

The ‘Social Market Economy’ in a (Heterogeneous) Social Europe: Does it Make a Difference?

Catherine Barnard*, Sybe de Vries**

1. Introduction

Realising a highly competitive social market economy, as proclaimed in Article 3(3) of the Treaty on European Union (TEU), has been one of the tasks and objectives of the EU since 2009. Although much has been written about the ‘social market economy’, it is still unclear what the notion requires in terms of substantive EU policies.¹ This is, in part due to the fact that social protection, through *inter alia* the adoption of market-correcting policies, largely remains a matter for individual Member States and, outside the more narrow field of employment law, the EU lacks competence to enact measures in the broader frame of social policy more generally. Meanwhile Europe’s (social market) economy faces huge, strongly interlinked, challenges, both from within and from outside the EU: growing inequality, an ageing population, technological innovation and migration both from within the EU (free movement of persons) and outside (the migration crisis). There are ever greater calls for the EU to respond to these challenges, at the very time when there is a lack of significant political will to act.

These problems are exacerbated by the fact that some perceive the EU to be the cause of the problems. EU Treaty provisions, especially on the four freedoms, seek to open up national markets and promote undistorted competition. This has had two consequences. First, the EU rules themselves have been seen as deregulatory, striking down national social protection: the market prevails over the social. Second, the opening up of national markets has meant that migrants have been free to move to those States offering more generous social protection, both in terms of social benefits and employment rights. Many nationals living in these receiving States see this as unfair, as a cause for social dumping, and a decline in their own living standards.

The growing rise of populism States can be attributed in part to the increasingly vexed issue of migration. In the UK immigration – specifically the ‘unrestricted’ free movement persons – was a, if not the, cause of its vote to leave the EU. There was a (false) perception that EU migrants were taking more than they gave and that immigration constituted a threat to the cohesion of society. For the newer Member States, particularly Hungary, the ‘migration crisis’ which has brought many thousands of refugees to the EU’s shores, provided fertile ground to build an anti-migrant, and anti-EU, rhetoric. In Germany the same migrant crisis and Angela Merkel’s dramatic decision to welcome large numbers of Syrian refugees, has produced significant shifts in its politics. These trends have resulted in growing cleavages between the EU Member States.

* Professor of Law, University of Cambridge, email: csb24@cam.ac.uk. She is grateful for the support awarded under the following programme: Trabajo y Digitalización: el impacto de la economía 4.0 sobre el empleo, las relaciones laborales y la protección social DER2017-82444-R.

** Professor of Law, Europa Instituut, Utrecht University, email: s.a.devries@uu.nl.

1 E. Muir, ‘Drawing Positive Lessons From the Presence of “The Social” Outside of EU Social Policy *Stricto Sensu*’, (2018) *European Constitutional Law Review*, 14: 81 a.f.

At the same time, all EU countries are witnessing major shifts in the way that work is done. New technology has dramatically changed daily life for many people. Work has become increasingly precarious in the so-called gig economy for those employed through online platforms such as Uber and Deliveroo.² This may mean zero hours contracts or (false) self-employment. All legal systems are struggling to work out whether, and if so how, employment laws should apply to this diverse group of individuals. Many, but by no means all, of those working in these jobs are migrant workers from elsewhere in the EU or from third countries, thus bringing together the two issues we would like to consider in this chapter: migration and precarious work.

For those left behind by globalisation, who are forced to do such precarious work, this creates further resentment, of the government which was seen as failing to protect them, and of EU migrants who were portrayed as taking their ('good') jobs.³ This resentment manifested itself in the UK's referendum. As Goodwin and Heath put it:⁴

The vote for Brexit was anchored predominantly, albeit not exclusively, in areas of the country that are filled with pensioners, low skilled and less well educated blue-collar workers and citizens who have been pushed to the margins not only by the economic transformation of the country, but by the values that have come to dominate a more socially liberal media and political class. In this respect the vote for Brexit was delivered by the 'left behind'- social groups that are united by a general sense of insecurity, pessimism and marginalisation, who do not feel as though elites, whether in Brussels or Westminster, share their values, represent their interests and genuinely empathise with their intense angst about rapid change.

It is quite clear that, for the groups identified by Goodwin and Heath, the language, let alone the substance, of 'social market economy', has proved empty. Had they even heard of the concept, they would have seen a 'market economy' but no 'social'. In particular, what they did experience was a market which delivered free movement and increased competition for their jobs, jobs which were themselves often precarious. And they also saw no real social safety net. Both the EU and their own Member State had failed them.

In this article we take managing migration and managing the gig economy as a prism through which to examine not only whether the phrase 'social market economy' has any real substance but also whether it offers any steer as to how the EU may respond in the future. We argue that the language of 'social market economy', a concept drafted in the halcyon days prior to the financial and migration crises, serves only to highlight the gap between rhetoric and reality (Section 3). We identify two main reasons for this: lack of legal competence and lack of political will. We then consider whether the objective of attaining a 'social market economy' can be operationalised in any way. In the light of the establishment of the European Social Pillar, we argue it can – but within limits (Section 4). In Section 5, we conclude by arguing that the lack of clear communication by the EU, both of its successes but also of the limits on its powers, means that it receives little credit for the good it is able to do while also unnecessarily raising expectations among the public about what it can achieve. This inevitably leads to the disappointment generated by unfulfilled expectations.

We begin in Section 2 by setting out the legal and political challenges in the two policy areas we have identified: migration and precarious work. We argue that in the field of migration, EU law has created the conditions for some of the tensions which have emerged, tensions famously framed by Fritz Scharpf in 1999 as the 'decoupling of the economic and social spheres',⁵ and a growing cleavage between the East and West States of the EU as to how to respond. In respect of the gig economy, the EU, as well as the Member States, are struggling to get to grips with the very nature of the problem and just how law can be used to respond.

2 See further J. Prassl, *Humans as a Service* (2018).

3 See further F. O'Toole, *Brexit and the Politics of Pain* (2018), ch. 3.

4 M. Goodwin and O. Heath, 'Brexit and the Left Behind: A Tale of Two Countries' (22 July 2016), <<http://blogs.lse.ac.uk/brexit/2016/07/22/brexit-and-the-left-behind-a-tale-of-two-countries/>> (last visited 24 May 2019).

5 F.W. Scharpf, *Governing in Europe. Effective and Democratic?* (1999), ch. 2.

2. The legal and political challenges posed by migration and by the gig economy

2.1. Challenges posed by migration

The Treaty on the Functioning of the European Union (TFEU), its interpretation by the Court of Justice of the European Union (CJEU) at EU level, and its implementation at national level, has created the framework for ongoing tensions both in respect of internal and external migration. In this section we look first at the tensions arising between the older and newer Member States (mainly West against East) in the context of intra-EU migration (Section 2.1.1.) and then between the existing Member States following immigration from the East mainly in the context of extra-EU migration (Section 2.1.2.).

2.1.1. West against East

Free movement of workers

As is well known, Article 45 of the TFEU allows for free movement of workers and enshrines the principle of non-discrimination. Article 7(2) of Regulation 492/2011 also prescribes the principle of equal treatment in respect of social advantages and tax advantages.⁶ The fact that under EU law EU migrants, especially migrants from (poorer) EU-8 States, can receive welfare benefits in the host State led some to argue that the northern European States were attracting EU migrants in unsustainable numbers.⁷ For example, in 2014, the then Prime Minister David Cameron advanced the 'honeypot' thesis, arguing that 'tax credits and other welfare payments are a big financial incentive [for EU nationals to come to the UK], and we know that over 400,000 EU migrants take advantage of them'.⁸

The academic, Gareth Davies, succinctly summarised the views of many of the Vote Leave constituency:

there were too many [migrants], they were pushing down wages, they were keeping the low-skilled native out of work, they were costing the government a fortune in in-work benefits, they were making towns and villages unrecognisable and alienating the more established inhabitants.⁹

It was certainly clear that migration was a growing source of public concern after the 2004 enlargement.¹⁰

This was recognised in the most comprehensive study on the issue conducted by the Migration Advisory Committee (MAC). It reported that net migration, both European Economic Area (EEA) and non-EEA, of 250,000 a year meant adding a city the size of Birmingham to the UK population every four years.

