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DOES THE COURT CARE ABOUT THE COALFACE? THE EUROPEAN SOCIAL MODEL AND THE CONTINUED CONSTITUTIONAL IMBALANCE BETWEEN 'MARKET' AND 'SOCIAL' VALUES

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Abstract

This paper argues that despite recent scholarly accounts arguing the contrary, an asymmetry between 'the market' and 'the social' continues to exist in the EU legal order. This asymmetry manifests itself, in particular, in the case law, which - more as the rule than as the exception - underprotects the values of the European Social Model and overvalues economic freedom. A new frontier of negative economic integration is being crossed in the interpretation of Article 16 EUCFR (the freedom to conduct a business), while social fundamental rights are overlooked and misunderstood. Furthermore, despite the (politically driven) post-Brexit renaissance of Social Europe over the past decade, the constitutional scope of positive social integration through European-level collective bargaining (cf. EPSU) and legislation (cf. EU Minimum Wages) has been constrained. This paper argues that the resulting imbalance is contrary to the identity of the EU legal order as laid down in the Treaties and the Charter, which reflects an attachment to 'social democracy', and that it is for the Court to correct, as it is largely of its own making.

1. Introduction

The European Social Model reflects the idea that social justice and economic progress are conducive to one another, postulating a synergy rather than contradiction between economic competitiveness and social cohesion. It is seen as distinctively 'European': something that is, on the one hand, shared by the countries of Europe, as 'welfare States', and on the other hand, different from the rest of the world, most notably the US and China. Other variants operationalize the vital balance between 'the market' and 'the social' in different ways, but it essentially comprises the protection or

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promotion of social rights through regulation of the labour market, with collective bargaining as a central mechanism to do so, as well as through the operation of universal social protection systems and extensive public services. This 'social model' is thus 'European', but the European Union's role in relation to it is not straightforward. The notion was devised precisely because of the potential threat that European economic integration and market-making posed to the social model of the Member States. Its underlying promise is that the levels of social protection achieved by the Member States will be respected and protected in the course of economic integration, if not by leaving their own solutions in place, then by the adoption of European-level standards, and that the European project as a whole will lead to upward social and economic development for all, benefiting the social cohesion and equality both within and between Member States.

The European Social Model as such is perhaps not an 'EU value' as listed in Article 2 TEU, but it is difficult to see how the Article 2 values and principles as applied to the economy would not necessarily express themselves as an emanation of that model. Therefore, it is not argued in this paper that Article 2 TEU – or written EU primary law more generally – enshrines the idea of 'liberal democracy'. In fact, although it provides some interpretative space as to the relationship between 'freedom' on the one hand, and 'solidarity', 'equality' and dignity' on the other, written EU primary law goes further than to just agnostically endorse 'constitutional democracy'. Textually, the post-Lisbon Treaties and Charter have attached themselves to the values of 'social democracy'. In particular, Article 3(3) TEU and the EUCFR corroborate that view. The case law of the Court of Justice, however, does not tend to reflect this vision of what a 'good society' is, and regularly goes out of its way to endorse a liberal economic approach instead.

This paper argues that there is a rather consistent inconsistency in the Court's normative construction of the EU legal order, best described as an undervaluing of social interests, institutions and provisions – particularly those providing for or emanating from collective social processes; notably, collective bargaining – and an overvaluing of economic freedom (where the 'new frontier' of the internal market is now Article 16 EUCFR), even though this is increasingly in tension with the text of written primary and secondary law. This paper considers this to be problematic, regardless of the question of whether it has been empirically proven to have led to a dismantling of national social models or has prevented the growth of a degree of European social union. This paper is not primarily interested in the question of whether political and societal efforts at national and European level have been able to democratically absorb, buffer or compensate for this asymmetry, and if so, what explains this resilience. Nor does it investigate

the legal and political nuances concerning the extent of the possibility of 'legislative override' whereby the legislature can socially upgrade from the case law. This paper considers it problematic, quite simply, that important strands of case law are ill-disposed to the values and identity of the European Social Model. It is all the more problematic because in most of the cases where this imbalance is fostered, it takes quite some judicial effort to do so (and extrajudicial effort to defend it).[1]

