative[80] power. Furthermore, like their ordoliberal counterparts, neoliberals are not against a strong state as such[81]. They are rather, in essence, against specific arrangements of the state, be it that of a quantitatively strong state[82] or of a democratically constrained[83] one. On both these points the similarities with ordoliberal and Schmittian themes on state and democracy become apparent.

State power is essential for neoliberals in providing the necessary societal regulation[84] (including, re-regulation and 'liberalisation' of the labour market, but also elevation of economic freedoms to the pinnacle of the normative scale) that will create and maintain the desired preconditions[85] for the exercise of unhindered (market) freedom in conditions of absolutely free competition. For neoliberals, in close analogy to ordoliberal beliefs[86], the very concept of freedom is utilitarian, economic and not necessarily equally distributed[87], identified with the freedom of an autonomous, rational market actor to participate and engage in the economic sphere[88]. Once all these necessary conditions, that in effect constitute a neoliberal '*ordo*', are in place, the role of the state is reduced to maintaining them and combating distortions to the market equilibrium caused by various externalities[89]. Among the factors producing 'distortive' effects we find labour regulation and labour participation or self-determination mechanisms.

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[78] *Mirowski*, n.69, 434-435. cf *Phillips-Fein, Kim* 'Business Conservatives and the Mont Pèlerin Society' in *Mirowski/Plehwe*, The Road to Mont Pèlerin, n.11, 280 (283) referring to the neoliberal vision to 'reconfigure' society.

[79] *Mitchell, Timothy*, 'How Neoliberalism makes its world: The urban property rights project in Peru' in *Mirowski/Plehwe*, n.11, 386-416 (386).

[80] Draft Statement of Aims [of the Mont Pèlerin Society), April 7, 1947, Point 5: '*The preservation of an effective competitive order* ***depends upon a proper legal and institutional framework*** *The existing framework* ***must be considerably modified*** *to make the operation of competition more efficient and beneficial*' (emphasis added), reproduced in *Mirowski/Plehwe*, op.cit., 23.

[81] *Mirowski*, n.69, 436.

[82] ibid.

[83] See *Hayek*, Law, Legislation and Liberty, n.76, Vol 3, 137-139, 150 (footnote 1), 151, and 194; *Buchanan, James*, 'Democracia limitada o ilimitada' (1982) Estudios Publicos 6, 37.

[84] See *Steger/Roy*, n.101,14.

[85] *Bonefield 2012*, n. 11, 634.

[86] ibid, 638..

[87] *Mirowski*, n.69, 438.

[88] See Draft Statement of Aims [of the Mont Pèlerin Society), April 7, 1947, op.cit, Point 2,

[89] See *Mirowski*, n.69, 436.

The prescribed neoliberal 'order' and the market equilibrium[90] that allegedly follows it are to be insulated from the all democratic structures and process that might put them at risk[91], including those that aim to democratise the market specifically, such as collective labour institutions. The optimum direction for the state to take and the elevation of neoliberal market society as the desired ideal are not to be dictated by the irrational[92] electorate but by qualified educated technocrats[93], better equipped to digest market information and neutrally direct the necessary course corrections.

Thus, from Schmittian state bureaucrats[94] we move to ordoliberal (undemocratic) state guidance interplaying with private sphere actors, to neoliberal technocrats and market forces. The common thread is the effective 'privatisation of politics'[95] and the de-democratisation of the market[96], which must be kept out of reach of democratic scrutiny and intervention. By implication, the transplantation of collective democratic processes into the market through collective labour law is inherently incompatible with the counter-democratic premise of both an ordoliberal and a neoliberal market economy.

1.1 The undemocratic market: effects of the Schmittian, ordoliberal and neoliberal ideas on the EU economic constitution

[90] cf. Cristi, n.46, 153.
[91] See *Buchanan*,n.83.
Buchanan, premised on the assertion of majoritarian democracy as unlimited, and thus 'totalitarian' (p. 37), effectively identified majoritarian with parliamentary democracy (p.39-40). Based on this premise, and following a neoliberal line of reasoning that relates to ordoliberalism's functional value of the legally prescribed 'order', he suggests: (trans.) ' *a political-governmental structure that is constitutionally limited to a well-defined array of actions – even if governmental decisions that are made within this array are not formed democratically – might be preferable than an open and unlimited (government) structure,decisions are made democratically by legislative-parliamentary majorities*' (p.44). Consequently, he concluded that his 'Public Choice Theory', encapsulating the essence of the neoliberal envisaged 'order', *demands* the imposition of limits on democracy (p.50).
[92] *Mirowski*, n.69, 436-437.
[93] Referring to the Chilean neoliberal project, see *Fischer, Karin*, The influence of neoliberals in Chile before, during and after Pinochet in *Mirowski,/Plehwe* The Road to Mont Pèlerin, above n. 11, 305 (306-307).
[94] Schmitt, Strong State and Sound Economy, n.62, 221-222.
[95] *Lösch, Bettina*, 'Die neoliberale Hegemonie als Gefahr für die Demokratie', in Butterwegge, Cristoph/ Lösch, Bettina/ Ptak, Ralf Kritik des Neoliberalismus 2. Verbesserte Auflage , 279
[96] See *Everson, Michelle*, 'The European Crisis of Economic Liberalism. Can Law Help?' in *Nanopoulos/Vergis*, The Crisis Behind The Eurocrisis (CUP, Cambridge 2019), 381 (382).

This decoupling of the economic from the democratically accountable political process highlights the fallacy of the assumption that a constitutional legal order can legitimately function, much less be born, on the basis of a fundamental normative arrangement that not only places economic rights at its pinnacle, but, moreover, elevates a particular form of economic policy to constitutional status and beyond the reach of democratic scrutiny. It is no coincidence that the European integration project, based precisely on this assumption for most of the Union's life, has failed to inspire the constitutional faith and popular civic allegiance, the prerequisite of a constituent demos, that would have democratically legitimised it. The assumption of a self-created polity based solely on a predetermined economic rationale, removing the 'economic' from the 'social' and, thus, ultimately, from democratic accountability itself, alludes to a governmental structure of a technocratic oligarchy.

Ordoliberal structures are by nature susceptible to functionally neoliberal norms and policies. Such norms and policies themselves lead to, if they do not presuppose[97], counter-democratic[98], authoritative overseeing of a market, thus seen as 'liberalised' from politics[99]. That is especially true in the clear absence of a pre-existence constitutive demos that would have 'formally' legitimised, albeit indirectly, an ordoliberal economic constitution. In this case the idea of a top-down constructed constitutional structure that side-lines democratic processes, or even pulls the core of the economic framework out of political deliberation and democratic scrutiny, is counterintuitive for the constitutionalisation process. It is, therefore, disheartening that the basic undemocratic DNA of Schmittian, ordoliberal and neoliberal ideas, which constitutes their fundamental connecting thread, had been transplanted in the original EU substructure, and, arguably, still dominates judicial and technocratic conceptions of the Union.

A purely ordoliberal economic-focused organisation might of course reach a point where it possesses some of the positivist attributes that could appear familiar to a legal constitutionalist. Such an organisation could attain a level of development where the formal, normative and material aspects of its primary legal

[97] See *Buchanan*,n.83.
[98] cf. Lösch, n.95, 221- 283 (221).
[99] *Fischer, Karin*, n.93, 325.

framework could be discerned. However, if focused entirely, or primarily, on rigid, predetermined economic values and ideals, any pure 'ordoliberally' structured transnational legal entity would lack those elements that could connect it to Raz's ingredient of 'common ideology' and to allegiance-weaving ideas that would be considered universal among its perceived citizens.

A normatively, hence substantively, prejudiced constitutional arrangement is incapable of mirroring the universality and balance of this minimum constitutive consensus. Therefore, civil, political and social values, objectives and rights should all be equally protected alongside the economic for a democratic constitutionalisation process to function and have the potential to bear fruits of legitimacy. To go back to the discussion of Schmitt's authoritarian ideas, it is no coincidence that he advocated a free 'sound' economy without the social considerations and welfare obligations that would come from a constitutionally enshrined social justice principle[100]. That one-sidedness may appeal to employers but cannot form the basis of a sound constitutional arrangement. Only through an amalgam of constitutive values, political, economic and social, can any legal construction, aspiring to be deemed ultimately a constitutional polity, ignite the perception of commonality that may lead to allegiance and thus the emergence of a demos where initially no such existed. Moreover, this perception of belonging to a common project is the prerequisite of democratic participation and hence the basis for any analysis of the constitutional polity as a political, rather than a merely legal, phenomenon.

It is also only through a thus weaved constitutional nexus, where the economic is at balance with the political and the social, that the dual nature of labour law can be accommodated. Especially collective labour law, inherently built upon the idea of participation and democratisation of labour market processes, can only in such a balanced environment be reconciled with economic rights and objectives. Otherwise, its collective nature would be deemed at odds with the individualistic focus of classical liberal and neoliberal economics. At best, collective labour processes might be structurally connected to Schmitt's intermediate concept of a

[100] *Sceurman, William*, The Unholy Alliance of Carl Schmitt and Friedrich A. Hayek' in Proceedings of the 17th IVR World Congress, Vol. VI (CLUEB Bologna 1995), 119 (122).

private-public sphere, the autonomous self-regulatory but still political sphere comprised of private market actors. Substantively, however, under a pure ordoliberal or classical liberal reasoning labour law, and especially collective labour rights, would most probably be unavoidably perceived as regulatory instruments that are nothing but obstacles to free competition. That is precisely how the treatment of collective labour rights can be explained under the market access rationale of *Viking/Laval,* which tapped into the economic focused history and ordoliberal roots of EU primary law. That is also the dangerous rationale lurking[101] under the equally ordoliberal structure that is the EMU and contemporary EU economic governance.

Nevertheless, the question is whether the EU substantive constitution still adheres to this one-sided structure of an 'order' that favours economic values and freedoms above all else. The answer to this question also holds the key to the Union's legitimacy as a constitutional polity capable of producing a demos. It is also critical as to the role of collective labour law in the overall architecture.

2. The current EU normative economic constitution, after the Treaty of Lisbon: neutral, balanced and structurally pluralist

It might be that the Union's primary law framework carries the ordoliberal DNA of its earlier variations[102], but that does not mean it has not shown signs of moving away from its monistic economocentric character to evolve into a more inclusive normative framework. It has been suggested that functionally and structurally the European project, in its early conception, was remarkably close to the pure ordoliberal ideal[103]of merely providing a framework that would ensure a functional yet ultimately self-organised market based on undistorted

[101] *Berghahn, Volker/Young, Brigitte* Reflections on Werner Bonefield's 'Freedom and the Strong State: On German Ordoliberalism' and the continuing importance of the ideas of ordoliberalism to understand Germany's (contested) role in resolving the Eurozone Crisis (2013) New Political Economy 18 (5), 768 (771).
[102] Inter alia see *Mestmäcker, Ernst-Joachim* (ed), Wirtschaft und Verfassung in der Europäischen Union (Nomos, Baden-Baden 2003).
[103] Indicatively, see *Blanke*, n. I. 243, 371; *Streit/Mussler*, n.5, 330-333; *Maduro, Miguel Poiares*, 'Reforming the Market or the State? Article 30 and the European Constitution: Economic Reform and Political Rights' (1997) ELJ 3, 55 (61); Sauter, n.6., 49-50 (fn.78).

competition[104]. To that end, arguably the EU provided the ideal vehicle for the imposition of an order at a level beyond national politics and thus beyond the need for legitimation of every action[105], effecting the necessary[106] discipline and stability. As such, it also accommodated an ideological systemic approach of the market that functionally aligns with a Hayekian 'spontaneous order',[107] driven by the self-regulating capacities[108] (the 'hidden hand'[109]) of the market, that would emerge once the necessary conditions and framework were in place.

Despite those strands of DNA of the European project that are defined by the narrow focus on a specific ideological and economic model, it would be a stretch to suggest that the EU had always been, even originally, an absolutely ordoliberal project with no regard for social considerations,[110] or that there had not been efforts to infuse it with such during its evolution.[111] [112] This movement progressed into the Lisbon Treaty, which, restructuring the entire constitutional architecture, amended the foundations of the Union's economic constitution, definitively distancing it from its ordoliberal roots towards a more balanced normative paradigm.. The architecture is now reminiscent of the familiar inverted pyramid of western liberal constitutional documents: at its basis lie values and objectives

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[104] *Streit/Mussler*, n.5, 330; *Tuori* 2011, n.1, 10.
[105] *Joerges 2005*, n. 10,471; *Joerges/Rödl*, n. 38, 131.
[106] *Devroe/van Cleynenbreuge* n.21, 98; *Chalmers, Damian/Davies, Gareth/Monti, Giorgio*, European Union Law (2nd ed.; CUP, Cambridge 2010), 917-918.
[107] See inter alia *Boettke, Peter*, The Theory of Spontaneous Order and Cultural Evolution in the Social Theory of F.A. Hayek (1990) Cultural Dynamics 3 (1), 61-83.
[108] Rapport des Chefs de Delegation aux Ministres des Affaires Etrangeres (*'Spaak Report'*), Brussels 21 April 1956 (http://aei.pitt.edu/996/1/Spaak_report_french.pdf last accessed 10/6/2014), 65. See also *Streit/Mussler*, n.5, 321-322.
[109] *Countouris, Nicola/Freedland, Mark*, The myths and realities of 'Social Europe' in *Countouris, Nicola/ Freedland, Mark*, Resocialising Europe in a time of Crisis (CUP Cambridge 2013), 1 (2). See also *Malloy, Robin Paul* Invisible Hand or Sleight of Hand - Adam Smith, Richard Posner and the Philosophy of Law and Economics (1987-1988) U.Kan.L.Rev. 36, 209 (211; 224-226).
[110] See 'Social Aspects of European Economic Co-operation' (*Ohlin Report*) (1956) Int'l Lab.Rev. 74, 99.
See also *Sauter*, n.6, 51 and 57; *Deakin, Simon*, In Search of the Social Market Economy in *Bruun, Niklas/Lörcher, Klaus/Schömann, Isabelle (eds.)* The Lisbon Treaty and Social Europe (Hart, Oxford 2012), 19 (22-23).
[111] Commission White Paper, 'Completing the Internal Market', 28-29 June 1985, COM(85) 310 final; Single European Act (SEA) OJ L 169 of 29.6.1987.
[112] *Kenner, Jeff*, EU Employment Law: From Rome to Amsterdam and Beyond (Hart, Oxford 2003), 23-215; *Sandholtz, Wayne/Zysman*, John, 1992: Recasting the European Bargain (1989) World Politics 42 (1), 95; *Marks, Gary/Hooghe, Liesbet/Blank, Kermit*, European integration from the 1980s: State-centric v. multi-level governance (1996) JCMS 34 (3), 341; *Bermann George A.*, The Single European Act: A New Constitution for the Community (1988-89) Colum.J.Transnat'l.L. 27(3), 529; *Hooghe, Liesbet/Marks, Gary*, The making of a polity: the struggle over European Integration in *Kitschelt, Herbert/Lange, Peter/ Marks, Gary/ Stephens, John* (eds) Continuity and Change in Contemporary Capitalism (CUP Cambridge 1999), 70 (79).

deemed as fundamental, from which all subsequent provisions stem. Functionally, these normative foundations provide the anchor and compass for the interpretation of the whole of EU law. Each of them is intrinsically connected to the respective relative parts of the material EU constitution that need to be respectively consistently interpreted and applied so as not to compromise or undermine the Union's fundamental values and goals. This weaving together of the normative and material constitutions is at the core of the idea of the EU's substantive constitutionalisation. It is within this context that collective labour rights should be placed and assessed, as an integral part of an emerging social market economy. Approaches that are linked to the previous, one-sided and ideologically burdened concept of the market are not only normatively out of place; they are in fact inconsistent with even simple positivist analysis of contemporary primary law.

2.1. Rearranged values: Competition leaves the spotlight

The reference to free and undistorted competition has been removed from the Union's principal values and objectives[113]. Free competition, the cornerstone of any ordoliberal competition, is no longer among the values enshrined in the normative part of the EU constitution. Relevant reference has been moved to the annexed Protocol 27, which effectively amounts to constitutional structural exile. So far the Court seems to disagree. In *TeliaSonera* it adopted another of its imaginative interpretations, reading free competition into the very notion of the internal market, in order to bring back the old normative value of the principle through the back door[114]. Arguably, this amounts to clinging onto the previous formulations of the Treaties, if not the ordoliberal ideal itself. However, the Court cannot go on ignoring the obvious change in the language and structure of primary law, without putting constitutional coherence and consistency at risk. Free competition is no longer included in the marquee hanging above the EU constitution's gates that is its nexus of normative values and objectives. The change is not cosmetic. In a systematic overview of the EU constitutional pyramid

[113] cf *Blanke*, n. I. 243, 378-379
[114] See C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527, paras. 20-21.

it implies that the principle of undistorted competition can no longer be counted among the normative bases that act as an interpretative lens for the rest of the constitution, regardless of the binding nature of Protocol 27 as part of primary law. Undistorted competition is definitely no longer the paramount constitutional objective that pulls all other considerations and the exercise of freedoms and rights into its gravitational field[115], justifying bending them to accommodate it.

The wording of the Protocol itself gives the impression that explicitly identifying '*ensuring that competition is not distorted*' as an inherent systemic element of the internal market came as an afterthought. It is as if the drafters realised ex post that they had neglected to define the internal market in such terms in the main body of the Treaty. However, even if the removal of free competition was intended as a symbolic change without real consideration of the potential implications the structural change would effect[116] in interpreting the normative foundations of the EU, in fact it resulted in formally balancing the constitutional framework. While the Protocol is deemed to be of equal legal value to the Treaties[117] and certain European leaders have publicly proclaimed that the significance of undistorted competition remains unscathed[118], the fact is that, at the very least, the constitutional architecture of the Union has been substantively amended[119]. Competition may remain, at best, one of the principles related to the internal market, but it is to be construed under the light of the rearranged normative foundations of the Union, as systematic substantive constitutional review requires.

Consistent systematic interpretation[120] is a minimum precondition of legal certainty[121], which is integral to any legal order based on the rule of law[122]. It is

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[115] cf *Scharpf, Fritz*, 'Negative and Positive Integration in the Political Economy of European Welfare States' in *Marks/ Scarpf/ Schmitter/ Streeck*, Governance in the European Union, (Sage, London, 1996), 15 (18).
[116] *Schmitter, Philippe*, 'Examining the present Euro-Polity with the help of past theories' in *Marks/ Scarpf/ Schmitter/ Streeck*, Governance in the European Union, (Sage, London, 1996), 1-14 (5).
[117] *Semmelmann*, n.3, 522.
[118] *EurActiv*, 'Brussels plays down EU Treaty competition fears' (EurActiv.com 27/6/2007) http://www.euractiv.com/competition/brussels-plays-eu-treaty-competition-fears/article-164974 (accessed 8/6/2014).
[119] For expressed reservations that disregard the value of the change, see *Semmelmann*, n.3, 522;524. *Piris*, The Lisbon Treaty, n.I.110, 74, 308-309.
[120] For the principle of consistency, see inter alia, *Besson, Samantha*, From European integration to European integrity: Should European Law speak with just one voice? (2004) ELJ 10 (3), 257; *Herlin-Karnell, Ester/Konstantinides, Theodore*, 'The Rise and Expressions of Consistency in EU Law: Legal

indispensable for any framework that aspires to be perceived as a unitary[123] coherent legal order rather than as a loose, undisciplined set of rules which would be incapable to command allegiance[124]. Consistency grounds diverse rules to a normative anchor[125] and puts them to the service of an overarching common objective: the regulation of social and institutional conduct within a specific organisational and regulatory context. Especially in the context of the ever complex, pluralist, multilevel framework of the EU, consistency is not only crucial to maintain the unity and promote the efficiency[126] of EU law. It is furthermore critical if the Union is to present itself as a legitimate constitutional legal order[127], a coherent, constitutionally disciplined polity of values[128], rather than a functionalist intergovernmental nexus grounded on political opportunism.

Interestingly, therefore, if any coherent interpretation of EU primary law as a systematic constitutional framework is to be attempted, the substance of the term 'competition' needs to be re-envisaged so as to be in line with the various social values and goals of the EU constitution. That is precisely what the obligation of consistent and coherent interpretation and application of primary law provisions (Art. 7 TFEU and 13 TFEU) prescribes, so as to delimit the substance of the Union's powers[129] and the limits of its intervention capability[130].

What could emerge from a socially oriented redefinition of the very concept of competition as a constitutional objective would be the guiding principle for a 'social competition' among Member States in the fields where primary competence is left to the national level, such as labour regulation. Such a 'social competition' would not only allow for diversity of labour law systems but would aspire to the levelling up of standards of social protection, most notably as to labour standards and the enjoyment of collective labour rights. Consequently, the

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and Strategic Implications for European Integration' in *Barnard, Catherine/Albors-Llorens Albertina, Gehring Markus/Schutze Robert*, Cambridge Yearbook of European Legal Studies, Vol 15 2012-2013, 139.

[121] *Karnell/Konstantinides,* op.cit., 143.

[122] ibid, 142.

[123] ibid, with references to Dworkin's 'single vision of justice'.

[124] *Besson*, n.120, 261.

[125] *Karnell/Konstantinides,* n.18, 142-143.

[126] ibid, 143-144.

[127] *Besson*, n.120, 260.

[128] ibid, 280.

[129] *Karnell/Konstantinides,* op.cit., 145.

[130] ibid.

established understanding of what constitutes a ‘distortion’ would be reversed: distortions to this kind of competition would now stem from economic and bargaining power imbalances; effective labour protection would be no longer a ‘distortion’ but a remedy.

It is also critical to position the concept and function of competition within the now prescribed ‘social market economy’. As will be discussed below, this term denotes a conciliation and fusion of social and economic interests, considerations, and objectives. Economic mechanisms, including competition or the labour market, are not ends in themselves, but means to achieving the end of creating a socially cohesive constitutional community, with people as members of a whole, rather than as carriers of individualistic interests, at its centre.

In this context, given transnational free movement guaranteed by the Treaties, EU citizens can also be considered rational *social* actors – potential ‘buyers’ of protective social regulation that advances their quality of life - as much as potential buyers of services and goods. In that context, labour regulation, the exercise of labour rights and collective autonomy institutions and mechanisms should not be approached as restrictions to economic competition. They ought to be regarded as one of the cogs of the decentralised and competing national manifestations of the centrally promoted social market economy. In a reversal of the Court’s market access logic as regards labour rights, labour law systems and social protection mechanisms could thus constitute factors that would make a national social market ‘more appealing’ for people as well, than just for businesses. Henceforth, a radically different rationale to the contemporary predominant neoclassical economic could emerge, balancing economic growth with social cohesion and quality of life. That balanced revision of the concept of competition could prove to be the long elusive ‘European model’.

In any case, free competition is now to be treated as itself subject to the Union’s rearranged normative and substantive constitution that incorporates a more balanced conception of the internal market and the integration project at large. This development firmly moves the EU substantive economic constitution away from its ordoliberal origins or the constitutional entrenchment of neoclassical and neoliberal ideas. It therefore provides a more neutral canvas that, one the one

hand, allows for a re-conception of the 'European social model'[131] and how it fits within the internal market structure while, on the other, welcomes political processes and the participation of various actors at different levels, including the various levels of industrial and labour relations, without this running the risk of being considered as distorting intervention in the supposed market competition equilibrium.

2.2. A shift to include non-economic guiding principles: Dignity and solidarity

We should also recall that in this reshuffled normative basis of the EU order, market accommodating norms are infused with complementary social values and objectives. The Union's values have been expanded to include ideas and principles that move the EU beyond a narrow (and singular) economic focus point and closer to the paradigm of a western liberal constitutional polity. This fundamental normative framework now includes respect for human dignity, as the primary lens through which everything is to be assessed, as well as social collective values such as solidarity (Art.2 TEU).

2.2.1 Dignity as a normative anchor

Dignity, a normative novelty introduced by the Treaty of Lisbon in EU primary law, features prominently. Article 2 TEU regards dignity as one of the indivisible[132] values cited as basic integral elements of the Union's normative constitution upon which the EU has been founded. It is in fact placed first within that group of values : '*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*'. The prominent position of dignity among the fundamental values is reflected by its place within the material constitution, as manifested in the Charter of Fundamental Rights. Not only does the Charter open with the affirmation of the prescribed value of dignity,

[131] See *Bronzini, Giuseppe*, The European Social Model and the Constitutional Treaty of the European Union in *Joerges/Strath/Wagner*, n.26, 183 (184-185).
[132] See Preamble of the CFREU.

in Article 1 ('*Human dignity is inviolable. It must be respected and protected*')[133], but it dedicates the full first chapter (entitled 'Dignity') to elaborating upon rights and norms that are seen as inherent in the concept of dignity and critical for its effective respect. Constitutional architecture is not to be ignored as only of formal or cosmetic value, as we have already seen. The positioning of dignity at the very start of the Charter designates the significance ascribed to the right[134] but furthermore sets the tone as to how that right affects the EU legal order's perception of all fundamental rights and freedoms.

In that respect it is interesting to note that, within the systematic architecture of the Charter, the right to life (Art.2 CFREU) is discussed within the 'Dignity' chapter, and is essentially viewed as corollary to dignity. In traditional human rights texts, the right to life and dignity appear substantively and conceptually disconnected, if they even appear together, and the emphasis is given to the right to life. The prominent European example would be the European Convention of Human Rights, which enshrines the right to life in Art. 2 but does not contain any reference to dignity. Eventually, dignity had to be read in the text through interpretation[135], initially leading to the idea of a perceived hierarchy, if not antagonism, between the two values of dignity and life[136]. However, the Charter of Fundamental Rights is innovative in presenting a functional vision of dignity that, in return, results in a qualitative conception of the right to life. Thus, what appears

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[133] See *Kresal, Barbara*, 'Article 1-Human Dignity' in *Dorssemont, Filip/Lörcher, Klaus/Clauwaert, Stefan/Schmitt, Melanie*, The Charter of Fundamental Rights of the European Union and the Employment Relation (Hart, Oxford 2019), 191.

[134] Among Member States, dignity holds a prominent position similar to that reserved for it in the Charter in the constitutional documents drafted right after the states they belonged to emerged from autocratic regimes or dictatorships. This has been suggested to symbolically mark a new beginning (see *Dupre, Catherine*, Unlocking human dignity: towards a theory for the 21st century, [2009] E.H.R.L.R. 190 (204)) or the realisation of the value of dignity, following experience of autocratic rule (see *McCrudden, Christopher*, Human Dignity and Judicial Interpretation of Human Rights, (2008) EJIL 19(4), 655 (673).
Some of the most prominent examples are the German, Greek, Spanish and Portuguese constitutions. For instance, the German Grundgesetz (*Basic Law*), opens with 'inviolable' dignity as the starting point of the constitution (Art.1) and the source from which constitutional human rights flow (Art.2). Similarly, Art.1 of the Portuguese Constitution denotes dignity as the very basis of the Portuguese republic. For the Greek constitution, Art.2 stipulates that the '*respect and protection of the value of the human being*' are the primary obligations of the State, a provision that identifies dignity (αξιοπρέπεια) with the value of the human being (αξία του ανθρώπου).

[135] *Tyrer v United Kingdom*, 2 EHRR 1, para. 33. See, more recently, *Goodwin v. United Kingdom*, 35 EHRR (2002) 447, paras 90-91.

[136] The ECtHR has since affirmed that respect for dignity and human freedom constitute the essence of all Convention rights. See *Pretty v. United Kingdom*, 24 EHRR (1997) 423, para. 65.

to be protected and promoted, arguably, is not merely the right to life as such, but the right to life with dignity[137].

This interpretation, that presents the idea of a systemic, holistic right to dignified life, is corroborated by the reference to dignity in subsequent, specific provisions. Article 25 CFREU on the rights to elderly refers to the right '*to lead a life of dignity and independence*' which is then directly linked to the participation '*in social and cultural life*'. It appears that this Article constitutes an affirmation of the general holistic right as introduced in Title I of the Charter. Furthermore, this idea is certainly present in Art.31 CFREU as regards work and worker rights, where dignity is cited as one of the values that working conditions need to ensure.

It is therefore argued that what this holistic interpretation entails is moving dignity beyond the confines of the individual and her 'isolated' autonomy. It allows for a conception of the right to life that is integrated with the social aspects of life and the interconnectivity of the individual to others and society at large[138]. This is a conception that breaks the individualistic confines of the traditional liberal philosophy of rights, with its focus on the individual and the erection of walls around her to protect the private sphere from unwarranted interventions, primarily by coercive state mechanisms but also from other individuals. The individualistic image of man in isolation, fending off attacks and making his way, is strongly connected to the notion of the autonomous individual as a free actor in a competitive market economy, solely pursuing self-centred goals *against* others, notwithstanding the positive sum outcomes that may arise from contracting in such a nevertheless antagonistic context. This notion lies at the very heart of every economic thought school that sprung out of classical liberalism, including classical economics, ordoliberalism, and neoliberalism. Pushed to the extreme, this idea of a competitive market does not come far from revealing a conception of the other as the 'enemy'. It would sound appealing to Schmitt and his idea of self-

[137] Notice the similarities with the Spanish constitution, the Preamble of which, among the objectives, refers to '*ensuring a dignified quality of life*'. The Belgian Constitution (Art.23(1)) also makes reference to the right to lead a life *'in conformity with human dignity'*.

[138] See, for instance, the treatment of dignity in the Portuguese constitution, in which it is connected to '*the pursuit of a free, just and solidary society'*. Art. 23(2) and (3) allude to a similar interconnected conception of dignity.
cf. *Kommers, Donald,* The Constitutional Jurisprudence of the Federal Republic of Germany (Duke University Press 2nd ed, 1997), 307-308; BVerfG judgment of 15 February 2006 *(Aviation Security Act Case),* 1 BvR 357/05.

preservation of the nation, as a projection of the individual at the international level, by reference and against to the 'other'[139].

The comprehensive interpretation that endows dignity as a legal concept with broader substance in not self-evident. There is no absolute consensus across jurisdictions on the definition of dignity as a legal term[140], on its nature (as Dupre wonders, 'is it a right, a value or a principle?'[141]) or even as regards the concept's legal function[142]. The term itself carries the burdens and virtues of various historical, philosophical, and ethical traditions, tapping into religion and politics[143]. It is also usually tuned into the cultural tradition and history of the particular state or regional context where it has been legally deployed[144]. Before the adoption of a positive, EU specific, manifestation of dignity in the Charter, when dignity was juridically recognised and applied as a general principle of Union law[145], the Court of Justice had shown respect for the national variations of the value, as they appeared in national constitutional contexts[146]. The ambiguity as to the meaning of dignity has made it popular in international law as a symbolic term upon which political and legal consensus can easily be reached, precisely because it accommodates all the diverse ideas of the concept[147]. The universal minimum consensus prescribes to dignity the value ascribed to every human being and to the respect this value commands of others[148].

A holistic, systematic understanding of the notion of dignity fits better with its function as a right. It also matches the manner dignity has been deployed, as an interpretative principle, in human rights theory, criss-crossing theoretical divisions and underpinning all various categories of rights[149]. Connected with the idea of the

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[139] *Schmitt, Carl*, The concept of the political (George Schwab tr., University of Chicago Press, Chicago 1996).
[140] *Rao, Neomi*, Three concepts of dignity in constitutional law, (2011) Notre Dame L.Rev. 86, 183 (185); *Dupre*, n.134, 192.
[141] *Dupre*, n. 134, 202. See also *McCrudden*, n.132, 675.
[142] *McCrudden*, n.134, 689-705; 710-722.
[143] ibid, 656-663.
[144] ibid, 675; *Lord Hoffmann*, 'Human Rights and the House of Lords', (1999) MLR 62 (2), 159 (165).
[145] See inter alia, C-303/06, Coleman v Law and Law [2008] ECR I-05603; C-105/93 Maria Pupino, [2005] ECR I-05285; C-308/89 di Leo; [1990] ECR I-04185; C-13/94 P v S [1996] ECR I-02143.
[146] See C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, (2004) ECR, I-9609.
[147] ibid, 678. See also *Carozza, Paolo*, Human Dignity and Judicial Interpretation of Human Rights: A reply (2008) EJIL 19(5), 931 (932-933).
[148] ibid, 934-935. cf. *McCrudden*, n.134, 679.
[149] *Dupre*, n. 134, 202.

autonomy and liberty of the individual, it resonates with the liberal tradition[150], out of which civil and political rights arose. Life in dignity presupposes the freedom of the individual to sustain herself and achieve her potential. Hence, dignity is also the basis of economic rights[151], such as the right to work or to adequate, 'fair' remuneration. However, dignity goes beyond merely being a guardian of autonomy[152]. As a value and interpretative principle it underpins third generation rights, as it evokes a certain quality in life that cannot be achieved but through dependence from, and interaction and engagement with, a variety of activities or requirements. Therefore, dignity is the value[153] that penetrates all other rights and values, but also a principle guiding their interpretation[154]. Furthermore, it is itself expressing a right to a dignified life, the quality of which is inherently and indivisibly connected with the enjoyment of the full spectrum of rights and freedoms and in a symbiotic relationship with the interests of others and the community as a whole. In his vision of a cosmopolitan Europe as a transnational constitutional legal polity, Habermas considers dignity to be the connecting thread that keeps the structure together[155].

If all rights are joined by the thread of dignity then they cannot be a priori assumed to be antithetical and at odds with each other. The conciliation prescribed by dignity as the fundamental interpretative principle is about building bridges, not erecting walls around an individualistic notion of the private sphere. It entails the careful, without prejudice, consideration of all aspects and functions of the conflicting interests, taking into account their individualistic function, but also their broader systemic role. In effect, this reasoning could enhance the classical liberal balancing exercise. Instead of 'balancing' that seeks to resolve the clash between conflicting individualistic absolutes in favour of one, we would have a

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[150] See, for example, *Petersmann, Ernst-Ulrich*, 'Human Rights and International Trade Law:Defining and Connecting the Two Fields', *in Abbot, Frederick/Kaufmann, Christine/Cottier, Thomas (eds)*, International Trade and Human Rights: Foundations and Conceptual Issues: World Trade Forum v.5 (University of Michigan Press 2006), 29ff.

[151] See *Petersmann, Ernst-Ulrich*, Human Rights, International Economic Law and Constitutional Justice (2008) EJIL 19(4) 769. cf. *Howse, Nelson*, Human Rights, International Economic Law and Constitutional Justice: AReply (2008) EJIL 19(5), 945, harshly criticising Petersmann's traditional liberal approach.

[152] *Dupre*, n.134, 193.

[153] *McCrudden*,n.134, 681.

[154] ibid.

[155] See *Habermas, Jürgen*, 'The concept of Human Dignity and the realistic utopia of Human Rights' in *Habermas, Jürgen* The Crisis of the European Union: A response (Polity Cambridge 2012), 71-100.

more considerate systemic approach; a 'balancing' of all factors, individual, social and systemic.

It appears that the holistic conception of dignity and the system of fundamental rights is what has been adopted for the Charter. We should not overlook that the Preamble of the Charter recites '*human dignity, freedom, equality and solidarity*' as the '***indivisible*** *universal values*' (emphasis added) upon which the Union is founded. This idea of indivisibility under the auspices of dignity reflects the most modern and evolved understanding of the function of human rights. Furthermore, it is a manifestation of the overall balance that is sought for by the post-Lisbon substantive constitution of the EU between the social and the economic so as to build a society with people, not merely economic interests, at its centre[156]. As regards the economic constitution, this reading of dignity complements the notion of a social market economy and the understanding of labour rights as an integral part of the broader system rather than an obstacle to the Union's objectives.

The principle of dignity, as a guiding interpretative lens, calls for a respective reassessment of economic rights and freedoms. As regards labour rights, in particular, this entails ensuring workers' dignity by providing for appropriately humane minimum labour standards and working conditions, Moreover, it calls for the protection of the right to work as a manifestation of workers' economic freedom[157] and as their primary means of subsistence, hence as a precondition for the full enjoyment of a dignified private life. Such an interpretation supports the view that the market and economic freedoms are not an end in themselves, capable of producing individual and social prosperity only as a consequence of their successful realisation and functioning. Rather, they constitute the means that provide the minimum preconditions based on which workers can develop as individuals (alluding to what Deakin terms 'human developmental' goals[158]), explore and fulfil their potential (that is, the full range of their 'choice of

[156] *Jones, Jackie*, Human Dignity in the EU Charter of Fundamental Rights and its interpretation before the European Court of Justice (2012) Liverpool Law Rev. (33), 281 (299;283).
[157] *Supiot, Alain*, Beyond Employment. Changes in Work and the Future of Labour Law in Europe (OUP, Oxford 2001), 26.
[158] *Deakin 2012*, n.110, 36-42.

alternative functionings'[159]), which they should be able to explore free from coercion (connecting to the idea of Sen's 'capabilities'[160]) and participate in the economic life through their labour[161].

2.2.2 Solidarity as a normative principle

In the same vein, solidarity[162] (Art.2 TEU) can be understood as entailing different levels of substantive obligations and effects. On the one extreme of this conceptual spectrum, solidarity can be construed as an abstract social cohesion requirement. On the other extreme, which nevertheless takes into account the full nexus of the substantive constitution, it could even be further understood as an endorsement of redistributive policies. In fact, the very notion of solidarity has often been identified with the idea of redistributive justice and the capacity of the EU to exercise it[163]. As such, solidarity can be construed functionally, depending on the field it is being deployed. For example, labour protection and labour regulations are seen by Floris de Witte as elements of 'market solidarity', operating in support of market actors who partake in a particular market environment[164]. 'Communitarian solidarity'[165], on the other hand, may refer to extra-market, social welfare support mechanisms to which EU citizens may be entitled access to by virtue of their citizenship status. However, identifying solidarity with its functional institutional manifestation, or with the notion of

[159] *Browne, Jude/Deakin, Simon/Wilkinson, Frank*, 'Capabilities, Social Rights and European market integration' in *Salais, Robert/Villeneuve, Robert (eds)* Europe and the Politics of Capabilities (CUP Cambridge 2004), 205 (210).
[160] See *Browne/Deakin/Wilkinson*, ibid; *Deakin, Simon/Supiot, Alain* (eds) Capacitas : contract law and the institutional preconditions of a market economy (Hart Oxford 2009).
[161] An idea that is at the heart of the right to work as developed under the Greek Labour Law Theory, based on approaching it as of dual nature: as an ad hoc social right (Art. 22 para. 1 of the Greek Constitution) but also as a manifestation of basic economic freedom, itself viewed as an integral part of the freedom to personal development (Art. 5 para.1 of the Greek Constitution). See (in Greek) Ol.StE (Council of State, Grand Chambers) 4036/1979. To Syntagma 1980, 156; *Zerdelis, Dimitris*, Labour Law Vol.I (in Greek), (Ant.Sakkoulas Athens 2006), 106-115; *Zerdelis, Dimitris*, Labour Law Handbook:Individual Employment Relations (6th ed, Sakkoulas, Athens-Thessaloniki 2017), 80-87.
[162] *Dorssemont, Filip*, 'Values and Objectives' in *Bruun/Lörcher/Schömann*, n.110, 45 (48).
[163] *de Witte, Floris*, Transnational Solidarity and the Mediation of conflicts of Justice in Europe (2012) 18(5), 694 (697).
[164] ibid, 705.
[165] ibid, 706-707.

social rights, due to the label of Title IV in the Charter, as the UK apparently maintains[166], would be too restrictive.

Understood as part of the structural whole of the substantive constitution, solidarity encompasses redistributive capacities as well as the more substantive notion of social justice and its various mechanisms. However, further still, it should be construed as also entailing the underlying substantive reasoning and ethos of social justice: the comprehensive view of the society that EU institutional structures engross which understands the individual as a member of that community, not merely as an autonomous unit[167]. In other words, substantively, solidarity expresses both the social justice necessity for supportive mechanisms that will help the individual retain a dignified life ('passive solidarity') and the entirety of the legal tools (rights and freedoms) that a person requires in order to be able to express his/her solidarity to others, in support of their rights to a dignified life (active solidarity).

In that context, the institutional[168], de-personified[169] aspect of solidarity, is a necessary corollary of its normative principled aspect[170],that refers to the existence of personal bonds of empathy, support and sense of common fate. The institutions creating and supporting solidarity allow for the mobilisation of resources (monetary or non-monetary) pulled from common contributions in pursuit of the equally common purpose of social cohesion[171]. That goal is achieved through the support of the weakest members of a particular social structure, who draw upon the common resources according to their needs[172]. In turn, this sense of a de-personalised legal duty to contribute, so as to provide a network of protection for those who may need it the most, this institutional mutual risk sharing and responsibility feeds back into the creation and nurturing of the substantive, personalised, sense of social connection and empathy. It is that sense that

[166] See above, in the discussion of Protocol 30.
[167] Loosely connected to the de Witte's 'aspirational solidarity'.
[168] *Supiot, Alain*, Homo Juridicus: On the Anthropological Function of the Law, (Saskia Brown tr., Verso, London 2007), 207-208.
[169] ibid, 208-209.
[170] ibid, 207.
[171] ibid, 208.
[172] ibid.

underpins the 'pure', pre-legal normative idea of solidarity as a socially constitutive and cohesive factor[173].

In the field of labour law, the idea of solidarity is connected to the default endorsement of collective autonomy mechanisms and principles[174]. It underpins (national and transnational) collective labour structures as the formal mechanism that facilitates inter-workers support or the correction of negotiating power imbalances. We should also consider the connection between the concept of solidarity and democracy, as one of tis corollary values, if the EU is to actually normatively distance itself from its ordoliberal origins. Solidarity, in that sense, is integral to the democratisation of the labour market and the mobilisation of its actors within the wider context of the reshuffled EU polity.

The institutional creation and exercise of substantive solidarity rights and capabilities (from atypical forms of mobilisation and organisation to the exercise of political or collective labour law rights) could lead to the creation of the pre-legal and pre-political connections and relations within the society that are the precondition for the realisation of the substance of the declared EU values, objectives and rights. As Carozza remarks, with reference to human rights: '*the thin practical consensus on human rights alone is not self-sustaining: it depends on extra-legal sources of consensus about human status and worth and extra-legal sources of commitment to respecting that status and worth*'[175]. The same holds true as regards the respect and attainment of constitutional goals and the telos of fundamental values rights and values. It is the institutional construction of these relationships and the realisation of common rights, interests and, ultimately, participation to a common fate that are absolute prerequisites for the emergence of a true sentiment of transnational solidarity, and thus for the emergence of a truly European public sphere; hence, for the creation of an EU demos.

The idea of a fused normative basis for the constitutional structure of the EU, consisting of indivisible values that place people at the centre of the project not just as cherished autonomous individuals but as member of a community,

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[173] See ibid, 211.
[174] *Sciarra, Silvana*, Notions of Solidarity in times of economic uncertainty (2010) ILJ 39(3) 223-243.
[175] *Carozza 2008*, n.146, 942.

resonates with the redefined economic objective of a functional social market economy, to which we now turn our attention.

2.3. Rearranged objectives: 'Social market economy'

Similar to the rebalanced values of the EU, a social-economic equilibrium has also been reached as to the various Union's objectives (Art. 3 TEU). Open market economy as a main goal of the project has been replaced with that of a 'highly competitive *social market economy*'[176], flanked with the pursuit of social objectives. This new manifestation of the internal market aims at 'full employment and social progress', the promotion of 'social justice and protection', as well as '*social cohesion*' based on '*balanced* economic growth' (Art.3 (3) TEU). Dorssemont has gone as far as to suggest that the constitutional architecture of the Treaty implies a hierarchy that places Art. 2 values at the very top, with Art.3 objectives pursued in their service[177]. 'Values' cut across the core of political constitutionalism, as the foundation of the perception of allegiance to the Union and the ideal that holds EU citizenship together, whereas 'objectives' provide functional restrictions and yardsticks to assess the Union institutions' actions[178]. Moreover, the constitutional superiority of Art. 2 values as the core of the normative constitution of the Union is evident by their respect being an obligation of Member States, fulfilment of which is monitored by the Union (Art. 7 TFEU),[179] and a condition for accession to the EU (Art. 49 TEU).

That said, the content of the Art. 3 TEU concept of 'social market economy' remains contested[180]. Joerges and Rödl have suggested that it cannot be identified with the equivalent, yet functionally dissimilar, ordoliberal-oriented national German concept (*Soziale Marktwirtschaft)*[181] [182]. Rather, it is asserted that, in the

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[176] Due to the overarching hermeneutical effect of constitutional fundamental values and objectives, TFEU provisions still referring to an open market with free competition [Art.119(1),120] are to be interpreted accordingly. *Contra* C-52/09 *Konkurrensverket v TeliaSonera*, para.20-22.
[177] *Dorssemont*, n.162, 50-51.
[178] ibid, 50.
[179] ibid.
[180] *Semmelmann*, n.3, 521.
[181] *Joerges/Rödl*, n.38, 137ff.
Likewise, they suggest that there is no connection between the EU 'social market economy' goals and the German constitutional principle of the social state (*Sozialstaatsprinzip*). This is an easier assertion

case of the EU, the term was adopted as a 'linguistic symbol' that would signal the incorporation of enhanced social values and objectives in the originally purely economic European project[183].

However, it would be a mistake to brush aside the provision as a mere 'cosmetic and rhetorical'[184] endorsement of the significance of the social element within the EU framework. As a matter of normative substance the term does encompass the core objectives that Müller-Armack, a prominent ordoliberal theorist who coined the *Soziale Marktwirtschaft* concept[185] and was engaged in the construction and early years of the EEC[186], had aspired to: correction of the de-facto deficiencies of the competitive market ideal when operating under real conditions[187]; balance between market rules and objectives and social considerations[188]. 'Social market economy' becomes therefore a normative legal concept that ultimately prescribes a synthesis[189] that takes into account social cohesion as the theatre within which the market operates[190]. The term, thus, underlines the need for balance; the need to take into account, encompass and finally reconcile all the various interests, socioeconomic aspects, alternatives and

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to agree with than the dismissal of connections to the notion of *Soziale Marktwirtschaft*. The *Sozialstaatsprinzip* is essentially a principle that not only presupposes a state structure and apparatus, but furthermore connects to the egalitarian idea of redistribution and support through state mechanisms that has its roots in the late 19th century ideas of *Socialpolitik*, devised to avoid revolutionary tendencies out of growing inequality (see *Ebner, Alexander*, The intellectual foundations of the social market economy: theory, policy and implications for European integration (2006) JES 33(3), 206). Neither the state mantle nor the redistributive egalitarian element exist or were intended at a Union level, hence the absence of relevant competences.
cf. *Ptak, Ralf*, Vom Ordoliberalismus zur Sozialen Marktwirtschaft: Stationen des Neoliberalismus in Deutschland (Lesk & Budrich, Opladen 2004).

[182] *Semmelmann*, n.3, 520.

[183] *Joerges/Rödl*, n.38, 147-148.

[184] *Semmelmann*, n.3, 522.

[185] *Müller-Armack, Alfred*, Wirtschaftslenkung und Marktwirtschaft (Kastell Munich 1990; 1st ed 1947). See also *Müller-Armack, Alfred*, 'The Social Aspect of the Economic System' (1947) in *Ludwig-Erhard-Stiftung* (ed) Standard Texts on the Social Market Economy: Two Centuries of Discussion (Derek Rutter tr., Gustav Fischer, Stuttgart 1982), 9-22.

[186] *Watrin, Christian*, 'Alfred Müller-Armack – Economic policy maker' in *Koslowski*, The Theory of Capitalism in the German Economic Tradition (Springer, Berlin 2000), 192 (193-194); Goldschmidt, n.55, 16. See also *Müller-Armack, Alfred*, Auf dem Weg nach Europa. Erinnerungen und Ausblicke (Tübingen, R. Wunderlich 1971).

[187] *Müller-Armack, Alfred*, The Social Market Economy as an Economic and Social order (1978) Review of Social Economy 36(3), 326(326).

[188] See *Müller-Armack 1947 (1990 repr.)*, n.185, 85-86; 93, 109; *Müller-Armack*,n.186, 50ff; *Müller-Armack*, n.157, 327; *Watrin*, n. 186, 210.

[189] *Müller-Armack, 1947 (1982)*, n. 185, 17ff.

[190] *Goldschmidt*, n. 42, 20.

even ideological rationales, achieving 'peace'[191], or, in other words, a neutral, all accommodating economic framework. This interpretation, arguably, fits harmoniously with the neutral, balance oriented normative foundation of the EU constitutional framework.

Systematically, the principle should be read in conjunction with the rest of the Union's normative constitution, as well as functional and institutional provisions, such as the principle of subsidiarity. Under that light of consistent interpretation, the policy mechanisms of social welfare, social justice and redistribution that Joerges and Rödl consider to be missing from the structure are revealed to be in fact entrusted to the national level of the EU pluralist legal order[192]. The specific 'social' element of the EU social market economy is to emerge from the interplay of diverse national social policy systems[193] within a functioning market, in harmony with the idea of embedding the market to the social peculiarities and necessities of each state. Furthermore, at the very least, what the objective of 'social market economy' as referred to in Art.3 TEU ultimately describes is an internal market that is constructed as a structural pluralist model in which, normatively, the social and the economic are placed on equal footing, without prejudice or presupposed hierarchies.

Deakin seems to agree with this assumption. For him, the broad term 'social market economy' connects to the idea that sustainable growth cannot be achieved within a market where the social fabric is disintegrating[194]. A social market economy, thus, needs to be structured so as to ensure social cohesion. Labour law is precisely a tool by which minimum standards and balanced labour market relations can be guaranteed.

Despite the concerns expressed that 'social market economy' is merely 'an empty' objective[195], therefore, a systematic interpretation of the Union's substantive constitution informs the understanding of the economic constitution

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[191] What Müller-Armack had called 'Social Irenics', from the rather unfortunate cacophonous Anglicisation of the Greek word "ειρήνη" (peace), to describe moderation, synthesis and conciliation within a social order. See *Müller-Armack, Alfred,* Social Irenics (1950) in *Ludwig-Erhard-Stiftung (1982)*, n. 185, 347-360.
[192] cf *Ebner*, n.181, 216-217; 219.
[193] See *Ebner*, op.cit., 219-220.
[194] *Deakin 2012*, n.110, 23.
[195] *Joerges*, n.10, 486; *Semmelmann*, n.3, 522.

and places the concept of social market economy as its cornerstone. The prominence of a value such as dignity, which, at the very least, steers interpretation of all rights and actions towards an anthropocentric approach, one that places the effective holistic consideration of human needs at its centre, affirms that the economic objectives of the Union are now not an end in themselves. They are but means to the end of social cohesion. Economic objectives are part of something bigger; the creation of an aspiring constitutional polity to the benefit of the people as subjects of the EU. The very function of dignity as a cohesive factor of potentially diverse philosophical ideas and traditions, that ultimately allows for the accommodation of diversity while maintaining a basic common principled core of protection, further reinforces the probability of the 'social market economy' objective of the EU being closer to Mülller-Armack's construction of the concept. Therefore, a European social market economy can indeed be understood as a reconciliatory mechanism of balance, capable of bringing about both economic progress and social peace. The incorporation of social values, like solidarity, in the fundamental values of the Union, in conjunction with the idea of the pluralist architecture of the Union, are further indications of the functioning social market economy being not an empty declaration but an applicable proclamation.

If the construction of a common free market had been the intention of EU primary law prior to Lisbon, its current constitutional formulation indicates that the *constitutional* intention has shifted to building a polity. From a one-sided economic focal point, with market actors at the core, we have moved to a holistic aspirational structure, with people as citizens at its centre. The concept of social market economy is just the label given to the manifestation of this balanced conception on the economic sphere.

The shift towards a comprehensive arrangement, where social considerations are given due regard, is evident in the material constitution of the Union and the constitutional entrenchment of a binding Charter of Rights that prominently contains social rights, including, for the first time, core collective labour rights. What emerges is a system, within which the market should now operate, where

there is no *a priori* formal hierarchy established between economic and social objectives[196] or Charter rights[197].

Thus, what ultimately seems to have substantively emerged is maybe not an economic constitution tipped in favour of *Soziale Marktwirtschaft* as a preordained order within the national German context of the term, but neither one attached to pure ordoliberal ideals or the free market system and its neoliberal incarnation. Rather, the Union has been endowed with an open economic constitution[198], one that does not promote any particular market formulation but allows for flexibility and diverse arrangements, as long as the balance between social and economic objectives and concerns is respected.

Consequently, the 'social market economy' goal is not toothless because Art. 3 TEU allegedly lacks an explicit indication as to specific measures for its implementation[199]. As a fundamental provision that is part of the normative basis of the EU constitution, it is of grave importance as it is meant to encompass the various relevant considerations and anchor interpretation to the newly prescribed normative balance. It defines the model the economic constitution ascribes to and the nature of the EU internal market and provides an interpretative lens that informs the application of the entirety of subsequent primary and secondary law. Importantly, it entrenches balance in the consideration of social and economic objectives and values and in the exercise of relevant freedoms and rights. Thus, the tools for the implementation of the goal set in Art.3 TEU are already there. At the central level, they can be found in the material constitution of the Union and the provisions considering institutional arrangements and competences. The EU institutions are now under a mandate to use these tools on the basis and under the light on the obligations arising from Art. 3 TEU. Moreover, the available toolbox also extends at the decentralised, national levels of the pluralist EU structure. The principle of subsidiarity indicates the conscious choice to leave core relevant regulatory mechanisms to Member States, accommodate diversity and induce a dialogue of possible alternatives.