The UK tried to address these concerns in the Brussels negotiation in February 2016 but the limited and technical changes agreed there proved insufficient to convince the British public that the EU really understood and was willing to respond to its concerns.¹¹

While concerns over intra-EU migration are seen as primarily a British problem and one that will be resolved with the UK's departure from the EU, other Northern European States are, in fact, struggling with similar issues. Work done by Dorte Sindbjerg Martinsen and her colleagues tracks a hardening of attitudes

6 Council Regulation (EU) 492/2011 on the free movement of workers, OJ 2011, L 141/1.

7 See also C. Bruzelius et al., '(Dis)united in diversity? Social policy and social rights in the EU', in: F. Pennings & M. Seeleib-Kaiser (eds.), *EU Citizenship and Social Rights – Entitlements and Impediments to Accessing Welfare* (2018), pp. 51-71.

8 See full text of speech at <<http://www.bbc.co.uk/news/uk-politics-30250299>> (last visited 24 May 2019).

9 G. Davies, 'Could It All Have Been Avoided? Brexit and Treaty-Permitted Restrictions on Movement of Workers', *European Law Blog*, 18 August 2016, <<http://europeanlawblog.eu/2016/08/18/could-it-all-have-been-avoided-brexit-and-treaty-permitted-restrictions-on-movement-of-workers/>> (last visited 24 May 2019).

10 Prior to the 2004 expansion of the EU, there was little concern expressed in the UK about free movement, perhaps because the flows were small and relatively balanced. After the expansion of the EU in 2004, the flows became much larger and mostly towards the UK and public concern about immigration also rose. The share of the population who were born in an EEA country (excluding the Republic of Ireland or the UK) increased from around 1.5% in 2004 to around 5.1% in 2017: Migration Advisory Committee, 'EEA migration in the UK: Final report' (September 2018), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/741926/Final_EEA_report.PDF> (last visited 24 May 2019).

11 European Council, 'European Council meeting (18 and 19 February 2016) – Conclusions' (19 February 2016), <<http://data.consilium.europa.eu/doc/document/ST-1-2016-INIT/en/pdf>> (last visited 24 May 2019).

towards EU migration in other Northern States. They show, for example, how the changing political context in Denmark and Austria influences the frontline application of EU rules on benefits. They conclude:

the street-level bureaucrat does not turn to the supranational level for guidance on how to understand and administer these concepts. Instead they seek instructions from their more immediate superiors, i.e. the national authorities. The political, managerial and judicial signalling they express come to guide and influence decisions on the ground. The message sent from the more immediate superior is being picked up at the frontline of administration. The domestic interpretation of EU law and CJEU jurisprudence thus informs front-line case-handling. In both the Danish and the Austrian case, we saw domestic consensus towards a more restrictive line towards EU migrants and their cross-border access to welfare benefits.

So the application of Article 45 of the TFEU on free movement of workers was already seen as putting a strain on the solidarity inherent in the EU system. However, the other freedoms also created problems for the integrity of national social systems.

Freedom of establishment and freedom to provide services

The EU Treaty principles of freedom of establishment and freedom to provide services, as interpreted by the CJEU through the prism of its market access jurisprudence,¹² inevitably led to a clash with the social rights laid down by national law, as the decisions in *Viking* and *Laval*¹³ showed. It will be recalled that both cases essentially 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 actually blockading the site (*Laval*) with a view to stopping the employers' conduct.

In considering whether the actions by the trade unions breached Articles 49 and 56 of the TFEU respectively, the CJEU followed its standard pattern of adjudicating disputes under EU free movement law: it found a breach of the Treaty which needed to be justified and then considered whether the steps taken were proportionate. In both cases, it seemed unlikely that the trade union action was proportionate (*Viking* was settled before there was a final decision; *Laval* received compensation in the Swedish courts).

The single market approach adopted in these cases had the following consequences. First, the CJEU emphasised the broad scope of application of the Treaty freedoms even in the social domain, and even where fundamental (national) social rights were at stake. Second, it extended the application of the free movement provisions vis-à-vis private actors, in casu the trade unions, thereby granting not only rights to individuals but also imposing obligations on private actors. Third, it reinforced the broad substantive scope of the free movement of services and freedom of establishment, which meant that the attention focused on justification (and proportionality). Fourth, unusually, given its broad approach to scope, the CJEU took a restrictive approach to justification and proportionality:¹⁴ the Court said 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.

Thus *Viking* and *Laval* (and their progeny) were seen as totemic of the conflict between the social and economic dimensions of the EU,¹⁵ with the social dimension being seen as inferior.¹⁶ And these cases were not isolated examples. Most notoriously, albeit outside the framework of 'migration', was the decision in

12 See further C. Barnard, *The Substantive Law of the EU: the Four Freedoms* (2019), ch. 6.

13 Case C-438/05, *Viking Line*, ECLI:EU:C:2007:772; Case C-341/05, *Laval un Partneri*, ECLI:EU:C:2007:809.

14 E.g. S. Weatherill, 'Protecting the Internal Market from the Charter', in: S. De Vries et al., *The EU Charter of Fundamental Rights as a Binding Instrument – Five Years Old and Growing* (2015), pp. 223-227; C. Barnard, 'The Protection of Fundamental Social Rights in Europe after Lisbon – A Question of Conflicts of Interest', in S. De Vries et al., *The Protection of Fundamental Rights in the EU After Lisbon* (2013), pp. 37-59; A. Veldman & S. de Vries, 'Regulation and Enforcement of Economic Freedoms and Social Rights; A Thorny Distribution of Sovereignty', in: T. van den Brink et al. (eds.), *Sovereignty in the Shared Legal Order of the EU – Core Values of Regulation and Enforcement* (2015), pp. 83-85.

15 S. Prechal & S.A. de Vries, 'Seamless Web of Judicial Protection in the Internal Market?' 2009 (34) *ELRev.*, p. 5.

16 See generally M. Freedland & J. Prassl (eds.), *Viking, Laval and Beyond* (2014).

Alemo-Herron,¹⁷ a reference from the UK courts about the interpretation of the Transfer of Undertakings Directive 2001/23. The CJEU used Article 16 of the EU Charter of Fundamental Rights (hereafter EU Charter or Charter) on the Charter right to conduct a business, a civil and political right, to challenge and remove the higher social protection for transferred employees found in UK law, since that protection was deemed to interfere with the employer's managerial freedom. In other words, as in *Viking* and *Laval*, EU primary law was used to set aside national legislation. At no stage did the Court in *Alemo-Herron* consider the application of any of the provisions in the Solidarity Title of the Charter as a counterweight to the employer's Article 16 right, nor did it refer the principle of a social market economy. Once again, economic rights were seen to trump national social protections.¹⁸

2.1.2. East v further East: the migration crisis

So far we have focused on the East/West cleavage in the EU caused by intra-EU migration. The migration crisis revealed a different split – between the Eastern European States and migrants coming from much further East: Syria, Afghanistan, Iraq. In 2015 the migration crisis was at its height and States like Hungary were shutting their borders to non-EU migrants. Meanwhile, States at the EU frontier – Italy, Greece and Spain – were struggling to manage the sheer numbers of migrants arriving on their shores. EU plans to reallocate those migrants across the EU-27 generally failed to come to fruition.

The migration crisis has not only revealed the complexity of migration itself, but also the tensions between EU competence and national sovereignty, and between immigration policy and human rights. Although these tensions 'have pushed the EU towards greater harmonization in this field',¹⁹ there is no common approach to migration in general; rather there is a patchwork of rules depending on whether the EU deals with irregular immigration, legal migration or asylum.