2. The rise of the European Social Model

The European Social Model emerged in the 1990s as a political concept in the context of the EU's renewed efforts towards completing the internal market and the deepened economic and monetary integration foreseen by the Maastricht Treaty, as well as the increasing contestation of the legitimacy of the EU and its identity at this time.[2] Although, as with so many successful concepts, it is an ambiguous and polysemic notion that is used in different ways (descriptively, normatively and rhetorically) to different scientific and political ends, it is generally agreed to reject the 'neo-liberal assumption of a big "trade-off" between economic efficiency and social justice', seeing social policy instead as an essential factor in promoting economic adjustment and postulating a synergy rather than contradiction between economic competitiveness and social cohesion.[3] It is seen as a

1. As Julien Louis notes in relation to the crown witnesses of the social critique of CJEU case law, *Viking* and *Laval:* 'I found only a few academic texts which have supported the judgements [in *Laval* and *Viking*]. Moreover, among these supportive authors, one later became a judge in the General Court (Damjan Kukovec) and one advised the Latvian government in the Laval case (Norbert Reich). In fact, most of the authors who published supportive or non-critical interpretation of the Viking and Laval case were mostly members (judges, advocates general, référendaires) of the CJEU. Indeed, on several occasions, these judicial actors intervened in the scholarly debate to defend a more positive or nuanced interpretation of their case law (the CJEU's Vice-President and President themselves also published an Article), but they did not succeed in countering the prevalence of the critical interpretation by academics.' Julien Louis, 'Constructing the Viking and Laval cases as a major defeat for social Europe: a contextual and processual analysis' (2023) 2 European Law Open 724, doi: 10.1017/elo.2023.44.

2. European Commission, White Paper, 'Growth, Competitiveness and Employment. The Challenges and Ways forward into the 21st Century' COM (1993) 700 final, European Commission, White Paper, 'European Social Policy – A Way Forward for the Union' COM (1994) 333 final. See Vaïa Demertzis, 'The European Social Model(s) and the Self-Image of Europe' in Furio Cerutti and Sonia Lucarelli (eds), *The Search for a European Identity* (Routledge 2008).

3. Anton Hemerijck, 'The Self-Transformation of the European Social Model(s)' in Gøsta Esping-Andersen (ed), *Why we Need a New Welfare State* (OUP 2002) 39.

distinctively 'European' vision of what makes a good society: on the one hand, shared by the countries of Europe, and on the other hand, different from the rest of the world. Under the umbrella of the European Social Model, various (Nordic, Continental Mediterranean and Anglo-Saxon) variants have been identified,[4] which operationalize the balance between 'the market' and 'the social' in different ways. But there is agreement on the main features, even if these are present to differing degrees in, and thereby used to distinguish between, the different traditions: the protection or promotion of social rights through regulation of the labour market, with collective bargaining as a central mechanism to do so, as well as through the operation of universal social protection systems and extensive public services.

The EU's role in relation to this European Social Model is not straightforward. The Jacques Delors Commission devised the notion to assuage the fears of the Member States and their citizens that became increasingly unconvinced of the integration project, and to build towards a sustainable future for the emerging polity, precisely in recognition of the potential threat that European economic integration and market-making posed to the national social models. It promised citizens that national levels of social protection would be respected and protected in the course of European economic integration, if not by leaving domestic solutions in place, then by the adoption of common EU standards, and that participation in the European project as a whole would lead to upward social and economic development for all, benefiting social cohesion and equality both within and between Member States. It is an emanation of Jacques Delors' social-democratic vision for the European integration project and the core of his legacy. Under his stewardship, the Community Charter of the Social Rights of Workers was adopted, serving as an action plan for the progressive adoption of EU legislation to protect and promote these rights in the following years, benefiting from an enhanced mandate and infrastructure for decision-making with an expanding social legal basis and the creation of European-level social dialogue.

The European Social Model quickly became entrenched in the EU's self-perception. European leaders have held fast to the notion, at least nominally, even when political winds changed – as we know they did, in times of austerity and deregulation. It was 'sacred' even for Barroso, who presided over the demise of that very European Social Model:

4. Maria Jepsen and Amparo Serrano Pascual, 'The European Social Model: an exercise in deconstruction' (2005) 15 Journal of European Social Policy 231, doi: 10.1177/0958928705054087.

