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Unorthodox Competences and the Functional Architecture of EU Social Law

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ABSTRACT: EU social policy encompasses a wide range of fields, including, above all, labour and welfare rights. While primarily framed under Title X TFEU ('Social Policy'), these matters also surface across other policy domains with no explicit social embedding, notably internal market, free movement and migration. This paper explores a selection of key legislative instruments adopted in these policy areas, aiming to reconstruct the legal, functional, and constitutional rationale behind the pursuit of social objectives beyond the traditional legal framework. Through a detailed mapping and comparison of the selected measures, situated within both their original and current operational contexts, the analysis reveals how different legal bases influence the articulation and scope of social entitlements. By situating these developments within the broader architecture of EU governance, the paper offers an insight into the evolving modalities of the Union's social action and into the tensions arising from the reliance on non-social legal foundations for the advancement of social aims.

KEYWORDS: competences – legal bases – internal market – free movement – workers – third-country nationals.

1. The EU orthodox and unorthodox social competences: an introduction

According to well-settled caselaw the choice of the legal basis is one of 'constitutional importance'[1] and, as such, it must be 'based on objective factors which are amenable

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[1] *Ex plurimis*, Opinion 2/00 *Carthagena Protocol*, EU:C:2001:664, para 5; Case C-370/07 *Commission v Council*, EU:C:2009:590, paras 46–49; Opinion 1/08 *General Agreement on Trade in Services*, EU:C:2009:739, para 110.

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to judicial review'.[2] The queries addressed to the Court of Justice of the European Union (ECJ) tend to illustrate that the determination of the legal basis, despite being in principle subject to objective criteria, is sometimes not a simple process yielding unambiguous or self-evident results. EU social policy – comprehensively intended as encompassing the regulation of labour and welfare entitlements, and working conditions – is a prime example of a typical dynamic of the EU law-making process calling into question competing interests and, potentially, different legal bases. The rules governing the EU competence in this policy area are now set out under Title X of the Treaty on the Functioning of the European Union (TFEU). Article 151(1) TFEU, with a remarkably programmatic tone, enshrines the duty of the Union and the Member States to 'have in mind fundamental social rights' and sets out a rich catalogue of social objectives, including, *inter alia*, 'the promotion of employment, improved living and working conditions' and 'proper social protection'. The second part of Article 151(1) TFEU provides a reminder of the fact that EU social policy must nonetheless be reconciled with some economic imperatives, in particular, the need to maintain the competitiveness of the Union economy.

Against this background, the ensuing provisions under Title X TFEU, in particular Article 153 TFEU, lay down the means for achieving such objectives by establishing a list of no fewer than eleven specific areas, ranging from working conditions to social inclusion where the Union can supplement and support the activities of the Member States.[3] An extensive body of legislation is grounded on this legal basis.[4]

[2] *Ex plurimis*, Case C-45/86 *Commission v Council*, EU:C:1987:163, para 11; Case C-263/14, *Parliament* v *Council*, EU:C:2016:435, para 43; Case C-482/17 *Czech Republic v European Parliament and Council*, EU:C:2019:1035, para 31. In addition to the core rule of the 'objective factors', the Court has developed more detailed criteria to scrutinise the choice of the legal basis. For a comprehensive overview, see A Engel, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation* (Springer 2018); K Lenaerts and P van Nuffel, *EU Constitutional Law* (Oxford University Press 2021) at 88 ff.

[3] The whole list of areas mentioned under Article 153(2) TFEU includes: (a) improvement in particular of the working environment to protect workers' health and safety; (b) working conditions; (c) social security and social protection of workers; (d) protection of workers where their employment contract is terminated; (e) the information and consultation of workers; (f) representation and collective defence of the interests of workers and employers, including co-determination […]; (g) conditions of employment for third-country nationals legally residing in Union territory; (h) the integration of persons excluded from the labour market […]; (i) equality between men and women with regard to labour market opportunities and treatment at work (j) the combating of social exclusion; (k) the modernisation of social protection systems […].

[4] See for instance Directive 2003/88/EC of the European Parliament and the Council of 4 November 2003 concerning certain aspects of the organisation of working time; Directive 2002/14/EC of the European Parliament and the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation; Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer. As for some more recent pieces of legislation adopted to deliver the principles of the European Pillar of Social Rights see, for instance, Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform

However, even though Title X of the TFEU was conceived as the *ad hoc* source of power for implementing social rights and policies at EU level, this article contends that, beyond this *orthodox* competence, the Treaties include plenty of other – *unorthodox* – competences which can be deployed to advance social policy objectives. This has always been so, even if a fully-fledge obligation in this sense is now enshrined in the social mainstreaming clause under Article 9 TFEU.[5] While exploring the characteristics of EU social legislation resulting from the exercise of *unorthodox* competences, it is argued that this dynamic reflects the intrinsically transversal nature of the EU governance architecture and its capacity to project social considerations horizontally across diverse policy-making processes.[6] This determines a shifting of social regulation from its traditional normative locus to other areas of EU law.[7] Among the many available *unorthodox* routes for addressing the social outside the social, the present paper examines the internal market (including free movement of services) and migration competences as two crucial examples of this phenomenon.[8] By examining the

work; Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union and Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.

[5] Article 9 TFEU 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 protection of human health'.

[6] Cf. S Garben, 'Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Powers' (2014) 35 *Oxford Journal of Legal Studies* 55. *Inter alia*, the author discusses the EU 'functional powers' i.e., those provisions that allow to 'cut horizontally through virtually all policy areas'. Among them, she mentions Articles 46, 50, 56, and also 114 TFEU. See below, sections 2 and 3.

[7] In some respects, this phenomenon is considered in some contributions of a special issue of European Constitutional Law Review edited by Kilpatrick under the heading of 'displacement'. The leading contribution by Kilpatrick herself explains the notion of displacement and one of the meanings of displacement upheld thereunder is 'moved elsewhere or replaced'. Cf. C Kilpatrick, 'The Displacement of Social Europe: A Productive Lens of Inquiry' (2018) 14 *European Constitutional Law Review* 62. See also E Muir, 'Drawing Positive Lessons from the Presence of "The Social" Outside of EU Social Policy *Stricto Sensu*' (2018) 14 *European Constitutional Law Review* 75.

[8] The non-social legal basis with social implications par excellence is Article 19 TFEU. Nonetheless, the non-discrimination competence is not included among the present research. This exclusion is justified by the distinctive nature of Article 19 TFEU compared to the other legal bases examined in this study. Unlike provisions that delineate specific material fields of EU action (such as employment, social security, or public health), Article 19 TFEU establishes a policy objective – the combating of discrimination on exhaustively enumerated grounds (sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation) – that can manifest across diverse substantive domains. For instance, this legal basis has served for the adoption of legislation addressing discrimination in employment and occupation (Directive 2000/78/EC), in access to goods and services (Directive 2004/113/EC), and in areas as varied as education and social protection (Directive 2000/43/EC). In other words, the non-discrimination competence does not demarcate a material field of Union action but, rather, defines a normative objective – combating discrimination on specified grounds – that transcends sectoral boundaries. This transversal nature distinguishes Article 19 TFEU from the sectoral legal bases that constitute

relevant legal bases and the resulting legislation, this paper explores both the significance and the implications of the Union's long-standing practice of addressing social objectives outside the *orthodox* framework of the social policy competence.[9]

2. The social dimension of EU internal market powers: temporal, substantive and strategic considerations

The original legal framework of the Community stemming from the Treaty of Rome did not contemplate any explicit social competence.[10] The Treaty establishing the European Economic Community (TEEC) portrays that this absence is consistent with the foundational rationale of the Community as a project of economic integration centred on the creation of a common market.[11] A fully-fledged social policy competence, as now enshrined in Title X TFEU, has its roots in a provision first introduced by the Single European Act (SEA) in 1986. Crucially, the SEA added Article 118a which, with the aim of promoting improvements in the working environment concerning workers' health and safety, introduced the power to adopt directives by qualified majority voting in the Council.[12]

the analytical framework of this research. Accordingly, while the strategic deployment of Article 19 TFEU as a vehicle for social regulation has been explored extensively elsewhere, it falls outside the scope of the present inquiry, which is structured around sectoral competences rather than transversal objectives. As for some, among the copious literature, concerning EU non-discrimination law see G Zaccaroni, *Equality and Non-Discrimination in the EU* (Springer 2021); E Muir, *EU Equality Law: The First Fundamental Rights Policy in the EU* (Oxford University Press 2018); F Spitaleri, 'Eguaglianza e non discriminazione nell'Unione europea: dai singoli divieti al principio generale' in I Castangia and G Biagioni (eds.), *Il principio di non discriminazione nel diritto dell'Unione europea* (Editoriale Scientifica 2011) 3; C Favilli, *La non discriminazione nell'Unione europea* (Il Mulino 2008). Regarding the capacity of the Union to interfere in the protection of social rights even in the context of external action, see, for example, M Manfredi, *La promozione e la tutela dei diritti economici e sociali nell'Unione europea* (Cacucci 2022), in particular chapter 5.