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[196] *Semmelmann*, n.3, 520.
[197] *Dorssemont*, n.162,56.
[198] *Devroe/van Cleynenbreuge*, n.21, 111;120.
[199] See *Semmelmann*, n.3, 522.

Furthermore, the reference to a 'social market economy' should not be seen as self-standing and having emerged from a vacuum, but ought to be connected to the wider EU constitutional nexus post Lisbon Treaty. The context is now of a transnational entity that actively and explicitly aspires to be regarded as an autonomous legal order that can be regarded and analysed as an internally consistent constitutional polity.

2.4. Further indications of normative balance and pluralist ethos

This idea of Art.3 TEU as part of a constitutional nexus of provisions that promote equilibrium and balance without prejudice as to the nature of conflicting considerations is enhanced by the emphasis on balancing mechanisms, such as the principles of subsidiarity and proportionality. The former's role and value has been enhanced by the Treaty of Lisbon under the new wording of Art. 5 TEU and Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality. These provisions recognise the complexity and interconnectivity of roles of multiple actors within the EU constitutional architecture, including not only state authorities, national, regional or local[200], but furthermore '*economic operators and citizens*'[201]. The provisions highlight both the inherent pluralist nature of the EU constitution and the multiplicity of interests, economic as well as social, that come into play within it and essentially constitute '*the shared values of the Union*'[202]. The principle of subsidiarity in that respect does not amount to erecting procedural walls of absolutely divided competences. It rather serves as a legal reminder that all the various interests, objectives and levels of government need to be taken into account and balanced before one is given precedence, even when the EU is exercising its exclusive competences[203].

Therefore, beyond its specific procedural manifestation under Art. 5(3) TFEU, subsidiarity can also be construed as part of the balance-promoting constitutional

[200] Art. 5 (3) TEU and Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality. Art. 5.
[201] Protocol No 2, Art. 5.
[202] Protocol No 26 on Services of General Interest, Art. 1 in conjunction with Art. 14 TFEU.
[203] *Edward, David*, 'Subsidiarity as a Legal Concept' in *Cardonnel, Pascal / Rosas, Allan / Wahl, Nils*, Constitutionalising the EU judicial system: Essays in honour of Pernilla Lindh (Hart, Oxford 2012), 94 (102).

framework of the pluralist, yet coherent[204], multilevel legal order of the Union. The role of the principle of subsidiarity as the normative link between the various regulatory levels of the EU system (including the Member State level), that are still nevertheless part of the same whole, has been enhanced and underlined by the more systematic delimitation of competences added by the Lisbon Treaty (Art. 2-6 TFEU). As such, the idea of a 'social market economy' operating through a normative toolbox that is distributed among the various levels of a single, integrated legal order can be construed to be a functional reality.

What is ultimately promoted is the consistency of a legal order that is based on this coherent multiplicity of regulatory levels, interests and considerations, for which balance is prescribed.

In this context, the absence of regulatory competence at the centralised EU level as to the core of collective labour rights (the right to strike and collective bargaining) should not be regarded as resulting in the diminution of their role or importance within the EU system. On the contrary, it merely reflects a conscious choice as to the division of regulatory power between the various levels of the pluralistic, yet integrated, EU constitutional legal order. The fact that Member States are deemed to be better suited to retain regulatory power as to the details of the substance and exercise of certain social rights, including core collective labour rights, does not negate the obligations of EU institutions that arise from the balanced substantive constitution of the Union and preclude any unduly infringement of those issues or rights that are left to be regulated at the decentralised, national level of the EU integrated structure.

2.5. Potential dangers for the neutrality and cohesion of the economic constitution by the EMU and crisis economic governance as 're-pillarising' catalysts

As we have discussed, the apparent balanced image of a neutral economic constitution that seeks to conciliate economic and social integration is somewhat distorted by contemporary provisions that relate to the European Monetary Union

[204] See *Scharpf*, n.115 36.

(EMU) and relevant structures, including the 'abnormality'[205] of relevant euro crisis induced mechanisms and acts. Things are not made any easier by the fact that the EMU apparently adheres almost absolutely to the ordoliberal structural paradigm of a predefined order to be adhered to, which, substantively, embeds neoclassical dogma prescribes strict discipline and rigidity as to the available policy and regulatory tools. The construct reveals the functional connections of ordoliberal structure and form with substantive neoliberalism.

It is no coincidence[206] that Maastricht adopted a monetarist[207], neoclassical economic architecture[208], that is nevertheless unbalanced as to the relation between the centralised EMU structure, which focuses on monetary policy, and the national level that is, at least superficially, largely responsible for economic policy, [209] though the central level absolutely encroaches upon the exercise of national relevant competences through a series of monitoring and course-adjusting mechanisms.

The application of EMU provisions and the multitude of economic structures and measures it has produced, some running in parallel with the EU proper, have created the understandable perception of a monetary union project that is not only on the fringes of core EU and the accountability it entails, but is also exerting critical influence upon the Union's economic constitution or, at the very least, upon the economic aspects of an emerging EU political constitutionalism. In that regard the influence of EU economic governance threatens to revive the one-sided outlook on the European project[210], not to mention recall the authoritarian and counter-democratic characteristics and conceptual underpinnings of ordoliberalism. There is obvious evidence of this corrosive effect as regards the impact that crisis induced policies, often dictated by EMU related mechanisms and

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[205] *Kilpatrick, Claire*, 'Abnormal Sources and Institutional Actions in the EU Sovereign Debt Crisis-ECB Management and the Sovereign Debt Loans' in *Cremona, Marise/Kilpatrick, Claire (eds)*, EU Legal Acts:Challenges and Transformations (OUP, Oxford 2018), 70.
[206] *Lucarelli, Bill*, 'European Monetary Union: A Neo-liberal Trojan horse?' (2004) Contributions to Political Economy 23, 81 (82-85).
[207] *Verdun, Amy*, The building of economic governance in the European Union, (2013) Transfer 19, 23 (25).
[208] *Degryse, Christophe*, The new European economic governance, (2012) ETUI Working Paper 2012.14, 8 <https://www.etui.org/Publications2/Working-Papers/The-new-European-economic-governance> (last accessed 5/1/2018).
[209] See *Verdun*, op.cit., 26.
[210] See *Dawson,Mark/de Witte,Floris*, Constitutional Balance in the EU after the Euro-Crisis (2013) MLR 76(5) 817-844.

institutions, have had in the very fabric of labour law. Collective labour rights have taken a hit[211], both in relevant CJEU case law (or, rather, lack thereof), and materially, with promoted legislative amendments that jeopardised their effective function in any meaningful form.

More alarmingly still, the explosion of these EMU specific regulatory potentialities into an array of legal documents, mechanisms and new institutional arrangements on the face of the Eurozone crisis over the last decade, has threatened to effectively re-pillarise the European project. The rapidly formed EMU 'pillar', operates on the fringes of EU law, straining the Union's economic constitution to its limits, by, inter alia, adding a positivist, formal aspect to normative choices that are seemingly inconsistent with the Union's normative and material constitution. It is a combination that poses considerable risk for the very legitimacy of the Union project[212].

However, as we have argued, all these EMU related norms, policies and frameworks at the edge of (if not beyond) the Union's constitution, constitute contemporary EMU 'economic governance' rather than a fundamental normative element of the EU economic constitution. 'Economic governance' refers to the formal processes and institutional mechanisms that create and maintain a specific variation of a market economy; a particular economic *order*[213]. It is the nexus that entails, institutionally, the economic, financial and monetary rule making and enforcement mechanisms[214], and, substantively, the ensuing regulatory framework (legal norms, soft-law approaches, policies, strategies)[215]. 'Economic governance', describes formal functions and structures that are, however, themselves subject to[216], the fundamental normative constitutional context.

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[211] *Bruun,Niklas/Lörcher, Klaus/Schömann,Isabelle*, The Economic and Financial Crisis and Collective Labour Law in Europe (Hart, London 2014).
[212] *Dawson/de Witte*, op.cit.
[213] *Thompson, Grahame*, ' Governing the European Economy: a framework for analysis' in *Thompson, Grahame (ed)* Governing the European Economy (Sage, London 2001), 2.
[214] See *Tabb, William*, Economic Governance in the age of Globalization (Columbia University Press, New York 2004), 1.
[215] *Luckhurst, Jonathan*, The G20 and ad hoc Embedded Liberalism: Economic Governance amid Crisis and Dissensus, (2012) Politics and Policy 40 (5), 740 (741).
[216] But see *Stiglitz, Joseph*, 'Is there a Post-Washington Consensus Consensus?' in *Serra, Nargis/Stiglitz, Joseph (eds)*, The Washington Consensus Reconsidered : Towards a New Global Governance (OUP, Oxford 2008), 41 (48).

As such, EU 'economic governance' should be considered, if anything, as subject to the EU substantive constitution, including its economic aspect. Relevant structures, processes and outputs are but the institutional branch of just one aspect of the broader economic constitution of the Union. As such, they are not self-standing, distinct and cut-off from the normative foundations of the EU and beyond its grasp. The fundamental values and objectives of the EU delimit the Union's economic constitution, define its nature, and, thus, also determine the function and substantive extent of the powers of the institutions that have been created as a means towards its realisation. By implication, they also provide the ultimate normative yardstick by which the exercise of institutional power and the functioning of EMU rules should be guided and reviewed[217]. Economic governance is not, therefore, purely technocratic nor neutral. It is not an end in itself, but rather a means to achieve the broader goals of the EU as a coherent entity. As such, EU economic governance, including EMU structures, ought to be judged by the Union's normative standards and be held to them, especially when it appears to stray away from the balance and pluralism the latter formally prescribe.

2.6. Interim summary

The discussion of what has become commonly referred to as 'the economic constitution' of the Union revealed that the ordoliberal conceptual DNA of the very idea of the economic constitution as the legal manifestation of a preordained order inherently carries the risk of disassociating economic regulation from democratic scrutiny and consent. This depoliticised process, allegedly protective of the economy against populism, implies the disconnection of the 'economic' from the 'social'. It creates the perception of two opposite, antagonising poles, with economic considerations taking precedence and the social being viewed only as the beneficial consequences of a 'properly' operating market economy. Thus, what is allowed to emerge is a structure and, more importantly, a way of thinking, that is susceptive to accommodating extreme neoliberal policies, further widening the gap of the perceived lack of democratic legitimacy of the EU project.

[217] See Art.120 TFEU.

Despite the ordoliberal origins of the European market structure and the EU economic framework, it has been argued that equating the traditional historical concept of an economic constitution with the EU constitutional arrangement and the parts of it that relate to the economy would be short-sighted, if not plainly inaccurate. The EU, especially after the Treaty of Lisbon, has been shown to pursue the status of an autonomous legal order, gradually worthy of being regarded as a constitutionally governed entity. The end goal is the Union's evolution into a politically integrated transnational polity. The constitutional structure has been amended in order to accommodate these aspirations, in line with the Court's occasional proclamations that had alluded to the self-identification of the EU as a *constitutional* autonomous legal order. The result has been the substantive constitutionalisation of EU law, which is based on a balanced normative foundation, comprised of fused economic and social goals.

The substantive economic constitution, containing the fundamental values and objectives as manifested in the sphere of the economy, has been suggested to be but an integrated part of an inherently coherent whole. The market objectives are not an end in themselves, but serve as a means to attain the fused societal and political objectives of the Union and its ultimate integration aspirations. The main economic objective of the creation and maintenance of a 'social market economy' is the explicit manifestation of this holistic approach, in which the 'social' and the 'economic' are no longer enemy combatants but inseparable aspects of one and the same framework. It has thus been concluded that the substantive economic constitution of the Union is no longer to be understood as accommodating ordoliberal structures and objectives. It rather sets a balanced framework of values and objectives that create a neutral environment, allowing for flexibility as to the choice of economic models and policy. As part of a coherent whole, which is structured as multilevel pluralist legal order, the balanced economic constitution also allows for diversity among the economically as well as socially competing Member States, themselves part of the whole. Nevertheless, the connecting thread and ultimate limit of all the possible various policies pursued is the accommodation and pursuit of the normative values and objectives of the Union, within the context of the expressed wish of the constitutive states to ever move

towards the ideal of an interconnected, liberal and democratic meta-national legal order. These assumptions are not at odds with EMU related structures and norms, which are themselves creatures of, and therefore subject to, the EU normative constitution.

However, understanding the nature of the EU economic constitution only sets the canvas of discussion. The critical question remains: is there a role for labour law and collective labour processes within the economic constitution framework and the context of a consistent autonomous democratic legal order? To these questions we shift our attention next.

III. Labour Law and Collective Labour Rights within the EU substantive constitution: integral factors of the EU social market economy, and catalysts of solidarity and democratic legitimacy

The discussion of the idea of the Union's substantive constitutionalisation, the analysis of the evolved normative foundations of the EU constitutional order and their connection to the concept of the EU economic constitution have revealed a balanced constitutional environment within which collective labour law exists and should be examined. That normative environment, along with the core 'social market economy' objective, allow for different economic approaches and policies to be employed, insofar the full nexus of EU values and objectives (social and economic) is respected. This 'balance' unlocks the rise of labour rights from the back of the bus of the Union project.

A holistic interpretation of the EU constitution should result in an equally holistic consideration of the role and place labour law holds within it and vis-à-vis economic freedoms. Labour market regulation is to be regarded as an integral factor of the economic aspects of the pluralistic multilevel EU polity, encompassed in the descriptive goal of a social market economy. Even if the Union was still to just be regarded as a transnational organisation of loose political integration, focused primarily on economic objectives, the balanced constitutive

concept of the EU social market economy would call for a re-evaluation of labour rights' protection within the overall framework.

Furthermore, however, labour law is to be seen as strongly connected to the broader social, political and democratic aspects and objectives of the constitutional legal order the EU aspires to become. Therefore, labour rights as EU rights should be approached not only as regards their position and value within the EU economic constitution, but also as cogs in the broader constitutional architecture, to which the economic constitution itself is integrally embedded. Contrary to the one-sided analyses that might resonate with the ordoliberal roots of the EU economic constitution, the multiple regulatory and constitutional functions of collective labour law, as a subset of labour market regulation, will be extrapolated over the next pages.

We will attempt to look into the economic function of labour market regulation as instrumental to the social market economy envisaged by the EU substantive economic constitution. Collective labour rights will be suggested to also be a possible remedy to the undemocratic musings of the Schmittian and purely ordoliberal conceptions of the economy and its alleged constitutive function. As we have seen, such centralised undemocratic approaches to the market and the legal structure that encompasses them might be evoked by traditional analyses that are more closely influenced, consciously or not, by the ordoliberal subtexts of the original EU structure.

1. Conceptual basis: The many faces of labour law and the EU constitutional order

1.1. The multiple objectives of labour law and its fundamental dual nature

If we are to regard collective labour law within the context of a constitutional legal order, not just an organisation focused on economic objectives, it is imperative that we keep in mind the multiple functions and objectives attributed to

labour law[218]. Labour law is not a conveniently[219] self-contained[220] or entirely, and universally, coherent body of concepts and norms[221], but touches upon and draws from many legal disciplines. Private law seems to be its apparent relative, due to the traditional central focus on the employment contract[222]. However, economic law, especially corporate and company law mainly[223], also come into play. There is also an increasing interrelation with human rights law[224] and constitutional law and theory, while the fundamental social values and objectives considered as pursued through labour law reveal how it correlates to public law.

The complexities that arose with the advent and expansion of globalised capitalism and the subsequent interconnectivity of competing markets have only added to the picture, taking the debate on labour law beyond the humble origin of the need to regulate the employment relationship itself[225]. The market network and legal framework the EU establishes lie at the heart of this new world of labour law regulatory regime. The Union's substantive constitution and its multileveled nature is one of the reasons fostering the suggestion of moving beyond the examination of labour *law* and into the more general realm of labour market *regulation*[226]. In that context, law is but one of the regulatory instruments used to

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[218] See *Arthurs, Harry*, 'Labour Law after Labour' in *Davidov, Guy/Langille. Brian* (eds) The Idea of Labour Law (OUP, Oxford 2011), 13(13-14); See also *Collins, Hugh*, Labour Law as a Vocation (1989) LQR 105, 468.

[219] *Mitchell, Richard/Arup, Christopher,* 'Labour Law and Labour Market Regulation' in *Arup, Christopher/ Howe, John/ Mitchell, Richard/ Gahan, Peter/ Johnstone, Richard/ O'Donnell, Anthony (eds)*, Labour Law and Labour Market Regulation (The Federation Press, Sydney 2006), 3 (5).

[220] *Collins, Hugh*, Employment Law (OUP, Oxford 2003), 26.

[221] *Langille, Brian*, 'Labour Law's Back Pages' in *Davidov, Guy/Langille, Brian*, Boundaries and Frontiers of Labour Law (Hart, Oxford 2006), 13 (16).

[222] *Countouris, Nicola*, The Changing Law of the Employment Relationship: Comparative Analyses in the European Context (Ashgate, Aldershot 2007), 15-55; *Deakin, Simon/Wilkinson, Frank*, The Law of the Labour Market. Industrialisation, Employment and Legal Evolution (OUP, Oxford 2005), 108 (also see 4-18, 100-105). Deakin and Wilkinson, however, argue that the modern employment contract is as much a product of contract law as it is of the welfare state, and of the evolution of enterprise organisation and collective labour law structures (ibid, 108).

[223] See *Deakin/Wilkinson*, op.cit., 69-70; *Deakin, Simon*, A New Paradigm of Labour Law? (Book Review), (2007) Melb.U.L.Rev. 31, 1161 (1162, 1168-1169).
cf. *Mitchell/Arup*, op.cit 17.

[224] *Alston Philip (ed)*, Labour rights as human rights (OUP, Oxford 2005) See also *Mundlak, Guy*, The right to work: Linking human rights and employment policy (2007) International Labour Review 146 (3-4), 189; *McIntyre, Richard*, Are Worker Rights as Human Rights? (U of Michigan Press, 2008). See also *Allen, Robin/Beale, Anna/Crasnow/Rachel*, Employment Law and Human Rights (2nd ed, OUP, Oxford 2007) for a human rights analysis of domestic labour law.

[225] *Mitchell/Arup*, op.cit 13.

[226] ibid, 16. cf. *Deakin 2007,* op.cit., 1161-1185.

achieve economic and social objectives[227]. Law is merely a means of regulation[228], complemented by social and political mechanisms and institutions (among which Trade Unions and their role), that intervene and define the labour market, albeit not through legislation as such. Furthermore, the idea of focusing on labour market regulation wishes to highlight the interplay of the various legal disciplines that influence the subject-field and go beyond just the legal rules relevant to the employment relationship *per se*[229].

Though approached with scepticism[230], the shift towards regulatory theory is but the formal expression of the common perception of labour law as a sui-generis regulatory field, influenced both by legislation and non-state forces, and an affirmation of the notion of regulatory autonomy in the labour sphere. This notion purports that legislative regulation is complemented by the autonomously created norms, customs and practices that arise either from the institutionalised relations between management and labour (for example, collective bargaining) or the informal customary ethos their very dynamic produces[231].

Consequently, what the (labour) 'regulation approach' only illustrates is the continuing interaction between labour law and the evolution of capitalist market economies. It is to the paradigm of a globalised competitive free market economy that labour lawyers try to respond, much how the early conceptions of labour law attempted to address the emergence of modern capitalism and the potential evils of industrialised labour relations it brought with it. Hence, the theoretical trend of moving from labour law to labour market regulation only emphasises the inherent connection of the labour law Janus to its economic face[232], without severing the link to its social aspect[233].

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[227] *Collins, Hugh*, 'Justifications and techniques of legal regulation of the employment relation' in *Collins, Hugh/Davies, Paul/ Rideout, Roger* (eds), Legal Regulation of the Employment Relation (Kluwer, London 2000), 3 (3); *Mitchell/Arup*, n.219, 13.
[228] ibid.
[229] *Frazer, Andrew*, Regulating Labour Law: The Labour Market Regulation Project (2008) Macquarie LJ 8, 21 (23).
[230] *Arup, Christopher*, Labour Law as Regulation: Promises and Pitfalls (2001) Australian Journal of Labour Law 14, 229 (229).
[231] *Arthurs, Harry*, 'Landscape and Memory: Labour Law, Legal Pluralism and Globalisation' in *Wilthagen, Ton* (ed), Advancing Theory in Labour Law and Industrial Relations in a Global Context (North-Holland, Amsterdam 1998), 21 (26).
[232] See *Deakin 2007*, n.223, 1162.
[233] See *Frazer*, op.cit., 37.

Ultimately, no matter the theoretical camp we choose, traditional or any of the proposed new, it is the reality of the duality of labour as a social and economic phenomenon that defines the normative duality of any relevant regulatory or conceptual scheme. One the one hand, as an integral part of the market, any labour law/regulation arrangement has to address the challenges the market itself poses. It ought to perform a corrective function for market failures[234] and a complementary one as regards the pursuit of economic objectives and the enjoyment of economic freedoms of all involved actors. On the other hand though, the human element at the core of the concept of the labour market and the critical importance of work for the subsistence, social recognition[235], development and, consequently, for the dignity and integrity of the individual, reveals the social character of labour rights and institutions. Their existence serves purposes related to individual freedom and social cohesion, be it social justice and fairness, redistribution[236] or the democratisation of the market[237].

It is therefore simplistic to talk about labour law with reference to the narrow and solitary objective of protecting workers from management's coercion or, more generally, the imbalances of the employment relationship. It is equally simplistic, however, to emphasise the economic function of labour law as a market regulation instrument. That would lead to a myopic focus on competitiveness, economic efficiency and flexibility on purely capitalist terms[238], hence perpetuating the fundamental tenets of neoclassical and neoliberal ideas and interests, and obscuring the equally fundamental democratic and social functions of labour law and, especially, collective labour institutions. Rather, the social and economic functions, the two coexisting and complementary fundamental pillars of the nature of the employment relationship[239], can foster a multiplicity of purposes[240] and

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[234] *Collins 2000*, n.227, 6; 7-11; 15-16.
[235] See *Smith, Nicholas/Deranty, Jean-Philippe,* New Philosophies of Labour: Work and the Social Bond (Brill, Leiden 2012).
[236] *Collins 2000*, n.227, 6.
[237] See *Dukes, Ruth*, Hugo Sinzheimer and the Constitutional Function of Labour Law, in *Davidov/Langille,* n.218, 56 (59-60).
[238] *Frazer*, n.229, 22.
[239] *Davidov, Guy*, The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection (2002) U Toronto LJ 52, 357.
[240] *Mitchell/Arup*, n.219, 11; 13-14.

regulatory solutions[241]that would be compatible with the relevant, each time, market or societal environment.

This variety of options has been reflected in the evolution of collective labour law mechanisms, their functions and aims[242]. In their purely economic function trade unions have operated as hubs of worker organisation in pursuit of strictly economic purposes, such as the betterment of working conditions and the representation of labour's economic interests vis-à-vis employers[243], seeking to balance out the inherent inequality of power in the employment relationship. Furthermore they can also constitute a means of influencing managerial decisions that will ultimately affect workers, within a more cooperative, less antagonistic[244], conception of a firm's structure (codetermination)[245], in pursuit of aggregate economic benefits[246] for both management and labour[247] and, ultimately, for the establishment or firm as a functional, coherent whole. These benefits have been suggested to include productivity[248], efficiency[249], economic rationality[250] and

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[241] *Gahan, Peter/Brosnan, Peter*, 'The Repertoires of Labour Market Regulation' in *Arup et als*, n.219, 127-146.
[242] *Hyman, Richard*, 'Five Alternative Scenarios for West European Unionism' in *Munck, Ronald/, Waterman, Peter* (eds), Labour Worldwide in the Era of Globalization (MacMillan, London 1999), 121 (122-125).
[243] ibid, 122; 123-125.
[244] Thus hailed as 'revolutionary' by *McPherson, William*, Codetermination: Germany's Move toward a New Economy, (1951-1952) Indus.&Lab.Rel.Rev. 5 (21).
[245] A largely German idea, associated with works councils as much as with trade unions. See *McPherson*, op.cit., 20; *Gorton, Gary/Schmid, Frank*, Class Struggle Inside the Firm: A Study of German Codetermination, (2000) NBER Working Paper N.7945 <http://www.nber.org/papers/w7945> (last accessed 13/8/2018).
[246] *Smith, Stephen*, On the economic rationale of codetermination law, (1991) Journal of Economic Behavior & Organization 16(3), 261.
[247] E.g. higher wages; see *Hübler, Olaf/ Jirjahn, Uwe*, Works Councils and Collective Bargaining in Germany: The Impact on Productivity and Wages, (2003) Scottish Journal of Political Economy 50(4), 471 (485,489).
[248] *Fitzroy, Felix/Kraft, Kornelius*, Co-determination, Efficiency and Productivity, (2005) BJIR 43(2), 233. Especially when codetermination structures coexist with unionisation, collective bargaining structures and hence coverage by a collective agreement, according to *Hübler /Jirjahn*, op.cit, 486-489. See also the earlier conclusions of *Cable, John/Fitzroy, Felix*, Productivity, efficiency, incentives and employee participation: Some preliminary results from West Germany, (1980) Kyklos 33(1), 100. However, cf. *Doucouliagos, Chris*, Worker Participation and Productivity in Labor-Managed and Participatory Capitalist Firms: A Meta-Analysis, (1995-1996) Indus.& Lab.Rel.Rev. 49, 58 (67-69).
[249] *Gerum, Elmar/Wagner, Helmut*, 'Economics of Labor Co-Determination in View of Corporate Governance' in *Hopt, Klaus J./Kanda, Hideki/Roe, Mark J./Wymeersch, Eddy/Prigge, Stefan*, Comparative Corporate Governance: The State of the Art and Emerging Research (OUP, Oxford 1998), 341 (348-351). cf. *Furubitn, Eirik*, Codetermination and the Modern Theory of the Firm: A Property-Rights Analysis, (1988) The Journal of Business 61(2), 165 (esp.166 and 170-180); *Doucouliagos*, op.cit., 68.
[250] *Smith*, n.246.

profitability[251], highlighting a purely economic beneficial role of collective labour institutions for workers and employers rational actors operating in internal labour markets of any free market economy.

However, trade unions have also been perceived as instruments of political struggle[252] and the advancement of class interests[253], rather than the micro-interests of a particular group of workers closely associated to a specific workplace, company, occupation or sector[254]. Less radical conceptions of their function ascribed to trade unions broader political and social objectives *alongside* their basic economic goals[255] associated with negotiation, conflict and cooperation[256] in the workplace[257]. Modern reconsiderations of the role of trade unions have toned down their political aspect[258], focusing instead in social conciliation and dialogue, while maintaining and seeking to enhance their economic role as actors within the labour market. Nevertheless, the political function of trade unions, as cells of interest organisation and institutions of democratisation, should not be overlooked. Collective labour structures and mechanisms play a pedagogic role as to the role of workers as citizens. They provide a vehicle of democratisation in the workplace, which builds an ethos of participation and a culture of compromise of antithetical opinions in the pursuit of common interests and goals. That ethos carries over to the extra-workplace political structures, contributing to systemic democratisation.

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[251] *Kraft, Kornelius*, Codetermination as a strategic advantage?, (2001) International Journal of Industrial Organization 19(3-4), 543. cf. *Gorton, Gary/Schmid, Frank. A*., (2004), Capital, Labor and the Firm: A study of German Codetermination, (2004) Journal of the European Economic Association, 2, 863.

[252] See *Trotsky, Leon*, ' The Death Agony of Capitalism and the Tasks of the Fourth International' in *Trotsky, Leon*, The Transitional Program for Socialist Revolution; with introductory essays by Joseph Hansen and George Novack (3rd ed, Pathfinder Press, New York 1977), 145 ff.

[253] *Hyman, Richard*, Understanding European Trade Unionism: Between market, class and society (Sage, London 2001), 17-37. See *Trotsky, Leon*, 'Trade Unions in the Epoch of Imperialist Decay (August 1940)' in *Trotsky, Leon (Riddel, John ed.)*, Trade Unions in the Epoch of Imperialist Decay (Pathfinder, 1990), 49 ff.

[254] *Hyman 1999*,n.242, 123.

[255] *Hyman 2001*, n.253. Also see *Hyman, Richard*, 'Changing Trade Union Identities and Strategies' in *Hyman, Richard/Ferner Anthony (eds)*, New Frontiers in European Industrial Relations (Blackwell, Oxford 1994), 108; 'Changing Union Identities in Europe' in *Leisinik, Peter/van Leemput, Jim/Vilrokx, Jacques (eds)*, The challenges to trade unions in Europe : innovation or adaption (Edward Elgar, Cheltenham 1996), 53.

[256] See *Lopez, Julia/Chacartegui, Consuelo/Canton, Cesar G*., 'From Conflict to Regulation: The Transformative Function of Labour Law in *Davidov/Langille*, n.218, 344 (355-358).

[257] See *Hyman 1999*, n.242, 124, 125.

[258] See *Hyman, Richard*, 'European unions towards 2000', (1991) Work, Employment and Society 5(4), 621 (637).

This brief, broad-stroke overview of the evolutionary journey of trade union utility brings us back to an old definition that is descriptive, yet still accurate in its simplicity. Trade unions, are largely still associations '*of wage-earners for the purpose of maintaining or improving the conditions of their employment*'[259]. However, substantively, these ends are connected to increasingly complex contexts and rationales. Procedurally, the practical and theoretical legal, economic and political tools unions employ in order to achieve their objectives have become equally elaborate. Nevertheless, the objectives and function of collective labour structures still fall within the area delimited by the two basic contextual objectives of all labour law: the achievement of purely economic goals within a capitalist market environment and the pursuit of social ideals, be it collective (social cohesion, democratisation) or related to the autonomy and freedom of the worker as an individual, as we will see further on.

1.2. The duality of labour law as an element of the EU constitutional order and the social market economy objective

This fundamentally binary socioeconomic nature and purpose of any conception or manifestation of labour law coincides perfectly with the duality of the concept of social market economy that lies at the heart of the economic part of the EU substantive constitution and the balance it prescribes. Art. 151 TFEU can be seen as channelling this new balanced substantive economic constitution and the fundamental values and objectives the economic constitution is, in turn, subject to. Art. 151 TFEU, seen as a step up the inverted pyramid of the normative constitutional structure of the EU, constitutes an expression of that normative framework in setting the objectives of what is called by Title X TFEU EU 'Social Policy'. Essentially, though, it is labour market regulation and the related rights that lie at the very heart of Title X and Art 151 TFEU.

The provision of Art. 151 refers to social ends, such as the '*promotion of employment*', '*improved working and living conditions'*, '*social protection*' and the '*combating of exclusion'*. All these characteristic objectives arguably directly

[259] *Webb, Sidney/Webb, Beatrice*, The History of Trade Unionism (Longmans, London 1894), 1.

reflect the Union's fundamental goal to pursue '*full employment*' (Art.3(3) TEU), aiming to '*the well-being of its peoples*' (Art.3(1) TEU), '*social justice and protection*' and countering '*social exclusion*' (Art.3(3) TEU). Furthermore, these objectives are to be asserted and embedded in EU social policy through, and in the form of, labour regulation and collective labour law mechanisms (Social Dialogue). In other words, EU labour market regulation and policy do not only share values and objectives with the EU normative constitution; they constitute their direct specification and the means for their attainment.

Ultimately, it is the substantive constitution of the Union that shapes the market and its elements. In a constitutionally governed space, be it a full-fledged polity or a transnational legal order undergoing integration, the market does not operate in a vacuum. It is shaped by regulation[260] and must be made to fit the fundamental values that bind together the particular society economic institutions are supposed to support[261]. Law is an instrument of that society, but also a product of the dialectical[262] processes[263] therein[264]. The neoclassical preconception[265] of a spontaneous competitive market[266] as the miraculous manifestation of a natural process, akin to a natural phenomenon and capable to be analysed in the same terms, does not hold much water in the real world.

Even within the discipline of economics, institutional economists accept that regulatory structures and mechanisms, of which law is a part[267], delimit economic activity and give form to the market[268]. Law has a constitutive function, shaping

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[260] *Deakin/Wilkinson*, n.222, 11; *Deakin, Simon/Wilkinson, Fran*k, 'Labour Law and economic theory: A reappraisal' in *Collins/Davies/Rideout*, n.227, 29 (60): '*...normative and institutional factors are...structuring economic activity*'. See also *Wilkinson, Frank*, Productive Systems (1983) Camb.J.Econ 7, 413-429.

[261] MacCormick calls this nexus of values '*the common scheme of justice*' in a certain civil society; *MacCormick, Neil*, Institutions of Law: An Essay in Legal Theory (OUP, Oxford 2007), 239.

[262] *Wilkinson 1983*, op.cit., 424.

[263] *MacCormick*, Institutions of Law, op.cit, 171-240 (referring to political, legal and economic processes and their dynamic relationship).

[264] *Deakin/Wilkinson*, n.222, 9. See also *Wilkinson (1983*), op.cit., 420-421;423.

[265] *Wilkinson 1983*, op.cit., 413.

[266] *Boettke, Peter*, The Theory of Spontaneous Order and Cultural Evolution in the Social Theory of F.A. Hayek (1990) Cultural Dynamics 3 (1), 61-83; *Hayek*, Law, Legislation and Liberty, n.76, Vol 3, 151.

[267] Doubt has been voiced on whether law is an institution per se. However, see *MacCormick*, Institutions of Law, op.cit; *La Torre, Massimo*, Law as Institution (Springer, London 2010), 97-134.

[268] *Kaufman, Bruce*, 'Labor law and employment regulation: neoclassical and institutional perspectives' in *Dau-Scmidt Kenneth/Harris, Seth/Lobel, Orly*, Labor and Employment Law and Economics (Edward Elgar, Cheltenham 2009), 3 (26). For an early thesis see also *Commons, John*, Legal Foundations of Capitalism (Macmillan, New York 1924).

and maintaining the operation of a certain market arrangement[269] that reflects a fundamental political choice[270]. Law and regulation should not be considered as *only* a reaction, a defensive measure aiming to counter and contain the power of the free transnational market[271], as Polanyi had suggested[272]. In fact, Polanyi himself had acknowledged the constitutive function of regulation. He had pointed to the irony of proponents of neoclassical economic liberalism preaching the autonomy and self-regulating capacity of the free market system, yet relying entirely on the state and regulatory intervention to establish and maintain it[273].

In the case of the EU, it is rather clear that EU law is the instrument that created[274] the transnational common market with its basic characteristics of openness and free movement. The law-created market is the '*order*' of the initial ordoliberal formulation and conception of the Union. Hence, the labour market, as part of the common market, is also a creation of, and regulated by, the guiding norms of EU law. It thus operates in conjunction with national labour law mechanisms and arrangements, within the pluralist multi-level model of a constitutionally governed EU.

Consequently, fundamental norms, their specification under Art.151 TFEU and the ensuing legislation, regulation and policy define the internal EU labour market[275]. These norms reveal the specific purpose and function of the labour market of a social market economy operating within the constitutional legal space of the EU legal order. Furthermore, transnational collective labour mechanisms (Social Dialogue) and collective labour rights, in the form of rights guaranteed in the CFREU and fleshed out in European Social Charter and the Community Charter of Fundamental Social Rights of Workers, are to be regarded as integral

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[269] *Arup, Christopher*, 'Labour Law and Labour Market Regulation: Current Varieties, New Possibilities' in Arup/Howe/Mitchell/Gahan/Johnstone/O'Donnell, n.219 717 (722).
[270] *Estlund, Cynthia/ Wachter, Michael*, 'Introduction: the economics of labor and employment law' in *Estlund, Cynthia/Wachter, Michael (eds)*, Research Handbook on the Economics of Labor and Employment Law (Edgar Elgar, Cheltenham 2012), 3 (16); see *Wachter, Michael,* 'The striking success of the National Labor Relations Act' in *Estlund/Wachter,* op.cit., 427 (427-428; 458) (henceforth *Wachter 2012a*).
[271] *Arup*, op.cit, 722.
[272] *Polanyi, Karl*, The Great Transformation: The Political and Economic Origins of Our Time (2nd paperback ed., Beacon Press, Boston 2001), 136ff.
[273] ibid, 155, 156.
[274] See *Arup*, op.cit., 723-724; Barnard suggests the example of the adoption and specific formulation of the 'equal pay for equal work' rule (157 TFEU) and the seminal role it had in shaping the internal market: *Barnard, Catherine*, EU Employment Law (4th ed, OUP, Oxford 2012), 35-37.
[275] See *Collins 2003*, n.220, 21.

cogs for that function and instruments in the attainment of the stated objectives. The indivisibility of collective labour law institutions and the concept of the market economy had been indicated in the Commission White Paper on Social Policy[276]. In that document the Commission had cited '*democracy and individual rights, free collective bargaining, the market economy, equality of opportunity for all and social welfare and solidarity*'[277] as intrinsically interconnected values supporting European Social Policy.

Therefore, it is suggested that labour law, and especially collective labour mechanisms, cannot be seen as external or foreign to the coherent balanced pluralist constitutional structure of the EU. They are inherent elements of the basic economic and social conceptual building blocks of the Union: a 'social market economy' and a liberal democratic and socially cohesive community of peoples[278]. Furthermore, they are also instruments for the achievement of the array of fundamental objectives of the EU. The amalgam of social and economic objectives[279] and their crystallisation into respective derivative goals (such as social inclusion, protection of social rights of individuals and competitiveness[280]) shapes the market into what has been characterised 'an emerging social European model'[281].

Consequently, we turn to examining in more detail each of the two normative hearts of labour law and collective labour structures and their correlation to the EU social market economy and the broader normative constitution of the Union.

2. Labour law as element of a market economy

In the present formulation of the EU constitutional framework, the creation and maintenance of a common transnational market within the system of the European 'social market economy' is but one of the objectives of the Union. As it has been argued, as regards the broader aspirations of the EU, the social market economy is

[276] COM(94) 333, European Social Policy-A Way Forward for the Union-A White Paper, para.3.
[277] ibid.
[278] cf the TEU Preamble.
[279] cf COM(94) 333, ibid: '...*economic and social progress must go hand in hand'.*
[280] See Art.151 TFEU.
[281] *Collins 2003*, n.220, 20-26.

a means to the end[282] of social, political and ultimately constitutional integration rather than an end in itself.

Whatever the position of economic objectives related to the common market in the greater scheme of the Union's aspirations and very nature as a legal and political entity, the role of labour law and the relevant rights within the core concept of 'the market' have often been downplayed or misunderstood *vis-a-vis* individual economic freedoms.

Collective labour law in particular, has often been approached by the Court as something 'external' to the market, a distortion or an obstacle[283]. This restrictive and narrow interpretation as to the role of collective labour law is hardly a definitive (or particularly accurate) thesis. It reflects a particular ideological and economic line of argument rooted in the popularity of neoclassical economic theory[284]. This interpretation fails to capture the constitutive role that law, understood as including autonomous labour regulation and collective labour law mechanisms, plays for the market and its interrelation with the societal and political environment within which it operates[285].

Further, however, the dismissive approach adopted by the Court effectively ignores that, even from an economic point of view, the very concept of a labour market and the law that regulates it are a direct consequence, and thus an instrumental part, of any liberal free market economy.

Labour Law, as a regulatory, corrective mechanism, is very much a child of modern capitalism, forged in the conflicts[286] that followed the early industrialisation of labour[287] and the need to bring balance to worker/employer relationships within a system of organised mass production. The 'traditional'

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[282] cf *Stiglitz, Joseph*, 'Foreword' in *Polanyi*, The Great Transformation, vii (xv).
[283] As discussed in Part III.
For an interim overview see, inter alia, *Malmberg, Jonas/Sigeman, Tore*, Industrial actions and EU economic freedoms: The autonomous collective bargaining model curtailed by the European Court of Justice, (2008) CMLR 45(4), 1115.
[284] See, inter alia, *Boyer, George R./Smith, Robert S.*, The Development of the Neoclassical Tradition in Labor Economics, (2001) Indus.&Lab.Rel.Rev. 54(2), 199; see also *Lord Wedderburn, William*, Employment Rights in Britain and Europe (Lawrence and Wishart, London 1991), 204 discussing Thatcherite interpretation of Hayek anti-union sentiments.
[285] See *MacCormick 2007*, n.261, 171-240.
[286] *Van den Bergh, Tony*, The Trade Unions-What are they? (Pergammon Press, Oxford 1970), 3-4.
[287] See *Deakin/Wilkinson*, n.222; *Kaufman 2009*, n.268, 3.

model that dominated post-WWII Western European[288] labour law systems, theory, and collective praxis, forging the constitutional and legal traditions of most EU Member States, emerged to address the challenges of the Fordist model of mass production and narrow specialisation of labour[289], and the hierarchical organisation of business and labour within the workplace, usually as a centralised, largely self-contained unit, it brought about. One of the constants of Fordist market economies was a labour market regulatory structure that stood upon the twin pillars of autonomous regulation through collective bargaining and of the welfare state[290].

However, the EU itself is part, if not a regional catalyst, of the meta post-Fordist[291] globalised economy, the mass consumption paradigm of transnational, integrally connected markets, characterised by the free movement of capital, production and services and focused on unrestrained competition[292]. This new model of complex and interconnected market relations has led to structures and policy rationales that have combined neoclassical, post-Fordist and post-modern[293] market characteristics, such as the individualistic ethos and an aversion to trade

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[288] Supiot, Beyond Employment, n.157, 1.

[289] ibid.

[290] *Lipietz, Alain*, Post-Fordism and Democracy in *Amin, Ash (ed)* , Post-Fordism Reader (Blackwell, Oxford 1994), 338 (342). See also *Espring-Andersen Gosta*, The Three Worlds of Welfare Capitalism (Polity, Cambridge 1990).

[291] The term 'post-Fordism' is ambiguous and has been used in an attempt to describe many a characteristic of market and production modernisation (technologic advance, 'flexible specialisation', post-industrialism and shift to services, to name a few). Post-Fordism has thus been criticised as a vague and inaccurate concept of convenience, anchored in national perspectives and analyses; a 'fantasy' umbrella-term for a variety of theories of economic, institutional and regulatory transition. See *Amin, Ash*, 'Post-Fordism: Models, Fantasies and Phantoms of Transition' in *Amin, Ash* (ed), Post-Fordism:A Reader (Blackwell, Oxford 1994), 1-39; *Munck, Ronaldo*, Labour Dilemmas and Labour Futures in *Munck/Waterman*, n.242, 3 (10). cf. *Kumar, Krishan*, From Post-Industrial to Post-Modern Society: New Theories of the Contemporary World (2nd ed; Blackwell, Oxford 2005), 61ff (87-88). For this reason Munck has warned against identifying a clear divide between 'Fordism' and Post-'Fordism' as two supposedly coherent distinct stages of the evolution of capitalist market economy: *Munck*, op.cit., 5; cf. *Williams, Karen/Cutler, Tony/Williams, John/Haslam, Colin*, The End of Mass Production? (1987) Economy and Society 16(3), 405 (438).

[292] *Munck*, op.cit., 10; *Smith, Roger*, 'The convergence/divergence debate in comparative industrial relations' in *Rigby, Mike/Smith, Roger/Lawlor, Teresa* (eds.), European Trade Unions: Change and response (Routledge, London 1999), 1 (11).

[293] The term alludes to aesthetic, ethical, moral and cultural characteristics, shaped in part by the evolution of economic structures. See inter alia *Harvey, David*, The Condition of Postmodernity: An Inquiry into the Origins of Cultural Change (Blackwell, Oxford 1989).
cf *Anderson, Perry*, The Origins of Postmodernity (Verso, London 1998); *Jameson, Frederic*, The Cultural Turn: Selected writings on the Postmodern, 1983-1998 (Verso, London 1998); *Callinicos, Alex*, Against Postmodernism: A Marxist Critique (Polity, Cambridge 1989). For a notorious fiercer critique see *Sokal, Alan/Bricmont, Jean*, Fashionable Nonsense: Postmodern Intellectuals' Abuse of Science (Picador, New York 1998).

unionism and labour market self-regulation through collective labour law mechanisms[294]. However, this loose ideological economic framework has moved beyond post-Fordism[295] towards advocating production and trade freed from all regulatory interventions (seen as hindering competition), further promoting labour 'flexibility' and highlighting the idea of a globalised market. It has been argued that the shift is nothing more than the shedding of the Gramscian[296] revisionist left mantle[297] (playfully dubbed '*designer socialism'* by Rustin[298]) in analysing what is ultimately a neoclassical, and increasingly neoliberal[299], evolution[300], of capitalist market economies on a global scale.

The re-arrangement of global capitalist markets has challenged the established norms, institutions and structures that had evolved within self-contained national (legal, economic and social) orders[301]. The ensuing shake-up has led Lash and Urry to use the term 'disorganised capitalism'[302] to describe the reality not of a market or society in disarray[303] as a result of the changes, but of a nevertheless radical departure[304] from familiar norms, structures and their certainties[305]. The shift in paradigm has led to labour market deregulation and an aggressive tendency to fit labour and workers to the new market conditions[306].

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[294] *Rustin, Michael*, The Politics of Post-Fordism: or, The Trouble with 'New Times' (1989) NLR I/175, 54 (61-62).
[295] *Kumar,* op.cit., 87-88.
[296] See *Gramsci, Antonio*, Americanism and Fordism (Prison Writings) in *Forgags, David (ed)*, The Gramsci Reader: Selected Writings 1916-1935 (NYUP, New York 2000), 275.
[297] *Rustin*, op.cit., 63-69.
[298] ibid, 63.
[299] According to *Rustin* 'Thatcherism may be understood as a strategy of post-Fordism initiated from the perspective of the right': *Rustin*, op.cit., 75. See also *Harvey, David*, A brief history of neoliberalism (OUP, Oxford 2005), 13-19; *Crouch, Colin*, The strange non-death of neoliberalism (Polity, Cambridge 2011).
[300] *Antonio, Robert/Bonanno, Alexander*, A New Global Capitalism? From "Americanism and Fordism" to "Americanization-Globalization", (2000) AMSJ 41, 33.
[301] *Supiot*, Beyond Employment, n.157, 2.
[302] *Lash, Scott/Urry, John*, The End of Organised Capitalism (Polity, Cambridge 1987).
[303] *Kumar*, n.291, 73.
[304] See *Supiot*, Beyond Employment, n.157, 50.
[305] *Lash/Urry*, op.cit., 312-313; cf. *Traxler, Franz*, Collective Bargaining and Industrial Change: A Case of Disorganization? A Comparative Analysis of Eighteen OECD Countries, (1996) Eur.Soc.Rev. 12(3), 271: this is certainly how Traxler understands the effects of 'disorganisation'. He is critical of the disorganisation thesis as a synonym of a linear, unavoidable (or 'deterministic', ibid, 272) and unitary (ibid, 275) process of convergent deconstruction. However, Traxler does concede to evidence of shifts in perceptions, structures and paradigms, albeit resulting in diversity and multiplicity rather than convergence (ibid, 279-283).
[306] *Supiot*, Beyond Employment, n.157, 50-51.

The effect has been certainly felt in collective labour relations[307]. Stances as regard unionisation have changed, with an increasing drop in membership[308], in most EU Member States[309], which has revealed representation questions and has generally weakened the political influence of Trade Unions. With decentralisation and the emphasis on establishment-level labour relations[310], combined with the advance of flexible and atypical working relations, the strength and role of Trade Unions even as regards their narrower function as market actors and co-regulators has waned[311].

On the other hand, alternative forms of participation and codetermination have arisen, such as the Works Councils in the EU context[312], complemented by relevant facilitating norms, most notably the 'information and consultation' framework. Partaking in this new 'cooperative' ethos, Trade Unions attempted to adapt to contemporary economic rationales of efficiency and productivity of the business, as the core of attention[313], and of the 'trickle down' beneficial effects they allegedly can have for workers.

In other words, Trade Unions essentially conceded to a purely economic understanding of their role. Their retreat to economic pragmatism was, however, distorted in that it side-lined the fundamental understanding of the employment relationship as one of clashing interests. By accepting a shift away from their role as the embodiment of collective negotiation power, which also includes coercion if necessary, it is possible that Trade Unions contributed to disillusion among

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[307] See *Lash/Urry*, n.302, 232-284. cf. *Traxler*, op.cit., 281.

[308] According to the latest OECD country statistics on Trade Union density, since 1980 membership had fallen from 49.7% of the workforce to 25,4% in 2013 in the UK. Similar decline has been observed in other core markets (34,9% to 18% in 2010 in Germany; 18,3% to 7,9% in France; 49,6% to 35,6% in 2011 in Italy).
See *OECD StatExtraxts database* <http://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN#> (last accessed 4/9/2014). See also *Jaspers, Teun*, 'The future of collective labour agreements system challenged?' in *Malherbe, Kitty/Sloth-Nielsen, Julia*, Labour Law into the Future: Essays in honour of D'Arcy du Toit (Juta, Claremont 2012), 97 (98-99).

[309] Membership is still consistently high in Nordic countries (in 2010 trade union density registered 67,6% in Denmark, 54,8% in Norway, 68,2% in Sweden and 70% in Finland) and Belgium (50,4% in 2010): *OECD StatExtracts database*, op.cit.

[310] *Hyman 1991*, n.258, 626-627.

[311] *Smith, R.*, n.292 11.

[312] See, inter alia, *Rogers, Joel/Streeck, Wolfgang*, Works councils : consultation, representation, and cooperation in industrial relations (University of Chicago Press, Chicago 1995).

[313] *Streeck, Wolfgang*, Social Institutions and Economic Performance: Studies of Industrial Relations in Advanced Capitalist Economies (Sage, London 1992).

workers. Their '*representational credibility*'[314] in the eyes of individual workers and their position in the collective imaginary as social and political, as well as economic, actors were undermined. The limited conception of collective labour processes as mainly a mechanism of labour/management cooperation to promote their supposedly[315] 'common' economic interests of advancing the business (that is, the work organisation) has contributed to the '*disaggregation of the working class*'[316] as such into isolated business-related pockets of workers with no sense of commonality, and, hence, of broader solidarity and interconnection[317].

It seems that ultimately Trade Unions might have not only succumbed, but actually fostered the mantra of unrelenting competition, flexibilisation and the individualistic economic rationales, that place business and the freedom of enterprise (and of entrepreneurs) at the basis of all relevant discussions and analyses. In other words, labour has internalised the promises of post-Fordist liberalised free market models and stretched collective labour vehicles to their conceptual limits to that end, especially in the context of the EU.

The European Union's internal market has become the epitome of such a transnational highly competitive market economy. As such, it has transcended, but also put stress on, labour market-related national paradigms, norms and perceptions, and on the goals and values associated with labour rights. The Union has not only induced economic integration, culminating in the EMU and its shaky first twenty years, nor just pushed for the acceptance of a particular understanding of a capitalist market. It has, further, brought forth cultural and social transformations, especially through free movement[318]. These have resulted, inter alia, in introducing novel elements in our understanding of the labour force itself[319] and the notions of its cohesion through collective labour mechanisms of solidarity. It is no coincidence, then, that the EU common market bears the characteristics of 'disorganisation', understood as a challenge to traditional

[314] *Hyman, Richard*, 'Trade Unions and the Disaggregation of the Working Class' in *Regini, Marino* (ed), The Future of Labour Movements (2nd ed, Sage, London 1994), 150 (150).
[315] *Smith, R.*,n.292, 11.
[316] ibid, 150 ff.
[317] ibid, 151.
[318] *Supiot*, Beyond Employment, n.157, 94.
[319] ibid.

established paradigms, especially when it comes to the preconceptions as regards the role of collective labour law[320].

As we have seen, the roots of the Union as a transnational organisation, focused solely on the creation and maintenance of a free market, have been influenced by neoclassical and neoliberal economic theory. As a consequence, long before the Lisbon Treaty, the perception of normative balance had been tipped in favour of economic considerations and freedoms. Collective labour rights had been branded as definitively 'social', and thus antagonistic to economic freedoms. The idea of the dual nature and the inherent economic character of collective labour law, evident from its historical evolution within national traditions, had appeared to be all but lost to EU institutions. However, the holistic approach of the Union as a constitutionally governed system that has legally created a specific market arrangement compels the reconnection of perception and interpretation with a similarly holistic understanding of collective labour law and its role within the market as an inherent element thereof.

2.1. 'Traditional' fundamental perspectives: bargaining power inequality and the corrective role of collective labour law

The predominant justification of special regulatory intervention in the employment relationship has always been its suggested inherently imbalanced nature. Whether the focus is on the employment contract or the broader worker/employer relationship, the need to countervail, if not institutionally prevent[321], imbalances, such as the inequality of bargaining power[322] and the intrinsic subordination of labour to management[323], has formed the normative foundation of labour law. This characteristic is, by and large, responsible for

[320] See *Hyman, Richard*, The Europeanisation –or the erosion- of industrial relations? (2001) IRJ 32(4), 280. cf. *Traxler,* op.cit., 281 (though he rejects the expressed fear of 'social dumping': ibid, 272).
[321] See *MacMillan, Craig*, 'Recognition Theory and Institutional Labour Economics' in *Smith, Nicholas H./Deranty, Jean-Philippe,* New Philosophies of Labour: Work and the Social Bond (Brill, Leiden 2012), 101 (128).
[322] *Kahn-Freund, Otto* in *Davies/Paul/Freedland, Mark*, Kahn-Freund's Labour and the Law (3rd ed; Stevens, London 1983), 18; *Wedderburn 1991*, n.284 200. See also *Hutt, William Harold.,* The Theory of Collective Bargaining (1st ed 1934; The Free Press; Glencoe, IL 1954), 21, 24-29, 44-47, 62-63 on some historical context for the evolution of the idea, back to Adam Smith himself.
[323] ibid.

labour law being usually perceived as having the protection of workers as its only function, thus only exhibiting a 'social', or redistributive[324], character. Consequently, collective labour mechanisms are eventually branded as foreign and hostile to the ideal of a self-constitutive, self-regulating free market.