An asylum seeker is defined as a person fleeing persecution or conflict, and therefore seeking international protection under the 1951 Refugee Convention; a refugee is an asylum seeker whose claim has been approved; and an economic migrant is person whose primary motivation for leaving his or her home country is economic gain.²⁰ The EU is currently witnessing a situation whereby economic migrants and asylum seekers travel together;²¹ and these groups can and do overlap.

Under the Dublin Regulation, asylum seekers must claim refugee status in the first state of entry to the EU.²² Invariably this means Italy, Spain and Greece – geographically most proximate to North Africa – and this has put huge pressure on the administrative structures of these countries. In 2015 Germany did waive the Dublin requirements and welcomed over one million Syrian migrants. This decision put the Schengen area under enormous strain as the migrants, in violation of the Dublin Regulation, travelled across the Schengen zone, which induced Member States, like Hungary, to reinstall border controls.

That was 2015. In 2018 the same three States continue to receive the largest number of migrants: Italy (16,000), Greece (13,000) and Spain (15,000). This, in fact, represents a dramatic fall in the number of arrivals: they 'have dropped by 97% on the Eastern Mediterranean route- from 10,000 a day in October 2015 to an average of 81 following the EU-Turkey statement'.²³ On the central Mediterranean route, arrivals are down 77% in 2018 compared to the same period in 2017, following the joint work between the EU, Italy, Libya and Niger. The EU is also pumping significant sums of money into the countries of origin to help improve conditions there. Nevertheless, while the reality on the ground is changing, the political climate has become more polarised, with growing nationalist tendencies across the EU. The mini summit held at the

17 Case C-426/11, *Alemo-Herron and Others v Parkwood Leisure Ltd*, ECLI:EU:C:2013:521, paras. 31-35.

18 J. Prassl, 'Business Freedoms and Employment Rights in the European Union' (2015) 17 *Cambridge Yearbook of European Legal Studies*, p. 189.

19 S. Peers, 'Immigration and Asylum', in C. Barnard & S. Peers, *European Union Law* (2017), p. 791.

20 <<http://www.unhcr.org/asylum-and-migration.html>> (last visited 24 June 2018).

21 *Ibid.*

22 Regulation (EU) 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member State by a third-country national or a stateless person, OJ 2013, L 180/31.

23 European Council, 'EU-Turkey statement, 18 March 2016', <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>> (last visited 3 November 2018).

end of June 2018 showed that the politics of controlling immigration has taken precedence over the reality on the ground. But in fact little was agreed.

In conclusion, migration – both intra-EU and extra-EU – has proved a source of growing tension in the EU. The flagship policy of *intra*-EU free movement has highlighted growing tensions between West and East of the EU. And *extra* EU migration has produced major tensions between Eastern States and States from further East and between the Eastern and Northern States. Both have proved major challenges for EU (social) policy. But this is not the only challenge. Rapid changes to technology means there are different ways that work is delivered. This brings us to our second case study on the gig economy and the challenges that it poses to the social market economy.

2.2. Challenges posed by the development of the gig economy: uncharted territory for Member States and the EU

Technological developments and the digitalisation of the economy have led to the emergence and growth of the gig economy, mainly through app-based platforms that provide all kinds of (new) services, like driving services (Uber, Blablacar), deliveries (Deliveroo), cleaning homes, hotel booking services (Booking) or home sharing (Airbnb).

The gig economy – which gets its name from each piece of work being akin to an individual ‘gig’²⁴ – involves temporary, flexible jobs being done by those who are described as independent contractors rather than being done by full-time employees.

The gig economy undoubtedly raises new opportunities for workers across Europe, and provides for economic growth, efficiency, new opportunities for freelancers to earn a living and, for some, a better work-life-family balance. However, the gig economy also raises issues in terms of worker protection. Hatzopoulou identifies the following issues:²⁵ non-standard work; breaking down of work, micro-labour, short duration; the use of algorithms to assign work, fix prices, and to evaluate workers; uncertainty, insecurity, isolation and precarity; health and safety issues; discrimination and fundamental rights generally. This has inevitably led to calls for greater regulation of the gig economy.

However, in the multi-level context, the gig economy raises a number of legal questions. Firstly, what is the applicable (EU) regulatory framework? What is the margin of discretion for Member States to set their own regulatory standards? What is the degree of market access that is guaranteed by EU rules? Some of these issues were considered in the *Uber* case. The CJEU ruled that Uber’s services were transport services, not services in general. In reaching this conclusion the Court followed its Advocate General (AG). AG Spzunar had held that Uber’s activities had to be viewed as a whole, encompassing both the service of connecting passengers and drivers with one another by means of a smartphone app and the supply of transport itself.²⁶ This meant that the Services Directive²⁷ did not apply and, since the matter concerned the unharmonised area of transport, Member States continued to have a large degree of discretion in exercising ‘damage control’ over the potentially disruptive effects on the taxi market.²⁸ The question is, of course, for how long?

Secondly, if there is to be regulation of the gig economy, what exactly is being regulated? It is not always clear (i) what type of service is being delivered – e.g. is it an information society service or, in the case of *Uber*, a transport service? (ii) who is providing the service – the service provider (the app, the company, the driver?), and/or the intermediaries, the service recipient (consumer)?

Thirdly, there is a further issue particularly relevant to our discussion: the employment status of the individual providing the service. In the gig economy the ‘micro-entrepreneurs, on-demand workers,

24 N. Kobie, ‘What is the gig economy and why is it so controversial?’, *Wired*, 14 September 2018, <<http://www.wired.co.uk/article/what-is-the-gig-economy-meaning-definition-why-is-it-called-gig-economy>>; V. Hatzopoulou, *The Collaborative Economy and EU Law* (2018), pp. 4-8.

25 Hatzopoulou, *ibid.*, pp. 152-157.

26 Case C-434/15, *Elite Taxi v Uber*, ECLI:EU:C:2017:981.

27 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006, L 376/36.

28 See also D. Adamski, ‘Lost on the digital platform: Europe’s legal travails with the *Digital Single Market*’, (2018) 55 *Common Market Law Review*, p. 719.

freelancers or contractors are typically self-employed', whereas some may even be unemployed.²⁹ Yet a number of these individuals, often doing precarious work, may be in a vulnerable and subordinate position, putting them in a similar position to their off line peers.³⁰ The question, then, is how the rights of the gig economy workers can be protected. The EU and national regulatory framework are mostly designed to protect the rights of 'workers' or 'employees', but not the self-employed, as the recent adoption of the Directive on Transparent and Predictable Working Conditions (TPWC) shows.³¹ How does this affect the rights of gig economy workers? We return to this point below.

And finally, we turn to the relationship between the gig economy and migration. Although there is not much consensus about the ethnicity of the workforce and the nationality of gig economy workers, many third country nationals (TCNs) who are already in a vulnerable position on the labour market will become more vulnerable in the gig economy.³² Tighter entry controls for TCNs may lead to more informal employment, more self-employed work to extend their stay, and increased poverty for migrants in low-paid precarious work, particularly since barriers to enter the gig economy's labour market are relatively low.³³ Where, on the one hand, the gig economy offers migrants opportunities to integrate into the host country's society by being economically active, the protection of their rights may be seriously jeopardised, considering the precariousness of the work and the absence of a legal safety net.

3. Has the advent of the 'social market economy' made a difference?

3.1. Introduction

The picture painted so far is bleak. There are challenges to domestic social cohesion caused by free movement within the EU and to migration from outside the EU. Meanwhile the technology and lived experience of the gig economy currently outstrips the EU and Member State capacity to respond and there is little evidence that the desire to deliver a social market economy has shaped the EU's response. We argue that there are two reasons for this: lack of competence and lack of political will.

3.2. The question of competence

It is axiomatic that the EU can act only where it has the powers to do so, and this point has been made expressly by Article 5(2) of the TEU. Although the EU's competences have expanded over the years, the precise delimitation of what it can achieve is highly contested.

