

# Unravelling the embedded liberal bargain: Labour and social welfare law in the context of EU market integration

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## I INTRODUCTION

EU market integration was never designed or intended to replace institutions of social citizenship which existed at national level. Nevertheless, there was a keen awareness among the founders to the European integration project of the importance of national social and welfare systems. It is from this initial observation, an interest in the approach of the EU and the Member States to the social dimension of trade liberalisation, that this paper approaches the question of ‘embedded liberalism’ and the de-territorialisation of labour law and industrial relations within the EU. In other words, how the EU and the Member States have sought to anticipate or respond to the potential negative social fallout and the economic insecurity arising from liberalising previously closed national markets. A central concern of this paper is how the EU confronted the conundrum of increased economic integration between states which had quite differing systems of labour market regulation and welfare models, and how the original settlement has evolved over time.

The story of EU integration, as recounted by labour lawyers and scholars of the EU internal market, is by now familiar.<sup>1</sup> This paper begins, in Part II by exploring this history, and the evolution of the European social dimension, through the lens of ‘embedded liberalism’. One can trace a narrative from Ohlin and Spaak<sup>2</sup> to the Treaty of Rome, premised on the understanding that the creation of a single market would not require harmonisation of labour standards. Rather, so I contend, reliance would be placed on a response mainly at national level: well-coordinated market-correcting institutions and the willingness to compensate for market failures. In surveying the causes of the unravelling of the embedded liberal bargain, the focus of Part III of this paper is on the role which adjudication may have in framing what forms of social intervention are legally viable or permissible within the context of market integration. Whilst we may not look to a court to engage in redistribution, nevertheless it can curtail the efforts of other actors, and the Court of Justice of the European Union has played an important role in market creation, with a resultant impact on social and labour market institutions at national level. Accordingly, the paper examines the impact of the Court

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<sup>1</sup> Paul Davies, ‘The Emergence of European Labour Law’ in William McCarthy (ed) *Legal Intervention in Industrial Relations: Gains and Losses* (Blackwell, 1992); Simon Deakin ‘Labour Law as Market Regulation: The Economic Foundation of European Social Policy’ in Paul Davies, Antoine Lyon-Caen, Silvana Sciarra and Spiros Simitis (eds) *European Community Labour Law: Principles and Perspectives*, OUP, 1996; Catherine Barnard, *EC Employment Law* (OUP, 3rd ed, 2006).

<sup>2</sup> The Ohlin and Spaak Reports, see n 22 below.

on redistribution which is typically the preserve of Member States and national regimes of social citizenship. Part IV makes the argument that the Court, through its internal market jurisprudence and in particular through its activist interpretation of the right to healthcare and the concept of EU citizenship, may in fact be constructing a form of social citizenship at EU level, which undermines the capacity of member states to maintain certain forms of social models, especially corporatist forms. Whilst noting the Court's reliance on the concept of 'solidarity' between Member States, I argue that the individualised conception of solidarity promoted by the Court serves to undermine expressions of collective solidarity within the Member States.

## II THE EMBEDDED LIBERAL BARGAIN

One means by which to understand the response of states, and even of international organisations, to the challenges of open markets, of trade liberalisation between market societies, is through the work of Karl Polanyi. Polanyi's concept of embeddedness is central to the thinking of many, in particular those working in the discipline of economic sociology, who seek to challenge economic imperialism, most especially the assumption of the self-regulating market economy. At the core is the idea that the market is embedded within the social. However, the concept of embeddedness is not very well defined within Polanyi's major work, *The Great Transformation*<sup>3</sup> and, as Krippner et al point out, there are 'clear tensions between Polanyi's initial use of the concept and its use today'.<sup>4</sup> But what we can discern is Polanyi's central thesis that:

the idea of a self-adjusting market implied a stark utopia [i.e. an impossibility]. Such an institution could not exist for any length of time without annihilating the human and natural substance of society.<sup>5</sup>

His contention was that, as the market system expands, this movement is met by a counter-movement, checking the growth of the market in order to protect society. In other words, rules and institutions to restrain 'free' markets from degenerating into a Hobbesian war.<sup>6</sup> What Polanyi refers to as the 'double movement' relates to a political, regulatory response to the spread of markets, to the commodification of labour power and of land (the environment): the forces of *laissez-faire* economic liberalism are offset by principles of social protection.<sup>7</sup> The key assertion here is the importance of state action and social relations as constitutive of markets; that social protection is necessary not only to prevent commodification of labour and of land, but also to protect

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<sup>3</sup> Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, 2001 [1944]).

<sup>4</sup> Krippner, Granovetter et al 'Polanyi Symposium: a conversation on embeddedness' (2004) *Socio-Economic Review*, 109-135, at 109-110. See also Gareth Dale, 'Lineages of Embeddedness: On the Antecedents and Successors of a Polanyian Concept' (2011) 70:2 *American Journal of Economics and Sociology*, 306-339.

<sup>5</sup> Polanyi, *The Great Transformation*, at 3.

<sup>6</sup> Fred Block, 'Karl Polanyi and the writing of *The Great Transformation*', (2003) 32 *Theory and Society*, 275-306 at 297.

<sup>7</sup> Polanyi, *The Great Transformation*, at 79-80, 136, 138-139. Polanyi gives, as examples of the protective counter-movement, trade union law and anti-trust legislation, as well as legislation relating to public health, factory conditions, workmen's compensation, municipal trading, social insurance, public utilities and trade associations: *The Great Transformation*, at 153-157.

‘productive organization’.<sup>8</sup> By this Polanyi meant not only in the establishment of rules to enforce contract and protect property rights, but further, in the protection of society from market liberalism by anchoring markets within institutional regulation.<sup>9</sup> Markets are thus not autonomous, or self-regulating as must be the case in economic theory, but located within a web of politics, religion, and social relations.

### A. Varieties of embeddedness

There are at least two meanings of ‘embeddedness’ at play in Polanyi’s thought.<sup>10</sup> On the one hand, the term is used to mean that all economies, and economic behaviour, are enmeshed in non-economic institutions; the constructedness of markets is a given in Polanyi, in contrast to their supposed naturalness. On the other hand, there is the idea that embeddedness alters from one economic system to another; that whilst it is not possible to fully disembed the economy from the rest of society, there are differences in the *degree* of enmeshment.<sup>11</sup> In my view, these two conceptualisations are reconcilable. The instinct that prompts one to reject the orthodox account of the rise of the self-regulating market as a utopian project, surely makes it difficult to conceive of markets as being entirely disembedded. And, in truth, many neo-Polanyians refer to the idea of the ‘always embedded market’. As Barber puts it:

While the modern market system may appear to be more differentiated from other social system structures, somewhat more concretely separate, this image diverts attention from the basic fact of its multiple and complex interdependence with the rest of the social system. Calling the market ‘disembedded’ leads analytic attention away from just what this interdependence is.<sup>12</sup>

So, the notion of embeddedness does not speak to the specific characteristics of modern capitalist economies, or to the specificity of market organisation.<sup>13</sup> Drawing together Polanyi’s use of embeddedness with the insights of the ‘varieties of capitalism’

<sup>8</sup> Polanyi, *ibid.* See also Block, n 6 above at 296: ‘In short, the construction of competitive markets requires ongoing state action’; Fred Block, ‘Introduction’ in Karl Polanyi, *The Great Transformation*, at xxiii-xxiv.

<sup>9</sup> Jens Beckert, ‘The Great Transformation of Embeddedness: Karl Polanyi and the New Economic Sociology’, Max-Planck-Institut für Gesellschaftsforschung, Köln, MPIfG Discussion Paper 07/1, January 2007, at 8.

<sup>10</sup> A third conceptualisation of embeddedness is that offered by Granovetter, who argues that orthodox neoclassical economic accounts provide an ‘undersocialized’ account of economic action, whilst sociology offers an ‘oversocialized’ conception; whereas in fact, he posits, most economic behaviour is closely embedded in networks of interpersonal relations. Mark Granovetter, ‘Economic Action and Social Structure: the Problem of Embeddedness’ (1985) *American Journal of Sociology*, 481-510. However, this interpretation of embeddedness, focussing on network structures, has been criticised for leaving ‘intact the notion of an analytically autonomous economy criticized forcefully by Polanyi’: Greta Krippner and Anthony Alvarez, ‘Embeddedness and the Intellectual Projects of Economic Sociology’ (2007) *Annual Review of Sociology*, 105-128. Granovetter himself later observed ‘I use the term “embeddedness” [in the 1985 article] in a narrower and somewhat different way than Polanyi meant it’: Krippner, Granovetter et al n 4 above, at 113.

<sup>11</sup> Kurtulus Gemici, ‘Karl Polanyi and the antinomies of embeddedness (2008) *Socio-Economic Review*, 5-33, at 7-10; Dale, n 4 above, at 323-325.

<sup>12</sup> Bernard Barber, ‘All Economies are “Embedded”: The Career of a Concept, and Beyond’ (1995) *Social Research*, 387-414, at 400.

