ARTICLES

THE HORIZONTAL CLAUSES OF ARTS 8-13 TFEU: NORMATIVE IMPLICATIONS, IMPLEMENTATION AND POTENTIAL FOR MAINSTREAMING

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BETWEEN HOPE AND FEAR: THE CREATION OF A MORE INCLUSIVE EU SINGLE MARKET THROUGH ART. 9 TFEU

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ABSTRACT: In this *Article*, we assess to what extent art. 9 TFEU, which contains the social mainstreaming clause, may be used to shore up the social dimension of the EU Single Market. The story of hope of a more socially inclusive internal market starts with the "porous" EU internal market legal framework itself and ends with art. 153 TFEU and the European Pillar of Social Rights. Yet, there are also fears that, despite the language of social mainstreaming, the EU cannot deliver on the promise of art. 9 TFEU for various reasons, including the limited legislative competences of the EU to pursue social policies. While we mainly want to emphasize the story of hope, we will also look into the fears and how some of these could be addressed.

KEYWORDS: art. 9 TFEU – social mainstreaming – EU Single Market – social policy – EU Charter – European Court of Justice.

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I. Introduction

Art. 9 TFEU constitutes the horizontal, integration or mainstreaming clause for social aspects. The requirement for the EU to take into account social aspects in defining and implementing its policies and activities includes internal market policy, which has since long constituted the legal core of the EU. The language of mainstreaming of social interests gives rise to the hope that the social dimension of the EU Single Market can be reinforced and expanded. This story of hope begins with the "porous" legal framework of the EU Single Market itself,[1] whose rules on free movement and competition are not absolute and allow for the protection of public interests in general, and social policy interests in particular. Already back in 1976, the European Court of Justice (hereafter: ECJ or Court) explicitly recognized the social dimension of the EU Single Market in the *Defrenne II* case, wherein it held that the European Economic Community (EEC) is not merely an economic union, "but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty".[2]

Nevertheless, there is also the fear that the language of mainstreaming may raise expectations of a more socially inclusive internal market which the EU cannot or only in part can deliver. These fears relate *inter alia* to the fact that social protection, through the adoption of market-correcting policies,[3] largely remains a matter for individual Member States. Meanwhile, the realisation of a more socially inclusive internal market faces important challenges, including growing inequality, migration, disruptive technological innovation and digitalization, as well as climate change and environmental depravation.

Before turning to the specific role and (potential) legal effects of art. 9 TFEU with respect to the EU Single Market, we will briefly describe how the economic and social spheres have become intertwined at EU level. We will then look more specifically at the extent to which art. 9 TFEU has reinforced or can strengthen the social dimension of the EU Single Market within the Court's case law and the EU's legislative praxis. We will subsequently identify and address the fears that may undermine the creation of a more socially inclusive EU internal market and how these fears could be addressed.

II. Different levels of social mainstreaming and EU law

Social mainstreaming may occur at different levels of governance. At a more macro or meso level, the question of social mainstreaming relates to the interdependence of social

[1] S Weatherill, 'Protecting the Internal Market from the Charter' in S de Vries, U Bernitz and S Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart Publishing 2015).

[2] Case C-43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* ECLI:EU:C:1976:56 para. 10.

[3] C Barnard and S de Vries, 'The "Social Market Economy" in a (Heterogeneous) Social Europe: Does it Make a Difference?' (2019) Utrecht Law Review 47.

and economic spheres – or the shaping of the social market economy – within states or within the European Union. With respect to the latter, what the European Pillar of Social Rights (EPSR) envisages is mainstreaming on a macro or meso level. The EPSR consists of twenty principles and is intended to provide a counterweight to the economic orientation of the EU. It is ambitious in scope and has political will behind it.[4] The EPSR serves as an instrument collecting and consolidating different social rights and principles, stemming from different sources with different addressees, all under the consenting umbrella of Member States and EU institutions.[5]

Social mainstreaming of EU internal market law on a more micro level is required on the basis of art. 9 TFEU but has, as will be seen hereafter in sections III and IV, already been inherent in, for instance, EU free movement law and the EU's legislative harmonisation practice, which is not only aimed at creating a level playing field for businesses but also involves the protection of public and social interests.

II.1. The relationship between the economic and social at EU level

At the level of the Member States, the social and economic spheres are severely intertwined and highly interdependent. Whereas the promotion of social values can require market-correcting policies, economic rights and values are supported by market-making policies. Hence, there are tensions between social and economic values, yet at the same time, policies in the sphere of income and social protection may have, according to different economic theories and philosophies, not only impeding but also reinforcing effects. The Hayekian (liberal) economics, for instance, perceive income and employment protection as a distortion of competition, burdening the market with unjustifiable costs and rigidities. Keynesian (social-democratic) economics, however, perceive it as enhancing consumption. In any event, the social and economic spheres of welfare states are severely intertwined and highly interdependent, in that policies in the one sphere have consequences for the other and *vice versa*.[6] As Polanyi observed, "[i]f markets are not woven into the fabric of societies [...] this may arouse social dislocation and spontaneous movements. In the end this could threaten political stability, as was witnessed with the initial process of industrial revolution".[7] Markets are therefore necessarily socially

[4] European Commission, *European Social Pillar of Rights* ec.europa.eu. See also C Barnard and S de Vries, 'The 'Social Market Economy' in a (Heterogeneous) Social Europe' cit. 47.

[5] Communication COM(2017) 250 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 26 April 2017 establishing a European Pillar of Social Rights.

[6] A Veldman and S de Vries, 'Regulation and Enforcement of Economic Freedoms and Social Rights: A Thorny Distribution of Sovereignty' in T van den Brink, M Luchtman and M Scholten (eds), *Sovereignty in the Shared Legal Order of the EU: Core Values of Regulation and Enforcement* (Intersentia 2015).

[7] K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Rinehart 1944).

embedded[8] and, at the national level of capitalist social welfare states, *social mainstreaming* is part of the political agenda, whereby a balance is sought between economic and social values.[9]

At the level of the EU, legislative harmonisation in the field of social policy was originally not part of the internal market project and mainly fell within the national agenda.[10] This "decoupling" of the economic and social spheres, as famously phrased by Scharpf,[11] led to a constitutional asymmetry between the EU economic freedoms and national social values. Whilst the economic freedoms are firmly rooted and protected at EU level through the principles of primacy and direct effect, this has for a long time been different for social interests and rights. This dichotomy has created problems, particularly since the widening and deepening of the internal market since the 1980s.[12] Nevertheless, public economic law, even though initially created in light of the internal market and to overcome competitive concerns on this market, has provided public authorities with a varied pallet of instruments to achieve social objectives and, therefore, been able to temper some of the "social deficit" concerns.[13]

The current Treaty framework, particularly since the adoption of the Treaty of Lisbon, seeks to "recouple" the economic and social spheres at EU level in various ways. Firstly, through the inclusion of the notion of social market economy in art. 3(3) TEU. This *Article* states that the EU strives to a attain a highly competitive "social market economy" aimed at full employment and social progress. Although it is unclear what a "social market economy" at EU level exactly means, the inclusion in the Treaty of Lisbon marks an important shift by combining European social and economic objectives and values in one single phrase. Art. 3(3) TEU forms a bridge between market and social policy objectives, expressing the need to strike a balance under the auspices of an open market economy as stated in art. 119 TFEU.[14] Whereas the pre-Lisbon social clauses were subject to the economic objectives and merely aspirational in nature,[15] art. 3(3) TEU reinforces the idea that social

[8] *Ibid*. Cf on Polanyi: C Joerges and F Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval' (2009) ELJ 1. See also A Veldman and S de Vries, 'Regulation and Enforcement of Economic Freedoms and Social Rights' cit. 71.

[9] A Veldman and S de Vries, 'Regulation and Enforcement of Economic Freedoms and Social Rights' cit. 71.

[10] *Ibid*. 72.

[11] FW Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999).

[12] A Veldman and S de Vries, 'Regulation and Enforcement of Economic Freedoms and Social Rights' cit. 76.