[9] This work builds on and develops the argument that EU social legislation can be adopted within different legal bases I put forward as a preliminary point in V Salese, 'Exploring the Protection of Fundamental Social Rights in the EU: Some Patterns of Interaction between the Charter and the Legislation in the ECJ's Caselaw' (2024) 2 *Il Diritto dell'Unione europea* 349.

[10] An exception can be found in Article 119 TEEC on the principle of non-discrimination between men and women which constituted the legal basis for the Community to adopt Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

[11] Article 2 TEEC read as follows: 'The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it'.

[12] For a deeper insight on the evolution of the social policy competence until the Maastricht Treaty, see G Majone, 'The European Community between Social Policy and Social Regulation' (1993) 31 *Journal of Common Market Studies* 153.

Nonetheless, given the nexus between internal market policies on the one hand and social and labour policies on the other, the introduction of certain minimum standards regarding the conditions of workers in the EU proved instrumental to the market-making goal. Accordingly, even before the SEA compensated the social lacuna in the original Treaty text, the very first *unorthodox* route to social regulation had already emerged within the internal market framework itself.

The internal market is now mentioned under Article 4(2)(a) TFEU and is one of the broadest and most significant areas where the Union and the Member States enjoy a shared competence. The core legal foundations of this policy field fall under Title VII TFEU that lays down the rules on competition, taxation and approximation of laws. More precisely, Chapter III thereof, entitled 'Approximation of the laws' includes Articles 114 and 115 TFEU. While Article 114 TFEU (corresponding to formerly Article 100a TEEC) was introduced by the SEA, Article 115 TFEU (formerly Article 100 TEEC) has been part of the Treaties since their inception.[13] Notwithstanding the increasing prominence gained by Article 114 TFEU since its introduction under the SEA,[14] Article 115 TFEU has retained an important – albeit less visible – role in the adoption of social policy legislation. Maintaining its original structure,[15] this provision empowers the Council to adopt, by unanimous vote, directives for the approximation of the laws, regulations or administrative provisions of the Member States affecting the establishment or the functioning of the common

[13] Article 100a (now renumbered as Article 114 TFEU) provided a way simpler procedural setting for legislating in the internal market area above all the qualified majority voting instead of the unanimity threshold set in Article 100 TEEC/115 TFEU. For a comprehensive view of the impact of the SEA on the internal market arrangements, cf. CD Ehlermann, 'The Internal Market following the Single European Act' (1987) 24 *Common Market Law Review* 361. For an overview of the evolution of the internal market powers see also M Kellerbauer, 'Articles 114-115 TFEU' in M Kellerbauer, M Klamert and J Tomkin (eds.), *Commentary on the EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) 1235. See also P De Pasquale and O Palotta, 'Articoli 114-115 TFUE' in A Tizzano (ed.), *I Trattati dell'Unione europea* (Giuffré 2014) 1261; G Gattinara, 'Articoli 114-115 TFUE' in C Curti Gialdino (ed.), *Codice dell'Unione europea operativo* (Edizioni Simone 2012) 1144; F Caruso, 'Articoli 94-95 CE' in A Tizzano (ed.), *Trattati dell'Unione europea e della Comunità europea* (Giuffré 2004) 651; M Condinanzi, 'Articoli 94-95 CE' in F Pocar and MC Baruffi (eds.), *Commentario breve ai Trattati della Comunità e dell'Unione europea* (CEDAM 2001) 496.

[14] For some literature on the uses and abuses of Article 114 TFEU see, *ex plurimis* S Weatherill, 'The Competence to Harmonise and its Limits' in P Koutrakos and J Snell (eds.), *Research Handbook on The Law of the EU's Internal Market* (Edward Elgar 2017) 82 and S Garben, 'From Sneaking to Striding: Combatting Competence Creep and Consolidating the EU Legislative Process' (2021) 26 *European Law Journal* 429.

[15] The timeline of this provision is defined by the following key moments: Article 100 TEEC was already included since the Treaty of Rome and, as such, it was consolidated as Article 100 TEC under the Maastricht Treaty. Subsequently it was renumbered as Article 94 TEC. The main change affecting its content occurred under the Lisbon Treaty where, while the provision has been renumbered as Article 115 TFEU, the opening was modified by including the formula '(w)ithout prejudice to Article 114 TFEU'. This amendment suggests that the drafters wanted this provision to be recognised only a residual role in the post-Lisbon era.

market. Only two conditions must therefore be fulfilled: unanimity in the Council and a functional link to the establishment or functioning of the common market.[16] The absence of substantive constraints has transformed this legal basis into a versatile and strategic tool enabling action across a broad spectrum of policy areas.[17]

The use of internal market legislation to address issues with significant – if not primarily – social implications has been evident since the early 1970s, notably with the adoption of several directives that remain in force today. The most prominent examples are Council Directive 77/187/EEC on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses[18] and Council Directive 75/129/EEC on collective redundancies.[19] Basically, even though the Community at that time lacked an explicit social mandate or competence, the regulation of certain aspects of labour relations nevertheless became an integral part of its broader strategy to build the common market.

Beyond the historical context, there are substantive reasons that continue to make the internal market framework an effective and fertile ground for regulating certain aspects of social policy. This is vividly illustrated by the fact that even under the most recent reforms both the aforementioned directives have retained their original market legal framework. Evidently, given the sensitivity of social policy matters, Member States are more willing to accept the intervention of the Union when it is framed as an internal market measure rather than as explicit social policy. In spite of the unanimity condition, the internal market powers appear as a particularly convenient and flexible option for the EU legislator. Notably, there is a marked difference between the open-ended internal market powers and the sector-specific competence described under Article 153 TFEU.[20] In contrast to the comprehensive and yet vague

[16] On this point see B de Witte, 'Non-Market Values in Internal Market Legislation' in NN Shuibhne (ed.), *Regulating the Internal Market* (Edward Elgar 2006) 61. The author stresses the lack of justification demonstrating that the adoption of EU rules was actually necessary for the functioning of the internal market, as the legal basis requires: 'No attempt was made, in the preambles of the relevant legislative acts, to argue why exactly the unharmonised state of national laws directly affected the common market'.

[17] Similar to social policy, and in the lack of a dedicated legal framework, environmental policy has been developed primarily through the use of internal market powers. Subsequently, the SEA provided a formal legal basis also for environmental policy.

[18] Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

[19] Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies.

[20] On the characteristics of the different competences based on the formula of the legal bases and on the constraints stemming therefrom, see G Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 *European Law Journal* 2. As opposed to the notion of 'sector-specific' legal bases which are defined 'in terms of a particular field to be regulated', with the label 'purposive competences' Davies identifies those legal bases that are defined 'in terms of the power to take measures to achieve a particular goal'. The author describes the purposive powers as a danger for

competence to ensure the functioning of the internal market, Article 153 TFEU delineates both the subjects on which the EU may legislate and the limits beyond which it may not intervene, even specifying the permissible degree of harmonisation in those areas.[21] Accordingly, the flexible and broadly framed formulation of Article 115 TFEU, as opposed to the more constrained nature of the social policy competence, makes it a more attractive and strategic avenue for the EU legislator.