<sup>13</sup> Beckert, n 9 above at 19.

literature, Fred Block points to how different market societies are embedded within diverse matrices of ideas, rules and institutional structures.<sup>14</sup> In contrasting ‘liberal market economies’ with ‘coordinated market economies’, Hall and Soskice illustrate how states may well choose to order national political economies with greater or lesser amounts of institutional regulation, whilst being equally ‘efficient’.<sup>15</sup> John Ruggie takes this embeddedness reasoning further, to examine international regimes, applying Polanyi’s insights to the institutional reconstruction of the postwar international economy.<sup>16</sup> His observation is that, in the negotiations on the postwar international economic order which culminated in the Bretton Woods institutions, whilst – for example – the US was far less Keynesian than the UK, ‘these differences among the industrialised countries concerned the *forms and depth* of state intervention to secure domestic stability, not the *legitimacy* of the objective’.<sup>17</sup> For Ruggie, the essence of the embedded liberal compromise is the formulation of a type of multilateralism, one which is predicated on domestic intervention, and which is compatible with the requirements of domestic stability.<sup>18</sup>

The main point I wish to highlight here relates to the variety of forms and depth of state intervention to secure domestic stability, and the divergent institutional structures in which markets may be embedded. My argument is that liberalised markets at EU level are embedded in varieties of institutional structures at Member State level. This paper will turn to one specific facet of these structures – labour, industrial relations, and social welfare systems – the former which have been described, aptly in my view, as representing varieties of institutional structures which ensure that labour relations are not primarily determined by market forces.<sup>19</sup> Such institutional structures at national level may, though, give rise to difficulties where, as we shall see, there exists a cross-national market integration project of which a core *raison d’être* is that labour is commodified as one of factors of production.

To the extent that the poorly-defined concept of the ‘European social model’ has any real content, it can be understood as referring to economic integration shored up by a

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<sup>14</sup> Block, n 8 above, at 299-300. Fred Block, ‘Understanding the Diverging Trajectories of the United States and Western Europe: A Neo-Polanyian Analysis’ (2007) 35: 1 *Politics & Society*, 3-33. On ‘varieties of capitalism’ see J. Rogers Hollingsworth and Robert Boyer (eds) *Contemporary Capitalism: The Embeddedness of Institutions* (CUP, 1997); Peter Hall and David Soskice (eds) *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (OUP, 2001).

<sup>15</sup> Hall and Soskice n 14 above, especially at 8-9, 21-33, 36-44.

<sup>16</sup> John Ruggie, ‘International Regimes, Transactions, and Change: Embedded Liberalism in the Post-War Economic Order’ (1982) 36 *International Organization*, 379-415; see also John Ruggie, ‘Taking Embedded Liberalism Global: The Corporate Connection’, Institute for International Law and Justice Working Paper 2003/2, New York University School of Law.

<sup>17</sup> Ruggie (1982) n 16 above, at 394; emphasis added.

<sup>18</sup> Ruggie (1982) n 16 above at 393, 399. See at 308:

But that multilateralism and the quest for domestic stability were coupled and even conditioned by one another reflected the shared legitimacy of a set of social objectives to which the industrial world had moved, unevenly but ‘as a single entity’.

<sup>19</sup> Richard Hyman, ‘The Europeanisation – or the erosion – of industrial relations?’ (2001) 32:4 *Industrial Relations Journal*, 280-294, at 281. As Fred Block points out, it is important to distinguish between the degree of regulation on the one hand and the extent of institutional coordination on the other: even in an economy such as the US, the state plays a critical coordinating role, not only in supporting core, state-dependent industries (e.g. defence, agriculture, oil, pharmaceuticals) but also in providing a favourable regulatory and taxation regime. Block (2007) n 14 above, at 12-14.

social community; a social community built on adjustment mechanisms at national level – such as social regulations, social transfers and public infrastructure – as well as by a growing body of social law and policy at EU level. This was the grand social bargain in many industrialised economies.<sup>20</sup> But principally, the embedded liberal compromise within the European integration project involved embedding the internal market within national social policy. This was predicated on the ability of these industrialised nations to alleviate any adverse impact of market integration through national systems of employment protection and social welfare, and to fund social policy interventions.

## B. The minimalism of EU social law

I want to apply this approach to examine the interaction between trade liberalisation on the one hand and on the other, labour standards, or what one might call market-correcting social and labour market institutions, within the EU from 1957 onwards. This section will argue that the initial thinness of social policy provisions within the EU integration project was premised on a consensus that the creation of a single market for the Member States of the European Economic Community would not require harmonisation of labour standards or national systems of labour law. But a crucial component of this consensus was precisely that such cross-national trade liberalisation was understood to be embedded within a post-war consensus at the national level.

The goal of economic liberalisation at the centre of the European integration project was founded on the understanding that competition did not necessarily require a complete harmonisation of costs; that differences such as those in labour costs or interest rates, would tend to level up in a common market, through the free circulation of the factors of production (goods, services, capital and workers).<sup>21</sup> Thus, the orthodox view at the foundation of the EU – exemplified by the inter-governmental Spaak Report on which the original EEC Treaty was based<sup>22</sup> – was that equalisation of labour standards would be the *result* rather than the *condition precedent* of the operation of the common market. This view was reinforced rather than undermined by the insertion of a Title on ‘social

<sup>20</sup> John Gerard Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection*, Institute for International Law and Justice Working Paper 2003/2, New York University School of Law.

<sup>21</sup> The following is based on section 3 of Diamond Ashiagbor, ‘Embedding trade liberalization in social policy: Lessons from the European Union?’ 32:1 (2011) *Comparative Labor Law & Policy Journal*, 373-404.

<sup>22</sup> Comité Intergouvernemental Créé par la Conférence de Messine, Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères (1956) (the Spaak Report), summarized in English in *Political and Economic Planning*, Planning No 405 233 (1956):

[C]ompetition does not necessarily require a complete harmonisation of the different elements in costs; indeed, it is only on the basis of certain differences – such as wage differences due to differences in productivity – that trade and competition can develop. [...] In addition, wage and interest rates tend to level up in a common market – a process which is hastened by the free circulation of the factors of production. This is a consequence rather than a condition of the common market’s operation.

The Spaak Report had, in turn, drawn heavily on the 1956 Ohlin Report of the International Labour Organization’s Committee of Experts, underpinned by the theory of comparative advantage that differences in levels of social protection, labour law or wage costs between states engaged in international trade broadly reflected differences in productivity and would level up as a result of trade: International Labour Organization, ‘Social Aspects of Economic Co-operation: Report of a Group of Experts’ (The Ohlin Report), 46 *Studies and Reports, New Series* (1956). See the analysis in Deakin, n 1 above.

policy' into the EEC Treaty (Articles 117-122 EEC).<sup>23</sup> With the exception of Article 119 EEC on equal pay between men and women,<sup>24</sup> the original social policy provisions were principally exhortatory and failed to provide legally enforceable social rights.<sup>25</sup> Indeed Article 117 EEC makes clear Member States' belief that improved working conditions would ensue principally from the functioning of the common market,<sup>26</sup> with Article 119 one of the few exceptions to the rejection of a wider role for transnational harmonisation of social policy. Other provisions stressed the supportive role of the Community institutions whilst conferring no real power on them, the role of the Commission being to 'promot[e] close co-operation between Member States in the social field' (Article 118 EEC). Thus, whilst 'textually broad' it is arguable these original social policy provisions were 'legally shallow'.<sup>27</sup> It thus seems apposite to claim, as Stefano Giubboni does, that the 'apparent flimsiness' of the social provisions of the Treaty of Rome was deliberate.<sup>28</sup>

With hindsight, it became clear that the very process of economic liberalisation was placing demands on the ability of states to maintain living and working standards: there is arguably in the creation of a common market, pressure on national economies to deregulate to remain competitive, since national capacity to regulate markets is severely reduced due to removal of barriers to trade, mobility of capital and fear of capital flight. There has been an incremental development of a framework of basic minimum standards at EU level, in response to and justified by a complex set of rationales, only one of which was the need to protect against destructive downwards competition. The key observation here is that there has been a significant development of the EU social dimension, admittedly from a very low base. Nevertheless, the social harmonisation which has emerged has never been intended as a replacement for the more substantial social provision assumed to exist at national level. As the then president of the European Commission declared in 1986, 'the creation of a vast economic area, based on the market and business cooperation, is inconceivable – I would say unattainable –

<sup>23</sup> The social policy title has undergone radical revision since 1957. Following the coming into force of the Treaty of Lisbon on 1 December 2009, the EU's social policy provisions are now to be found in Title X, Articles 151-161 Treaty on the Functioning of the European Union (TFEU).

<sup>24</sup> Article 119 EEC is now, following the Treaty of Lisbon, Article 157 TFEU. See Catherine Barnard, 'The Economic Objectives of Article 119', in Tamara Hervey and David O'Keeffe (eds) *Sex Equality Law in the European Union* (Wiley, 1996).

<sup>25</sup> For instance, Article 120 EEC (now Article 158 TFEU) exhorts Member States to 'endeavour to maintain the existing equivalence between paid holiday schemes'.

<sup>26</sup> Article 117 EEC:

'Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained.

They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.'

<sup>27</sup> Catherine Barnard, 'Social Policy Revisited in the Light of the Constitutional Debate' in Catherine Barnard (ed) *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (OUP, 2007). See also Philippa Watson, *EU Social and Employment Law: Policy and Practice in an Enlarged Europe* (OUP, 2009) esp at 47: 'Articles 117-122 were vague and repetitious, conferring no real powers upon the Community institutions, and little by way of direct rights on Community citizens'.

<sup>28</sup> Stefano Giubboni, *Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective* (CUP, 2006) at 16.

without *some* harmonization of social legislation. Our ultimate aim must be the creation of a European social area'.<sup>29</sup> The approach, emerging over several decades and accelerating following the Treaty on European Union (TEU) in 1992, has been to build on the thin social policy provisions of the Treaty of Rome. Although the Single European Act (SEA) 1986 extended the use of 'qualified majority voting' (QMV) to measures relating to the health and safety of workers (i.e. denying the possibility for one Member State to veto a proposal by voting against it in the Council of Ministers), measures relating to 'the rights and interests of employed persons' still required the unanimous agreement of the Council. The SEA thus enabled the enactment of directives ostensibly concerned with health and safety, such as the Working Time Directive and the Pregnant Workers Directive,<sup>30</sup> but failed to provide a legal basis for broader social policy interventions. It was only with the TEU 1992 that the EC acquired the requisite Treaty base: a 'Protocol and Agreement on Social Policy' annexed to the TEU broadened the substantive scope of social policy at European level, and also made the process of enacting harmonising legislation more straightforward, through the extension of QMV. However, the United Kingdom's 'opt out' from this social policy chapter cast doubt on its legal status, until the Amsterdam Treaty finally brought together the various sources of EC/EU social law into a single chapter on social policy, to which all Member States are now subject.<sup>31</sup> What changed over this period was a greater political willingness among the Member States to accept that social law and policy were not solely national functions, alongside a newly emerging economic consensus that there could be an *economic* justification for labour standards to smooth the process of integration – hence the willingness to change voting procedures to facilitate the enactment of social law at European level.