Nevertheless, the lack of balance in the employment relationship can also be analysed and understood within the context of a purely economic market economy reasoning.

2.1.1. Bargaining inequality and economics, and the normative construction of the market

The claim of unequal bargaining power between workers and employers is not generally accepted by neoclassical economists[325]. The worker is seen as an independent actor in the external labour market (the market *for* jobs)[326]. In a highly competitive[327] market economy it is free competition of workers, and their particular skills, that defines the bargaining power of each individual worker, according to the laws of supply and demand[328]. Moreover, competition also compels employers to provide such wages and terms of employment that can attract and retain skilful labour[329]. Thus, there is no need for regulatory mechanisms, perceived as external to the market process, to restore a supposed blanket bargaining power inequality. On the contrary, collective bargaining and collective action are regarded as inducive to a labour market cartel, restricting free competition[330].

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[324] *Klare, Karl*, 'Countervailing workers' power as a regulatory strategy' in *Collins/Davies/Rideout*, n.227, 63 (63-64). cf *Collins 2000*, n.227, 11-16.
[325] See for example *Schwab, Stewart*, 'The Law and Economics Approach to Workplace Regulation' in *Kaufman, Bruce* (ed), Government Regulation of the Employment Relationship (IRRA, Madison 1997), 91 (111-113;103).
[326] *Wachter, Michael*, 'Neoclassical labor economics: its implication in labor and employment law' in *Estlund/Wachter*, n.270, 21 (henceforth *Wachter 2012b*); also see *Wachter, Michael/Wright, Randal*, The economics of Internal Labor Markets, (1990) IR 29(2), 240.
[327] ibid, 23.
[328] ibid, 24; *Estlund/Wachter*, n.270, 9. cf. *Dau-Schmidt, Kenneth G./Traynor Arthur*, 'Regulating unions and collective bargaining' in *Dau-Schmidt/Harris/Lobel*, n.268, (96) 107-108.
[329] *Kaufman* 2009, n.268, 30.
[330] *Collins 2000*, n.227, 10.

Some go as far as arguing that there is no need for 'intrusive' labour regulation even for the internal labour market[331], the 'micro-market' that operates within a firm. As Wachter, for example, notes, Trade Unions, albeit helpful, are not necessary to protect workers against arbitrary use of managerial power by opportunistic employers that might jeopardise job security[332]. Employers can be averted from opportunistic behaviour that only bears them short term gains merely by operating as rational market actors. If they do not, they risk sacrificing the investment they have made on building the relationship with their employees and as to the cost of their company-related training and the experience and skills[333] it creates. They might also be risking their reputation in the external labour market, where they will be perceived by potential employees as unstable or unreliable[334]. However, that suggestion assumes that interest in ongoing employment relationships or dependence on personnel specifically skilled for a particular firm are the norm[335]. In a world of increasing labour mobility, dehumanisation of the employer/manager paradigm through the dominance of large corporate structures, and precarious relationships, this assumption seems misplaced[336].

Moreover, Schwab has argued that regulation and mechanisms protective of workers impose costs on the company that are ultimately borne by the workers themselves as 'co-owners' and 'shareholders', through their firm-level pension funds[337]. When no company-based pension system exists, the argument turns to suggesting that the costs of 'paternalistic'[338] regulation affect consumers more than workers. Furthermore, labour regulation costs, including those induced as a consequence of collective bargaining and union activity, may result in harming

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[331] See *Doeringer, Peter/Piore, Michael*, Internal Labor Markets and Manpower Analysis (Heath, Lexington MA 1971); *Osterman, Paul*, Internal Labor Markets (MIT Press, Cambridge MA 1984); *Dunlop, John*, 'Organizations and Human Resources: Internal and External Markets' in Kerr, Clark/Staudohar, Paul (eds), Labor Economics and Industrial Relations: Markets and Institutions (Harvard University Press, Cambridge MA 1994), 375. *Wachter, Michael/Wright, Randal*, The economics of Internal Labor Markets, (1990) IR 29(2), 240. Also see *Wachter 2012b*, n.326, 31.
[332] *Wachter 2012b*, op.cit., 34; 41
[333] ibid, 35.
[334] ibid.
[335] ibid, 34-35.
[336] See, inter alia, Standing, Guy, The Precariat:The New Dangerous Class (Bloomsbury, London 2011); *Stone, Katherine*, From Widgets to Digits: Employment regulation and the changing workplace (CUP, Cambridge 2004).
[337] *Schwab*, op.cit., 97.
[338] ibid, 98.

workers themselves, leading employers to lower wages in order to cut their costs or disincentivising them to offer jobs[339].

However, even within neoclassical economics, some commentators realise the need for collective labour law corrective mechanisms when it comes to internal labour markets[340]. The hypotheses of efficiency, mobility and competitiveness[341], as well as the effects of 'market forces' in general[342], that supposedly provide for market self-coordination and self-regulation, do not necessarily apply to the environment of internal labour markets[343]. Thus, there is need of administrative and regulatory structures that will alleviate the shortcomings of internal labour markets as regards coordination and control[344]. Collective labour law mechanisms and collective agreements as their normative expression constitute aspects of such structures.

As we have seen, however, the overarching fundamental assumption of a perfectly competitive, thus self-regulating and self-balancing, labour market is an artificial theoretical construction[345], arguably not entirely solid even on a theoretical level[346]. In the case of the labour market, imbalances are unavoidable[347], as they derive from the very nature of its fundamental element: the employment relationship itself[348].

For institutional economists, bargaining inequality, subordination and control (hence relevant exploitation of labour[349]), and the asymmetry of resources[350] that

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[339] ibid, 97-98. Also, inter alia, see *Kahn, Lawrence*, Wage Inequality, Collective Bargaining, and Relative Employment from 1985 to 1994: Evidence from Fifteen OECD Countries, (2000) RevEconStat 82(4), 564-579. cf *Jimeno, Juan/Thomas, Carlos*, Collective bargaining, firm heterogeneity and unemployment, (2013) EurEconRev 59, 63-79, painting a more complex picture regarding sectoral and firm-based collective agreements.
[340] *Wachter 2012b*, n.326, 31.
[341] Becker, Gary, Human Capital (University of Chicago Press, Chicago, 1964).
[342] *Kaufman, Bruce*, 'Economic analysis of labor markets and labor law: an institutional/industrial relations perspective' in *Estlund/Wachter(2012)*, n.270, 52 (75).
[343] *Wachter 2012b*, n.326, 32.
[344] *Kaufman 2012*,op.cit..
[345] *Kaufman 2009*, n.268, 30.
[346] *Kaufman, Bruce*, The impossibility of a perfectly competitive labor market, (2007) CJE 31(5), 775 (776; 780-781; 783; 784-785).
[347] *Kaufman 2007*, op.cit., 775-787; *Kaufman 2009*, n.268, 31; Manning, Alan, 'Imperfect Competition in the Labor Market' in *Card, David/Ashenfelter, Orley*, Handbook of Labor Economics Vol.4, Part B (Elsevier, 2011), 973-1041 (1031).
[348] *Kaufman 2009*, n.268, 31.
[349] ibid, 33.
[350] ibid, 34.

are inherent in the employment relationship[351] preclude the rational exercise of choice by both parties[352], employer and employee, that is the basis of free competition and its supposed benefits[353]. Competition, if it is to be a tool of progress and prosperity that allows the market to be the projection of individual freedom on the economic plain, need not only be free but also 'fair and balanced'[354]. The inherently unbalanced nature of the employment relationship requires targeted regulatory and institutional interventions to counterbalance its effects and restore fairness and balance, without, however, resulting in overregulation of the market[355].

The organisation of workers into unions and the endowment of those collectivities with bargaining capabilities, flanked with the coercive power of collective action, are proportionate responses to the imbalance question[356]. The right to associate and form unions maximises the capability of an individual worker to have access to the information and resources required to make a rational choice[357].

However, worker organisation needs to be complemented by the ability to threaten and inflict costs on the employer as a negotiation weapon[358]. After all, it is the threat of costs and the capability of coercion that constitutes the foundation of bargaining power[359]. Collective action, therefore, is an inherent part of effective negotiating power[360] and not a blatant attack on the freedom of enterprise, an 'antisocial power of coercion'[361], or a 'social' measure imposed, or tolerated, by the state. Collective labour law is an integral systemic element of a functioning

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[351] *Kaufman 2009*, n.268, 30-31.
[352] See *Davies, Anne*, Perspectives on Labour Law (2nd ed; CUP, Cambridge 2009), 21.
[353] ibid, 30-33.
[354] *Kaufman, Bruce*, Historical insights: The early institutionalists on trade unionism and labor policy, (2005) JLR 26(1), 1 (6).
[355] *Kaufman 2009*, n.268, 41.
[356] *Dau-Schmidt/Traynor*, n.328, 107.
[357] *Dau-Schmidt/Traynor* , op.cit., 119. *Hepple, Bob*, The Right to Strike in an International Context, (2009-2010) CJELJ 15, 133 (140).
[358] ibid, 116.
[359] ibid.
[360] cf. *Wedderburn 1991*,n.284, 328.
[361] *Hayek*, Law, Legislation and Liberty, n.76, Vol.3, 96.

market and a liberal society, not an exploitative force[362] or a threat to the market, the rule of law[363] and society as a whole[364], as Hayek would maintain.

As a regulatory instrument, collective labour law institutions are not unwarranted state interventions on the labour market. They rather constitute supporting organisational structures that liberate and expand the self-regulating capabilities of the market, by endowing all the actors and interests in it with the power to contribute. Even strikes, as the extreme, coercive manifestation of collective labour law instruments, should be seen as a necessary tool to render collective bargaining and its market correcting role effective – a point to which even Hayek could not but concede[365].

Therefore, collective bargaining and collective action should not be seen as solely 'social', in perpetual battle with economic freedoms and considerations. They ought to be understood as corrective mechanisms for distortions in market self-calibration that arise from the exclusion of the effective representation of worker interests, in the exercise of what effectively amounts to regulatory power through economic action.

2.1.2. Bargaining inequality and the normative construction of the economic environment

Power inequality (which includes the asymmetry of resources and information) as integral characteristic of the employment relationship, has further consequences. In the overall market conception, these asymmetries result in a pre-rigged, '*tipped playing field*' as regards opportunity, risk and, ultimately, economic freedom, which is in favour of employers[366]. This bias is reflected in the influence exerted to those political and regulatory forces that are external to a pure theoretical market model, yet affect and institutionally shape the specific version

[362] ibid.
[363] ibid, 89.
[364] ibid.
[365] Though firmly oppose normatively: *Hayek, F.A.*, The Constitution of Liberty: The definitive edition (Ronald Hamowy ed.; University of Chicago Press, Chicago 2011;1st ed.1960), 394.
[366] *Kaufman 2012*, n.342, 75.

of market structure in any given social and political context[367]. Collective labour institutions, therefore, also operate as a vehicle through which workers can provide input to the broader political and legislative debate that shapes the market and its constitutive legal institutions[368].

From a positivist point of view, norms concluded through collective labour law processes can lead to not only more comprehensive but potentially to fairer labour market regulation vis-à-vis state imposed legal norms. It has been argued, in fact, that often legal rules themselves, as the direct outcome of state intervention (legislative or judicial), especially in common law traditions[369] or, more broadly, in contract law-based, or influenced, analyses[370], tend to favour employers[371]. This skewed outcome is a direct result of legal tradition[372] and historical evolution[373]. It reflects a fundamentally distorted historical understanding of production, ownership and the employment relationship as one of dominance[374], to the detriment of labour[375]. Importantly, it is also the consequence of the better, more direct, access economic elites have to the legislative and the judicial processes, and the consequent influence they yield over them, directly or indirectly[376]. This last point, as we have seen, is especially characteristic of the EU, its creation and

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[367] ibid, 75.
[368] cf *Galbraith, John Kenneth*, American Capitalism: The Concept of Countervailing Power (Transaction, 1993; 1st ed 1952); *Klare*, n.324, 63-82. See also *Stone, Katherine*, ' A Labor Law for the Digital Era: The Future of Labor and Employment Law in the United States' in *Dau-Schmidt/Harris/Lobel*, op.cit., 709.
[369] *Deakin, Simon*, The Contract of Employment: A Study in Legal Evolution, (2001) HSIR 11, 1-36; *Deakin, Simon*, 'The Many Futures of the Contract of Employment', in *Conaghan J./Fischl, R.M./Klare, K. (eds)*, Labour Law in an Era of Globalisation: Transformative Practices and Possibilities (OUP, Oxford 2002), 177 .
[370] See *Freedland, Mark/Kountouris, Nicola*, Towards a Comparative Theory of the Contractual Construction of Personal Work Relations in Europe, (2008) ILJ 37(1), 49-74, for an analysis of the basic distinctions of contract-based models in common law and civil law traditions.
[371] *Kaufman 2009*, n.268, 34; *Dau-Schmidt/Traynor*, n.328, 107.
[372] See *Deakin, Simon/Lele, Priya/Siems, Mathias*, The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes, (2008) ILR 146(3-4), 133-162.
[373] *Hepple, Bob* (ed) The Making of Labour Law in Europe (Mansell, London 1986); *Deakin 2002*, n.369, 182-183 and 194-195; *Deakin, Simon*, The Comparative Evolution of the Employment Relationship, in *Davidov /Langille 2006*,n.221, 89 (92-98: UK; 98-102: continental Europe). See, for the broader argument on the merits of an evolutionary analysis, *Deakin/Wilkinson*, n.222, 11-18; 34-35.
[374] *Deakin 2002*, n.369, 178; *Freedland/Kountouris 2008*, op.cit., 59.
[375] See, for example, *Deakin/Wilkinson*,n.222, 108 (obedience and loyalty); 17, 61-71 (on subordination and managerial autocracy); 90-95 (on control).
[376] *Kaufman 2009*, n.268, *34-35*; *Commons, John R.*, Institutional Economics: Its place in Political Economy (Macmillan, New York 1934), 895.

legal evolution[377], and the consequent understanding of the role and value of labour rights[378] within its initial ordoliberal structure. The normative framework that ensues from the accumulation of those factors creates a tilted legal playing field from the very beginning. Such a normative starting point, however, is outright antithetical even with the theoretical assumption of a freely operating, hence balanced, competitive market economy.

Collective labour law, in other words, more that responding to the inherent imbalances of the employment relationship, ensures the equitable function of the market as a level playing field for all related economic interests. In that sense, it promotes the effective exercise of fundamental economic freedoms of all economic actors. As a consequence, collective labour law institutions hold the potential to restore balance not only within the narrow context of contractual bargaining, but as regards the broader outcomes[379] of the economic, political and legal processes that underpin the labour market. It is this broader relation to the workers' exercise of individual economic freedom that we now turn our attention.

2.1.3. Inequality and individual economic freedom

The imbalance of negotiating and coercive power is antithetical to the liberal idea of the autonomous individual market actor exercising her economic freedom released from coercion and external distortions. It should be noted that, when it comes to workers as economic actors, their freedom to work is a component of professional freedom[380], itself a seminal aspect of economic freedom. Full enjoyment of that fundamental freedom, by reference to, and on the basis of, legal norms[381], is the core prerequisite for unconstrained, considerate economic behaviour. The inherently weak position of the paradigm of a worker dependent

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[377] *Best, Heinrich/Lengyel, Györgi/Verzichelli, Luca*, The Europe of Elites: A study into the Europeanness of Europe's Political and Economic Elites (OUP, Oxford 2012), 213-214.
Even from a integrationist conservative perspective, that denies neoliberal attributes attached to the EU, see *Haller, Max*, European Integration as an Elite Process: The failure of a dream? (Routledge, London 2008), 110-115; 123-135. See also Maduro, Miguel Poiares, 'Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU' in Alston, Philip (ed), The EU and Human Rights (OUP, Oxford 1999), 449 (459).
[378] *Best/Lengyel/Verzichelli*, op.cit., 236.
[379] See *Klare*, n.324, 70-71.
[380] *Supiot*, Beyond Employment, n.157, 26; 56.
[381] cf. ibid, 56-57.

on his employer, as to the stability of his job and to its working conditions, can only be overcome by collective mechanisms that multiply the individual voice and coercive power of individual workers[382].

Neoclassical reasoning adopts a procedural, normatively sterilised, concept of liberty and economic freedom; freedom is merely construed as the absence of state (or institutional[383]) interference. However, a modern interpretation of economic freedom needs to account for the legal framework within which it is exercised and the broader objectives it connects and aspires to (hence the paradigm of the 'social market economy'). Therefore, economic freedom is not an end in itself. It is a means to ensuring dignity and participation in the social sphere. Moreover, the exercise of economic freedoms is connected to the wider idea of individual liberty, pertaining to the capacity for personal fulfilment and evolution[384].

The legal manifestation of economic autonomy and freedom, and its subdivision in a set of economic rights, are therefore defined and delimited by the constitutional nexus that weaves all these various objectives and protected interests together. Consequently, any interpretation of economic freedoms should construe them substantively, with reference to these broader objectives; not merely procedurally, as if they were a mathematical variable. Hence, labour rights, as corollaries of a worker's economic freedom, cannot but be considered under this systematic, broad interpretation. Only through this route can their purely economic objectives be reconciled with social considerations, fundamental constitutional values, and a substantive understanding of individual liberty - all relevant to labour regulation[385].

As a result, it appears that institutional and neo-institutional labour economics are better suited to understand and analyse economic questions as part of tangible legal and social reality. Their fundamental theoretical assumptions accept the

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[382] See *MacMillan*, n.321, 118; *Dukes*, n.1, 30-31.
[383] Hayek, for example, counts Trade Unions as institutional mechanisms that, '*contrary to all principles of freedom*', exercise '*coercion of fellow workers*': *Hayek*, Constitution of Liberty, n.365, 386.
[384] *Sen, Amartya*, Commodities and Capabilities (OUP, New Delhi 1999); Development as Freedom (Alfred Knopf, New York 2000), 87-110; The Idea of Justice (Belnkap Press, Cambridge MA 2009), 225-290.
[385] cf *Sen 2000*, op.cit., 116.

substantive construction of economic freedom and the nature of labour as integrally related with workers' humanity[386].

2.1.4. Preconditions of bargaining equality: countering the asymmetry in resources and information

At an individual level, the inequality of bargaining power is also a consequence of the inherent inequality of resources[387] and access to information[388] between the bargaining parties of the employment relationship.

As regards resources, the employment relationship is, by definition, heavily asymmetrical[389]. It is the employer who provides the necessary infrastructure for workers to be able to offer their labour. More importantly, labour is the only resource workers possess[390]; on the other hand, the employer's capital is only one of its resources. As it transposes to wages, labour may very well constitute the main, if not the only, financial resource workers look forward to for their very subsistence. Furthermore, in a modern market economy, workers are dependent upon the employer to build 'marketable' assets and professional qualifications, such as experience, credibility, and evidence of their efficiency and productivity[391]. Neoclassical economists argue that there is no bargaining inequality in the wider (external) labour market, since workers, to fulfil their need for employment, use their qualifications as bargaining assets, thus being rational active buyers themselves rather than passive receptacles of whatever conditions employers have to offer. However, that argument fails to take account the dependence of workers on employers so as to build those 'employability qualifications' that allegedly turn them into active market actors of significant negotiating power.

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[386] Kaufman *2012*, n.342, 72.
[387] *MacMillan*, n.321, 117.
[388] *Wachter 2012b*, n.326, 36.
[389] *Kaufman 2009*, n.268, 31.
[390] cf. *Hutt*, n.322, 66.
[391] For example, see Spring v Guardian Insurance plc [1994] 3 All ER 129, 146.

Effective and rational bargaining, and transaction choice also presuppose access to as much information as possible[392]. In the context of the employment relationship however, information asymmetry is not only present but, arguably, more weighing on workers, both in the pre-contractual phase and after having entered an employment contract, with reference to both crucial functional[393] or financial (assets-related) information about the business and to details related to the workplace ethos[394] and relevant practices. Moreover, given the contemporary complexity of corporate structures, it is quite possible that that limited set of information, albeit crucial, only partially reflects reality. Under such conditions, workers are essentially unable to make 'rational' choice.

The employer's access to information relating to its workers is considerably better. An employer can have reasonably adequate access[395] to those details that are relevant to a worker's skills and qualifications, even though their value as to the worker's actual efficiency and productivity is indicative[396]. Beyond those details, it has been suggested that there is just a single piece of counter-information of which only the individual worker has full knowledge: the effort she puts in her labour[397]. However that is by no means enough to countervail the immense imbalance as regards access to information of every possible factor relevant to the progression of the employment relationship. As Wachter points out, as a result of modern production methods and the control and oversight of management on labour, employers can actually gather information about the productivity of workers that workers themselves cannot estimate accurately[398]. Ultimately, it is marginal productivity that interests employers as a basis for their choices and negotiation and not the elusive 'effort' workers put it to achieve that level of productivity. Consequently, the asymmetry of information remains.

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[392] *Collins 2000*, n.227, 7.
[393] ibid, 7-8.
[394] ibid, 8.
[395] cf. ibid, 7.
[396] *Deakin/Wilkinson 2000*, n.260, 40.
[397] *Wachter 2012b*, n.326, 36. cf
[398] ibid.

It has in fact been asserted that collective action is the result of imperfect information[399] that precludes rational choice, which, in this case, would have been reaching an agreement through mutual concessions and avoiding the costs strikes entail for both parties.

Collective organisation aims to resolve the imbalance through institutional means. Unionisation provides a stable, organised collectivity, operating within the business or the relevant sector, endowed with the resources and the institutional power to have access to information that eludes individual workers. In that respect, unions act as conduits of information towards workers. Furthermore, they have the institutional capacity to make use of that information to directly negotiate with the employer, representing their members. The aims of these negotiations might extend from being informed about business decisions that might affect the status quo of the workforce, potentially allowing workers to influence the ensuing managerial decisions, to, at the furthest extend, codetermining business policy (codetermination) and working conditions (collective bargaining). To those ends, trade unions enjoy, on the one hand, information and consultation rights in various situations and, one the other, the power to collectively bargain and conclude collective agreements with the employer.

The organisation of trade unions makes it easier for them to gain access to crucial information, which can be beyond the reach of the limited capabilities of individual workers. In turn, this means that collectivities can approach issues with, sounder, more objective, and thus more pragmatic, judgment. Moreover, they enjoy a position within the labour market, and connections to other unions or market actors (professional associations, political parties and entities), that allow them knowledge of the wider economic environment. That understanding can provide worker collectivities with a clearer perspective of all that is at stake[400].

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[399] *Mauro, Martin*, Strikes as a result of imperfect information, (1982) Indus.& Lab.Rel.Rev.35, 522; *Dau-Schmidt/Traynor,* n.328, *118*; *Kennan, John*, The Economics of Strikes in *Ashenfelter, Orley/Layard, Richard*, Handbook of Labor Economics, Vol. II (Elsevier, 1986), 1091 (1104-1112). See also *Hicks, John*, The Theory of Wages (Macmillan, New York 1932), 146-147.
cf *Schor, Juliet/Bowles, Samuel*, Employment Rents and the Incidence of Strikes, 1987 Rev. Econ. Stat. 69(4), 584.

[400] See *Schwab, Stewart*, 'The union as broker of employment rights' in *Estlund/Wachter*, n.270, 248 (255).

Absent the collective negotiating power, and especially in the absence of legally mandatory labour rights[401], individual workers would be susceptible to waiving some of their rights, or accepting detrimental conditions, to achieve a bargaining advantage[402] vis-à-vis co-workers or other job-seekers. To keep up with the competition, others might join in accepting the reduction of labour standards, resulting in an intra-firm race to the bottom[403]. Trade unions, however, seek to protect the collectivity of their members, or the workers they covers, hence safeguarding an aggregate protection or advancement[404] of labour standards and conditions.

The fundamental role of unions as conduits of information and representatives of worker interests has been reflected in EU legislative instruments. Indicatively, EU law provides to 'representatives' of 'employees'[405] or 'workers', a term that includes trade unions but is not restricted to them[406], the ad hoc right to information prior to, respectively, a. the transfer of an undertaking (Art.7(1) Dir. 2001/23[407]); or b. collective redundancies (Art. 2(1) Dir.98/59[408]). As regards collective redundancies, information is provided as a direct necessary prerequisite to consultation between employment and labour[409].

Beyond the normal, 'peaceful' operation and functions of collective labour institutions, and the accumulation of information in that context, it has been suggested that strike action can be an extreme means of extracting information[410]. Absent access to information that could lead to fruitful negotiations, because, for example, an employer might want to avoid revealing its true resource and capital capacity[411], collective action is the ultimate weapon to compel it to share or give in to demands, regardless. At the very least, strike action is the aggressive means that achieves to reveal the extent of the employer's capacity to make concessions,

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401 ibid, 252-253.
402 ibid, 253.
403 ibid, 252.
404 ibid, 254.
405 It should be noted that the relevant national definition is mainly relevant here: See Art. 2(2) Dir. 2001/23.
406 Hence allowing for the various national collective labour law structures and institutions. See *Barnard*, EU Employment Law (2012), 637.
407 OJ [2001] L82/16.
408 OJ [1998] L225/16.
409 Art 2(1) Dir.98/59: ...'*with a view to reaching an agreement*'.
410 *Dau-Schmidt/Traynor*, n.328, 118.
411 ibid, 119.

while also informing it of the level of resolve and unity, and thus the bargaining power, of the workforce[412]. It is obvious that this is a coercive power that individual workers lack[413].

It is for this combination of the collective bargaining power and the complementary coercive threat of strike action, that even neoclassical economists have found unionisation and collective bargaining to be an effective remedy to the inherent asymmetry of the work relationship. Even under the assumption of a purely self-calibrating, rational market, unions have been accepted as 'economic agents'[414] that can facilitate rationality. Hence, collective labour mechanisms provide the means of restoring not just the perceived imbalance of negotiating power, but failures of the internal labour market itself, such as the information disequilibrium. The result is the rationalisation of choices, as much as possible transcending individual sentiments and the subsequent potential irrationality. In other words, collective labour law structures allow trade unions to act as agents of individual workers[415] in promoting their economic interests in the most aggregately rational and cost effective way, while safeguarding their rights.

2.2. Beyond traditional themes: Law and Economics and the economic objectives of Collective Labour Law

The collective labour rights inscribed as part of the material constitution of the Union, emanate from national traditions, and thus connect to the traditional understanding of collective labour law and its institutions as corrective of the asymmetries in bargaining power within the employment relationship. However, the treatment the Court, political actors, or EU Institutions reserve for collective labour law, and for its position within the broader market structure of the EU and the Union's economic constitution, is, arguably, heavily influenced by modern economic theory. Purely economic analyses, particularly those based on dominant contemporary paradigms, however, do not hold the traditional conceptions and

[412] ibid, 118.
[413] See *Macmillan*, n.321,117; *Kaufman 2009,* n.268, *31*.
[414] *Gahan, Peter*, 'Trade Unions as Regulators: Theoretical and Empirical Perspectives' in Arup/Howe/Mitchell/Gahan/Johnstone/O'Donnell, n.219, 261 (263-266.
[415] cf. *Schwab,* n.400, 248-272.

origins of labour law and its collective aspects in high regard - if they even factor them in their assumptions at all. Legal interpretations of the role of collective labour law within the EU common market usually fail to more systematically consider the entirety of the multiple functions and objectives of collective labour institutions, including the complexity of their economic function.

In assessing the 'economic' side of the role of collective organisation, bargaining, and action as elements of a social market economy, arguments drawn from Law and Economics[416], can prove useful[417], but not necessarily definitive. It should be kept in mind that Law and Economics emerged within a context of a very differently constructed market, in terms of legal regulation; that of the US[418]. In the absence of strong state intervention or fundamental constitutional social norms pertaining to labour rights or worker participation, labour market regulation analysis has been strongly influenced by economic arguments, if not entirely reliant on them[419]. It could be maintained that it is paradoxical to adopt an essentially purely economic interpretation of legal norms within a legal order based on a tradition of 'social' regulation and legally embedded collective labour rights, such as that of the EU. Nevertheless, the ordoliberal roots of the EU project can account, to an extent, for the economic focus being at least part of the discussion.

2.2.1. Neoclassical approaches

As we have seen, neoclassical[420] economic reasoning, emanating from the liberal tradition[421] of understanding the economic sphere, is based on the conviction that the market is neutral in itself. It is the natural outcome of the rational exercise[422] of complete, individual[423], self-serving freedom[424]. As such,

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[416] *Stigler, George*, Economics: The Imperial Science?, (1984) Scand.J.Econ. 86(3), 301 (303, 304-305).
[417] *Stigler, George*, Law or Economics?, (1992) J.LawEcon. 35(2), 455 (467).
[418] *Kaufman 2012*, n.342, 52-54.
[419] See *Posner, Richard*, Economic Analysis of Law (7th ed. Wolters-Kluwer, New York 2014), 3.
[420] *Lawson, Tony*, What is this 'school' called neoclassical economics?, (2013) Cambridge J.Econ. 37, 947 (947); *Kaufman 2012*, op.cit., 53-54. Lawson actually concludes that the variety is such that the term 'neoclassical economics ' itself is problematic and should be dropped altogether (ibid, 980).
[421] cf *Lawson*, op.cit., 948, 952.
[422] See *Posner*, op.cit., 4; *Lawson*, op.cit., 949-950.

market functions can essentially be understood as those of a spontaneously emerging natural phenomenon[425], capable of being analysed by objective 'scientific' method and measure[426]. If left to evolve without interference, markets have the capacity to self-regulate, evolve and ultimately reach equilibrium[427] by producing beneficial results for individual economic actors and the society at large.

However, neoclassical economists seem to purposely overlook[428] those institutions and the ensuing regulatory tools, such as legal norms (most notable among which economic constitutions) that had been necessary for the creation and the maintenance of particular types of market structure[429]. Some of these norms are essentially taken as of neutral economic effect[430], or as a given[431], so as to allow the fundamental assumption of a market economy that is competitive[432], rational[433], and efficient in its use of resources[434], upon which the neoclassical analytical model is based.

In essence, neoclassical law and economics cherry-pick norms and institutions to fit a particular narrative. Hence, these 'picks' are presented as either constitutive or, reversely, distortive of the supposed spontaneous economic environment of markets[435]. Legal norms and structures that are constitutive of the neoclassical

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[423] *Lawson*, ibid.
[424] *Clark, Charles M.A*., Spontaneous Order versus Instituted Process: The Market as Cause and Effect, (1993) J.Econ.Issues 27(2), 373 (379).
[425] cf. *Duggers, William*, Instituted Process and Enabling Myth: The Two Faces of the Market, (1989) J.Econ.Issues 23(2), 607 (607). *Commons*, Institutional Economics (1934), 713; Legal Foundations of Capitalism (University of Wisconsin Press, Madison 1957), 2-3. See also *Clark*, n.424, 375, 379; *MacMillan*, n.321, 109.
[426] *Commons*, Legal Foundations of Capitalism, op.cit., 3.
[427] *Calabresi, Guido*, 'Transaction costs, resource allocation, and liability rules-a comment', (1968) J.Law Econ. 11(1), 67-73 (68).
[428] *Kaufman 2012*, n.342, 78; *Howe, John/Johnstone, Richard/Mitchell, Richard*, 'Constituting and Regulating the Labour Market for Social and Economic Purposes' in Arup/ Howe/ Mitchell/ Gahan/ Johnstone/O'Donnell, n.219, 307 (308).
[429] *Deakin/Wilkinson 2005*,n.222, 11.
[430] *Furubotn, Eirik/Richter, Rudolf*, Institutions and Economic Theory: the contribution of the New Institutional Economics, (2nd ed. University of Michigan Press 2005), 2.
[431] *Furubotn, Eirik/Richter, Rudolf*, 'The New Institutional Economics: An Assessment' in *Furubotn, Eirik/Richter, Rudolf (eds)*, The New Institutional Economics (Texas A&M Press, College Station Texas 1991), 1 (2). cf. *Commons, John*, Institutional Economics, (1931) The American Economic Review 21 (4), 648 (657).
[432] *Kaufman 2012*, n.342, 54-56; 63.
[433] *Calabresi*, n.427.
[434] ibid, 55.
[435] See for example *Wachter 2012b*, n.326, 46. cf. *Lawson*, n.420, 971-972, 974-975, 981 where he discusses the broader methodological inconsistencies of neoclassical analyses.

market are considered perfect and given, to be enforced without question[436]. This idea of a neutral and impregnable ex-ante constructed, pre-existing framework, would be entirely familiar to ordoliberals[437]. On the other hand, any institution that interferes with the rational function of the market, a function largely based on an ideal concept of individual autonomy, is perceived to be problematic; an unwarranted coercive intervention to economic freedoms.

This assumed economic purity [438]of the theoretical market paradigm upon which neoclassical economics rests is artificially constructed; a fallacy[439]. It has been asserted that the neoclassical model takes the function of social welfare and relevant regulatory interventions as a given[440]. In turn, arguments about the redistributive function of collective labour law or its connection to fundamental social or democratic values are irrelevant for a neoclassical analysis. They are purportedly operating at a political economy level[441].

This line of argument is again indicative of cherry picking institutions when reference to them does not suit neoclassical reasoning. If we are to take various institutions, from economic constitutions to redistributive justice mechanisms, as either 'givens' or 'inappropriate' variables, what exactly is left for an analysis based on a supposed self-emanating, self-regulated market economy? At best, the assertion of 'free' individual choice, albeit disconnected from any institutional context. The conceptual foundation of neoclassical economics is thus neatly insulated against criticism; legal, political and social reality is just not a relevant variable. Moreover, if indeed, even for neoclassical economics, institutions mould the framework and effectively shape the market, albeit through political choices rather than economic variables, then no such thing as a pure conception of a free market, one unregulated from external factors, even exists. All manifestations of

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[436] *Furubotn/Richter 2005*, n.430, 19.
[437] However, see the allusion to a similar relation between ordoliberalism and the neo-institutionalist 'constitutional economics' (and their conception of the economic constitution) in *Furubotn/Richter 2005*, n.430, 38.
[438] See *Deakin 2007*, n.223, 1170.
[439] For Coase, this theoretical assumption, albeit coherent, is simply counterfactual. *Coase, Ronald*, The New Institutional Economics, (1998) The American Economic Review 882(2), 72 (74).
[440] *Wachter 2012b*, n.326 47.
[441] ibid and; *Wachter 2012a*, n.270, 427-462, discussing the US National Labor Relations Act as an instrument of political economy, indicative of a political and legal compromise. Paradoxically, but conveniently, the Act's effectiveness can be assessed by reference to economic theory, but the NLRA itself is not to be taken into account as a constitutive variable in pure neoclassical economic analyses. cf *Furubotn/Richter 2005*, n.430, 25-27.

market economies are politically construed and legally delimited. Therefore, fundamental legal norms contained in the economic constitution, itself subject to the constitutional foundations of the system it seeks to regulate, are not only important but decisive.

Nevertheless, in neoclassical analyses and neoliberal political thinking, labour law institutions[442], and especially collective labour structures, considered more aggressively interfering with free market function[443], are usually seen as obstacles to the natural evolution of the market rather than necessary elements of the system. That is precisely one of the fundamental tenets of neoclassical labour economics[444] and the relevant neoclassical law and economics[445] approach. It always goes hand in hand with the other basic feature of neoclassical thinking that tends to adopt an economic, individualistic perspective on work itself, considering labour a commodity that can be traded[446]. Consequently, workers are seen as economic actors and rent seekers who are in the market to 'trade' their labour, with the rules of a competitive free market absolutely applying. Those assumptions could not be farther from the traditional assumptions on the nature of labour, expressed by the fundamental principles of the ILO[447].

2.2.2. Institutionalist and neo-institutionalist approaches

For institutional[448] and neo-institutional[449] economics, markets are neither naturally emergent[450] or self-standing[451] nor the sole definitive force behind the

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[442] *Deakin, Simon*, 'The contribution of Labour Law to Economic and Human Development' in *Davidov/Langille*, n.218, 156 (159).
[443] *MacMillan*, n.321, 110.
[444] On the emergence and evolution of neoclassical labour economics see *Kaufman, Bruce*, 'Chicago and the development of twentieth century labor economics' in *Emmett, Ross*, The Elgar Companion to the Chicago School of Economics (Edward Elgar, Cheltenham 2010), 128-151.
[445] See *Medema, Steven*, 'Chicago law and economics' in *Emmett*, op.cit., 160-174.
[446] *Tucker, Eric*, Renorming Labour Law: Can We Escape Labour Law's Recurring Regulatory Dilemmas?, (2010) ILJ 39(2), 99 (102).
[447] *O'Higgins, Paul*, 'Labour is not a Commodity' – an Irish Contribution to International Labour Law, (1997) ILJ 26(3), 225-234.
[448] For a broad overview of historical institutional labour economics, albeit focused in the US, see inter alia *Kaufman, Bruce*, Industrial Relations and Labor Institutionalism: A Century of Boom and Bust (2006) Labor History 47(3), 295-318; *Rutherford, Malcolm*, Institutional Economics: Then and Now, (2001) J.Econ.Perspect. 15(3), 173-194. See also *Kaufman, Bruce*, Labor Markets and Employment Regulation: The view of the "Old" Institutionalists' in *Kaufman (ed) 2007*, n.325, 11.

behaviour of economic actors. Markets are constructed[452], and operate within a certain context and framework which is as much historical and social[453] as it is normative[454]. Free competition, the cornerstone of a free market economy and the centrepiece of the original EU economic constitution, is not a naturally occurring ideal but an artificially constructed condition[455]. The same is true of the market itself[456]. Institutions, 'norms, mores traditions and customs'[457] also exert influence on the behaviour of economic actors[458], alongside theoretical economic considerations, delimiting the market[459] and, ultimately, moulding the particular concept of the economy it operates within[460]. The most obvious source of influence is law, which has effectively not only created the necessary framework for the market to operate as it does[461], but provided a vehicle for pre-existent underlying relevant philosophical and ideological rationales[462]. In turn, law is of course itself influenced by the economic and social reality it is called to regulate and serve[463].

Thus, an analysis of collective labour mechanisms that is based on the tradition of institutional law and economics cannot avoid considering their social function and origin[464], alongside the economic. It is this systemic approach that allows

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[449] See, inter alia, *Furubotn/Richter (eds) 1991*, n.431.; *Furubotn/Richter 2005*, n.430; *Coase 1998*, n.439, 72-74; *Dow*, *Gregory*, 'The New Institutional Economics Approach to Workplace Regulation' in *Kaufman, (ed)*, Government Regulation of the Employment Relationship, n.325, 57.
[450] *Dugger*, n.425, 607; *Clark*, n.424, 377; *Furubotn/Richter 2005*,op.cit., 350.
[451] *Kaufman 2012*, n.342, 79; *Rutherford* (on Veblen), op.cit. 175. cf *Furubotn/Richter 2005*, 19-21, 25.
[452] *Dugger*, op.cit., 609-612, 614; *Furubotn/Richter 2005*, 314-315, 350-351; *Clark*, n.424, 379-381. cf. *Polanyi*, The great transformation.
[453] *Deakin/Wilkinson 2005*, n.222, 9; *Kaufman 2012*, op.cit., 68. See also *Polanyi, Karl/Arensberg, Conrad M./Pearson, Harry W.*, Trade and Market in the Early Empires: Economies in History and Theory (Free Press, Glencoe IL 1957).
[454] *Deakin/Wilkinson 2005*, n.222, 9
[455] *Commons*, Institutional Economics (1934), op.cit., 713. In fact, *perfect* competition within any labour market is an outright illusion: *Dow*, n.449, 58-59; *Kaufman 2012*, n.342, 82-83.
[456] *Dugger*, ibid. See also *Polanyi/Arensberg/Pearson*, op.cit., 243-270; also published as *Polanyi, Karl*, 'The Economy as an Instituted Process' in *Dalton, George (ed)*, Primitive, Archaic and Modern Economies: Essays of Karl Polanyi (Beacon Press, Boston 1968), 59-77.
[457] *MacMillan*, n.321, 128.
[458] *Rutherford*, n.448, 174; *Clark*, n.424, 378.
[459] *Furubotn/Richter 2005*, 1.
[460] *Kaufman 2005*, n.354, 78; *Williamson, Oliver*, The New Institutional Economics: Taking Stock, Looking Ahead, (2000) J.Econ.Lit. 38(3), 595 (595) .
[461] See *Wilkinson*, Productive Systems, n.260, 413-429.
[462] See *Commons*, Legal Foundations of Capitalism, op.cit.
[463] *Deakin/Wilkinson 2005*, n.222, 11; 18; 32-33
[464] ibid, 9-11; *Clark*, n.424, 378; *Kaufman 2009*, n.268, 25.

social theory and political philosophy approaches[465] to enrich our understanding of the function of legal norms encapsulated in collective labour law institutions within a constitutionally governed space. These approaches do not only capture the social value and function of work, hence of mechanisms protective of work, such as collective labour law, at a theoretical structurally societal level. Further, they consider the role of work and labour law institutions at an ontological level that pertains to the very dignified existence of the individual as an autonomous entity. As such, institutionalist approaches do not ignore or completely reject classical and neoclassical tools and analyses. Rather, they aim to complement them[466], by considering their 'pure' economic assumptions, presented as objective and rational, as only one of the factors to be taken into account.

Consequently, the holistic systematic understanding of labour market, as the sum of individual action in the exercise of economic freedom, and of norms, institutions and social conditions, leads to considering collective labour law mechanisms to be an integral, inherent part of the system. As regards the fundamental acknowledged issue of bargaining inequality, as we have seen, collective labour law institutions have been argued to be structural prerequisites of bargaining equality rather than corrective mechanisms that intervene ex-post[467]. Thus, they do not fall into the typical trope of 'social' policy measures, with their redistributive objectives[468] considered by orthodox classical and neoclassical economists as coercive and distortive of market function. Therefore, relevant collective labour law norms are critical in moulding *ex-ante* the level playing field which guarantees the fully effective exercise of economic freedom that leads to the most rational, most balanced beneficial economic outcome[469].

In other words, it is inequality itself, not collective labour law, that is seen as a distortion of rational economic action and, therefore, of the rational and efficient function of the market itself. In this sense, bargaining inequality is not an affront to individual contractual freedom, as we saw earlier. Rather, more broadly, it can

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[465] See *Schmidt am Busch, Hans-Christoph,* 'The Legacy of Hegelian Philosophy and the Future of Critical Theory' in *Smith./Deranty,* op.cit., 63 (70-71).
[466] *Commons, IE (1931),* n.431, 648; *Samuels, Warren,* On the Future of Institutional Economics, (1969) J.Econ.Issues 3(3), 67 (68-69).
[467] *MacMillan,* n.321, 128.
[468] ibid.
[469] ibid.

be regarded as a hindrance in such an operation of market structures that would benefit the overall socioeconomic system. Mechanisms that allow the organisation of workers and the collective defence and assertion of their interests are seen as integral in maintaining the balanced, rational and free from external influences bargaining paradigm that free market economics perceive as the core ideal of economic transactions[470].

Despite striving for a more holistic alternative to neoclassical theory, neo-institutional economists, in their pursuit of theoretical coherence[471], have attempted to respond to neoclassical reasoning, and complement it[472]. In that endeavour neo-institutionalists have adopted some of the core rationales objectives of neoclassical economics, and have tried to integrate them in their analysis[473]. Most notably, neo-institutional economics have been criticised for having moved to employing purer economic arguments[474], distancing themselves from the more integrated socioeconomic or broader ethical analyses of proto-institutionalists[475]. Thus, arguments revolving around the concepts of rationality and the ensuing self-regulatory forces of the markets, have been utilised by neo-institutional theorists[476]. Moreover, focus has shifted towards economic efficiency and the contribution of institutions to pursuing it[477].

However, this approach, unavoidably, once more tells only part of the story: the part that is tilted towards business interests and the beneficial effects to capital at large, and which assumes that those effects will ultimately reflect on workers. It is imperative that we also take into account the consequences of collective organisation as regards the enjoyment of economic freedom of workers themselves. Moreover, efficiency should be considered in a broader sense. It should be regarded not only in relation to production, maximisation of profit and consumption, but with reference to the overall macroeconomic institutional and

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[470] *cf Kaufman 2012*, n.342, 64.
[471] *Coase 1998*, n.439, 72; *Samuels*, op.cit., 70.
[472] See *Rutherford*, n.448, 185; 187.
[473] *Jacoby, Sanford*, The New Institutionalism: What Can It Learn from the OLD?, (1990) IR 29(2), 316 (316); *Kaufman 2009*, n.268, 23. See also *Rutherford*, n.448, 187-188; *Clark*, n.424, 376.
[474] *Dow*, n.449, 57.
[475] *Jacoby*, op.cit., 317; *Macmillan*, n.321, 125.
[476] *Clark*, n.424, 376.
[477] *Jacoby*, op.cit., esp. 316, 336; *Dow*, op.cit., 59-63; *Rutherford*, n.448, 187-188.

systemic organisation of the market at large, and in consideration of labour interests alongside capital's[478].

2.3. Beyond bargaining: economic effects of collective autonomy and trade unionism

We have already seen that bargaining inequality is an affront to the protection of individual workers' contractual freedom. More broadly, however, within the context of a liberal free market conception of labour law, collective labour rights should also be seen as corollaries to the right to work as the manifestation of workers' *economic* freedom, in its broader sense. Labour rights have been traditionally regarded as social rights, in the sense of a state-created protective net put in effect to countervail power imbalances inherent in the employment relation, allow for the enjoyment of social goods (training, leisure) or provide support against risks[479] (health and safety). This approach reveals a paternalistic interventional ethos[480], which, despite being benevolent and non-coercive, could be found to be at odds with the liberal individualistic paradigm of autonomy and freedom of rational economic actors[481].

Despite suggestions to the contrary[482], it could be accepted that an *absolute* paternalistic understanding of the nature of labour rights allocates full regulatory power to political and juridical elites. Thus, there is a risk of completely de-democratising the market. The best case scenario of insulation of regulatory power would be the intervention of indirectly legitimised state actors on the basis of minimum input from the actual participants of the labour market, labour and management. The risk becomes greater as to collective labour institutions, considering that paternalism might result in a battle for regulatory supremacy between the state and the subjects of collective autonomy. That clash would

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[478] See *Slichter, Sumner,* Modern Economic Society (2nd ed; Henry Holt, New York 1931), 651-653.
[479] See *Supiot*, Beyond Employment, n.157, 56.
[480] *Spector, Horacio*, Philosophical Foundations of Labour Law (2006) Florida State University Law Review 33, 1119 (1139-1144).
[481] ibid, 1141.
[482] ibid, 1144.

undoubtedly be won by central state regulation, pushing aside collective laissez-faire, or the autonomous collective labour law regulatory structures.

In addition, an absolute social colouring of labour rights would reveal a paradox in a liberal economic analysis. The managerial prerogative or business decision freedom of the employer, constantly recognised as elements of its economic freedom, would prevail, on the basis of the individualistic liberal doctrine, over the protection of workers' social rights, with marginal exceptions. This is precisely the rationale of analyses influenced by neoclassical dogmas, including the jurisprudence of the CJEU as regards the clash between collective labour rights and fundamental (individual) economic freedoms.

Consequently, collective labour rights, in conjunction to their social aspect, should also be approached with reference to their connection to the economic freedom of workers, a concept that goes beyond mere contractual freedom and the capacity of rational choice. It also relates to the 'full enjoyment' of the freedom to choose not merely an employer or the optimal offered contractual terms, but, inter alia, a specific job, position, or place of work. All these are, in turn, related to the free movement of workers, the relevant manifestation of their economic freedom at EU level. It is evident, therefore, that even in an assessment which prioritises economic considerations, such as that employed by the CJEU, all the possible aspects of the economic effect of collective labour law should be factored in.

Even more broadly, collective organisation and the ensuing bargaining mechanisms should also be approached with regard to their value and role as regards the efficient enjoyment of economic freedoms of workers and employers alike. In other words, collective labour law should be taken into account as an integral factor of overall labour market stability and efficiency. As such it is essential for the support of the economic substructure[483] upon which individual economic rights and freedoms are to be exercised.

2.3.1. The collective element of economic freedom

[483] See *Nickell, Stephen/Layard, Richard*, 'Labor Market Institutions and Economic Performance' in Ashenfelter/Card (eds), Handbook of Labor Economics, Vol.3, (Elsevier, 1999), 3029 (see 3029-3037, 3041-3044 and 3066-3069 as to the role of unions).

On an individual level, economic freedom, as a prerequisite of a liberal market economy, ought to be enjoyed equally by all the market actors as rent seekers. As we have seen, institutional economic theory provides for a better basis to understand the substance of economic freedom and to examine the means by which it manifests and the limits it succumbs to. The emphasis on the collective element of economic behaviour[484], allows for a more comprehensive assessment of the complex interplay the exercise of the economic freedom of individuals[485] has on both the individual and the macroeconomic level.

Within that school of economic thought, collective labour law and its structures are one of those institutions that constitute, as Commons would note, '*collective action in control, liberation and expansion of individual action*'[486]. 'Collective action' in this sense, which includes both the establishment, as well as enforcement and evolution of institutional norms[487], is an essential corollary of individual choice, and the constitutive block of capitalist market economies.

Collective autonomy aims to attain some balance in the bargaining playing field, countervailing the imbalance of capital and resources in favour of the employer, by combining the strength of workers' interests and voices. Collective organisation, therefore, enhances the power and effect of individual worker interests and freedoms ('*expansion'*) vis-à-vis the employer, the ex-ante stronger party in what is assumed by neoclassical economics to be a free, balanced transaction: the construction and operation of the employment contract and relationship. Collectivisation of worker interests counterbalances the employers' smaller risk margin in the relevant ongoing process of the employment relationship, thanks to their command of resources, capital and means of production, and the respective reliance of workers on the job position and its relevant stability.

In doing so, it allows for the essential full enjoyment of worker freedom, and their emancipation from the inherent subordinate role traditional conceptions of the employment relationship as a strictly contractual one would imply

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[484] Dukes, n.1, 30-31; *Commons, IE (1931)*, n.431, 649, 654.
[485] ibid, 654.
[486] ibid, 651.
[487] *Furubotn/Richter 2005*, 25.

('*liberation*'). It guards workers against coercion and exploitation[488]. Furthermore, through industrial action, it provides them with aggressive countermeasures, the threat of which can prove enough to prevent abuse of the employer's dominant position. Consequently, collective organisation and action, that are necessary for the exercise of collective labour rights, are not an affront to the individualistic focus of traditional conceptions of economic freedom. Rather, they are the means by which substantive economic freedom can be pursued and achieved, in a field, if not an economic world, that is infinitely more complex than the simplistic conceptions of economic interactions initial liberal conceptions of property rights and economic freedom took into account[489].

Moreover, collective labour structures and mechanisms are the vehicle that leads to the adoption of norms and customs that allow for the self-regulation of the labour market ('*control*'). In other words, it constitutes the principal means by which arbitrary use of power is curtailed, and a normative framework for the more equitable operation of a free market is set in place. Moreover, 'control' of chaotic market forces, and thus what an ordoliberal would conceive as 'order', is ensured not through the intrusive intervention of the state, but through what Commons would consider the collective action of market actors themselves.

It is in this conceptual and normative context that collective institutions might also unleash their beneficial effects as to the outcomes of full, effective enjoyment of economic freedoms: productivity and efficiency.