From a pragmatic standpoint, this reasoning appears sound; however, it also raises legitimate concerns as to the validity of such an approach. In particular, a possible conflict may arise with the principle according to which general legal bases must yield to special legal bases. The lawfulness of this practice remains, as a matter of principle, subject to rigorous scrutiny under the doctrine of conferral.[22] To date, however, the use of internal market competences for social regulation has never been directly challenged before the ECJ. Moreover, in settled caselaw concerning Article 114 TFEU, the Court has acknowledged the inclusion of non-market objectives within internal market law.[23] Nevertheless, this jurisprudence does not eliminate the

democratic decision-making at EU level. He argues that due to the purposive powers setting '(d)ebate is changed from 'where should we go' to 'how do we get to X'.

[21] The margin of manoeuvre allowed under the internal market competence, specifically as regards the harmonisation power is thoroughly discussed in S Weatherill, 'The Fundamental Question of Minimum or Maximum Harmonisation' in S Garben and I Govaere (eds.), *The Internal Market 2.0* (Hart Publishing 2021) 262. Contrary to the internal market competence, as regards social policy, Article 153(2)(b) TFEU states that the EU can only set 'minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States'. However, also the internal market social legislation typically sets a baseline while giving the Member States some leeway to adjust the content of its rules. See both Directive 2001/23 on the transfer of undertakings, Art 8 and Directive 98/59 on collective redundancies which are going to be analysed below in section 2.1.

[22] This question is raised by S Weatherill, 'Supply of and Demand for Internal Market Regulation: Strategies, Preferences and Interpretation' in NN Shuibhne (ed.), *Regulating the Internal Market* (Edward Elgar 2006) 29. In his view, the very crucial query remaining since the introduction of a specific social policy legal basis under the SEA is 'how to reconcile the pre-Single European Act reality that much harmonisation legislation was not really about market-making at all with the post-Single European Act reality that sector-specific legal bases had been (and continued to be) created, with the awkward implication that some previous practice might need to be unravelled in order to allocate matters previously dealt with within the harmonisation programme to sector-specific legal bases that involved different rules'. On the relationship between internal market and other legal bases, cf. also both B de Witte, 'A Competence to Protect: The Pursuit of non-market Aims through Internal Market Legislation' in P Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 26 and B de Witte (n 16).

[23] A major example of this kind is given in a set of rulings concerning the EU legislation affecting the sale of tobacco products based on what is now Article 114 TFEU. The legal basis has been repeatedly challenged on several grounds for being manifestly aimed at pursuing goals unrelated to the market. In many of those cases the charge was that the internal market competence was inappropriate due to the predominance of the health-related goals. See, *ex plurimis*, Case C-547/14 *Philip Morris Brands and others*, EU:C:2015:853; Case C-491/01 *British American Tobacco*, EU:C:2002/741; Case C-380/03 *Germany v European Parliament and Council*, EU:C:2006:772 and case C-376/98, *Germany v European Parliament and Council*, EU:C:2000:544.

need for a more clearly articulated methodology capable of reconciling market and non-market objectives within the EU internal market legal framework. Some broader reflections on this point will be developed in the following section, which examines specific examples of internal market legislation encompassing labour regulation.

2.1. Structural transitions and working conditions: insights from Directive 2001/23 and Directive 98/59

Council Directive 2001/23/EC addresses the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.[24] The version of this legislation currently in force results from a series of amendments undergone by the original version adopted in 1977 under the impetus of the Social Action Programme.[25] Based on Article 94 TEC – now renumbered as Article 115 TFEU – this legislation lies at the intersection between two distinct perspectives. In fact, while seeking to accommodate the economic trends characterised by changes in the structure of undertakings, the Directive does not pursue the harmonisation of procedural rules regulating the transfer but, rather, focuses on setting out some standards applicable to the employees facing a change of employer as a consequence of the transfer.

Accordingly, the Court has repeatedly stressed that 'the continuity of employment relationships existing within an economic entity irrespective of any change of ownership' constitutes a priority for this legislation[26] along with the aim 'to ensure, as far as possible, that the contract of employment continues unchanged with the transferee, in order to prevent the workers concerned from being placed in a less favourable position solely as a result of the transfer'.[27] However, the goal of safeguarding employees must be balanced with business prerogatives. This principle as well is reflected in the caselaw which reiterates the need to grant 'a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other hand'.[28] It serves as a reminder that the objective of providing

[24] Council Directive 2001/23/EC 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 transfers of undertakings, businesses or parts of undertakings or businesses.

[25] Council Resolution of 21 January 1974 concerning a social action programme. The original Council Directive 77/187/EEC had been already replaced by Council Directive 98/50/EC. Based on its preamble, Directive 2001/23 is aimed at codifying the substantial revisions undergone in 1998, 'in the interests of clarity and rationality'.

[26] Case C-664/17 *Ellinika Nafpigeia*, EU:C:2019:496, para 41 and Case C-458/12 *Armatori*, EU:C:2014:124, para 51. For an insight on the Court's interpretative approach to the very first version of this legislation, cf. C Groot, 'The Council Directive on the Safeguarding of Employees' Rights in the event of Transfers of Undertakings: An Overview of the Case Law' (1993) 35 *Common Market Law Review* 331.

[27] *Ex plurimis*, Joined cases C-674/18 and C-675/18 *TMD Friction*, EU:C:2020:682, para 48 and Case C-509/17 *Plessers*, EU:C:2019:424, para 52.

[28] *Ex plurimis*, *TMD Friction* (n 27) para 50; but see also Case C-344/18 *ISS Facility Services*, EU:C:2020:239, para 26; Case C-336/15 *Unionen*, EU:C:2017:276, para 19 and also Case C-328/13 *Österreichischer Gewerkschaftsbund*, EU:C:2014:2197, para 29.

some common rules on how to safeguard employees is not absolute but must, instead, be reconciled with the need to make the transfer operational.

This tension between workers' protection and the efficiency of the transfer process represents the structural rationale of the Directive and explains its positioning at the crossroads between labour and market integration. In a nutshell, the Directive recognises three main kinds of rights for the employees affected by the transfer. Firstly, Article 3 stipulates that the employees have the right to be taken over by the new employer without any change to their existing terms and conditions of employment. Secondly, Article 4 provides that the transfer shall not *per se* constitute a ground for dismissal unless there is 'an economic, technical or organisational reason entailing changes in the work-force'. Lastly, Article 7 states that the employees' representatives must be informed and consulted when the transfer is to take place. However, no further specification is provided as regards the entitlements in question nor are any remedies envisaged in case such entitlements are diminished. This is no mistake but, rather, a deliberate choice not to overburden the transferee while the domestic lawmakers are ultimately entrusted with the problematic task of giving substantive content to these provisions.[29]

The objective of preserving business' interests is also valued in the caselaw, which tends to emphasise that the transferee must be placed 'in a position to make the adjustments and changes necessary to carry on its operations'.[30] *Alemo-Herron*[31] is perhaps the most paradigmatic case. Pivoting on the freedom to conduct business under Article 16 of the Charter of Fundamental Rights (CFR), the Court favoured the U.K. transferee company against the workers' claim that a contractual clause deferring to collective agreements should be interpreted dynamically, thereby allowing the incorporation of rules from collective agreements concluded after the transfer. Beyond the Court's approach, this case illustrates the uncertainties surrounding the scope of the guarantees afforded by this legislation. While this is manifestly detrimental from the workers' perspective, such a design may reflect a deliberate choice to avoid drafting a text that is too precise and specific with regard to the rights that may be derived therefrom.[32]

[29] In this respect, see J McMullen, 'Some Problems and Themes in the Application in Member States of Directive 2001/23/EC on Transfer of Undertakings' (2007) 23 *The International Journal of Comparative Labour Law and Industrial Relations* 335. See also B Hepple, 'Report for the Commission of the European Communities Directorate-General Employment, Industrial Relations and Social Affairs-Main shortcomings and proposals for revision of Council Directive 77/187/EEC', December 1990.

[30] *Unionen* (n 28) para 19 and *Österreichischer Gewerkschaftsbund* (n 28) para 29. Moreover, in Plessers the Court interpreted broadly the exceptions to the prohibition of dismissal laid down in Article 4(1). *Plessers* (n 27) para 53.