> '[Social cohesion] is a feature that distinguishes European society from alternative models. Some say that, because of the crisis, the European Social model is dead. I do not agree. Yes, we need to reform our economies and modernise our social protection systems. But an effective social protection system that helps those in need is not an obstacle to prosperity. It is indeed an indispensable element of it. Indeed, it is precisely those European countries with the most effective social protection systems and with the most developed social partnerships, that are among the most successful and competitive economies in the world.'[5]

This signifies that politically, the notion has become part of the 'imaginary' of a legitimate European Union, commonly shared as a value, at least at the first-order level, rather than *in se* contested under different party ideologies.

The notion also became legally entrenched. In the Maastricht decade, European-level collective bargaining became part of EU level decision-making processes, and social rights have come to feature prominently in the EU Charter of Fundamental Rights adopted in Nice and legally binding since Lisbon. In particular, Article 3(3) TEU, in its Lisbon-iteration reads as a codification of Delors' European Social Model. The internal market was embedded in the higher goals of social progress, contributing to a 'a highly competitive social market economy'. There is a potential here to create not only a clever synergy between 'the social' and 'the economic', but also between 'politics' and 'the law'. The European Social Model as part of the EU's constitutional identity could be the social-democratic answer to the ordo-liberal ideal of 'economic constitutionalism', to which end the internal market and its 'fundamentalized' economic freedoms could be deployed: EU-level rules could just as well serve to constitutionalize social rights and foster social regulation through democratic decision-making.

3. The demise of the European Social Model

Yet, the ink was not yet dry on the hard-fought 'social market economy' clause in the Lisbon Treaty when the European Social Model came to face its nadir. For its part, the Court of Justice celebrated the signature of the Lisbon Treaty in December 2007 with two judgments rendered that same week: *Viking* and *Laval.* Without rehashing the entire stale debate, it seems safe to

5. European Commission, 'Statement by EESC president Mario Sepi on President Barroso's support for the European social model during his address to the EESC plenary session' (CES/08/111, 5 December 2008) <ec.europa.eu/commission/presscorner/detail/en/ces_08_111> (all websites last visited 23 November 2025).

say that this line of case law is markedly activist in its expansion of negative integration and that it is widely considered to reflect an ordo or neoliberal rather than a social vision of the constitutional position of collective bargaining, workers' dignity, and the right to strike in relation to company interest.[6] These judgments soon became the crown witnesses of the 'asymmetry thesis' made famous (or infamous) by Fritz Scharpf, who considered that such negative, liberalizing integration by the Court meant that, in view of the political conditions of decision-making in the enlarged EU, the EU could not make good on its 'social market economy' promise after all.[7] That same December of 2007, the Great Recession started. We may now be eager to move on from the economic and financial crisis and the EU's governance thereof, but the very real damage that was done in the austerity years to both the European Social Model and the social fabric of European societies is not – and should not – be easily forgotten. Troika processes and policies have had such regressive human and political consequences, and have contributed to an erosion of citizens' trust and belief in the European project at such a profound psychological level, that we may never know the true cost of the crisis. It was always hard to fall in love with the internal market,[8] but it became very easy to hate the EMU.

The black mirror version of Delors' vision for Europe, this period was marked by a case law hostile to trade unions and workers' rights[9] and a Court standing idly by executive efforts to destruct everything that the European Social Model stands for. The Court allowed a structural disregard for the Community method and its democratic and constitutional safeguards, and condoned it being replaced by the 'Union method'[10] featuring an obscure, toxic mix of

6. To the point of being in breach of international social and human rights. See *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden* Complaint no 85/2012 (European Committee of Social Rights, 27 June 2012); *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v Norway* App no 45487/17 (ECHR, 10 June 2021).

7. Fritz Wilhelm Scharpf, 'The asymmetry of European integration, or why the EU cannot be a 'social market economy'' (2010) 8 Socio-Economic Review 211, doi: 10.1093/ser/mwp031.

8. 'Address given by Jacques Delors to the European Parliament' (Strasbourg, 17 January 1989 <www.cvce.eu/content/publication/2003/8/22/b9c06b95-db97-4774-a700-e8aea5172233/publishable_en.pdf>: '[…] as I have often said in recent months – you cannot fall in love with the single market.'