[13] See A Gerbrandy, W Janssen and L Thomsin, 'Shaping the Social Market Economy After the Lisbon Treaty: How "Social" is Public Economic Law' (2019) Utrecht Law Review 32; G Monti and J Mulder, 'Escaping the Clutches of EU Competition Law' (2017) European Law Review 635.

[14] F Pennings, 'The Relevance of the Concept of the Social Market Economy: Concluding Observations on the Contributions in this Special Issue' (2019) Utrecht Law Review 1; see also D Ferri and F Cortese, *The EU Social Market Economy and the Law: Theoretical Perspectives and Practical Challenges for the EU* (Routledge 2020).

[15] See case C-126/86 *Giménez Zaera v Instituto Nacional de la Seguridad Social and Tesoreria General de la Seguridad Social* ECLI:EU:C:1987:395 paras 10-11.

and economic interests should be reconciled. This was confirmed by the Court in the *AGET Iraklis* case (see hereafter, section III).[16]

Secondly, post Maastricht, the EU's most prominent legal basis for social policy, art. 153 TFEU, has been improved and covers a variety of issues, ranging from the more traditional improvement, such as the working environment to protect workers' health and safety and working conditions, to social security and social protection of workers; protection of workers where their employment contract is terminated; and the conditions of employment for third-country nationals legally residing in Union territory.[17] But the ability to introduce social policy based on art. 153 TFEU is not unlimited, as it adds in para. 5 that "the provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs".

Thirdly, the EU Charter of Fundamental Rights (hereafter: the EU Charter) has been widely viewed as significantly raising the status of social rights in the EU by recognizing their constitutional status. Social rights are now adopted in the same document as economic rights, thereby underlining their importance as part of the core legal basis of the EU. And, according to the case law of the Court, some of the fundamental rights included in the Solidarity Title of the EU Charter have direct effect and are judicially cognisable, even in horizontal disputes, considering their mandatory and unconditional wording.[18] The assumption that all EU fundamental social rights within the meaning of art. 52(5) of the EU Charter should by their very nature be regarded as merely principles, which need to be elaborated by EU or national legislation first, is thus wrong (see hereafter, section III).

And lastly, the inclusion of the social mainstreaming provision of art. 9 TFEU, which will be discussed hereafter, and the incorporation of the non-discrimination principle as contained in art. 10 TFEU have, as Muir writes, "[injected] the social" across the entire sphere of EU policies.[19] Art. 8 TFEU prescribes the EU to eliminate inequalities and to promote equality between men and women in all its activities. Art. 10 TFEU states that the EU shall further aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The horizontal clauses of arts 8 and 10 TFEU, accompanied by art. 9 TFEU, all seek to contribute to social mainstreaming of EU policies, as well as helping the EU legislature to strike a balance between the EU's social and economic objectives.[20]

[16] Case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972.

[17] See, for example, C Barnard, *EU Employment Law* (Oxford University Press 2012); and G De Baere and K Gutman, 'The Basis in EU Constitutional Law for Further Social Integration' in F Vandenbroucke, C Barnard and G De Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017) 348.

[18] Joined cases C-569/16 and C-570/16 *Bauer* ECLI:EU:C:2018:871; case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* ECLI:EU:C:2018:874.

[19] E Muir, 'Drawing Positive Lessons From the Presence of "The Social" Outside of EU Social Policy Stricto Sensu' (2018) EuConst 81.

[20] See A Aranguiz, 'Social Mainstreaming Through the European Pillar of Social Rights: Shielding "the Social" from "the Economic" in EU Policymaking' (2018) European Journal of Social Security 343.

II.2. Art. 9 TFEU

Social mainstreaming is thus specifically required based on art. 9 TFEU, which reads as follows: "In defining and implementing its policies and activities the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and the protection of human health".

The application of art. 9 TFEU stretches out towards all policies. The requirement to implement the aims mentioned in art. 9 TFEU in all policy domains, emphasises the interdependency of EU policies. With this extensive application, the horizontal social clause aims to foster the EU's fundamental social values and objectives, which we can also find in arts 2 and 3 TEU, all within the framework of the EU's responsibilities.[21] And art. 9 TFEU includes several social issues such as education, training and human health, which do not necessarily concern social policy *stricto sensu*.[22]

The importance of art. 9 TFEU is *inter alia* emphasized by its place in the Treaty under Title II on provisions having general application. Art. 9 TFEU clearly reinforces the social dimension of EU policies, including internal market and competition policies. In taking a closer look at the mainstreaming provisions as set forth in Title II, it appears, though, that they are differently formulated. It has been submitted that the environmental integration clause of art. 11 TFEU is most forcefully formulated, particularly through the inclusion of the word "must", and seems to be the strongest of all the mainstreaming clauses.[23] By contrast, art. 9 TFEU is seen as a weaker provision which is written in a more "reluctant manner" using "less straightforward language", which raises questions about the "degree of obligation" for the EU institutions.[24]

But just like the other mainstreaming clauses, art. 9 TFEU constitutes a legal tool to reinforce the social dimension of EU policies. As AG Cruz-Villalon states in the *Palhota* case, these changes by the Treaty of Lisbon should have a definite impact on the relationship between the Treaty freedoms and the rules on social protection.[25] What this impact concretely means in light of the Court's case law and the legislative praxis in the field of the internal market, will be discussed hereafter.

[21] Opinion 2012/C 24/06 of the European Economic and Social Committee of 28 January 2012 on Strengthening EU cohesion and EU social policy coordination through the new horizontal social clause in Article 9 TFEU.

[22] These concern policies and measures outside the Title on Social Policy in the TFEU, see also E Muir, 'Drawing Positive Lessons from the Presence of "the Social" Outside of EU Social Policy Stricto Sensu' cit.

[23] N Dhondt, *Integration of Environmental Protection into Other EC Policies. Legal Theory and Practice* (Europa Law Publishing 2003) 102-103. See also S de Vries, *Tensions Within the Internal Market: The Functioning of the Internal Market and the Development of Horizontal and Flanking Polices* (Europa Law Publishing 2006) 20.

[24] See A Aranguiz, 'Social Mainstreaming Through the European Pillar of Social Rights' cit. 344.

[25] Case C-515/08 *Santos Palhota* ECLI:EU:C:2010:245, opinion of AG Cruz Villalón, paras 51-55.

III. A story of hope (I): Art. 9 TFEU, EU competition law and the Four Freedoms

Due to their broad scope of application, there is hardly any area of socio-economic life that escapes from the application of EU free movement and competition law. The fact that these market rules determine the normative framework for the assessment of social policies has raised considerable criticism by some, who argue that the EU institutions and the Court of Justice, by inclination, have a market-oriented and instrumental vision.[26] In our view, this criticism is based upon a misconception of EU Single Market law, as this in principle offers sufficient guarantees for the protection of domestic, public interests and social rights.

There are basically two ways in which mainstreaming of public and, more specifically, social interests in the Court's case law on free movement and competition has been given shape. Firstly, the ECJ has excluded certain agreements that pursue social aims from the scope of application of the EU competition rules altogether, which involves, for example the (exercise of) the right of collective bargaining. As such, the protection of these particular social interests remains outside the reach of competition law. Secondly, the ECJ allows Member States – and to some extent private actors – to justify restrictions on trade and free movement for social policy reasons within the framework of the exceptions to free movement. And this has been without an explicit role for art. 9 TFEU, which either had not yet been included in the Treaty or has not – or rarely – been referred to by the Court or, in the field of competition law, by the European Commission. The question is then how the application of art. 9 TFEU could (potentially) steer the direction of the Court's case law.

III.1. The "social exemption" for collective bargaining

In *Albany*, the Court excluded collective bargaining agreements between social partners from the cartel prohibition of art. 101(1) TFEU. In doing so, the Court has avoided a delicate balancing exercise altogether by granting *per se* "immunity" from European competition law to collective labour agreements pursuing the improvement of employment conditions. While the Court did not explicitly refer to the fundamental right's character of autonomous collective bargaining, it held that "the social policy objectives pursued by such [collective] agreements would be seriously undermined if management and labour were subject to [the Treaty provisions on competition law] when seeking jointly to adopt measures to improve conditions of work and employment".[27]

The Albany line of reasoning has recently been extended by the Commission to collective labour agreements which are concluded by *solo self-employed* working in the

[26] D Augenstein, 'On the Autonomous Substance of EU Fundamental Rights Law' (2013) German Law Journal 1917.