This is not the place to recount the detail of the social policy measures at EU level since the Treaty of Rome,<sup>32</sup> suffice to say that the paucity of institutions of social citizenship at European level at the start of the project was a conscious choice. There have, since then, been various rationales to justify the successive waves of EU social policy intervention, from the instrumentalist (positing the economic value of transnational labour standards within the context of market integration), to the wider concern to respect fundamental rights. We have seen adjustment assistance, financial instruments and initiatives to address economic and social imbalances at European Union level, some of which have existed since the beginning of the European integration project, for example in the form of the European Structural Funds. There have been social security and residence rights for Community workers and EU citizens, and eventually a legal basis for broader social policy interventions. However, what is crucial is that attempts at EU level to shore up working and living standards in the face of economic liberalisation have principally taken the form of supporting the Member States in so doing. Legally,

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<sup>29</sup> Programme of the Commission for 1986, Statement by Jacques Delors, President of the Commission, to the European Parliament and his reply to the ensuing debate, Strasbourg, 19 February 1986, Bulletin of the European Communities, Supplement 1/86, at 9. Emphasis added.

<sup>30</sup> Working Time Directive, Council Directive 93/104/EC, O.J. L 307, 18; Pregnant Workers Directive, Council Directive 92/85/EEC, O.J. L 348, 1-8.

<sup>31</sup> Articles 136-145 EC Treaty – now Articles 151-161 TFEU. For further analysis, see Catherine Barnard, *EC Employment Law*, 3-26 (OUP, 3rd ed, 2006).

<sup>32</sup> For analysis, see Barnard n 31 above; Watson, n 27 above.

Member States share competence with the EU over social policy,<sup>33</sup> but the burden of financing the social transfers ameliorating trade liberalisation falls on the Member States.

### III CHALLENGES TO EMBEDDED LIBERALISM

What has changed over the years? My argument here is that the embedded liberal bargain has begun to unravel, for a number of reasons both within and without the scope of influence of the European integration project: the Lisbon strategy, austerity and challenges to the welfare state, enlargement, and the operation of the internal market.

The first set of reasons can be seen in the gradual change of policy emphasis which crystallised within the strategy launched at the 2000 European Council Summit in Lisbon. The compromise which has emerged as EU social policy has developed, between the free market and support for national labour law and social welfare systems, has always been an unstable one; but in my view, the Lisbon strategy or agenda has placed ever greater emphasis on the ‘market’. And in the past two decades, the focus has shifted away from employment protection: rather than protecting workers *from* the market, the emphasis is now on enabling them to strengthen their employability *within* the market. Emerging prior to the current wave of retrenchment or austerity policies introduced in response to the global financial crisis, the discourse emanating from the EU institutions in the original Lisbon strategy and the renewed Lisbon 2020 agenda has been to encourage Member States to ‘mobilise labour for growth’.<sup>34</sup> In other words, to flexibilise labour markets along with product markets; liberalise wage-setting mechanisms; and rethink unemployment benefit systems.<sup>35</sup>

Second, it is arguable that whilst European welfare states have come under increased pressure since the 1990s, more acute challenges to their sustainability have arisen in particular in the wake of the current global economic crisis.<sup>36</sup> The issue of the negative social consequences of the global financial crisis – the impact of the crisis on labour and employment laws and, conversely, how such laws may be utilised to mitigate or ameliorate the negative consequences of the crisis, and of related retrenchment or austerity programmes – is of course worthy of analysis in its own right, but is not the chief focus of this paper. What is noteworthy, though, is the interaction of the Lisbon strategy with responses to the recent crisis. Not surprisingly, austerity programmes have

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<sup>33</sup> Article 4(2) TFEU.

<sup>34</sup> Commission Communication, *The Annual Growth Survey 2012*, Brussels, 23.11.2011 COM(2011) 815 final, at 10.

<sup>35</sup> See, for example: Commission Communication, *The Annual Growth Survey 2012*, Brussels, 23.11.2011 COM(2011) 815 final, Annex III Draft Joint Employment Report; Council Recommendation of 12 July 2011 on the National Reform Programme 2011 of Belgium and delivering a Council Opinion on the updated Stability Programme of Belgium, 2011-2014, (2011/C 209/01); Council Recommendation of 12 July 2011 on the National Reform Programme 2011 of Portugal (2011/C 216/01); Council Recommendation of 12 July 2011 on the National Reform Programme 2011 of Greece (2011/C 213/04).

<sup>36</sup> Note that Vis and her co-authors identify a more nuanced response amongst selected welfare states to the financial crisis: an absence of any immediate radical retrenchment due in part to continued public support for the welfare state, and only more recently a turn to retrenchment: Barbara Vis, Kees van Kersbergen and Tom Hylands ‘To What Extent Did the Financial Crisis Intensify the Pressure to Reform the Welfare State?’ (2011) *Social Policy & Administration*, 338-353.

been criticised for the negative impact of tight fiscal discipline on institutions of social citizenship, on the social fabric in general, including labour law. As Claire Kilpatrick observes, through its fiscal discipline measures (in particular the Fiscal Compact Treaty of 2 March 2012) and its stabilisation mechanisms in the wake of the global financial crisis and the crisis within the Eurozone, the EU has become a key driver in the dismantling of social rights within Member States.<sup>37</sup> What may not have been foreseen by critics of austerity programmes is that even a countervailing focus on growth, as opposed to austerity,<sup>38</sup> is still likely to lead to dismantling of social rights at Member State level, since this may translate into growth predicated on cuts in benefits and employment protection for labour market ‘insiders’, as the ‘mobilising labour for growth’ mantra implies.

Third, one can point to the enlargement of the original EEC of six to an EU to twenty-seven states. The original six had been relatively homogenous in terms of having highly regulated labour markets and industrial relations systems. Whilst enlargement to the UK, Denmark and Ireland in the 1970s had brought into the Community states with divergent welfare state models,<sup>39</sup> nevertheless, these were states marked by high social regulations, social transfers, public services and public infrastructure. The story with subsequent enlargements is *not* a simplistic one of non-existent welfare states in the new, post-2004 member states. But it is true to say that the heterogeneity of the Member State welfare models following recent waves of enlargement undermines the effectiveness of the embedded liberal bargain in absorbing the adjustment costs of either market integration, or of global trade.

The fourth reason, which will be the focus of the remainder of this article, relates to the evolution of the internal market and the role of the Court in this. The contention is that the recent jurisprudence of the Court of Justice of the European Union, since its decisions in *Viking*<sup>40</sup> and in particular in *Laval*<sup>41</sup> has run counter to, and served to undermine, the foundational settlement referred to as the embedded liberal compromise.<sup>42</sup> That is because this internal market reasoning has difficulty

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<sup>37</sup> Claire Kilpatrick, ‘Can Fundamental Rights Resocialize Europe’ paper presented to the conference on ‘Resocializing Europe and the Mutualization of Risks to Workers’ 18-19 May 2012, University College London.

<sup>38</sup> See Paul Krugman, *End This Depression Now!*, W. W. Norton & Co. 2012; ‘Austerity and Growth’, 18 February 2012, <http://krugman.blogs.nytimes.com/2012/02/18/austerity-and-growth/>; ‘Austerity And Growth, Again (Wonkish)’, 24 April 2012, <http://krugman.blogs.nytimes.com/2012/04/24/austerity-and-growth-again-wonkish/>.

<sup>39</sup> ‘Anglo-Saxon’ and ‘Scandinavian’ in contrast to the ‘Continental’ model dominant in existing Member States. With reference to Esping-Anderson’s taxonomy of welfare state models, Denmark could be characterised as representing the ‘Social Democratic’ or ‘Scandinavian’ model, the UK and Ireland the ‘liberal or ‘Anglo-Saxon’ model, with the original six Member States conforming to the ‘Christian Democratic’ or ‘Continental’ model: Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press, 1990). To Esping-Andersen’s three regime types, a fourth can now be added: the ‘Mediterranean’ or ‘Southern’ model. See analysis in Fritz Scharpf, ‘The asymmetry of European integration, or why the EU cannot be a ‘social market economy’’ (2010) 8 *Socio-Economic Review*, 211-250.

<sup>40</sup> Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line* [2007] ECR I-10779.

<sup>41</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

<sup>42</sup> See Christian Joerges, ‘Will the welfare state survive European integration?’ (2011) I *European Journal of Social Law*, 4-19, especially at 13:

accommodating the pluralism or variety of the national industrial relations regimes, and has begun to challenge the varieties of institutional structures in which liberalised markets are embedded.

The Court, it will be argued, could be said to be engaging in its own ‘double movement’ in its attempt to embed the market in a distinctly different conception of the social. As will be seen, the Court’s market-creation or market-expansion mode has extended to include an application of its ‘classic’ internal market case law and ‘restrictions’ approach to the field of collective labour rights, followed by a subsequent swing towards a form of social citizenship, in expanding the rights of EU citizens to access welfare benefits and health care systems previously thought the preserve of nationals.