9. Case C-346/06, *Dirk Rüffert v Land Niedersachsen*, EU:C:2008:189; Case C-319/06, *Commission of the European Communities v Grand Duchy of Luxemburg*, EU:C:2008:350; Case C-576/13, *European Commission v Kingdom of Spain*, EU:C:2014:2430; Case C-413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, EU:C:2014:2411.

10. Angela Merkel, 'Speech by Federal Chancellor Angela Merkel at the opening ceremony of the 61st academic year of the College of Europe' (Bruges, 2 November 2010) <www.coleurope.eu/sites/default/files/speech-files/europakolleg_brugge_mitschrift_englisch_0.pdf>. See, critically, Eleanor Spaventa, 'Constitutional Creativity or Constitutional

international, EU and national institutions, actors, procedures and norms, with uncertain legal status yet strong financial coercion. Substantively, the Eurocrisis response seemed precisely aimed at dismantling the pillars of the European Social Model (collective bargaining structures, social rights and social regulation).[11] The Court could, at the time of *Pringle,* perhaps not foresee the grave social damage that would be done under this architecture. When this became clearer, however, the Court did not step in to defend the EU's social values as part of its identity either.[12] The only 'ESM' that mattered in these days seemed to be the European Stability Mechanism, not the European Social Model.

4. The European Social Model is dead; long live the European Social Model

It took an extraordinary political effort in the form of the adoption of a European Pillar of Social Rights, and subsequently, an investment programme of unprecedented scale in NextGenerationEU, for the EU to redeem its status as a friend and not a foe of the European Social Model. Especially the Social Pillar is a return to Delors' approach, following as it does in the footsteps of the Community Charter of the Social Rights of Workers by serving as an action plan for the progressive adoption of EU legislation to protect and promote social rights. It has led to a blossoming of Social Europe over the past decade: the Work-Life Balance Directive (paid paternity leave!), the Directive on Transparent and Predictable Working Conditions (combating zero-hours contracts!), Pay Transparency and Gender Balance on Boards (quasi-quota?!), the Online Platform Work Directive (platform workers are 'workers'?!), as well as a European Labour Authority and a revised Posted Workers Directive (equal pay for equal work?!).

Deception? Acts of the Member States Acting Collectively and Jurisdiction of the Court of Justice' (2021) 58 CML Rev 1697.

11. The ILO World Social Protection Report provides a comprehensive, damning overview. International Labour Organization, 'World Social Protection Report 2014/2015. Building economic recovery, inclusive development and social justice' (International Labour Office 2014) <www.ilo.org/sites/default/files/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_245201.pdf>.

12. Case C-208/17 P, *NF, NG and NM v European Council*, EU:C:2018:705; Case C-370/12, *Thomas Pringle v Government of Ireland, Ireland and the Attorney General*, EU:C:2012:756. C-434/11, *Corpul Naţional al Poliţiştilor v Ministerul Administraţiei şi Internelor (MAI) and Others*, EU:C:2011:830; C-462/11, *Victor Cozman v Teatrul Municipal Târgovişte*, EU:C:2011:831; C-128/12, *Sindicato dos Bancários do Norte and Others v BPN*, EU:C:2013:149. See Catherine Barnard, 'The Charter in Time of Crisis: A Case Study of Dismissal' in Nicola Countouris and Mark Freedland (eds), *Resocialising Europe in a Time of Crisis* (CUP 2013) 250 and Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 OJLS 325, doi: 10.1093/ojls/gqv002.

No measure is so symbolic of the resurgence of the European Social Model as the EU Minimum Wage Directive.[13] With its two-pronged approach of structure and substance – strengthening collective bargaining on wage setting and pursuing the adequacy of minimum wage levels – the Directive fosters both the collective and individual dignity of workers and their families in the EU. With its nuanced, differentiated approach to its scope, obligations and implementation, it aims to respect the diversity of national social models while driving upward convergence against the background of common minimum standards. As such, it is an emblem of the European Social Model. It is also an act of atonement for precisely the attack on that model in the crisis years. Wages, in particular, were subject to regressive measures: they were subjected to negative pressure in the internal market, especially following *Laval*, and the EU institutions and the Troika deeply intervened in wage formation mechanisms of the bailout Member States by requiring cutbacks in minimum wage levels, public expenditure and the decentralization of collective bargaining mechanisms.