[27] Case C-67/96 *Albany* ECLI:EU:C:1999:430 para. 59.

platform economy, in line with the earlier *FNV Kiem* case.[28] Although the relevant Guidelines do not explicitly mention the social mainstreaming provision of art. 9 TFEU, they show an overall generous – and thus socially friendly – approach of the Commission to collective labour agreements, and EU competition law and social policies are still seen as two distinct policies.[29] This "immunity" approach is, however, limited and not always an option for EU internal market law, particularly considering the often interwovenness of the economic and social spheres as mentioned, and has thus not been followed by the Court in the field of free movement.[30]

III.2. Social interests as an exception ground to free movement

As the four freedoms are not absolute,[31] Member States are allowed to restrict trade and free movement with a view to protecting non-economic, public interests, thereby relying on either one of the Treaty exceptions or the mandatory requirements as developed in the Court's case law.[32] According to Weatherill, the case law of the Court reveals "just how porous EU free movement law [...] to justification has become".[33] And this readiness to accept justification grounds under the scheme of the four freedoms also applies to fundamental rights.[34] In cases like *Schmidberger* or *Omega*, the Court has shown its willingness to take fundamental rights seriously and put them on an equal footing with the EU rules on free movement.[35] At the background art. 9 TFEU may play a role here as well. In respect of public health, which is also included in art. 9 TFEU, the Court stipulated: "In that regard, the Court has already recognised on several occasions that [...] the protection of public health constitutes, as follows also from art. 9 TFEU, an objective of general interest justifying, where appropriate, a restriction of a fundamental freedom [...]".[36]

Based on the proportionality principle, which plays a key role here, the Court balances non-economic, public interests with the four freedoms. The crucial question is,

[28] Annex C(2021) 8838 final to the Communication COM(2021) 762 final from the Commission of 9 December 2021 on the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work. See also case C-413/13 *FNV Kunsten Informatie en Media* ECLI:EU:C:2014:2411.

[29] A Kornezov, 'For a Socially Sensitive Competition Law Enforcement' (2020) Journal of European Competition Law 399.

[30] The ECJ held, for instance, in *Viking* that "it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced to a certain degree", case C-438/05 *The International Transport Workers' Federation and the Finnish Seamen's Union* ECLI:EU:C:2007:772 paras 52-55.

[31] P Oliver and WH Roth, 'The Internal Market and the Four Freedoms' (2004) CMLRev 410.

[32] Starting with the Court's case law in *Dassonville* and *Cassis de Dijon*, see case C-8-74 *Dassonville* ECLI:EU:C:1974:82; case C-120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42.

[33] S Weatherill, 'Protecting the Internal Market from the Charter' cit. 217.

[34] Case C-390/12 *Pfleger and Others* ECLI:EU:C:2014:281 paras 59 and 60.

[35] Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333; case C-36/02 *Omega* ECLI:EU:C:2004:614.

[36] Case C-544/10 *Deutsches Weintor* ECLI:EU:C:2012:526 para. 49.

though: how should the Court in the light of art. 9 TFEU balance the conflicting interests of free movement and social protection under its traditional scheme of adjudication?

a) Viking and Laval, and an uncomfortable balancing exercise

The way in which the proportionality test has been carried out in the much-criticised *Viking* and *Laval* cases law suggests that the Court put "the four freedoms and thereby political economic values as its first point on the agenda".[37] Both cases concerned attempts by employers to take advantage of cheaper Eastern European labour, by reflagging a Finnish vessel as Estonian in the case of *Viking* and by posting Latvian labour to fulfil a building project in Sweden. In both cases the trade unions protested, threatening strike action (*Viking*) or blocking the site (*Laval*) with a view to stopping the employers' conduct.[38]

Although the Court in its judgments reiterated the principle that the EU pursues social aims, it took a restrictive approach to justification and proportionality.[39] The Court ruled that the trade unions' actions could only be justified if they served a wider aim, *i.e.* there should be a serious threat to employment. The particularly strict interpretation of the Posted Workers Directive 96/71 in *Laval*, leaving little or no scope for the Swedish tradition of collective bargaining, also raised serious concerns for the trade union movement. With the social dimension being seen as inferior, various commentators have argued that the approach in the *Viking* and *Laval* case law in fact sits uneasily with how the Court normally adjudicates conflicts between the four freedoms and public interests.[40]

As stated above, according to AG Cruz Villalón in the *Santos Palhota* case, though, the inclusion of art. 9 TFEU in the Treaty should have specific repercussions as to how the derogations to the four freedoms are being applied.[41] In his Opinion, he argues that, regarding the posting of workers, the provision of art. 9 TFEU as primary social law must result in a less strict interpretation of working conditions, constituting an overriding public interest, that justifies a derogation from the freedom to provide services.[42] Because the primary law framework warrants a high level of social protection, Member States must be granted a certain leeway in restricting a fundamental freedom under the header of safeguarding social protection.

This view was confirmed by the Court in the *AGET Iraklis* case, which concerned Greek legislation allowing the prefect or the Minister for Labour to oppose collective

[37] A Veldman and S de Vries, 'Regulation and Enforcement of Economic Freedoms and Social Rights' cit. 84.

[38] C Barnard and S de Vries, 'The "Social Market Economy" in a (Heterogeneous) Social Europe' cit. 50.

[39] See, for example, S Weatherill, 'Protecting the Internal Market from the Charter' cit. 223-227; A Veldman and S de Vries, 'Regulation and Enforcement of Economic Freedoms and Social Rights' cit. 83-85; C Barnard, 'The Protection of Fundamental Social Rights in Europe after Lisbon: A Question of Conflicts of Interest' in S De Vries, U Bernitz and S Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013) 37-59.

[40] See S Weatherill, 'Protecting the Internal Market from the Charter' cit. 227.

[41] Case C-515/08 *Santos Palhota* ECLI:EU:C:2010:245, opinion of AG Cruz Villalón.

[42] *Santos Palhota* cit. para. 52-53.

redundancies in certain circumstances in the interests of the protection of workers and of employment, and whether that legislation was compatible with the freedom of establishment, the free movement of services and the freedom to conduct a business as enshrined in art. 16 of the EU Charter.[43] Explicitly referring to *inter alia* art. 9 TFEU, the Court held that "Member States have a broad discretion when choosing the measures capable of achieving the aims of their social policy, [...] however, that discretion may not have the effect of undermining the rights granted to individuals by the Treaty provisions in which their fundamental freedoms are enshrined [...]".[44]

b) Article 9 TFEU and improving the balancing exercise

Legal scholars and Advocates-General have put forward a number of suggestions as to how to improve the balancing exercise and make EU free movement law more responsive to social interests and rights, operationalising art. 9 TFEU.[45] Options are either, first, a relaxation of the proportionality test, or, second, the adoption of a true balancing approach, which entails a "double proportionality review" as applied in the above-mentioned *Schmidberger* case, taking as a starting point the equal ranking between fundamental (social) rights and fundamental freedoms.

Regarding the first option, Barnard has argued in several contributions that the Court should focus on the procedural rather than substantive elements of the question whether national measures can be justified.[46] According to her, proportionality does not work in some social contexts, in particular strike action, given that "the more successful the strike action, the less likely it is to be proportionate".[47] In a similar vein, the Court considered in *AGET Iraklis* that a national law opposing collective redundancies for social policy reasons may in principle be proportional if certain requirements of good administration are met. Regarding the specific characteristics of the debated Greek national measure, the ECJ held that the criteria applied by the competent relevant national body were "formulated in very general and imprecise terms".[48] The ECJ continued:

> "[...] in the absence of details of the particular circumstances in which the power in question may be exercised, the employers concerned do not know in what specific objective circumstances that power may be applied, as the situations allowing its exercise are potentially numerous, undetermined and indeterminable and leave the authority concerned

[43] Case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972 para. 71.