### A. The ‘restrictions’ approach of the Court of Justice

As will be familiar to scholars of the EU market integration project, the extension of the scope of internal market law through ‘negative integration’ and the principle of mutual recognition soon gave rise to the potential for a clash between social policy at national level and the principles of the internal market. Over the decades, policy areas previously believed to be the preserve of national regulatory autonomy have become enmeshed in the logic of the internal market. The Court of Justice, initially in its decisions on free movement of goods, and subsequently in decisions on free movement of workers, services and the freedom of establishment, promoted a ‘negative’ form of market integration. This was done by applying internal market law to strike down a wide range of national rules which were found to have an adverse affect on the free circulation of economic resources and hence on inter-state trade.<sup>43</sup>

Conflict between the values of national level labour law or social policy on the one hand, and market integration and competition policy at EU level on the other was scrutinised in a series of Court of Justice decisions during the 1990s which illustrated that the Court is, on occasion, willing to admit of circumstances where EU internal market and competition law does not apply, where it is prepared to accept that the principle of solidarity is sufficient to insulate certain social policies from their reach.<sup>44</sup> The Court recognised, in *Albany*, that collective agreements could theoretically restrict competition, but that since the Treaty as a whole also recognises social policy objectives, and promotes freedom of association and collective bargaining, then such agreements must be regarded as falling outside the scope of what is now Article 101(1) of the Treaty on the Functioning of the European Union. This was an important

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What we can more safely assume is that the negotiators operated on the assumptions of the same kind of vaguely presumed ‘embedded liberalism’ and the sustainability of the foundational constellation, so that the protagonists of welfare policies could live with the compromise which the negotiations had accomplished.

<sup>43</sup> See Report from the Commission of the European Communities, *Second Biennial Report on the Application of the Principle of Mutual Recognition in the Single Market*, COM(2002) 419 final; Miguel Poiates Maduro, ‘So close and yet so far: the paradoxes of mutual recognition’ (2007) 14 *Journal of European Public Policy* 814-825.

<sup>44</sup> Case C-41/90, *Klaus Höfner and Fritz Elser v Macroton GmbH* [1991] ECR I-1979; Cases 159 & Case C-160/91, *Poucet and Pistre* [1993] ECR I-637; Case 67/96, *Albany International BV* [1999] ECR I-5751. The following discussion draws on Diamond Ashiagbor, *The European Employment Strategy: Labour Market Regulation and New Governance* (OUP, 2005) 273-276.

recognition of the legitimacy of collective bargaining (and social policy) within the European legal order<sup>45</sup> and some recognition of its autonomy, even though this autonomy was to some extent circumscribed.

Others have explored in detail the reasoning in *Laval* in respect of the operation of Treaty provisions on freedom to provide services, and in *Viking* with regard freedom of establishment.<sup>46</sup> The approach adopted in these cases to the reconciliation of market freedoms with social rights – in particular collective labour rights and foremost amongst these, the right to strike – epitomises the struggle to reconcile competing values within the ‘social market’ of the European integration project. The first battle within these cases was over whether certain labour market or social policies (what I would refer to as institutions of social citizenship at national level) could be insulated from the reach of EU internal market law. On several occasions, Member State governments – and organisations such as trade unions – have argued before the Court that national rules governing a given policy area fall entirely out with the scope of the internal market law, for example because they concern national constitutional principles, social security provision in the gift of the Member State, public provision of medical services, or are based on non-market values such as solidarity. As for *Viking* and *Laval*, in both cases, the trade unions (and some Member State governments) argued that collective action taken by a trade union should be outside the scope of EU internal market law, on the basis that application of these free movement provisions would undermine the right of workers to bargain collectively and to strike with a view to achieving a collective agreement and, further, that the right of association and the right to strike are protected as fundamental in various international agreements, which EU law respects.<sup>47</sup> The Court has, however, consistently used such opportunities presented by the litigation to insist on a broad reading of internal market law, refusing to permit the solidarity and other arguments to exempt areas of national policy-making from the reach of internal market law.<sup>48</sup>

Second, the question arose as to the applicability of trade law within the private sphere, i.e. whether individuals, corporations, private associations or trade unions are to be included within the circle of addressees of the internal market law. The Court repeated previous jurisprudence on the horizontal effect of Treaty provisions, to the effect that provisions on free movement (of workers, enterprises and service providers) applied not only to the actions of public authorities; not just to bodies exercising a regulatory or quasi-public role, but also to those responsible for rules or agreements seeking to regulate paid work collectively.<sup>49</sup>

<sup>45</sup> See Catherine Barnard & Simon Deakin, ‘In Search of Coherence: Social Policy, the Single Market and Fundamental Rights’ (2000) 31: 4 *Industrial Relations Journal*, 331-345 see especially 331-337.

<sup>46</sup> Article 49 EC on freedom to provide services is now Article 56 TFEU; Article 43 EC on freedom of establishment is now Article 49 TFEU. See Phil Syrpis and Tonia Novitz, ‘Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation’ (2008) *European Law Review*, 411; A.C. L. Davies, ‘One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ’ (2008) *Industrial Law Journal*, 126; Diamond Ashiagbor, ‘Collective Labor Rights and the European Social Model’ (2009), *Law & Ethics of Human Rights*, 222-266..

<sup>47</sup> See Opinion of AG Maduro, *Viking Line*, at para. 20.

<sup>48</sup> *Viking*, para 55; *Laval*, paras 88-95.

<sup>49</sup> *Viking*, paras 64-66. For further analysis, especially on competing approaches to the applicability of free movement rules to private actors, the circumstances in which private action can be said to

The third disputed terrain relates to the question whether national policy – now open to scrutiny by reference to internal market principles – impedes or interferes with trade, or with the building or operation of the market. For both service providers and individuals or companies seeking to establish in another Member State, the Court’s case law increasingly began to take market access into account, finding that even non-discriminatory measures could in principle breach the Treaty if they were liable to prevent or otherwise impede access to the market, or make less attractive the exercise of the commercial freedom granted by the Treaty.<sup>50</sup> Such a broad conception of internal market law inevitably means that national measures which disrupt commercial freedom will routinely be treated as sufficiently obstructive of trade, even where they apply to domestic and foreign traders alike and do not put foreign traders or businesses at any disadvantage. And so it is with the exercise of the right to strike: the Court in *Viking* held that collective action by a trade union to induce an undertaking, Viking, to enter into a collective agreement, had the effect of ‘making less attractive, or even pointless’ Viking’s exercise of its right to freedom of establishment. Collective action to implement the union’s ‘flags of convenience’ policy, in seeking to prevent ship owners located in one country from ‘re-flagging’ (registering their vessels in another State, typically to reduce wage costs) was at least liable to restrict Viking’s exercise of its right of freedom of establishment.<sup>51</sup> Similarly, in *Laval*, the Court held that collective action by Swedish trade unions to compel undertakings established in other Member States to sign a collective agreement, granting posted workers more favourable terms and conditions of employment, was liable to make it less attractive, or more difficult, for such undertakings to ‘post’ these workers to carry out work in Sweden, and therefore constituted a restriction on their freedom to provide services.<sup>52</sup>

And if it is found that internal market law is triggered by collective or industrial action, it will be necessary move to the final stage of the Court’s methodology: for the Court to engage in a balancing act between two sets of rights which might equally claim to be ‘fundamental’ to the European project – freedom to provide services or freedom of establishment on the one hand, versus (collective) social rights on the other. A restriction on free movement rights is warranted only if it pursues a legitimate objective compatible with the Treaty, and is justified by overriding reasons of public interest. Further, the restriction must be proportionate, i.e. suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary to attain it.<sup>53</sup> In relation to strike action, the Court of Justice in *Laval* and *Viking* provided a clear statement of the recognition of the right to strike in EU law, but subject this right to potentially debilitating limitations. In particular, whilst accepting that the market rights under the Treaty must be balanced against the objectives pursued by social policy, nevertheless the proportionality assessment applied to judge the legality of collective action was such that it is difficult to envisage strike action which interferes with exercise of a free movement right being readily justified. As far as the Court is

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‘trigger’ application of the free movement rules, see Ashiagbor, n 46 above, at 243-247.

<sup>50</sup> With regard to services see Case C-76/90, *Säger v Dennemeyer*, 1991 ECR 4221, para. 12; with regard to establishment: Case C-55/94, *Gebhard*, 1995 ECR I-4165, para. 37.

<sup>51</sup> *Viking*, paras 72-73.

<sup>52</sup> *Laval*, para 99.

<sup>53</sup> *Viking*, para. 75; *Laval*, at para. 101.

concerned, to satisfy the requirement that its resort to strike action was proportionate, a trade union would need to show it had pursued other forms of action, short of strike, which were less restrictive of freedom of establishment. Strike action is, in effect, valid only as a weapon of last resort. The effect of the standard of scrutiny in such cases being so strict is to negate the very substance of one of the rights the Court is seeking to balance.

## **B. The context of the Posted Workers Directive**

The Posted Workers Directive of 1996 was to some extent an attempt to reach a compromise between state sovereignty over labour market regulation and concerns about the impact of such regulation on free movement, in particular, the provision of cross border services.<sup>54</sup>

Prior to the Directive, the Court of Justice initially adopted what could be called a strong conflicts of law approach to the possibility of service providers making full use of any comparative advantage with regard to lower labour costs. In its 1990 decision in *Rush Portuguesa*, the Court had interpreted Article 49 EC [now Article 56 TFEU] to prohibit Member States preventing service providers established in another state from moving freely, with their staff.<sup>55</sup> However, in response to concerns about social dumping, in particular those expressed by the French government, the Court also held, without fully explaining its reasoning, that:

Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means.<sup>56</sup>

So, Article 49 EC protected movement rights; it did not – at this stage at least – extend to granting those undertakings which had exercised their free movement rights an effective ‘immunity’ from the application of national labour laws. The difficulty with this assertion is that this finding was not strictly necessary for a determination of the questions asked of the Court in *Rush Portuguesa*. But what this did do was to give Member States the assurance that they were free to impose their domestic labour standards on incoming foreign enterprises. In subsequent case law, the Court retreated somewhat from the stark position articulated in *Rush Portuguesa*.<sup>57</sup> It adopted a more nuanced and structured approach, acknowledging that, in line with its ‘restrictions’ or ‘market access’ approach with regard to much of the personal freedoms, it would be necessary to examine whether the host state’s regulatory framework imposed requirements on the service provider which restricted the freedom to provide services,

<sup>54</sup> See Paul Davies, ‘The Posted Workers Directive and the EC Treaty’ (2002) 31: 2 *Industrial Law Journal*, 298-306.