As it happens, winds have yet again been a-changing. Politically, after some years of respite from the corrosive deregulatory spirits inhibiting the EU's Better Regulation Agenda that flourished in the crisis years, 'simplification' in the name of economic competitiveness is back in Brussels. This may well have important consequences, impacting the level of social ambition for both existing and prospective legislative initiatives, even if for now the focal point of deregulation has been on environmental standards. Whether this new 'competitiveness drive' will undo some of the social redemption achieved over the past decade remains to be seen. In any event, the EU Minimum Wage Directive – the flagship of the social resurgence of the past two political terms – has now been partially undone by the Court through its partial annulment of the Directive, as is discussed in the next section.

5. The European Social Model and the Constitutional Imbalance between 'the Market' and 'the Social' in the EU Revisited

Scharpf's 'asymmetry thesis' has recently been 'revisited' and considered 'to no longer accurately depict European integration'.[14] Partially by reference to the resurgence of the European Social Model discussed in the previous

13. Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union [2022] OJ L275, 33-47.

14. See, notably, Martijn van den Brink, Mark Dawson and Jan Zglinski, 'Revisiting the asymmetry thesis: negative and positive integration in the EU' (2023) 32 JEPP 209, doi: 10.1080/13501763.2023.2296940.

section, it has been argued that 'negative integration has become weaker, positive integration has gained in strength, and both phenomena have impacted on the substance of EU law and policy-making, which is promoting market-correcting policies to a greater extent than it used to'.[15] It is certainly true that the UK's withdrawal from the Union has politically reconfigured the Union in a way conducive to the adoption of market-correcting policies, and particularly social policy measures.[16] Combined with the intense politicization and democratic contestation of both European integration and austerity policy giving rise to a change in political outlook at domestic and EU level on the back of the crisis, the output of the EU decision-making process has been decidedly more 'social' over the past decade. If Scharpf's argument was ever (and this paper does not think it was) that it is structurally near-impossible for the EU to adopt social legislation, then obviously that argument is not – or no longer – valid post-Brexit. The fact, however, that we have seen a surge of socially-forward positive integration, does not mean that there is no constitutional asymmetry between the market and the social in the EU construct in general, or in the Court's approach in particular. In my view, a value imbalance continues to permeate the case law. This is deeply problematic, even regardless of whether the legislature (at EU or national level) has been able to compensate for it.

On the one side of this imbalance is the overvaluing of economic freedom. Here, whatever we may say about the traditional internal market freedoms, the new frontier of economic freedom needs to be accounted for: the freedom to conduct a business in Article 16 of the EU Charter. In the words of former Judge Wahl: 'a right of fundamental importance for the future of the European Union'[17] and, in his view, forming 'part of the EU's economic constitution according to which Member States have undertaken to commit to a specific form of political economy and market within the European Union'.[18]

15. ibid.

16. Considering that Scharpf's account rests on the way in which the Court's case law changes the relationship between Member States with the 'liberal market economy' and those with a 'social market economy', and considering that the UK has always been the most powerful example of the former, the post-Brexit developments can in fact be taken as a confirmation of his original thesis.

17. Nils Wahl, 'The Freedom to Conduct a Business – A Right of Fundamental Importance for the Future of the European Union' in Fabian Amtenbrink, Gareth Davies, Dimitry Kochenov and Justin Lindeboom (eds), The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley (CUP 2019) 273, 287. Judge Wahl notes the 'shift in focus' towards social values in the Lisbon Treaty and asks: 'How far-reaching rights should we afford to employees? Should those rights go so far as to result in insolvency and if so, are we, in reality, protecting workers?'.

18. ibid.

> 'Every restriction [to the freedom of undertakings to conduct a business] constitutes a serious interference in the open market economy on which the EU is built. If the freedom to conduct a business is, also in the future, sidelined and dealt with as a cost-free resource by, in particular, the EU legislature, a risk exists that it will become all the more difficult to describe the EU as an open market economy.'