[44] *AGET Iraklis* cit. para. 81.

[45] See, for example, D Schiek, 'Towards More Resilience for a Social EU: The Constitutionally Conditioned Internal Market' (2017) EuConst 618; S Garben, 'Balancing Social and Economic Fundamental Rights in the EU Legal Order' (2020) European Labour Law Journal 364.

[46] See also S Prechal, 'Free Movement and Procedural Requirements: Proportionality Reconsidered' (2008) LIEI 203; C Barnard, 'A Proportionate Response to Proportionality in the Field of Collective Action' (2012) ELR 117. See also C Barnard, 'The Protection of Fundamental Social Rights in Europe after Lisbon' cit. 50-51.

[47] C Barnard, 'The Protection of Fundamental Social Rights in Europe after Lisbon' cit. 50-51.

[48] *AGET Iraklis* cit. para. 99.

> a broad discretion that is difficult to review. Such criteria which are not precise and are not therefore founded on objective, verifiable conditions go beyond what is necessary in order to attain the objectives stated and cannot therefore satisfy the requirements of the principle of proportionality [...]".[49]

The Greek authorities should thus have opted for more objective conditions the fulfilment of which could be reviewed by the national courts.[50] AG Wahl held a similar procedural view. In his Opinion, he stated that "[a]n alternative might have consisted in listing the types of dismissals considered to be unjustified", referring to the Appendix to the European Social Charter.[51]

Regarding the second option, *i.e*. the "double proportionality review", AG Trstenjak held in *Commission v Germany* that the balancing approach of the Court in *Schmidberger* would contribute to an optimum effectiveness of fundamental rights and fundamental freedoms.[52] This approach is not confined to an assessment of the appropriateness and necessity of a restriction of a fundamental freedom for the benefit of fundamental rights protection. It must also include an assessment of whether the restriction of the fundamental rights is appropriate in the light of the fundamental freedom. And such a scheme of analysis would, according to AG Trstenjak, be more in line with the "principle of equal ranking for fundamental rights and fundamental freedoms".[53] This equal ranking bodes well for art. 9 TFEU, especially concerning the social objectives the EU legislator needs to take into account, as the risk of "losing out" to more economic objectives may be mitigated under the double proportionality review. According to Weatherill, this review implies a rebalancing of priorities "with consequences sympathetic to social protection" and in line with other case law of the Court on EU free movement law, which is generally more sensitive to certain national practices and concerns.[54]

c) Article 9 TFEU and the socio-economic constitution

Another, and to the foregoing related, path that can be followed with a view to socially mainstream EU free movement law and to give more weight to art. 9 TFEU, concerns the more explicit recognition of the four freedoms as constitutionally conditioned rights. After all, art. 26 TFEU states that the internal market is ensured *in accordance with the provisions of the Treaties*. Furthermore, the four freedoms can be seen as a specific

[49] *Ibid*. 100.

[50] M Markakis, 'Case C-201/15 AGET Iraklis: Can Governments Control Mass Layoffs by Employers? Economic Freedoms vs Labour Rights' (3 January 2017) EU Law Analysis eulawanalysis.blogspot.com.

[51] Case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:429, AG Wahl, para. 71.

[52] Case C-271/08 *Commission v Germany* ECLI:EU:C:2010:183, opinion of AG Trstenjak, para. 191.

[53] *Ibid*. para. 183.

[54] Beginning with *Rewe v Bundesmonopolverwaltung für Branntwein* cit., see S Weatherill, 'Protecting the Internal Market from the Charter' cit. 226-227.

amplification of the EU Charter of Fundamental Rights, "which accepts that the internal market is constitutionally conditioned, particularly by social rights".[55]

At the same time, EU fundamental social rights have gained traction since the binding EU Charter. The rulings in *Bauer et al* and *Max Planck* are important as the Court, according to Frantziou, affirms the constitutional status of social rights by aligning them with the right to equal treatment, and makes EU social rights more useful for individuals, especially in situations where social rights are jeopardised.[56] In these judgments, following up on its previous decision in *Egenberger* on *inter alia* the principle of non-discrimination as enshrined in art. 20 of the EU Charter, the Court has strengthened the protection of fundamental social rights by unequivocally affirming that some of the social rights enshrined in Title IV (Solidarity) have direct effect. This means that these rights can be invoked and applied, even directly in a dispute between private parties. The strengthening of some EU fundamental social rights responds to the needs of art. 9 TFEU, placing them on an equal footing with the economic rights in the EU Charter, like the right to choose an occupation (art. 14 of the EU Charter), the right to property (art. 15 of the EU Charter) and the freedom to conduct a business (art. 16 of the EU Charter).

In the *Bauer et al*. judgment, the Court determined that a worker's right to paid annual leave under art. 31(2) of the EU Charter could not only be applied *vis-à-vis* a public employer, *i.e.*, the City of Wuppertal, but also horizontally *vis-à-vis* the private employer Mr. Willmeroth. The Court held that art. 31(2), concerning certain aspects of the organisation of working time, is an essential principle of social law, which is mandatory and unconditional. What matters is the nature of the provision and that the provision must be sufficient in itself to confer a right.[57] The Court added that even though art. 51(1) of the EU Charter does not directly address private parties, it does not "systematically preclude such a possibility". Thus, the right to fair and just working conditions in art. 31 of the EU Charter can have horizontal direct effect.

With *Bauer et al.* and *Max Planck*, the Court takes a further step towards increased protection of EU social rights, as the application of the EU Charter should not be dependent on the status of the employer (either public or private). This is especially relevant in the social policy field with a view to protect workers in vertical and horizontal labour disputes with their employers.[58] It has thereby followed a route that had been set out in several

[55] D Schiek, 'Towards More Resilience for a Social EU' cit. 626.

[56] S de Vries, 'The Bauer et al. and Max Planck Judgments and EU Citizens' Fundamental Rights: An Outlook for Harmony' (2019) European Equality Law Review 29; E Frantziou, 'Joined cases C-569/16 and C-570/16 Bauer et al: (Most of) the Charter of Fundamental Rights is Horizontally Applicable' (19 November 2018) European Law Blog europeanlawblog.eu.

[57] S Prechal 'Horizontal Direct Effect of the Charter of Fundamental Rights of the EU' (2020) Revista de Derecho Comunitario Europeo 420.

[58] J Fraczyk, 'EU Fundamental Rights and the Financial Crisis' in S Douglas-Scott and N Hatzis (eds), *Research Handbook on EU law and Human Rights* (Edward Elgar Publishing 2019) 480.

judgments concerning non-discrimination between men and women (*Defrenne*), nationality (*Angonese*), age (*Mangold* and *Kucükdevici*) and religious discrimination (*Egenberger*).[59] As such, the horizontal direct effect of (at least some) fundamental social rights will contribute to the realization of a more socially inclusive EU Single Market as it allows for more adequate protection of citizens and workers, also in cases of private relationships.

The idea of a constitutional conditioned internal market entails that trade or free movement is conditional upon respecting the social constitution and that individual rights of economic actors are no longer – or at least not always – prioritised. As stated above, such an approach fits well into the (implicit) underlying ratio and the (explicit) social objectives of art. 9 TFEU. In addition, a constitutional conditioned market may amount to a more restrained test used by the Court under the prohibitive Treaty rules on free movement. This approach could take the form of a mere discrimination test, *i.e.* to assess whether national legislation or national practices protecting fundamental social rights (including the right to strike) have more detrimental effects on non-nationals, either directly or indirectly.[60]

IV. A story of hope (ii): Art. 9 TFEU and EU legislative harmonisation

In giving effect to the social dimension of the EU internal market and, in particular, art. 9 TFEU, the EU legislator could – roughly – follow two routes. First, through legislative harmonisation based on the internal market legal bases, including art. 114 TFEU. EU internal market legislation is by its very nature receptive to public and social policy interests. After all, harmonisation has a dual function, as it "sets common rules for the European market, but, against a background of diverse national sources of regulatory inspiration, it also involves a standard of re-regulatory protection [...]".[61] This function is also relevant for the social policy domain, in which pre-existing diverse regulatory choices amongst the Member States leading to barriers to free movement are widespread.[62] The second route concerns legislative harmonisation, more specifically in the social policy field on the basis of art. 153 TFEU, which use may make the internal market more socially inclusive and contribute to the realisation of the social market economy.