[31] Case C-426/11 *Alemo-Herron*, EU:C:2013:521.

[32] This echoes the discussion on the direct effect accorded to the right to paid annual leave. For further analysis, see, *inter alia*, and in chronological order V Salese (n 9) and the bibliography thereof; L Cecchetti, 'Unravelling horizontal direct effect in EU law: the case of the fundamental right to paid annual leave between "myth" and "practice"' (2023) 42 *Yearbook of European Law* 42; F Costamagna, *Diritti fondamentali e rapporti tra privati nell'ordinamento dell'Unione europea* (Giappichelli 2022) in

A very similar market-oriented approach also informed the adoption of Directive 98/59 on collective redundancies.[33] Firstly conceived at the impulse of the 1974 Social Action Programme, Directive 98/59/EC has undergone various amendments across its long life,[34] none of which has altered the original legal basis. Unlike Directive 2001/23, this legislation potentially tackles two specific labour rights, namely the workers' right to information and consultation and the right to protection against unjustified dismissal. In particular, with the view to establishing minimum[35] procedural requirements for the enactment of collective redundancies, the Directive lays down an array of obligations addressed to employers. Two main obligations stand out: first, the employer contemplating collective redundancies is required to begin consultations with the workers' representatives[36]; second, the employer must provide prior notification to the competent public authority, and the projected collective redundancies cannot take effect earlier than thirty days after this notification.[37] From an *ex ante* perspective, the consultation with the workers' representatives is aimed at preventing the termination of the employment contracts or at least at reducing the number of workers affected.[38] In case the consultation does not succeed, the notification is intended to enable the public authority to check on the characteristics of the redundancy.[39]

particular at 126; E Frantziou, '(Most of) the Charter of Fundamental Rights is Horizontally Applicable: ECJ 6 November 2018, Joined Cases C-569/16 and C-570/16, *Bauer et al*' (2019) 15 *European Constitutional Law Review* 306; E Muir, 'The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from *Mangold* to *Bauer*' (2019) 12 Review of European Administative Law 185; R Palladino, 'Diritti, principi ed effetto diretto orizzontale delle disposizioni (in materia sociale) della Carta dei diritti fondamentali dell'Unione europea' (2019) *Il diritto dell'Unione europea* 175; M Condinanzi, 'Le direttive in materia sociale e la Carta dei diritti fondamentali dell'Unione europea: un dialogo tra fonti per dilatare e razionalizzare (?) gli orizzonti sull'effetto diretto. Il caso della giurisprudenza "sulle ferie"' (2019) 10 *Federalismi.it*; LS Rossi, 'La relazione fra Carta dei diritti fondamentali dell'Unione europea e direttive nelle controversie orizzontali' (2019) 10 *Federalismi.it*; D Gallo, *L'efficacia diretta del diritto dell'Unione europea negli ordinamenti nazionali. Evoluzione di una dottrina ancora controversa* (Giuffré 2018) in particular at 275; MA Panascì, 'The Right to Paid Annual Leave as an EU Fundamental Social Right. Comment on *Bauer et al.*' (2018) 26 *Maastricht Journal of European and Comparative Law* 441.

[33] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

[34] The first directive on collective redundancies was adopted right in the aftermath of the 1975 Paris Summit on the basis of then Article 100 TEEC. The original text underwent some major changes in 1992 and was subsequently consolidated in 1998 into the version that remains in force today.

[35] Same as for Directive 2001/23, Art 8, also Art 5 CRD provides the typical minimum harmonisation reminder reading that 'the Directive shall not affect the right of Member States to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to promote or to allow the application of collective agreements more favourable to workers'.

[36] Directive 98/59 (n 33) Art 2(1).

[37] Ibid Art 3.

[38] Case C-134/22 *MO*, EU:C:2023:567, para 29. As for the rationale of the information and consultation duties with the workers' representatives, see also paras 30–31.

[39] Ibid para 32: 'the reasons for the projected redundancies, the number and categories of workers to be made redundant, the number and the categories of workers normally employed, the period over

Besides the procedural obligations, no substantive limit is provided to prevent the employer from enacting a collective dismissal, nor is any sanction established in case of breach of the procedural rules. According to the Court, indeed, 'the means of protection to be afforded to a worker who has been unlawfully dismissed as part of a collective redundancy […] are manifestly unrelated to the notification and consultation obligation arising from Directive 98/59'.[40]

In line with this approach, it has also been repeatedly held that 'the objective of the directive is not only to afford greater protection to workers in the event of collective redundancies, but also […] *to harmonise the costs which such protective rules entail for EU undertakings* (emphasis added)'.[41] *AGET Iraklis*[42] best illustrates a reading of this legislation as one primarily oriented towards the benefit of the undertakings. Significantly, following a well-settled interpretative scheme, the Greek legislation implementing the Directive on collective redundancies was examined against the freedom of establishment guaranteed by Article 49 TFEU.[43] This led to find that the prior authorisation mechanism involving the Greek authorities failed to comply with the principle of proportionality laid down in Article 52(1) of the Charter and, therefore, with Article 16 thereof.[44]

The parallel history of Directive 2001/23 and Directive 98/59 reveals striking similarities which, starting from the choice of legal basis, have shaped these instruments since their inception. The first point of convergence lies in the fact that both

which the projected redundancies are to be effected, and the criteria proposed for the selection of the workers to be made redundant'.

[40] *Ex multis*, Case C-652/19 *Consulmarketing*, EU:C:2021:208, para 42 and Case C-32/20 *Balga*, EU:C:2020:441, para 32.

[41] *Ex plurimis*, Case C-80/14 *USDAW and Wilson*, EU:C:2015:291, para 62; Case C-182/13 *Lyttle and Others*, EU:C:2015:317, para 43; Case C-385/05, *Confédération générale du travail*, EU:C:2007:37, para 43; Case C-55/02 *Commission v Portugal*, EU:C:2004:605, para 48.

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

[43] As for some examples of how the fundamental freedoms are balanced against fundamental rights and of the traditional conflict-setting techniques see, *ex plurimis*, C Barnard, 'The Protection of Fundamental Social Rights in Europe after Lisbon: a Question of Conflicts of Interests' in S de Vries, U Bernitz and S Weatherill (eds.), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013) 27; V Trstenjak and E Beysen, 'The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case-Law of the CJEU' (2013) 38 *European Law Review* 293; N de Boer, 'Fundamental Rights and the EU Internal Market: Just how Fundamental are the EU Treaty Freedoms? A Normative Enquiry Based on John Rawl's Political Philosophy?' (2013) 9 *Utrecht Law Review* 148; S de Vries, 'The Protection of Fundamental Rights within Europe's Internal Marker after Lisbon – An Endeavour for More Harmony' in S de Vries, U Bernitz and S Weatherill (eds.), *The Protection of Fundamental Rights in the EU after Lisbon* (Hart Publishing 2013) 59; S Garben, 'The 'Fundamental Freedoms' and (Other) Fundamental Rights: Towards an Integrated Democratic Interpretation Framework' in S Garben and I Govaere (eds.), *The Internal Market 2.0* (Hart Publishing 2021) 335.