<sup>55</sup> Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, para 12.

<sup>56</sup> *Rush Portuguesa* para 18.

<sup>57</sup> See Case C-165/98 *Mazzoleni* [2001] ECR I-2189; Joined Cases C-369/96 and C-376/96 *Arblade and Leloup* [1999] ECR I-8453; Joined Cases C-49/98, C-50/98, C-52-54/98, C-68-71/98 *Finalarte* [2001] ECR I-7831.

and if so, whether such restriction could nevertheless be justified. Nonetheless, it would still be true to say that there remained a strong presumption that host states were free to regulate and to apply their domestic labour laws. So, for example, *Mazzoleni* (2001) and *Arblade* (1999) suggest that the host state may be justified in requiring a service provider to pay its workers minimum wages laid down in the host state's legislation or collective agreements, provided the terms of such collective agreements were sufficiently precise and accessible.

The approach adopted by the Court of Justice in *Rush Portuguesa* would seem to challenge that required by the principles of private international law. The 1980 Rome Convention has been replaced by an EU Regulation of 2008 (Rome I),<sup>58</sup> but the default position under both is the same: namely that the law of the country in which the employee habitually carries out his work will govern the employment contract, even if he is temporarily employed in another country.<sup>59</sup> The assumption under the Rome Convention/Regulation is therefore that temporarily posted workers will be subject to the labour law of their *home* state. It is against this backdrop that the Posted Workers Directive intervenes, to construct what initially appeared to be a clear exception to the treatment of temporary or posted workers under the Rome Convention/Rome Regulation.

Subsequently, when Article 3 (1) of the Posted Workers Directive stated that 'Member States shall ensure that, *whatever the law applicable to the employment relationship ...* undertakings ... guarantee workers posted to their territory' the terms and conditions of employment laid down nationally, most Member States freely interpreted this as allowing them to require enterprises posting workers into their territories to respect local legislation and collective agreements. Accordingly, most also adopted an interpretation of the Posted Workers Directive as reinforcing the Court's approach in *Rush Portuguesa*. Indeed the 12th recital to the Directive repeats almost word for word the position of the Court in *Rush Portuguesa* that Member States can apply local labour legislation or collective agreements to those working, even temporarily, on their territory.<sup>60</sup>

One of the aims of the Posted Workers Directive, according to the 13th recital, is to ensure that undertakings which post workers temporarily to another Member State observe 'a nucleus of mandatory rules for minimum protection' of those workers. With respect to a 'hard core' of employment protection rights – defined by Article 3(1) of the Directive to include, *inter alia*, health and safety, maximum working hours and minimum wages – the position under the Rome Convention/Regulation is overturned, since Member States have discretion to rely on national law, regulation, administrative

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<sup>58</sup> 80/934/EEC Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, OJ L 266, 9.10.1980 (the 'Rome Convention'); Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177/6, 4.7.2008.

<sup>59</sup> Article 6(2) of the Rome Convention and Article 8(2) of the Rome Regulation.

<sup>60</sup> Posted Workers Directive, Recital 12: 'Whereas Community law does not preclude Member States from applying their legislation, or collective agreements entered into by employers and labour, to any person who is employed, even temporarily, within their territory, although his employer is established in another Member State; whereas Community law does not forbid Member States to guarantee the observance of those rules by the appropriate means'.

provision, and/or collective agreements or arbitration awards to implement minimum terms and conditions for posted workers, provided such collective agreements or awards have been declared universally applicable. The Directive allows for three ways in which a host state may set a minimum rate of pay. First, by *law, regulation or administrative provision*.<sup>61</sup> Second, by collective agreements which are *universally applicable*.<sup>62</sup> And third, (for those states such as Sweden where it isn't possible to declare collective agreements universally applicable) minimum standards/pay can be set by other types of *broadly applicable collective agreements*. Article 3(8), second subparagraph envisages either: collective agreements which are generally applicable to all similar undertakings in a geographical area and industry; and/or collective agreements which have been concluded by the most representative employers' and labour organisations at national level.

It is arguable that, pre-*Laval*, a reasonably safe interpretation of the Posted Workers Directive was that it set a floor of rights, on which host states could build. That host states could impose labour standards higher than the minimum floor set out in Art 3(1) of the Directive, up to the ceiling imposed by Article 49 EC (now Article 56 TFEU). However, the Court has over time adopted a marked retreat from the position in *Rush Portuguesa*, culminating in the decisions in *Laval*, *Rüffert* and *Commission v Luxembourg*.<sup>63</sup> As a result, it would seem that the Posted Workers Directive is now itself the ceiling.

### C. The Court of Justice and pluralism in national industrial relations

What is of interest is the impact the Court's jurisprudence – primarily on the Posted Workers Directive, but also more broadly – is having on the territorial application of national labour law, in particular the Court's reluctance to recognise the applicability of host state labour standards. The Court's interpretation of that Directive serves as a useful case study of what one could see as its inability to deal with pluralism within national systems of social welfare and industrial relations, but its reasoning on collective rights and collective bargaining in *Commission v Germany* is equally salient.<sup>64</sup>

The problem in *Laval* was that the Court considered the 1999 Swedish act on posted workers failed adequately to set minimum rates of pay in accordance with one of the three mechanisms for setting minimum standards envisaged by the Directive.<sup>65</sup> The Court's overly restrictive approach in and since *Laval* serves to flatten out or disregard the diversity within national systems of social welfare and industrial relations, and the complexities of systems of collective bargaining. Claire Kilpatrick refers to the Court's inability to deal with 'normative pluralism in labour standard-setting' in the Member States, especially in relation to 'two-tier' bargaining where there is coordination

<sup>61</sup> Article 3(1) Posted Workers Directive.

<sup>62</sup> Article 3(8) Posted Workers Directive.

<sup>63</sup> Case C-346/06 *Rüffert* [2008] ECR I-1989; Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323. See Paul Davies, Comment on *Rüffert* (2008) 37:3 *Industrial Law Journal*, 293-295.

<sup>64</sup> Case C-271/08 *Commission v Germany* [2010] ECR I-7091; see below.

<sup>65</sup> For a discussion, see Claire Kilpatrick, 'Laval's regulatory conundrum: collective standard-setting and the Court's new approach to posted workers' (2009) *European Law Review*, 844-865.

between local and central collective bargaining over pay.<sup>66</sup> In both *Laval* and *Rüffert*, because a collective agreement, rather than legislation set the minimum wage, the Court would not accept the law as a minimum wage-setting mechanism for the purposes of Article 3(1).

On the facts of *Laval*, in which minimum wages for posted workers were set by state-sanctioned workplace-level collective bargaining conducted under the shadow of collective action, the Court of Justice accepted that collective action which restricted free movement rights was in principle justifiable. However, having held that strike action to protect workers from ‘social dumping’ was a legitimate aim,<sup>67</sup> the Court nevertheless found the unions’ action disproportionate: a blockade designed to ‘force’ an undertaking to negotiate on rates of pay in the absence of clear or precise national provisions which would enable the undertaking to predict its obligations in advance could not be justified in the public interest. The Court was sympathetic toward the employing undertaking on the ground that it would be subject to the unreasonable or unconscionable burden of having to negotiate with trade unions under conditions of uncertainty as to the outcome of such bargaining. However, this suggests a, perhaps wilful, refusal to acknowledge the unique nature of collective bargaining, a process of negotiation which is unavoidably open-ended, and a rejection of one of the core rationales for collective bargaining, namely as a legitimate process for collective decision-making and setting of wages.

In a non-posted workers case, *Commission v Germany*, the Court is, however, more nuanced: there is an express acknowledgment of the ‘diversity of national systems’ of industrial relations but ultimately, the Court still imposes its own, narrow, conception of the substance or essence of the collective rights at issue. This case concerned a collective agreement between local authority employers’ associations and the largest public sector trade union in Germany, designed to enhance the level of workers’ retirement pensions. Among other arguments, the German government contended that EU public procurement law (Directives 92/50 and 2004/18) did not apply to the agreements awarding these pensions contracts because to do so would be contrary to the autonomy of management and labour protected in Article 9(3) of the German Basic Law. The Court went to lengths to explain why *Albany* did not apply to the internal market. In *Albany*, it had been held that despite the restrictions of competition inherent in them, collective agreements between organisations representing employers and workers were exempt from EU anti-trust provisions.<sup>68</sup> However, in *Commission v Germany* this collective right – even a right enjoying constitutional protection – could not in this instance justify an exemption from EU public procurement law. Beginning with a clear acknowledgment that the right to bargain collectively is a fundamental right in EU law,<sup>69</sup> the Court also took note of Article 152 TFEU, which states that the EU recognises and promotes the role of the social partners, and takes into account the ‘diversity of national systems’. But the Court has its own particular grasp on what is

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<sup>66</sup> Ibid, at 853-854.

<sup>67</sup> *Laval*, para 103.

<sup>68</sup> *Commission v Germany*, para 45.