2.3.2. Effects on Productivity

The influence of collective labour organisation on productivity[490] cannot be doubted, and has been strongly supported by empirical evidence[491]. However, there is some discrepancy as to the exact effect that unionisation and associated

[488] *Commons, IE (1931)*, n.431, 651.
[489] See *Supiot*, Homo Juridicus, n.168, 200-201, making the analogy to the evolution of property rights, especially as regards the concept of intellectual property, and the necessity of collective organisation for the full enjoyment of a right (property) initially considered entirely individualistic in its pursuit, protection, and exercise.
[490] For a brief account of the term, see *A.Davies 2009*, n.352, 32-33.
[491] *Nickel/Layard*, n.483, 3067-3068.

activity might have on businesses' productivity[492] and productivity growth[493]. Some reports have failed to identify a definitive positive correlation[494], or even anything but zero significant correlation[495]. Others have suggested that collective labour activity might have, in fact, a regressive effect on productivity growth[496] or investment[497]. This might result from unions' attempt to prevent changes (technological, organisational or of business practice)[498] that could result to a change of operational paradigm[499], thus affect the working conditions status quo or even the unions' own power. However, caution is prescribed when discussing the correlation between productivity and union activity. Their interplay is far from simplistic[500]. It involves a variety of systemic[501] and economic factors[502], such as the specific institutional organisation of collective labour relations and mechanisms, the issues that can be subject to collective bargaining[503], or the ad

[492] *Dau Schmidt/Traynor*, n.328, 107; *Freeman, Richard/Medoff, James*, What Do Unions Do? (Basic Books, New York 1984), 162-180.
[493] *Hirsch, Barry*, Labor Unions and the Economic Performance of Firms (W.E. Upjohn Institute for Employment Research, Kalamazoo 1991), 5, 91; *Flanagan, Robert*, The Economics of Unions and Collective Bargaining, (1990) IR 29(2) 300 (303) .
[494] See, for example, *Schnabel, Claus*, Trade Unions and Productivity: The German Evidence, (1990) BJIR 29(1), 15; For the US see *Pantuosco, Lou/Parker,Darrell/Stone, Gary*, The Effect of Unions in Labor Markets and Economic Growth; An Analysis of State Data, (2001) JLabRes 22(1), 195-205; *Hirsch, Barry*, 'Unionization and Economic Performance: Evidence on Productivity, Profits, Investment, and Growth' in *Mihlar, Fazil (ed)* Unions and Right-to-Work Laws (Fraser Institute, Vancouver, 1997), 35-70.
[495] *Doucouliagos,Chris/Laroche, Patrice*, 'Unions and Productivity Growth: A meta-analytic review' in Kato, Takao/Pilskin, Jeffrey (eds), Advances in the Economic Analysis of Participatory & Labor-Managed Firms (Emerald, Bingley 2003), 57-82; *Doucouliagos,Christos/Laroche, Patrice*, 'What do Unions Do to Productivity: A Meta-Analysis' (2003) IR 42(4), 650-691 (682); *Addison, John/Hirsch, Barry*, Union Effects on Productivity, Profits and Growth: Has the Long Run Finally Arrived?, (1989) JLabEc 7(1), 72-105 (100; 98-101).
[496] *Nickel/Layard*, n.483, 3068; *Addison/Hirsch*, op.cit., 98-99.
[497] *ibid*, 3067-3068. See also *Nickel, Stephen/Denny, Unions* and Investment in British Industry, (1992) EJ 102 (413), 874 (882-884); *Addison/Hirsch*, op.cit., 96-98.
Contra, *Mosley, Layna/Uno, Saika*, Racing to the Bottom or Climbing to the Top? Economic Globalization and Collective Labour Rights, (2007) Comparative Political Studies 40(8), 923 (940-941).
[498] *Nickel/Layard*, n.483, 3067.
[499] See *Nickel/Denny*, op.cit., 874.
[500] See *Nickel/Layard*,n.483, 3068, 3079.
[501] See for example *Menezes-Filho, Naercio/Ulph, David/van Reenen, John*, R&D and Unionism: Comparative Evidence from British Companies and Establishments, (1998) ILRR 52(1), 45 (56-57, 59) on the relevant systemic divergences between the UK and the US; *Doucouliagos/Laroche*, What Do Unions Do to Productivity?, op.cit., 682 (highlighting both country and sectoral differences); *Hirsch (1991)*, op.cit., 93-94, 102 (sectoral differences).
[502] See *Menezes-Filho/Ulph/van Reenen*, op.cit., 45-63; *Addison/Hirsch*, op.cit., 100.
[503] *Menezes-Filho/Ulph/van Reenen*, op.cit., 56.

hoc response of management each time[504], that operate simultaneously and cannot be easily quantified, neatly categorised or absolutely conclusive[505].

It is argued, though, that wages and benefits set above the market norm through the intervention of collective labour mechanism result in a more loyal and efficient workforce[506]. Consequently, while the correlation between above market wages and productivity has been doubted[507], it is loyalty and effort that should be highlighted. As we have seen, the individual effort workers put in work is the one piece of information they can 'withhold' from their employers. A satisfied workforce is more probable to be loyal, committing its full capacities to the progress of the business.

This assumption highlights the value of worker participation in business decisions and cooperation between management and labour. The German model of codetermination[508] and the idea of 'partnership'[509] reflect the value of collective labour law institutions in not only alleviating differences, or aggressively resolving conflicts, but in contributing to avoid them in the first place. It would not be a stretch to assume that this cooperative ethos cannot exist in the broader domain of collective autonomy and beyond the narrow confines of the function of Works Councils. For example, broad organisational or managerial business policy could be the subject of collective bargaining, with relative guidelines constituting part of a collective agreement. Furthermore, the establishment of mechanisms that would ensure fairness in the workplace and the abuse of managerial prerogative, such as grievance and disciplinary procedures, would help induce a sense of

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[504] *Nickel/Layard*, n.483, 3068, 3079.
[505] See *Menezes-Filho/Ulph/van Reenen*, op.cit., 46; *Hirsch 1991*, op.cit., 110. See also *Hirsch, Barry/Link, Albert*, Unions, Productivity, and productivity Growth, (1984) JLabRes 5(1), 29-37 (34). cf. *Addison/Hirsch*, op.cit., 82 (referring to researcher bias or lack of suitable data).
[506] See *Wachter 2012b*, n.326,46.
[507] *Hirsch, Barry*, 'Unions, dynamism and economic performance' in *Estlund/Wachter*, n.270, 107-145.
[508] See, inter alia, *Beal, Edwin*, Origins of Codetermination, (1955) ILLR 8(4), 483-498; *McGaughey, Ewan*, The Codetermination Bargains: The History of German Corporate and Labour Law, King's College London Law School Research Paper No. 2015-15 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2541877##> (last accessed 18/1/2015); *Waas, Bernd*, Codetermination at Board Level in Germany, (2009) ECL (6)2, 62–67.
[509] See *Lord Wedderburn, William*, Employees, Partnership and Company Law, (2001) ILJ 31(2), 99-112; *McCaffrey, Gordon*, Industrial Democracy, (1972) RI/IR 27(3), 307 (310, 312-320). cf *Beal*, op.cit., 487.

stability, thus boost workers' moral[510]. The result would be, again, a more loyal, hence more productive, workforce[511].

Last, but not least, it could be argued that workers are inherently stakeholders in the well-being and progress of the business they are working for. Productivity and growth would allow for the betterment of their economic position within the firm, participating in the gains through wage and benefit increases or improvement of working conditions. Furthermore, workers are better suited to provide valuable insights on the everyday workings of the business, monitor and check management conduct, than shareholders that are, by definition, remote from the actual realities of production and business operations[512]. The democratic objective of providing workers with a collective voice, therefore, could also function as an advice and management accountability mechanism, to the economic benefit of the business as a whole[513].

A collective labour law system that would allow such collaborative processes and abuse-restraining mechanisms would not be incompatible with employer interests, thus making the relevant market 'less attractive' for them. On the contrary, it could very well induce productivity, and therefore profit, albeit at the cost of unilateral prerogative and control[514].

2.3.3. Collective labour mechanisms and 'efficiency'

a. Theoretical assumptions of efficiency

At a theoretical level, in modern economics, efficiency[515] is understood through the prism of its Coasean conception, and through the idea of Paretan optimality.

The *'Coase theorem'*, proposed by George Stigler[516] interpreting a theoretical example presented by Coase in one of his papers[517], is firmly based upon (and

[510] See *Flanagan*, n.493, 303.
[511] ibid, though with little empirical evidence.
[512] *Dau-Scmidt/Traynor*, n.328, 109.
[513] ibid.
[514] *Flanagan*, n.493, 304.
[515] cf. *Stigler 1992*, n.417, 458.
[516] *Stigler, George*, The Theory of Price (4th ed, Macmillan Publishing; New York 1966), 117-120. See *Coase, Ronald*, The Firm, the Market and the Law (University of Chicago Press; Chicago 1988), 157;

consistent with)[518] the fundamental neoclassical assumptions of rationality and unrestrained competition[519]. Taking these two conditions as a given, it is suggested that the private[520] and social costs[521] of any transaction will be equal, regardless of the law governing it (more specifically, regardless of the legal assignment of liability for damage)[522]. Consequently, in this world of zero transaction costs, it is the negotiations of the parties in of themselves that will always lead to the most efficient result, the maximisation of wealth for everyone involved[523], irrespective of the initial assignment of rights through prior legal regulation[524].

Efficiency, in other words, is not the result of the institutional and legal framework facilitating and delimiting economic processes. For those supporting Coasean theory, as preoccupied with rationality as most followers of modern neoclassical economics, efficiency is plainly the result of rational individual choice[525]: when an agreement is beneficial for both parties of the negotiation, they will seek to reach it, regardless of the framework[526].

Pareto optimality in an allocation of resources, and, by extension, in a bargaining process, is reached when resources cannot be allocated, or concessions cannot be rearranged, in a manner more beneficial for one party without, simultaneously, detriment to the other party[527]. The implication of this definition of efficiency is that it would require perfect information to allow for any assessment[528]. As we have already seen, perfect access to full information is simply impossible. At best, institutions and interventions are constructed in order

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Coase, Ronald, The Institutional Structure of Production, (1992) Am.Econ.Rev. 82(4), 713 (717); *McCloskey, Deirdre*, The So-Called Coase Theorem, (1998) East.Econ.J. 24(3), 367 (367).

[517] *Coase, Ronald*, The Problem of Social Cost, (1960) J.LawEcon. 3, 1-44.

[518] *Stigler, George*, Two Notes on the Coase Theorem, (1989) Yale L.J. 99(3), 631 (632); *Demsetz, Harold*, R. H. Coase and the Neoclassical Model of the Economic System, (2011) J.LawEcon. 54(4), S7-S13.

[519] See *Calabresi*, n.427, 67-68.
However, Mumey has suggested that it might lead to outcomes that are inconsistent with the economic incentives that are necessary for a free enterprise model to work and produce results: *Mumey, G.A.*, The 'Coase Theorem': A Reexamination, (1971) QJEcon 85(4), 718-723.

[520] The costs incurred by the parties of the transaction (for example, the employer and its employees).

[521] The costs incurred by the broader market, and society as a whole.

[522] *Stigler 1966*, 119-120; *Donohue, John III*, Diverting The Coasean River: Incentive Schemes to Reduce Unemployment Spells, (1989) Yale L.J. 99(3), 549 (550).

[523] See *Stigler 1984*, n.416, 304; *Calabresi*, n.427, 68.

[524] *Coase 1992*, op.cit., 717; *Stigler 1989*, n.518, 632-633.

[525] cf. *Coase 1988*, n.516, 3, criticising that stance.

[526] *Stigler 1989*, n.518, 631; *Stigler 1992*, n.417, 457.

[527] *Donohue 1989a*, n.522, 551.

[528] ibid.

to counter practical and institutional obstacles and restore the flow of information that would, presumably, be the gateway to rational, and thus efficient, choices. It is this focus on information as the prerequisite of rational individual action that essentially focuses any assessment on only a single variable. More importantly, Pareto optimality perpetuates the primacy attributed to individual-centric analyses and the assumption of rationality market actors and, consequently, market forces, as the main, if not the sole, catalyst and determinant of market regulation.

The Coase theorem is ridden by similar problems as regards the assumptions it considers critical. Both supporters[529] and detractors[530] of the theorem and its practical value have conceded that Coasean efficiency cannot be achieved outside the purely theoretical world of zero transaction costs[531], which does not correspond to empirical economic reality[532]. Its simplistic formulation, that negotiation will always lead to the optimal result, if both parties consider that result beneficial, regardless of the allocation of liabilities, is essentially a corollary of the fundamental rules of trade, as put forward by Adam Smith, it is argued[533]. Coase did not theorise, assuming a world of zero transactions. On the contrary, accepting that in reality transaction costs are in various cases inherent, and often high, he stressed the value of the relevant legal framework, as McCloskey argues[534]. In other words, far from aligning with neoclassical assumptions[535], and despite of his scepticism on governmental interference with the market[536], Coase has in fact emphasised the importance of institutional and normative intervention[537] to alleviate market imbalances. That is an idea that corresponds to the complementary, balancing, economic function of collective labour rights, we have already explored.

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[529] *Donohue, John J. III*, Two Notes on the Coase Theorem: Reply, (1989) Yale L.J. 99(3), 635 (635) [*Donohue 1989b*].
[530] *Ellickson, Robert*, The Case for Coase and against "Coaseanism", (1989) Yale L.J. 99(3), 611 (613).
[531] See *Coase 1988*, n.516, *26; 114-119*.
[532] *Ellickson*, op.cit., 613-614, 616; cf. *Donohue 1989b*, op.cit., 636.
[533] *McCloskey*, n.516, 368.
[534] ibid, 368.
[535] See ibid, 367, 369; *Posner, Richard*, Keynes and Coase, (2011) J.LawEcon. 54(4), S31-S40 (S38). cf. *Demsetz*, n.518.
[536] *Posner 2011*, op.cit., S39.
[537] See *McCloskey*, n.516, 370. See also *Calabresi*, n.427, 69-73, emphasising, nevertheless, the difficulty in measuring the effect of institutional intervention empirically (70).

b. Coasean efficiency and collective labour law

Transplanted in the theory of collective bargaining, the Coase theorem would seem to suggest that insofar it is to the benefit of both management and labour to reach an agreement, they will seek to reach it regardless of the suggested initial inequalities of bargaining power or the form of institutional and legal restraints placed upon the negotiating procedure[538]. In fact, given the suggestion that the optimal number of negotiating parties for coordination costs to be reduced, thus Coasean efficiency to be reached, is two[539], it could be argued that collective bargaining is the better vehicle for the negotiation. Rather than negotiating multiple individual contracts, with all the inherent variables, negotiating actors are reduced to just the employer, on the one hand, and a trade union, acting on behalf of multiple employees, on the other. Nevertheless, employees retain their capacity to bargain their terms individually, thus avoiding bilateral monopoly that would raise costs and, therefore, prevent efficiency[540].

Therefore, even if we accept a judicial analysis that would be mainly founded upon economic considerations and assumptions, as is the case with the Court's Lochnerian approach of the EU labour market and collective labour rights, collective autonomy ought to be regarded the most efficient vehicle for the attainment of the internal market's objectives of efficiency and flexibility.

However, any court attempting to assess collective bargaining utilising Coasean thinking should bear in mind the unattainable assumptions on which the theorem stands. Perfect equilibrium that nullifies transaction costs, a *conditio sine qua non* of Coasean efficiency, cannot be achieved, even in a system that strongly supports management and labour cooperation[541], or endorses collective autonomy. The imbalance of information, one of the causal roots of negotiation costs, will always remain, to the benefit of management. As we have often remarked, this is an imbalance that is inherent in the nature of the employment relationship itself. Collective labour mechanisms can at best alleviate its effects. Nevertheless,

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[538] cf. *Stigler 1989*, n.518, 631.
[539] *Donohue 1989a*, n.522, 556.
[540] See ibid, 556, 607.
[541] cf. *Ellickson*, n.530, 620.

insofar a capitalist structure delimits the market (thus, the relevant relationships and transactions) and the division of resources and means of production between management and labour remains, the imbalance of relevant information will still be in place. So will transaction costs.

Apparently, industrial action is more difficult to be reconciled with a Coasean or Paretan notion of efficiency, in the sense of the optimal outcome resulting from rational choice[542]. Collective action, including strikes, is inherently costly to both management and labour, hence *prima facie* 'irrational'. Moreover, strikes often entail irrationality by definition. Following the collapse of negotiations, workers who engage in collective action usually abandon rational assessment and operate upon the, often unrealistic, faith that management will yield to all their demands, regardless[543]. This is why, as we have seen, economists tend to explain them as the result of imperfect information[544] or an aggressive means of acquiring information[545]. In any case, the Paretan condition of perfect information does not apply.

However, strike action can be construed as a form of aggressive negotiations, extracting information and calibrating the response to employer behaviour as it goes. It is possible that, through strike action and over its course, workers are able to test the employer's resistance, thus its resources and financial capability, essentially exploring what the optimal result of an agreement might be[546]. Furthermore, over the period strikes go on, both sides are constantly assessing the costs they incur[547], hence the viability of continuing the strike as opposed to giving in to the other party[548]. Thus, as strike action unfolds, both employers and strikers tend to make concessions in order to achieve an agreement and return to operational normality. In fact, precisely due to costs of industrial conflict to both management and labour, merely the threat of pending strike action can be enough of an incentive for the successful conclusion of collective bargaining[549]. All this

[542] *Kennan*, n.399, 1091.
[543] ibid, 1100.
[544] *Flanagan*, n.493, 311.
[545] See *Kennan*, op.cit., 1111.
[546] ibid, 1101.
[547] See, for example, *Schor*, n.399, 587-591, referring to the risk of job loss.
[548] *Kennan*, op.cit., 1103.
[549] *Flanagan*, n.493, 311.

process, from the stage of a strike risk to the full development of industrial action, is nothing sort of a process of negotiation, albeit irregular and imperfect, that attempts to produce efficient results.

c. Assessment of Coasean efficiency in a social market economy

Economic assumptions and theorems in order to assess concepts such as 'efficiency' and the processes that lead to it might be useful tools in economics. However, absolute adoption of these tools in order to build legal analyses and interpretations of complex constitutional problems and clashes of rights does not necessarily lead to accurate, coherent, and, ultimately, legally optimal results. Theory affords to be abstract, focused on a particular narrow thematic context (for example, the economy). Legal analysis, however, needs to be specific and considerate of all the various variables connected with the case at hand. And when legal analyses turn juridical, the intensity of this holistic scrutiny and consideration becomes even greater. Judges, as any good legal theorist, need to juggle all the elements of a specific legal problem at once: from the particular facts, to the legal framework, and even to the meta-considerations that relate to the multiple levels of potential consequences (individual, social, political) and the coherence of the constitutional context within which the case is judged. The toolbox used in legal analyses, therefore, ought to contain more than just economic tools.

Consequently, legal theorists that attempt to adopt economic theories and models on which to base their legal arguments, wary of such concepts as efficiency and competitiveness,[550] should proceed with caution. If for any other reason, because, as George Stigler suggests despite being the primary proponent of the Coase theorem, we should not confuse economic efficiency with justice[551]. The former aspires to achieving the economically most valuable goal, at the optimal cost[552]. In other words, it prioritises economic considerations and objectives. Justice, however, is reached only with the holistic assessment of all possible variables and analyses, economic and non-economic.

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[550] E.g. see *Deakin/Wilkinson*, n.222, 277; *Deakin 2007*, n.223, 1172.
[551] *Stigler 1992*, n.417, 461-463
[552] ibid., 458.

Furthermore, as Dukes argues, efficiency-based assessments, rooted as they are in economic reasoning, seem to require the preservation of the order of a specific formulation of the market as the necessary prerequisite for the acceptance of any social right[553]. Henceforth, such analyses strive to only endorse those functions of collective labour law that would be considered compatible with market purposes[554], such as efficiency, in its economic sense[555]. The risk is that collective labour law objectives and purposes that would be antithetical to capitalist rationales[556], since the reference is always one of a capitalist market economy[557], would be simply disregarded or stretched via interpretation to fit to an economic, efficiency and optimality oriented, analysis[558]. However, that kind of an analysis misses the multiplicity in the functions and purposes of collective labour organisation and action, that can very well be constitutive of a market format rather than defined by it.

Beyond this fundamental difference in focus between economic and legal analyses, however, it is the economic tools employed by legal theorists and judges who attempt to assess legal institutions, such as collective autonomy, with a focus on efficiency, that are problematic in of themselves. As regards the concept of efficiency, it should be noted that the assumptions of Coasean analyses, for example as regards collective bargaining, are not necessarily corroborated by empirical evidence[559]. It appears that the Coase theorem, like most of neoclassical assumptions, works better on paper than in the complexities of real life[560]. Furthermore, regardless of the theoretical economic model a legal analysis would choose, a conception of efficiency that is either narrowly construed to the level of the workplace or the business and strongly connected with the relevant costs, or strongly associated with the idea of productivity and productivity growth, once more places the interests of businesses at the centre. Consequently, it essentially ends up identifying the interests of employers with the interests and objectives of

[553] *Dukes, Ruth*, The Labour Constitution, n.1, 114.
[554] ibid.
[555] *Tucker*, n.446, 136.
[556] c.f. *Deakin/Wilkinson*, n.222, 348-349; *Dukes 2014*, op.cit., 121.
[557] See *Tucker*, op.cit., 99, 122.
[558] *Dukes 2014*, op.cit., 115-116.
[559] See *Ellickson*, op.cit.
[560] *Donohue 1989a*, n.522, 556,607; *McCloskey*, n.516, 367.

the market at large. However, the market should be seen as equally encompassing the interests of all potential market actors, employers and employees alike.

Thus, the concept of 'efficiency', should be seen more broadly, as referring systemically to the labour market as a whole. In that context, the institutional value of collective labour law norms and structures in supporting the macroeconomic framework[561] and providing an autonomous source of externalities regulation that arises from market actors themselves should not be disregarded. Nevertheless, similarly with the evaluation of unions' effects on productivity growth, the absolute neoliberal assertion that collective labour institutions are inductive of market inefficiency, is dogmatically simplistic[562].

The relation between collective autonomy and efficiency is not a quantitative question of the existence of collective autonomy structures and mechanisms. Rather, it is a qualitative assessment of their substance and systemic role. Adams, for example, notes that worker participation mechanisms and cooperative structures, such as the Works Councils, contribute to business performance, while also serving as a mechanism that keeps employers' behaviour in check, in conformity with broader societal values and conventions[563].

Along the same lines, it could be noted that a collective agreement is a '*peace treaty*' and at the same time an agreement with normative content[564]. It reflects the parties own idea of an reasonable compromise between their complex interests, including those that are not economic *stricto sensu*, but even social or political. Hence, a collective agreement can be understood as the result of autonomous processes that lead to the self-regulation of the business, and thus, ultimately, of the labour market as a whole, in a manner that is accepted by the actors themselves as efficient (in the broad, substantive sense) and balanced. That is the reason why some legal systems endow collective agreements with the normative regulatory effect and enforceability of legislation rather than that of contract.

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[561] See *Aidt, Toke/Tzannatos, Zafiris*, Trade unions, collective bargaining and macroeconomic performance: a review (2008) IRJ 39(4), 258-295.
[562] *Adams, Roy*, 'Taking on Goliath: Industrial Relations and the Neo-Liberal Agenda' in Wilthagen, Ton (ed), Advancing Theory in Labour Law and Industrial Relations in a Global Context (North-Holland, Amsterdam 1998), 11 (16-17).
[563] ibid, 17.
[564] *Kahn-Freund*, n.322,123.

As with collective labour rights themselves, therefore, the discussion of their effects on efficiency, and thus on the 'health' of the market at large, should not be restrained to narrow economic analyses. The Coasean conception of efficiency is ridden with the same fundamental problems that plague the neoclassical and neoliberal theoretical paradigms. It assumes individualistic, egocentric actors, that are one-dimensional in their aspirations: maximisation of profit and minimisation of costs, construed only in economic terms. Moreover, it is based on the ideal paradigm of a perfectly competitive, open market economy that is self-emergent and perpetuated on the basis of rational choices by its autonomous actors. As we have seen, however, such a model is an illusion, far from human and institutional reality and without regard for the complexity of either.

2.4. Interim conclusions

The precedent discussion was by no means intended to fully 'economise' collective labour institutions and norms and quantify their value and effect. It only attempted to illustrate the inherent economic aspect of unionisation, collective bargaining and collective action, which is often downplayed in legal analyses and not entirely comprehended by courts. The result of those analyses is a perpetuation of the perceived clash, if not antithesis, between 'pure' economic freedoms, on the one hand, and labour rights and mechanisms as predominantly social rights, on the other. However, a holistic, systemic understanding of collective labour law reveals it as a complex normative tool that serves an amalgam of macroeconomic, microeconomic and social objectives, both collective and individual.

As we have seen, an analysis of any given constitutional framework should not overplay the importance of the economic constitution, or, more extremely, subject constitutional values to the contemporary needs of the market environment. Subjugating constitutional norms and structures to extra-constitutional interests and choices that lay beyond those normative limitations that allow democratic accountability and legitimacy would amount to accepting the idea of 'a market

society embedded in economics'[565]. In other words, it would accept the premise of a polity that bows to economic rationales and objectives[566], rather than a market that operates within the ethical, democratic and normative boundaries the constitutional polity sets[567]. In this vein, any analysis of collective labour institutions, the vehicles of democratisation of the workplace, and, hence, the labour market, cannot be overly reliant on economic reasoning, pushing aside those functions that relate to social and democratic values and effects. As the economic constitution cannot be disassociated from the coherent whole of the constitutional framework, so the social aspects of collective labour institutions cannot be divorced from the economic, and vice versa[568].

Consequently, legal assessments should be cautious not to stretch references to economic theory to blindly adopting any economic dogma. Nor should the illustration of economic aspects effectively amount to adopting a purely economic reasoning when approaching and evaluating the relevant normative framework and the related case law[569]. A supposedly pure economic analysis, as the one attempted in neoclassical economics, opens the door to neoliberal dogmas that distort the complexities of the reality of the market as a legally and socially construed human institution. As Adams notes: "*The model of man implicit in neoliberal economic thought is of a selfish, self-interested being prone to achieve in shirking, opportunism and deceit (...) to achieve its ends. Economic man is a dishonourable being who puts Scrooge to shame. This is a loathsome and repugnant view of human nature*"[570]. He then warns against attaching to neoliberal dogmas and rationales, thus to the purity of the neoclassical assumptions, as doing so entails the risk of establishing that 'loathsome' individual model as the norm, perpetuating its fallacy[571]. What follows from this prescription of caution is that analyses based on economics, law, human rights or political science are to be

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[565] *Frerichs, Sabine*, 'Re-embedding Neo-liberal Constitutionalism: A Polanyan Case for the Economic Sociology of Law' in Joerges, Christian/Falke, Josef (eds), Karl Polanyi, Globalization and the Potential of Law in Transnational Markets, (Hart, Oxford 2011), 65 (77-79).
[566] ibid, 78.
[567] cf *Wynn, Michael*, 'European Social Dialogue: Harmonisation or new diversity?' in *Collins/Davies/Rideout*, n.227, 491 (496).
[568] *Doucouliagos/Laroche*, What Do Unions do to Productivity?, n.495, 683.
[569] *A.Davies 2009*, n.352, 35.
[570] *Adams*, n.562, 14.
[571] ibid.

complementary[572], due to the inherent complexity of the subject matter at hand, that is human labour and the relevant supportive collective labour law institutions.

That is especially true when the legal analysis of collective labour institutions takes part within a more general constitutional framework. A properly systematic consideration of collective labour rights within the EU legal order and the context of the 'social market economy', proclaimed as the fundamental economic objective of the Union, takes into account their inherently dual socioeconomic nature. Furthermore, it evaluates their role and effects within the specific systemic context of that legal order, with its pluralist governance structure[573]and its complex, complementary fundamental constitutional objectives. There can be no prioritisation of economic considerations to the detriment of the social or the democratic. Enjoyment of economic freedoms, or any theoretical understanding of what constitutes economic efficiency, discipline or growth, cannot marginalise the assessment of effects on social cohesion, democratic legitimacy[574] or the protection of fundamental rights.

Moreover, acceptance of the market as a constructed, rather than self-emerging, contextual framework, leads to also accepting that a particular construction can be traced back to specific human choices, be it political or ideological. Constitutional structures and legal institutions are the direct result of such choices: law is not a neutral tool that merely exists to empower a supposedly self-emergent market. It is constitutive of a particular framework of economic and financial transactions. In its constitutional manifestation, legal regulation provides the normative and ethical essence to the particular manifestation of the market[575] that is the constitutional choice.

Consequently, a capitalist free market economy is not immaculately conceived, a natural phenomenon to be allowed to sprout freely, nor a logical inevitability that follows from the evolution of any system of economic transactions[576]. It is constructed. And any market construction inherently has particular objectives,

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[572] See *Dau-Schmidt/Traynor*, n.328, 97.
[573] See *Wynn*,n,567, 494.
[574] *Wynn*, op.cit., 491 (496).
[575] See *Keat, Russell*, 'Liberalism, Neutrality and Varieties of Capitalism' in Smith/Deranty, n.235, 347 (364-369).
[576] *Derantly, Jean-Philippe*, 'Expression and Cooperation as norms of contemporary work' in *Smith/Deranty*, op.cit., 151 (161).

prioritises certain interests or values above others, and therefore has a particular conception of the 'good'[577], its normative and substantive compass, which is in turn defined by the norms, policies and institutions that have been chosen to support it[578].

An approach that understands economic analyses of collective labour institutions as corollary and complementary to their social, and democratic function, and within the legal and constitutional context they operate, enhances accountability[579] and transparency. It allows for the dissection of obscure economic theory and for the subjection of market related institutions, norms and policy choices to democratic and judicial scrutiny, in a more comprehensive and effective fashion. Such scrutiny is served by understanding work as a value in itself, with ethical and personal development dimensions; a prerequisite of substantive individual freedom, that allows workers to enjoy and perform their democratic role as citizens. Furthermore, democratic scrutiny is better served by also recognising the relevant function of collective labour institutions, as a source of meta-state democratic and moral regulation of the market[580] by its own actors. This democratic function also is one of the factors that ultimately shape political decisions, feeding back into the state choices that define the market and its socioeconomic environment[581].

Under such a comprehensive approach of the relationship between economic, social and democratic considerations, quasi-religious economic dogma[582] is returned to its natural position within a liberal substantive constitutional framework: that of just another subject of review on the basis of fundamental normative constitutional principles, rather than the definitive standard. Furthermore, such an understanding accepts that multiple constitutionally and institutionally constructed formats of a market economy can exist. Despite the

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[577] *Smith, Nicholas H./Deranty, Jean-Philippe*, 'Work, Recognition and the Social Bond: Changing Paradigms' in *Smith./Deranty*, n.235, 1 (38).
[578] ibid.
[579] See *Dugger*, n.425, 608, 613-614
[580] *Arthurs 1998*, n.231, 26.
[581] *Smith/Deranty*, n.577.
[582] That amounts to 'myth and magic' according to *Dugger*, op.cit., 609.

evolutionary process which has led to modern capitalism[583], neither is any economy unavoidably 'a market'[584], nor are 'the market' and 'capitalism' necessarily identical concepts[585]. Therefore, we can distinguish the EU constitutional model of a 'social market economy' from the socially insulated paradigm of a pure, capitalist neoclassical free market that could foster and support neoliberal policies. The distinction provides us with the normative economic framework within which any assessment of collective labour institutions and their multiple functions (economic, social, democratic) should be positioned.

It is this social, democratic and political value of collective labour institutions, as instruments of social cohesion and accountability, to which we now turn. These additional functions complement the economic[586], and balance out any effects that are perceived as detrimental or negative by one-sided neoclassical economic analyses.

3. Collective labour law as an instrument in the service of social, democratic, and political constitutional values and objectives

The perceived social element of labour law has largely dominated relevant traditional analyses as well as the popular understanding of the function and utility of labour regulation. Consciously or not, the perception is unavoidably rooted in the fundamental understanding of humans themselves as naturally social animals[587]. Regardless of the form of political or economic mantle under which a human community operates, people are inherently dependent on each other[588] and

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[583] c.f. *Marx, Karl*, Capital vol. I, (1st ed. 1867 in German; Ben Fowkes tr, Pelican Classics, London 1990), 486.
[584] *Polanyi*, The Great Transformation, 45.
[585] See *Bidet, Jacques*, Exploring Marx's Capital: Philosophical, Economic and Political Dimensions (Haymarket Books, Chicago 2009).
[586] *Doucouliagos/Laroche*, What Do Unions do to Productivity?, n.495, 683.
[587] *Aristotle*, Politics, 1.1253a. Aristotle actually used the expression '*πολιτικὸν ζῷον*' ('political' being). However, the word 'political', in the context of Aristotle's work and his world of city states, denotes both the social *and* the political (in the modern sense of the word) aspect of human life.See also *Hardimon, Michael*, Hegel's Social Philosophy: The Project of Reconciliation (CUP, Cambridge 1994), 153-164 for Hegel's extrapolation on the Aristotelian principle (153), with the addition of connecting individuals to specifically formulated societies and their institutions and not society as a general notion (153-154).
[588] See *Hegel, Georg Wilhelm Friedrich*, Elements of the Philosophy of Right (Wood, A.W. ed., Nisbet H.B trans.; CUP, Cambridge 1991), §183, 221; §189, 227. See also *Kohler, Thomas*, Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues, (1995) B.C.L.Rev 36, 279 (295).

on the subsequent relevant social and legal structures that govern human labour and its organisation[589]. The notion of interdependence refers to the interrelation of the outcome of each individual's labour to produce the necessary means of subsistence[590]. Moreover, it describes the cooperative element that characterises any work and, thus, any labour market as a whole[591]. Ultimately, it is the provision of labour and the distribution of its product that constitutes the fundamental building block for the sustenance of a society and the emergence of any economic system.

In that sense, labour, its function, and the organisation of its provision and division had always be regarded as ultimately connected, on the one hand, with the needs of the individual herself and, on the other, with the fundamental political and social structures of any given society. Therefore, any economic system cannot by itself define, regulate or explain its structures. There will always arise a social impetus to reconnect economic arrangements and conceptions back to considerations that relate to the individual as well as the collective element of the society and polity she lives in. Within that context, after all, individuals are identified and defined in their three, inherently coalescent, capacities: as persons, as bourgeois citizens (members of a particular societal configuration and the classes therein), and members of a particular political community, a particular polity[592].

Workers retain these three capacities, even as labour actors, and in their activity within the workplace. The multiple functions of collective labour law structures correspond to considerations that are relevant to each of those, be it individualistic (e.g. economic freedom and interests) or collective (e.g. solidaristic or class-related) in nature. In that respect, trade unions act as hubs of socialisation and democratisation within a market structure, allowing these three properties of individual activity to emerge in the workplace, and their broader social and political effects to be mirrored in that context. Trade unions are as much economic institutions as they are elements of civic society. As such, they reflect and promote

[589] *Smith/Deranty*, n.577, 6.
[590] *Hegel*, op.cit., §182-183, 220-221; *Smith/Deranty*, ibid.
[591] *Smith/Deranty*, ibid.
[592] *Schmidt am Busch 2012*, n.465, 71.

communal values, such as cooperation, solidarity and the sense of human interdependence and commonality of interests, as opposed to the individualistic, selfish ethos[593], the '*atomism ascendant*'[594], of neoclassical economic perceptions[595].

3.1. Collective labour as a catalyst of social re-embedding of the constitutionally titular 'social market economy'

What follows from our introductory remarks is that, in Polanyan terms, trade unions and, more generally, collective labour institutions, can provide the anchor to re-embed the market in its specific social context, coupling economic considerations with their inherent social base.

For Polanyi, the neoclassical idea of a self-calibrating market that is neutral and can exist outside and beyond social and legal frameworks is a fallacy[596]. The market, as a social, constructed structure, is always inherently connected with specific social structures, institutions, and norms, and with specific political choices[597]. It is impossible to commodify everything, turning the entity of human behaviour and activity into something that can be objectively explained by the rules of trade or economic rationales, such as neoclassical 'rationality'.

Human labour, in particular, is for Polanyi a 'fictitious commodity'. It was never intended as something to be 'produced' and 'traded' in a market, as any other commodity, thus following the market's 'natural' laws[598]. It is a human activity that cannot be detached from its multiple functions[599], for example as a catalyst of personal self-awareness and development, as an expression of the worker's very physical, 'moral, psychological and moral' entity[600] and identity, and as a vehicle of social participation[601]. Labour cannot be entirely stripped down to its economic value, to be construed as merely a market commodity, despite the

[593] *Kohler*, n.588, 294-296.
[594] ibid, 295.
[595] *Levine, Peter*, The Legitimacy of Labor Unions, (2001) Hofstra LELJ 18, 529 (559-560).
[596] *Polanyi*, The Great Transformation, 1-2.
[597] ibid, 2.
[598] ibid, 75.
[599] ibid,.
[600] ibid, 76.
[601] ibid.

need for its economic function to be regulated to fit particular economic structures, the modern capitalist market being the latest of which[602].

Furthermore, it is always necessary for the state to intervene to support and protect its citizens life, well-being and individual identity. As such, state intervention to alleviate the risks of freely 'trading' one's labour or to counter labour market imperfections, that can lead, for example, to unemployment and poverty, in order to retain social cohesion, is unavoidable. Therefore, no market exists outside and beyond specific social, political and legal institutions which support the human web that constitutes the very fabric of the economy[603].

Any effort to 'disembed' the economy from society and its considerations, will inevitably lead to strains that will, in turn, result in resistance. That is the essence of Polanyi's double movement thesis[604]: dislocating the economy from its social context will undoubtedly result in social reaction[605], in order to bring the two back together.

Resistance, however, can either take the extreme form of disorderly reaction via revolts and social unrest, or can be funnelled through pre-existing democratic institutions. Collective organisation is such a democratic hub, that, by definition, exists to couple economic and social considerations and infuse democratic ethos in the labour market. In that respect, Polanyi meets Sinzheimer. The Polanyan objective of balance, re-connection of the economy to the society, through democratisation, is served by the democratisation of the economy itself. That, in turn, is the ultimate goal of collective labour law and its institutions, according to Sinzheimer[606].

It is this characteristic of inherent interconnectivity of any economic system that regulates labour to social considerations and to the autonomy of the individual that informs the Hegelian idea of the necessity of an 'ethical basis'[607] of the

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[602] ibid, 72-79.
[603] Veitch, Kenneth, Law, Social Policy, and the Constitution of Markets and Profit Making, (2013) J.Law & Soc. 40(1), 137-154.
[604] See *Polanyi*, The Great Transformation, 136-140.
[605] ibid, 156-157.
[606] *Dukes, Ruth*, Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law, (2008) J.Law & Soc. 35(3), 341 (343, 346); The Labour Constitution, n.1, 18-19.
[607] *Smith/Deranty*, n.577, 17-18.

economy, which will operate as its moral anchor[608]. In other words, any economic system must take into account and cater for these social considerations and relevant objectives, functioning as part of a coherent whole which encompasses the political, the social and the economic. In turn, by doing so, a socially embedded economic system can be accepted by its actors and thus be perceived as morally[609], and therefore socially and politically, legitimate. This comprehensive socioeconomic systemic paradigm, especially when legally formulated within a constitutionally governed polity, illuminates the normative value and function[610] of the 'social market economy' concept we identified in the EU economic constitution. It also resonates with the thesis of the fundamental socioeconomic duality of the function of collective labour law. The social element of that dual character can further be understood at a political, individual and, ultimately, constitutional level.

That social aspect of collective labour rights operates at both the individual and the collective level. Collective labour rights can be understood as a factor safeguarding individual autonomy, ensuring a dignified living and personal development. However, the relevant collective institutions do not only produce effects at the level of individuals, or their grouping into societal structures, but they are seminal as regards the institutionalisation of that societal organisation. Consequently, collective labour law institutions should also be placed within the context of the democratisation of the market and its infusion with social objectives. Finally, these social strands, articulated in constitutional language, indicate the political and constitutive value of collective labour law within an existing or emerging polity.

Within the context of the EU substantive constitution, these functions of collective labour law and its institutions are entirely consistent with the normative weight given to the principles of dignity, solidarity and social cohesion we have already looked into. Moreover, these 'social' functions are essential for the materialisation of the economic objective of the social market economy. Even

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[608] *Honneth, Axel*, 'Work and Recognition: A Redefinition' in *Schmidt am Busch, Hans-Christoph/Zurn, Christopher (eds.)*, The Philosophy of Recognition: Historical and Contemporary Perspectives (Lexington Books, Plymouth 2010), 223 (229-230).
[609] ibid, 230; *Smith/Deranty*, n.577, 17.
[610] See *Honneth*, ibid.

more broadly, the democratic deficiencies of the EU can find a remedy in the relevant effects of collective autonomy[611], thus providing for the effective respect of the normative principle of democracy, that also governs the EU normative foundation.

3.2. Collective labour rights as the vehicle of market democratisation

3.2.1. Workplace democratisation

Democratisation of the workplace, and by implication, the labour market processes, does not necessarily imply absolute codetermination. It does not suggest substituting the dominant decisive position of management with the collective will of an instrument equally comprised of management and labour. Hence, entrepreneurial freedom is not threatened. To use Kahn-Freund's words, democracy does not mean '*that those who have to obey the rules have an active share in making them, and this is true of political as well as of "industrial" democracy*'[612]. For Kahn-Freund, democratisation simply denotes participation in the making of the workplace rules through representative agents[613]. The paradigm, therefore, of the workplace micro-polity is not the direct democracy of a commune or a collective. In line with the liberal tradition[614], part of which are capitalism and the ensuing contemporary formulation of the labour market, Kahn-Freund has the model of a liberal representative democracy in mind.

That said, however, the full virtues of that model are to be transplanted to the workplace as well[615]: from the respect of individual rights to that of democratic processes by which the voice of the whole, majority and minority included, is regarded to be expressed by relevant elected representatives. In the style of the proto-modern republics, the representatives of those affected by the rules come together with the sovereign (in this case, the employer) to produce them. The

[611] See *Supiot*, Homo Juridicus, 164-167.
[612] *Kahn-Freund*, n.322, 23.
[613] ibid.
[614] See *Collins, Hugh*, 'Theories of Rights as Justifications for Labour Law' in *Davidov/Langille*, n.218, 137 (144-146).
[615] *Arthurs 1998*, n.231, 27-28.

overall process includes both internal trade union democratic procedures and the 'external' process of collective bargaining.

The mechanism of workplace democracy culminates in setting, through collective agreements, norms that ultimately constitute the '*negotiated law*'[616] which governs the workplace micro-polity. It should be noted that collective agreements often go beyond just configuring working conditions. They also establish mechanisms and processes for the resolution of conflicts and for providing for a fair hearing before the imposition of penalties. Disciplinary and grievance procedures constitute the internal 'judicial' processes of the workplace that ensure accountability and transparency but also respect for individual rights. That illustrates that collective labour law is the means that guarantees that the workplace mini-polity, as a system of '*industrial self-government*'[617], does not merely produce 'negotiated law', but is actually '*governed by an agreed upon rule of law*'[618].

Furthermore, the idea that those who are affected by employment related decisions, norms and conditions are entitled to participate in the regulation of labour, connects with deeper, substantive, rather than merely procedural, democratic themes. Freedom from coercion, the need to scrutinise the exercise of power, the avoidance or peaceful resolution of conflict[619], are all linked to the idea of participation, and henceforth the expression of collective voice[620]. All these objectives are relevant for both the context of the workplace but also broadly for any political community. They constitute rights and expression of individual freedom[621] for the person in her capacities as both a worker and a citizen.

Collective labour institutions, therefore, are instruments of substantive workplace democratisation, not mere precursors of conflict. As with any democratic system of governance, their main objective is not to promote conflict for conflict's sake. It is to ultimately achieve reconciliation and consensus through mutual concessions and respect of of all parties. An agreeable balance is a

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[616] *Supiot*, Homo Juridicus, 162.
[617] Steelworkers v. American Mfg. Co., No 363, 363 U.S. 564 (1960), 570 (see https://supreme.justia.com/cases/federal/us/363/564/case.html, last accessed 7/6/2015).
[618] *Kohler*, n.588, 298.
[619] *Kahn-Freund*, n.322, 27.
[620] *Freeman/Medoff*, n.492, 7-11.
[621] *Dukes*, The Labour Constitution, n.1, 30-31.

prerequisite of peaceful coexistence to the benefit of the whole. The existence and effective operation of collective autonomy institutions is not antithetical to the unfettered functioning of a free market economy; it is imperative for its balance and stability. Further still, democratising the workplace can ultimately result in the democratisation of the market itself, an element that eludes economic approaches.

Economic analyses of the function of collective labour law, no matter how 'labour-friendly', unavoidably accept the central role of economic arguments, be it neoclassical or institutional. Therefore, they take modern, increasingly globalised and neoliberalised, capitalism for granted, seeking only to restrain its effects by adopting its fundamental reasoning and attempting to use it to the benefit of workers. Consequently, what is ultimately accepted is the basic tenet of the self-regulated market; what is sought is simply an alternate path to self-regulation.

However, the real issue is doing away with the neoclassical fallacy of the autonomous operation of markets, and placing them within the constitutional and legal and social environment they operate in and make use of. The question is subduing market forces to the fundamental collective choices made by the constituent people the economic system is meant to serve[622]. Market democratisation is but a facet of the systemic democratisation prescribed by any liberal constitutional charter.

3.2.2. Systemic democratisation

Market democratisation is inevitably systemically connected to the democratisation of the society within which the market operates. When that society functions within a legal framework, market democratisation holds the potential of infusing input legitimacy to the overall structure. It contributes to the overall perception of the legal superstructure as democratically legitimate, emerging from popular participation and resulting in collective benefit[623]. Hence, any discussion of a democratically regulated polity requires not only an examination of its broad economic constitution, as we have defined it, but, more

[622] cf. ibid, 206-207.
[623] See *Smith/Deranty*, n.577, 21; *Honneth*, n.608, 223.

specifically, of the function and norms of labour law[624] and its democratisation 'tools', collective labour mechanisms.

First, the economic and social functions and virtues of collective organisation can have positive impact on structural systemic democratisation, and the promotion of an ethos of participation. Furthermore, substantively, participation in collective labour law structures can also benefit the quality of democracy[625], building upon and beyond the economic emancipation of workers.

On a first level, corollary to the economic function and objective of collective labour law, collective organisation in pursuit of the protection of the narrow economic interests of workers within the workplace has the capacity to result in their personal and political emancipation. A worker given the chance to participate in the regulation and organisation of her own working conditions and the provision of her labour, ensuring full respect of her own economic freedom, develops, in turn, into a citizen that enjoys greater freedom from coercion. Stability and relative economic security allow for greater liberty of choice. Also, an individual forged in collective organisation and a sense of commonality to escape abuse and subordination from her direct economic superior, the employer, can employ these learned tools to safeguard her community against abuse from any overbearing group or institution.

In that respect, beyond the narrow confines of workplace democratisation, collective organisation can provide a vehicle for the exertion of political pressure towards central political actors. Usually, that pressure will aim at promoting relevant worker interests and relate to issues pertaining to the regulation of the labour market, and the consequent interventions of state institutions[626].

At the same time, beyond the boundaries of their narrow economic considerations, through their participation in the collective institutions that allowed for the promotion of those interests, workers develop their bourgeois identity. They develop their sense of belonging to a commonality of broader

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[624] See *Smith/Deranty*, n.577, 22-23.

[625] cf the relevant point, though more based on a predominantly economic understanding of modern democracy, in *Atleson, James*, Values and Assumptions of American Labor Law, (University of Massachusetts Press, Amherst MA 1983), 35-43.

[626] *Lester, Gillian*, 'Beyond Collective Bargaining: Modern Unions as Agents of Social Solidarity' in *Davidov/Langille*, n.218, 329 (331),. cf *Levine*, op.cit., 562-567.

economic and socio-political interests that underpins a particular social identity. Further, though, they realise that those interests can better be promoted through dialogue and mutual concessions with those of opposing objectives. In other words, besides the ethos of participation, workers develop the deeper, substantive, democratic reflexes and 'skills'[627], as well as the relevant experience, that allows for quality debate, deliberation and balance of opposing views[628].

Thus, workers are schooled[629] in the prerequisites of effective, respectful engagement in the public sphere and the democratic processes. Trade Unions and the relevant collective labour law mechanisms become incubators of civic virtues[630].They forge workers in their micro-democracies, so as to evolve, in turn, into conscious, engaged citizens within the greater polity.

The constitutional potential of collective labour institutions and organisation to contribute to the democratisation of modern socioeconomic systems becomes clearer once considered within the context of the complexity of contemporary systemic structures in a globalised, largely capitalist, world[631]. Modern capitalist markets are characterised by their transnational character, with extreme interconnectivity between national levels, and extensive diversity and complexity as to the services and goods produced, but also as to the institutional and organisational structures involved and the conflicting interests therein. This new environment of socioeconomic activity and interaction demands a re-conceptualisation of the traditional paradigm of worker collective representation[632].

The old, simplistic idea of unitary representation of only occupational interests of workers[633] by a single trade union, or the unions of a single sector, and the absolute identification of collective organisation solely with the mechanisms of collective bargaining[634] can no longer deliver an accurate conduit for the collective voice of workers. Transnational labour might share interests, but not necessarily

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[627] *Levine*, op.cit., 561-562.
[628] ibid, 567-569; *Kohler*, n.588, 300.
[629] *Kohler*, n.588, 299.
[630] ibid, 279-304.
[631] *Waterman, Peter*, 'The New Social Unionism: A New Union Model for a New World Order' in *Munck/Waterman*, n.242, 247 (248-249).
[632] *Munck*, Labour Dilemmas and Labour Futures, n.291, 12-13; *Waterman*, op.cit., 247-264.
[633] *Hyman 1999*, n.242, 123.
[634] See *Hyman 1999*, op.cit., 124.

working conditions and duties, status (e.g. employee/worker; full time/part time workers) or even geographical proximity and national identity[635]. Workplace democratisation needs to transcend traditional structures[636], without, however, necessarily replacing them[637]. Building upon existing solidarity structures, their scope needs to encompass the evolution of interests and the consequent apparent, albeit substantively superficial, heterogeneity of employment forms[638] and of respective relevant worker interests[639]. Further, within the complex transnational context trade unions can operate as hubs that will facilitate wider societal cooperation[640] that would also transcend traditional national boundaries and concepts.

The epitome of this new heterogenous, yet systemically integrated, market paradigm is undoubtedly the pluralistic world of the EU internal market, built upon diverse conceptions and approaches of labour market (re-)regulation, with a shared understanding of the value of minimum social protection. The uniqueness of the EU market vis-à-vis other transnational market structures rests upon its subjugation to the Union's constitutional framework. That is the element that reconfigures the EU market and its regulatory nexus into only one aspect of a broader pluralistic legal order which aspires to become a polity, rather than just an economic space.

We have discussed the Union's ordoliberal roots and the neoliberal politics dominating its contemporary 'economic governance'. However, to disregard its substantive constitution and the fundamental normative values and objectives upon which it rests, would expose not only the Union's economic sphere but the entire integration project to the delegitimising effects of a democratically unsound and uncontrolled neoliberal market rationale. Existing national and transnational (Social Dialogue) collective labour structures can provide an immediate buffer against that risk. They are diverse, and thus also in line with the ideal of pluralism. Further, by their very nature and in accordance with their multiple functions, they

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635 *Waterman*, n.631, 249.
636 *Hyman 1999*, n.242, 126-130.
637 *Supiot*, Beyond Employment, n.157 127-129.
638 ibid, 128-129; *Munck*, n.291, 13.
639 *Supiot*, op.cit., 131. See *Hyman 1999*, op.cit., 127.
640 *Lester*, n.626, 329.

formally embody and concretise the ideal of comprehensive pursuit of social, economic and political goals, that normative EU constitutional objectives prescribe.

The Union's formal institutional framework has often been criticised as too stagnant or too remote from the actual multiple socioeconomic needs of the people it is supposed to serve and represent. It could be argued, nevertheless, that there is no need to wait for the consensus that would lead to an extensive overhaul of the Treaties to alleviate the issues of diminished input legitimacy. Allowing for transnational layers of collective representation and bargaining, even across sectors, would enhance the democratic input in not just the self-regulation of the internal market, but in the overall governance of the European project. Thus, the de facto pluralism of interests, identities, national peculiarities and potentially different social structures and priorities[641] would find a way to be expressed within the formal institutional framework of an area that aspires to become a polity fundamentally built upon the idea of pluralism.

Reading the objectives of democratisation, social cohesion, and the organisation of a social market economy into the function of collective labour law structures would allow them to act as the tools to realise the Union's substantive constitution. Thereby, the economic arm of the integration project would be infused with a means of bottom-up democratic participation, building webs of transnational understanding and solidarity among workers on the basis of a commonality of interests that may well transcend narrow national or occupational considerations

Transnational association and representation, as institutional vehicles of the relevant substantive constitutional values and objectives of the EU, could enhance systemic democratic participation even absent a formal collective bargaining structure. Conscious of the social interconnectivity of interests, modern trade unions often break the walls that delimit their traditional function within the workplace or the confines of the labour market, to connect with their broader communities[642] in pursuit of wider social objectives[643]. The examples of Trade

[641] See *Munck*, n.291, 13.
[642] *Stone, Katherine/Cummings, Scott*, Labour Activism in Local Politics: From CBAs to 'CBAs' in *Davidov/Langille*, n.218, 273-292.
[643] *Munck*, op.cit., 15; *Supiot*, Beyond Employment, n.157, 132.

Unions engaging in community-wide local initiatives to push for social policy reforms[644], or leading social movements, such as that against water privatisation in Greece[645] during the ongoing Eurozone crisis, illustrate the tendency and the capacity of collective structures to open to the greater society, and function as hubs of social and political mobilisation[646]. Those examples of social interaction are indicative of the greater democratic potential of traditional collective labour institutions. Therefore, reality appears to disprove Rawlsean interpretations by which Trade Unions are judged to be inherently undemocratic because their core objective is to induce wealth redistribution for the promotion solely of the interests of the close caste of their members[647].

On a greater scale, it should also be noted that forums of transnational cooperation between national trade unions have increasingly assumed the role of tackling the globalisation of the markets by approaching common problems, not solely related to labour, but also to democratic, social and ecological considerations[648], from an internationalist perspective[649]. These transnational collective cooperation webs effectively provide invaluable means for the voice of workers to be heard in the realm of transnational, globalised economy. More so as this is an environment which has developed into a space free of democratic intervention, accountability and control, traditionally exercised through state structures. The democratic function of collective labour institutions becomes more critical if we consider the possibility that globalised market structures were conceived and constructed precisely so as to escape the confines of state institutions, given the Washington Consensus and the neoliberal dogma's aversion to the 'obstacles' democratic oversight puts on the supposed self-regulation of the market.