[44] *AGET Iraklis* (n 42) para 103. For a more comprehensive analysis of this judgment cf. M Markakis, 'Can Governments Control Mass Layoffs by Employers? Economic Freedoms vs Labour Rights in Case C-201/15 *AGET Iraklis*' (2017) 13 *European Constitutional Law Review* 724.

regulate employment standards in response to a pathological situation within the undertaking i.e., a corporate transformation that, precisely because it affects the functioning of the internal market, provides a sound justification for recourse to that legal basis. The second point of convergence is that, despite the amendments introduced to both texts between the late 1990s and the early 2000s, the legislature chose in both cases to retain the original legal basis. This is not a minor fact, especially if compared to another example – Directive 2008/94 on the protection of employees in the event of employer insolvency[45] – which, following the 2008 reform, was explicitly relocated under the social policy heading. The history of Directive 2008/94 shows that, in theory, both the rules on the transfer of undertakings and those on collective redundancies could have been framed under the social policy framework. For instance, drawing from the redefinition of the scope of the internal market legal basis following the first *Tobacco* ruling in which Directive 98/43/EC was annulled,[46] Syrpis explicitly argued for a reconfiguration of collective redundancy law under the social policy framework.[47] That option, however, was ultimately set aside, and today it is even less likely to materialise. Yet, beyond the question of alternative legal bases – or more precisely, specific competences – assessing the appropriateness of the chosen legal basis requires consideration of the deeper rationale that led the legislature to regulate these matters in this way and to reaffirm that choice across subsequent revisions. The explanation, perhaps obvious, lies in the fact that some aspects of labour policies form an integral part of internal market considerations, and that the approximation of national regimes is functionally connected to the free movement of undertakings and workers. Given this underlying rationale, moving this body of law under the social policy heading would not *per se* be able to enhance its social dimension, except nominally. This is all the more evident considering that Article 151 TFEU, at the outset of Title X, emphasises that the Union's social action must operate in synergy with the internal market policies.

Nevertheless, with a view to improving the protections of the employees affected by these corporate changes, nothing would prevent a parallel intervention under the social policy competence from complementing the protective ambitions outlined by

[45] Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (Codified version).

[46] *Germany v European Parliament and Council* (n 23), namely case C-376/98. The Court found that Directive 98/43/EC, being concerned with the advertising and sponsorship of tobacco, was fundamentally oriented towards the safeguarding of public health. Consequently, the Court reasoned that the Directive did not primarily serve the objectives of realising the internal market project and could not legitimately derive its legal basis from what was then Article 95 TEC.

[47] P Syrpis, 'Smoke Without Fire: The Social Policy Agenda and the Internal Market' (2001) 30 *Industrial Law Journal* 271. Syrpis claimed that the Directive did not meet the condition for utilising the internal market legal basis. In particular, as merely laying down minimum standards, in Syrpis' view the Directive cannot be regarded as capable of remedying the divergences between national laws on collective redundancies affecting the functioning of the internal market.

these directives. For instance, as regards collective redundancies, one could envisage the adoption, under Article 153(2)(d) TFEU ('conditions of employment when the contract is terminated'), of some substantive rules applicable once the (collective) dismissal has taken place in spite of/in light of the procedural guarantees laid down under Directive 98/59. Yet, even such a scenario is currently rather unlikely. This is because dismissals remain among the most sensitive areas of EU labour law, where agreement is particularly difficult to achieve. But this is even more so because Article 153 TFEU still requires unanimity in the Council for this subject matter.[48] Indeed, while secondary legislation based on Article 153 TFEU has so far primarily addressed working conditions,[49] legislative action is still lacking in those areas where unanimity is required.

3. Between free movement of services and workers: the EU regime on posted workers

Grounded on the free movement legal bases under Articles 53(1) and 62 TFEU which also belong to the internal market legal framework, Directive 96/71/EC concerning the posting of workers (PWD)[50] addresses the situation arising when an employer based in one Member State sends (or 'posts') its workers to another Member State, so-called host State, to provide services there. Under such circumstance a crucial question arises regarding which labour standards should be applicable to posted workers: those of the State where the posting employer is based or those in place where the working performance is carried out?[51] Combining elements of free movement and private international law,[52] the PWD provides a response to this dilemma laying down an obligation to apply some of the labour standards in force in the host Member State also to posted workers. Crucially, the PWD does in no way affect the

[48] Pursuant to Article 153(2) TFEU unanimity in the Council applies to the fields referred to in paragraph 1(c), (d), (f) and (g) thereof concerning, respectively, 'social security and social protection of workers', 'protection of workers where their employment contract is terminated', 'representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5' and 'conditions of employment for third-country nationals legally residing in Union territory'.

[49] See for instance the legislation mentioned above (n 4).

[50] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services as amended by Directive (EU) 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.

[51] The intersection between free movement and labour rights is thoroughly addressed in, *ex plurimis* H Verschueren, 'The European Internal Market and the Competition Between Workers' (2015) 6 *European Labour Law Journal* 135; C Kilpatrick, 'Internal Market Architecture and Accommodation of Labour Rights: As Good As It Gets?' (EUI Working Paper LAW 2011/04) at cadmus.eui.eu. As for the specific risks of posting, see S Robin–Olivier, 'Posting of Workers in the European Union: An Exploitative Labour System' (2022) 1 *European Law Open* 679.

[52] E Kolehmainen, 'The Directive Concerning the Posting of Workers: Synchronization of the Functions of National Legal Systems' (1998) 20 *Comparative Labor Law and Policy Journal* 71.

domestic labour regulations substantively; it merely establishes a criterion for determining the applicable legal regime in cross-border posting situations. In other words, rather than setting standards, the PWD sets the criteria for their application. The genesis of this approach lies in the legal dispute between a Portuguese construction firm and the French immigration authorities, culminating in the ECJ's seminal judgment in *Rush Portuguesa*.[53] The Court articulated a crucial principle, stating that 'Community law does not preclude the Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, irrespective of the Member State in which the employer is established'.[54] In that case, considering the transitional arrangements applicable to Portugal following its accession,[55] and with a view to enhancing the application of Union law, the Court identified the phenomenon of the posting of workers as a direct corollary of the freedom to provide services. Although stemming from a contingent set of circumstances, this judicial approach was later mirrored in secondary law, which crystallised the principle that the posting of workers constitutes a specific manifestation of the freedom to provide services.[56]

Although the Directive underwent a major revision in 2018, its original 1996 architecture was largely preserved. The final text of the amending Directive – Directive 2018/957[57] – while overall strengthening the safeguards for posted workers, retained the same legal bases as the original instrument. Article 53(1) TFEU on the freedom of establishment empowers the Union to adopt directives for 'the coordination of the provisions laid down by law, regulation or administrative action in Member States' and Article 62 TFEU extends this power to the legislation on free movement of services.[58] Notably, departing from the harmonising power conferred by Ar-

[53] Case C-113/89 *Rush Portuguesa*, EU:C:1990:142.

[54] Ibid para 18.

[55] The historical context of the dispute corresponds to the enlargement of the EEC to Portugal and Spain in a moment when the accession agreement provided a transitional phase suspending the operation of the rules on free movement of workers until 1993. Due to this asymmetric operation of EU law, the French authorities sought to restrict the activity of the Portuguese undertaking by imposing the recruitment of the workers *in situ* or, alternatively, requiring the Portuguese workers themselves to obtain a work permit from the French authorities.

[56] See M de Vos, 'Free Movement of Workers, Free Movement of Services and the Posted Workers Directive: A Bermuda Triangle for National Labour Standards?' (2006) 7 *ERA Forum* 356. Referring to the Court's reasoning in *Rush Portuguesa*, De Vos argues that the Posted Workers Directive has 'essentially turned a possibility into a duty'.

[57] Directive (EU) 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.

[58] Article 53(1) TFEU now provides that the ordinary legislative procedure shall apply for the Council and the Parliament to issue directives aimed at, *inter alia*, 'the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities and self-employed persons'. Article 62 TFEU (on services) expressly states that the

ticle 115 TFEU seen above, Article 53(1) TFEU introduces two new concepts: 'mutual recognition' through 'coordination' which together delineate a different normative technique.[59]

Against these legal foundations, and yet inspired by the approach proposed in *Rush Portuguesa*, the core device of the PWD is found in Article 3(1) thereof establishing that, irrespective of the law governing the employment relationship, on the basis of equality of treatment, workers who are posted to the territory of a Member State different from that where their employer is established must be covered by a given set of 'terms and conditions of employment' as laid down in the host Member State. The next part of Article 3(1) identifies an exhaustive list of terms and conditions of work and employment ranging from maximum working time and remuneration to equality between men and women. Following the critics spreading in response to the so-called *Laval* quartet[60] the amendments to the Directive finally agreed in 2018 have overall improved the regime applicable to posted workers above all, by adding the express provision of the principle of equal treatment with local

rules under Articles 51-54 TFEU (concerning the freedom of establishment) apply as well to the matters related to services. This entails that, as it was for the PWD, directives based on Article 53(1) TFEU can be adopted also for removing the restrictions on the provision of cross-border services. At the time of the adoption of the original PWD the legal bases were numbered as Articles 57(2) and 66 TEC. On the scope of these legal bases, cf. Case C-233/94 *Germany v Parliament and Council*, EU:C:1997:231, in particular para 17.