<sup>69</sup> A point subsequently confirmed in *Rosenbladt*: Case C-45/09 *Gisela Rosenbladt v Oellerking Gebäudereinigungsges. mbH*, judgment of 10 October 2010, not yet reported.

required to respect this national diversity, and to elaborate on the now familiar balancing between collective social rights and free movement or market rights. In paragraph 52 of its judgment, the Court referred to the need to reach a ‘fair balance’ between economic and social values, but ultimately echoed the asymmetrical approach in *Viking* and *Laval*, whereby social rights were deployed as a ‘exception rule’ to the logically prior market rights. In contrast, the Advocate General in *Commission v Germany* offered the tantalising prospect of a symmetrical approach, before reverting in her conclusion to the familiar privileging of market rights. Starting with the idea of the equal ranking for conflicting fundamental *rights* (e.g. the right to strike) and fundamental *freedoms* (e.g. freedom of establishment),<sup>70</sup> Advocate General Trstenjak proposed that such rights and freedoms exist as ‘mirror images’ such that economic freedoms may equally be required to give way to social rights.<sup>71</sup>

In the view of the Court, the process of recognising collective social rights to the extent that they could justify restrictions on market rights nevertheless meant that the *essence* of the right to bargain collectively was respected. It’s arguable, though, that greater deference to Member State choices is shown where the countervailing values to those of the market relate to what might be described as moral choices of a state. It’s instructive to contrast the approach in *Commission v Germany* and *Laval* with that adopted in a decision such as *Omega*.<sup>72</sup> There, in a case involving respect for human dignity, the Court recognised that Member States may legitimately differ as to the precise way in which a fundamental right or legitimate interest is to be protected.<sup>73</sup> *Omega* concerned German prohibitions on the commercial exploitation of British laser/video games involving the simulation of acts of violence against persons. The Court considered that, since both the EU and the Member States respected fundamental rights, the protection of those rights was a legitimate interest capable of justifying restriction on fundamental freedom such as freedom to provide services, but measures which restrict the freedom to provide services could be justified on public policy grounds only if they were proportionate, i.e. necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures. Crucially, however, in these cases involving the proportionality of Member State action, the Court adopts a non-majoritarian standard:

It is not indispensable... for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected... On the contrary... the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State.<sup>74</sup>

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<sup>70</sup> *Commission v Germany*, Opinion of AG Trstenjak, para 195.

<sup>71</sup> *Commission v Germany*, Opinion of AG Trstenjak, para 199. See Phil Syrpis, ‘Reconciling Economic Freedoms and Social Rights – The Potential of *Commission v Germany* (Case C-271/08, Judgment of 15 July 2010)’ (2011) *Industrial Law Journal*, 222-229

<sup>72</sup> C-36/02 *Omega* [2004] ECR I-9609.

<sup>73</sup> *Omega*, para 37.

<sup>74</sup> *Omega*, paras 37-38.

A state's regulatory choices may still be necessary and proportionate, even where it adopts a system of protection different from all other states.<sup>75</sup> So, there is no 'one size fits all' when it comes to protection of the commonly held value of human dignity; here, the Court is happy to eschew a majoritarian standard. However, in *Commission v Germany*, the Court appears to find that there is only one way to respect the essence of the right to collective autonomy, negating the reality of the diversity of ways in which collective autonomy is respected in the Member States.

This evidences a deep suspicion of, or reluctance to accept, collective action as a means of setting standards within the labour market generally, and especially in the case of posted workers.<sup>76</sup> Whilst not explicitly spelt out in these cases involving collective social rights, there is clearly an anxiety, on the part of the Court, over protectionism: a wariness that respecting national diversity in social rights, in particular collective labour rights where standard-setting may be devolved to non-state actors, risks insulating national markets from cross-border competition. What this means in practice is a major intrusion into national labour market models, in particular in those member states which hold the notion of collective autonomy dear. Such mechanisms for collective setting of standards are rooted in a national institutional framework and a distinctive national systems of employment regulation.<sup>77</sup> It's clear that the Court struggles to accept legal pluralism, not only with regard to diversity between states, but also with regard to who sets labour norms within a given member state.<sup>78</sup> So, in member states such as Sweden or Germany where binding norms are routinely set by means of the process of collective bargaining rather than through legislation, the national systems are particularly susceptible to challenge via the application of internal market law: the further away one is from state-set norms, the more the Court feels able to intervene, and to declare any restriction on free movement rights to be unjustified.

#### IV POLANYI IN BRUSSELS?

What these cases reflect is the Court's attempt to grapple with an issue over which the political institutions are similarly engaged: how to promote market liberalisation without undermining the social values which national governments are perhaps best placed to protect. However, I am not convinced that EU-level institutions – either the Court of Justice or the legislative institutions – are predisposed to or capable of 're-embedding' the market in a supranational version of the social.

##### A. A 'fair balance' between social rights and economic freedoms

Indeed, an ongoing political response to this debate over reconciling social rights and economic freedoms can be seen in the attempt to re-cast the single market project. The 'Monti Report' of 2010, aimed at relaunching the Single Market,<sup>79</sup> was followed by a

<sup>75</sup> Here, the Court in *Omega* refers to Case C-124/97 *Läärä and Others* [1999] ECR I-6067, para 36; Case C-67/98 *Zenatti* [1999] ECR I-7289, para 34; Case C-6/01 *Anomar and Others* [2003] ECR I-8621, para 80.

<sup>76</sup> Kilpatrick, n 65 at 854.

<sup>77</sup> See Hyman, n 19 at 288.

<sup>78</sup> I owe this observation to Claire Kilpatrick.

<sup>79</sup> Mario Monti, *A new strategy for the single market: At the service of Europe's economy and society*, 9

Commission proposal for a new Single Market Act, and more specific legislative proposals designed to improve the implementation of the Posted Workers Directive,<sup>80</sup> and aimed at ‘clarifying’ the exercise of fundamental social rights within the context of the economic freedoms of the single market.<sup>81</sup> In the view of the Monti Report:

a clarification on these issues should not be left to future occasional litigation before the ECJ or national courts. Political forces have to engage in a search for a solution, in line with the Treaty objective of a ‘social market economy’.<sup>82</sup>

My principal interest in this paper is precisely in the role which litigation and adjudication has played, given the Court’s earlier interventions, and the fact that it will continue to be the final arbiter of the interpretation of the Treaty and any secondary legislation. Nevertheless, there has unsurprisingly been intensive debate following the ‘*Laval* quartet’ of cases,<sup>83</sup> and this political response to the tone set judicially is central to an understanding of how the EU integration project as a whole attempts to reconcile social rights and economic freedoms. With regard to the posting of workers, the proposed new enforcement directive is intended to complement the existing Directive, to clarify its implementation, strengthen dissemination of information on the rights and obligations of workers and companies, administrative cooperation and sanctions.<sup>84</sup> The proposed Regulation on the right to take collective action in the context of the internal market (dubbed the Monti II Regulation)<sup>85</sup> acknowledges that there is no inherent conflict between the exercise of the fundamental right to take collective action and the freedom of establishment and the freedom to provide services. But it nevertheless

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May 2010, available at [http://ec.europa.eu/internal\\_market/strategy/index\\_en.htm](http://ec.europa.eu/internal_market/strategy/index_en.htm). Former EU Commissioner (Internal Market, Financial Services and Financial Integration, Customs, and Taxation Commissioner from 1995-1999; Competition Commissioner from 1999-2004) and prime minister of Italy since November 2011, Mario Monti was requested by the European Commission in 2009 to investigate options for the re-launch of the Single Market.

<sup>80</sup> Commission Communication, *Towards a Single Market Act. For a highly competitive social market economy 50 proposals for improving our work, business and exchanges with one another*, COM(2010) 608 final Brussels, 27.10.2010: Proposal No 30 of this Communication announced the Commission would adopt a legislative proposal to improve implementation of the Posting of Workers Directive.

<sup>81</sup> Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (known as the Draft Monti II Regulation), COM(2012) 130 final Brussels, 21.3.2012; Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services COM(2012) 131 final Brussels, 21.3.2012.

<sup>82</sup> Monti Report, n 79 at 69.

<sup>83</sup> *Viking; Laval; Ruffert; Commission v Luxembourg*. For a flavour of the positions and proposals from the EU institutions (in particular the European Parliament) and the social partners, see the Commission’s Explanatory Memorandum to the Proposal for a Council Regulation on the right to strike, n 81 above, especially at 2-8.

<sup>84</sup> COM(2012) 131 final Brussels, 21.3.2012, n 81 above.

<sup>85</sup> The Proposal for a Council Regulation on the exercise of the right to take collective action of 21 March 2012 has been named ‘Monti II’ since it mirrors a similar proposal introduced by Mario Monti during his tenure as internal market commissioner: this proposal became Council Regulation 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States, the aim of which was to remove obstacles to the free movement of goods - including those caused by private individuals. However, the 1998 Regulation took pains to clarify (in Article 2) that the Regulation should not be interpreted as ‘affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike’.

proceeds to re-affirm the balance between these competing values drawn in *Viking* and *Laval*, and in particular, to leave intact the proportionality assessment applied in these cases.<sup>86</sup> Neither legislative measure has been welcomed by the social partners, with both the peak level confederations rejecting the proposed Monti II Regulation in particular.<sup>87</sup>

Scholarly reaction to the draft Regulation has been scarcely less favourable.<sup>88</sup> As a response to such major ‘fault lines ... between the single market and the social dimension at national level’<sup>89</sup>, the Monti II Regulation is something of a disappointment, as it barely moves the debate on from the Court’s existing jurisprudence. Perhaps unsurprisingly, the Monti II Regulation rejected calls from trade unions for a ‘social progress’ clause or protocol to be inserted into the EU treaties.<sup>90</sup> In anticipation of the coming into force of the Lisbon Treaty in 2009, the ETUC proposed, in effect, a constitutionalisation of fundamental social rights at EU level, granting them *higher* status than the economic freedoms: ‘in case of conflict [with economic freedoms or competition rules] fundamental social rights shall take precedence’.<sup>91</sup> Such a protocol would essentially ‘immunise’ the right of strike, as recognised at national level, from the impact of single market rules.<sup>92</sup> The model for this was the 1998 Council Regulation on the functioning of the internal market in relation to the free movement of goods, Article 2 of which made clear that in removing obstacles to the free movement of goods (including those caused by private individuals) the Regulation should not be interpreted as ‘affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike’. However, the draft Monti II Regulation simply restates the ‘fair balance’ (to adopt the language of *Commission v Germany*) between social rights and economic freedoms as defined in *Viking* and *Laval*, namely to the detriment of collective labour rights such as the right to strike.<sup>93</sup>

If by Polanyi’s concept of the double movement, we understand a regulatory rejoinder to free markets, then it is certainly true to say that markets are being anchored within institutional regulation at EU level. However, there are political limits to the European project which militate against what could be a genuine ‘counter-movement’ to mitigate

<sup>86</sup> COM(2012) 130 final, Recitals 11-13 of the proposed Regulation.