3.2.1. The legal basis and the challenge to adopt binding measures in the social policy field

The legal basis for the EU to act in the social field is inevitably limited, albeit significantly broader than in the past. Post Maastricht, the most relevant provision, Article 153 of the TFEU, covers a variety of issues ranging from the more traditional improvement in particular of 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 TCNs legally residing in EU territory. However, Article 153(5) adds the important and severely limiting caveat: '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.'

It is true there are other legal bases such as Article 114 of the TFEU on the internal market. The problem is, however, that Article 114(2) of the TFEU explicitly excludes harmonisation in relation to the rights and interests of employed persons. But this is not the case for Article 115 of the TFEU, the other provision on the

29 See Hatzopoulos, *supra* note 24, p. 150.

30 *Ibid.*, p. 158.

31 A provisional agreement has been concluded in trilogue between European Parliament and the Council negotiators: <[http://www.europarl.europa.eu/RegData/commissions/empl/lcag/2019/02-15/EMPL_LA\(2019\)001486_EN.pdf](http://www.europarl.europa.eu/RegData/commissions/empl/lcag/2019/02-15/EMPL_LA(2019)001486_EN.pdf)> (last visited 24 May 2019).

32 Commission Staff Working Document accompanying the communication on the European agenda for a collaborative economy, SWD(2016) 184 final, 2 June 2016, p. 36.

33 E. Carmel, 'Division, austerity, the gig economy: migration isn't our biggest labour market problem', LSE Blogs, 13 March 2017, <<http://blogs.lse.ac.uk/brexit/2017/03/13/division-austerity-the-gig-economy-migration-isnt-our-biggest-labour-market-problem/>> (last visited 30 September 2018).

internal market, or for Article 62 of the TFEU in conjunction with Articles 53 and 59 of the TFEU in the field of services.³⁴ But whereas Article 115 of the TFEU requires unanimity, the question as to what extent the provisions on services can be used in the social policy field is unclear, although the revised Posted Workers Directive offers an interesting example of how internal market legislation may strengthen the social face of the EU (see Section 4).

Another option is, of course, Article 352 of the TFEU, reserved for unforeseen cases, but its utility is severely limited, as the Monti II saga showed. This was the EU's attempt to address some of the issues raised by the decisions of the CJEU in *Viking* (and *Laval*), discussed above. The Commission recognised that the case 'sparked controversy on the adequacy of existing EU rules to protect the rights of workers in the context of the freedom to provide services and the freedom of establishment' and entailed 'the risk of, if not a licence for, 'social dumping' and unfair competition'. Professor Monti, in his report, therefore concluded that there was a need to 'Introduce a provision to guarantee the right to strike, modelled on Article 2 of Council Regulation (EC) No 2679/98 (the so-called Monti I Regulation) and a mechanism for informal resolution of labour disputes concerning the application of the Directive'. And this indeed is what was proposed, as 'Monti II'.³⁵

The legislation for Monti II was subject to an impact assessment. The draft impact assessment was scrutinised by the Impact Assessment Board (IAB) twice and its recommendations for improvement were integrated within the final report. It concluded that the positive impact of so-called option 7 (legislative intervention) would be more significant since a legislative intervention (Regulation) provided for more legal certainty than a soft law approach (option 6). An alert mechanism would have further positive impact. In addition, a legislative intervention would express a more committed political approach by the Commission to respond to a problem that was seen with great concern by the trade unions and parts of the European Parliament.

But there were two stumbling blocks. The first was the legal basis of the measure itself: Article 352 of the TFEU was selected, which requires, *inter alia*, unanimous voting which already made the adoption of the measure more difficult. The second was subsidiarity. As the Commission noted, the objective of the Regulation, to clarify the general principles and EU rules applicable on industrial action in the context of the freedom to provide services and the freedom of establishment, required action at EU level and could not be achieved by the Member States alone.

What the Commission did not mention was just how constrained the proposal had to be in terms of respecting the terms of the CJEU's judgments. In fact, the life of Monti II was nasty, brutal and short.³⁶ It was always clear that the employers disliked the proposal, but so did the trade unions because they saw it confirmed the much-hated decision in *Viking*. There was much lobbying of Member States and of national parliaments which used the yellow card procedure (for the first time) to raise concerns about the proposal. Within an eight-week deadline – with just hours to spare – 18 parliamentary chambers, led by the Danish Parliament, formally objected to the Commission legislative proposal. The objections related not just to the subsidiarity question (in the original Treaty settlement, social policy was largely a matter for domestic law and so, it was argued, was the right to strike) but also to the legal basis and also to the proportionality of the measure. The Commission decided to withdraw the proposal. So born in March 2012, Monti II was dead by September 2012, six months later.

Now it might be argued, this was an exceptional case, being discussed in a highly febrile environment. Other proposals will not meet a similar fate. But they will still struggle to find a legal basis. Take, for example, Frank Vandenbroucke's proposal for a Europe-wide unemployment insurance scheme which he sees as an important stabiliser to the Eurozone area.³⁷ What would be the legal basis of this proposal? It could

34 S.A. de Vries, 'Protection Fundamental (Social) Rights through the Lens of the EU Single Market: The Quest for a More "Holistic Approach"', (2016) 32 *The International Journal of Comparative Labour Law and Industrial Relations*, no. 2, pp. 203–230.

35 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, COM(2012) 130 final.

36 The Adoptive Parents, 'The life of a death foretold', in M. Freedland & J. Prassl (eds.), *Viking, Laval and Beyond* (2014), p. 95 (anonymous authors).

37 See *inter alia* F. Vandenbroucke, 'Automatic Stabilizers in the EURO area and the European Social Model', *Tribune* (22 September 2016), <<http://www.frankvandenbroucke.uva.nl/wp-content/uploads/2016/11/257.pdf>> (last visited 22 February 2019).

perhaps be Article 153(1)(c) of the TFEU – social security and social protection of workers – but this requires unanimous voting and is subject to the limitation that any legislation shall 'not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof'.

However, for the EU to move forward it will need to be brave with its use of Article 153 or, failing that, to experiment more with alternative routes such as Article 115 or other internal market legal bases, or the enhanced cooperation mechanism under Article 20(2) of the TEU and Article 329(1) of the TFEU, or employing the *passarelle* provisions to convert areas of unanimous voting into qualified majority voting (see Article 153(2) of the TFEU) which will apply to areas such as the protection of workers where their employment contract is terminated. At the moment this has not happened but feelers are being put out as to the extent to which these bases can be used. Recently, the Commission adopted a Communication on more efficient decision-making in social policy in which it explores and identifies areas for an enhanced move to qualified majority voting.³⁸

3.2.2. The legal basis and the challenge to adopt binding measures in the field of external migration

We have seen the acute problems of competence in the field of social policy/internal migration. What about in the field of external migration? The EU's regulatory response has been more extensive in the field of irregular migration and asylum than in the area of legal migration. Irregular migration covers a wide range of situations whereby TCNs can become illegal, for instance, because they have overstayed their right of residence or they have clandestinely entered the country without authorisation.³⁹

With respect to legal migration, the EU, according to Article 79(1) of the TFEU, focuses on fair treatment of TCNs residing legally in Member States. Directive 2003/109 provides for equal treatment of long term TCN residents compared with EU nations with regard to *inter alia* social benefits and social security.⁴⁰ EU legislation is furthermore particularly aimed at migrants who are relatively young, wealthy and highly skilled (Blue card Directive, Single Permit Directive, Directives on researchers, students and volunteers).⁴¹ For the remainder, it is for the Member States to determine the volumes of admission of TCNs coming from third countries to their territory in order to seek work (Article 79(5) of the TFEU).