Within the context of the EU, pluralistic and balanced, yet susceptible to neoliberal manipulation due to the pertaining institutional inertia, the emergence

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644 *Stone/Cummings*, op.cit.
645 *van den Berge, Jerry/Boelens, Rutgerd/Vos, Jeroen*, 'Citizen mobilization for water:The case of Thessaloniki, Greece' in *Farhana Sultana/Alex Loftus (eds)* Water Politics: Governance, Justice and the Right to Water (Routledge, Abingdon 2020), 161-175.
646 cf *Waterman*, n.631, 260-261.
647 See *Levine*, op.cit., 536.
648 cf *Waterman*, op.cit., 253, 256-257.
649 *Munck*, n.291, 15.

of hubs of collective organisation could bring together communities and construct broader alliances to pursue wider social objectives. Beyond the narrow confines of employment, trade unions can act as the facilitative centre of broader social mobilisation[650]. Such social alliances[651] would not necessarily operate only politically, in the abstract, traditional sense of ideological association. More concretely, they would provide the organisational structure for the pulling together of resources of various convergent social groups and interests, so as to contribute to the debate by using the technocrat's own weapons: research and figures, yet now embedded in the evidence of social reality.

That would ultimately lead to the infusion of the technocratic ethos of the EU comitology[652], also often lacking in transparency[653], with a fresh air of democratic participation by making the product of this process of alliances a variable on the table. Even the pressure for collective input and participation would undoubtedly enhance accountability within the current EU administrative and legislative process. Substantively, it has been suggested that comitology debates often tend to focus on the interests of only one group of social actors (for example, small and mid-size businesses[654]), or pursue only specific economic objectives; allowing for the voice of other actors to be heard would only lead to more comprehensive solutions. On the political level, allowing transnational collective organisation to function as a catalyst of social organisation and mobilisation would put pressure on the Commission and comitology committees or on formal legitimising institutions, such as the European Parliament, so as to counterbalance lobbying from powerful economic groups[655]. Without an equally strong voice raising social and democratic considerations, such business and market lobbies, which share the priorities of neoclassical and neoliberal capital-friendly dogmas, end up skewing

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[650] See *Hyman 1999*, n.242, 130.
[651] *Waterman*, n.631, 261.
[652] cf *Joerges, Christian*, 'Deliberative Political Processes' Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making, (2006) JCMS 44(4), 779-802.
[653] *Chalmers, Damian/Davies, Gareth/Monti, Giorgio*, European Union Law (2nd ed.; CUP; Cambridge 2010), 124-125; *Cygan, Adam*, Accountability, Parliamentarism and Transparency in the EU (Edward Elgar; Cheltenham 2013), 12.
[654] *Schömann, Isabelle*, Better Regulation: analysis of the European Union strategies in law making or the denaturation of EU (labour) law as adjustment factor to competitiveness and growth? (2015 LLRN conference paper), 2,15.
[655] See *Wetendorff Nørgaard, Rikke/Nedergaard,Peter/Blom-Hansen,Jens*, Lobbying in the EU Comitology System (2014) Journal of European Integration 36 (5), 491-507.

the legislative output to predominantly reflect their economic considerations[656], distorting not only the prescribed normative constitutional balance, but, effectively, output legitimacy.

3.3. Non-economic value of collective labour law structures on individuals

Socialisation and democratisation could be seen as only 'public' goods, stemming from the effective function of collective labour institutions. However, we should not overlook the value these institutions have for the individual, beyond the protection of narrow economic interests. After all, the protection of a minimum that would ensure financial security and stability, if not wellbeing, is not an end in itself. It is a means to guarantee each person a life with dignity, that would allow her to develop, explore her potentials and, ultimately, truly enjoy freedom. In turn, an individual free from coercion who has the capacity to fully exercise that freedom is capable of becoming the building block of an equally free polity.

That is exactly what the relevant normative provisions of the EU substantive constitution seek to ensure, by elevating dignity, in its deeper sense, to a fundamental value, as we have seen in Part I. Collective labour institutions are therefore critical factors for the actual attainment of this constitutional goal.

3.3.1. Dignity as a precondition of substantive freedom

The idea of labour law as protective of individual dignity is founded upon the premise of the product of labour being the fundamental source of human subsistence[657]. Unemployment, inability to work or wage and working conditions that do not guarantee adequate subsistence are detrimental to dignity and self-esteem[658]. In that context, work emerges as the bulwark against deprivation or

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[656] See inter alia *Best/Lengyel/Verzichelli*, The Europe of Elites, n.377.
[657] See *Hegel*, n.588, §196, 231. cf. *Lane, Robert*, The Market Experience (CUP, Cambridge 1991); *Murphy, James Bernard*, The Moral Economy of Labour (Yale University Press, New Haven 1993).
[658] *Cullen, Bernard*, The Right to Work (1987) Royal Institute of Philosophy Lecture Series 22, 165 (175).

fear thereof, guaranteeing the capacity to enjoy all fundamental physical human needs[659].

The general objective of guaranteeing this aspect of dignity should be connected with the endowment of the individual with a set of fundamental rights[660], in order to pursue it by legal means. Hence, the pursuit of dignity is attached to the idea of social rights. However, even those liberal theorists that recognise (some)[661] social rights as the necessary corollary of first generation rights tend to stay short of also calling for the necessity of collective labour rights or of even considering their relevant function[662]. Perhaps they cling too much to the individualistic fundamental premise of classical liberal philosophy[663]. In doing so, though, they ultimately adopt a superficial understanding of the autonomy of the individual, as if existing in a vacuum, rather than within a social structure of constant interpersonal interaction. Otherwise they could have conceded that collective labour law, within a supposedly autonomous liberal market economy, is the primary mechanism that ensures not just work itself, but work that is at least capable of covering those needs. Therefore, it is to be understood as the basic safeguard of fundamental needs that comprise life with dignity.

Covering those needs is also, subsequently, related to the effective enjoyment of individual freedom, as a catalyst for personal development[664] (substantive freedom)[665].

In this sense, actual freedom encompasses unleashing all the capabilities[666] of an individual. That process can only be ensured under a framework that allows for the liberation of choice, and the emancipation from external coercion in exercising it[667]. The protective function of collective labour law we have already described

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[659] *Cullen*, op.cit., 176; *Waldron, Jeremy*, Liberal Rights (CUP, Cambridge 1993), 8.
[660] See *Collins 2011*, Theories of Rights as Justifications, n.614, 141-142; *Weiss, Manfred*, 'Re-inventing Labour Law' in *Davidov/Langille*, n.218, 43 (50).
[661] *Waldron*, op.cit.,10, 12-13.
[662] *Collins 2011*, n.614,153,155. cf *Waldron*, op.cit. 271-308 where there is absolutely no reference to labour law institutions in his discussion of the concept of social citizenship, albeit that concept is strongly related to social rights (including social security and welfare).
[663] *Collins 2011*, n.614,155.
[664] See Art. 22 Universal Declaration of Human Rights.
[665] *Langille, Brian*, 'Labour Law's Theory of Justice' in *Davidov/Langille*, n.218, 101 (118).
[666] *Sen*, The Idea of Justice, n.559, 225-290.
[667] *Deakin, Simon*, Capacitas: Contract Law, Capabilities and the Legal Foundations of the Market, in *Deakin/Supiot*, Capacitas, n.160, 1 (21-22).

aims precisely to safeguard the developmental potential of substantive freedom from employer manipulation and abuse.

The suggested developmental objective of labour law as a catalyst that allows the deployment and fulfilment of human potential, of each worker's capabilities, is reminiscent of Hegel's understanding of work as a means of personal development[668]. At a personal level, Hegel understood work as the vehicle for the satisfaction of the need for creativity, transcendence and therefore self-growth, in the sense of attaining each individual's potential. Labour is ultimately an expression of individual identity, which includes the full array of personal qualities, values and capacities. Drawing upon Tweedie, it can be asserted that the choice of work and the ability to provide labour without coercion are linked to the desire to provide 'depth, meaning and structure to human life'[669]. We will turn to that objective of a dignified life in the next part. However, it should be noted here that this ontological goal is to be attained through the constant process and pursuit of self-development and self-improvement[670].

Ensuring dignity, therefore, complements the economic elements of freedom, and allows that economic function to be considered as a means to the end of personal emancipation. Moreover, any constitutional legal framework based on the concept of individual dignity should respect the balance between the economic and the functional, substantive aspects of freedom, by delimiting the uncontrolled forces of modern capitalism. The 'flexibility' and constant movement, to the benefit of capital, that particular form of capitalism demands of workers threaten personal stability and the continuity of the individual's developmental process[671]. Consequently, they also disrupt personal evolution and the satisfaction derived from it[672]. Effectively, thus, the free exploration of capabilities and, ultimately, substantive freedom itself, are curtailed. Avoiding that disruption is precisely what a constitutional 'social market economy' should pursue, making use of the institutional tools of collective labour law, in the field of the labour market.

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[668] *Cullen,* op.cit., 174.
[669] *Tweedie, Dale*, 'A critical assessment of orthodox economic conceptions of work' in *Smith/Deranty*, n.235, 327 (346).
[670] ibid, 342.
[671] Ibid, 343.
[672] ibid.

Nevertheless, the preceding explanation alone of the function of labour law does not illuminate the full substance of work as a fundamental need and value. In fact, an analysis solely based on the necessity of work for subsistence or, more generally, for the acquisition of material means to achieve individual capacities is essentially an elaboration on the subject and content of self-interest that is considered the fundamental drive of rational economic behaviour in neoclassical economics[673]. The value, motivation and objectives of work, and thus of the legal norms that relate to it and protect it, are arguably more complex and include moral, social and even ontological considerations[674].

3.3.2. Dignity as a moral good: the 'dignified life'

The idea of a dignified existence does not merely relate to working conditions that ensure the protection of workers' freedom and autonomy or to the adequate enjoyment of labour's product for subsistence and personal development. It also goes back to the fundamental value of work itself to a dignified, or, in Hegelian terms, an 'honourable' life[675].

The value of work is therefore more complex and substantive. At a more fundamental level, it also includes the idea of work itself being a defining characteristic of the individual as a member of the community, thus an intrinsic element of the human condition[676]. Hegel, for example, emphasised the seminal value of one's work as that function and characteristic by which the individual is identified, defined and 'recognised' by herself and the other members of society[677]. He talks of the concept of 'honourable life' by reference to social relationships and the elements that constitute both the self-image and the social identity of each individual.

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[673] See *Smith, Nicholas*, 'Three Normative Models of Work' in *Smith/Deranty*, n.235, 181 (192).
[674] ibid, 191-192.
[675] *Schmidt am Busch 2012*, n.465, 72.
[676] cf. *Cullen*, op.cit., 169-170, who nevertheless dismisses this notion as a '*pious, perhaps wistful, theoretical observation with no practical relevance*'.
[677] *Hegel*, Elements of the Philosophy of Right, n.588, §207, 238.

In that context, the freedom to choose a profession and engage in work is seminal to the effective participation of each person in the social[678] and the economic sphere[679] (the market)[680], of which the labour market is a critical part[681]. Furthermore, work defines individuals both as regards the development of personal skills and capacities and their deployment *vis-à-vis* other members of the market and the wider community[682]. It is by these defining characteristics that a worker acquires a social identity[683]. Through this identity, projected in his social life, each worker also attains the feeling of self-fulfilment and satisfaction[684] that is conducive of the notion of not only dignity but also happiness[685].

Consequently, it has been argued that the Hegelian construct of honourable life supports the idea of a right to work[686] as the legal embodiment of the necessity to participate in socioeconomic life[687] through labour. This suggestion has led to the further point raised by Schmidt am Busch that diminution of labour standards, deregulation or 'flexibilisation' of labour law protection endangers the social identity and self-recognition of workers[688], which arguably constitute inherent elements of their autonomy and dignity.

Collective labour law institutions, such as trade unions, and their function could be argued to be instruments that can counter the imbalances[689] as well as the individualistic and alienating effects of purely economic capitalist market structures and perspectives. Procedurally, organisation of workers and collective bargaining and arbitration mechanisms, are conducive of fairer, hence more dignified, process of wage and working conditions determination. Macmillan,

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[678] *Cullen*, op.cit., 173-174.
[679] The 'estate of trade and industry'*: Hegel*, n.588, §204, 236.
[680] cf. *Schmidt am Busch, Hans-Christoph*, Personal Respect, Private Property, And Market Economy: What Critical Theory Can Learn From Hegel, (2008) Ethical Theory and Moral Practice 11, 573. See also the references to Honneth therein.
[681] *Schmidt am Busch 2012*, n.465, 72.
[682] ibid, 82.
[683] ibid.
[684] See inter alia *Jahoda, Marie*, Employment and Unemployment (CUP, Cambridge 1982).
[685] See *Clark, Andrew/Oswald Andrew*, Unhappiness and Unemployment (1994) The Economic Journal 108, 1025. cf. the American Declaration of Independence (1776), for the notion of happiness as an 'unalienable' right.
[686] *Hardimon*, n.587, 197.
Contra *Schmidt am Busch 2012*, n.465, 74, note 58. See also *Cullen*, op.cit. 178 opposing to a 'right to work' per se as too vague and impractical a notion.
[687] See *Cullen*, op.cit., 175.
[688] *Schmidt am Busch 2012*, n.465, 99-100.
[689] See *MacMillan*, n.321, 108.

extrapolating on the work of John Commons, has noted the value of due process as the recognition of labour's value in production and workers' economic contribution[690]. Subsequently, the recognition of workers' role as equal, integral and valuable assets of the company organism, creates a sense of self-respect[691] and fairness[692] that is a critical element of dignified participation in the economic life through work.

Substantively, institutions of collective organisation, bargaining and action can provide workers with the means to ensure the 'moral' element of labour, in guaranteeing dignity, social participation and integration, hence the very identity and autonomy of workers as individuals and 'social animals'. Even in the early times of capitalist markets, before collective labour law institutions had reached their current modern form, writers like Hegel[693] and Durkheim[694] had essentially identified trade union structures of worker organisation as crucial. Collective labour law structures are to act as social cohesion[695] and solidarity[696] catalysts so as to achieve the 'moral', or social, aspect of work and the related rights and values.

3.4. From collective democratisation, and individual dignity and freedom to identity building

The catalytic effect at both individual and socio-political level has the potential of ultimately creating an even broader sense of belonging and solidarity, the preconditions of the missing piece of the EU constitutional puzzle: a constituent identity. The first step, however, is achieved with the realisation of worker individual, class and bourgeois identity.

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[690] ibid, 127.
[691] ibid. See also *Honneth, Axel*, Struggle for Recognition (Joel Anderson tr., Polity, Cambridge, 1995).
[692] *MacMillan*, n.321, 129.
[693] With his broad concept of 'corporations'.
[694] *Durkheim, Emile*, 'Preface to the Second Edition: Some Remarks on Professional Groups' in The Division of Labour in Society (Halls,W.D. trans.; Macmillan, London 1984), xxxi (xxxv): The trade union can fall into Durkheim's concept of a 'corporation', a group '*constituted by all those working in the same industry, assembled together and organised in a single body*'.
[695] See *Durkheim*, op.cit., xliii.
[696] *Durkheim*, op.cit., xxxix.

Unquestionably, the socialising, democratising and emancipating effects of collective labour law processes we have described on the level of the social and private life of workers shape their self-awareness and identity as individuals and bourgeois citizens. Thus workers are reconnected with a sense of belonging to a particular class, but also to a particular community.

As an aspect of the shake-up in market structures and institutions, of Lash and Urry's 'disorganisation of capitalism' we discussed earlier, labour mobility and the 'flexibility' of employment forms have been argued to have changed the largely homogenous[697], in terms of nationality, gender and cultural background, labour force[698]. The result has been suggested to be the respective disarray in familiar patterns of self-identification with an easily defined working class[699]. Realisation of that common identity is a prerequisite for the emergence of the sense of commonality that underlines solidarity and its institutional manifestations in the form of participation in collective labour structures and action. Therefore, the flux in the nature of work, the components of the employment relationship, and, thus, the status of worker have only fed to the disassociation that is already a familiar pattern when discussing, more broadly, the apparent lack of the sense of common fate that is the underlying conceptual thread connecting the members of a constitutive demos as citizens of a shared polity.

This realisation brings us back to the EU, its original ordoliberally conceived common market project and its present potential of evolving into a constitutional polity. 'Disorganisation' (and the ensuing sense of disillusionment it creates for workers as citizens) is evident even in the reasoning and results of juridical approaches of labour rights and their inconsistency, judged against the treatment other rights receive.

The post-Lisbon substantive constitution of the Union can provide a normative anchor to settle the flux. At the very least, defining the nature of the internal market order as that of a social market economy and integrally positioning labour market regulation within its mechanism can provide guidance not only in the interpretation of the function of relevant mechanisms but, more importantly, in

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[697] *Supiot*, Beyond Employment, n.157, 25.
[698] ibid, 94.
[699] *Lash/Urry*, n.302, 283-284.

rebuilding collective identity. Further, a perspective that is also anchored on the non-economic principles of the substantive constitution can help us realise the constitutional potential of the multiple functions and effects of collective labour mechanisms on individuals, and on societal processes. The catalytic effect of these functions and effects at both individual and socio-political level has the potential of ultimately creating an even broader sense of belonging and solidarity. These two are the conditions of the missing piece of the EU constitutional puzzle: a constituent identity.

3.5. The constitutional value of collective labour law

Bringing together the strands as to the multiple functions of collective labour law and the values it protects (economic, democratic, social – individual and collective), under the prism of a systemic legal framework, reveals its multidimensional constitutional value.

Sinzheimer's idea of collective labour law as the element to constitutionalise and democratise the economy has recently re-emerged and has been connected to the modern economic and political environment thanks to Ruth Dukes' compelling work[700]. Sinzheimer envisaged a democratising effect of collective labour law that is not entirely autonomous from state institutions, as is the case with Kahn-Freund's collective laissez faire[701]. Rather, his take on collective autonomy makes use of institutional structures, such as the legal framework, to affect the economic sphere, but also feeds back into the broader systemic normative objectives, such as the pursuit of individual autonomy and freedom as precursors of democracy.

In that respect, labour law, and collective labour institutions, are not to be considered 'private law'[702], stemming out of contractual freedom and the self-regulating capacity of the market alone. On the contrary, they better resemble elements of public law; they are, in essence, applied constitutional law, subjugating the economic realm to the normative will of the democratic, political

[700] *Dukes*, The Labour Constitution, n.1.
[701] ibid, 69-91; Dukes 2008, n.606, 344, 356-360.
[702] *Dukes 2014*, op.cit., 31; cf. *Dukes 2008*, op.cit., 360-361 on Kahn-Freund.

constitution[703]. In that respect, state intervention to facilitate the constitutionally prescribed balance is welcome[704]. Consequently, collective labour institutions emerge as an instrument of Razian 'common ideology'. They are part of a coherent, pluralistic whole, which includes economic structures and interests as elements of the overall polity[705], and means to the ends of the common constitutional good, including social coherence, democracy and social justice[706].

This understanding of collective labour law, resonates with the pluralistic, coherent conception of the supranational EU constitutional space this thesis adopts. It reveals the coalescence of the diverse collective labour law structures and institutions, within the multilevel EU constitution, with the normative and substantive parts of the constitutional framework[707]. Collective labour law is, therefore, not an affront to economic freedoms protected under EU law. They both constitute integral, interconnected elements of the same whole, in service of the fundamental objectives of the EU as an organisation undergoing substantive constitutionalisation.

4. Conclusions

Substantively, collective labour law is an invaluable inherent systemic element of the social market economy the EU envisages. Its mechanisms are a necessary corollary to economic freedoms and to a qualitative, and not merely functional, conception of a transnational market economy.

Further still, labour law protection and collective labour rights have been shown capable of fulfilling their constitutive role within the broader scheme of the aspired EU constitutionalisation by creating necessary networks of solidarity and support for workers, both as individuals and as parts of the collective.

Moreover, collective labour rights and the subsequent autonomy of labour market regulation are a vehicle for the democratisation of the market and the expression of workers' voice. Hence, a holistic and systematic interpretation of

[703] ibid.
[704] cf Kahn-Freund's disagreement illustrated in *Dukes 2008*, n.606, 343-344.
[705] *Dukes 2014*, n.1, 31.
[706] cf ibid, 66-67.
[707] cf ibid, 190.

collective labour rights as a part of the pluralistic EU constitution, under the light of its normative foundations, also holds the potential for the emergence of a perception of belonging to a common transnational community. It could facilitate the forging a true community comprised of the peoples of Europe, workers yet citizens, which is perceived as interconnected, bound to a common fate and steered by shared humanistic ideals rather than just economic considerations.

This systematic and coherent approach of the EU constitution should be applied to its more specific provisions as regards labour law in general and collective labour law in particular. As we have seen, they comprise of the relevant portions of the material constitution, which needs to be read with due regard to the fundamental goals and objectives encompassed in the normative constitution. The fundamental values, objectives and guiding principles that arise from the normative foundations of the EU constitution, as well as the consequent understanding of the role of collective labour rights within it, should be read into the specific legal bases of EU law that relate to collective labour rights per se. The same reasoning should be taken into account when discussing the influence complementary sources of law, such as international law, ILO conventions and national constitutions, might have in the interpretation of the EU material constitution. We will therefore turn our attention to these, the objects of the superimposition of a constitutional reading of EU law.

IV. The EU material constitution on Collective Labour Law

As already seen, in any constitution, its material part is intrinsically connected to its normative section. The material constitution fleshes out the broad norms and principles of the normative foundations. Together, they paint the full picture of the constitution as a functioning instrument, providing its broad abstract values and objectives with tangible substance and essence (*substantive constitution*). Most notable among those are the provisions that confer rights upon individuals.

We have already discussed the conceptual underpinnings of both the normative constitution of the EU and of collective labour law institutions and mechanisms. We now need to look into those specifying norms of the EU material constitution

that are to carry these considerations into positivist legal analyses, and, ultimately, into a judicial interpretation of the Treaties that would be properly 'constitutional'.

Even with a pure market orientation, as the means to prosperity[708], the Treaty of Rome had recognised the need for '*the equalisation*' of working and living conditions '*in an upward direction*' (Art.117 TEEC) within the common market. Absent relevant EU competences, the eventual improvement was to be pursued through intergovernmental cooperation. The Union only devised an arsenal of low level and soft-law initiatives and tools (e.g. studies, issuing opinions, organising consultations)[709] to support Member States. However, '*the law as to trade unions, and collective bargaining between employers and workers*' [710] was explicitly mentioned as an element on which Member States should focus, facilitated by the (then) Community. This is the earliest formal acknowledgement of collective labour law as critical to the operation of the common market and the achievement of the social objectives of the Union.

The gradual evolution of the EU[711], culminating in the adoption of substantive constitutional characteristics, has led to labour law and collective labour rights featuring more prominently in the EU constitution. The Treaty of Amsterdam had a critical role in that respect[712]. It identified the European Social Charter (1961) (ESC) and the Community Charter of the Fundamental Social Rights of Workers (1989) (CC) as the sources of fundamental social rights respected and protected by the Union. Hence, it implied the recognition and guarantee of collective bargaining and – for the first time – of collective action.

Furthermore, the Treaty of Amsterdam, defining the Union's objectives, competence, and tools as regards labour law (Art.137 TEC – now 153 TFEU), retained EU competence only in regulating workers' information and consultation rights and the aspects of participation in the workplace and codetermination that are closely linked to those rights (e.g. Work's Councils). The rights of association

[708] The Preamble to the Treaty of Rome declared the constant improvement of the living and working conditions of the peoples of the Member States as one of the driving reasons behind the creation of the EEC. cf Art. 2 TEEC.
[709] Art.118 par.2 TEEC.
[710] Art.118 par.1 TEEC.
[711] On the evolution of the 'social' branch of EU law, see *Barnard*, EU Employment Law (2012), n.272, 3-45.
[712] ibid, 20-26.

and strike were excluded from the scope of that competence (Art.153(5) TFEU). Nevertheless, and although the law relating to collective agreements is a direct corollary to collective bargaining, it has been argued that itself is not excluded from the regulatory competence of the EU, since collective agreements and their regulatory regime are not expressly mentioned in Art.153(5)[713].

The Amsterdam treaty did introduce into EU primary law the Social Dialogue provisions as a mechanism for transnational dialogue between management and labour, however. That new institution would work both as a supplementary legislative mechanism within the Union and as a means of concluding European level framework agreements (Art.138-139 TEC, currently Art.154-155 TFEU). In effect, Social Dialogue has the potential to constitute the transnational platform for collective bargaining. Regardless of its transnational potential, we need to note that Art.152 TFEU essentially codifies the express obligation of the EU to 'recognise', but also to *'promote'*, that is to actively facilitate and enhance, the role of social partners (including trade unions and relevant associations) within its structures – a point to which we will return when discussing the Social Dialogue provisions.

All that goes to show that, although the EU still stays clear of claiming regulatory competence in the field of collective labour rights, substantively it incorporates them in its pluralistic constitutional fabric, and not merely in an abstract, normative manner. To that effect, it should be noted that, despite the exclusion of the Union's competence to regulate in these matters (153(5) TFEU), relevant national measures are not to be exempt from assessment in accordance to EU law[714]. Moreover, explicit references in the material constitution specify the normative functions of relevant collective labour rights and freedoms.

To that effect, it has been the Charter that has had the greatest impact. The relevant discussion comes with two caveats: first, that the emphasis is placed on the Charter as the main material vehicle of collective labour rights, as the recent rather toothless[715] (though positive[716] even as window-dressing[717]) instrument, that

[713] *Riesenhuber, Karl*, European Employment Law (Intersentia, Cambridge 2012), 146.
[714] Case C-341/05 *Laval*, paras. 86-88; Case C-438/05 *Viking*, paras. 39-41.
[715] Hendrickx, Frank, The European Social Pillar: A first evaluation (2018) ELLJ 9(1), 3 (5).

is the European Pillar of Social Rights lacks the characteristics (most importantly, a legally binding effect) that would allow it to be considered part of the EU material constitution; second, that discussing Charter rights as such goes beyond the focus and the relentless limitations of this thesis. It is not the purpose to replicate relevant comprehensive analyses[718], but to highlight some main relevant points that could be useful for our purposes.

1. The rights v. principles question

It is important for the essence of the Union's substantive constitution that the Charter incorporates social rights alongside civil and political. In the field of labour law, despite not recognising a right to work per se, the Charter does sanction each individual's freedom to seek and engage in work (Art.15 CFREU) under fair conditions (Art.31 CFEU) and be protected against unjust dismissal (Art. 30 CREFU). More importantly for the purposes of the present thesis, a set of collective labour rights is asserted, most notably the right to form unions (Art. 12 (1) CFREU), collective bargaining and collective action, including the right to strike[719] (28 CFREU), and workers' information and consultation rights (27 CFREU).

These Charter provisions constitute the specification of the normative values and objectives of the EU constitutional framework, with reference to the particular field of labour law and labour market regulation. They are not merely limited declarations or of secondary importance to fundamental values and objectives. They elaborate upon the EU normative foundations and should therefore be regarded as tools for their realisation. Hence, labour law related Charter

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cf. *Garben, Sacha*, The European Pillar of Social Rights: Effectively Addressing Displacement? (2018) EuConst 14(1) 210; The European Pillar of Social Rights: An Assessment of its Meaning and Significance (2019) CYELS https://doi.org/10.1017/cel.2019.3 (last accessed 17/11/2019).

[716] Hendrickx, op.cit., 5-6.

[717] Contra *Garben*, op.cit..

[718] For an excellent example, see *Dorseemont, Filip/Lörcher, Klaus/Clauwaert,Stefan/Schmitt, Melanie (eds)* The Charter of Fundamental Rights of the European Union and the Employment Relation (Hart, Oxford 2019).

[719] *Bercusson, Brian*, European labour law (CUP, Cambridge, 2009), 328.
Contra Barnard, Catherine, EC Employment Law,(OUP Oxford, 2006), 29-30. But see *Bercusson 2009*, op.cit., 209-210, 243-244

provisions, as parts of the EU material constitution, cannot be applied or restricted without bearing in mind that inherent connection[720].

However, the nature of these norms as encapsulating rights has been questioned, most prominently (if not uniquely) by the UK[721], which pushed for the very introduction of the rights/principles distinction[722]. Furthermore, it seems that the sole target of this request at the relevant negotiations were the social and economic rights of Title IV[723]. The introduction of the rights/principles distinction was explicitly connected by British officials with Protocol 30[724], again with the main target being the justiciability of social rights[725] rather than the publicly expressed objective of protecting the UK legal order from a European invasion of Fundamental Rights and CJEU judges[726],that would undermine UK sovereignty. According to government declarations, the main reason why the Protocol had been signed with the UK, Poland and, subsequently, the Czech Republic was to serve as an opt-out from the Charter[727]. In reality, though, it was never capable of having such an effect[728], as the Court of Justice recognised in *N.S.*[729], with the High Court conceding, and the UK government actually publicly accepted in the end[730]. However, some have suggested that the Protocol guards the UK against the possibility of provisions in Title IV being interpreted as containing rights rather

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[720] See also *Deakin, Simon*, 'In Search of the EU's Social Constitution: Using the Charter to Recalibrate Social and Economic Rights' in *Dorseemont /Lörcher /Clauwaert /Schmitt,* op.cit., 53.
[721] *Goldsmith*,A Charter of Rights, Freedoms and Principles, [2001] CMLRev 38, 1201 (1212-1213). See also HoC European Scrutiny Committee Report 43 'The application of the EU Charter of Fundamental Rights in the UK: a state of confusion', 26 March 2014, paras.93-94 and 157-158.
[722] *Barnard, Catherine*, 'The "Opt-Out'' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?' in *Griller, Stefan/Ziller, Jacques (eds),*The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty? (Springer, Vienna 2008), 257 (261) (*Barnard 2008a*); *Spaventa, Eleanor*, 'Fundamental rights in the European Union' in *Barnard, Catherine, Peers, Steve*, European Union Law (OUP, Oxford 2014), 226 (246).
[723] Goldsmith providing evidence in HoC European Scrutiny Committee Report 43, op.cit., paras.29 and 40-42.
[724] See *Peers, Steve*, The 'Opt-Out' that fell to Earth: The British and Polish Protocol concerning the EU Charter of Fundamental Rights (2012) HLRL 12(2), 375-389.
[725] *Goldsmith* providing evidence in HoC European Scrutiny Committee Report 43, op.cit., para.42; *Supiot,* Homo Juridicus, n.168, 211 (fn.77).
[726] *Barnard 2008a*, n.722, 277-278.
[727] *Goldsmith,* HoC European Scrutiny Committee Report 43, para.51.
[728] ibid, para.83-84.
[729] Joined Cases C-411/10 N.S. and C-493/10 M.E., Judgment, 21 December 2011 [2011] ECR I-13905, para. 23.
[730] HoC European Scrutiny Committee Report 43, op.cit., para.112: *'The Minister said that Protocol 30 "is very clearly not an opt-out", despite having been presented as such by some members of the relevant previous administration [..]it was "purely an interpretative Protocol which underscores the limited application of the Charter and is of very little if any value to the UK'.*
See also paras.141-145 and *Barnard 2008a*, n.722, 280-281).

than principles[731]. Nevertheless, even in that case, the rights enshrined would be applicable as general principles of EU law, regardless of the opt-out[732].

Regardless of the intended purpose of crafting the rights/principles divide, the reality is that there is no clear indication as to which Charter provisions contain rights and which principles[733]. The Explanations to the Charter contain no list enumerating principles to be 'observed' or rights to be 'respected'[734]. In fact, the very use of these two verbs only complicated matters further, even though it is rather clear that 'observance' means using principles as a strong, definitive interpretative tool[735]. Furthermore, the reference to the entire Title IV in Art.1(2) of Protocol 30 concerns solely the UK and Poland, and, at best, only as to the enforceability of the Charter in these jurisdictions. It is not a definitive characterisation of the provisions therein[736]. Therefore, it looks as if whether a provision contains a right or a principle should be judged on an ad hoc basis[737], taking into account the formal criterion of the provision's language and the substantive criterion as to its intended effect[738].

As regards the collective labour rights incorporated in the CFREU, it is more probable that they should be categorised as rights, given both the wording of the relevant Articles as well as the protected substance. Article 12(1) CFREU as to the freedom of association and the right to form and join trade unions is clearly drafted as a typical civil right (*'Everyone has the right to...'*). The same apples as to the rights to collective bargaining and collective action, both recognised under Art 28 CFREU in language clearly constituting them within the EU constitutional framework as rights rather than mere principles (*'Workers and employers...have...the right to...'*). Substantively, in both cases the Charter does

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[731] ibid, 85, 95, 152.
[732] *Douglas-Scott*, providing evidence in HoC European Scrutiny Committee Report 43, op.cit., para.86. See also *Douglas-Scott*, 'The European Union and Human Rights After the Treaty of Lisbon' (2011) HRLR 11(4), 645 (654), *Barnard 2008a*, n.722, 268; *Anderson, David/Murphy, Cian* 'The Charter of Fundamental Rights' in Biondi, Andrea/Eeckhout, Piet/Ripley, Stefanie (eds), EU Law after Lisbon (OUP, Oxford 2012), 155 (166-9).
[733] *cf Peers*, op.cit., 386.
[734] Explanations to the Charter, n. 341, Explanation on Art.52.
[735] *Craig*, providing evidence in HoC European Scrutiny Committee Report 43, op.cit., para.94.
[736] See above.
[737] *Barnard 2008a*, n.722, 261-262.
[738] This exercise is not all that straightforward. For example, Art.22 demands 'respect' of the rights of the elderly to participate in social life, indicating a right, according to Art.51(1). However, the provision is identified as a principle in the Explanations.

not just declare a guiding, interpretative principle, in which the existence of value or a right is being identified and the Union is bound to take it into account. Rather, it recognises clearly identifiable rights, regardless of the right to collective bargaining and strike being found in Title IV. As regards the right to strike specifically, it should be noted that it has been acknowledged as an EU right - not a principle - in *Viking*[739] and *Laval*[740].

Despite the slightly different language used, Article 27 CFREU on information and consultation has been worded assertively and positively enough (*'Workers or their representatives must...be guaranteed information and consultation...'*) to be regarded as containing a right. It must also be noted that Art. 27 CFREU constitutes a case where the mentioned right, in many of the EU Member States, owes its substance, if not its very existence, to EU law[741]. Therefore, it is only natural that the CFREU recognises a right that the Union itself has created and fleshed out. In addition, it is a right that has been deployed in pursuit of transparency but, more importantly, involvement and participation in the workplace, thus enhancement of labour peace and social cohesion, both necessary prerequisites of the effective functioning of a social market economy. However, the Court of Justice recently seemed to have a different opinion, as expressed in the *AMS* case[742].

The case concerned an entirely horizontal situation. As such, the Court could not rely on the direct effect of the (improperly implemented)[743] Directive, albeit sufficiently clear, precise and unconditional[744]. The Court thus had to resort to examining the possibility of applying *Kücükdeveci*[745], using the Directive as a vehicle for the direct application of Art.27 of the Charter. However, the Grand Chamber concluded that Art.27 is incapable of producing the *Kücükdeveci* effect.

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[739] C-438/05 *Viking* [2007] ECR I-10779, paras. 42-43.
[740] C-341/05, *Laval* [2007] ECR I-11767, para.91.
[741] Information and consultation rights are regulated by the European Works Council Directive (94/45/EC), the Information and Consultation Framework Directive (2002/14/EC) and the employee participation provisions of the European Company Directive (2001/86/EC). Further, they are provided for in the Directives regulating collective redundancy (98/59/EC) and the transfer of undertakings (2001/23/EC).
[742] C-176/12, *Association de médiation sociale v Union locale des syndicats CGT et als* (*AMS*), ECLI:EU:C:2014:2.
[743] See C-176/12 AMS, n.742, paras 28-29.
[744] ibid, paras. 36-37.
[745] C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG* [2010] ECR I-00365.

According to the Court, Article 27 cannot, by itself, confer a specific right on individuals as it lacks sufficient specificity, unlike the principle of non-discrimination (Art.21(1) CFREU), used in *Kücükdeveci*[746]. To produce any effect, the provision requires further specification through European or national law that will itself be capable to be invoked in a horizontal situation. Hence, a Directive, that in itself is found to be incapable of producing horizontal direct effect, cannot act as a conduit leading to the application of the rule included in Article 27. Subsequently, the Court in *Glatzel* explicitly connected the characteristics of insufficient specificity and consequent necessity for concretisation through further legislation[747] to the concept of principles[748], in an attempt to clarify the rights/principles dividing line.

In AMS, however, the CJEU Grand Chamber did not explain how the language of Article 27 made this provision less clear or specific enough than the provision of Article 21(1) CFREU. It may be true, as the Court accepted, that Art.27 CFEU does not explicitly, or necessarily, require or entail a norm referring specifically to which employees working in an undertaking should be taken into account, and how, in order to calculate the relevant prescribed threshold that triggers information and consultation rights[749]. Nevertheless, if that is the case, we should also accept as equally true that Article 21(1) does not explicitly, or necessarily, refer to the specific context of dismissal and the calculation of the relevant notice periods. Both provisions encapsulate clear, specific rights; a right not to be discriminated against on the basis of, inter alia, age, on the one hand, and a right to be informed and consulted within the undertaking. The emphatic, affirmative wording of Art. 27 ('*must...be guaranteed*') is characteristic of any legal provision's containing a justiciable right, while the very text of the Charter describes the norm of the Article as enshrining a worker's '*right*'. The reference to Union or national law regulating the details as regards the context of the information and consultation right (the '*appropriate levels*' and '*cases*') does not

[746] C-176/12 *AMS*, n.742, para. 47.
[747] C-356/12 *Wolfgang Glatzel v Freistaat Bayarn*, ECLI:EU:C:2014:350, para. 78.
[748] ibid, paras. 77-78.
[749] C-176/12 *AMS*, op.cit., paras 28-29.

dilute the right itself any more than the qualification of the seemingly absolute right to non-discrimination on the basis of possible justifications of discrimination.

Furthermore, the Court's assertion that the right contained in Art.27 does not suffice in itself to confer rights upon individuals without further specification through implementing measures[750] is evidently linked to AG Villalon's assessment of the right under Art.27 as insufficiently fleshed out to be considered self-standing. He finds, for example, that the provision lacks a definition of the situations within which the right might arise[751]. However, taking into account that Art.27 amounts to a constitutional right for the EU legal order, it must be noted that constitutional and fundamental human rights are drafted in sufficiently general terms so as to be able to accommodate various manifestations of their substance and exercise, without being too vague to be unusable. Thus, the right to speech does not define what speech is, or what situations might constitute protected expression or protected speech. That does not, however, make it a principle.

It becomes evident, then, that what the Court actually relied upon in order to reach a conclusion that effectively attributes greater effect to the Article 21(1) CFREU norm than that of Article 27, is the supposedly substantial rights/principles division that is introduced by Article 52(1) and 52(5) CFREU. In that respect, it appears the Court concurs with AG Cruz Villalon's Opinion[752], treating the right to information and consultation as a Charter 'principle', though without explicitly declaring it one, as he eventually did.

The Advocate General proceeded in a much more elaborate analysis than the Court. His starting point was the distinction between rights and principles and the not entirely clear provisions of Art. 52(1) and 52(5) CFREU as to the prescribed treatment and the effect of provisions containing principles[753]. Art.52(5), as we have seen, requires, but does not dictate, the implementation of principles by legislative or executive acts of the Union or the Member States – when they are implementing EU law – to produce any effects.

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[750] ibid, paras.47-49.
[751] ibid, para.54.
[752] AG Cruz Villalon (18/7/2013) in C-176/12 *AMS*, ECLI:EU:C:2013:491.
[753] ibid, para.43.

Recognising the little help the Explanations provided him with, he set off by a presumption[754]: since the right to information and consultation is a labour right, it falls into the broad category of social rights (second generation rights)[755]. More specifically, the Advocate General concludes that the sources of the right are to be found in international texts incorporating social and economic rights, such as the European Social Charter (Art.21) and the Community Charter of Fundamental Social Rights of Workers (points 17,18)[756]. Consequently, because the majority of social and economic rights are understood as positive rights, and therefore they are not directly enforceable, especially *vis-à-vis* individuals, they lack the characteristics to be considered 'rights' for the purposes of the Charter[757]. With one stroke, AG Villalon effectively places *all* social rights, regardless of their particular content or function, under the broad label of 'principles', containing obligations that can be invoked only against the state[758]. Hence, every provision in Title IV is deemed to contain principles, not rights[759].

The scarce commentary seems to applaud the Advocate General's meticulous argumentation and conclusion. However, what both the commentators and, more importantly the Advocate General, are missing is a basic informed substantive understanding of the content and function of labour rights as social rights[760]. The simplicity of the Advocate General's logic[761] notwithstanding, it should be noted that not all social rights are necessarily, or exclusively, positive rights directed at the state. The rights to health care or environmental protection can obviously only be exercised against the state, creating a positive obligation on its part, and cannot be invoked in horizontal situations. However, the majority of labour rights, if not all, are of dual character. It is hardly coincidental that the language in which all labour law rights contained in Title IV are drafted is positive and clear as to their

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[754] *Krommendijk, Jasper*, 'After AMS: remaining uncertainty about the role of the EU Charter's principles' (eutopia law 29 January 2014) < http://eutopialaw.com/2014/01/29/after-ams-remaining-uncertainty-about-the-role-of-the-eu-charters-principles/> (last accessed 1/7/2014).
[755] AG Cruz Villalon (18/7/2013) in C-176/12 AMS, n.752,para. 52.
[756] ibid.
[757] ibid, paras. 45, 48.
[758] ibid, para. 51.
[759] ibid, para. 55.
[760] See *Supiot*, Homo Juridicus, n.168, 199-201.
[761] *Krommendijk*, op.cit.

character: '*everyone has the right*' in Article 29 CFREU, '*every worker has the right*' in Articles 30-31 CFREU[762]. The language is hardly indicative of principles.

Labour rights could be considered to constitute expressions of a 'protectionist', socially considerate stance on the part of the state, invading the private sphere of the individual, as an autonomous economic actor in an ideally free market economy, to make corrections or targeted interventions. However, they are also the expression and precondition of the economic freedom of workers. Labour rights, including collective labour rights, exist to support and safeguard the effective enjoyment of the various aspects of economic freedom of an individual in connection to employment, including workers' contractual freedom, against disproportionate limitations that might arise due to the inherent imbalance of power within the employment relationship. As such, especially collective labour rights are, by their very nature, exercised in horizontal situations. Against the state, they may show elements of positive rights, in entailing the obligation of the state to set up the legal framework for their exercise, but they also exhibit traits of negative rights, disallowing state power to intervene in their exercise.

In the case of information and consultation, the language and substance of Art. 27 CFREU reveal a right that is designed to be exercised against the employer. Its aim is to induce participation in the life of the company but also to complement the exercise of other labour rights, such as collective bargaining. In addition, information and consultation can be seen as a necessary condition for the effective protection of workers interests, for example in redundancy situations.

Therefore, despite the reservations expressed, it is to be noted that collective labour rights enshrined in the Charter should not be construed as merely toothless 'principles' but as full-fledged EU rights within the scope of EU law, subject only to the limitations prescribed by Art.52 CFREU. The very validity of the distinction between rights and principles has been doubted, to the point that Spaventa chooses to dismiss even the linguistic distinction, referring instead to 'programmatic or inspirational rights' instead of 'principles'[763]. Though grounded in the wording of Art. 52(1) and 52(5) CFREU and the relevant Explanations[764], the distinction

[762] ibid.
[763] *Spaventa 2011,* I.n.238, 201.
[764] 2007/C 303/02, 17 (35).

between rights and principles seems to have been more of the product of the prejudice against the state intervention idea that underpins the positive state obligations associated with social rights[765]. It can also be understood as the result of the highly ideologically coloured political wish to insulate 'liberalised' labour markets, most notably that of post-Thatcher UK. It is not, however, a valid differentiation as to the value, status and hence power and effect of the relevant Charter provisions.

The one aspect that perhaps the Art. 52(5) rights/principles divide does affect is the justiciability and clarity of the relevant provisions. It affects whether consequent clear, rigid obligations on the part of the state (positive or negative) are introduced. It also affects the level of certainty as to the content of such obligations, as well as the potential for their horizontal application. It could be thus argued that whereas the duty to 'respect' a right provides its individual beneficiary with a solid claim against the state or possibly even another individual, the duty to 'observe' a principle does not give rise to equally tangible claims[766]. The Court in *Glatzel* seems to have further degraded the value of CFREU principles, by adopting a narrow interpretation that limits their use for the purposes of judicial review only to those measures that implement such principles[767].

However, a principle is not merely declaratory, nor delimited to the close confines of implementing measures, which would place it at the mercy of the EU institutions' discretion to even adopt such measures. Principles have broader normative value. They provide those invoking them with a yardstick to be used as the standard for review of potentially incompatible action on part of a Member State or EU Institutions, regardless of whether they have chosen to enact a measure that directly implements the relevant principle. Principles that have been constitutionally recognised, by virtue of their incorporation in the Charter, form part of the substantive nexus of the EU Constitution. Therefore, they should be

[765] *Ashiagbor, Diamond*, 'Economic and social rights in the European Charter of Fundamental Rights' [2004] EHRLR 1, 62 (71).
[766] See also AG Villalon (18/7/2013) in C-176/12 *AMS*, n.752, 50.
[767] C-356/12 *Glatzel*, n.747, 76.

ascribed at least equivalent interpretative value as general principles of EU law, broader in scope that their relevant implementing measures.

2. Charter provisions of core collective labour law rights

2.1. Context

Prior to the Charter and its elevation into a binding EU 'bill of rights' individuals had limited, if any, recourse to any positive legal bases relevant to social and labour rights. As Weiss remarks, until then, whatever progress in the field of social rights and policy had taken place '*not because of, but in spite of the Treaty*'[768]. Recognition and protection of the right to collective bargaining and the mechanisms of collective action were only implied through occasional reference of the Court or EU institutions to the European Social Charter[769], the Community Charter of Social Rights for Workers[770] (albeit a non-binding 'solemn proclamation')[771], and the more general relative provisions of the ECHR, as sources of these rights. The result was that, as a matter of positive law of the Treaties, collective labour rights, if at all relevant in the pre-Lisbon EU context, appeared to be 'second rate' to the predominance of the economic 'four freedoms' of EU law.

The Charter, at the very least, resolves any doubt as to whether collective labour rights belong in the EU legal order as 'internal' elements rather than

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[768] *Weiss, Manfred*, Fundamental Social Rights of the European Union in *Blanpain, Roger* (ed.), Labour Law and Industrial Relations in the European Union (Kluwer; Hague, 1998), 197.
[769] *McColgan, Aileen*, The EU Charter of Fundamental Rights (2004) EHRLR, 2. See also *Hepple, Bob,* 'European Developments-The EU Charter of Fundamental Rights', (2001) ILJ 30, 225; *Gijzen Marianne,* 'The Charter: A Milestone for Social Protection in Europe?', (2001) MJ 8, 33(40).
[770] See, e.g. C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti.*
See also Opinion of AG Trsteniak, delivered on 28 April 2010, on case C 45/09 *Gisela Rosenbladt v Oellerking GmbH.*
[771] Opinion of AG Jacobs in C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECR, I-05751, para. 137.
See also *Gould, Mark*, The European Social Charter and Community law - a comment, (1989) ELRev 14(4), 223-226. cf. *Riley, Alan*, The European Social Charter and community law, (1989) ELRev 14(2), 80 (82-84).

'external', possibly foreign, objects. The ESC, the Community Charter[772], the ECHR and the common traditions of the Member States, however, retain their value as sources of inspiration and as paradigms guiding interpretation of the material constitution of the EU.

The ECHR is explicitly the first point of reference for the interpretation of those Charter rights that derive from the Convention. According to Art.52(3) CFREU '*the meaning and scope of those rights shall be the same as those laid down*' by the ECHR. Based on that wording, it could be assumed that the level of protection accorded by the Convention should be construed as the absolute 'floor', below which protection under the Charter cannot go.

Art. 52(3) CFREU could be understood as opening a direct channel to the Strasbourg case law, since the ECtHR is the sole competent body for the interpretation of the substance of Convention rights. Consequently, the evolving tendency of the ECtHR to examine ILO instruments more closely as a basis of its relevant analyses, could become relevant, as would its more balanced reasoning and methodology of assessing conflicts between collective labour rights and more 'traditional' economic rights and freedoms.

However, it could be suggested that Opinion 2/13[773] might cast a shadow of doubt on these two propositions, as the CJEU assumes for itself the role of the sole interpreter and guarantor of rights and freedoms[774]. Regardless of the Court's view

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[772] See *Riley*, op.cit., 81. cf, *Blanpain, Roger*, European labour law, (Kluwer International; The Netherlands 2010), 208 (§ 370), arguing that the CC principles lack the element of commonality among Member States.

[773] Opinion 2/13 (Full Court) *Accession of the EU to the ECHR*, ECLI:EU:C:2014:2454.

[774] ibid, paras.201-214.
See *Editorial*, 'The EU's Accession to the ECHR – a "NO" from the ECJ!', (2015) CMLR 52(1), 1-16 (1; 9; 14-15); Krenn, Cristoph, Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13, (2015) GLJ 16(1), 147 (148; 153-154); Halleskov Storgaard, Louise, 'EU Law Autonomy versus European Fundamental Rights Protection-On Opinion 2/13 on EU Accession to the ECHR', (2015) HRLR 15, 485 (502-503; 511); *Reitemeyer, Stefan/Pirker, Benedikt*, 'Opinion 2/13 of the court of Justice on access pf the EU to the ECHR – One step ahead and two steps back' (European Law Blog, 31/3/2015) <http://europeanlawblog.eu/?p=2731> (accessed 11/4/2015); *Douglas-Scott, Sionaidh*, 'Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice' (UK Constitutional Law Association, 24/12/2014) <http://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/> (accessed 29/1/2015); *Michl, Walther*, 'Though shalt have no other courts before me' (Verfassungsblog, 23/12/2014) <http://www.verfassungsblog.de/en/thou-shalt-no-courts/#.Vh-M2vn6FNo> (accessed 29/1/2015); *Peers, Steve*, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection' (EU Law Analysis, 18/12/2014) <http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html> (accessed 29/1/2015).

of itself as essentially the EU human rights court, autonomous from the ECtHR, it should be noted that Strasbourg case law retains its elevated importance in the pluralist constitutional structure of the Union, by virtue of Arts.6 TEU and 52 (3) CFREU. The resulting judicial dialogue that unfolds between the ECtHR and the CJEU, albeit apparently escalating into a battle for dominance in the fundamental rights realm, might lead to the Luxembourg court adopting the methods and sources its Strasbourg 'rival' makes use in its reasoning.

Regardless of the relevance of ECtHR case law, though, ILO Conventions are invaluable to the CJEU, as they constitute the expression of not only state regulatory intent but also of the consensus between employers and workers, that is the actors of the labour market[775], and of their the autonomy[776].

2.2. Core collective rights under the Charter: Freedom of Association

Art. 12(1) CFREU, incorporating the freedom of association, is almost a word for word replication of Art.11 ECHR. The wording would imply that the Charter explicitly only recognises the 'positive' aspect of the freedom: it incorporates the right to form and join Trade Unions at all levels, including the European level. Similarly to Art.11 ECHR, the Charter remains silent as to whether it also protects the freedom to refrain from joining a Trade Union. This 'negative' side of the freedom of association has been implied in Art.11 ECHR[777], though not entirely conclusively, as an element absolutely equal in value to the 'positive' side of the freedom[778]. However, the ECHR, as an instrument that guarantees 'first generation' civil and political rights, is deeply embedded in the liberal tradition

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cf. *Halberstam, Daniel*, '"It's the Autonomy, Stupid!" A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward', (2015) GLJ 16(1), 105 (113-115; 117-120).

[775] Inter alia, see *Bartolomei de la Cruz, Hector/von Potobsky, Geraldo/Swepston, Lee*, International labor organization : the international standards system and basic human rights (Westview Press, Boulder,Col. 1996); *Servais, Jean-Michel*, International Labour Law (3rd ed; Kluwer, Alphen Aan Den Rijn 2011).

[776] cf. *McIntyre Richard*, Are Worker Rights Human Rights? (4th ed.; The University of Michigan Press), 80-81.

[777] However, see *Sigurjonsson v. Iceland*, judgment of 30 June 1993, Series A, No.264. For closed shops see *Sørensen and Rasmussen v. Denmark*, judgment of 11 January 2006, Application no. 52662/99 and 52620/99, (2006-I) ECHR 1, paras.64,75-76; *Young, James and Webster v. the UK*, judgment of 13 August 1981, Series A, No 44, 21, paras.49-50, 52, 57 cf. *Sibson v. the UK*, judgment of 20 April 1993, Application no. 14327/88, Series A, 258-A.

[778] *Sigurjonsson v. Iceland*, op.cit.,para.35.

and the focus on protecting the individual against coercion; liberal freedom is inherently negative, as it is individualistic[779]. It was therefore unavoidable that the Strasbourg Court would read Art.11 ECHR in such a light[780]. As the Charter stems from the same liberal tradition, it is natural to interpret the EU version of the freedom of association under Art 12(1) CFREU provision to include the freedom to abstain from joining any such institution[781].