<sup>87</sup> Business Europe, representing (mainly private sector) employers and employers’ organisations considers the proposed Regulation superfluous, given that ‘ECJ rulings have provided legal clarity’: Business Europe, Policy Briefing on Posting of Workers, 3 April 2012, available at <http://www.bussinesseurope.eu/>. ETUC (European Trade Union Confederation) Press Release, 21 March 2012 ‘ETUC says no to a regulation that undermines the right to strike’; ETUC Declaration on the Commission proposals for a Monti II Regulation and Enforcement Directive of the Posting of Workers Directive, 19 April 2012; both available at <http://www.etuc.org/>.

<sup>88</sup> Keith Ewing, ‘The Draft Monti II Regulation: An Inadequate Response to *Viking* and *Laval*’ Institute of Employment Rights Briefing, March 2012, available at: [www.ier.org.uk](http://www.ier.org.uk); Niklas Bruun and Andreas Bucker, ‘Critical assessment of the proposed Monti II regulation – more courage and strength needed to remedy the social imbalances’ ETUI Policy Brief, No 4/2012, available at <http://www.etui.org/>.

<sup>89</sup> Monti Report, n 79 at 68.

<sup>90</sup> ETUC Proposal for a ‘Social Progress’ Protocol, 6 July 2009, available at <http://www.etuc.org/a/5175>.

<sup>91</sup> *Ibid.*, Article 3(1).

<sup>92</sup> Monti Report, n 79 above at 69.

<sup>93</sup> Furthermore, it is arguable that the *Viking* and *Laval* jurisprudence is now unsound in light of subsequent decisions of the European Court of Human Rights on the right to collective bargaining and the right to strike; and that the compatibility of the Monti II Regulation with the ECHR is similarly suspect. See Ewing, and Bruun & Bucker, both n 88 above.

the expansion of the market or to prevent commodification of labour. Successive efforts to deepen integration – such as the relaunching of the internal market programme through the Single European Act 1986, the move to monetary union and the (supposed) discipline of Economic and Monetary Union, the fiscal constraints of the Stability and Growth Pact – all serve to outweigh any countervailing tendencies towards social Europe. The asymmetry exists at political level as well as within judicial discourse.<sup>94</sup> Whilst acknowledging that a Polanyian *counter*-movement need not necessarily take the form of a *social* movement, such as trade unionism, my argument, briefly stated, is that a societal response at this EU regional level will, by necessity, be muted: market governance at EU level cannot be said to amount to a re-embedding of the social.

## B. The Court's 'double movement'?

Turning back to the Court, my argument here is not that the embedded liberal bargain can *never* be struck at supranational level. But rather, that the *judicial* efforts we can observe to re-embed the market have done so within a version of the social based on a narrow conception of social citizenship which is potentially destructive of the national version. James Caporaso and Sidney Tarrow offer the helpful insight that thinking about movements and countermovements in the Polanyian sense need not be restricted to traditional social movements, but also includes 'shifts in cultural and ideological paradigms', whether statist or non-state.<sup>95</sup> On reviewing the Court's case law, they go further, and declare that the Court has

intervened between the European free-market regime and domestic structures to begin to create ... a structure of supranational embedded liberal compromises... [and that it has] both worked to perfect markets and gone beyond market-making to embed the market in what it considers the legitimate social purpose of protecting the rights of workers and their families.<sup>96</sup>

Caporaso and Tarrow undertake a study of the case law on rights and benefits conferred on EU migrant workers and their families, and conclude that the Court has created an international system of social protection through its creative interpretation of the Treaty and secondary legislation. This is an interesting thesis and, whilst their paper does not review the Court's interpretation of the citizenship provisions introduced by the TEU, it is valid to the extent that the Court has undoubtedly played a vital role in giving substantive meaning to the rights of individuals by virtue of their membership of a political community (as EU citizens) rather than by virtue of their cross-border economic activity.<sup>97</sup> Nevertheless, this jurisprudence is an insufficient basis from which

<sup>94</sup> 'Within these conditions of European asymmetric multi-level governance, socio-economic policy-making is structurally biased towards policies of neoliberal restructuring': Bastiaan van Apeldoorn, 'The Contradictions of "Embedded Neoliberalism" and Europe's Multilevel Legitimacy Crisis: The European Project and Its Limits' in Bastiaan van Apeldoorn, Jan Drahoukoupil, and Laura Horn (eds) *Contradictions and Limits of Neoliberal European Governance: From Lisbon to Lisbon*, Palgrave, 2008, at 26.

<sup>95</sup> James Caporaso and Sidney Tarrow, 'Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets' (2009) 63 *International Organization*, 593-620, at 597.

<sup>96</sup> *Ibid* at 594-595. For a contrasting view, see Van Apeldoorn, n 94 above.

<sup>97</sup> See Editorial comments, (2008) *Common Market Law Review*, 1-11: 'European citizenship is slowly but steadily evolving into a fifth Treaty freedom'. See also Dora Kostakopoulou 'Ideas, Norms and

to draw the conclusion that the Court has created a form of social citizenship to match that at national level. Caporaso and Tarrow's reading of the role of the Court focuses on a selective reading of a selective range of internal market jurisprudence – namely, the free movement of workers and their rights to residence and social benefits in states other than their own. I disagree with their analysis and conclusions, in particular in light of the plainly contentious assertion that 'most EU social policy is a product of the ECJ'.<sup>98</sup>

Caporaso and Tarrow identify three stages of the Court's jurisprudence on the 'four freedoms'. In what can be seen as a market-creating phase, the Court applied its newly developed doctrine of direct effect to the free movement provisions and arrogated to itself the authority to determine the meaning of 'worker' under the Treaty, and thus to determine the reach of EU law.<sup>99</sup> A second phase, in which national welfare systems were opened up to non-nationals, is exemplified for Caporaso and Tarrow by the decision in *Cowan*, in which the principle of non-discrimination was applied to recipients, as well as providers of services.<sup>100</sup> It is the third phase in particular which Caporaso and Tarrow posit as evidence of the 'social embedding' of the labour market, with cases such as *Mary Carpenter* extending rights to family members of free movers.<sup>101</sup> These cases are important markers in the evolution of market integration at the hands of the Court, in particular in the Court's prefiguring of the introduction of EU citizenship by moving away from an initial preoccupation with the 'market' citizen, subject to rights by virtue of their cross-border economic activity. A review of the Court's more recent case law on the rights conferred on EU citizens would have provided stronger grounds for Caporaso and Tarrow's thesis. However, even this citizenship jurisprudence falls short of re-embedding the market in the way they envisage. The Court's role in enhancing the claims of EU workers, and latterly, of EU citizens to access the rights which used to be the preserve of member state nationals is important: this case law is radical, in conferring rights on citizens regardless of whether they are economically active (marking a decisive shift from the EU's historical fixation with granting rights to individuals only to the extent that they are economically active), and also in conferring rights on EU citizens even where they have yet to engage in cross-border activity.<sup>102</sup> However, neither the free movement case law which Caporaso and Tarrow discuss, or the citizenship jurisprudence which they allude to, comes anywhere near to re-embedding the market in the social. The problem with the claim that this free movement jurisprudence marks a judicial countermovement is that these cases are studied in isolation. First, the selective reading ignores the other side of the coin of the jurisprudence on free movement or 'restrictions'. The same market-making logic underpins the case law on freedom of establishment and freedom to provide services which, as has been seen, can collide with nationally enshrined social rights, in

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European Citizenship: Explaining Institutional Change' (2005) *Modern Law Review*, 233-267.

<sup>98</sup> *Ibid.*, at 603.

<sup>99</sup> Case 53/81 *Levin* [1982] ECR 1035.

<sup>100</sup> Case 186/87 *Cowan* [1989] ECR 195. Caporaso and Tarrow use the language of citizenship before this concept was introduced into the EU project by the TEU. Nevertheless, it is true to say that 'the Court began to imagine citizenship before it existed': Gareth Davies, 'The High Water Point of Free Movement of Persons: Ending Benefit Tourism and Rescuing Welfare' (2004) *Journal of Social Welfare and Family Law*, 211-222.

<sup>101</sup> C-60/00 *Mary Carpenter* [2002] ECR I-6279.

<sup>102</sup> Case C-34/09 *Ruiz Zambrano*, judgment of 8 March 2011, nyr.

particular the principle of collective autonomy. Second, increasing individuals' cross border access to national social security or healthcare systems is not the same as constructing institutions of social citizenship at EU level.<sup>103</sup> The move from 'market' citizenship to a form of 'social' citizenship has, in great part, been premised on notions of social solidarity in the EU – but an understanding of solidarity which is itself contested, individualistic and potentially destructive of collective solidarity at Member State level.