Against the background of a patchwork of EU laws with an increased focus on migration control together with national competences on determining the conditions to access the territory and the labour market, which may in some Member States be extremely limited for, for instance, asylum seekers,⁴² there continue to be wide gaps in the protection of the most vulnerable migrants: those who are asylum seekers, those who have managed to enter a Member State illegally and those who do not meet the requirements of high income to obtain a residence permit – or those who are subject to sanctions – and do not have a long term residence status, are likely to work in the precarious and low wage economy of the Member State, together with some of the lowest skilled national workers with whom they are in competition.

3.3. The lack of political will

Competence is not the only challenge facing the EU. It is also a question of political will. We have already seen how a combination of political objections from the left and right helped sink the Monti II Directive. The TPWC Directive, intended to update the Written Statement, nearly met a similar fate, but has now almost

38 See Communication from the European Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - More efficient decision-making in social policy: Identification of areas for an enhanced move to qualified majority voting, COM(2019) 186 final.

39 See Peers, *supra* note 19, p. 798.

40 Directive (EC) 2003/109 concerning the status of third-country nationals who are long term residents, OJ 2004, L 16/44.

41 Directive 2009/50, OJ 2009, L 155/17 (Blue Card); Directive 2011/98, OJ 2011, L 343/1 (Single Permit); Directive 2016/801 OJ [2016] L 132/21 (students, researchers, volunteers, trainees).

42 ECRE, 'Ireland: planned opt-in to recast Reception Conditions Directive', ECRE, 24 November 2017, <<https://www.ecre.org/ireland-planned-opt-in-to-recast-reception-conditions-directive/>> (last visited 24 May 2019).

completed the legislative process but with some watering down of its content (see Section 4).⁴³ Political differences within the Member States and between Member States make it very difficult to find common ground for adopting binding EU legislation in the social policy field.

However, it should be noted that there are also political voices calling for a reinforced social Europe, like the French president Macron proposing a ‘social shield for all workers (...) guaranteeing the same pay in the same workplace, and a minimum European wage appropriate to each country and discussed collectively every year’.⁴⁴ The advent of the Social Pillar, especially read in the light of the accompanying documents,⁴⁵ provides a significant further push in that direction.

So is the simple solution to amend the Treaty to provide the competence to enable the EU to deliver more and better? While the answer may be yes, the politics make it very difficult. At first sight, the changes introduced by the Lisbon Treaty, introducing a simplified revision procedure into Article 48(6) of the TEU look promising. The simplified procedure is confined to revising all or part of the provisions of Part Three of the TFEU – and this would include the provisions on migration policy and social policy – but any decision to amend Part Three of the TFEU ‘shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements’. Further, the Decision ‘shall not increase the competences conferred on the Union in the Treaties’. These two limitations curtail the utility of Article 48(6) to deliver speedy or wide-reaching change.

The unreformability of the EU was one of the reasons which frustrated the UK’s Brussels negotiations in February 2016. The UK wanted an emergency brake on migration. However, there is no provision in the Treaty to deliver this and so it needed a Treaty amendment. Since this was not possible, let alone in the narrow time frame available, the UK had to content itself with a complex soft law document – the Brussels Agreement – which envisaged an amendment to EU *legislation* to deliver an emergency brake not on the volume of migration but to limit benefit claims. For the average voter looking for reassurance on this key issue, this was too complicated and too uncertain. It also confirmed in the minds of some that the EU is remote, does not listen and does not understand.

4. Can the ‘social market economy’ make a difference in shaping a response to the problems raised?

4.1. Introduction

The story so far has not been positive. While the problem of the lack of legal competence has always been difficult, the lack of political will is increasingly problematic. And there is a total absence of awareness of ‘social market economy’. The TPWC proposal does not even make reference to the phrase, nor did the revisions to the Posted Workers Directive 2018/957, seen as considerably more social than its predecessor. The CJEU itself rarely refers to the phrase, even in important decisions such as *Bauer*,⁴⁶ which have gone some way to giving greater effect to the Solidarity Title of the Charter. The one exception is in *Iraklis*⁴⁷ where the Court said:

It should be added, in respect of the overriding reasons in the public interest (...), that, as is apparent from Article 3(3) TEU, the European Union is not only to establish an internal market but is also to work for the sustainable development of Europe, which is based, in particular, on a highly competitive social market economy aiming at full employment and social progress, and it is to promote, inter alia, social protection.

43 European Commission, Statement: Transparent and predictable working conditions: Commission welcomes the provisional agreement reached today, 7 February 2019, <http://europa.eu/rapid/press-release_STATEMENT-19-873_en.htm> (last visited 24 May 2019).

44 <<https://www.elysee.fr/emmanuel-macron/2019/03/04/for-european-renewal.en>> (last visited 24 May 2019).

45 Commission Staff Working Document: Establishing a European Social Pillar of Rights, SWD(2017) 201 final, 26 April 2017, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0201&from=EN>> (last visited 24 May 2019).

46 Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal and Volker Willmeroth als Inhaber der TWI Technische Wartung und Instandsetzung Volker Willmeroth e. K. v Maria Elisabeth Bauer and Martina Broßonn*, EU:C:2018:871.

47 Case C-201/15, *AGET Iraklis*, EU:C:2016:972, para. 76.

The case it cites in support of this proposition is *Viking*, the very case seen by many, especially in the North to undermine a balancing between the social and the market.

And what does a social market economy look like when the perception is that immigration is a threat to the very quality of work and life that the EU citizens might aspire to? The answer is often the EU should do more – give more rights and more protection to non-migrant EU citizens – but paradoxically this might create an environment which is still more attractive to those from outside the EU, which exacerbates the populist problem. So does this mean that the EU should, in fact, put up the barriers to keep non-EU citizens out – are there signs that this is increasingly happening?

As far as the gig economy is concerned, the rapid pace of change raises new questions about the scope of application of employment law in the EU and its Member States, and how, within the EU legal context, social rights of migrants and non-migrants can be balanced with the requirements of market access and economic progress. . In this section we shall argue that there are attempts to give more support to the social dimension of the market economy (even though the 'social market economy' language itself is not used), especially through the European Social Pillar (ESP) and the tools it deploys, albeit its possibilities are still limited by the political and legal competence issues outlined above.

4.2. The ESP

The ESP⁴⁸ is intended to provide a counterweight to the economic orientation of the EU.⁴⁹ It is ambitious in scope and it will be buttressed by scoreboards and mainstreaming. It has political will behind it – it is backed by a solemn proclamation – and some momentum. It is striking that the text of the ESP also makes no reference to 'social market economy'. However, its drafters would no doubt argue that it is the embodiment of the very notion of the social market economy and there are some reasons for optimism about its impact.⁵⁰ It provides a visible counter weight to the economic orientation of most of the DGs in the Commission, its political endorsements provide DG Employment, Social Affairs and Inclusion (hereafter: DG EMPL) with some justification to act, and it provides DG EMPL with an opportunity to 'repurpose' some older proposals which have languished on the books for a number of years, including the Equal Treatment Directive in the field of goods and services. A 'social scoreboard' has been set up which will monitor the implementation of the ESP by tracking trends and performances across EU countries in 12 areas and the ESP will feed into the European Semester of economic policy coordination. The scoreboard will also be used to assess progress towards a social 'triple A' for the EU as a whole.⁵¹ This may provide a prompt for the Member States to act – or at least to have regard to the social consequences of their actions, especially in the areas where the EU lacks competence to act. Where the EU is competent to act, the Commission seeks to induce the legislator to use the qualified majority procedure as much as possible.⁵² The European Parliament is also eager to address the social dimension of EU law, as the recent initiative of the European Parliament Employment Committee to boost workers' rights shows.⁵³

So at a political level, the ESP is already having some impact but what about the legal rights which have come out of it and how have they had an impact on our two case studies, migration and the gig economy? We look first at legislation proposed within the context of the ESP (Section 4.2.1.) and then at mainstreaming, i.e. the incorporation of social values and rights in legislation outside the competence in the social policy field and how this might strengthen a notion, if not the language, of social market economy (Section 4.2.2.).