To dive deeper into the substance of this freedom under EU law, however, it is useful to turn to the Community Charter[782] (CC) and the European Social Charter (ESC). Art.11 CC and Art.5 ESC clarify scope of the freedom, noting that both workers and employers, and their respective collective representative bodies (Trade Unions or professional associations), are covered. Importantly, Art.5 ESC establishes the potential of national as well as 'international' organisation, effectively allowing for structures that would foster the exercise of the right to collective bargaining at a transnational level. Moreover, it explicitly recognises that collective organisation primarily[783] aims to protect not only economic but also social interests, essentially recognising the multiplicity of functions of collective labour law mechanisms.

It should be noted that, contrary to reservations expressed about the nature of collective labour rights[784], the principle of effective exercise of ESC rights implies that freedom of association should not be constrained within the conceptual boundaries of an absolute negative right. The European Committee of Social Rights (ECSR) has concluded that Art.5 SEC creates a *positive* obligation on states to legislate in order to protect the right to organise and its effective exercise; lack of effective legislation cannot be tolerated nor compensated by practice or custom[785]. Worker organisations are to be guaranteed a certain level of internal

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[779] cf. *Barnard 2012*, n.272, 702.
[780] See, for example, *Sørensen and Rasmussen v. Denmark*, op.cit., para.58.
[781] See Case C-499/04 *Hans Werhof v Freeway Traffic Systems GmbH & Co. KG* [2006] ECR I-2397, paras. 33-37.
[782] Inter alia, see *Bercusson, Brian*, The European Community's Charter of Fundamental Social Rights of Workers, (1990) MLR 53, 624-642, *Riesenhuber*, n.713, 78-83.
[783] *Harris, David/Darcy, John* , The European Social Charter (2nd ed; Transnational Publishers, New York 2001), 93.
[784] *Waldron, Jeremy*, Liberal Rights (CUP, Cambridge 1993), 8.
[785] *Harris/Darcy*, op.cit., 89, referring to the ECSR Conclusion C XI-1 78(Iceland).

autonomy to fulfil their purpose, both by minimising legislative intervention[786] and prohibiting employers' interference[787]. Autonomy, hence full protection of the right to organise, is thought to be a prerequisite for the effective exercise of core collective labour rights, especially the right to collective bargaining[788].

The European Court of Human Rights (ECtHR) has reached the same conclusion[789], reading into Art.11 ECHR a positive obligation of the state to ensure the existence of those structures that accommodate the effective enjoyment of the freedom. Collective organisation cannot be prohibited[790] and any relevant restriction should be construed narrowly, with states enjoying only a slim margin of appreciation[791]. Furthermore, though, the state ought to guarantee the effective functioning of Trade Unions, as the expressions of freedom of association for the purposes, primarily, of collective bargaining[792].

Art.12 CFREU remains silent as to any specific limitations to the freedom of association, essentially referring to the general provision of Art.52 CFREU. We should note, however, that according to Art.11(2) ECHR the freedom of association can be subject only to restrictions that '*are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others*'. Moreover, the article allows for derogations as regards armed forces, police and state administration workers. What becomes evident from the wording of the provision is the ambiguity of the standards for potential limitations[793].

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[786] ibid, 96.
[787] ibid, 98
[788] ibid, 97
[789] *Demir and Baykara v Turkey*, Application no.34503/97 [2008] ECHR 1345. cf. *Council of Civil Service Unions et als v. UK ('GCHQ')*, Decision of 20 January 1987, Application no. 11603/85, 50 DR, 228.
For extensive analysis of the relevant case law, see *Dorssemont, Filip*, 'The Right to Form and to Join Trade Unions for the Protection of His Interests under Article 11 ECHR: An Attempt "to Digest" the Case Law (1975–2009) of the European Court on Human Rights' (2010) ELLJ 1(2), 185-235.
[790] *Demir and Baykara*, op.cit., para. 127.
[791] *ibid*, para. 119.
[792] *Wilson, NUJ et als v. the UK*, judgment of 2 July 2002, Application nos. 30668/96, 30671/96 and 30678/96, para.48; *Ewing, Keith*, The implications of Wilson and Palmer, (2003) ILJ 32, 1 (6).
[793] *Barnard 2012*, n.272, 703-704, with reference to the restrictive reading on Art.11 ECHR in the *GCHQ* case, op.cit., and the gradual relaxation of the Court's stance in subsequent cases (*UNISON* and *Demir and Baykara*, op.cit.).

It is understandable, within the context of an instrument created for and devoted to the protection of individual rights, that such rights can be invoked to justify restrictions. As we have seen, however, within the context of the inherently asymmetrical employment relationship, collective organisation and engagement are an effective prerequisite for the essential enjoyment and exercise of individual economic freedom. The two, individual and collective, cannot be separated[794]. Furthermore, in the context of the inherent inequality of bargaining power that defines the employment relationship, collectivisation becomes imperative so as to restore the balance and the normative equality in arms that liberal theory of individual rights, upon which the ECHR rests, presupposes as a given. In other words, for workers freedom of association and the relevant collective labour rights are not entirely self-standing, but a necessary prerequisite to ensure individual autonomy and liberty, and the true enjoyment of first generation rights.

It is less straightforward[795] to identify which restrictions would be deemed '*necessary in a democratic society*'. Within the autonomous legal order of the EU, such a restriction should be construed narrowly, with due regard for the pluralistic nature of the structure and the diversity it calls for, and for the multiple socio-economic normative objectives of the EU fundamental foundations. As such, the CJEU as a human rights court, should start exhibiting an understanding of the multiple relevant functions and effects of collective labour law mechanisms we have discussed above. Those functions should be judged as integral to the particular form of a 'democratic society' the Union aims to become, according to its constitutional charter. That is the standard that ought to be preserved whenever any restraints to the exercise of the freedom of association are to be assessed.

2.3. Core collective rights under the Charter: collective bargaining and the right to strike

[794] *Wedderburn William*, 'Freedom of Association or Right to Organise? The Common Law and International Sources' in *Wedderburn 1991*,n.281, 138 (142-143).
[795] See *Wedderburn 1991*,op.cit., 143-144.

Art.28 CFREU[796] is the Charter provision that establishes core[797] collective labour rights, namely collective bargaining and collective action, including the right to strike, for workers, employers, and their respecting organisations.

Art.28 CFREU, explicitly including European-level[798] exercise of both rights, formally adds transnational exercise of collective bargaining and the possibility of transnational collective action to the regional and national manifestations of the right. Thus, the provision holds the potential of elevating the importance of the Social Dialogue mechanism under 154-155 TFEU to more than just a supplementary legislative process[799]. Social Dialogue can also be understood as a transnational collective labour law mechanism, a vehicle for the full deployment of collective autonomy at a transnational level.

According to the restrictions prescribed by Art.28 the exercise of the rights to collective bargaining and collective action should respect EU law and national laws and practices, and the rights and freedoms of others. However, whatever restrictions put upon the core collective labour rights of Art. 28 CFREU must be proclaimed by law, pursue objectives of general interest recognised by the Union, and adhere to the principle of proportionality (Art.52 (1) CFREU).

2.3.1. Collective bargaining

The Community Charter[800], the ESC[801] and ECHR[802], and ILO instruments[803] (particularly, Conventions 87 and 98) retain their value as tools for the exploration of the essence of collective labour rights within the EU material constitution.

The Community Charter is thorough as to the substance of collective bargaining and, importantly, it explicitly recognises it as a tool integral in the operation of the transnational, internal EU labour market (Art.12(2) CC). According to Art.12 CC, collective bargaining consists of two elements: a. of the right to hold negotiations

[796] For a thorough discussion see *Dorssemont, Filip/Rocca, Marco*, 'Article 28 – Right to Collective Bargaining and Action', in *Dorssemont/Lörcher/Clauwaert/Schmitt*, n.718, 465-504.
[797] ibid,465.
[798] See Explanations, Art.28 CFREU.
[799] cf. *Barnard* 2012, n.272, 714; *Riesenhuber*, n.713, 71-87; 152-160.
[800] *Dorssemont/Rocca*, n.796,471.
[801] ibid,472-473.
[802] ibid,473-474.
[803] ibid, 474-476.

between individual employers or employers' organisations, on the one hand, and workers' organisations, on the other; b. of the right these negotiations to lead to the conclusion of *binding* collective agreements under the conditions laid down by national legislation and practice. It should be stressed that what is guaranteed is the bargaining process, the outcome of which *may* be a binding collective agreement. The CC, and therefore the CFREU, do not entail a right to the ultimate conclusion of such an agreement.

It is to be noted that the CC acknowledges a normative effect for collective agreements stronger than that of mere 'gentlemen's accords' as the necessary substantive corollary to effective collective bargaining. However, Art.28 CFREU leaves the issues of the effect of collective agreements to national bargaining systems, respecting the diversity inherent in the multilevel constitutional structure.

The Community Charter, consequently, appears to envisage a complete, effective system of transnational, EU level collective bargaining, that incorporates both the traditional pillars of the mechanism: free, autonomous negotiations, but also agreements that legally bind the participating parties.This mechanism clearly aligns with the relevant European Social Charter provisions and their take on the substance of collective bargaining.

Art.5 and 6 ESC include the rights to organise, and to bargain collectively[804]. These provisions are complemented by Art.28 ESC which aims to ensure their effective exercise, providing for the right of workers' representatives to be protected against employers' prejudice and to be guaranteed the necessary means to carry out their functions.

Collective bargaining is crystallised in Arts.6(1) and (2) ESC which refer to the obligation of the signatory states to '*promote'*, respectively, 'joint consultation' and 'machinery for voluntary negotiations' between workers and employers. The ECtHR, making reference to the ESC in the context of interpreting Art.11 ECHR, had interpreted the term so as not to denote a '*real right to consultation'* per se[805].

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[804] See also Part I ESC, points 5 and 6

[805] *National Union of Belgium Police v. Belgium,* Judgement of 27-10-1975, [1975] ECHR (Ser.A), 279, para. 38.
cf. *Demir and Baykara*, op.cit.

The provision, rather, is construed to impose an absolute[806] obligation on states to promote communication, relations and dialogue between labour and employers, and to refrain from any unnecessary intervention[807], without precluding tri-partite consultations, in which the State only participates, as long as the autonomy of the social partners is respected[808].

Procedurally, the capacity to conduct consultations and negotiations is not linked to a specific organisational structure. Therefore, trade unionism is not recognised as a mandatory institution that operates as the sole conduit of worker interests and voice. The relevant formal capability could even conceivably be recognised to ad hoc organised workers' committees[809].

Such 'consultations' can relate to all possible issues of mutual interest to workers and employers without any exception. Further, there should be no constrictions as to the level consultations are conducted[810]. They should be promoted at sectoral, occupational, enterprise and workplace level[811] as well as at all possible geographical levels[812].

Art.6(2) ESC treads beyond 'consultation' and goes right to the heart of collective bargaining: the right of employers and workers to engage into voluntary negotiations that can culminate in concluding collective agreements. The provision is complemented by Art.6(3) ESC, as to the establishment of conciliation and voluntary arbitration[813] procedures that may be used if negotiations stagnate or fail. By offering alternatives Art. 6(3) ESC aligns with Art.28 CFREU: what is constitutionally guaranteed is the bargaining process, not any one outcome, most notably, a binding collective agreement. However, as the Civil Service Tribunal[814] held, in a blatant contra legem reading of Art.6(2) ESC the General Court

[806] *Świątkowski, Andrzej Marian*, Charter of social rights of the Council of Europe, (Kluwer Law International; Alphen aan den Rijn 2007), § 7.2.2, 213-214, with reference to European Committee of Social Rights Addendum to Conclusions XI-2, 22-23(Ireland).
[807] ibid, 213; *Harris/Darcy*, n.783, 99-100.
[808] *Świątkowski*, n.806, 213 (footnote nr.152), *Harris/Darcy*, n.783, 99.
[809] *Świątkowski*, op.cit, 214.
[810] ibid, 215.
cf. *Harris/Darcy* , n.783, 99.
[811] *Świątkowski*, op.cit., 215
[812] ibid, 215: 'national, regional and in-house' levels.
cf. *Harris/Darcy*, n.783, 99, implying that levels other than the national and company level could fall outside the scope of Art.6(1).
[813] Compulsory arbitration is not unconditionally prohibited - *Harris/Darcy*, n.783, 103, *Świątkowski*, n.806, 234-235
[814] F-121/11 Michael Heath v ECB, ECLI:EU:F:2011:174,paras.110-123.

upheld[815], the duty to 'promote' voluntary negotiations does not imply positive obligation for the state to introduce the relevant 'machinery', that is the appropriate procedure and institutional capacity, for bargaining purposes[816].

ILO instruments that can be drawn upon to further flesh out the right include Convention C-87 on the freedom of association and the protection of the right to Organise (1948)[817], supplemented by Art.1-3 of C-98 (1949); and Convention C-154 on to collective bargaining (1981), complemented by Art.4 of C-98.

2.3.2. Collective action

Collective action might have been characterised 'a fundamental right' by the Court[818], but the extent to which such a right is effectively protected under the EU material constitution is a question. Art.28 CFREU is especially laconic; it remains silent as to the conditions under which it the right granted and as to its form and substance, referring the specifics to national systems. As we have noted, the Charter cannot be a means to circumvent the division of competences (Art.51 (2) CFREU). Therefore, it does not create new rights, in the absence of an explicit EU competence that would allow EU regulatory intervention (Art.153(5) TFEU).

The limitations of the Charter could lead to the preliminary assessment that Art.28 CFREU does not provide a special legal basis for a EU constitutional right to strike that could even be invoked in Member States where no such right exists. This statement appears to be accurate, from a positivist point of view. An alternative, however, could be Bercusson's more systematic, teleological suggestion[819]. He noted that prioritising or focusing on formalistic considerations of national limitations could undermine EU law supremacy and the commonality of a guaranteed level of protection for EU citizens. Furthermore, he remarked that Art.153(5) TFEU does not preclude the exercise of rights based on provisions in other parts of the Treaty, including the Charter, or relevant institutional action.

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[815] T-645/11 Michael Heath v ECB. ECLI:EU:T:2013:326.
[816] *Schmitt, Melanie*, 'Evaluation of EU Responses to the Crisis with Reference to Primary Legislation (European Union Treaties and Charter of Fundamental Rights)' in *Bruun /Lörcher/Schömann,* n.457, 195 (225-226); *Dorssemont/Rocca*, n.796, 482-484.
[817] C-151 (1978), as regards civil servants.
[818] In *Viking* and *Laval.* See Part III, below.
[819] *Bercusson 2009*, n.719, 209-210; 243-244.

Therefore, taking into account the normative nexus and the pluralist character of the EU constitution, we could accept that, within this framework, a Charter-based right does exist, albeit one that is limited by national laws and practices[820]. This right is afforded to individuals by virtue of their status as EU citizens, regardless of the situation under their respective national legal orders. In the absence of a right to strike in any given domestic context (such as the UK), nationals of that state, by virtue of their EU citizenship, should have prima facie the right to engage in transnational collective action. It is another issue how that right would be concretised, depending on the time and place strike action would actually be carried out, in which case national limitations and conditions might kick in. The exercise of such a right based on the EU material constitution even allows, if it does not necessitate, institutional intervention to support its exercise, such as that attempted through the, now failed, controversial[821] Monti II Regulation[822].

The ambiguity in the language of Art.28 CFREU as to the scope, essence, and even effective existence of the right, is understandable from the perspective of its constitutional character. It could be attributed either to the constitutional will to respect the diversity of the pluralist EU structure or, perhaps more realistically (if not cynically), to political aversion[823] to recognise a transnational EU-wide form of the right to strike to the prejudice of national concepts and systems.

Regardless of its justification, that ambiguity allows for multiple interpretations as to the substance of the right and the particular form of action that falls within the scope of its exercise[824].This potential for flexibility is constitutionally appropriate, given the EU pluralist structure that welcomes diversity between the multiple national dimensions constituting its multilayered legal order. More than that, however, it is particularly suitable for a subject such as collective action and the right to strike. These happen to be concepts, as well as subject matters of

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[820] cf. *Barnard 2012*, n.272, 722, arriving to the same conclusion by assessing the Court's case law rather than the material constitution as such.
[821] *Hepple, Bob*, The European Right to Strike Revisited, (2013/14) Diritto del Lavoro e di Relazioni Industriali 140, 575 (576).
[822] *Barnard 2012*, op.cit., 721-723; 209-213. See also *Bruun, Niklas/Bucker, Andreas/Dorssemont, Filip*, Balancing Fundamental Social Rights and Economic Freedoms: Can the Monti II Initiative Solve the EU Dilemma? (2012) Int'l.J.Comp.Lab.L.&Indus.Rel. 28, 279.
[823] Most probably, on the part of the UK, and its immunities-based system. See *Wedderburn, William*, 'The New Politics of Labour Law: Immunities or Positive Rights?' in *Wedderburn 1991*, n.281, 74-105; 'The Right to Strike: Is There a European Standard?', ibid, 276-353.
[824] See ibid, 278-279; 287-289.

regulation, notorious for the variety of approaches, across national legal systems, in defining their essence and delimiting their function[825].

Art.6(4) ESC has been identified as the first international treaty provision to ever recognise the right to collective action[826]; it has been essentially copied by Art.13 of the Community Charter. The European Social Charter places collective action within the context of collective bargaining (Art.6 ESC). It seems to imply, thus, that collective action is only a corollary to collective bargaining, and cannot exist outside the relevant processes[827]. However, the ESC refers to workers' interests, rather than rights, to denote that strikes arise in the event '*of conflicts of interest*'. This wording might leave a small window to construe interests more broadly than merely as those closely related to collective bargaining as such.

Despite traditional understanding of collective action as a counterbalance to the employers' powers of coercion and their control over resources and capital[828], the ESC takes a neutral approach. It considers collective action a weapon to be yielded by both employers and workers. However, Trade Unionism is not a *conditio sine qua non* of the exercise of the right; thus strike action is envisaged as possible to be exercised irrespective of trade union organisation structures[829]. It ought to be noted that, although collective action and the right to strike are not explicitly covered by an ILO instrument[830],both have been declared fundamental[831] by the ILO supervisory bodies (the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations), and inherently implied[832] in the freedom of association. They constitute the only means of effective defence of the rights that are to be protected and pursued through association and collective bargaining[833], though they can be subject to

[825] *Hepple 2009-2010*, n.357, 134-135; *Wedderburn*, ibid, 278; *Servais, Jean-Michel*, ILO Law and the Right to Strike, (2009-2010) CLELJ 15, 147 (148-149).
[826] *Harris /Darcy*, n.783, 104; *Dorssemont, Filip*, The Right to Take Collective Action in the Council of Europe: A Tale of One City, Two Instruments and Two Bodies (2016) KLJ 27(1), 67-88.
[827] *Hepple 2009-2010*, n.357, 138.
[828] ibid, 139-140.
[829] *Harris/Darcy*, op.cit., 109, *Świątkowski*, op.cit, 228
[830] *Novitz, Tonia*, International and European Protection of the Right to Strike (OUP, Oxford 2003), 118; *Hepple 2009-2010*, n.357, 136-137.
[831] ILO, Freedom of association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (5th ed., 2006), para.520.
[832] ibid, para.523.
[833] ibid, paras.520-522.

restrictions[834]. The concept of 'interests', however, is perceived by ILO bodies more broadly[835] than in the ESC and the CC. 'Interests' are construed to transcend the narrow confines of the employment relationship and collective bargaining processes. Broader socio-economic considerations, connected to political, social and economic issues, and the respective relevant policies, that may have an impact on the lives and status of workers, may be understood as 'interests' that justify strike action[836]. Consequently, though 'purely' political strikes are likely to fall outside the scope of protected action (in line with the CC and the ESC), those that are directed at specific policies and reforms, associated with those broadly construed workers' socio-economic interests, may be sanctioned[837].

This idea of industrial action as integrally connected and corollary to collective bargaining also penetrates Art.28 CFREU[838]. It could be therefore suggested that the 'interests', the conflict of which justifies collective action, can only be narrowly construed so as to relate with the specific purpose of collective bargaining (its instigation or process) and the employment relationship to which that process, in turn, relates.

However, a more holistic understanding of Art.28 CFREU, within its overall constitutional context, as we have discussed, could sanction a broader reading. In that context, there is no excuse for collective action to be approached narrowly, as merely an instrument in the service of purely, narrowly construed, economic interests. As Wedderburn observes, the division between the 'economic' and 'political' character of strikes is not ontological, inherent in the description of the phenomenon of collective action[839]. It is conventional; the result of, essentially, political choice[840]. It is also reliant upon its specific normative systemic context[841]. Lastly, too much of an 'economic' reading of the 'interests' in support of which collective action is deployed risks narrowing the scope of the right to the extreme,

[834] ibid, paras.547-563 (procedural), 570-603 (substantive).
[835] ibid, para.526.
[836] ibid, para. 527, 531.
[837] ibid, para.528. See paras.542-544 on political general strikes. See also *Servais 2009-2010*, n.825, 150-151; *Dorssemont/Rocca*, n.796,490.
[838] *Barnard*, Employment Law (2012), 719-720.
[839] *Wedderburn 1991*, n.281, 285.
[840] ibid, 285-286.
[841] ibid.

completely disregarding the multiple, not solely economic, functions and objectives of collective labour law.

At the very least, therefore, within the EU framework, we should accept a broader conception of the 'interests' that justify industrial action, such as the one adopted by ILO bodies. Under such an understanding, broader business decisions, not necessarily related to collective bargaining as such (e.g. contemplation of redundancies), and even regulatory and policy choices that affect the economic and social status of workers[842], would suffice for transnational collective organisation and action.

This broader interpretation could also serve to highlight the role of transnational worker cooperation within the labour market as conducive to the realisation of a commonality of interests that transcends national identities and borders. In other words, it would serve as a catalyst for the creation of civic identity in a transnational context. That is precisely what the essence of the core objective of European 'integration' is proclaimed to bring about.

It is through this prism that certain forms of collective action, such as sympathy strikes, ought to be assessed. Within this normative European constitutional framework sympathy strikes should not be considered a priori antithetical to the essence of the rights under Art.28 CFREU. Further, they should not be disallowed by definition, merely by reference to the disruption such action might inflict on employers' economic interests, and on the grounds of the lack of a direct link between each inflicted employer's behaviour and the action that affects them[843]. Secondary action is the manifestation of a right protected under the EU material constitution, that serves specific, normative, and multidimensional constitutional purposes[844]. As such, it should not be regarded narrowly, on the basis of interests confined in a particular business or sector, or assessed with focus on a reactionary conception within directly reciprocal relationships. Sympathy action, albeit examined with due reference to the rights of all parties affected and the principle

[842] See *Dorssemont/Rocca*, n.796.,490.
[843] cf. *National Union of Rail, Maritime and Transport Workers v United Kingdom*, judgment of 8 April 2014, Application No 31045/10 ('*RMT'*).
[844] See, *Wedderburn 1991*, op.cit., 293-294.

of proportionality, ought to be accepted as a tool as much necessary for the self-regulation of the labour market, as for the forging on transnational solidarity.

Essentially, therefore, a reading of Art.28 CFREU that encompasses interests beyond the narrow economic, and allows for diversity in the forms of the exercise of collective action, would allow collective mechanisms to fulfil their social and identity-constructive role, acting as agents for the democratisation of the internal market. The result would be an institutional option that complements formal, systemic, democratic processes, and helps build networks of transnational cooperation and effective solidarity. Such an option would not only promote essential active participation in the European public sphere, which is a constant goal of EU Institutions. It would effectively place the seeds for the feeling of commonality that is prerequisite in the emergence of any demos.

3. Social Dialogue as an EU level collective labour law mechanism

In addition to the Charter, there is another set of provisions that deserves notice: Art.152 and 154-155 TFEU, that set up the EU Social Dialogue mechanism[845]. Whereas the Charter provisions constitute the substantive aspect of collective labour rights within the EU structure, the Social Dialogue provisions, hailed as an instrument for the development of an autonomous European 'social policy'[846], could be argued to have constructed the process that could act as the vehicle for the effective transnational exercise of those rights and the attainment of their substantive and normative objectives.

The stated objective of Social Dialogue as a TFEU institution is to promote a balanced dialogue between management and labour (Art.154(1) TFEU). What is envisaged, therefore, is a prima facie autonomous process between the basic actors of the labour market themselves. However, that process is also recognised as crucial and necessary in providing input to the Commission regarding the

[845] For thorough discussions see *Franssen, Edith*, Legal Aspects of the European Social Dialogue (Intersentia, Antwerp 2002); *Welz, Christian*, The European social dialogue under articles 138 and 139 of the EC treaty : actors, processes, outcomes (Kluwer, Austin 2008). cf.*Hepple, Bob*, European Social Dialogue: alibi or opportunity? (IER, London 1993).

[846] *Neal, Alan*, 'Do we need a Social Policy for Europe?' in *Blanpain, Roger/Weiss, Manfred (eds)*, Changing Industrial Relations & Modernisation of Labour Law (Kluwer, The Hague 2003), 287 (292-294)

formation of policy and legislation on matters that may affect the labour market and the interests of employers and labour. This consultation obligation, prescribed in Art. 154(1)-(2) TFEU, might lead to more tangible results by evolving into a formal recommendation by the social partners to the Commission (154(4)TFEU).

However, perhaps the most innovative aspect of Social Dialogue is its capacity to function as an autonomous regulatory mechanism, than merely an addendum to the Commission's duties, through the conclusion of an agreement between management and labour (Art.155 TFEU) which effectively contains the norms that would regulate its subject matter.

Consistent with the pluralist, multilayered structure than defines the EU legal order, the agreement can acquire binding effect by following either the decentralised, national route or the EU path of harmonisation. It may be implemented according to the national relevant procedures and practices, in which case it is filtered through the national systems of labour regulation and collective autonomy. In addition, however, if the agreement refers to matters covered by EU competence under Art.153 TFEU and the social partners so request, it can also be rendered effective on the decision of the Council, following the relevant proposal by the Commission. In this instance the word 'decision' does not just indicate the EU legislative instrument bearing the same name, but it is taken with its normal meaning. If the Council does not refuse to give legal effect to the social partners' agreement, upon its relevant decision the agreement may take the form of any binding measure. Upon that decision by the Council, the content of the agreement becomes binding as it was concluded by the social partners, since the Council has no power to amend it[847].It should be noted that the European Parliament has no power to intervene in this process.

This omission could be understood conceptually as intended to align with the various normative functions of collective labour law we examined. Collective autonomy can be construed as a means to infuse the market with democratic processes and ethos, and involve the directly affected in the creation of the norms that govern it. Therefore, the deliberation and agreement between employers and

[847] COM (93) 600, par.38; *Blanpain*, n.772, § 1717, 760; *Barnard*, ibid. See also *Kenner, Jeff*, EU employment law (From Rome to Amsterdam and beyond), (Hart, Oxford, 2003), 253, nr.274. *Contra* COM (96) 26-final, par.30.

labour legitimises the regulatory outcome - more so than the intervention of the remote representatives who sit in the European Parliament. The objective of representation of the affected interests, that is the expression of their voice in a way that leads to a conclusion that respects and reflects it, is better served through the autonomous process of intra labour market regulation. The implied fundamental normative objectives of democratic legitimacy, pluralism and autonomy, but also of minimal intervention on the common market's processes, are thereby achieved without any risk to the balanced social market economy ideal.

That said, on the particular issue of representativity[848], and, consequently, the democratic legitimacy[849] of the implementation of agreements through Council decisions, the Social Dialogue provisions have drawn scepticism. It is understandable that those issues can be considered interwoven under the approach that views the Social Dialogue process as part of the EU legislative procedure[850]. Fredman, for example, has warned of the normative dangers of endowing very specific interest groups, rather than elected representatives of the general populace, with legislative power[851].

However, criticism pertaining to representativity, in the broader sense of unbalanced representation of the EU citizenry within a part of the legislative process, and, hence, to a legitimacy deficit, subside if we consider Social Dialogue to be an instrument of collective autonomy[852]. In that sense, the mechanism is to be approached as an extension of the relevant autonomous regulatory mechanism of private law and industrial relations[853]. Within this context, Bercusson has suggested that the term 'representation' refers to the interests represented[854], not to

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[848] T-135/96, *Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME) v Council of the European Union*, (1998) ECR, II-2335, paras.88-90. For the criteria of representativity, see COM(93) 600, par.24.
See also *Franssen*, op.cit., 192-199; *Betten, Lammy*, The democratic deficit of participatory democracy in Community social policy, (1998) ELRev 23(1), 20 (32).
[849] *Barnard 2012*, n.272, 79-85; *Riesenhuber*, n.713, 155; *Betten*, op.cit., 30-36.
[850] See T-135/96 *UEAPME*, op.cit.,paras. 66-67. See also *Welz*, n.845.
[851] *Betten*, op.cit., 35.
[852] See *Bercusson, Brian*, Democratic Legitimacy and European Labour Law, (1999) ILJ 28, 153.
cf. *Fredman, Sandra*, 'Social Law in the European Union: the Impact of the Lawmaking Process' in *Craig, Paul/Harlow, Carol (eds)*, Lawmaking in the European Union (Kluwer, London 1998), 386 (408-409).
[853] ibid.
[854] *Bercusson 1999*, n.853.

the individuals who are members of the interacting organisations. He therefore goes beyond a formulaic, procedural interpretation, adopting a more normative view, with class-oriented undercurrent reasoning. It ought to be noted, however, that commentators have highlighted structural deficits of the current Social Dialogue framework that could lead to the process producing uneven results, even if we accept it as a manifestation of transnational collective bargaining. Most notably, the perpetual issue of inequality of negotiating power has been raised. In this case, it would take the form of employers, and their interests, potentially dominating the process[855], especially in the absence of a transnational framework for industrial action that would allow workers to balance the coercive power scales[856].

Those structural issues, however, do not alter the nature and main objective of post-Lisbon Social Dialogue. The procedure under 155(2) TFEU is to be understood as a form of *erga omnes* extension of collective agreements' effect, a regulatory choice of giving effect to collective autonomy[857]. It constitutes a mechanism of transnational collective labour law, similar to equivalent procedures that appear under national systems. Art.155(2) TFEU does not create a substitute for the legislative process that would circumvent the electorate and its representatives.

There is strong indication that the primary role and function of Social Dialogue in the post-Lisbon framework is indeed to serve as a vehicle for the exercise of collective autonomy and not simply as an addendum to the legislative machinery. That view is corroborated by one of the understated developments of the Lisbon Treaty: the adoption of Art. 152 TFEU. It could be argued that Art.152 is not a mere cosmetic addition that 'namedrops'[858] the Social Partners as elements of the Union's constitutional institutional nexus and potential contributors to the legislative process. Rather, it essentially acts as an explicit recognition of collective autonomy at EU level. The provision acts as the substantive element of

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[855] *Fredman*, op.cit., 410.
[856] ibid, 409.
[857] *Bercusson 2009*, n.719, 582; *Ryan, Bernard*, 'The Charter and Collective Labour Law' in *Hervey, Tamara/Kenner, Jeff,* Economic and Social Rights Under the EU Charter of Fundamental Rights - A Legal Perspective (Hart, Oxford 2003), 88-89.
[858] *Barnard 2012*, n.272, 713.

a mechanism, the procedural details of which are set out under Art. 154 and 155 TFEU. These elements, substantive and procedural, , in conjunction with the express recognition of an EU fundamental right to collective bargaining under Art.28 CFREU, suggest that Social Dialogue is to be now primarily acknowledged as a sui generis manifestation of collective autonomy[859] at transnational level[860].

Consequently, Art.152 TFEU effectively clarifies the nature of Social Dialogue, that had been the subject of debate and controversy until its adoption. Social Dialogue is not strictly, and primarily, a complementary Union legislative mechanism, nor is it a social cooperation method with no binding implications. If it is recognised to have as a primary function the realisation of collective autonomy, it follows that the once controversial[861] proposition that the 'procedural' provisions of Art.154-155 TFEU are to serve as the principal means of exercising the right to collective bargaining at Union level[862] , is now accurate.

Even if that transnational reading of the function of social dialogue is not proved to accurately reflect the actual intention of the Treaty, we can infer from the wording of Art.152 TFEU an obligation of the Union vis-à-vis collective labour institutions that is not necessarily related to the formal process of Social Dialogue as a sui generis mechanism. Art.152 TFEU clearly stipulates that the Union ought to both 'recognise', but, perhaps more importantly, 'promote' the role of social partners 'at its level'. It could be suggested that this provision clarifies that the EU recognises the role, function and legal identity of existing worker and employer organisations and associations of national or transnational nature and is burdened by a positive obligation to actively facilitate them in the pursuit of their systemic function. It could be argued that Art.152 TFEU introduces such an obligation that extends beyond the narrow confines of the European Social Dialogue mechanism and its processes, within the context of which the Union, under Art.154(1) TFEU carries a separate, ad hoc obligation to promote (that is, facilitate) the consultation of management and labour.

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[859] C-271/08, *Commission v Germany*, ECLI:EU:C:2010:426, para.39.
[860] *Bercusson 2009*, n.378, 578; *Blanpain*, n.772, 749
cf. *Lo Faro, Antonio*, Deregulating Social Europe: Reality and Myth of Collective Bargaining in the EC Legal Order (tr, Rita Inston; Hart, Oxford 2000), 74-83.
[861] *Neal 2003*, n.846, 294.
[862] *Ryan*, n.862, 88-89.

That would imply that the EU recognises collective organisation and collective bargaining mechanisms as inherent elements of its market model and that, bar competence limitations, is actually obliged to establish and promote a labour market structure that embraces collective autonomy. For example, this facilitative role of the EU could arguably entail its obligation to explicitly recognise standing to Social Partners engaging in direct challenges of EU Acts. Without such power to assert their rights, social partners cannot possibly exercise their primary functions. Under such reading of Art. 152 it is clear that the case law of the Court which is cautious[863], if not stringent, in recognising standing to Trade Unions to directly challenge the EU Commission is directly at odds with a positive EU obligation arising from an express provision of its material constitution.

Unfortunately, but typically, that is not what the General Court thought in *EPSU*[864], as we will discuss in the next part.

[863] See C-319/07 P, 3F v Commission of the European Communities, ECLI:EU:C:2009:435.
[864] T-310/18 EPSU and Willem Goudriaan v Commission *(pending).*

PART III

Endangering the balance:

The Court against the substantive constitution

I. Lochner in Luxembourg: ignoring the substantive constitution

1. CJEU's Lochnerian trend

The Court's understanding of the role and value of collective labour institutions and mechanisms within the internal market, and indeed within the constitutional framework, of the EU is still largely anchored to its traditional market access approach. The pluralistic, balanced internal constitutional framework of the EU, comprised of equally valued democratic, social and economic normative objectives, and the relevant multiple functions of collective labour mechanisms still elude the Court. Nevertheless, instead of political opportunism and cynicism that could be said to characterise regulatory choices on economic governance, the Court's stance could be simply attributed to institutional inertia.

It might be that the CJEU is just slow to fully comprehend and embrace the structural constitutional changes as to the substantive constitution of the EU. Instead, it has been sticking to the familiar path it had laid under a different formulation of the normative foundations of the Union; that which existed before the Lisbon Treaty. In that case, if the Court is only going through its own Lochnerian period, there might still be redemption for it.

It is, therefore, useful to touch upon the infamous[1] *Lochner*[2] case and illustrate the analogies of the *Lochner* trend of the US Supreme Court (SCOTUS) and its underlying causes to the current stance of the CJEU in its assessment of collective labour rights.

[1] Indicatively, *Bernstein, David*, Lochner's Legacy's Legacy (2003) Texas Law Review 82(1), 1 (2-3); *Gillman, Howard*, The Constitution Besieged: The rise and demise of Lochner Era Police Powers Jurisprudence (Duke University Press 1993), 132-137.
[2] Lochner v New York, 198 US 45 (1905).

1.1 *Lochner* and judicial constitutionalism

The subject of controversy in *Locher* was a piece of state legislation introduced in New York in the late 19th century. The 1895 Bakeshop Act was adopted in an attempt to address the health and safety issues raised by the horrible conditions under which the newly emerged, massive production-discovering baking industry operated in sprawling urban centres – a new phenomenon themselves[3]. To alleviate the consequences of those conditions on workers' health, the Act, inter alia, introduced a limit on working hours for bakery workers (average 10 hours/day; maximum 60 hours/week)[4]. The Act cemented the limit, by declaring any violation of its provisions a criminal offence (a misdemeanour) that would carry the possibility of imprisonment or the imposition of fines[5].

It should be noted that the working time limit was not introduced as a labour law measure per se, but rather as part of a set of measures introducing specific design and construction requirements and other sanitation measures for bakeshops[6]. The importance of the provision, however, consisted in it being essentially the first regulatory measure unreservedly enforcing mandatory limits on working time that covered private law employment relationships[7]. The Act did not contain a 'free contract' exit-clause that would allow employers to circumvent the protective limit through the introduction of contractual terms whereby workers would agree to work without any time limitations, as previous acts did[8]. Furthermore, it was introduced with criminal sanctions attached to prevent against breaches. It thus constituted the first definitive regulatory intervention on contractual freedom regarding employment relationships in the US which, until then, had been entirely at the mercy of employers' dominant negotiating power over workers.

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[3] *Kens, Paul*, Judicial Power and Reform Politics: The anatomy of Lochner v New York (University Press of Kansas, Lawrence KS 1990), 6-13; Lochner v New York: Economic Regulation on Trial (University Press of Kansas, Lawrence KS 1998), 6-14.
[4] NY Act of 2 May 1895 Section 1 (Laws 1897 , c.415, Art.8 §110) ("The 1895 Bakeshop Act").
[5] ibid, Section 7.
[6] ibid, Sections 2-8.
[7] *Kens*, op.cit., 27
[8] ibid, 26.

It was precisely on the ground of interfering with contractual freedom that the working hour limit introduced by the Bakeshop Act was challenged and, ultimately, defeated. A bakeshop owner, Joseph Lochner, raised an appeal against sanctions brought upon him for breaching the working time limit against one of his workers, claiming that the relevant provisions constituted an affront to his allegedly constitutionally guaranteed 'liberty of contract'. Lochner, as dissenting NY Appellate judge O'Brien acknowledged, essentially accused the state of paternalism, which could in fact endanger the smooth relationship between 'master and servant' (employer and worker) and '*inevitably put enmity and strife*'[9] between them. That interference would ultimately, infringe upon the contracting parties economic liberty, stripping them of the ability to negotiate at will, and define and protect their own interests[10].

However, the principle of Lochner's claim was not upheld until the case was judged by the US Supreme Court, two years later[11].

The court's stance was not coincidental, but an evolution of a trend it had followed since the late 19th century, applying its 'substantive due process' principle to review, and potentially strike down, legislation. 'Substantive due process' constituted an interpretative expansion[12] of the 'due process of law' clause originally contained in the Fifth Amendment of the US Constitution and subsequently replicated in its Fourteenth Amendment[13]. What appeared as a procedural mandate[14] was reinterpreted[15] by commentators (most prominently, Thomas McIntyre Cooley)[16], State constitutional courts[17] and, eventually, the

[9] O'Brien J. (dissenting), People v Lochner , NY Court of Appeals, (177 NY 145), 69 N.E., 373 (385) (N.Y. 1904).
[10] ibid.
[11] Lochner v New York, 198 US 45 (1905).
[12] *Colley, Thomas McIntyre*, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union (Little, Brown & Co, Boston 1868) 355-359.
[13] *Hovenkamp, Herbert*, The Political Economy of Substantive Due Process (1988) Stanford Law Review 40(2), 379 (379-380) *(Hovenkamp 1988a).*
[14] See *Sunstein, Cass*, Lochner's Legacy, (1987) Colum.L.Rev. 87, 873 (912-913).
[15] cf. *Mayer, David*, The Myth of 'Laissez-Faire Constitutionalism': Liberty of Contract During the Lochner Era (2009) Hastings Const.L.Q. 36, 217 (229-230), who argues that the alleged shift is a misconception and that substantive due process was inherently present since the early days of the US constitution.
[16] ibid, drawing upon, inter alia, the opinion by Johnson J in *Bank of Columbia v. Okely*, 17 U.S. 4 Wheat. 235 (1819).
[17] *Williams, Ryan*, The (One and Only) Substantive Due Process Clause (2010) 120 Yale L.J., 408.

SCOTUS[18] as also entailing a substantive restriction of state and federal government[19] and legislation[20]. Fundamental constitutional rights of individuals[21] were to provide the core of this substantive 'yardstick' by which federal and state acts ought to be assessed.

Drawing parallels with our discussion of the CJEU, it is a historical irony that it was primarily economic rights (specifically, the right to property[22], and freedom of contract[23]) that US courts drew upon to base their new tool of constitutional review. It is also particularly interesting that even commentators who disagree with the main criticism directed at *Lochner*, namely that the SCOTUS adopted an interpretation that ignored social reality (the 'social facts') in relation to the employment relationship and its inherent inequality, as well as the labour market and workers' rights, nevertheless acknowledge that the majority of Supreme Court justices were specifically sceptical towards, if not directly averse to, collective labour law and its institutions.

Critics of *Lochner* argued that its narrow construction of liberty of contract as a substantive yardstick was arbitrary and unsupported by constitutional text[24], counterfactual[25] and at odds with its contemporary socio-political trends[26], and the result of the majority embracing an individualistic and skewed conception of liberalism[27]. This ideological choice by the judicial majority, which was dismissed

[18]Dred Scott v Sanford, 60 US (19 How. 393) 393 (1857), in which the principle was invoked to uphold the right to own slaves.
[19] Loan Ass'n v. Topeka, 87 US 655 (1874), at 663.
[20] Hurtado v California 110 US 516 (1884), at 531-536
[21] ibid, at 532. See also *Bernstein, David*, Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism (2003) Geo.L.J. 92(1), 1 (32-42) (*Bernstein 2003a*).
[22] Above, n.12, n.17 & n.18.
[23] *Bernstein 2003a*, op.cit., 42-46.
[24] *Hovenkamp 1988a*, n.13, 380.
[25] *Pound, Roscoe*, The Liberty of Contract, (1909) 8 Yale L.J. 454 (484); Woodard, Calvin, Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State, (1962) Yale L.J.72, 286 (327).
[26] *Hovenkamp 1988a*, ibid.
[27] *Pound, Roscoe*, Mechanical Jurisprudence, (1908) 8 Colum.L.Rev. 605; The Liberty of Contract, (1909) 8 Yale L.J. 454. See also Sunstein, n.14.

as activist[28], would open the door for the SCOTUS to be able to obstruct or prohibit social reform regulatory interventions[29].

1.2 Misconstruing the substantive constitution

Economic rights and freedoms were present in the US constitution, as they are in any liberal constitutional framework[30], including EU primary law; as such, they ought to be part of any constitutional review. However, choosing them to form the centre of the review (as opposed to civil rights, for example)[31], interpreting their content broadly, and engaging in the specific balancing exercise the SCOTUS opted for is what was ultimately ideologically coloured[32]. As Cass Sunstein famously noted[33], that choice was apparently based on a belief that the liberal character of the US market order was essentially a natural phenomenon rather than a legal construct. And, as we have seen, this fundamental idea forms the basis of market liberalism and its offshoot neoclassical and neoliberal dogmas. By choosing to adopt a particular interpretation of the law, judges ultimately endorsed a particular economic theory[34], and made a fundamentally normative economic decision[35], thus inadvertently becoming the instrument of particular political economy[36]. That implied endorsement of particular economic tenets also explains the stance of the Lochnerian age SCOTUS vis-à-vis trade unionism and collective labour rights[37], including the right to strike[38].

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[28] *Soifer, Aviam*, The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court 1888-1921 (1987) Law&Hist.Rev. 5, 249 (250); *Hovenkamp 1988a*, n.13, 380; *Hovenkamp, Herbert*, Judicial Restraint and Constitutional Federalism: The Supreme Court's *Lopez* and *Seminole Tribe* Decisions, (1996) Colum.L.Rev.96 2213 (2213-2215).
Contra, indicatively, *Whittington, Keith*, Congress before the Lochner Court (2005) B.U.L.Rev.85, 821(856).
[29] *Pound 1908*, op.cit., 616.
[30] See *Sunstein*, n.14, 902-903.
[31] However, Hovenkamp argues that at the time of Lochner, under the Civil Rights Act of 1866 and the Fourteenth Amendment of the US constitution, 'civil rights were fundamentally defined as economic rights': *Hovenkamp 1988a*, 395.
[32] *Fiss, Owen*, Troubled Beginnings of the Modern State, 1888–1910 (MacMillan Publishing Co., New York 1994), 21.
[33] *Sunstein, n14*. cf. *Bernstein 2003*, Lochner's Legacy Legacy, n.1 (note especially 25-27).
[34] *Hovenkamp 1988a*, n.13, 439.
[35] ibid, 385.
[36] ibid, 385-386.
[37] *Hovenkamp, Herbert*, Labor Conspiracies in American Law, 1980-1930, (1988) Texas Law Review 66(5) 919 (note, for example 940-941).
[38] ibid, 945-948.

No judicial (or indeed legal) interpretation is of course devoid of conscious or unconscious ideological bias or lies beyond the effect of political, economic or ideological beliefs contemporary to the ruling judges[39]. In that regard, there is valid criticism to be made, especially on the basis of alternate systematic interpretations that better reflect the substantive constitutional architecture and environment. Any constitutional framework is dynamic, existing and evolving alongside the political, social and societal environment it has been created to both regulate and serve. If we accept that it is within the role of the courts of a polity to either engage in review of the constitutionality of legislation or government action or at least ensure that legislation is interpreted under the light of constitutional rights and principles, then this function should adopt a complex, yet balanced approach[40]. Such an approach should respect the deference the democratic principle ascribes to government and the legislature, but also ensure the normative, substantive and institutional limits[41] placed on it by the constitution are adhered to, while acknowledging the constitution's dynamic character as a living instrument. Constitutional interpretation should not be sterilised and insulated from social considerations and sociopolitical developments and reality under the guise of 'neutrality'[42] that is really about preserving the status quo[43]. Equally, it should not be rigid[44], solidified with reference to either sacrosanct originalism or established jurisprudence. It ought to be founded upon a holistic understanding of the constitutional framework and the normative and substantive constitutional thread that weaves it together[45]. In that respect, the 'European model' in its constitutional form would reveal not merely a Razean 'common ideology' but a constitutional theory of justice, derived from the both the text and the normative objectives of the EU constitution, to be used as the basis of constitutional interpretation and review.[46] Upon this foundation, individual provisions on rights, freedoms or

[39] See *Hovenkamp 1988a*, n.13, 393, 398-400.
[40] *Sunstein, n.14*, 906-912.
[41] ibid, 912.
[42] cf. *Sunstein, n.14*, 874.
[43] ibid, 882,884, 888-889, 894-900 and 918-919.
[44] *Mayer*, n.15 221-222. See also *Sunstein*, n.14, 904; *Bernstein 2003a*, n.21, 23-33, with regards to interpretation of common law.
[45] *Sunstein*,n,14, 907-908, 912 and 918.
[46] See ibid, 918.

processes should then be approached with due regard to their own critical function and content[47], but also to their socioeconomic and political context[48].

Under such an approach, the CJEU, as the de facto 'constitutional court' of the autonomous EU legal order, would have to engage in balancing conflicting freedoms and rights taking under consideration both the overarching fundamental nature, objectives and principles of the substantive constitution of the EU, but also the specific content and function(s) of the relevant rights under review. In that respect, the multiple roles and functions of collective labour rights within the overall substantive constitutional nexus of EU law, as we examined them above, would have to be properly acknowledged. More importantly, however, the Court would have to come to terms with the fact that the rearranged substantive constitution of the Union has moved beyond the confines of its original narrowly economic free market-oriented objectives[49]. Thus, it needs to be ready to move away from practices and interpretations established under the previous framework. However, even if the CJEU continues to espouse a market-oriented approach, it will have to acknowledge that any market model is not a naturally emerging phenomenon but an artificial construct defined by the legal framework. As such, it allows, and sometimes demands, intervention and change, rather than the preservation of a status-quo 'order'[50]. Further, the Court will have to recall that the EU market model is defined by the 'social market economy' designation and objective and the complicated socioeconomic balance it calls for. In that respect, it would need to re-evaluate the theory of justice[51] implied in post-Lisbon EU primary law. That would also inherently entail a reassessment of not just its understanding of the EU market's nature and functions, but, more specifically, of how regulatory competition ought to work within this pluralist and complex market arrangement[52], as embedded in the EU substantive constitutional and social environment.

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[47] ibid, 907.
[48] *Caruso, Daniela*, Lochner in Europe: A Comment on Keith Whittington's Congress before the Lochner Court, (2005) B.U.L.Rev.85, 867 (875-876).
[49] cf. ibid,872-873.
[50] *Sunstein*, n.14, 919.
[51] cf ibid, 908-909.
[52] See *Deakin, Simon*, Regulatory Competition after Laval (2007-2008) CYELS 10, 581.

1.2 Misconstruing the functions and context of labour rights

David Bernstein is among those that consider the criticism that the SCOTUS was prejudiced in favour of laissez-faire economics and, thus, against labour institutions unwarranted[53], noting[54] that the US Supreme Court in later years, and by the mid-1910s, upheld the majority of newly introduced labour legislation, a trend that carried on in the 1920s (with the notable exception of minimum wage laws). Both the majority[55] and the dissent[56] in *Lochner* agreed that in principle it would be constitutional, and in compliance with the liberty of contract doctrine, for legislation to redress the difficulty or inability of workers to negotiate terms offered by the employer[57], or to intervene to protect workers' health[58] [59]. Bernstein emphasises that the SCOTUS did in fact more generally accept that 'bargaining power disparities' between employers and employees could justify legislative intervention[60], even though he fails to mention that the Supreme Court very narrowly construed the circumstances under which such intervention might be constitutionally appropriate[61]. What is more important, however, is that he acknowledges that even if the majority of Supreme Court justices were not averse to labour legislation as such[62] and they could recognise that bargaining power disparities can exist in the employment contract, they did not believe that these issues could be addressed by collective labour law processes and the regulatory enhancement of relevant rights and institutions[63].

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[53] *Bernstein, David*, Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform (The University of Chicago Press, Chicago 2011), 42-55; *Bernstein 2003*, n.1, 34-36 and 62-63; *Bernstein 2003a*, n.21, 2-4; 9. See also Mayer, n.15

[54] *Bernstein 2011*, op.cit., 49-51; *Bernstein 2003*, n.1, 34-39.

[55] Peckham J, Lochner v New York, 198 US 45 (1905) at 53.

[56] Harlan J. (dissenting), Lochner v New York, 198 US 45 (1905) at 65.

[57] Peckham J, op.cit, at.54-55, where such an exception was very narrowly construed.
cf. *Learned Hand, Billings*, Due Process of Law and the Eight-Hour Day (1908) Harv.L.Rev.21, 495 (501-503).

[58] ibid at 54-56. However, Peckham J opined that there was nothing to suggest that baking is a unhealthful profession requiring intervention.(ibid at 57-59), and that restricting working hours was not directly relevant to health considerations (at 60-62).

[59] See also *Sunstein*, n.914, 877-878.

[60] *Bernstein 2011*, op.cit., 51.

[61] Effectively restricting them to the imposition of terms by the employer rather than a more nuanced understanding of bargaining inequality. See *Holden v. Hardy*, 169 U.S. 366

[62] n.54. See also *Bernstein 2003*, op.cit., 30-31.

[63] *Bernstein 2011*, op.cit., 52; *Bernstein 2003*, op.cit., 39-41.

This suggestion of an inherent bias against trade unionism and collective autonomy is substantiated by subsequent decisions of the US Supreme Court which followed the substantive due process principle adopted in Lochner to assess collective labour rights. In 1908, for example, in *Adair v United States*[64], the SCOTUS relied on the principle of liberty of contract as the basis of its Lochnerian 'substantive due process' review[65], now expanded to allow review of not only state but also federal legislation under the similar 'due process' clause of Fifth Amendment of the US Constitution[66], to strike down legislation that facilitated trade union membership. The Supreme Court found that an Act of Congress prohibiting railroad companies engaged in interstate commerce and transportation from demanding individuals not to be members of a trade union in order to employ them was unconstitutional. Any legislative regulation of interstate commerce, the SCOTUS held, could not be exerted in violation of any fundamental right, including personal liberty (in this case, liberty of contract), and property[67]. Restricting the employer as to the choice of their employees to just those who were unionised constituted an affront to their contractual freedom and, thus, went against the 'substantive due process' principle.

It is interesting to note how the SCOTUS in its analysis in *Adair* failed to grasp the function and purpose of trade unionism and of the relevant collective labour rights, especially in relation with the proper functioning of commerce. Though justices did acknowledge that legislation designed to protect the health and safety of workers would be 'manifestly' relevant to the purpose of regulating (interstate) commerce, as it would refer to the protection of both workers and consumers (travellers)[68], the same could not be said with regard to rights related to collective autonomy. Even though the SCOTUS explicitly recognised that the 'general purpose' of labour organisations to pursue 'improving or bettering the conditions and conserving the interests' of their wage-earner members is an objective 'entirely legitimate and to be commended, rather than condemned'[69], it also

[64] Adair v. United States, 208 U.S. 161 (1908).
[65] ibid, 173.
[66] ibid, 172.
[67] ibid, 172-176.
[68] ibid, 177. See also Johnson v. Railroad, 196 U.S. 1 (1904).
[69] ibid, 178.

concluded that collective labour institutions 'have nothing to do' with trade (interstate commerce) as such[70]. Adopting a very narrow definition and understanding of how commerce, production, and, ultimately, the market, operate, SCOTUS justices remarked that trade union membership as such has no relevance with the skills, capability or diligence required for the discharge of a worker's duties and the provision of her labour. In this superficial reading of labour as an element of the market, it is only those characteristics that were considered inherently relevant. The other functions of labour and collective labour mechanisms, not least amongst them enhancing and protecting the 'liberty' of workers (including their economic freedom) and redressing the imbalance of the employment relationship (thus, arguably, ensuring the quality of the workers' contractual freedom) escaped the SCOTUS justices, as they appear to escape their contemporary counterparts at the CJEU.