[59] *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* cit.; case C-281/98 *Angonese* ECLI:EU:C:2000:296; case C-144/04 *Mangold* ECLI:EU:C:2005:709; case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21 and case C-414/16 *Egenberger* ECLI:EU:C:2018:257.

[60] In a similar vein, D Schiek, 'Towards More Resilience for a Social EU' cit. 628 and S Garben, 'Balancing Social and Economic Fundamental Rights in the EU Legal Order' cit. 383.

[61] S Weatherill, 'Protecting the Internal Market from the Charter' cit. 228. See also S de Vries, *Tensions within the Internal Market* cit. 247-296.

[62] S Weatherill, 'Protecting the Internal Market from the Charter' cit. 228.

IV.1. The internal market legal bases of *inter alia* art. 114 TFEU

By using the potentially very wide legal basis of art. 114 TFEU, the EU legislator has managed to touch upon nearly all policy domains of socio-economic life. After all, art. 114 TFEU allows for the harmonization of national laws, which are designed to protect public interests or fundamental rights, but constitute an obstacle to free movement, even when the Treaty limits or excludes legislative powers in certain policy fields.[63] As follows from the *Tobacco Advertising* case, a directive, which (also) aims to protect public health, can be adopted only if measures have as their object either the objective of removal of obstacles to the exercise of fundamental freedoms, or alternatively the removal of appreciable distortions of competition.[64]

The Court's judgment implies that once these threshold requirements have been met, the EU legislature has the power to intervene in practically any policy field, even the field of public health for which art. 168 TFEU contains a prohibition for the EU to adopt binding harmonisation measures. In a similar vein, art. 114 TFEU or other internal market legal bases exploiting their "broad and fuzzy contours" could potentially be used in the social policy field, where the EU does not or hardly dispose of specific harmonization powers. The problem is, however, that art. 114(2) TFEU itself explicitly excludes harmonization in relation to the rights and interests of employed persons. This is not the case for art. 115 TFEU, the other provision on the internal market, or for art. 62 TFEU in conjunction with arts 53 and 59 TFEU in the field of services.[65] However, art. 115 TFEU requires unanimity and it is unclear to what extent the provisions on services can be used in the social policy field, although the revised Posted Workers Directive offers an interesting example of how internal market legislation may strengthen the social face of the EU (see hereafter).[66]

Art. 114(3) TFEU includes a mainstreaming clause, as it requires the Commission to take "a high level of protection" into account concerning proposals in the field of health, safety, environmental protection, and consumer protection. But the provision does not mention social protection, which emphasizes the additional value of art. 9 TFEU. In light thereof, the (possible) influence of art. 9 TFEU on the application of art. 114 TFEU is

[63] Case C-376/98 *Germany v Parliament and Council* ECLI:EU:C:2000:544; case C-380/03 *Germany v Parliament and Council* ECLI:EU:C:2006:772.

[64] *Germany v Parliament and Council* ECLI:EU:C:2000:544 cit. para. 69.

[65] S de Vries, 'Protecting Fundamental (Social) Rights through the Lens of the EU Single Market: The Quest for a More 'Holistic Approach'' (2016) The International Journal of Comparative Labour Law and Industrial Relations 203.

[66] Another option is, of course, art. 352 TFEU, reserved for unforeseen cases, but its utility is severely limited, as the Monti II saga showed. This was the EU's failed attempt to address some of the issues raised by the decisions of the Court of Justice in *Viking* (and *Laval*) through a Council Regulation, as discussed in section III.2. See Communication COM(2012) 130 final of the Commission of 21 March 2012 on the 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. See also C Barnard and S de Vries, 'The "Social Market Economy" in a (Heterogeneous) Social Europe' cit. 47.

threefold. Firstly, the requirement to take into account social interests delimits the EU's discretionary powers, *i.e.* the full effect of the internal market must be mitigated where social interests are at issue. As such, art. 9 TFEU should prevent a purely market-oriented expansion of the EU internal market, without taking due account of social policy interests. In addition, although the discretionary powers of the EU legislature remain broad, there is a strong duty to motivate on the part of the EU as to whether and how the objectives of art. 9 TFEU have been taken into account.

Secondly, the mainstreaming clause reaffirms the view that social issues must be promoted within the context of the internal market, thereby emphasizing the social dimension of the internal market and the link with the social market economy as mentioned by art. 3(3) TEU (see hereafter). It may result in more robust legislation that provides for a high level of protection of social rights and interests.[67] In this way, the provision takes up a balancing role that ensures the integration of social policy at Union level.[68] At the same time, however, art. 9 TFEU does neither prescribe how exactly different interests should be balanced by the EU legislature, nor does it constitute a legal basis in itself for binding EU measures and thereby bypass art. 114(2) TFEU just like that.[69]

Drawing on experiences in the broader field of public economic law and non-discrimination, the powerful EU internal market infrastructure has nevertheless proven to be a driving force to "convey social values and enhance individuals' protection".[70] An example is the Accessibility Act, which is based on art. 114 TFEU and lays down requirements for goods and services, and gives specific effect to obligations arising from the United Nations Convention on the Rights of Persons with Disabilities and art. 26 of the EU Charter.[71] Another example is EU procurement legislation, which seeks to enhance sustainable and inclusive growth and prescribes public authorities to comply with social and labour law provisions.[72] Furthermore, the EU anti-discrimination legal framework has been pivotal in combating discrimination in employment and "thus deals with questions that are at the core of a traditional approach to social policy although viewed through the lens of

[67] C Barnard and S de Vries, 'The "Social Market Economy" in a (Heterogeneous) Social Europe' cit. 60.

[68] A Aranguiz, 'Social Mainstreaming through the European Pillar of Social Rights' cit. 345.

[69] *Ibid*. 345.

[70] E Muir, 'Drawing Positive Lessons from the Presence of 'the Social' Outside of EU Social Policy Stricto Sensu' cit. 84; C Barnard and S de Vries, 'The "Social Market Economy" in a (Heterogeneous) Social Europe' cit. 60.

[71] Directive 2019/882/EU of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services. See also S de Vries and T de Sterke, 'De Europese Toegankelijkheidsrichtlijn voor mensen met een handicap: grondrechtenbevordering binnen de Europese interne markt' (2020) Nederlands tijdschrift voor Europees recht 168.

[72] E Muir, 'Drawing Positive Lessons from the Presence of "the Social" Outside of EU Social Policy Stricto Sensu' cit. 85. See Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

human dignity".[73] However, while in all three examples art. 114 TFEU forms a driving-force in shaping the EU's social acquis, an explicit reference to art. 9 TFEU is missing.

By contrast, the Posted Workers Directive, perhaps the most well-known example of internal market legislation conveying social values and enhancing individuals' protection, explicitly mentions art. 9 TFEU.[74] The Posted Workers Directive is premised not on differential treatment between domestic workers and posted workers but on equality of treatment. This shifted focus is positive news for the individual posted workers, whereas the (mostly Eastern European) posting companies may see their competitive advantage removed. The preamble of the Directive refers to art. 9 TFEU, as well as to art. 3 TEU and the promotion of "social justice and protection" (found in art. 3(3), para. 2 TEU). The horizontal social clause's substantive demand thus seems to be taken into consideration. Rather surprisingly, the Directive does not refer to art. 3(3), para. 1 TEU on the social market economy, even though art. 9 TFEU forms a bridge between the internal market and the social market economy.[75]

The concrete impact of art. 9 TFEU on EU "social" legislation based on art. 114 TFEU thus seems on occasions limited. The EU legislator does not often explicitly mention whether the horizontal social clause served as, for example, a concrete cause for introducing the legislation, or as a guiding principle during the drafting of the legislation. Any possible, substantive role of art. 9 TFEU in introducing these regulatory initiatives remains second-guessing.