In concordance with those extrajudicial remarks, over the past 15 years the Court has been a business-freedom pioneer, giving forceful interpretations of Article 16 despite its weak wording and pedigree.[19] Emblematically, in *Alemo-Herron*[20] – a judgment that, according to most scholars, deserves to be 'consigned to the bottom of an icy lake'[21] – the Court used Article 16 to read a minimum harmonization directive adopted on an internal market basis but intended to protect the interests of workers in the event of a transfer of undertakings in a way that it precluded a Member State from providing, in the event of the transfer of an undertaking, that dynamic clauses referring to collective agreements negotiated and adopted after the date of transfer are enforceable against the transferee. The judgment points at a next step in the constitutionalization of the internal market by anchoring it directly in a 'fundamental right'. Importantly, the various fundamental social rights that would have been directly relevant to the case, and that should at least have been used to balance Article 16 of the Charter, such as Article 28 of the Charter on collective bargaining and Article 31 of the Charter on fair and just working conditions, were ignored by the Court.

19. The wording indicates that this freedom is inherently relative and can be limited by both regulations and practices, suggesting it is one of the 'weaker' rights in the EU Charter. It is considered to be 'one of the less traditional rights', not generally protected in international human rights instruments. It is not traditionally universally present in the national constitutional law of the Member States, with many having only recognized versions of this right very recently and some not as an enforceable constitutional right at all. Where the freedom to conduct a business is recognized in national constitutional law, it tends to allow a relatively wide scope of limitation in the public interest and it is generally conceived as an individual's right to set up an economic activity or join a profession rather than concerning the general exercise of economic activity: '[…] they have in common that they do not constitute unfettered prerogatives and must thus be viewed in the light of their social function'. See Xavier Groussot, Gunnar Thor Pétursson and Justin Pierce, 'Weak right, strong Court – the freedom to conduct business and the EU Charter of Fundamental Rights' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar 2017) 326.

20. Case C-426/11, *Mark Alemo-Herron and Others v Parkwood Leisure Ltd*, EU:C:2013:521.

21. Stephen Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of "Freedom of Contract"' (2014) 10 ERCL 167, doi: 10.1515/ercl-2014-0006. Although lauded as 'well-balanced' and 'perfectly reasonable' by Judge Wahl (n 17).

The judgment has been widely criticized, and has arguably been contradicted on the general question of the applicability of the Charter in cases of standards higher than minimum harmonization norms,[22] but the value imbalance is visible in many other places. For instance, in *AGET*,[23] a case on the protection of Greek workers against collective redundancies in the crisis years, where the relevant fundamental social right in Article 30 of the Charter on protection against unjustified dismissal gets only a brief mention in passing while Article 16 of the Charter is actively drawn into the assessment of a restriction of the freedom of establishment. The latter judgment deploys a language more cognizant of the need for the public interest restrictions of Article 16, but the asymmetry in the treatment of economic fundamental rights and fundamental social rights is striking, as is the conflation of the freedom of establishment and the freedom to conduct a business; not to speak of the Court's incomprehensible finding that, in order to effectively protect workers against collective redundancies, such redundancies should be possible in the first place.

In these judgments, and in addition to an over-constitutionalization of economic freedom, a corresponding underconstitutionalization of the European Social Model can be witnessed (particularly, collective rights and processes): the fundamental social rights in the Charter are ignored or given a cursory mention and are not genuinely engaged with the interpretation of EU primary or secondary law. They are important judgments as they set a precedent for the relationship between the internal market provisions and the Charter, as well as the relationship between Article 16 on the one hand, and the various fundamental social rights such as Article 28 and 31 EUCFR on the other hand.

But the problem does not stop here; it is compounded by other judgments that undervalue the characteristics of the European Social Model. Take *EPSU*, where the Court gave a limited reading to the scope of the 'European Social Method' of Article 155 TFEU – the crown-jewel in Delors' legacy – whereby European-level collective agreements can lead to directives.[24] The Court held that the Commission is not required to submit a successfully concluded agreement to the Council for adoption. In

22. Joined Cases C-609 & C-610/17, *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry and Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Satamaoperaattorit ry*, EU:C:2019:981, where at least Article 31 EUCFR on fair and just working conditions was not considered applicable – which may still leave open the possibility that the Court will apply the freedom to conduct a business'.