The main criticisms against *Lochner* could be suggested to hold true for the stance the CJEU has adopted vis-a-vis collective labour rights[71]. The US Supreme Court had been accused of falsely prioritising and emphasising economic rationales and interests[72], that constitute only one aspect of a holistic understanding of constitutional rights and freedoms, within the systemic context of the US constitution. Furthermore, and perhaps more importantly, it has been suggested that it did so not on the basis of normative constitutional guidelines, positive law or even moral principle, but on the basis of economic and political prejudice[73]. In other words, the accusation was that the SCOTUS ignored the express constitutional framework to impose, through interpretation, a politically and ideologically driven agenda.

Although Bernstein dismisses the critique that the Lochner judgment was ideologically driven[74], he does note that 'when faith in the market process collapsed in the 1930s, so did the ability and willingness of the Supreme Court to

[70] ibid.
[71] See *Eliasoph, Ian*, A 'Switch in Time' for the European Community? Lochner Discourse and the Recalibration of Economic and Social Rights in Europe (2008) Colum.J.Eur.L. 14(3), 467 (470).
[72] *Kens*, n.3, 4-5
[73] ibid, 4.
[74] See also *Mayer*, n.15, 219-220 and 224-225.

preserve Lochner'[75]. He does not refer to the use of fundamental constitutional rights as a standard of judicial review of state and federal legislation, which continued, albeit more positivist, with reference to the rights expressly enshrined in the Bill of Rights of the US Constitution[76]. In any liberal constitutional legal order, constitutionality review would have to be based on the fundamental normative values, principles and objectives that form the foundation of each constitutional order, a point to which even the dissent in Lochner acceded to[77]. Rather, what faded was judicial extrapolation based on a broad reading of economic rights under the Due Process Clause. However, precisely this broad reading of liberty of contract and the right to property is what relates to that 'faith' in a very specific understanding[78] of 'market process', and thus to embracing a particular ideological approach that Bernstein acknowledges was a central element in Lochner. Which rights the Lochner judges chose to focus on and how they came to interpret them in constructing a constitutional yardstick was not simply the 'natural' evolution of legal dogma. Moreover, the very conclusion the SCOTUS reached reeked of free market dogma: in a free market and within a presupposed freedom of contract and equality of negotiating power, workers were not deemed to be in need of labour law protection. They could fend for themselves, as autonomous market actors, exercising their economic freedom of contract[79].

The CJEU stance on collective labour rights resembles *Lochner*'s, regardless of whether that stance is a conscious choice or a result of institutional inertia. The Court has failed to fully grasp the balance the re-arranged normative foundations of the Union prescribe and the multiple role and function of collective labour institutions in the service of that balance. Consequently, it has kept on applying its traditional 'market access' approach in assessing collective bargaining mechanisms and collective action, narrowly construing them as restrictions to economic freedoms. In other words, it has insisted on applying a test devised

[75] *Bernstein 2003a*, n.21, 51.
[76] ibid, 52.
[77] Holmes J. (dissenting), Lochner v New York, 198 US 45 (1905) at 76. See also Mayer, n.15, 221.
[78] *Hovenkamp 1988a*, n.13, 431-433(on the implications of the mid-19th century 'wage-fund theory') and 447.
[79] *Lochner*, 64.

under a normative regime that did prioritise the economic aspect of integration, and the ensuing market rationales[80].

Moreover, it has proven to be entirely blind to the relation of collective labour law structures and functions to not just the social and democratic objectives of the Union, but even to the economic role of the relevant institutions of collective autonomy. What is more worrying, however, is the stance that the Court has taken in (not) assessing direct attacks to national collective labour institutions by EMU related politics and novel mechanisms, that threaten the pluralist ethos of the constitutional structure, on top of its balanced substantive framework. In all these cases, the Court has provided us with little or no analysis based on the positive, substantive constitutional norms that might have led it to its decisions. Instead, it either has explicitly emphasised specific political and economic choices (e.g. 'the stability of the Eurozone' as a dominant normative objective) or has chosen not to even touch certain cases, impliedly for the same reasons.

The situation, of course, has become more complex by the creation of the financial governance mechanisms related and designed to respond to the euro crisis, and the apparent emergence of particular institutions (most notably, the ECB) or features of the European project (the EMU) that appear to have been elevated above and beyond the grasp and scrutiny of the Union's substantive constitution.

2. Indications of the Lochnerian Trend

2.1 AMS

As we have seen in the extensive discussion of the Charter as the material element of the EU constitution[81], the Court has resorted to employing the supposed rights/principles division of Charter provisions in order to keep discovering a perceived hierarchy within them. Moreover, the Court has exhibited an interpretative stance as to the substance of conflicting Charter rights that shows an adherence to a prejudiced economic rationale. The deployed reasoning stands in

[80] See Caruso,n.48,873.
[81] Part I, Chapter III, under 2.2.2.

conflict with the balanced substantive constitution of the Union and the conciliation prescribed by the social market economy objective as the core of the neutral economic constitution.

The invocation of the rights/principles distinction features prominently, as we have seen, in the *AMS* case[82], as regards Article 27 of the Charter on the rights of workers on information and consultation. In his Opinion, AG Villalón[83] effectively bundled the entirety of provisions enshrined under Title IV, holding them to be containing merely principles instead of rights. As it has been remarked[84], he thus fuelled the perceived dichotomy between social and economic rights, to the prejudice of the former. Economic rights are ascribed the status of justiciable, enforceable rights that moreover hold the potential of horizontal direct effect. Labour rights, on the other hand, are regarded as principles, at best able to be used as interpretative guidelines, and enforceable only through implementing measures.

The Court's ruling avoided a definitive answer as to the nature of Art.27 CFREU, much less the rest of the Solidarity Title IV rights. However, impliedly, it did seem to adopt the principle-oriented approach. It failed to read sufficient substance into the right to information and consultation that would allow it to be enforced, using a (wrongly implemented) Directive as a conduit, by analogy to *Kücükdeveci*. By reaching that conclusion, however, despite the lack of obvious significant differences in the language and substance of Art.27 and non-discrimination as guaranteed by Art. 21(1) CFREU, the Court revealed prejudice tipped in favour of non-social rights. Labour law rights do not appear to be attributed the same 'sufficiency', or at the very least the same benefit of the doubt, as do more 'traditional' first generation rights.

This approach, however, misses the point and value of social rights in general, and labour rights in particular, within an integrated constitutional structure. More specifically, on a substantive level, it completely ignores the symbiotic nature of

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[82] C-176/12, *Association de médiation sociale v Union locale des syndicats CGT et als (AMS)*, ECLI:EU:C:2014:2.
[83] AG Cruz Villalon (18/7/2013) in C-176/12 AMS, ECLI:EU:C:2013:491.
[84] *Krommendijk, Jasper*, 'After AMS: remaining uncertainty about the role of the EU Charter's principles' (eutopia law 29 January 2014) < http://eutopialaw.com/2014/01/29/after-ams-remaining-uncertainty-about-the-role-of-the-eu-charters-principles/> (last accessed 1/7/2014).

the relationship between first and second generation rights[85]. Labour rights and collective labour mechanisms, as we have seen, are complementary and supplementary to 'traditional' civil and political rights. The essential precondition for the effective fulfilment of first generation rights is emancipation, not just from the state and its interference, but from economic and physical coercion. The pursuit of individual freedoms can only be meaningful if a minimum level of sustenance and personal integrity (security, health), and the institutional capacity for personal development are ensured[86]. Therefore, social rights in general are a necessary prerequisite for the enjoyment of civil and political rights, including economic freedoms. Hence, they should in principle enjoy the same legal value, and be treated equally in their application by courts[87]. Collective labour rights, in particular, ensure the effective enjoyment of those individual freedoms and rights in the realm of work, while allowing for the democratisation of the workplace and the prevention of abuse of power by the sovereign of that particular dominion, the employer.

The Court seems to be overlooking these characteristics, in adopting its more shallow approach on the nexus of Charter rights. What it essentially misunderstood is, in essence, the normative prism that should be the starting point of judicial analysis: the idea of a social market economy, as introduced in the EU constitution. For it is within such a constitutionally construed framework where the symbiotic interplay between first and second generation rights comes to fore. Social rights and 'traditional' liberal human rights are integral complementary elements of the legal construction of the market. The rights/principles divide is, therefore, an artificial judicial construction, especially when applied to Charter provisions that evidently, by language or substance, encapsulate fully fledged rights[88], as is the case with the freedom of association and collective labour rights.

2.2. Alemo-Herron and AGET: The rise of Art.16 CFREU

[85] *Kresal, Barbara*, 'Mutating or Dissolving Labour Law? The fundamental right to Dignity of working people questioned (again)' in *Rigaux, Marc/Buelens, Jan/Latinne, Amanda* (eds), From Labour Law to Social Competition Law? (Intersentia, Cambridge 2014), 149 (150).
[86] *Supiot*, Homo Juridicus, 199.
[87] *Kresal*, op.cit., 150.
[88] cf. ibid, 199-200.

Beyond the rights/principles divide, the Court has also exhibited an interpretative stance as to the substance of conflicting rights that does not comply with the balance paradigm. In *Alemo-Herron*[89], in the context of transfer of undertakings (Art.3 Directive 2001/23), the Court considered the right to collective bargaining and its results, collective agreements, against the contractual freedom, as a corollary of the freedom to conduct a business[90], of the transferee employer. The result was once more tipped in favour of the latter, in a reading of Charter rights into relevant Directive that implied a presupposed hierarchy in favour of economic freedoms. However, it is cause for concern that the Court in *Alemo-Herron* appeared to have taken that hierarchy for granted, without going into any substantial balancing, as it had done in *Werhof*[91].

More specifically, *Alemo-Herron*'s basic question concerned the fate of the effect of (UK) sectoral collective agreements that had been incorporated via relevant bridging terms in the contracts of an employment of an undertaking before its transfer, in the event of the signing of a new collecting agreement after the transfer has taken place. In other words, the issue was whether to embrace the static or the dynamic theory on bridging terms and collective agreements. The Court, tipping its cards, approached the issue as a possible infringement upon the freedom of the transferee employer to conduct his business unhindered.

The Advocate General maintained that due regard should be given to the overall relevant legal framework of collective bargaining and its effects and not merely to the fact that the transferee would be bound by the terms of a post-transfer collective agreement. Looking into the collective bargaining system of the UK, as the context of the case, he remarked that it allowed the renegotiation, amendment or expunction of a dynamic bridging term at any point[92]. Hence, ultimately, the transferee employer's contractual freedom remained intact,

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[89] C-426/11 *Mark Alemo-Herron et als. v. Parkwood Leisure Ldt.* ECLI:EU:C:2013:521.
[90] See AG Cruz Villalon (19/2/2013) in C-426/11 *Alemo-Herron* ECLI:EU:C:2013:82, para.54. See also 2007/C 303/02, Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C 303/17, Article 16.
[91] C-499/04 *Hans Werhof v Freeway Traffic Systems GmbH & Co. KG.* [2006] ECR I-02397.
[92] AG Cruz Villalon in C-426/11 *Alemo-Herron, op.cit.,* para.56.

allowing it to opt-out of collective agreements subsequent to the transfer by simply renegotiating the bridging terms in the individual contracts of employment[93].

The Court, however, took a less nuanced and informed view. Beginning by citing *Werhof*, the Court recognised that according to the language of Art.3(1)[94] of the consolidated Acquired Rights Directive (ARD)[95] it is possible for a transferee employer to be allowed to avoid the commitments arising from a collective agreement that was concluded after the transfer had taken place and to the negotiation and drafting of which the new employer had no part. However, Art.8 of the Transfer of Undertakings Directive (2001/23) made it equally possible for national legislation and labour systems 'to promote or permit collective agreements or agreements between social partners more favourable to employees' to have effect even as regards those contracts of employment that have passed to the new employer. So far the Court was revisiting familiar ground. Then however, it jumped to an assumption it had not made before.

The Court suggested that the ARD '*does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other*'[96]. In that respect, the crucial transferee's interests supposedly connect with its freedom to conduct its business without coercion, which entails allowing it the flexibility to make the necessary changes as it sees fit[97]. Importantly, the Court grounded its decision upon Art.16 CFREU, in which it read the employer's freedom of contract as a necessary corollary[98].Thus, the judges accepted that the freedom to conduct a business further includes the employer's freedom to defend its interests by negotiating and being able to change contractual terms as to the employees' working conditions[99]. That said, the Court

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[93] ibid, para.57.
[94] '*Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement*'.
[95] Council Directive (EC) 23/2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, business or parts of undertakings or businesses [2001] OJ L82/16.
[96] C-426/11 *Alemo-Herron*, n.89, para.25.
[97] ibid, 25.
[98] ibid, 32.
[99] ibid, 32-33.

did not subsequently examine the particular characteristics of the UK collective bargaining system, as the Advocate General had done, to see whether contractual freedom to avoid coercion was in fact afforded to the transferee employer, be it exercised at the level of collective bargaining or at the level of the employment contracts. Thus, the Court completely disregarded the employer's freedom to renegotiate individual employment contract terms and amend existing bridging terms. Rather, it declared that a dynamic term is not just potentially capable of having an adverse effect on the employer's freedoms[100], but it is inherently, by definition, limiting contractual freedom so thoroughly, at the level of the collective agreement, that can infringe the very core of the right to conduct a business[101]. It simply does not matter that, at any given point, the employer is fully free to renegotiate and change the terms at the level of individual employment contracts. The 'fair balance' between the interests of the employees and the employer has been undermined.

It is clear that in assessing the fairness of the balance, the Court hardly took the employees' rights to achieve more favourable terms into account with any seriousness. In the event of a, just the event itself renders sectoral collective bargaining useless, if the transferee is not a party of the original sectoral bargaining process. Consequently, it could be suggested that the transfer itself makes the exercise of the relevant rights and freedoms of the employees to pursue an improvement of their working conditions not just rather ineffective but outright meaningless. The employer's freedom of contract is a central issue for the Court, but the actual extent to which workers can enjoy the same freedom is not considered.

Furthermore, the Court's conclusion does not follow a systematic examination of the potential alternatives available to the employer *within* a continuing bargaining process. On the contrary, the judgment is based on a presupposition that is adopted as a given; that dynamic terms are inherently restrictive. It is obvious that the conclusion the Court reached is not based on any real notion of balance, and is at odds with the principle of proportionality, resulting in infringing

[100] ibid, 28-29.
[101] ibid, 35-36.

the core of the right to collective bargaining, and hence, arguably, the effective enjoyment of contractual freedom by workers, without examining less restrictive alternative interpretations.

Moreover, the judgment is at odds with the content of the very norm it pertains to apply. There is no indication in the Transfer of Undertakings Directive that, as the ECJ posits, it 'seeks to ensure a fair balance'[102] between the rights of the employer and the employee[103]. Quite the opposite. It is intended as a pre-emptive countermeasure to the risks freeing the market would entail for the employees' working conditions and stability. The Preamble of the consolidated Directive 2001/23/EC explicitly states: *'It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded'* (point 3). The Preamble also cites the relevant passages from the Community Charter of the Fundamental Social Rights of Workers, further emphasising that the Directive is a traditional labour law instrument[104], aiming at the protection of workers in instances of shifts in the working environment (point 5). It is certainly, also, no coincidence that the Directive had been adopted under a social policy legal basis.

By reaching the conclusion it has reached in *Alemo-Herron*, through manifest disregard for the substance and the extent of the rights it is supposed to be balancing, for the principle of proportionality, and even for the very text of the Directive it is had been asked to interpret and apply, the Court has followed a line of thought that indicates a presumption which ascribes *prima facie* greater value to the rights of employers. The employer's freedom to conduct a business is essentially pre-emptively regarded as worthy of absolute protection, without any careful scrutiny of the case or the competing right of the workers to collective bargaining.

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[102] ibid, para.25.
[103] See *Prassl, Jeremias*, 'Freedom of Contract as a general principle of EU law? Transfers of undertakings and the protection of employer rights in EU labour law. Case C-426/11 Alemo-Herron and others v Parkwood Leisure Ltd' (2013) ILJ 42 (4), 434 (439).
[104] *Prassl,* op.cit., 439.

Alemo-Herron was not a glitch. Its reasoning was replicated in *AGET Iraklis*[105], in the context of collective redundancies. Once more, Art.16 CFREU on the freedom to conduct a business[106] and its corollary, the employer's contractual freedom, featured prominently as the objects of protection against measures that seek to enhance the protection of workers[107] subject to collective redundancies. In fact, a regime by which a national public authority can effectively block, wholly or partly, the proposed redundancies, to safeguard the rights of workers given the specific labour market environment they engage in, was found to be an unjustifiable obstacle to freedom of establishment[108], but also a disproportionate restriction upon the freedom to conduct a business[109]. Again, any discussion as to the extent to which workers' contractual freedom against infringement (such as premature termination of their contracts) ought to be protected is missing, as is any reference to the right to work (Art.15 CFREU) which is the functional equivalent of the right to conduct business for those who are not self-employed.

It is interesting to note that the Court in *AGET* did not deny that protecting workers[110], safeguarding employment[111] and reducing unemployment[112] are legitimate public interest grounds that could justify restrictions. Further, it acknowledged, by making explicit reference to Art.3(3) and the goal of a highly competitive social market economy[113], that the normative nexus of the EU now includes explicit social objectives, fleshed out inter alia by Arts.151[114] and 147 TFEU, as we have discussed. Therefore, its choice to focus on Art.16 CFREU and to apply a myopic understanding of the complex interplay of interests and power between an employer and its employees that are about to be made redundant, was entirely conscious.

As much as the Court's eventual ruling seems to be consistent with its usual case law on fundamental freedoms, one cannot but wonder: would the Court have

[105] C-201/15 Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis, ECLI:EU:C:2016:972.
[106] ibid, para.66.
[107] ibid, para.37.
[108] ibid, para.104.
[109] ibid,para.103.
[110] Ibid.para.73.
[111] ibid, para.75
[112] ibid,para.74
[113] ibid., para.76.
[114] ibid.paras.77-78

found as easily as it did as regards employers' freedom of establishment that a regime that would *not* afford workers the enhanced protection against collective redundancies the Greek system did would make the state that employed such a framework less attractive for workers to move to, thus impeding *their* relevant fundamental freedom of movement? AG Fennely in *Graf* certainly did not seem to think so[115], highlighting the suspicion that traditionally the CJEU tends to apply double standards depending on the holder of the interest at risk.

Mirroring the employment of the rights/principles divide in *AMS* to similarly tip the balance in favour of employers' economic rights, *Alemo-Herron* and *AGET* reveal a troubling trend that is far from the prescribed balance on both the entity of the substantive constitution of the Union and its economic aspect.

II. Collective labour law and the Court: The Lochnerian trend boosted

1. From Rush Portuguesa to Viking/Laval, and beyond

There are certain analogies that can be drawn between the 'substantive due process' era of the US Supreme Court and recent CJEU jurisprudence, both in terms of the methods and principled bases of the review the courts engaged in and of their constitutional validity, as well as in the critical reaction they produced. Of course, nowhere is the Court's Lochnerian trend more evident than in its treatment of collective labour rights, as cemented in its *Viking/Laval* case law. Those that defend the *Lochner* judgment tend to approach it not as an act of judicial interventionism (much less one ideologically driven), but as the natural and sensible outcome of a Court bound by a specific constitutional framework[116]. According to this position, even before the Fourteenth Amendment provided the SCOTUS with the competence to strike down state laws that breached 'due process', the courts still were under a mandate to uphold the competence division arrangement between the state and the federal level, as well as those constitutional

[115] AG Fennely (16/9/99) in C-190/98 *Volker Graf v Filzmoser Maschinenbau GmbH* ECLI:EU:C:1999:423,para.32.
[116] *Bernstein* 2011, n.53, 124-129.

rights of economic nature that were devised with the objective of creating a common market among the various states within the federal political union.

This approach is echoed in scholarly commentary on the CJEU market access jurisprudence, as applied on the *Viking/Laval* defining case duo. It is argued that the Court did not do anything more than what was to be naturally expected of it: apply its own evolving case law, culminating in the market access test[117], to protect the four fundamental economic freedoms against any intervention, and, by implication, the integrity and openness of the common market itself. What is overlooked, however, is the inconsistency of a Court assuming for itself a constitutionalising role that aspires to go beyond the common market and embrace a plurality of civil, civic and socioeconomic principles and objectives. Moreover, even if the *Viking/Laval* approach was to be deemed the only appropriate on the face of the primary law framework as it then stood, it is difficult to withstand the formal embodiment of a broader substantive constitutional framework following the Lisbon Treaty. Under this framework, perpetuation of the *Viking/Laval* rationale is easier to be considered less of a principled approach grounded upon the contemporary substantive constitutional arrangement and more as a Lochnerian trend, with the Court essentially holding onto principles from a past point of constitutional evolution, if not devising them as it goes.

It is interesting to note, for example, how the Court, specifically as regards collective labour rights, appears to divert from its own adopted balanced, 'human rights' jurisprudence as to the resolution of clashes between fundamental rights and freedoms.

This inconsistency in the Court's normative reasoning is even more striking, following the self-affirmation in Opinion 2/13 of its role as the constitutional guardian of human rights in the Union internal legal order. The Luxembourg Court has found itself not only more competent than its Strasbourg 'rival', but also equally proficient in applying, at the very least, the traditional balancing act the ECHR has used to resolve cases of rights' restrictions. However, it is questionable whether the Court understands the substantive equality between the various

[117] *Hinarejos, Alicia*, Laval and Viking: the right to collective action versus EU fundamental Freedoms, (2008) HRLRev, 714; *Shuibhne, Niahm Nic*, Settling Dust? Reflections on the Judgements in Viking and Laval, (2010) EBLR, 681 (685-689).

freedoms and rights it approaches, within the EU constitutional context. Moreover, and perhaps more importantly, it is dubious whether it comprehends the normative nexus that binds these rights together, as substantive and material elements of a coherent whole, in the service of the fundamental systemic objectives of the Union.

1.1 A promising start: from balancing first generation rights to *Albany* and *Rush Portuguesa*

The Court had always appeared hesitant to embrace constitutional balancing with reference to fundamental constitutional principles and objectives when it came to assessing collective labour rights against economic freedoms. It has been bolder, though, when the spotlight is on protecting first generation rights, in a stance arguably consistent with the individualistic focus free market reasoning would entail. In relation to first generation rights, since the early 2000s, the ECJ began adopting more systematic and purposive approaches that would fit its self-acclamation as the constitutional court of the EU legal order. *Schmidberger*[118] and *Omega*[119] were relatively early illustrative examples of that shift, that has since intensified.

What was particularly interesting in those cases was not that the Court proceeded to apply its usual free movement line of reasoning (identifying the restriction; justification; proportionality)[120]. The important points to note were rather *how* the Court engaged in its usual balancing exercise[121], but also the comprehensive understanding of the value and function of the non-economic rights it used to construct the scales. First, in *Schmidberger* and *Omega* the Court essentially placed economic freedoms and civil and political rights (as general principles of EU law) [122] on equal footing, so as to proceed to a balancing

[118] C-112/2000, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich,* (2003) ECR, I-05659.
[119] C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn,* (2004) ECR, I-09609.
[120] *Shuibhne,* n.117, 692.
[121] *Dawes, Anthony,* A freedom reborn? The new yet unclear scope of Art.29 EC, (2009) ELRev 2009, 639(648)
[122] C-112/2000, *Schmidberger,* paras.71-72.

assessment that would be fairer and more considerate of the full ad hoc normative and factual context. Second, and perhaps more importantly, the ECJ displayed nuanced appreciation of the value and essence of collective civil and political freedoms, such as assembly and collective expression. It declared them, even in their more extreme and 'intrusive' expression that is the right to demonstrate and protest, to be part of the '*fundamental pillars of a democratic society*'[123]. Moreover, the Court displayed a similarly comprehensive understanding of the fundamental principle of dignity, that collective civil and political freedoms ultimately come to serve, considering it as ample basis to support justification of proportionate restrictions of the four fundamental economic freedoms[124].

It would not be unreasonable for such comprehensive understanding within the Court's reasoning to raise hope as to its capacity to construe the complex function and objective of collective labour rights, as complementary to, and intertwined with, collective civil and political rights.There were some early examples that had indicated that this might indeed be the case, namely *Rush Portuguesa*[125] and, especially, *Albany*[126].

Rush Portuguesa dealt only indirectly with collective labour law as such, in recognising collective agreements as a source of labour law equal to legislation and allowing for their extension to all workers employed, even temporarily, within a Member State's territory regardless of the employer's country of origin[127]. However, this ruling could have been signalling that the Court was prepared to consider the protection of workers' interests arising from collective labour law, and thus, arguably, collective labour law regimes themselves, as important public interest grounds that could be invoked by Member States to escape the effects of market liberalisation and the race to the bottom it induces. Optimists perhaps could have even also interpreted that ruling as the Court flirting with the idea of endorsing the favourability principle in case of conflicts. It certainly did not look as if the Court would regard the extension of a regime more favourable for

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[123] ibid, para.78
[124] ibid, para.33-36.
[125] C-113/89, *Rush Portuguesa Ldª v Office national d'immigration*, (1990) ECR, I-01417
[126] C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, (1999) ECR, I-05751
[127] ibid, par.18, with reference to Joined Cases 62 and 63/81 (*Seco SA and Another v EVI*), (1982) ECR, 223

workers as prohibiting or restricting free movement of services, making it 'less attractive' for a service provider to move to a Member States with higher labour law standards. It is precisely this, more collective labour law-friendly, approach from which the Court would depart later.

Albany[128] raised further optimism, as the Court's conclusion that collective agreements and collective action fall outside the scope of the Treaties' competition provisions[129] led to the suggestion that *Albany's* main effect was that EU single market rules and considerations could not be called upon to undermine collective bargaining[130]. The systematic and comprehensive reasoning employed by the Court, which included consideration of the (then) normative fundamental values and objectives of the Union was also particularly interesting.

The Court had pointed to the (then) TEC provisions that identified '*a policy in the social sphere'* as one of the activities the Union pursues (Art.3(1)(j) TEC 1997) and to Art.2 TEC 1997 (comparable to Art. 3(3) TEU and 9 TFEU) that set as part of the objectives of the EU the promotion of a '*harmonious and balanced development of economic activities'* and of '*a high level of employment and of social protection'*[131]. It had also noted the Commission's obligation to promote close cooperation and dialogue between Member States 'particularly in matters relating to the *right of association and collective bargaining between employers and workers'*[132], but also between management and labour at a transnational, European level. Regarding social dialogue, the Court had highlighted the recognition and importance of collective autonomy at European level, which entails the possibility of contracting collective agreements[133]. It is evident that, by employing a more systematic analysis of EU primary law, the Court had

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[128] See e.g. *Bercusson, Brian* European Labour Law (CUP, Cambridge 2009), 18-20 and 290-294; *Barnard, Catherine* EC Employment Law (OUP, Oxford 2006), 765-769; *Deakin, Simon/Browne, Jude*, 'Social Rights and Market Order: Adapting the Capability Approach' in *Hervey, Tamara/Kenner, Jeff, Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart, London 2003), 41(41 and 75-79); *Kenner, Jeff*, EU Employment Law (From Rome to Amsterdam and beyond) (Hart, Oxford, 2003)144-148; *O' Leary, Siofra*, Employment Law in the European Court of Justice: Judicial Structures, Policies and Processes (Hart, Oxford 2002), 112; *Szyszczak, Erika*, EC Labour law(Longman, Harlow 2000), 47-47; *Ashiagbor, Diamond*, Economic and social rights in the European Charter of Fundamental Rights, (2004) EHRLR, 62(67-68).

[129] Which the Court reached by completely departing from the opinion of AG Jacobs, who had been quite hesitant in recognising the value of collective autonomy in the EU system.

[130] *Deakin/Browne*, n.123.

[131] C-67/96, *Albany*, n.126,para.54.

[132] ibid, para.55.

[133] ibid, paras.56 and 57-59.

recognised collective autonomy as inherent to the general social objectives and policies of the Union and as a critical instrument to achieve the respective relevant specific aims regarding employment and social protection.

1.2 Viking and Laval: the Lochnerian milestones

Viking along with *Laval*[134] have become two of the most analysed and commented upon decisions in the history of the Court of Justice of the European Union. It is perhaps Davies who best described the initial response that these two decisions triggered across labour law experts, writing that they constitute '*one step forward, two steps back'*[135] in European Labour Law. The '*step forward'* had been the first explicit recognition of the right to collective action as fundamental, before the Court proceeded to restricting it to the point of leaving very little room for its effective exercise within EU law.

1.2.1 Viking (C-438/05)[136]

As is well known, *in Viking* the Court proceeded to regard collective action as a restriction to the freedom of establishment (Art. 49 TFEU), and, rather strictly applying the proportionality test, essentially treated collective action (strike in particular) as an absolute *ultima ratio*.

Prior to that conclusion, the Court had expressly recognised collective action as a fundamental right, with reference to international instruments such as the ESC, ILO Convention No 87, the Community Charter and, in one of the first times to be used as a relevant legal basis, the Charter, which was not legally binding at that time[137]. However, the Court repeated that the exercise of fundamental rights

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[134] C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, (2007) ECR, I-11767.
[135] *Davies, A.C.L.*, One step forward, two steps back? The Viking and Laval cases in the ECJ , (2008) ILJ, 126.
[136] C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, (2007) ECR, I-10779.
[137] C-438/05, *Viking*, para.43

should be '*reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality*'[138].

Following that assertion the Court first established that workers' organisations fall under the vertical direct effect of Treaty provisions, as a result of their capacity to exert regulatory effect on the market through the actions and means at their disposal. When the Court applied its balancing exercise, however, it quickly prioritised freedom of establishment and treated collective action as a restriction[139], as it can affect and perhaps discourage employers from exercising their freedom under Art.49 TFEU[140]. It did so without much consideration or analysis of the complex role and function of collective labour institutions even within an absolutely free-market prioritising economic constitution.

On the first point, Azoulai interestingly described the Court's understanding of the concept of vertical direct effect of free movement provisions as a not only a judicial expansion of the scope of 'Community (i.e. Union) law' but, more importantly, a re-conceptualisation of the concept so that it does not necessarily coalesce with that of the scope of Union competence[141]. This might not seem as a revolutionary remark. The Court has for long[142] sought to establish that 'all' rules, measures or practices, including those that derive from (national) legislation and irrespective of the lack of EU regulatory competence with reference to them[143], that can hinder or restrict in any way, actually or potentially, intra-community trade are reviewable, and indeed prima facie unacceptable, under the Treaty's free movement provisions. However, the effect of that approach has been the encroachment of Union power upon national law even in areas that are seemingly beyond the competences of the Union.

Far from the pluralist ethos proclaimed to be the essence of the EU and a central element of its framework, *Viking* effectively introduced what amounts to an ultra-vires regulatory capacity for the Union, absolutely expanding the scope of

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[138] ibid, para.46.
[139] ibid, paras.55 and 33-37.
[140] ibid, para.55
[141] *Azoulai, Loïc*, The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realization (2008) CMLR 45, 1335 (1343).
[142] Going as far back as *Dassonville*: Case C-8/74 Procureur du Roi v Benoit and Gustave Dassonville ECR 1974-00837, para. 5.
[143] C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* ECR-1995 I-04921.

its normative influence to cover any conceivable instance in which trans-border elements could be discerned[144], regardless of the principles of conferral and subsidiarity. Further still, it cemented the absolute prioritisation of the specific variety of free market reasoning inherently implied in the original economocentric primary law framework of the EU, even to the detriment of possibly opposing principles deriving from national constitutional law.

However, even if rights such as those enshrined in the Charter, including collective labour rights included in Art.28 CFREU, are by that fact elements of 'Union law'[145], that would not necessarily imply that Union law applies and ought to be enforced beyond the competences of the Union. Nor does it imply that such rights are always to be subject to the established reasoning of free movement case law, developed under the narrower in scope and predominantly economic context of the pre-Lisbon partial integration model.

Such dissociation of the scope of de facto and de lege Union influence from the scope of its regulatory competence does not sit right with its current pluralistic structure. If anything, it feeds into the perception of the Union as lacking legitimacy in its actions, which in turn is absolutely detrimental to the pursuit and preservation of the common acquiescence and allegiance required for the emergence of a true European demos.

Regardless, this disjoining approach can explain the departure in *Viking* from prior case law related to collective bargaining. The Court in *Viking* effectively discarded the express and implied reasoning of the judgement in *Albany*, which had acknowledged the complex nature and purpose of collective agreements, indicating remarkable misconceptions[146] as regards basic labour law concepts, institutions, principles and rights.

That is reflected in the Court effectively equating the institutional role and capacity of trade unions to call for collective action to the power of the state to regulate the market. It is established case law that professional organisations

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[144] cf *Deakin 2008,* n.48,589 ff. Deakin points out that especially in Laval the trans-border element is far from clearly established, indicating that the Court is prepared to apply its rules even at the slightest hint of possible trans-border characteristics.
[145] *Shuibhne*, n.117, 687.
[146] *Sciarra, Silvanna*, Viking and Laval: Collective Labour Rights and Market Freedoms in the Enlarged EU, (2007-2008) CYELS 10, 563 (564).

which exert de facto regulatory influence on market processes and standards ought to be subject to the same scrutiny, standards of review and limitations as states and public authorities in their exercise of regulatory power vis-à-vis the fundamental economic principles and freedoms of the EU common market. This reasoning has been employed to protect individuals (ironically, typically workers) against any infringement of their Treaty rights[147] by various regulatory choices, practices or measures, regardless whether the source of regulation is legislation and state authorities' action or if it lies with private entities, such as professional associations[148] and their bodies[149] or sectoral (private) regulatory entities and authorities[150], including those that regulate semi-professional activities such as certain Olympic sports (e.g. the International Olympic Committee)[151]. However, in this instance the same reasoning was used as an instrument to essentially curtail a labour right that is recognised in the CFREU as such, namely the right to strike, and, by implication, to restrict the effectiveness of the right to collective bargaining, and, hence, ultimately, the effective enjoyment of economic freedom of workers itself. This supposed analogical application[152] of previous case law[153] results from a critical misconstruction: that the mere capacity to seek collective action, let alone actually hold a strike, is potentially liable to have similar, if not equal, restrictive effect on the market as actual regulatory measures of legislative or private origin[154]. Consequently, the reasoning goes, regulatory interventions (legislative or otherwise; by public or private actors) should be equated to the capacity to threaten and instigate collective action[155].

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[147] *Azoulai*, n.141, 1345.
[148] Case 107/83 *Ordre des avocats au Barreau de Paris v Onno Klopp* ECR 1984 -02971.
[149] Case 71/76 *Jean Thieffry v Conseil de l'ordre des avocats à la cour de Paris ECR 1977-00765*; C-55*/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* ECR 1995 I-04165; C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* ECR 2002 I-01577; C-1/12 *Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência* ECLI:EU:C:2013:127.
[150] C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* ECR 1995 I-04921; C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)* ECR 2000 I-02681.
[151] C-519/04 P *David Meca-Medina and Igor Majcen v Commission of the European Communities* ECR 2006 I-06991.
[152] *Dashwood, Alan*, Viking and Laval: Issues of Horizontal Direct Effect (2007-2008) CYELS 10, 525 (534).
[153] C-341/05, *Laval*, Opinion of AG Mengozzi ECR 2007 I-11767, paras.223-228.
[154] C-438/05, *Viking*, n.136, paras.72-73; C-341/05, *Laval*, n.134,paras.99-100.
[155] *Azoulai*, n.141, 1344-1345.

That same fundamentally skewed understanding of the role and function of collective labour institutions we suggested above, even within a pure economic analysis, would also explain the Court's blunt rejection of the point that a certain degree of 'prejudice' against, and restriction of, one of the EU's economic 'fundamental freedoms, is inherent in the exercise of the right to strike[156]. In other words, the ECJ appeared to disregard that, even by the most conservative interpretation, the primary purpose of the right to strike is to infringe upon the employer's economic freedoms as a means of exerting pressure that could reinforce the workers' negotiating power, aiming to balance the inherently imbalanced nature of the individual employment relationship[157]. If the Court had seriously considered this important point, it might have understood that the possible disruption on employers that the capacity to engage in collective action entails is not only an inherent feature of this right but, importantly, a *conditio sine qua non* for the effective enjoyment of workers' respective fundamental economic freedoms. This could have resulted in the obverse reasoning: it would have been the restriction of the fundamental freedoms of workers, and the exercise of fundamental rights necessary for their full enjoyment, that would have to be justified.

It might be argued, though, that this point did not escape the ECJ, since it was raised, to an extent, by AG Maduro in his Opinion. Maduro suggested that the basic social contract the EU presents entails that workers will accept the 'painful consequences', risks and losses that come with the pursuit of free market principles[158], in return for the resulting economic development and overall prosperity and benefits that will, allegedly, inevitably trickle down on them[159]. To counterbalance workers' acceptance of those risks and losses, however, the EU social contract also provides that the Union is committed to use the economic objectives as a means of pursuing the general improvement of living and working conditions, and of providing support to alleviate the immediate consequences on

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[156] C-438/05, *Viking*, para.52
[157] *Novitz, Tonia*, A Human Rights Analysis of the Viking and Laval Judgments (2007-2008) CYELS 10, 541 (550); *Davies*, n.135, 140, *Shuibhne*, n.117, 696-697.
[158] C‑438/05, *Viking*, ECR 2007 I-10779 Opinion of AG Maduro, para.58.
[159] ibid, para. 57.

workers of the economic readjustment free market necessitates[160]. In this context, Maduro noted that collective bargaining and collective action are essential institutional tools for the realisation of that supportive role the Union ought to play, ensuring that that part of the Union's social contract is respected by both governments and employers, and that the negative consequences of the establishment of a common market are also spread onto employers[161]. In other words, regardless of the validity of the basic economic theory on which Maduro's argument and, indeed, the Union's embrace of free market principles are based, it is important that the Advocate General recognised the importance and function of collective labour institutions within the context of the free market itself and positioned them within that fundamental economic theory as inherent institutional elements of free market liberalism. The Court, however, avoided to engage with Maduro's argumentation on this point or to attempt any systemic review of even only the economic substance, role and purpose of collective labour rights.

Importantly, the Court also proceeded to essentially give carte blanche prevalence to the four freedoms, including over fundamental rights. Its argumentation on this point was, again, laconic, if not lacking. The ECJ simply remarked that the *Albany* reasoning could not be applied with reference to the four fundamental economic freedoms[162]. To justify this position, it recited the rather obvious point that the circumstances and conditions for the application of different Treaty provisions (e.g. on competition and on free movement)[163] are also different, and thus that the exclusion of a set of facts from the scope of one provision does not necessarily imply that they fall outside the scope of another[164]. That assertion, however, was left with no further systematic exploration of the nature and function of collective bargaining and the right to strike, including the mere possibility to threat of strike (which was the main issue in the case) as a negotiation weapon in the workers' arsenal. The Court used its remark on the different scope and prerequisites of different Treaty articles as the sole justification for pivoting to the use of its established application of free movement provisions. It did not, however,

[160] ibid, para.59.
[161] ibid, para.60.
[162] C-438/05, *Viking*, para.51
[163] C-519/04 *P David Meca-Medina and Igor Majcen v Commission* (2006) ECR I-06991, paras. 29-31.
[164] C-438/05, *Viking*,, para.53.

actually elaborate or discuss how or why the conditions of those provisions were fulfilled. More importantly, in order to assess the appropriateness of its subsequent argumentation, the ECJ did not engage in any examination of the essence of the right to strike and the inherent connection to both other fundamental rights of workers and the normative foundations of the EU constitutional framework.

Interestingly, AG Maduro did touch upon this point in his Opinion, but his conclusion was rather problematic. He argued that *Albany* had been the result of an attempt by the Court to avoid contradiction between those Treaty provisions that promote social dialogue, with an eye of concluding collective agreements as regulatory instruments, and those that protect competition[165]. However, as we have seen, the capacity to threaten collective action is integral to any conceivable effective enjoyment of the right to collective bargaining. If protection of collective bargaining was enough to exclude collective agreements from the scope of competition law, it should also be enough to warrant exclusion from the scope of free movement rules of the mechanism by which collective bargaining is conducted, which includes the capacity to strike. Considering the threat of collective action a priori a restriction to free movement would be equally contradictory vis-à-vis the promotion of social dialogue by the Treaty. Maduro's argument that social policy-related public interests have been proven to be reconcilable with freedom of movement, in the sense there have been instances where they have been accepted as lawful and proportionate restrictions, and thus *Albany* should not apply[166], is irrelevant. Even in those instances, the starting point has always been economic freedoms, and social policy objectives have been made to fit into the traditionally established reasoning that evolved in the context of partial, market-focused, integration, rather than deeper and more systemic inspection.

Following the rather superficial analysis in establishing that collective action falls within the scope the rules on the freedom of establishment, it has been argued[167] that it was only comfortingly[168] natural that the Court proceeded to apply

[165] Opinion of AG Maduro in C‑438/05, *Viking*, ECR 2007 I-10779, para.27.
[166] ibid, paras.23-25.
[167] *Hinarejos, Alicia*, Laval and Viking: the right to collective action versus EU fundamental Freedoms, (2008) HRLRev 8, 714.

its established (or even 'formulaic'[169]) relevant arsenal of prior developed[170] principles and tests. Accepting that Art.49 TFEU enjoys horizontal direct effect, and that, therefore, private undertakings can invoke it against a trade union or an association of trade unions[171], the ECJ considered collective action to be a restriction on the freedom of establishment and treated it accordingly.

Attached to its problematic understanding of collective labour law we have discussed, the Court easily took the view that even the mere threat of collective action is to be deemed restrictive when it has the effect of making the exercise of freedom of establishment '*less attractive, or even pointless'*[172] for the employer. It cannot be disputed that, by definition, the risk of such an effect is intrinsic in the preparation for, and the exercise of, any form of collective action. The threat of strike action is an essential part of collective bargaining, as an element of the countervailing mechanism to the employer's bargaining power that are collective labour rights. It is acknowledged as such even in systems (of which the UK is the main example)[173] that do not recognise a right to strike per se but tolerate a relevant freedom. A comprehensive understanding of, first, the substantive EU constitutional nexus, and, second, of the relevant functions of collective labour institutions as we have described them, escaped the Court. Evidently the ECJ adhered to its traditional approach that gives absolute predominance to the four economic freedoms[174], effectively adopting a grammatical rather than a purposive, teleological interpretation of the Treaties.

Even under that narrower 'traditional' approach, the assessment of the alleged restriction poised by the threat of collective action was not without issues. As is well established in the Court's jurisprudence, and seen in in *Schmidberger,* it is not the exercise of a fundamental right in itself that is important in excusing a

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[168] *Azoulai,* n.141, 1339-1340.
[169] *Shuibhne,* n.117, 685.
[170] *Azoulai*, op.cit., 1339.
See also *Barnard, Catherine,* 'Internal Market v Labour Market: A Brief History' in De Vos, Marc, European Union Law Internal Market and Labour Law: Friends or Foes? (Intersentia, Oxford 2009), 19 (35-41).
[171] C-438/05, *Viking*, paras.56-66.
[172] ibid, par.72
[173] Rookes v Barnard [1964] AC 1129; OBG v Allan [2007] UKHL 21.
[174] *Barnard, Catherine,* Social dumping or dumping socialism?, (2008) CLJ , 262 (264).

restriction. What is crucial, rather, is the objective pursued through that action[175]. The action or measure deemed a restriction must seek to accomplish a legitimate aim, justified by overriding grounds of public interest, and pass the proportionality test[176].

On this point, the Court accepted that protection of workers and their interests is an overriding reason of public interest that constitutes the legitimate objective pursued through collective action[177]. However, it proceeded to suggest a very narrow definition of that objective, even though it first seemed to remark that the determination of its substance lies with national courts. According to the ECJ, the sole circumstance under which protecting workers would be necessary, and thus sufficient to justify restricting freedom of establishment, would be if their jobs or employment conditions were '*jeopardised or under serious threat'*[178]. This interpretation leaves very little room(if any) for the full enjoyment and effective exercise of the right to collective action[179]. It effectively restricts it solely to cases where the right can be used as a defensive measure under extreme duress (the risk of dismissal or redundancy) and rules out its 'aggressive' exercise in less extreme circumstances where it is used as a weapon in the workers' arsenal related to regular collective bargaining. For example, absent the risk of job loss or detrimental variation of employment conditions, the *Viking* reasoning would preclude the threat of strike as a means of exerting pressure upon the employer to maintain the standards of protection and the terms workers enjoy or to agree on improving upon them.

Further still, the extremely strict proportionality test the Court applied essentially marginalised collective action by making it not only a defensive measure but the ultimate one; the very last line of defence[180]. In order for its exercise to be considered proportionate, it must be proven that the workers have

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[175] *Davies*, n.135,141.
[176] C-438/05, *Viking*, ibid, para.75
[177] ibid, para.77
[178] ibid, para.81
[179] *Davies*, n.135, 142-143
[180] *Barnard*, Social dumping or dumping socialism?, n.74, 264; *Barnard, Catherine*, Viking and Laval: An Introduction (2007-2008) CYELS 10, 464 (483); *Barnard, Catherine*, 'Internal Market v Labour Market: A Brief History' in *De Vos, Marc*, European Union Law Internal Market and Labour Law: Friends or Foes? (Intersentia, Oxford 2009), 19 (42); *Davies*, n.135,142-143.

exhausted all other less restrictive means at their disposal restrictive before resorting to strike or the threat of strike[181].

In that respect, *Viking* contained another rather problematic point. According to the ECJ, collective action is but one of the means used to protect workers' interests[182], the others being collective bargaining and the conclusion of collective agreements. It is revealing of its important misconceptions about labour law and its institutions that the ECJ explicitly referred to these rights as if they are separate from one another ignoring the intricate interplay between them and the comprehensive mechanism they constitute. As we have discussed, collective action is not just a stand-alone passive or defensive right, but can be used in the offense as a tool complementary and inductive to collective negotiations and agreement. It can also be regarded as an autonomous (extra-state) means of imposing sanctions[183] upon the employer for failing to respect the terms of individual contracts or of a collective agreement. In that respect, even under an absolute free market rationale that would be against any legislative or governmental intervention in the labour market, collective action could be seen as part of the processes by which the labour market self-regulates and is self-policed. In fact, it could be argued that in practice the instances strike action (or threat thereof) is used as the ultimate defence against the loss of jobs or 'serious threats' on working conditions are quite few and far apart compared to its other functions that are complementary to, and inherent in, collective bargaining.

Viking also effectively enhanced procedural and formal restraints as regards collective action and the capacity to achieve its juridical sanctioning. *Viking*'s reasoning imposes upon workers the burden to prove that they have exhausted all possible alternate routes to achieving their goals before resorting to threatening strike action. Thus, successfully justifying collective action before the Court would be not only substantively difficult, due to the narrow tests employed, but also procedurally cumbersome, if not improbable, due to the formal and evidential burden applied. This judicial stance, erecting procedural barriers on top of the substantive, would reappear in later cases, suspiciously again with reference to the

[181] C-438/05, *Viking*, para.87
[182] ibid, par.86.
[183] *Kahn-Freund, Otto/Hepple, Bob,* Laws Against Strikes (Fabian Society, London 1972), 7.

conflict between workers' rights and interests and fundamental dogmas related to the EU variety of financial and monetary system. *Laval* would be just the first.

1.2.2 Laval (C-341/05)

Laval was the second of the infamous duet of ECJ decisions that cemented the Court's current stance on collective labour rights. *Laval*, touching upon the Posted Workers Directive (PWD)[184], effectively upturned *Rush Portuguesa,* which had allowed for the favourability principle (the extension of the host nation's more favourable labour law provisions) to apply on posted workers, an idea that had been transplanted into the Directive itself.

Importantly, the Court faithfully replicated *Viking*'s reasoning, especially concerning the right to collective action. It upheld the position that collective action does not fall outside the scope of the Treaty and its free movement provisions (in this case Art. 56 TFEU)[185] despite the Union's lack of competence to regulate it; national collective labour rights should effectively comply with EU law[186]. The Court proceeded to adopt exactly the same approach as in Viking, using the economic freedoms as the starting point (and thus as essentially the standard) of its assessment. *Laval* reaffirmed the fundamental status of the right to strike, albeit subject to limitations[187], which in principle could justify restrictions to the freedom of services[188]. Nonetheless, once more following the market freedoms-oriented rationale, the Court considered the exercise of the right a restriction upon the freedom to provide services[189], requiring it to be objectively justified and subjecting it to a very strict proportionality test[190]. *Laval* arguably went further than *Viking* by embracing an even narrower interpretation of the conditions under which the exercise of the right could be justified. It was in the argumentation on that particular point that the Court's true colours as to its

[184] Directive 96/71/EC of the European Parliament and the Council (16 December 1996) concerning the posting of workers in the framework of the provision of services, OJ L 18 (21.1.1997), 1–6.
[185] C-341/05, *Laval*, paras. 94-95.
[186] ibid, paras.87-88.
[187] ibid, paras.90-92.
[188] ibid, paras.93-94, 103 and 107.
[189] ibid, paras.96-97
[190] ibid, paras.101 and 107-110

substantive evaluation of the role and function of the right to strike shone through. It was also particularly troubling that in *Laval* the Court showed itself to be sceptical not only towards a particular singular policy, norm or practice, but at an entire comprehensive system of labour market regulation based on collective autonomy[191]. The Swedish system as a whole[192], with its various features that the Court touched upon, was essentially regarded to make the Swedish market 'less appealing' to service providers and investors that seek 'unrestricted' access to it.

On the front of constitutional analysis, it appeared as an encouraging sign[193] that the Court seemed to attempt an assessment that had the potential to approach the systemic and comprehensive review substantive constitutionalisation would require. The ECJ, for example, did acknowledge the social policy objectives of the EU (as expressed pre-Lisbon), such as the promotion of '*a harmonious, balanced and sustainable development of economic activities*' and '*a high level of employment and of social protection*' (Art.2 TEC; now, see 3(3) TEU[194]), as well as the need to strike a balance between those and the economic objectives that are tied with the free movement provisions[195]. To that end, the Court also highlighted (then) Art. 136 EC, to affirm that labour and social protection standards, including 'dialogue between management and labour', were integral parts of the social objectives of the Union to be considered[196]. In fact, Shuibhne notes[197] that the wording of the reasoning could even suggest that the Court would be prepared to test economic freedoms against social objectives rather than the other way around, effectively reverting its traditional approach. Azoulai went further in his apparent constitutional optimism, remarking that he could even discern a clear attempt by the Court to depart from the traditional hierarchical pro-economic freedoms approach and embrace a more comprehensive constitutional analysis that might begin to explore the normative essence of the 'social market economy'

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[191] See also *Kilpatrick, Claire*, Laval's regulatory conundrum: collective standard-setting and the Court's new approach to posted workers, (2009) ELR 15, 844.
[192] Indicatively, see *Eklund, Ronnie*, The Laval Case (Case Comment), (2006) ILJ 35(2), 202 (203-205).
[193] *Azoulai*, n.141, 1336-1337.
[194] Discussed in depth above, under Part II.2.
[195] C-341/05 *Laval*, paras.104-105
[196] ibid, para.105.
[197] *Shuibhne*, n.117, 691.

objective[198]. However, despite appearances, *Laval* did not really pursue that potential in any seriousness; arguably, it hardly even engaged in proper balancing even under the Court's traditional market-oriented reasoning.

The Court also approached the Posted Workers Directive as a measure of exhaustive harmonisation that sets both the minimum and maximum standard of allowed protection. Reading Art.3(1) PWD as exhaustive, the Court concluded that the host country cannot impose the observance of more favourable terms and conditions on issues beyond that provision's list[199]. As a result, collective negotiations and relevant agreements that relate to such issues for the benefit of posted workers are precluded[200], in a clear infringement upon collective autonomy, including the contractual freedom of the posting employer, who is deprived of the choice to engage in the relevant process. The discrepancy between the *Omega/Schmidberger* and the *Viking/Laval* treatment of rights declared to be fundamental is not simply to be attributed to the economic zeitgeist surrounding the relevant cases. The tougher stance of the Court vis-à-vis collective labour rights is not merely the result of the ECJ opting to send a message against protectionist national frameworks in a time when the beginning of economic downturn was emerging, as Shuibhne has suggested[201]. Neither is it the result of an estimation of the different economic cost a single highway-blocking protest might cause as opposed to a potential sectoral strike[202]. It is not the place of any court to make substantive economic or business assumptions or to effectively create and pursue policy. Such activity would go beyond the competence of any judicial body, and thus present an affront to the principle of separation of powers that is inherent in the liberal constitutional model, including the democratic values and the respect for the rule of law, that EU primary law espouses.