A third and last way as to how art. 9 TFEU influences EU internal market legislation is that it, although addressed to the EU institutions, indirectly binds Member States as well, for instance when they implement EU Directives and would like to take more restrictive measures to protect social rights and interests.[76] On a more practical note, to give flesh to the bones of art. 9 TFEU, it has been brought forward that there is a need for the EU to carry out impact assessments, assessing the impact on social policy interests of EU actions.[77]

If the result of all this is more socially robust EU internal market legislation, either through an explicit or implicit recognition of the role of art. 9 TFEU in regulatory initiatives,

[73] E Muir, 'Drawing Positive Lessons from the Presence of "the Social" Outside of EU Social Policy Stricto Sensu' cit. 88.

[74] In addition to the Revised Posted Workers Directive, the European Labour Authority (ELA), created in October 2019, aims to "to support Member States in implementing EU legislation in the areas of cross-border labour mobility and social security coordination, including free movement of workers, posting of workers and highly mobile services". The ELA could thus play a useful role in ensuring the continuing adherence to the objectives of art. 9 TFEU in the field of posted workers. See European Council Press Release, 'European Labour Authority: Council Agrees its Position' (6 December 2018) European Council www.consilium.europa.eu.

[75] Directive 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

[76] See also S de Vries, *Tensions within the Internal Market* cit. 19-20.

[77] E Muir, 'Drawing Positive Lessons from the Presence of "the Social" Outside of EU Social Policy Stricto Sensu' cit. 82.

it will be easier for the ECJ to interpret this legislation in a socially friendly manner. Legislative constraints set by the EU legislator on economic rights, including the four freedoms or the freedom to conduct a business as enshrined in art. 16 EU Charter, which played a too prominent role in the *Alemo-Herron* case (see hereafter), may be upheld accordingly. The judgments of the Court in the *Sky Österreich* and *Google Spain* cases, although situated outside the social policy domain, may serve as source of inspiration. In *Sky Österreich* the Court, in interpreting the Audiovisual Media Services Directive, ruled that the EU legislature was entitled to adopt rules on the basis of the internal market legal provision, which limited the free movement of audiovisual media services or rather the freedom to conduct a business, whilst giving priority to public access to information for the sake of media pluralism.[78] In a similar vein, the Court in *Google Spain* held that the rights to privacy and data protection do "as a rule, [...] override the economic interests of the operator of the search engine [...]".[79]

IV.2. The importance of art. 153 TFEU in making the EU internal market more socially inclusive

The important role of art. 153 TFEU in fleshing out the horizontal social clause of art. 9 TFEU, is shown in several recent legislative proposals, amongst others the recently adopted Minimum Wage Directive and the proposal for a Directive on improving working conditions.[80] As for the Minimum Wage Directive, in light of the goal to ensure a "fair and adequate minimum wage" with the argument that "the dignity of work is sacred",[81] the first recital of the act explicitly refers to art. 3(3) TEU and art. 9 TFEU, thus underlining the importance of both provisions as a set of guiding principles. This role is also shown in the legislative process of the Directive. For example, the European Parliament (unsuccessfully) proposed to amend recital 11, which states that, in 2018, the statutory minimum wage did not provide sufficient income for a single minimum-wage earner to reach the at-risk-of-poverty threshold in nine Member States. Accordingly, recital 11 – in the view of the European Parliament – should have explicitly stated that this risk "is not in line with the aims of the Union as outlined in Article 9 TFEU".[82] In addition, the Directive shows the role of the EPSR as the driving force of social policy legislative proposals. The act refers

[78] Case C-283/11 *Sky Österreich* ECLI:EU:C:2013:28.

[79] Case C-131/12 *Google Spain and Google* ECLI:EU:C:2014:317 para. 97.

[80] Directive 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union; Proposal for a Directive COM(2021) 762 final of the European Parliament and of the Council of 9 December 2021 on improving working conditions in platform work.

[81] European Commission, 'State of the Union Address by President Von der Leyen at the European Parliament Plenary' (16 September 2020) ec.europa.eu.

[82] European Parliament Report, Amendments 001-106 by the Committee on Employment and Social Affairs of 7 September 2022 on Employment and Social Affairs www.europarl.europa.eu 11.

to principle 6 of the EPSR to reaffirm workers' right to fair and minimum wages, to prevent in-work poverty, and to set all wages in a transparent and predictable way.[83]

The proposed Directive on improving conditions in platform work is based on art. 153(1)(b) TFEU as well.[84] Inspired by the ever-increasing presence of platform-oriented work, the proposal has the threefold aim to promote employees having or obtaining the correct employment status, to ensure a fairer and more transparent algorithmic management, and to enhance transparency and improve enforcement of the applicable rules in platform work.[85] Already labelled as a "welcome and decisive step" towards improving working conditions for platform workers, the proposed Directive seems a promising legislative tool to grant gig economy workers more protection against algorithmic-based employment.[86] At the same time, contrary to the Minimum Wage Directive, no explicit mention is made of art. 9 TFEU. Yet, the explanatory memorandum refers to principle 5 of the EPSR that "regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions and access to social protection". This reference highlights the increasingly important role of the EPSR in shaping EU "social" legislation and forming a specific policy bridge between art. 9 TFEU and the EU social acquis.

V. Fears undermining the safeguarding of social interests in the EU single market through art. 9 TFEU

Although art. 9 TFEU could thus (and sometimes does) play an important function in integrating social interests in the EU internal market, there are fears that the horizontal social clause cannot deliver on (all) of its promises. We divide these fears into two categories, *i.e.* fears stemming from art. 9 TFEU itself (*e.g.* the relatively vague and unclear wording of the provision), and fears that go beyond art. 9 TFEU *stricto sensu* but nonetheless relate to the difficulties in mainstreaming social policy interests in EU internal market law. At any rate, there must be a *political* will in the EU to find common ground for making EU law and policies more socially inclusive and to deliver a more ambitious social policy agenda. In the following sections we will focus on the *legal* difficulties and challenges that the EU faces in this respect.

V.1. The relatively vague and unclear wording of art. 9 TFEU

As described, art. 9 TFEU provides the ultimate balancing exercise between economic and market goals and social policy objectives. From a strictly legal perspective, however, its significance is less clear.

[83] Recital 3 Directive 2022/2041 cit.

[84] Communication COM(2021) 762 final cit.

[85] *Ibid*. 9.

[86] A Kelly-Lyth and J Adams-Prassl, 'The EU's Proposed Platform Work Directive: A Promising Step' (8 December 2021) Verfassungsblog verfassungsblog.de.

First, the language of art. 9 TFEU is relatively vague and unclear. Given the need to "take into account" the social needs set out in the horizontal social clause, art. 9 TFEU seems designed as suggesting a series of objectives to increase overall policy coherence in the EU.[87] Although the ECJ held in the *Pillbox 38* case that art. 9 TFEU "require[s]" the EU legislator to ensure a high level of protection of human health in its policies,[88] which could suggest a certain binding to achieving social objectives,[89] art. 9 TFEU in itself does not contain any commitment language. As a result, the wording of art. 9 TFEU limits its function to a mere guiding nature, *i.e.* to provide the pathway of developing and implementing policies that *do* have a material nature.[90] One risk of this guiding nature is that references in legislative acts to art. 9 TFEU could lack significance, for example because the act merely repeats the wording of the clause or parts thereof.[91] In such cases, a true indication of art. 9's role in drafting the legislative act and its content remains missing, given that the wording of the horizontal social clause does not prescribe the EU legislator in more commanding fashion to explain how it committed to executing art. 9 TFEU in the particular act.