48 European Social Pillar of Rights, <https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf>.

49 C. Kilpatrick et al., 'From Austerity Back to Legitimacy? The European Pillar of Social Rights: A Policy Brief', *EU Law Analysis*, 20 March 2017, <<http://eulawanalysis.blogspot.com/2017/03/from-austerity-back-to-legitimacy.html>> (last visited 8 October 2018).

50 S. Garben. 'The European Pillar of Social Rights: Effectively Addressing Displacement?' (2018) 14 *European Constitutional Law Review*, p. 210.

51 Commission, 'Social Scoreboard', <<https://composite-indicators.jrc.ec.europa.eu/social-scoreboard/>> (last visited 24 May 2019).

52 *Supra* note 38.

53 European Parliament, 'Gig economy: Employment Committee MEPs want to boost workers' rights' (18 October 2018), <<http://www.europarl.europa.eu/news/en/press-room/20181017IPR16398/gig-economy-employment-committee-meps-want-to-boost-workers-rights>> (last visited 24 May 2019).

4.2.1. Legislative texts

The first two limbs of the social pillar – equal opportunities and access to labour market, and fair working conditions – are more closely linked to traditional labour law. The third limb – social protection and inclusion – is more ambitious in scope and includes: unemployment benefits, healthcare, housing and assistance for the homeless. These are areas often affected by EU law, namely the four freedoms,⁵⁴ but outside the EU’s legislative competence. It is no surprise, then, that the two pieces of legislation proposed as a consequence of this ESP concern traditional labour law matters: the revision of the Written Statement Directive, considered below, and a Directive on Family Friendly policies.

In respect of migration issues, the ESP is, in fact, silent. Yet, two of the major proposals which might fall under the umbrella of the ESP come in this domain. The first is the revised Posted Workers Directive 2018/957 which is premised not on differential treatment between domestic workers and posted workers but equality of treatment. This change was largely driven by the energy and enthusiasm of President Macron who wanted to show that the social model had some meaning. From a social perspective this is clearly good news for the individual posted workers. From the perspective of the posting company, mainly from Eastern European States, their competitive advantage is being removed. It is striking that the preamble to the Directive refers to Article 3 and the promotion of ‘social justice and protection’ (found in Article 3(3), paragraph 2, not Article 3(3), paragraph 1 on the social market economy).⁵⁵ The Revised Posted Workers Directive is not mentioned in the ESP plans. By contrast the other major proposal, the European Labour Authority (ELA),⁵⁶ is a significant innovation and does come under the ESP, even though the ESP does not mention migration. Its expressed aim is ‘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’.

In respect of the gig economy, the main proposal is the TPWC Directive. The Parliament’s draft of the proposal contained a number of provisions which sought to improve the position of workers in the platform economy. Specifically, its definition of scope was broader:

*This Directive lays down minimum rights that apply to every worker in the Union. Those rights shall apply to a natural person who, for a certain period, performs services for and under the direction of another person in return for remuneration in the case of dependency or subordination between the former and the latter. Persons who do not fulfil such criteria do not fall within the scope of this directive. Member States shall ensure that all the persons to which this Directive applies can make effective use of those minimum rights within the framework of national law or practice, including collective agreements.*⁵⁷

However, the final version of the text is more limited in its ambition and reverted to the more traditional language of ‘worker’.⁵⁸ Article 1(2) provides:

This Directive lays down minimum rights that apply to every worker in the Union, who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice of the European Union.

However, Article 1(3) contains a potential exclusion:

Member States may decide not to apply the obligations in this Directive to workers who have an employment relationship with predetermined and actual time worked equal to or less than three hours per week on

54 See e.g. C–157/99, *Geraets-Smits and Peerbooms*, [2001] ECR I–5473; Case C–372/04 *Watts v Bedford Primary Care Trust*, [2006] ECR I–4325; Case 63/86 *Commission v Italy (social housing)*, [1988] ECR 29.

55 Directive 2018/957 (OJ [2018] L173/16).

56 European Council Press Release, ‘European Labour Authority: Council agrees its position’, 6 December 2018, <<https://www.consilium.europa.eu/en/press/press-releases/2018/12/06/european-labour-authority-council-agrees-its-position/>> (last visited 24 May 2019).

57 The section in italics was the addition proposed by the European Parliament to the Commission’s original proposal: <http://www.europarl.europa.eu/doceo/document/A-8-2018-0355_EN.html?redirect> (last visited 26 May 2019).

58 <[http://www.europarl.europa.eu/RegData/commissions/empl/lcag/2019/02-15/EMPL_LA\(2019\)001486_EN.pdf](http://www.europarl.europa.eu/RegData/commissions/empl/lcag/2019/02-15/EMPL_LA(2019)001486_EN.pdf)> (last visited 26 May 2019).

average in a reference period of four consecutive weeks. Time worked with all employers forming or belonging to the same enterprise, group or entity shall count towards that three-hour average.⁵⁹

Thus, the Directive applies to workers, as defined by the CJEU,⁶⁰ a broader category than 'employees'. It therefore prevents Member States from excluding workers in certain non-standard forms of employment (such as platform workers) from the scope of the Directive.⁶¹ It may also cover dependent self-employed who may be in a similar position to workers and are in need of extra protection.⁶² However, it does not meet the trade unions' request for a radical overhaul of the proposed Directive to contain a specific reference to the self-employed person or gig economy workers, nor does it contain concrete obligations for online platforms, which can easily evade the current rules, or specific rules on remuneration and guaranteed hours to end zero-hour contracts.⁶³

More positively, the Directive does go beyond its predecessor and contain not just more information obligations – and sooner – but it also contains a number of material rights, including the right to request a more stable form of work and to compensation if the employer cancels an assignment after a specific deadline.

There is one other measure which may have indirect impact on protecting the rights of workers, including more vulnerable workers: Directive 2014/24 on public procurement. But yet it, too, makes no mention of the 'social market economy', even though it has a marked social dimension not found in any of its predecessors.⁶⁴ The Preamble talks about amending the Directive to enable procurers to make better use of public procurement in support of common societal goals. The Directive is also intended to help the EU deliver on its EU2020 strategy 'as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth'. It is now possible to have strategic social procurement. As Article 18(2) puts so clearly:

Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.

The Directive is the embodiment of the 'social market economy'. It increasingly looks like the EU barely wishes to speak the name of 'social market economy' even though it is increasingly trying to deliver on its objectives through employment legislation and also through mainstreaming.

4.2.2. Mainstreaming

In one sense, what the ESP envisages is mainstreaming on a macro level. Mainstreaming on a more micro level is inherent to EU legislative harmonisation practice, as harmonisation within the context of the internal market is not only aimed at creating a level playing field for businesses and consumers, but necessarily also involves the protection of particular public and social values. Harmonisation has a dual purpose: it

59 This had been deleted by the Parliament, albeit that the final version contains a lower hours limit than had been proposed in the original (eight hours).

60 Case 66/85, *Lawrie Blum*, 3 July 1986, ECLI:1986:284; Case C-216/15, *Ruhrlandklinik*, 17 November 2016, ECLI:EU:C:2016:883; Explanatory Memorandum to Proposal COM(2017)797 final, pp. 3 and 11.

61 Proposal COM(2017)797 final. The European Commission, the European Parliament and the Council reached a provisional agreement on the Commission's proposal on 7 February 2019: <<https://ec.europa.eu/social/main.jsp?catId=89&langId=en&newsId=9297&furtherNews=yes>> (last visited 22 February 2019).

62 M. Risak, 'Fair Working Conditions for Platform Workers – Possible Regulatory Approaches at EU level' (2017), <<https://library.fes.de/pdf-files/id/ipa/14055.pdf>> (last visited 27 June 2018), p. 13.