23. Case C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, EU:C:2016:972.

24. Case C-928/19 P, *European Federation of Public Service Unions (EPSU) v European Commission*, EU:C:2021:656. For a critical discussion, see Samantha Velluti, 'The European

light of the mandatory language of the second paragraph of Article 155 ('shall'), the principle of the autonomy of social partners laid down in Article 152 TFEU and the importance of social dialogue from the perspective of fundamental social rights – in particular, the right to collective bargaining – it could have been argued that once the procedural conditions of valid social dialogue as set out in the Treaties are fulfilled, the Commission is not entitled to reject the agreement on political grounds. The Court, however, read Article 155(2) in light of Article 17 TEU on the Commission's powers and declined to read it more forcefully in light of Article 28 EUCFR. Article 17 TEU clearly provides that 'Union legislative acts may only be adopted on the basis of a Commission proposal, *except where the Treaties provide otherwise*'. The deliberate interpretative choice that is thus made is one that attaches more importance to the institutional interest of the Commission than to the interest in European collective bargaining.

The Court recently made another interpretative choice to the detriment of the European Social Model and the EU's competence to democratically and socially compensate for the regressive effects on wages through the economic, political and legal dynamics of the internal market and the currency union. In the *Adequate Minimum Wages* judgment, the Court annulled the aspects of the Directive that made it correspond to its title.[25] Although the Court was eager to communicate that it 'confirms the validity of a large part of the Directive',[26] a core element has been lost; namely, the criteria designed to ensure the adequacy of minimum wages that the EU legislature required the Member States that feature statutory minimum wages to include in the procedure for setting and updating them.[27] Certainly, the choice of a shaky legal basis – that explicitly excludes 'pay' – was a dangerous move by the EU legislature. It would therefore go too far to say that the Court 'went out of its way' to annul this social milestone. Yet, neither would it have been impossible for the Court to find the legal arguments to uphold the Directive in its entirety if it had been committed to do so. Scholars will no doubt debate, for years to come, whether the regulatory gap between negative and positive integration that has now emerged on wages in the EU is a legal one or a political one. Is there no

Social Dialogue as a source of EU legal acts following EPSU: Collective bargaining and industrial relations get lost in translation' (2022) 59 CML Rev 871, doi: 10.54648/COLA2022055.

25. Case C-19/23, *Kingdom of Denmark v European Parliament and Council of the European Union (Adequate minimum wages)*, EU:C:2025:865.

26. CJEU, 'The Court confirms the validity of a large part of the Directive on adequate minimum wages in the European Union' (Press Release no 136/25) <curia.europa.eu/jcms/upload/docs/application/pdf/2025-11/cp250136en.pdf>.

27. Article 5(2) of EU Minimum Wage Directive (n 14).

competence for the EU to intervene directly on the adequacy minimum wages at all, or is it just the choice of a wrong legal basis?[28] But, for the European Social Model, that hardly matters. Apparently, there is still an 'asymmetry' in the EU construction, which fosters negative and regressive integration on wages but inhibits positive and progressive integration on the same issue. Moreover, there is an 'asymmetry' in the Court's value hierarchy – it has shown itself consistently permissive to the EU legislative process' extensive interpretations of EU legal bases, including to protect the values that make up the EU's constitutional identity,[29] just not – it seems[30] – as much in the context of Social Europe.

All of this is not to say, of course, that there are no socially protective judgments in the Court's case law. When it comes to the individual rights of workers, especially in the areas of non-discrimination,[31] working hours and annual leave,[32] the Court has arguably been as activist as it has been in the internal market. It does not shy away from imposing unpopular obligations on employers in this regard,[33] although it deserves to be mentioned that Article 16 EUCFR has cropped up here too, to nuance that finding. In *Achbita*, the Court considered that an employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognized in Article 16 of the Charter and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact

28. The EU Institutions chose to use Article 153 TFEU. Ane Aranguiz and Sacha Garben, 'Combating income inequality in the EU: a legal assessment of a potential EU minimum wage directive' (2021) 46 E L Rev 156; Sacha Garben, 'Choosing a Tightrope instead of a Rope Bridge: The Choice of Legal Basis for the EU Minimum Wage Directive' in Luca Ratti, Elisabeth Brameshuber and Vincenzo Pietrogiovanni (eds), *The EU Directive on Adequate Minimum Wages* (Hart 2024) 25.