The Court's approach to solidarity at EU level can be seen in *Grzelczyk*.<sup>104</sup> Here, despite the provisions of the relevant EU residence directive that migrant students only had a right of residence provided that they had sufficient resources, the Court considered that citizens exercising their free movement rights could have recourse to public funds in the host state without automatically losing the right of residence.<sup>105</sup> Underlying this conclusion was the argument that Treaty provisions and secondary legislation required Member States to accept 'a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States'.<sup>106</sup> Undoubtedly, a degree of reciprocity between Member States social security systems has long been a feature of EU internal market law: Regulation 1408/71,<sup>107</sup> enacted in 1971 with the aim of facilitating free movement of workers (and later, of the self-employed) requires Member States to coordinate their social security systems, such that those wishing to exercise their free movement rights are not penalised with regard to social security benefits.<sup>108</sup> Thus, free movers are entitled to non-discrimination: subject to the same obligations and enjoying the same benefits under the legislation of a Member State as the nationals of that State. However, this Regulation stops short, applying only to economically active persons who are insured within their home social security systems. What the Court has done in *Grzelczyk* has been, in effect, to enlarge the personal scope of beneficiaries of Member States' coordination duties, such that reciprocity and solidarity in welfare benefits now extends to non-economically active citizens moving between welfare systems.<sup>109</sup>

<sup>103</sup> See Martin Höpner and Armin Schäfer, 'Polanyi in Brussels? Embeddedness and the Three Dimensions of European Economic Integration', Max-Planck-Institut für Gesellschaftsforschung, Köln, MPIfG Discussion Paper 10/8, August 2010, at 21-23.

<sup>104</sup> C-184/99 *Rudy Grzelczyk* [2001] ECR I-6193.

<sup>105</sup> A view which, according to some, went against the wording and purpose of secondary EU law: Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) CLMRev, 1245-1267, at 1251.

<sup>106</sup> *Grzelczyk*, at para 44. The Court acknowledged that Directive 93/96 on residence rights for students did indeed require that migrant students must have sickness insurance and sufficient resources, but focused on the requirement that citizens avoid becoming an 'unreasonable burden on the public finances of the host Member State' as the situation to avoid. Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States repealed and replaced the three earlier residence directives: Directive 68/360; Directive 90/365; Directive 93/96.

<sup>107</sup> L 149 of 05.07.1971. In an attempt to simplify and clarify EU rules on the coordination of Member States' social security systems, the bulk of Regulation 1408/71 was repealed with effect from 2009, and replaced by Regulation 883/2004, OJ L 314 of 7.6.2004 (amended by Regulation 988/2009, OJ L 284 of 30.10.2009) and Implementing Regulation 987/2009.

<sup>108</sup> Catherine Barnard, *EC Employment Law*, 3rd ed, OUP, 2006, at 210-233.

<sup>109</sup> An expansion which has been subsequently codified within secondary legislation: Regulation 883/2004 amended Regulation 1408/71 to extend the personal scope of social security coordination, applying to all Union citizens insured in whatever capacity (i.e. not necessarily as employed or self employed) and to their family members and survivors. See Barnard, n 108 above.

The Court has been successful in opening up the ‘solidarity-based redistribution’<sup>110</sup> of national welfare systems to EU citizens of other nationalities who have been able to demonstrate ‘a certain degree of integration into the society’ of the host state (though not, significantly, to third-country nationals).<sup>111</sup> Curiously, however, the Court is less willing to countenance arguments premised on solidarity *within* rather than *between* national systems of social citizenship. This point is well illustrated by the case law on citizens’ rights to cross-border healthcare, which Caporaso and Tarrow do not examine. These, even more starkly than the cases on access to welfare benefits, show how the version of solidarity the Court imposes on Member States, requiring states to reimburse their citizens who choose to ‘exit’ national health care systems, may in fact serve to undermine solidarity within the national system. Once the Court categorised health care as a service falling within the scope of the internal market provisions,<sup>112</sup> it was only a matter of time before tensions between individual’s exercise of their freedom to receive cross-border services and national regulatory autonomy to organise health care on a territorial basis came to the fore.<sup>113</sup> The pattern of the Court’s reasoning is by now familiar: whilst accepting that EU law does not detract from Member States’ autonomy to organise their social security or health care systems, the argument that the special nature of these services removes them from the ambit of the fundamental principle of freedom of movement is given short shrift.<sup>114</sup> Thus, the focus of enquiry moves to whether restrictions on economic freedoms can be justified: for instance, where patients asked their health insurers or health authorities for authorisation to go abroad for treatment, Member States in *Geraets-Smits and Peerbooms*, *Müller-Fauré* and *Watts* sought to justify restrictions on treatment abroad on public health grounds, on the basis that patient migration might lead to cost increases which would threaten the stability and sustainability of the public health system.<sup>115</sup>

The Court accepts, in principle, that restrictions on free movement may be justified by the need to protect national health care systems from the effects of uncontrolled (individual) patient choice. However, there is a disinclination to accept that the principle of ‘solidarity’ on which national health care systems are based (namely, responsive to health needs of patients irrespective of their means, and financed by contributions from individuals irrespective of the health risk)<sup>116</sup> can be used to justify excluding this area of economic activity from the reach of EU internal market law. And, further, an unwillingness to accept that the putative risk of patient migration seriously undermining

<sup>110</sup> Stefano Giubboni, ‘A certain degree of solidarity? Free movement of persons and access to social protection in the case law of the European Court of Justice’ in Malcolm Ross and Yuri Borgmann-Prebil (eds) *Promoting Solidarity in the European Union*, OUP, 2010, at 193.

<sup>111</sup> C-209/03 *R v London Borough of Ealing and Secretary of State for Education, ex parte Danny Bidar* [2005] ECR I-2119, at para 57. On third country nationals, see Mark Bell, ‘Irregular migrants: beyond the limits of solidarity?’ in Ross and Yuri Borgmann-Prebil n 110 above.

<sup>112</sup> Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377.

<sup>113</sup> See Case C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473; Case C-385/99 *Müller-Fauré* [2003] ECR I-4509; C-372/04 *Watts v Bedford Primary Care Trust* [2006] ECR I-4325.

<sup>114</sup> *Geraets-Smits*, para 54; *Müller-Fauré*, para 39.

<sup>115</sup> Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials*, CUP 2nd Edition, 2010, at 817.

<sup>116</sup> Christopher Newdick, ‘Citizenship, Free Movement and Health Care: Cementing Individual Rights By Corroding Social Solidarity’ (2006) *Common Market Law Review*, 1645-1668, at 1649.

the financial balance of the social security system has in fact been shown. In contrast to this individualised cross-border solidarity promoted by the Court, the Advocate General in *Geraets-Smits and Peerbooms*, prioritised the pursuit of collective social solidarity within a single State. In other words, finding that a restriction on an economic freedom (a requirement of prior authorisation) was a necessary and proportionate means to maintain the financial equilibrium of the healthcare system – necessary if the State was to control healthcare costs, establish health-care priorities, and respect the principle of equality between insured persons.<sup>117</sup>

Caporaso and Tarrow anticipate a criticism of their ‘Polanyi in Brussels’ thesis, that the jurisprudence of the Court is ‘too thin a gruel to sustain an international system of social protection’.<sup>118</sup> True, but in addition, it is difficult to equate this jurisprudence with a Polanyian counter-movement, checking the growth of the market in order to protect society: in the health care cases in particular, the EU extends social rights to EU citizens, not as members of a putative EU welfare state, but in their guise as (rational) economic actors wielding rights conferred on them by EU internal market law as recipients of services. We thus see in play an individualistic conception of solidarity at EU level undermining institutional expressions of collective solidarity at national level in health care systems and, as discussed previously, collectively determined labour law. Cross-border solidarity of the sort witnessed in the Court’s case law on workers, (health) services and citizenship means that national social security and healthcare systems become more permeable to outsiders:<sup>119</sup> to migrant workers and their family members – though not to third country nationals; to EU citizens, whether or not economically active – though mainly those able to take advantage of their free movement rights. This enhances the social content of EU market rights, on a piecemeal basis, but at the risk to the institutional integrity, and possibly also the legitimacy, of national systems.

## V CONCLUSIONS

As argued earlier, the foundational assumptions at the start of the European project in large part presupposed the ability of these industrialised member nations to embed the market within national level social policy. This was the grand social bargain in many industrialised economies, and resulted in the liberalised market of the EU being located within and ameliorated by the many ‘socials’ at national level. However, as markets become increasingly more open in the case of the EU, this ‘grand social bargain’ has partially unravelled. It has become harder to counterbalance the ‘destructive potential’ of the internal market, by national institutions of social and industrial citizenship.

We have seen the discourse of both the Lisbon Strategy and the Lisbon Treaty attempting to recast the EU as a social market economy. Nevertheless, it is clear that we will not see an institutionalisation of social welfare at EU level, of the sort which exists at national level in many of the Member States. It is unlikely that the economic and the social dimensions to the EU project will genuinely to be placed on an equal footing.

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<sup>117</sup> Advocate General Ruiz-Jarabo Colomer, *Geraets-Smits and Peerbooms*, paras 52 and 58.

<sup>118</sup> Caporaso and Tarrow, n 95 above, at 612.

<sup>119</sup> Giubboni, n 110 above.

Given that, it seems preferable to seek to preserve domestic institutions of social citizenship, and to do so as much as possible to retain their diversity.

One would not expect a court to play a major role in re-embedding the market. Countervailing tendencies to the impetus to market creation, if not emanating from social movements, must at least be rooted in a political project aimed at preventing the subordination of society to the economy. Nevertheless, the Court of Justice has had a central role in the evolution of the embedded liberal bargain. Through its jurisprudence on social rights, in particular collective labour rights and their interaction with economic freedoms, the Court has intensified the impetus towards disembedding, by weakening the 'socials' at the national level. Further, in a line of case law which at first sight offers the prospect of enhancing the social content of EU citizens' rights, the Court's selective conception of the social, and of citizenship, has been shown to be potentially destructive of a more community-based conception of solidarity.