[59] Due to the characteristics of the legal basis, it is suggested to regard the PWD as a 'functional alternative to harmonisation' cf. E Kolehmainen (n 52). Similarly, cf. C Barnard, 'Social Policy and the Shifting Sands of the Constitutional Order: The Case of Posted Workers' in A Arnull, C Barnard, M Dougan and E Spaventa (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011) 321. Barnard holds that 'the PWD is not a standard harmonisation measure' where, instead, 'it aims to co-ordinate the legislation […] of the Member States. The same view emerges in some caselaw see, for instance, Case C-396/13 *Sähköalojen ammattiliitto ry*, EU:C:2015:86, para 31: 'Directive 96/71 has not harmonised the material content of those mandatory rules for minimum protection, even though it provides certain information concerning that content'.

[60] A Koukiadaki, 'The Far-Reaching Implications of the *Laval* Quartet: The Case of the UK Living Wage' (2015) 43 *Industrial Law Journal* 91. This expression identifies a set of rulings, *Laval* (Case C-341/05 *Laval*, EU:C:2007:809), *Rüffert* (Case C-346/06 *Rüffert*, EU:C:2008:189), *Commission v Luxembourg* (Case C-319/06 *Commission v Luxembourg*, EU:C:2008:350) and *Viking* (Case C-438/05 *Viking*, EU:C:2007:772). These cases, due to the detrimental impact on labour rights within the cross-border provision of services, had given rise to an intense political and judicial debate which contributed to lead to the PWD reform. Among the copious literature, see C Barnard, 'The Calm After the Storm: Time to Reflect on EU (Labour) Law Scholarship Following the Decisions in *Viking* and *Laval*', in A Bogg, C. Costello and ACL Davies (eds.), *Research Handbook on EU Labour Law* (Edward Elgar 2016) 337; C Kilpatrick, 'Laval's Regulatory Conundrum: Collective Standard-setting and the Court's new Approach to Posted Workers' (2009) 34 *European Law Review* 844; P Syrpis and T Novitz, 'Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation' (2009) 34 *European Law Review* 411; ACL Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ' (2008) 37 *Industrial Law Journal* 126; V Hatzopoulos, 'Actively Talking to Each Other: The Court and Political Institutions' in M Dawson, B de Witte and E Muir (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar 2013) 102, in particular at 121.

workers to paragraph 1 which now reads 'Member States shall ensure […] that undertakings as referred to in Article 1(1) guarantee, *on the basis of equality of treatment*, workers who are posted to their territory the terms and conditions of employment covering the following matters […] (emphasis added)'. Despite the strong opposition including the yellow card invoked by national parliaments pursuant to Protocol No. 2,[61] even the most relevant reforms have been maintained.[62]

[61] The proposal was finalised in March 2016. Subsequently, as part of the early warning procedure under Protocol No. 2, the reactions of the national parliaments highlighted divergent domestic interests. For instance, while the French parliament criticised the proposal for not adequately protecting the equality of treatment for posted workers, parliaments from Central and Eastern European Member States fought the proposal on the grounds that equal pay rights would harm competitiveness. By May 10th, 2016 fourteen chambers from eleven Member States (including ten from Central and Eastern Europe and Denmark) invoked the subsidiarity mechanism triggering a 'yellow card'. The primary concerns focused on the provisions of the PWD related to pay, which were deemed incompatible with the single market for being aimed at eliminating pay rate differences which was regarded as a legitimate competitive advantage for service providers. cf. A Eriksson, 'EU Shown Yellow Card on Workers' Pay, in EU Observer' (EU Observer 10 May 2016) at euobserver.com. On July 30th, 2016, the European Commission published a Communication which concluded that the proposed revision of the PWD did not breach the subsidiarity principle and, therefore, decided to maintain the proposal without even amending it. For an insight the perspective of Eastern countries see Z Rasnaca, 'Identifying the (dis)placement of 'new' Member State Social Interests in the Posting of Workers: the Case Of Latvia' (2018) 14 *European Constitutional Law Review* 131. See also D Fromage and V Kreilinger, 'National Parliaments' Third Yellow Card and the Struggle over the Revision of the Posted Workers Directive' (2017) 10 *European Journal of Legal Studies* 125.

[62] Among the various significant amendments to Article 3(1) PWD which fall outside the scope of the present analysis, some deserve closer inspection. The newly added paragraph 1(a) in Article 3 establishes a conflict-of-law rule for cases where the actual posting duration exceeds twelve months (or eighteen months in justifiable cases). Under this circumstance, besides the list of terms and conditions under Article 3(1), all the employment and working conditions of the host State are to be guaranteed to posted workers. When discussing the conditions based on the length of the posting, see Case C-165/98 *Mazzoleni*, EU:C:2001:162 where the Court first introduced the need to approach postings based on their length and typology. In brief, the Court's conclusion at the time was that only short-term postings could invoke the freedom to provide services to circumvent the application of the host Member State's social standards. Based on this view, *a contrario*, the new version of the Directive upholds that the longer is the posting the more extensive must be the range of terms and conditions applicable to workers. Second, the new PWD provides that the employer must reimburse the costs of board and lodging as well as travel expenditure faced by the workers (Article 3(7) PWD). Last, an amendment affected Article 3(8) PWD as regards the source-based limitation of the scope of application of the PWD. Pursuant to the previous system, the terms and conditions applicable to posted workers could stem from national collective agreements only insofar as they had been declared universally applicable according to Article 3(8) PWD. The new version extends the operation of collective agreements to some circumstances even in the absence of a declaration of their universal applicability. For a more in-depth comment on the revision see, *ex plurimis*, F Costamagna, 'Regulatory Competition in the Social Domain and the Revision of the Posted Workers Directive in S Borelli and A Guazzarotti (eds), *Labour Mobility and Transnational Solidarity in the European Union* (Jovene 2019) 83; R Zahn, 'Revision of the Posted Workers Directive: A Europeanisation Perspective' (2017) 19 *Cambridge Yearbook of European Legal Studies* 187; R Zimmer, 'The Revision of the Posting of Workers Directive and its Impact on National Law' in J Kubera and T Morozowski (eds.), *A 'Social Turn' in the European Union? New Trends and Ideas about Social Convergence in Europe* (Routledge 2020) 92.

As the lengthy list of working conditions mentioned under Article 3(1) PWD illustrates, free movement legal bases offer an additional avenue for a targeted and nuanced interference of EU law in social policy matters hidden behind the façade of promoting regulatory competition. In fact, in reaction to the socialising effect of the PWD realised by the 2018 reform, Hungary and Poland – both countries marked by significant outward labour mobility – filed an action for annulment against the amending Directive 2018/957 where, *inter alia*, they challenged the appropriateness of Articles 53(1) and 62 TFEU as the legal bases for the reform of the PWD regime.[63] This stance partly echoed that of the European Parliament which, during the legislative procedure, had voiced similar concerns and advocated the addition of Article 153 TFEU as a legal basis alongside the provisions on the freedom to provide services. The applicants' aim, however, was not to have the measure reclassified under the social policy legal basis, but rather to have it cancelled. Indeed, as labour-exporting countries, they had a clear interest in preserving the competitive advantage deriving from comparatively lower domestic labour standards which was threatened by the more protective approach of the revised PWD.