29. Case C-156/21, *Hungary v European Parliament and Council of the European Union*, EU:C:2022:97 and Case C-157/21, *Republic of Poland v European Parliament and Council of the European Union*, EU:C:2022:98. The approach taken is to make 'solidarity' and measures to ensure social and economic cohesion conditional on the other (more important?) values, such as the independence of the judiciary.

30. It may be that the Court takes a more competence-anxious approach in a more general sense from now on, which might also manifest itself, for instance, in relation to legislation to further the value of democracy, such as in the pending challenge to the Media Freedom Act; see request for a preliminary ruling in Case C-486/24, *Hungary v European Parliament and Council of the European Union.* See, further, Sacha Garben, *The Competence Question in the (Con)federal European Union* (OUP 2025).

31. Eg Case 149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, EU:C:1978:130.

32. Eg Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu*, EU:C:2018:874.

33. Case C-144/04, *Werner Mangold v Rüdiger Helm*, EU:C:2005:709.

with the employer's customers,[34] accepting it as objective justification for an undertaking to prohibit the visible wearing of any political, philosophical or religious sign in the workplace. Despite criticism,[35] the Court confirmed its approach to the issue in *IX/WABE*.[36] Even though, in the latter judgment, the Court puts some emphasis on the need to establish economic loss suffered by the employer, and even if this case law leaves a degree of discretion to the national level to provide a different outcome, the wide interpretation of the potential scope of Article 16 (affecting the attractiveness of economic activity generally) both stands, and stands out.

There are many more examples of cases where the Court under-appreciates or underprotects workers' interests, and especially collective rights.[37] A comprehensive and exhaustive treatment exceeds the scope of this paper. But the contention is that, on balance, with its pronounced emphasis on economic *freedom* and *individual* rights, and its reticence towards collective social solidarity processes not only at national but also European level, the case law does not seem to understand – let alone respect – the essence of the European Social Model. It goes out of its way to shape the EU 'constitution' as one committed to liberal democracy and an 'open market economy', instead of the social democracy and social market economy that its written provisions more explicitly endorse. This should be cause for concern for the EU legal discipline in and of itself, regardless of the question of whether this has led to a complete dismantling of national social models or has prevented the growth of a degree of European Social Union, or 'market-correcting' legislation more generally.

6. Conclusion

'What a fantastic progress it would be for our values of democracy and social justice if we managed to demonstrate our capacity to jointly succeed in building a more harmonious society, which would be more accessible to

34. Case C-157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, EU:C:2017:203.
35. See, eg, Joseph Weiler, 'Je Suis Achbita' (2018) 4 Public Law Quarterly Review.
36. Joined Cases C-804/18 & C-341/19, *IX v WABE eV and MH Müller Handels GmbH v MJ*, EU:C:2021:594.
37. See, eg, recently C-706/22, *Konzernbetriebsrat der O SE & Co. KG v Vorstand der O Holding SE*, EU:C:2024:402. Dagmar Schiek, 'Outmanoeuvring Transnational Employment Relations in the European Company via the European Court of Justice – A Final Victory? – Konzernbetriebsrat (C-706/22)' (2025) 50 ELR 350.

all.'[38] The spirit of Jacques Delors is needed in Luxembourg, to replace views such as that 'if the EU is to contribute to growth and increased welfare, undertakings and their needs must be taken seriously' and that 'without economic freedom and a well-functioning market, all other freedoms remain illusory'.[39] Recently, the Court has been keeping itself very busy with the construction of a 'Union of values' and its 'constitutional identity'.[40] This paper expresses the hope that the Court, in this endeavour, discovers the value of the European Social Model.

38. Jacques Delors, 'Address given by Jacques Delors' to mark the opening of the 40th academic year of the College of Europe (Bruges, 17 October 1989) <www.cvce.eu/content/publication/2002/12/19/5bbb1452-92c7-474b-a7cf-a2d281898295/publishable_en.pdf>.
39. Wahl (n 17).
40. From a social perspective, a somewhat bitter taste clings to the Court's case law on the rule of law in the Member States. An often overlooked aspect of the landmark *Portuguese Judges* judgment is that it was rendered in relation to European austerity-driven salary cuts in the Portuguese judiciary, who however did not get to benefit from the Court's moral courage to so broadly interpret its mandate in order to stand up for the rule of law.