In addition, the lack of commitment in art. 9 TFEU causes difficulties regarding the judicial review of art. 9 TFEU. To determine whether the EU legislator has complied with the obligation to "take into account" social considerations in designing a legislative act proves to be problematic. The ECJ has already held that, regarding the judicial review of the conditions of the implementation of the principle of proportionality, the EU legislature "must be allowed a broad discretion" in areas "which [entail] political, economic and social choices on its part, and in which it is called upon to undertake complex assessments".[92]

V.2. The constitutionalisation of EU (free movement) law and the unclear scope of EU fundamental social rights protection

Although the constitutional embeddedness of the four freedoms and economic rights may, as stated above in section III, contribute to social mainstreaming, the fundamentalisation or constitutionalisation of EU law may at the same time challenge social rights protection laid down by national and EU law. The effective application of art. 9 TFEU could be threatened in two ways.

[87] ME Bartoloni, 'The EU Social Integration Clause in a Legal Perspective' (2018) Italian Journal of Public Law 105.

[88] Case C-477/14 *Pillbox 38* ECLI:EU:C:2016:324 para. 116.

[89] As Bartoloni argues, see ME Bartoloni, 'The EU Social Integration Clause in a Legal Perspective' cit. 102.

[90] ME Bartoloni, 'The EU Social Integration Clause in a Legal Perspective' cit. 106.

[91] See, for example, Regulation (EU) 1304/2013 of the European Parliament and of the Council of 17 December 2013 on the European Social Fund and repealing Council Regulation (EC) No 1081/2006 (European Social Fund Directive), which states that "[i]n accordance with Article 9 TFEU, the [European Social Fund] should take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health".

[92] Case C-157/14 *Neptune Distribution* ECLI:EU:C:2015:823 para. 76.

Firstly, the EU Charter may be used to strengthen the internal market freedoms at the cost of other fundamental (social) rights. This happened in a way in *Alemo-Herron*, which concerned the interpretation of the Directive on employees' rights in the event of transfer of undertakings.[93] The Court relied on the freedom to conduct a business as enshrined in art. 16 of the EU Charter, to conclude that the higher national protection granted by UK law to employees was deemed to interfere with the employer's managerial freedom.[94] As such, the Court emphasized the importance of protecting employers' economic rights under the Directive, without making any reference to the social rights in Title IV of the EU Charter.[95] This judgment gives the impression that the economic freedoms and rights are overstretched with the help of the Charter,[96] but this over-reading of art. 16 of the EU Charter has been severely criticized as out of line with the Court's orthodoxy.[97]

If the four freedoms are interpreted in terms of fundamental rights, in particular the freedom to conduct a business (art. 16 EU Charter), the freedom to choose an occupation (art. 15 EU Charter) and the right to property (art. 17 EU Charter), this may have implications for the scheme of analysis employed by the Court. The Cassis de Dijon-type of test carried out within the context of EU free movement law is "lighter" and "friendlier", creating more room for Member States to protect public and social interests than the test prescribed by art. 52(1) of the EU Charter in case of conflicts between fundamental rights. A potential erosion of the Cassis de Dijon test could benefit individual and businesses' rights over collective (social) interests. The question is, however, whether things are as bad as they present themselves, as art. 52(1) EU Charter also explicitly recognises the importance and seriousness of the protected general interest.[98] Furthermore, as explained above, fundamental social rights in the EU Charter have gained prominence, particularly through the judgments of the ECJ in *Egenberger, Bauer et al* and *Max Planck.*

[93] Case C-426/11 *Alemo-Herron and others* ECLI:EU:C:2013:521; Directive 2001/23/EC of the European Council of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts of undertakings or businesses.

[94] See C Barnard, 'Are Social "Rights" Rights?' (2020) European Labour Law Journal 356. See, with regard to art. 16 and national level of workers' protection, F Laagland, 'Member States' Sovereignty in the Socio-Economic Field: Fact or Fiction?: The Clash between the European Business Freedoms and the National Levels of Workers' Protection' (2018) European Labour Law Journal 50.

[95] S de Vries, 'General Reflections on Current Threats and Challenges to, and Opportunities for, the Exercise of Economic Rights by EU Citizens' in S de Vries and others (eds), *EU Citizens' Economic Rights in Action: Re-Thinking Legal and Factual Barriers in the Internal Market* (Edward Elgar Publishing 2018). The different ways in which the proportionality principle has been applied in cases like *Viking Line* or *Schmidberger* may furthermore create legal uncertainty.

[96] S de Vries, 'The EU Single Market as "Normative Corridor" for the Protection of Fundamental Rights: The Example of Data Protection' in S de Vries, U Bernitz and S Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument* cit. 242.

[97] S Weatherill, 'Protecting the Internal Market from the Charter' cit. 234.

[98] M Van der Woude, S Prechal and S de Vries, 'In gesprek met René Barents…' (2022) SEW 392.

A second fear or concern relates to the unclear and limited scope of application of the EU Charter and the fundamental social rights enshrined therein. The point of departure is that the EU Charter applies to acts of Member States when they act within the scope of Union law.[99] However, in several cases concerning social rights, the Court has denied jurisdiction to apply the EU Charter because of the lack of a (sufficient) connection with EU law, although the national measures were adopted within the framework of EU legislation.[100]

In addition, due to the EU legislature's limited competences in the social policy field, social rights may remain out of sight and are thus less "covered" in preliminary rulings of the Court. The right of association or the right to strike, for example, are explicitly excluded from art. 153(5) TFEU, and even art. 114 TFEU, although it provides for broad legislative powers in the field of the internal market, cannot (always) be used in the social domain as stated above. As such, the fact that the Court, in interpreting EU internal market legislation touching upon social aspects, often does not and cannot establish a nexus may hamper the integration of social policy objectives across all EU domains and undermine social mainstreaming on the basis of art. 9 TFEU. This is different for fundamental rights that are and can be covered by internal market legislation, such as the principle of non-discrimination, the right to data protection, the right to (intellectual) property, or the freedom to conduct a business.[101]

To add to that, if a certain situation does fall within the scope of application of the EU Charter, it is unsure whether the fundamental social rights can be invoked by an individual. As art. 52(2) EU Charter sets out, EU Charter "principles" cannot generate the same legal effects as "rights". They need further implementation by EU institutions or Member States and are judicially cognisable only when the legality or interpretation of the underlying implementing act is at issue. Neither the Court nor the Advocate Generals have given much clarity so far regarding the "rights" vs "principles" debate.[102] And despite the Court's judgment in *Bauer et al.*, many of the fundamental social rights enshrined in Title IV on Solidarity seem to have been drafted as principles and do not thus confer rights on individuals that they can claim directly before national courts.[103] This may constitute

[99] Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105 paras 20-21.

[100] Case C-333/13 *Dano* ECLI:EU:C:2014:2358. See P Phoa, *EU Law as a Creative Process: A Hermeneutic Approach for the EU Internal Market and Fundamental Rights Protection* (Europa Law Publishing 2021). See also C Barnard, 'The Charter, the Court – and the Crisis' (2013) University of Cambridge Legal Studies Research Paper Series, and the case C-128/12 *Sindicatos dos Bancários do Norte* ECLI:EU:C:2013:149. Here, the Court concluded it lacked jurisdiction to review Portuguese national labour law reforms adopted on the basis financial assistance programs during the Eurozone crisis era. Furthermore, C Barnard, 'The Silence of the Charter: Social Rights and the Court of Justice' in S de Vries, U Bernitz and S Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument* cit. 173-188.

[101] See S de Vries, 'General Reflections on Current Threats and Challenges to, and Opportunities for, the Exercise of Economic Rights by EU Citizens' cit.

[102] See, for example, case C-176/12 *AMS* ECLI:EU:C:2014:2, in which the Court did not opt to provide clarity on the issue.

[103] S Prechal, 'Horizontal Direct Effect of the Charter of Fundamental Rights of the EU' cit. 421.

further constraints on the possibility of social mainstreaming via art. 9 TFEU across the EU's policies. After all, the stronger the legal effects of fundamental social rights enshrined in the EU Charter are, the easier it will become to integrate and enforce them in EU internal market law, and thus to meet the needs of art. 9 TFEU.