In line with the outcome of the legislative process,[64] the Court rejected the argument brought by Hungary that Article 153 TFEU would constitute a more specific legal basis. According to the Court, Article 153 TFEU concerns solely the protection of workers and not the freedom to provide services.[65] In this regard the Court further noted that neither of the legal bases contained in Article 153(2) TFEU could serve as an appropriate foundation for the Directive, given that the measure aims to coordinate – rather than harmonise – employment rules.[66] Even the action filed by Poland was dismissed. When addressing the claim concerning the legal basis, the Court basically found that the enhancement of posted workers' rights – which lies at the heart of the amending directive – does not alter the equilibrium established by the original version of the PWD. Starting from the premise that 'the EU legislature cannot be denied the possibility of adapting that act to any change in circumstances or advances in knowledge[67]' the Court found that restructuring the PWD to give it a more social character does in no way affect its legal basis. In doing so and acknowledging the coexistence of goals of different kind – i.e., the freedom to provide transnational

[63] Case C-626/18 *Poland v European Parliament and Council*, EU:C:2020:1000 and also Case C-620/18 *Hungary v European Parliament and Council*, EU:C:2020:1001.

[64] As for the reasons, it has been reported that the Legal Services of both the Parliament and the Council opposed the proposal for a dual legal basis arguing that the constraint of minimum harmonisation under Article 153 TFEU was incompatible with the substance of the PWD. On this, see A Lubow and AK Schmidt, 'A hidden champion? The European Court of Justice as an agenda-setter in the case of posted workers' (2019) *Public Administration* 321.

[65] *Hungary v European Parliament and Council* (n 63) para 65.

[66] Ibid paras 67–68.

[67] *Poland v European Parliament and Council* (n 63) paras 46 and 66. Also *Hungary v European Parliament and Council* (n 63) paras 41, 61, 64.

services, fair competition and the protection of workers – the Court placed emphasis on some 'overarching objectives of the European Union' of a social kind.[68] In the Court's view, their inclusion within the legal framework based on free movement is not only appropriate but also mandated by Article 9 TFEU which ranks 'the promotion of a high level of employment' and 'the guarantee of adequate social protection' among the goals to which the EU institutions must align with in their activities. Building upon previous caselaw,[69] this judgment lends visibility on the social mainstreaming implicitly recognising its potential to transform a set of rules originally conceived for free movement into a genuine protective device for workers.

All in all, in *Poland v European Parliament and Council*, Articles 53(1) and 62 TFEU as legal bases of the PWD have withstood the Court's scrutiny, allowing a more general conclusion to be drawn: the multifaceted nature of a piece of legislation must not necessarily be articulated nor reflected in its legal foundations. Although in different terms the same rationale emerges in *Hungary v European Parliament and Council*: 'in relation to the free movement of goods, persons, services and capital the measures adopted by the EU legislature, whether measures for the harmonisation of legislation of the Member States or measures for the coordination of that legislation, not only have the objective of facilitating the exercise of one of those freedoms, but also seek to ensure, when necessary, the protection of other fundamental interests recognised by the Union which may be affected by that freedom'.[70] Despite these assists from the Court and the exclusion of the social policy competence, the fact remains that, as the *Laval* quartet vividly demonstrates, the PWD has been interpreted so far in a manner hardly sympathetic to workers' entitlements.

Yet, the decision to situate posted workers within the framework of cross-border service provision and, thus, the choice of the PWD's legal foundations, has also been questioned by scholars concerned about its limited capacity to ensure fair cross-border competition and the effective protection of workers' rights. Unlike the objections raised by Hungary and Poland, these critiques are not driven by hostility toward the protective devices established in the Directive, but rather focus on the inoperability of the prohibition of nationality-based discrimination in relation to pay and working

[68] *Poland v European Parliament and Council* paras 46, 47, 51.

[69] There are a few cases where the Court has acknowledged the labour-related aspects of Article 9 TFEU. See Case C-511/19 *Olympiko Athlitiko Kentro Athinon*, EU:C:2021:274, para 39 and also *AGET Iraklis* (n 42) para 78. The potential of the mainstreaming clauses on EU legislation has been extensively discussed, cf. S de Vries, R de Jager, 'Between Hope and Fear: The Creation of a More Inclusive EU Single Market Through Art. 9 TFEU' (2022) 7 *European Papers* 1405; P Vielle, 'How the Horizontal Social Clause Can Be Made to Work: The Lessons of Gender Mainstreaming' in N Brunn, K Lörcher and I Schömann (eds.), *The Lisbon Treaty and Social Europe* (Hart Publishing 2012) 105; E Psychogiopoulou, 'The Horizontal Clauses of Arts 8–13 TFEU Through the Lens of the Court of Justice' (2022) 7 *European Papers* 1357; ME Bartoloni, 'The EU Social Integration Clause in a Legal Perspective' (2018) 10 *Italian Journal of Public Law* 97.

[70] *Hungary v European Parliament and Council* (n 63) para 105.

conditions prescribed within the framework of the free movement of workers.[71] Among others, already in 1997, Paul Davies had argued that anchoring the PWD to free movement of workers would have been a more fitting choice for a set of provisions ultimately aimed at preserving the labour regimes of the host States.[72] Accordingly, Garben and Ales are aligned with the view that posted workers have unfortunately been excluded from the provision of work and that such mistake was borne out of the intent to find a solution to the limitation on work-related matters in force while the accession of Portugal was pending.[73] Indeed, the *Rush Portuguesa* approach building upon the freedom of services was only meant to circumvent the temporary regime applicable to Portugal and, as such, it should have been limited to that specific circumstance.[74]

Ultimately, since this paradigm shift has not materialised and the legal bases have remained unchanged, the rationale that inspired the revision of the PWD may nonetheless help to recalibrate the original conceptual framing of posting through the prism of the free movement of workers rather than that of services. As the Court suggested in response to the applications filed by Hungary and Poland, it should be possible, at least to some extent, to disentangle the legal architecture from its substantive rationale: the protection of workers lies at the core of EU law and policy,

[71] Cf. Article 45 TFEU. The more detailed rules on free movement of workers within the EU are now set in Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, in particular Art 7. On this point, see H Verschueren, 'Cross-Border Workers in the European Internal Market: Trojan Horses for Member States Labour and Social Security Law?' (2008) 2 *International Journal of Comparative Labour Law and Industrial Relations* 171.

[72] P Davies, 'Posted Workers: Single Market or Protection of National Labour Systems?' (1997) 34 C*ommon Market Law Review* 571. Davies characterises the choice of the free movement of services as the legal basis for the PWD as a paradox. He compares the situation of posted workers with the free movement of goods and with services provided without posting. Focusing on the provisions concerning posted workers' pay, he argues that the PWD's approach could not be justified by the objective of ensuring fair competition. In this regard, he stresses that Member States are not allowed to restrict the import of goods or services from countries where wages are lower. Accordingly, in his view, the attempt to guarantee fair competition by imposing host-State labour standards on posted workers misconceives how competition functions within the internal market. He adds that, indeed, higher labour costs do not necessarily discourage imports either, because what ultimately matters is the labour cost per unit of output: highly paid but highly productive workers may produce goods or services more cheaply than lower-paid but less efficient workers. From this reasoning, Davies concluded that fair competition goals could not be achieved through the PWD. He therefore proposed Article 48 TEC (now Article 45 TFEU), on the free movement of workers, as a more appropriate legal basis for the posting regime, anchoring it to workers' mobility rather than to the free movement of services.

[73] S Garben, 'Posted Workers are Persons Too! Posting and the Constitutional Democratic Question of Fair Mobility in the European Union' in NN Shuibhne (ed.), *Revisiting the Fundamentals of the Free Movement of Persons in EU Law* (Oxford University Press 2023) 87; E Ales, 'Italy' in M Freedland and J Prassl (eds), *Viking, Laval and Beyond* (Hart Publishing 2015) 187.

[74] Portugal acceded in 1986, but the provisions on the free movement of workers did not apply until 1993, while the provisions on services were not covered by this derogation. The Court, in its 1990 judgment, appears to have opted for the freedom of services' solution in order to enhance the application of EU law in the face of this transition period. Cfr fn 55.

gaining particular significance in the context of cross-border service provision, where the human labour component forms the substance of the service itself. The renewed PWD is to be regarded as an instrument regulating a specific aspect of cross-border service provision, namely the phenomenon of posting, with a view to ensuring that workers are afforded more extensive protection than they were under the previous regime, within a rebalanced interpretative framework.