63 The European Trade Union Confederation (ETUC), 'ETUC calls for Written Statement Directive to be overhauled', 7 November 2017, <<https://www.etuc.org/en/pressrelease/etuc-calls-written-statement-directive-be-overhauled>> (last visited 24 May 2019). The trade unions initially welcomed the Commission's proposal to update the Written Statement Directive but expressed its concerns in a position paper: <http://www.cgil.it/admin_nv47t8g34/wp-content/uploads/2018/03/Allegato_2_11_en-etuc_position_on_the_draft_transparent_and_predictable_working_conditions.pdf> (last visited 24 May 2019). They have recently reinforced its stance on the concept of worker: ETUC, 'Progress on Work/Life Balance and Working Conditions Directives', 21 June 2018, <<https://www.etuc.org/en/pressrelease/progress-worklife-balance-and-working-conditions-directives>> (last visited November 2018).

64 C. Barnard, 'To Boldly Go: Social Clauses in Public Procurement', (2016) 46 *Industrial Law Journal*, p. 208.

aims to set common standards in order to integrate national markets in an EU wide internal market and it re-regulates the market ‘responding to pre-existing diverse regulatory choices made by Member States’.⁶⁵ In this way the EU legislator sets ‘a standard of re-regulatory protection of public interests that will apply throughout the EU’.⁶⁶ The CJEU has confirmed that even in a policy field where the EU has no competence to adopt legislative measures, the internal market provisions may be used to achieve the protection of public values, provided that the measure also serves the internal market; a threshold that is easily met.⁶⁷

Mainstreaming is also required on the basis of the Treaty. The integration clause of Article 9 of the TFEU requires the EU to pursue a high level of employment and to guarantee adequate social protection, and the incorporation of the non-discrimination principle as contained in Article 10 of the TFEU reinforces the social dimension of EU policies, including internal market and competition policies. According to AG Cruz-Villalon 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.⁶⁸ What impact might this have on our case studies?

First, with regard to the gig economy, new legislation adopted within the context of the digital market strategy should guarantee adequate social protection, e.g. to enhance the rights of consumers and self-employed, who are not covered by the current. As we have seen, a significant stumbling block for the use of Article 114 of the TFEU remains Article 114(2) of the TFEU which excludes the rights and interests of employed persons from its scope of application. So could Article 114 of the TFEU, whose contours are generally considered ‘broad and fuzzy’,⁶⁹ or other internal market legal bases, in particular Article 62 of the TFEU, read in conjunction with Articles 53 and 59 of the TFEU on services, be of help in tackling some of the problems in the gig economy within the internal market legal framework? The prohibition against harmonisation in the field of health on the basis of Article 168 of the TFEU did not constitute an obstacle for the EU legislator to adopt various directives on the basis of Article 114 of the TFEU to tackle health concerns.⁷⁰ Particularly where strict dividing lines between services providers, service recipients, self-employed and workers are fading, Article 114 of the TFEU may come into sight.

Where, however, it is considered that ‘most on-demand gigs, tasks, and rides are work, rather than entrepreneurship – and should be recognized as such’, we come up against the constraints imposed by Article 114(2) of the TFEU, and we will have to fall back on the Directive on transparent and predictable working conditions (see above).⁷¹

Second, if mainstreaming results in more robust legislation that provides for a high level of protection of social rights and interests, it will be easier for the CJEU to interpret this legislation in a socially-friendly way, upholding legislative constraints on economic rights, like the freedom of contract and the freedom to conduct a business, which played a too prominent role in *Alemo Herron*.⁷² In a very different field, namely in the *Sky Österreich* decision, the Court explicitly stated that ‘the freedom to conduct a business may be subject to a broad range of interventions on the part of the public authorities which may limit the exercise of economic activity in the public interest’.⁷³ Article 15(6) of the Audio-visual Media Services Directive (AMSD), a Directive based on Article 114 of the TFEU, requires the holder of

65 S. Weatherill, ‘Protecting the Internal Market from the Charter’, in: S. De Vries et al., *The EU Charter of Fundamental Rights as a Binding Instrument* (2015), p. 228.

66 Ibid.

67 Case C-376/98, *Federal Republic of Germany v European Parliament and Council Germany (Tobacco Advertising)*, ECLI:EU:C:2000:544; Case C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd (BAT/Imperial Tobacco)*, ECLI:EU:C:2002:741; Case C-210/03, *Swedish Match AB and Swedish Match UK Ltd v. Secretary of State for Health (Swedish Match)*, ECLI:EU:C:2004:802. See also Weatherill, supra note 65; S.A. de Vries, *Tensions within the Internal Market – The Functioning of the Internal Market and the Development of Horizontal and Flanking Policies* (2006).

68 Opinion of AG Cruz Villalon in Case C-515/08, *Palhota*, ECLI:EU:C:2010:245, paras. 51-55.

69 S. Weatherill, ‘The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law Has Become a Drafting Guide’, (2011) 12 Ger. L.J., p. 848.

70 Case C-376/98, *Federal Republic of Germany v European Parliament and Council (Tobacco Advertising)*, ECLI:EU:C:2000:544; Weatherill, ibid, p. 848; S.A. de Vries, *Tensions within the Internal Market: The Functioning of the Internal Market and the Development of Horizontal and Flanking Policies* (2006), p. 339.

71 Prassl, supra note 2, p. 9.

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

73 Case C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk (Sky Österreich)*, ECLI:EU:C:2013:28, paras. 46-47.

exclusive broadcasting rights of major sports events to authorise any other broadcaster to make short news reports without being able to seek compensation exceeding the additional costs directly incurred in providing access to the signal. The question in *Sky Österreich* was whether Article 15(6) infringed the fundamental rights of the holder of exclusive broadcasting rights.⁷⁴ According to the CJEU, the Directive was compatible with the EU Charter. In the light of the importance of safeguarding the fundamental freedom to receive information and the freedom and pluralism of the media guaranteed by Article 11 of the Charter and of the protection of the freedom to conduct a business as guaranteed by Article 16 of the Charter, the EU legislature was entitled to adopt rules limiting the freedom to conduct a business, and to give priority, in the necessary balancing of the rights and interests at issue, to public access to information over contractual freedom. The judgments of the Court in the field of data protection and privacy are also illustrative. In *Google Spain* the Court in interpreting the Data Protection Directive held that the rights to privacy and protection of personal data do, 'as a rule, (...) [override] the economic interest of the operator of the search engine (...).'⁷⁵

Third with regard to another field of the internal market, i.e. EU competition law, more scope should be granted for self-employed and service providers in the gig economy to collaborate with a view to protect social interests and rights also if competition on the market is distorted as a result of this collaboration. Mainstreaming is here particularly relevant for the European Commission, being the EU institution entrusted with the enforcement of EU competition rules. And if self-regulation is proposed as a serious alternative to legislative intervention by the EU legislator, it should not be thwarted by a rigid application of the cartel prohibition.⁷⁶

And as a last point, with respect to migration law and policies, mainstreaming requires the EU legislator to take account of the social consequences of migration. This implies, for instance, that not only the economic and social benefits of migration are taken into account or its social impact on society as well, but also that policies on social inclusion for migrants are developed. So far, mainstreaming within the field of migration seems limited and rather incoherent. A very specific example may be offered by the Directive on seasonal workers, which seeks to enhance social rights of TCN seasonal workers by including rules on accommodation, equal treatment and inspections.⁷⁷

4.3. Case law and the role of the CJEU

We have already seen that the CJEU's robust approach to the single market, which is however generally 'porous to non-economic interests and fundamental rights',⁷⁸ generated the problems seen as a result of the decisions in *Viking* (and to a lesser extent *Laval*). But might the Court be able to help? Do the tools of the social market economy and the broader context of the advent of the ESP provide a justification for a change in direction by the Court. There are some hints that it might.