V.3 The (sometimes) flawed reasoning in the case law on EU free movement law

In some cases, the reasoning of the Court is flawed, which gives rise to the fear that EU free movement law may not be suitable to sufficiently accommodate social policy concerns. The language of a *prima facie* breach of the four freedoms may entail a more market-led and instrumental approach to the protection of social rights and values. This can particularly be seen in the *Viking* case, which illustrates how the fundamental right to take collective action and to strike may be "subsumed" under a rule of reason exception ground, *i.e.*, the protection of workers, instead of the Court examining whether the fundamental rights *as such* may justify a restriction on free movement.[104] This development, whereby "a written or unwritten ground of justification within that fundamental right must [...] always be found",[105] could thus threaten the equal ranking of fundamental rights.[106]

The broad interpretation of the four freedoms and the market access approach of the Court entail that (national) social policy initiatives fall relatively easy within the scope of the fundamental market freedoms, especially if the said policy discourages foreign entities of setting up shop or providing a service in another Member State.[107] Given that the market freedoms could engulf national measures that (even) have an indirect and potential effect on cross-border trade, foreign companies possess a wide array of possibilities to challenge national (social) policy that hinders their business. This trend is also shown in the earlier mentioned *AGET Iraklis* case, given that the Court considered the Greek legislation on collective redundancies to be at odds with the freedom of establishment. In a similar vein, *Alemo-Herron* illustrates how the Court may be induced to give more weight to economic rights in interpreting EU internal market legislation, which also pursues social policy aims.

Market-led considerations by the Court in social policy issues may thus mitigate the integration of EU social policy objectives in the EU's legislative action and, as a result, could form an obstacle to an effective use of the horizontal social clause. Art. 9 TFEU, in

[104] C Barnard, 'EU "Social" Policy: From Employment Law to Labour Market Reform' in P Craig and G De Búrca, *The Evolution of EU Law* (Oxford University Press 2021) 671.

[105] *Commission v Germany*, opinion of AG Trstenjak, cit. para. 183.

[106] See also T Novitz, 'A Human Rights Analysis of the Viking and Laval Judgments' (2008) CYELS 541; J Malmberg and T Sigeman, 'Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice' (2008) CMLRev 1130. The Court has been criticized for prioritizing economic rights over social rights: C Barnard, 'The Charter, the Court – and the Crisis' cit. See also *Commission v Germany*, opinion of AG Trstenjak, cit. para. 183.

[107] F Laagland, 'Member States' Sovereignty in the Socio-Economic Field: Fact or Fiction?' cit. 55.

its core, precisely aims to *balance* market and social objectives in the policies and initiatives of the Union. The afore-mentioned cases by the Court could be said to be at odds with this balancing exercise. Having said that, we consider the "business friendly" case law by the Court (such as *Viking* and *Alemo-Herron*) to be of a symptomatic nature and not structural, which mitigates the fear regarding the use of the horizontal social clause. The above-mentioned cases are not typical examples of how the Court normally deals with fundamental rights and public interests under the scheme of free movement.[108]

V.4. The question of competence, technological innovation and digitalization

Digitalization will lead to a wide range of ethical and legal challenges for the EU's internal market and the EU's social acquis, which may pose obstacles to an effective use of art. 9 TFEU. The impact of digitalisation is for example visible in the field of Artificial Intelligence (AI), as the recently proposed Artificial Intelligence Act (AI Act), which is based on art. 114 TFEU and adopts the typically internal market "New Approach harmonisation technique", shows.

AI systems play an increasingly important role in questions of economic inequality and social rights.[109] The underlying algorithm is designed in such a way that the AI system is instructed to "learn and adapt", often on an autonomous basis, which in turn can lead to algorithmic discrimination and makes it hard to pinpoint and prove infringements on people's life, health, and property.[110] The rights of privacy and data protection, non-discrimination, human dignity and self-determination, and freedom of expression can all be negatively affected by AI systems.[111] The AI Act forms an important first step in regulating this current legal no-man's-land, by – amongst others – introducing a risk-based categorisation of AI systems, with each system having a different set of harmonised rules.[112]

Nevertheless, social policy considerations have received only marginal attention in the debate about how to regulate AI, which runs contrary to the specific guidance of art. 9 TFEU to incorporate social elements in the EU's policy. The main priority of the EU legislature concerns (somewhat understandably) the internal market, privacy and data

[108] S Weatherill, 'From Economic Rights to Fundamental Rights' in S de Vries, U Bernitz and S Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013) 213-234.

[109] J Niklas and L Dencik, 'What Rights Matter? Examining the Place of Social Rights in the EU's Artificial Intelligence Policy Debate' (2021) Internet Policy Review 1.

[110] M Ebers, 'Standardizing AI: The Case of the European Commission's Proposal for an Artificial Intelligence Act' in LA Di Matteo, C Pongibò and M Cannarsa (eds), *The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics* (July 2022) 4.

[111] *Ibid*. 3.

[112] Communication COM(2021) 206 final from the Commission of 21 April 2021 on the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts.

protection, transparency and non-discrimination.[113] However, although the proposed AI act is not entirely silent on some social policy considerations – the AI Act states that AI systems used for recruitment, promotion, termination, and evaluation of workers should be classified as high-risk AI systems given their potential impact on future career prospects and livelihoods[114] – social policy considerations as a whole seem to have been insufficiently taken into account. The proposal, for example, lacks specific provisions on AI's impact on workers' rights or (government-issued) social services. [115] In addition, the text may risk curtailing the freedom of social partners and employee representation bodies in the implementation and deployment of AI software intended to be used at work.[116] Given the autonomous nature of AI, social partners and employee representation bodies could lack sufficient insight as to *how* the AI system works and processes personal data, and whether practices like algorithmic bias can be prevented or mitigated.

Based on this, it could be argued that the EU legislator has missed the "Article 9 TFEU boat" in designing the proposed AI Act, especially when it concerns adequate protection for workers and other vulnerable groups. As such, the proposed AI Act shows the difficulty of balancing social policy objectives with the – often – primary aims of data protection, privacy and non-discrimination in the regulation of digital (and disruptive) technologies. In this interplay, an effective and prominent use of art. 9 TFEU in future regulation, making it a *true* guiding principle in EU legislation, seems a prerequisite for ensuring adequate social rights protection in the coming digital decades, in which new and (even more) disruptive technologies will continue to be developed.

VI. Conclusion

In this *Article*, we looked at the role of art. 9 TFEU in social mainstreaming in EU internal market law. Art. 9 TFEU calls upon the EU institutions to take their responsibility in achieving a more socially inclusive internal market seriously. Yet, art. 9 TFEU is hardly ever mentioned explicitly by the Court or the EU legislator. We positioned art. 9 TFEU between hope and fear. The story of hope reveals that, despite the lack of explicit or clear references to art. 9 TFEU, EU internal market law has become – or has the potential to become – more socially inclusive. There are various pathways followed by the Court to take account of social rights and social interests, which range from an "immunity" or balancing approach, to a more constitutionally and socially conditioned internal market. Meanwhile, the EU legislature starts using the potential of the legal bases in the fields of the

[113] J Niklas and L Dencik, 'What Rights Matter?' cit. 20.

[114] Communication COM(2021) 206 final cit. para. 36.

[115] See A Ponce Del Castillo, 'The AI Regulation: Entering an AI Regulatory Winter? Why an ad hoc Directive on AI in Employment is Required' (2021) ETUI Policy Brief 7.

[116] See A Cefaliello and M Kullmann, 'Offering False Security: How the Draft Artificial Intelligence Act Undermines Fundamental Worker Rights' (2022) European Labour Law Journal 561-562.

internal market and social policy, inspired by the European Pillar of Social Rights and art. 9 TFEU, to adopt more socially robust legislation.

Nevertheless, although "the social" seems to be increasingly firmly embedded in the current Treaty framework and in EU internal market law, there are fears that the language of mainstreaming promises more than what can be delivered by the EU, considering *inter alia* the limited legislative competences for the EU in the social policy domain. Some of these fears can be overcome, some relate to more structural, legal weaknesses including a lack of competences, and for others we need political willpower and courage.