What the difference in the approach of collective labour mechanisms reveals is a Court still attached to the previous partial integration model of the Union's architecture[203], the monolithically free market oriented economic constitution that

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[198] Azoulai, op.cit., 1336-1337.
[199] ibid, paras.79-80
[200] *Bercusson 2009,* European Labour Law, n.128, 695 and 697.
[201] *Shuibhne*, n.117, 693.
[202] ibid, 692.
[203] See *Barnard 2009,* n.180, 19.

had been at its centre, and, consequently, to a specifically ideologically coloured understanding of a free market and its constituent elements. It is that context that Maduro had alluded to in his academic capacity when he remarked that free movement of workers essentially exists not to protect workers themselves, but to promote free market integration by ensuring the 'optimal allocation of labour'[204] in accordance with the needs of the market. In that sense, the Court's inertia has ignored the rearranged balance within primary EU law and has misconstrued even the economic function and value of collective labour mechanisms and rights, including that of collective action.

That led commentators to wonder whether, established 'traditional' market freedoms-oriented review (restriction of economic freedom-grounds for justification-proportionality) notwithstanding, more nuanced understanding of the pluralist and complicated nature of normative and substantive primary law norms and principles at play could possibly have led the Court to a different conclusion substantively[205]. In other words, the question was raised whether such more considerate and balanced review could have changed not the form and process of the reasoning but its substance and outcome[206].

That would be a generous interpretation of the Court's stance. Any other would necessarily have to accept that the Court is blatantly prejudiced against collective labour rights as such, having embraced a particular economic and ideological dogma as the basis for its rulings, irrespective of the normative and substantive constitution of the Union or even of economic theory itself. Maduro refuted this point[207], arguing that the deregulatory effects of the Court's free market rationale have not been the result of ideological bias, but simply a product of the Court's institutional mandate to promote (free) market integration[208]. Deregulation is an inherent element of the neoliberal perception of a 'free market'. This suggests that even the 'light' deregulation[209] Maduro submitted has been the result of the Court's interventions might not have been the outcome of judicial bias, but of the

[204] *Maduro, Miguel Poiares*, 'Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU' in Alston, Philip (ed), The EU and Human Rights (OUP, Oxford 1999), 449 (462).
[205] Shuibhne, n.117, 689.
[206] ibid, 691.
[207] *Maduro 1999*, op.cit., 451.
[208] ibid, 450.
[209] ibid, 451.

bias entrenched in pre-Lisbon primary law. That would then imply that the Court was simply compelled to apply free market dogma above else.

Even under such a reading, however, consistent engagement with, and application of, neoclassical free market reasoning would also require deeper and more thoughtful consideration of the purely economic function of collective labour mechanisms and rights we have discussed[210]. Such careful examination would be imperative, as these norms and mechanisms are intrinsically linked to the economic freedom of workers, the effective enjoyment of which they aim to secure[211]. The Court seemed to miss this point altogether, though.

Laval, for example, could have easily be subject to more complex review that would have also considered the relevance of the issue to the essence and the normative purpose of free movement of workers as well. In that respect, the threat and pursuit of collective action could have been regarded as conducive of full enjoyment of workers' freedom of movement. Free movement of workers guarantees non-discrimination and ensures certain residency rights for migrant EU workers as means to a deeper implied objective that is, in fact, the basic impetus for economic migration in the first place: the improvement of the personal economic condition of the migrating worker, be it in the sense of enhancing an individual's job prospects and options or simply in the sense of pursuing to work under better conditions, standards and pay that in her home Member State. In other words, free movement might is not an end in itself. Equally, however, it is not merely an instrument in the service of the market's (and the employers') needs for the 'optimal', that is to say flexible, cheaper and with as little risk possible, allocation of labour'. If workers are to be regarded as citizens and economic actors of equal status to employers, free movement for them is a means to the end of achieving qualitative 'higher level of employment' and realising the essence of the liberal normative ideals and objectives that underpin the substantive constitution of the Union, including respect for individual dignity and autonomy, effective democracy and social cohesion.

[210] Part III, under III.2.
[211] cf. *Maduro 1999*, op.cit., 458.

Under that reading, even the ‘market access’ reasoning could be flipped on its head. The *ratio* is to open up national markets, but the question is for whom and to whose benefit. If it is also for the benefit of workers who move to another Member State, then surely the objective is for the exercise of their EU freedoms to not lead to possible the deterioration of their working standards and rights, as enjoyed in the host Member State. On the contrary, based on the foundational values and objectives of the EU constitution, the idea should be to promote a kind of normative cross-pollination of enhanced standards and practices so as to induce substantive integration and progress rather than a race to the bottom. Therefore, the ‘market access reasoning’ should evolve to also examine whether practices, norms and, indeed, restrictions on basic labour rights, would be likely to make a particular market more difficult or less alluring for *workers* to access.

Even when there is no movement by workers themselves, and the issue is related to the exercise of freedom of establishment and services, the economic function of collective labour structures and rights in the host Member State is not irrelevant. To regard them simply as restrictions of those economic freedoms that ought to be justified is myopic. Once again, under the holistic analysis substantive constitutionalisation would necessitate, neither of those freedoms are an end in themselves. Even within the isolated confines of the Union’s economic constitution alone, they are instruments to ensure the establishment and progress of a social market economy. Within that context, labour norms, collective bargaining and the right to strike are intrinsic elements of the capitalist market. Their (economic) function, role and purpose are all intrinsic elements of that system, essentially contributing to the economic environment the service provider seeks access to. In any systematic economic analysis, even one that would ultimately require a balancing exercise to be applied and a relevant juridical conclusion to be reached, would have to necessarily engage with the economic value of labour norms and institutions not as potential restrictions, but as inherent features of the overall normative primary law objective of a liberal social market economy.

Moreover, the established ‘market access’ approach is by default tilted in favour of the employer that seeks to ‘open up’ its target market. It is also

suspicious of, if not hostile towards, the interests of the workers that employer will ultimately utilise in order to achieve its economic objectives. It seems to completely disregard the potential adverse effects 'opening the market' might have if it is achieved through the removal of labour law structures and rights that act as safeguards against imbalance and exploitation or as guarantors of common minimum standards. As such, the 'market access' approach is not only incompatible with the pluralist non-partial integration model and the 'social market' promoted by the post-Lisbon architecture[212]. It also goes against the liberal core of neoclassical economic theory the Court appears to have embraced. It is not the interests and the autonomy of the individual, as a market actor, that are being safeguarded. Rather, what is ultimately protected is the interests of a particular individual, the service provider or the entity that seeks to engage in economic activity through a fixed establishment (that is to say, the employer)[213] without similarly serious concern for the interests of the other economic actor, the worker, whose autonomy and individuality is supposedly equally important within a liberal market framework. As such, it is not even liberal theory that is applied, but a specific ideologically coloured reading of it, poised to promote the interests of capital and employers above all others, with the assumption that overall progress and economic advances will ensue for all.

The counterpoint to this could validly be that insofar the issue is raised before the ECJ as a freedom of services/establishment question, it is the rights of the party that wished to have its relevant rights protected under EU law that need to be the starting point. Ultimately, it is that party that has exercised its freedom of movement, not workers. Therefore it is only that issue that triggers the application of EU law, albeit thus encroaching upon (de)regulating areas for which the Union has no regulatory competence. This separation between regulatory competence and normative effect of EU law, that Azoulai noted[214], could perhaps be attributed to the internalisation of the obligations and relevant (economic) ethos under EU law by Member States, in what Bickerton has described as gradual transformation

[212] See *Barnard 2009*, n.180, 38-39.
[213] *Dorssemont, Filip*, 'The Right to take Collective Action v Fundamental Economic Freedoms in the Aftermath of Laval and Viking' in *De Vos, Marc*, European Union Internal Market and Labour Law: Friends or Foes? (Intersentia, Oxford 2009), 45 (46).
[214] *Azoulai*, 141.

of nation-focused statehood into 'Member Statehood'[215]. Member States, in other words, have gradually grown to function and conduct themselves with due regard to their role and position as members of a broader transnational community. That implies not just shifts in the mentality of shaping national and international policy, but also, more specifically, the conscious application or, at the very least, acquiescence, of EU law norms, and, importantly, of more abstract relevant points of principle or (economic) philosophy the EU is perceived, with good reason or not, as attached to. Even if that rationale for the disconnect Azoulai has described could be accepted, however, the 'market access' approach in both juridical reasoning and policy making is a problematic tool to promote coherence and, ultimately, substantive integration within the pluralist and complex normative environment of the EU constitutional architecture.

In that regard, Barnard was right in remarking that the 'market access' reasoning, as traditionally employed, begins to reveal its limitations[216]. The older, discrimination-based approach, she has argued, was better suited to give deference to national regulatory competence. The non-discrimination-based model, neutral as it is as to its normative preferences, would arguably not be as effective in actively crafting a common transnational single market model based on specific free market principles that would effectively supersede all opposing or uneasily fitting national norms and structures.

The market access test was a reflection of the Union's willingness to promote closer scrutiny of national laws and practices[217], albeit themselves outside of its regulatory scope, with an eye to achieve functional harmonisation, based upon the principles of a robust form of market liberalism, within the common market[218]. In other words, the embrace of 'market access' review is a means towards achieving homogeneity of (economic) principle within one particular sphere of the Union's active involvement, that of the market (partial integration).

However, this particular use of the 'market access' approach within the context of the post-Lisbon constitutional environment could be argued to be a crude tool,

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[215] *Bickerton, Chris*, European Integration: From Nation-States to Member States (OUP, Oxford 2012).
[216] *Barnard 2009*, n.180, 38-39.
[217] ibid, 25.
[218] See *Maduro 1999*, n.204, 451.

the outcome of what we have suggested is juridical inertia following the development of free movement case law on the basis of a now obsolete model of partial integration. It fails to engage with those that treats as colliding norms more systematically, that is as elements of the complex balance that the fundamental objectives of the Union prescribe according to primary law. Continuing to adhere to the relevant developed 'market access' case law might be absolutely detrimental to the attainment of the intricately interconnected express normative ideals and goals of the EU, including those pertaining to the social market model the Union is supposed to promote. AG Maduro in *Viking* might have been right in noting that *'nothing in the Treaty suggests that the Community's social policy objectives must always take precedence over the objective of having a properly functioning common market'*[219]. However, equally nothing in the (post-Lisbon) Treaties suggest that economic freedoms, and the reasoning developed around them, should always take precedence over social policy objectives and the relevant rights. The 'social market' objective, the rearranged normative foundations of primary law and the pluralist ethos of the relevant framework suggest that in order for the Union's aim to bring the economic and the social together[220], both the Court and the other EU institutions will need to re-evaluate and grasp what a 'properly functioning common market' actually entails within this context.

1.2.3 The Legacy of Viking/Laval: Solidifying the trend

The reasoning established in *Viking* was subsequently followed almost word for word[221] by the ECJ in *Commission v. Germany ('occupational age pensions'*) and in *Rüffert*[222]. *Commission v Germany* was important in that, in identifying the right to collective bargaining as fundamental, the Court made explicit reference, inter alia, to the CFREU (Art.28) as a now binding legal basis[223], and to the Social Dialogue process as an instrument that evidences the recognition of collective

[219] Opinion of AG Maduro in C‑438/05, *Viking*, ECR 2007 I-10779, para.23.
[220] ibid.
[221] See e.g. C-271/08, *European Commission v Federal Republic of Germany*, para. 47.
[222] C-346/06, *Dirk Rüffert v Land Niedersachsen*, (2008) ECR, I-01989.
[223] ibid, paras.37-38.

autonomy at the European level (Art.152)[224]. These references could have been considered indicative of the Court's eagerness to adopt a reasoning that would be more robustly grounded upon primary law norms specifically relevant to collective labour rights, and to attempt a more systemic reading of those rights and the relevant national mechanisms and structures within the newly emerged pluralist, balanced and better-framed EU constitution post-Lisbon. That assumption, however, would quickly prove misplaced.

Rüffert, following Laval's approach of the PWD, essentially prohibited Member States from allowing for working conditions to be regulated freely through collective autonomy mechanisms and the social dialogue process. Similarly, in *Commission v. Luxembourg*[225]the Court had the chance to elaborate on worker rights and interests as legitimate public interest grounds that could justify restrictions of free movement. The Court confirmed that the purpose of the (original) Posted Workers Directive (PWD) was to ensure a minimum level of protection for posted workers[226]. However, it then proceeded to effectively regard the PWD as having introduced both a floor and a definitive ceiling[227] of protected standards, noting that any exception to that rule on grounds of public policy (Art.3(10) PWD) should be absolutely strictly construed; the sole competent court to assess what the public policy derogation entails ought to be the CJEU itself[228].

In the case of a Luxembourg law, the Court opined that a clause that provided for the automatic adjustment of all wages, including those of posted workers, to the cost of living, thereby derogating from the 'minimum wage equivalence' rule of the PWD, had not cleared the public policy high bar the Court itself had set. A potential threat of degradation as to the standard of living of workers[229] was not considered to constitute enough of a '*genuine and sufficient threat to a fundamental interest of society'*[230], which is required to trigger the public policy derogation. This narrow understanding of the socioeconomic essence of labour

[224] *Commission v Germany* op.cit,,para.39.
[225] C-316/06, *Commission of the European Communities v Grand Duchy of Luxembourg,* (2008) ECR, I-04323.
[226] ibid, para.24.
[227] ibid, para.26.
[228] ibid, paras.30-31 and 50.
[229] See C- 346/06, *Ruffert*,op.cit..
[230] ibid, para.50.

standards, on the one hand, and the complex function and purpose of free movement of workers for workers themselves as economic actors of the market, is indicative of the institutional short-sightedness of the ECJ. It revealed once more that the Court actively avoids to seriously engage with the Union's social objectives and the qualitative reading of the 'high level of employment' objective. Essentially, what the Court avoids is to attempt to either integrate the complex normative basis of EU primary law in its reasoning or even simply indicate that it acknowledges it.

2. Challenges of EMU dogma: don't ask, don't tell

The Eurozone crisis was perhaps the single most important incidence that brought to light the endemic systemic inadequacies and flaws of the EU project as a whole. It could be argued the seeds of the Union's own reckoning hour had been contained in the historical and ideological foundations of the EU and its inherent structural and systemic deficiencies, often the result of unavoidable compromise[231]. Regardless of the nature and true causes of the crisis, however, there can be little doubt that it revealed that national governments and EU official alike, despite proclamations to the contrary, actually had rather little faith in the systemic integrity and resilience of the Union's legal and institutional framework, if not in the European project itself. The optimism and the triumphal rhetoric that had preceded right until the beginning of the Eurozone crisis in 2010, culminating in the signing of the Lisbon Treaty, as to the robustness of the Union and the inevitability of further integration, quickly gave way to panic and the stark realisation that the EMU was at risk. Pretexts were then shed, as the particular variety of the EU economic and monetary model, with its rules, standards and structures so steeped in particular economic theory and models that had been dubbed 'embedded neoliberalism'[232] by critics since the Maastricht Treaty,

[231] See *Nanopoulos, Eva/Vergis, Fotis*, The Crisis Behind the Eurocrisis: The Eurocrisis as a Multidimensional Systemic Crisis of the EU (CUP, Cambridge 2019).
[232] Indicatively on the notion, see *van Apeldoorn, Bastian*, Transnational Capitalism and the Struggle over European Integration (Routledge 2002), 81; *van Apeldoorn, Bastian*, Transnationalization and the Restructuring of Europe's Socioeconomic Order: Social Forces in the Construction of "Embedded Neoliberalism" (1998) 28 International Journal of Political Economy 28,12.

emerged as the ultimate objective and feature of the Union that ought to be salvaged at any cost. The stability of the Eurozone was to be preserved with any means possible, regardless of whether such means would disregard EU primary law, established procedure, competence and institutions, and, of course, without much regard for any balanced, considerate review of the entirety of the EU constitutional nexus and the complicated relationship between the various economic, social and other rights involved. The perceived 'emergency' would justify extraordinary measures, including the creation of seemingly ad hoc mechanisms that would sit outside the Union and the scope of EU law, circumventing questions of legality, but, inadvertently, raising questions of legitimacy and accountability. That practice would be challenged in *Pringle*.

2.1 Pringle and the salvation of the Eurozone: EMU stability as an implied fundamental objective

Pringle has been subjected to extensive analysis and debate[233] almost since the very day it came out. It is beyond the scope of the present work to examine the ruling in detail, as regards all the issues it covered and the entirety of its ramifications. It is useful, however, to note the implied reasoning in Pringle and the meticulous, yet intricate, legal gymnastics[234] the Court employed and affirmed in order to achieve a predictable objective: avoiding any bumps or delays in the 'emergency' effort of stabilising the EMU. In that, affirming the existence of the suggested emergency and essentially accepting it as a justification for circumventing existing EU law frameworks[235] by veering into dubious ad hoc adopted solutions that sit outside of the EU legal order, the Court rubber-stamped

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[233] Indicatively, *Hinarejos, Alicia*, The Court of Justice of the EU and the Legality of the European Stability Mechanism (2013) CLJ 72(2) 237; *Craig, Paul*, Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance (2013) EuConst 9(2), 263; *Borger, Vestert*, The ESM and the European Court's Predicament in Pringle (2013) GLJ 14, 113; *Koutrakos, Panos (Editorial)*, Political Choices and Europe's Judges (2013) ELRev 38(3), 291; *Adam, Stanislas/Mena Parras, Francisco Javier*, The European Stability Mechanism through the legal meanderings of the Union's constitutionalism: comment on Pringle (2013) ELRev 38(6), 848; *de Lhoneux, Etienne, Vassilopoulos, Christos*, The European Stability Mechanism Before the Court of Justice of the European Union (Springer, London 2014).

[234] *Tomkin, Jonathan*, Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy (2013) GLJ 14, 169.

[235] *Tomkin*, ibid.

the creation of the European Stability Mechanism (ESM). However, it did so with an important caveat, that would leave an opening for EU institutions 'borrowed' to partake in extra-EU law mechanisms to still be accountable under EU law, including of course its fundamental substantive norms and normative bases.

Pringle was of course not directly related to labour law or collective labour rights per se. However, it is critical in the examination of the evolution of CJEU case law, particularly as regards its understanding of not just the Union's economic constitution, but, more substantively, of the relationship between the various normative objectives, values and elements of the whole of EU primary law. *Pringle* appeared to solidify what might have been construed as a passing trend: the absolute prioritisation of economic and fiscal considerations over all else, and, importantly, the attachment to a particular theoretical and ideological approach as regards the formation, regulation and maintenance of an economic and monetary system. In that, it is important as it might have shed the facade of a Court that for long had strived to portray itself as the guardian of the constitution of the 'autonomous legal order' that the EU had been proclaimed to be, and the guarantor of internal constitutional coherence and consistency. For the sake of this analysis, it was also an affront to both the letter and the spirit of the post-Lisbon substantive constitution of the Union, and a clear sign that the Court's Lochnerian days were far from over.

2.2 A flood of inadmissibility ('clear lack of jurisdiction')

The issue at the core of *Pringle*, albeit not directly and expressly related to labour institutions, certainly did allow for severe interference with relevant national systems, norms and practices. The absolute and at any cost priority given to the salvation and stability of the Eurozone, as expressed in *Pringle*, was the grounds on which the mechanisms and institutions devised to achieve this objective were legitimised. Importantly, however, that was also on the basis upon which the policies and reforms these mechanisms demanded of Member States that were hit by the crisis were sanctioned. As a result, a series of legal challenges were raised before national courts regarding both the constitutionality of such

reforms under national law, but also their legality under EU law, including with regards to their compatibility with the Union's primary law. The outcome was disheartening, particularly as regards labour related reforms. The Lochnerian tendencies of the Court over the last decade were revealed to not be simply a passing trend. Rather, the ECJ has internalised the core ideological basis of the reasoning: the absolute prioritisation of economic objectives and considerations, embracing, further, a particular, ideologically coloured, conception of the free market, and, hence, of the nature of the Union's economic constitution. It is this latter point that relates to how collective labour rights and institutions are substantively approached by the Court, despite the declarations of the 'fundamental' nature of those rights within the EU legal system. Even when cracks appeared to form on the wall *Pringle* had raised to protect EMU related mechanisms and institutions, the boulders that are the Court's Lochnerian dogma in relation to collective labour institutions did not budge.

These points were reflected in the labour law related cases that emerged out of the Euro crisis (particularly from Portugal, Romania and Greece) as a consequence of the policies promoted, if not imposed, by Union institutions, albeit outside of their 'regular' role. Those cases revealed a Court that was not just hesitant to engage in more complex and systematic constitutional analysis, as was the criticism in the post *Viking* case law, but was unwilling to even accept that the complaints raised in relation to labour rights would warrant consideration. The implied reasoning and intention was clear: when the stability of the EMU and the particular economic model implied are even remotely at risk, considerations about social rights and any institution that does not nicely fit that model is promptly put aside.

The cases that arose from Portugal related to remuneration reductions enacted as a direct consequence of fiscal measures adopted to comply with EU monetary policy and standards, as well as with the specific demands attached to the joint IMF-EU 'bail-out' the country was forced to accept in 2011. In *Sindicato dos Bancarios do Norte*[236] trade unions and workers of the BNP bank, which had been

[236] C-128/12 *Sindicato dos Bancários do Norte v BPN – Banco Português de Negócios SA*, ECLI:EU:C:2013:149.

nationalised as part of the process of its bail-out by the Portuguese state in response to the crisis[237], complained for the mandatory cuts to their remuneration[238] by virtue of the 2011 state budget. The budget law had introduced extensive austerity measures, including blanket reductions across the wages of all public sector workers that superseded all norms to the contrary, including those based on collective agreements [239]. The claimants argued that these cuts amounted to a breach of EU law. They noted, inter alia, the fundamental normative principle of dignity which underpins Art.31(1) CFREU that guarantees fair working conditions as a means of preserving it. The Court, however, recognised no connection of their case to EU law and dismissed the case. There were 'no concrete evidence', the ECJ argued,[240] that the austerity measures brought about by the 2011 Budget Law had been enacted to implement Union law (51(1) CFREU). As such, the issue fell outside the scope of EU law and, therefore, of the Court's jurisdiction.

The complaint, related to pay cuts, and the Court's response were replicated almost verbatim in the two *Sindicato Nacional dos Profissionais de Seguros e Afins* cases that followed[241], concerning the continuous suspension of holiday and Christmas allowances based on the extension of the measures introduced by the 2011 Budget into 2012. This time the referring Porto Employment Tribunal (Tribunal do Trabalho do Porto) attempted to better substantiate its request for a preliminary ruling by elaborating on the suggestion that the fundamental principle of dignity was infringed and, also, by trying to link the imposition of austerity measures to the 'serious economic and financial crisis'[242] that had led to their enactment. It ought to be noted, however, that the Portuguese Tribunal did not expand on the specific link between the EU, its institutions, mechanisms and policy and either the creation and the extent of this crisis or the measures promoted in response to it. In other words, it did not elaborate on whether, and to

[237] ibid, para.4.
[238] ibid, paras.5-6.
[239] ibid, para.3.
[240] ibid, para.12..
[241] C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial - Companhia de Seguros SA*, ECLI:EU:C:2014:2036; C-665/13 *Sindicato Nacional dos Profissionais de Seguros e Afins v Via Directa - Companhia de Seguros SA*, ECLI:EU:C:2014:2327.
[242] C-665/13, above, para.16(5).

what extent, the remuneration cuts had been enacted 'in implementation' of EU law. As a result, it was only natural for the ECJ to dismiss the Porto Employment Tribunal's request on this particular ground[243] due to lack of jurisdiction, repeating its ruling from *Bancarios do Norte*[244] and somewhat reprimanding[245] the referring Tribunal's persistence.

The Court gave the exact same response to similar preliminary reference requests sent by Romanian Tribunals[246]. The measures that had instigated the complaint were identical to those that had given rise to the Portuguese cases, proving that the exact same recipe to address the alleged crisis had been imposed by the Union and 'Troika' institutions (comprised of the IMF, ECB and EU Commission) across all inflicted Member States. In the case of the Romanian referrals, the Court's rejection came despite the effort of referring judges to expand the fundamental rights allegedly infringed by austerity measures so as to include property (17 CFREU)[247], within the concept of which the sought to include pay and any type of worker remuneration. In the eyes of the Court, the connection to EU law had failed to be established.

In the Greek *ADEDY* cases[248] the claimants chose a different route to the CJEU. They opted to rely on the procedure under Art. 263 TFEU and appeal directly before the General Court rather than seek judicial remedy from national courts and pursue a referral under Art.267 TFEU. The intent was to circumvent the unwillingness of the Court to recognise that EU norms and institutions had been the legal source of the eventual national measures enacted in various Member States during the crisis. That is, to bypass the Court's unwillingness to

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[243] See C-264/12, op.cit., para.14.
[244] C-264/12, op.cit., paras.17-22; C-665/13, op.cit., paras.12-16.
[245] C-264/12, op.cit., para.14.
[246] C‑434/11 *Corpul Naţional al Poliţiştilor v Ministerul Administraţiei şi Internelor (MAI) and Others*, ECR 2011 I-00196; C-134/12 *Corpul Naţional al Poliţiştilor - Biroul Executiv Central v Ministerul Administraţiei şi Internelor and Others*, ECLI:EU:C:2012:288; C-369/12 *Corpul Naţional al Poliţiştilor - Biroul Executiv Central (representing Chiţea Constantin et als) v Ministerul Administraţiei şi Internelor and Others*, ECLI:EU:C:2012:725; C-462/11 *Victor Cozman v. Teatrul Municipal Târgovişte*, ECLI: EU: C: 2011: 831.
[247] C-134/12 and C-369/12, op.cit; C-462/11 Cozman, op.cit., paras.8-10 and 13-14.,
[248] T‑541/10 and T‑215/11 *Anotati Dioikisi Enoseon Dimosion Ypallilon (ADEDY) and Others v Council of the European Union and European Commission*, ECLI:EU:T:2012:626 and 627 respectively.

acknowledge that national austerity measures had been enacted in implementation of EU law and under the Union's edicts. The attempt, however, failed.

The claimants had been diligent in describing the facts and legal context of the crisis. They noted that the pay cuts had been mandated by the Council Decision 2010/320/EU[249] as amended by Council Decision 2010/486/EU[250] which aimed to reinforce and enhance fiscal surveillance on Greece. These Decisions gave the country notice to take measures for the deficit reduction judged necessary to remedy its proclaimed excessive deficit and stipulated a strict fiscal consolidation programme, based on the adoption of specific, detailed measures (Art.2 of Decision 210/320/EU) aimed, allegedly, to drastically reduce public expenditure and increase State revenue, reinforce budgetary supervision and discipline, and 'restructure' the Greek economy in general, with an eye of improving its competitiveness. The measures that were to be imposed in order for these objectives to be reached were subject to strict time limits and would effectively serve as conditions for the provision of assistance by Eurozone Member States during the crisis in the form their share of periodical 'doses' of a loan agreed multilaterally between Greece, the IMF, the ECB and the Eurozone Member States (which would be represented by the Commission). Essentially that manifested into a box-ticking list of austerity measures meticulously and in detail outlined in Art.2 of Decision 210/320/EU that covered a multitude of issues spanning the entirety of the Greek market regulation, irrespective of the nature (public or private) of the sector involved or the regulatory competence (or lack thereof) of the EU on the relevant issues (inter alia, pay and collective bargaining; taxation; public sector restructuring; privatisations[251]).

Importantly, the crucial Commission Decisions had been adopted on the basis Treaty norms pertaining to the regulation and functioning of the European Monetary Union (Art.119(2) TFEU). In particular, they were based on Art. 126(9) TFEU, that establishes the excessive deficit procedure, and Art.136(1) TFEU, which provides for the power of the Council to address specific measures towards Eurozone Members with the aim of coordinating and monitoring their budgetary

[249] OJ 2010 L 145, p.6, amended OJ 2011 L 209, p.63.
[250] OJ 2010 L 241, p.12.
[251] See T‑215/11 *ADEDY II*, op.cit., paras.72-73.

discipline, but also with an eye of promoting specific 'economic policy guidelines' for them. Further, the provisions of Protocol 12 'On the Excessive Deficit Procedure'[252] (particularly, Art.1, providing the standard reference values for the debt and deficit to GDP ratios) and of instruments of the Stability and Growth Pact[253] (in particular, Art.3-5 Regulation 1467/97[254], as amended by Reg.1056/2005[255], on the implementation of the excessive deficit procedure) were taken into account for the concretisation of the above Treaty norms and objectives vis-à-vis Greece in particular. It would not be difficult to discern in this case that the wage and pay related measures that had led to the claimant's complaint had been the direct consequence of enforcing EU law norms. As such, the Court would have to accept that Greece was 'implementing EU law' while adopting them, which would not only trigger the jurisdiction of the Court, but would also bring the case within the scope of the CFREU and the full normative nexus of the EU constitution.

However, the Court once again dismissed the case and refrained from entering into substantive analysis on labour rights and the compatibility of relevant reforms to EU primary law fundamental norms, In this case, its inadmissibility ruling was based on the argument that the claimants had not succeeded in establishing that the measures clearly detailed in the Council Decisions in question were of 'direct and individual concern' to them, as the term has been interpreted by the Court's case law[256]. In the eyes of the General Court, even the specific measures outlined in the Decisions in relation to pay reductions (reduction of Christmas, Easter and 'holiday' bonuses and allowances in the public sector)[257], family bonus cuts[258], pensions[259], and public sector recruitment[260], albeit clear and specific in not just the objective they set by also in providing guidelines so detailed as to outline the specific systems and measures to be adopted, were still vague enough to not

[252] OJ C 115, 9.5.2008, p. 279–280.
[253] see Council Resolution of 17 June 1997 on the Stability and Growth Pact (OJ 1997 C 236, p. 1).
[254] OJ 1997 L 209, p.6.
[255] OJ 2005 L 174, p.1.
[256] T-541/10 *ADEDY I*, op.cit., paras. 87-88; T-215/11 ADEDY II, op.cit., para.100.
[257] T-541/10 *ADEDY I*, op.cit., paras.69-73;
[258] T-215/11 ADEDY II, op.cit., paras.74-75 and 86-91.
[259] T-541/10 *ADEDY I*, op.cit., paras. 74-76;
[260] ibid, paras. 77-79; T‑215/11 *ADEDY II*, op.cit., paras.76-77 and 92-94.

warrant standing for the claimants. In any case, they did not affect their legal status and rights; only their factual situation[261].

Given the detail in which the list of measures under Art.2 of Decision 210/320/EU were expressed, the validity of the General Court's finding is dubious. Moreover, given the complex and more considerate assessment substantive constitutionalisation would prescribe, the insistence on defining 'individual concern' only on the basis of the claimant's legal situation could be questioned. In any case, the dismissal of the cases signalled the quick hesitation of the Court to engage in substantive analysis that would have to touch upon social rights and considerations, and to challenge the established perception of predominance for free market principles, the apparent ascendance of the EMU into the paramount EU objective and project, and thus, the 'untouchable' nature of the EMU related mechanisms and institutions. This observation could also paint a negative picture of the Court's suggestion that the claimants could pursue effective judicial protection through national courts[262], seeking a preliminary reference to the CJEU, given how it treated the relevant preliminary references sent by other national courts on similar, if not identical, substantive questions. Taking into account the inadmissibility rulings on those Portuguese and Romanian cases, the Court's insistence on its embrace of a stance skewed in favour of a particular conception of the economy and, hence, of an implied devised hierarchy of norms within EU primary law in favour of the objectives and aims relevant to that model, could possibly lead to suggesting that this is not so much part of a passing *Lochnerian* trend, but it reveals a worrying, ideologically coloured, judicial dogma that can risk constitutional consistency and amount to denial of justice.

2.3 Cracks in the post-*Pringle* wall?

It is true that the cracks in the wall of inadmissibility appeared in cases that were not really related to labour rights and relevant measures. They did, however, indicate a reversal to the trend of the early crisis years that would have the Court

[261] T-541/10 *ADEDY I*, op.cit., para.85; T‑215/11 *ADEDY II*, op.cit., para.97.
[262] T-541/10 *ADEDY I*, op.cit., paras.89-90; T‑215/11 *ADEDY II*, op.cit., paras.101-102.

refrain from even attempting to challenge the validity and legality of mechanisms and measures adopted as an emergency response to the perceived pending financial calamity for the Eurozone. In that, these rulings might also constitute early signs of the Court's willingness to engage in more careful and holistic substantive review that might potentially break with established paradigm, which includes not only the *Pringle* reasoning but potentially the Court's *Lochnerian* strand. On the other hand, such optimism is most likely premature. The most recent cases that arose out of the Eurozone saga might be indicative of the Court's intent to move back to normality, as the emergency character of the crisis subsides, and recognise the justiciability of claims and actions against EU institutions involved in the mechanisms and structures employed to counter that crisis. They did not, however, give any concrete indication of substantive departure from the *Lochnerian* characteristics we have discussed. There was little in them to suggest that the Court would be prepared to abandon its apparent construction of an implied hierarchy in favour of economic rights and freedoms (though it did engage with those more comprehensively and with due consideration of the economic rights and interests of individuals), and certainly nothing to indicate its future stance when labour rights and collective labour institutions in particular would be involved. On this latter point, especially, the ruling that followed in *AGET Iraklis*[263] was particularly disheartening, as we will see.

The cracks on the post-*Pringle* wall of inadmissibility have appeared on two fronts: first, with regard to the reviewability of the mechanisms related to the adoption and enforcement of monetary policy[264], including the powers granted to the ECB to exert regulatory supervision over the national banking systems[265]. Second, as regards the lawfulness of MoU 'conditionality', in the sense of the substantive consequences upon individuals of policies and measures imposed upon

[263] C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, ECLI:EU:C:2016:972.
[264] C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag*, ECLI:EU:C:2015:400.
[265] C-493/17 *Heinrich Weiss et als* ECLI:EU:C:2018:1000; T-733/16 *La Banque Postale v ECB* ECLI:EU:T:2018:477.

Member States as 'bail-out' conditions[266]. It ought to be noted, however, that in this latter case the Court remained on its laid track of giving due regard to economic rights predominantly, rather than attempting more balanced, nuanced and comprehensive review; it just acknowledged that individuals also enjoy economic rights and freedoms (in this case, property) that are deemed fundamental even under pure classical liberal theory.

It was important that the small window opened in *Pringle* (concerning the ESM) as to the reviewability of the conduct of European institutions taking part in mechanisms and programmes outside of the norm of the EU legal order was further explored in *Gauweiler (*concerning the OMT), *Weiss* (concerning the PSPP) and *La Banque Postale* (concerning banking regulation and Reg.575/2013) particularly with reference to the ECB.

It should be noted, however, that in terms of substantive balancing and, hence, justification of the conduct of EU institutions, the Court maintained the necessity of discipline in monetary police, affirmed the primacy of the price stability objective and, ultimately accepted that salvaging the coherence Eurozone was a priority overriding any other consideration, including consistent respect of the supposed normative foundations of the Union and the related balance between rights declared as fundamental. Importantly, it was in line with the Court's understanding of the nature of the 'market economy' paradigm promoted by the Union that it appeared prepared to afford some protection to fundamental individual economic rights, among which the right to property emerges as the most emblematic. However, when faced with questions less related to the basic liberal (economic) paradigm, such as social rights or, more so, collective labour rights, the Court did not appear to be ready to be as forgiving.

2.4 EPSU and the shadow above Hairdressers: for collective labour rights, the wall remains

[266] Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising Ltd and Others v Commission and ECB*, ECLI:EU:C:2016:701; C-105/15 P, Konstantinos Mallis and Other v Commission and ECB, ECLI:EU:C:2016:702; T-680/13 *Chrysostomides, K. & Co. LLC and Others v Council and Others*, ECLI:EU:T:2018:486; T-786/14 *Bourdouvali and Others v Council and Others*, ECLI:EU:T:2018:487.

Even if it were to be argued that the EMU related cases hold a peculiar position in the case law, due to the alleged emergency and critical importance of interventions related to the euro crisis and its aftermath, the recent treatment of the expression of transnational collective autonomy that is Social Dialogue is difficult to justify. It can only be explained by Lochnerian references.

As this thesis was concluded, the General Court delivered its ruling on the EPSU case[267], on the Commission's refusal to honour its obligation under the TFEU to facilitate and promote Social Dialogue (Art. 152 and 154(1) TFEU) but also, more importantly, its refusal to fulfil its mandatory role within Social Dialogue as a legislative process and submit to the Council a relevant agreement reached by the social partners in accordance with Art.155(2) TFEU. In late 2015, following consultation and negotiation under the Social Dialogue procedures, the European Federation of Public Service Unions (EPSU) and the European Union Public Administration Employers reached an agreement that would extent information and consultation rights reserved for private sector workers in case of restructuring to all workers employed by public administrations. Three and a half years later, the Commission refused to submit the signed agreement to the Council, as per Art.155(2). The General Court upheld the Commission's refusal, not merely disregarding the substantive constitution of the Union and the function of Social Dialogue within that context, by effectively adopting a *contra legem* interpretation of the TFEU.

The GC's reasoning was highly problematic in this regard, both in the specific points made by the court, but also in its failure to make any systematic reference to the normative context within which Social Dialogue operates. It is striking that the ruling claims to engage in teleological interpretation[268], even though its relevant reasoning does not contain a single mention of any of the critical relevant provisions of the normative and material constitution of the EU we have discussed, including Arts.2 (democracy; rule of law), 3 (social market economy) and 5(3) (subsidiarity) TEU, Arts.12 (association) and 28 (collective bargaining) CFREU, or even Arts.151 and 152 TFEU which contextualise the respect EU

[267] T-310/18 *European Federation of Public Service Unions (EPSU) and Jan Goudriaan v European Commission*, ECLI:EU:T:2019:757.
[268] ibid, paras.83ff.

institutions owe to dialogue between management and labour and to collective autonomy[269]. In fact, it dismisses all relevant points raised by the parties[270].

The judgment on the merits is of similarly inconsistent and problematic nature as to the reasons the Court gives for its dismissal of the applicants' arguments. It is beyond the remits of the present analysis to engage more deeply with those points (though the argument that *no* harmonisation is required because there are already various national law provisions in place that display significant differences between Member States[271] is particularly striking). It is important, however, to examine how far the Court went to preserve its Lochnerian disdain for collective autonomy and processes that have the potential to democratise the market.

Given that legislative initiative lies solely with the Commission (Art.17(2)TFEU)[272] unless it is explicitly obliged under EU law to submit a legislative proposal[273], the GC dismissed the application as it found that no such obligation of the Commission arises under the procedure of Art.155(2) TFEU. That is an interpretation that manifestly goes against[274] both the letter of the law[275], its spirit, arising from the systematic comprehensive interpretation of the Social Dialogue provisions as elements of the EU substantive constitution, but also previous case law[276], which, within the context of 155(2)TFEU, limited the Commission to a formal role, only responsible for reviewing the representativeness of signatory parties and the legality of their agreement, without allowing it any discretion as to whether it submits the agreement to the Council if these formal checks reveal no improprieties. In fact, Brian Bercusson considered the reading under which the Commission has no discretion, and it must forward the agreement of the social partners to the Council as the only one compatible with

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[269] *Dorssemont, Filip/Lörcher, Klaus/Schmitt, Melanie*, On the Duty to Implement European Framework Agreements: Lessons to be Learned from the Hairdressers Case (2019) ILJ https://doi.org/10.1093/indlaw/dwz007 (last accessed 12/12/2019), 14-18 *(2019a)*.
[270] EPSU,op.cit., paras.91-100.
[271] ibid,paras.116.
[272] ibid,para.65-66.
[273] ibid, para.67.
[274] *Dorssemont /Lörcher /Schmitt 2019a*, n.269, 21-25.
[275] Art.152 TFEU: 'The Union ...*promotes* [...] It *shall* facilitate dialogue';
Art.155(2) TFEU: 'Agreements [...] *shall* be implemented [...] at a joint request of the signatory parties, by a Council decision on a proposal from the Commission' (emphasis added).
[276] ibid,para.75.

both the principle of collective autonomy[277] and the innovation[278] in the legislative process that the parallel route of the Social Dialogue mechanism introduced.

EPSU effectively recognises the Commission as having the sole privilege to instigate the legislating process, emphasising Art.17 TFEU but ignoring Art. 155(2) TFEU and the pluralist nature of the Union. Its effective dismissal of the value of transnational collective autonomy leaves little hope for another similar case pending[279] before the GC on yet another refusal by the Commission to render Social Dialogue effective as the legislative mechanism it was intended to be.

The ruling in *EPSU* is disappointing, but entirely in line with what appears to have become an established trend of clear prejudice against collective labour rights and processes, even those that have been internalised by the EU framework to become part of the Union's legislative process. This trend is clearly based not on any solid reasoning consistent to what the Court does in other areas of law, but on the continuing embrace of a clear ideological bias, rooted in free market dogma. Twelve years after *Viking*, it is becoming increasingly hard to keep attributing the Court's stance to institutional inertia and the influence of the pre-Lisbon framework and established case law, especially since the Court in its recent judgments is aware of the amended primary law landscape.

III. Brief Conclusions: From an economic to a constitutional approach

Opinion 2/13 has shown that the Court is slowly repositioning itself within the new framework; it is seeking to reinvent itself. The first indication has been the assertion of its authoritative superiority in assessing and safeguarding fundamental rights, thus essentially considering itself the constitutional court of the autonomous EU legal order. However, an overview of its case law reveals a Court that is still unable, or perhaps unwilling, to assume to the true guardian of constitutional consistency of the EU legal order. That would require embracing the entirety of the normative and material EU constitution and hold on to in as the

[277] *Bercusson 2009*, n.128, 539 and 542-543; *Bercusson, Brian*, The Dynamic of European Labour Law After Maastricht (1994) ILJ 23(1) , 1 (27 and 30).
[278] *Bercusson, Brian*, Maastricht: A Fundamental Change in European Labour Law (1992) IRJ 23(3), 177 (187-188).
[279] *Dorssemont /Lörcher /Schmitt 2019a*, n.269.

definitive compass to guide any systematic comprehensive interpretation of primary and secondary EU law and relevant conduct, including any assessment relevant to the rights and freedoms of citizens.

Regardless of its regular use of constitutional language as to the status and autonomy of the legal order of the EU, the Court seems to not have been influenced by the actual rearrangement of the constitutional framework it evokes. Rather, it carries on applying its previous reasoning, on the complete opposite trajectory, by reading hierarchy in the primary law framework that tips in favour of economic freedoms, to the detriment of most notably, and perhaps not coincidentally, collective labour rights in particular. Given that it is now operating within the context of a rearranged constitutional framework, that has in turn remoulded the normative basis of the EU economic constitution, the Court risks disregarding positive constitutional law in favour of an 'economic substantive due process' interpretation that would be reminiscent of the equivalent stance of the US Supreme Court (SCOTUS) in *Lochner*[280].

This observation comes awfully close to describing the post-Lisbon CJEU case law[281] when it comes to collective labour rights (from information and consultation to collective autonomy and action) and its reading of perpetual, albeit implied, hierarchies within the EU material constitution. The Court has come worryingly close to committing the Lochnerian sin, either through the devised rights/principles distinction or by insisting on substantive presumptions, as those in *Alemo-Herron,* which in fact mirror the freedom of contract predominance assumption in *Lochner*[282]. It certainly crossed the line with keeping a strong hold of the *Viking/Laval* aversion to collective processes and the democratisation they entail, to the extreme point of upholding the suppression of transnational collective autonomy in *EPSU*. The issue is not only that comprehensive, systematic analysis is conspicuously absent specifically with regard to labour rights. It is also that the CJEU continues to misconstrue (if not ignore) the function of collective labour rights even within the remits of economic theory.

[280] Lochner v New York, 198 US 45 (1905).
[281] For a criticism of the Court's stance pre-Lisbon, see *Eliasoph,* op.cit, 467-508.
[282] See *Mayer,* n.15, 217-284.

In effect, the Court's stance amounts to prescribing an 'economic substantive due process', steeped in neoclassical thinking, as a factor of balancing rights and freedoms that is at odds with the neutrality of the economic constitution and the balanced normative foundations of EU constitutional law.

That said, it is true that the free movement provisions have been retained almost as they were; the '*four freedoms'* remain prominent, though not necessarily as ambassadors of economic liberalism[283]. Moreover, most of the social rights contained in the Charter are either under the constraints of limitations or not complemented by a Union competence or effective legal basis in the respective field[284]. In the new comprehensive stipulation of the Union's competences those referring to economic objectives and the internal market remain intact with the latter being accommodated by the harmonisation legal basis of Art. 114 TFEU. It should be noted however that the exclusive competence on competition has been reworded to reflect the changes in the TEU. No longer does it refer to establishing a system ensuring undistorted competition (Art. 3(1.c.) TEC) but rather to 'rules necessary' for the functioning of the internal market, thus not indicating preference to a specific market system. Consequently, it appears that the economic freedoms retain their value, without, however, this suggesting that they also hold on to their previous dominance. It is just that other, non-economic, rights and considerations have been incorporated in the system and elevated to the same, prima facie, status, to reflect the shift in paradigm for the EU as an entity.

When and if the Court fully comprehends the entirety of the constitutional framework it seeks to stand watch over, in its full, complex and interwoven nature, judges might also comprehend the relevant functions and value of collective labour institutions. Attention will then shift from a narrow economic approach, based on a very specific notion of the market and its operation, to a more holistic one. Such an approach would embrace the need for transnational democratisation of the EU space, its market included, and for social protection as corollary to

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[283] *Rosas/Armatti*, EU constitutional law:An introduction, (Hart Oxford, 2010),181 and 188.
[284] *Schiek, Dagmar*, 'Re-embedding economic and social constitutionalism' in *Schiek/Liebert/Schneider (eds.)* European economic and social constitutionalism after the Treaty of Lisbon (CUP, Cambridge, 2011), 17 (31).

economic growth. That will be the moment when the Court will have ascended to the status it aspires: that of a true constitutional guardian.

PART IV

Epilogue and Conclusions: a New Hope or a plunge to the Dark Side?

The last decade has been certainly tumultuous for the Union. The crisis of the EU has been more than just about its monetary union or even its cohesion. It has been a battle against disillusioned popular perception as to the dream that the EU was; a battle to win back trust and, ultimately, allegiance, so as to reignite the flames of the European project. That project's optimism came to a halt right as the Union had begun to take upon itself as having the characteristics of a legal order capable of being examined in constitutional terms. The EU, in fact, understands itself as an entity built upon, and under a mandate to protect and promote, fundamental values inherent in any liberal constitutional tradition, and as a guardian of the rule of law. It is of course curious that the Commission recently emphasised the EU's resolve to review the conduct of Member States in relation to the rule of law standard it advocates, yet has little to offer as to how the Union's own institutions fare under that same standard or what that standard actually is.

Examining these issues, and the constitutional environment in which they are to be situated, was critical in discovering and discussing the place, value and function of core collective labour rights within the context of the post-Lisbon constitutional architecture of the Union. This rearranged constitutional set up, as we saw, has reached a level of development that allows it to be analysed through the lens of substantive constitutionalisation; it displays clear normative and material aspects that are to be used to ground interpretation, ensuring consistency and normative coherence. The post-Lisbon normative constitution has moved beyond the narrow focus on the singular dominant market-centric objective and character that had dominated the evolution of the EU since its conception. It has moved towards embracing a balanced approach which seeks to reconcile social and economic objectives and considerations, fusing them into a coherent, yet pluralistic, whole.

In discussing this new paradigm it is useful to recognise the ordoliberal roots of the EU project as well as the strong neoclassical influences upon its development and institutional consciousness, so as to be mindful of the

undemocratic thread that connects these two schools, as well as those normative choices built upon them, with authoritarian musings. The contemporary economic constitution of the Union, however, has transcended such influences, promoting the social market economy objective as but one of a complex set of socio-economic goals that include the promotion of democracy and the rule of law.

This new comprehensive constitutional paradigm requires a re-evaluation of established institutional and juridical perceptions as to the essence of the EU economic constitution and the bias against collective labour rights. As we saw, both EU institutions, including the Court, and commentators often overlook (if not entirely ignore) the multiplicity of functions and objectives of collective labour law. It is crucial, however, to realise that collective labour rights are not simply intended to provide social protection. They also provide the vehicle for democratic expression, thus market and systemic democratisation, promote the perception of commonality and, hence, the building of solidarity that transcends established boundaries, and also play a crucial economic role as integral elements of any free market economy.

That multiplicity of functions seems to have escaped the Court, which has also displayed inconsistency in its understanding and acknowledgement of the contemporary reshuffled substantive constitution of the Union. The Court seems to be under a long Lochnerian trend, characterised by its clinging on to a predominantly economic rationale which prioritises economic freedoms above all else. It matters little that this model is no longer compatible with the rearranged balanced and comprehensive EU constitutional framework.

It is also notable that, the Court has failed to apply even that economic rationale itself with any consistency. Its case law seems to construe the fundamental economic freedoms as established to serve primarily businesses and employers, in a clear embrace of neoclassical and neoliberal reasoning that purports that prosperity for workers and the society at large will inadvertently ensue. However, a consistent approach would also consider the economic freedom of workers as market actors, and acknowledge labour rights and collective labour processes as necessary prerequisites for the effective exercise of that freedom and the protection of the autonomy of the individual.

In other words, the Lochnerian perpetuation of the market access test as a means of ensuring the effective side-lining of collective labour rights is detrimental to both the interests of workers and to the attainment of the social market economy, the core objective of the Union's economic constitution. A reassessment of the juridical tools employed is called for, at the very least.

Whether it would be more appropriate to embrace the principled alternative applied by the ECtHR is doubtful. Though the right-centric approach of the ECtHR on collective bargaining and collective action is more balanced and markedly dissimilar to that of the CJEU, the normative fruits it had yielded [285] were rolled back[286], revealing the limitations of the human rights approach.

The current stance of the CJEU, however, seems to be following the general trend of the past few decades, strongly influenced by neoclassical theory and the predominance of economic considerations, to 'contain'[287] core collective labour rights and institutions. Breaking with that trend might be the way towards starting to rebuild the tarnished popular perception as regards the EU and, hence, trigger active participation in all its processes, including the one that appears most elusive and distant to most people: the Union market itself.

The *Viking/Laval* saga and the Euro crisis related EU conduct, including the relevant case law, did nothing to convince workers that the Union's declared embrace of balancing socio-economic objectives was to become a tangible reality. The neoliberal mirage, and its empty promise of prosperity through liberalisation from the confines of traditional collective labour rights, seemed to remain the only alternative pushed forward. Brexit was, inter alia, a reaction by those who felt that their voices had no means to be heard, be it in the market or in the political arena.

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[285] See *Ewing, K.D./Hendy, John*, The Dramatic Implications of Demir and Baykara,(2010) ILJ, 2; *Barrow, Charles*, Demir and Baykara v Turkey: Breathing Life Into Article 11, (2010) EHRLR, 419; *Enerji Yapı-Yol Sen v Turkey* [2009] ECHR 2251.
See also *Dorssemont, Filip*, 'How the European Court of Human Rights gave us Enerji to cope with Laval and Viking' in *Moreau Marie-Ange*, Before and After the Economic Crisis: What Implications for the 'European Social Model'? (Edward Elgar, Cheltenham 2011), 217.

[286] *National Union of Rail, Maritime and Transport Workers v. United Kingdom* [2014] ECHR 366; *Bogg, Alan/Ewing, Keith*, The Implications of the RMT Case (2014) ILJ 43(3), 221; *Dorssemont, Filip*, The Right to Take Collective Action in the Council of Europe: A Tale of One City, Two Instruments and Two Bodies (2016) KLJ 27(1), 67-88

[287] *Hepple, Bob*, 'Factors Influencing the Making and Transformation of Labour Law in Europe' in *Davidov/Langille (eds)*, The Idea of Labour Law, 30 (35).

Collective labour rights, however, as elements of a balanced substantive constitution, could provide the vehicle for tangible democratisation. They can reveal the commonality of experience among workers and thus spark transnational solidarity, an element integral to the building of common identity. Moreover, even as mere market institutions, collective labour processes could facilitate the realisation of true economic freedom. Thus, collective labour law and its mechanisms are not only integral elements of the EU constitutional environment but, potentially, those elements that might reveal a potential route for reclaiming the European project for those it is meant to serve: people.

Clinging on not only to a status quo that seems to have been de facto left behind by the times and contemporary socioeconomic processes and developments, and to relevant established prejudices, but also to practices, rationales and judicial interpretations born out of a now obsolete version of the EU constitutional framework is dangerous. It will only exacerbate the continuous distortion of the idea of pluralism and integration not only of Member States, but of peoples and their standard of living, towards a 'multi-speed' Europe, in which certain classes, interests and even states are left behind, and democratic and social considerations take a backstep, to the benefit of the economically powerful. In this era of 'dys-integration' that is fuelling popular disillusionment with the European project and, ultimately, deligitimation of the EU, and in an environment of toxic retreat to the nation state, the re-evaluation of collective labour rights within our contemporary understanding of the Union's constitutional architecture presents a chance not only for a fairer and more balanced common market but, more importantly, the reinvigoration of the participation in the EU project that might begin to rebuild a feeling of commonality that transcends national borders.

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European constitutionalism and substantive constitutionalisation of EU Law

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PART II

Substantive constitutionalisation and Collective Labour Law

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PART IV

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