Take first the field of internal migration. There were signs that the CJEU had started to listen to concerns about benefit tourism. For example, in *Collins* the CJEU held that a habitual residence requirement prior to claiming a benefit could be objectively justified by the need to ensure that there was a genuine link between the applicant for an allowance and the geographic employment market in question. This decision chimed with a broader recognition by both the Tory and Labour parties that there was a need for 'fair contribution' before benefits should be paid.⁷⁹ In *Dano* the Court suggested that, in the case of a person who was not economically active, the right of lawful residence, acquired by demonstrating possession of comprehensive sickness insurance and sufficient resources, as required by the Citizenship Directive (CRD), was a precondition to the enjoyment of the principle of equal treatment. The Court held expressly that

74 Ibid.

75 Case C-131/12, *Google Spain SL and Google Inc*, ECLI:EU:C:2014:317.

76 See on the possibilities for regulating the collaborative economy Hatzopoulos, supra note 28, p. 190 a.f.

77 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ 2014, L 94/375.

78 See Weatherill, supra note 65, p. 234.

79 Case C-138/02, *Collins*, ECLI:EU:C:2004:172.

benefit tourism would not be encouraged.⁸⁰ Finally, in *Commission v UK* the Court confirmed that there was nothing to prevent the grant of social benefits to EU citizens who were not economically active being made subject to the substantive condition of a right to lawfully reside in the Member State.⁸¹

There are hints too that the CJEU recognises some of the concerns arising in regulating the gig economy. In the *Uber* case, AG Spzunar hinted at the possibility that Uber drivers are employees and should benefit from national social protection:

Uber exerts control over all the relevant aspects of an urban transport service: over the price, obviously, but also over the minimum safety conditions by means of prior requirements concerning drivers and vehicles, over the accessibility of the transport supply by encouraging drivers to work when and where demand is high, over the conduct of drivers by means of the ratings system and, lastly, over possible exclusion from the platform. (...) While this control is not exercised in the context of a traditional employer-employee relationship, one should not be fooled by appearances. Indirect control (...) based on financial incentives and decentralised passenger-led ratings (...) makes it possible to manage in a way that is just as — if not more — effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders.⁸²

The CJEU has become more robust in respect of the ‘false self-employed’. In *FNV Kiem*, the Court had to address the problem that if platform workers were not formally seen as employees but as self-employed, what could they do themselves to protect their rights? Agreements between self-employed on salaries can be seen as price agreements between undertakings, which are incompatible with the cartel prohibition contained in Article 101 of the TFEU. However, according to the Court in *FNV Kiem*, if the self-employed do not determine independently their own conduct on the market, but are entirely dependent on their principal, because they do not bear any of the financial or commercial risks arising out of the latter’s activity and operated as an auxiliary within the principal’s undertaking, they may be considered as ‘false self-employed’ and thus workers within the meaning of EU law.⁸³ Accordingly, a provision of a collective agreement, in so far as it sets minimum fees for service providers who are ‘false self-employed’, could not, by reason of its nature and purpose, be subject to the scope of Article 101(1) of the TFEU. This follows from the *Albany* case law.⁸⁴ But the question is how many of the gig economy workers qualify as ‘false self-employed’ within the meaning of this definition.

However, it is striking that, although the CJEU has stated several times that the EC or EU does not only have an economic but also a social purpose,⁸⁵ it rarely refers to the notion of ‘social market economy’, as seen above.⁸⁶ So it may not be the notion social market economy in itself that triggered this approach of the Court, but the early recognition that social values and objectives have been inherent in the economic integration process right from the inception of the EEC, and the recent affirmation of the constitutional status of fundamental social rights as enshrined in the EU Charter.⁸⁷

5. Conclusion

In this chapter we have looked at the potential (or lack of it) offered by the phrase social market economy in our chosen areas: migration and the gig economy. We have argued that the language of ‘social market

80 Case C-333/13, *Elisabeta Dano*, ECLI:EU:C:2014:2358. See also P. Phoa, ‘EU citizens’ access to social benefits: reality or fiction? Outlining a law and literature Approach to EU citizenship’, in: F. Pennings & M. Seeleib-Kaiser, *EU Citizenship and Social Rights – Entitlements and Impediments to Accessing Welfare* (2018), pp. 199-228.

81 Case C-308/14, *Commission v United Kingdom*, ECLI:EU:C:2016:436.

82 Opinion Advocate General Spzunar in Case C-434/15, *Elite Taxi v Uber*, ECLI:EU:C:2017:364, paras. 51-52.

83 Case C-413/13, *FNV Kunsten Informatie en Media (KIEM)*, ECLI:EU:C:2014:2411, para. 41.

84 Case C-67/96, *Albany International BV*, ECLI:EU:C:1999:430.

85 Case *Viking Line*, supra note 13, para. 79; Case C-43/75, *Defrenne*, ECLI:EU:C:1976:56.

86 Cf. the AG in Case *Palhota*, supra note 68, para. 51.

87 Cf. cases like *Defrenne*, supra note 85, para. 10; *Elisabeth Bauer*, supra note 46; Eleni Frantziou, ‘Joined Cases C-569/16 and C-570/16 Bauer et al: (Most of) The Charter of Fundamental Rights in Horizontally Applicable’, *European Law Blog*, 19 November 2018, <<https://europeanlawblog.eu/2018/11/19/joined-cases-c-569-16-and-c-570-16-bauer-et-al-most-of-the-charter-of-fundamental-rights-is-horizontally-applicable/>> (last visited 22 February 2019).

economy' has largely failed to deliver, at least in the two areas we have looked at, albeit there are some signs of modest, but positive, change, generated by the advent of the ESP. We conclude this article by arguing that the failure to deliver on the promise of the social market economy is for three reasons: cleavages, competence and communication.

In respect of *cleavages*, we have seen that the divide between the West and the East of the EU is becoming sharper and more entrenched. What is seen as protection to the West is protectionism to the East. Trying to get those two sides to be reconciled has proved an enormous challenge. From that point of view, securing agreement on the 2018 Posted Workers Directive was a tremendous achievement, although the two losing States – Poland and Hungary – have now challenged the legal basis. The phrase social market economy did not oil the wheels of the agreement.

On the question of *competence* this has been the Achilles heel of EU social policy. The terminology of 'social' policy has been misleading. The EU competence has always been confined to employment policy and even here political will may be lacking to deliver a more ambitious agenda. In the absence of clear powers at EU level, it is up to the Member States to put flesh on the bones of the social market economy, through implementation of policies at national level. The monitoring framework provided by the ESP may assist with this. However, the problem here is that the requirements of the internal market limit Member States' freedom to deliver. Here we need a more lenient and socially-friendly approach by the CJEU. There are hints in the more recent case law, such as *Bauer* or *Dano*, that the Court is willing to strengthen the EU's social face or to give Member States more space. But the Court's approach to social values and social rights is not always consistent and coherent, which may undermine legal certainty. Furthermore, the margin of discretion for Member States to pursue differentiated social policies remains subject to the important EU law principles of supremacy and effectiveness, which are viewed by the Court as crucial to preserve that the unity of the EU Single Market.

This brings us to the final issue: *communication*. The talk of the social market economy, now allied with ESP raises expectations that the EU can deliver in areas where there is a lack of political will, let alone competence to act. The full title of the ESP is a case in point: the European Pillar of Social Rights. It contains few, if any, 'rights' as traditionally understood by lawyers (and remember the rights/principles distinction which has bedevilled the Solidarity Title of the Charter, albeit a distinction currently being mitigated by cases like *Bauer*). It is, more realistically, 20 principles backed up by an action plan.⁸⁸ When viewed in this way it is a more realistic document. As it stands, the language of 'European Pillar on Social Rights' overpromises but risks under-delivering and therefore discrediting the social market economy, not supporting it. ■

88 Commission Staff Working Document, Monitoring the Implementation of the European Pillar of Social Rights, SWD(2018) 67 final, 13 March 2018, <<https://ec.europa.eu/commission/sites/beta-political/files/staff-working-document-monitoring-implementation-european-pillar-social-rights-march2018.pdf>>.