4. Third-country nationals' *vis-à-vis* social and welfare entitlements under the EU *unorthodox* migration competence

The EU competence in the field of migration has also served as a framework for certain forms of social regulation, particularly through the adoption of minimum rules concerning the social and welfare entitlements of third-country nationals (TCNs).[75] This policy domain belongs to a more recent stage of the integration project corresponding to the entry into force of the Treaty of Amsterdam, which first vested the Union with a comprehensive competence in the field of migration and asylum.[76] As regards the common migration policy, such competence is now reformulated under of Article 79 TFEU granting the Union authority to legislate on both legal and illegal immigration and to adopt rules concerning the status and rights of third-country nationals.[77] Yet in contrast with the open-ended nature of the internal market competence, Article 79(2) TFEU is designed as a strictly detailed legal basis leaving little margin of manoeuvre to the legislator regarding both the forms and the content of the act. Indeed, it contemplates the adoption of 'measures' concerning the status and the conditions for entry and stay of TCNs pursuant to letter (a) and norms concerning their rights pursuant to letter (b).

Following the Amsterdam revision, the endeavour to approximate the rights of third-country nationals with those of the EU citizens was placed at the core of the

[75] Cf. S Iglesias–Sánchez, 'Fundamental Rights Protection for Third Country Nationals and Citizens of the Union: Principles for Enhancing Coherence' (2013) 15 *European Journal of Migration and Law* 137 holding that migration law as having the function 'to regulate the entry and status, and, therefore, to establish lines of differentiation between individuals'.

[76] For a deeper insight on the implications of the Amsterdam Treaty in the field of migration and asylum see*, ex plurimis*, K Hailbronner, 'European Immigration and Asylum Law under the Amsterdam Treaty' (1998) 35 *Common Market Law Review* 1047 and G Simpson, 'Asylum and Immigration in the European Union after the Treaty of Amsterdam' (1999) 5 *European Public Law* 91.

[77] For a comprehensive overview of the novelties introduced by the Lisbon Treaty, *ex plurimis*, see S Amadeo, F Spitaleri, *Il diritto dell'immigrazione e dell'asilo dell'Unione Europea. Controllo delle frontiere, Protezione internazionale, Immigrazione regolare, Rimpatri, Relazioni esterne* (Giappichelli 2019) in particular at 1–12; A Adinolfi, 'La "politica comune dell'immigrazione" a cinque anni dal Trattato di Lisbona: linee di sviluppo e questioni aperte' in S Amadeo and F Spitaleri (eds.), *Le garanzie fondamentali dell'immigrato in Europa* (Giappichelli 2015) 3; A Adinolfi, 'La politica dell'immigrazione dell'Unione europea dopo il Trattato di Lisbona' (2011) 2 *Rassegna di diritto pubblico europeo* 13; S Peers, 'EU Immigration and Asylum Competence and Decision Making after the Treaty of Lisbon' (2008) 10 *European Journal of Migration and Law* 219.

Conclusions of the European Council meeting held in Tampere in 1999. The harsh debate on how to approach the integration of TCNs[78] has resulted in a highly fragmented legal framework where the Member States keep retaining a crucial power to define the scope of the social and economic protection afforded to TCNs. The recurrent pattern of the legal framework resulting therefrom[79] consists in the use of isolated equal treatment clauses pursuant to which TCNs are entitled to be treated equally with the nationals of the Member State where they reside as regards a range of economic and social entitlements.

Among the multiple ambitious options that were discussed for delivering the Tampere mandate[80] and to ensure fair treatment to the TCNs legally residing in the EU territory[81] all the legislation based on Article 79(2)(a) and (b) TFEU replicates the same pattern: focusing on regulating the recognition of a given status to categories of TCNs[82] each piece of legislation also includes a set of rights regarding, in particular, working conditions and access to social welfare.[83]

4.1. Equal treatment and migrant workers: the Tampere model in practice

The very flagship of the Tampere model is Directive 2003/109 on the status of third-country nationals who qualify as long-term residents[84] (LTD) regarding whom the

[78] In this regard, cf. K Groenendijk, 'Legal Concepts of Integration in EU Migration Law' (2004) 6 *European Journal of Migration and Law* 111.

[79] Directive 2003/109/EC of the Council of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

[80] See European Commission, 'A Community immigration policy', COM(2000) 757 final, in particular at 19 discussing civic citizenship as an alternative status to citizenship for third-country nationals where the core idea was the attribution of rights by virtue of residence rather than nationality. See then the shift towards national prerogatives and naturalisation prompted by the Commission: European Commission, 'Immigration, integration and employment', COM(2003) 336 final, in particular at 30. *Ex plurimis*, M Hedemann-Robinson, 'Third-Country Nationals, European Union Citizenship, and Free Movement of Persons: A Time for Bridges rather than Divisions' (1996) 16 *Yearbook of European Law* 332.

N.B. This discourse is necessarily intertwined with the debate on the extension of the prohibition of discrimination on the grounds of nationality under Article 18 TFEU to third-country nationals which cannot be dealt with here. Cf. C Favilli, 'Article 18 TFEU [Combating Discrimination Based on Nationality]' in HJ Blanke and S Mangiameli (eds.), *Treaty on the Functioning of the European Union – A Commentary* (Springer 2019) 453.

[81] Presidency Conclusions of the European Council, Tampere, 15–16 October 1999, para 18.

[82] See E Muir, 'Enhancing the Protection of Third-Country Nationals against Discrimination: Putting EU Anti-Discrimination Law to the Test' (2011) 18 *Maastricht Journal of European and Comparative Law* 136 maintaining that in 2011 about 80% of third-country nationals in the Union were covered by an EU Directive including a list of minimum rights to which they are entitled in the host State.

[83] Against this division into categories and the attribution of different sets of rights cf. D McCormack-George, 'Equal Treatment of Third-Country Nationals in the European Union: Why Not' (2019) 21 *European Journal of Migration and Law* 53 arguing that TCNs should be granted equal treatment on a general basis 'as a matter of legal doctrine and international and European human rights law'.

[84] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

Tampere European Council fostered a vigorous integration policy starting from the recognition of 'a set of uniform rights which are as near as possible to those enjoyed by EU citizens'.[85] For those who qualify as long-term residents,[86] the Directive lays down some rights and guarantees. Among these provisions, Article 11 of the Directive establishes that long-term residents shall enjoy equal treatment with nationals of the host Member State as regards the access to employment, some aspects of education including the recognition of diplomas and other qualifications, social security and social assistance, tax benefits, access to goods and services, housing benefits and, last, freedom of association and free access to the entire territory of the host Member State.[87] Most of these indents demand its definition to the laws of the Member States. For instance, Article 11(1)(b) refers to the concept of education and vocational training 'in accordance with national law' and, similarly, Article 11(1)(d) mentions social security, social assistance and social protection 'as defined by national law'.[88] Rather than setting uniform, minimum, EU standards, these references stipulate that the extent of the equal treatment provision mostly relies on the laws and practices of the individual Member States.[89] To further erode the effectiveness of this provision, the Member States also retain a significant power to derogate from the obligation to ensure equal treatment.[90]

[85] Presidency Conclusions of the European Council (n 81) para 21. For an insight on the complicated background of the adoption of this legislation, See S Peers and N Rogers, 'Long-term Residents' in S Peers and N Rogers (eds.), *EU Immigration and Asylum Law: Text and Commentary* (Brill 2006) 615 and D Thym, *European Migration Law* (Oxford University Press 2023) Chapter 15 entitled 'Integration and settlement', in particular at 494. See also S Peers, 'Implementing Equality? The Directive on long-term resident third-country nationals' (2004) 29 *European Law Review* 437.

[86] Two sets of requirements are provided for the recognition of the long-term residents' status. First, a temporal requirement concerning the minimum length of the continuous residence of at least five years in the territory of a Member State (Article 4); second, a condition concerning the 'economic self-sufficiency' and the possession of sickness' insurance (Article 5(1)(a) and (b)). Additionally, Article 5(2) provides the option for national laws to introduce or maintain integration conditions.

[87] For a detailed analysis of all the indents under Article 11(1) LTD each by each, cf. L Halleskov, 'A Fulfilment of the Tampere Objective of Near-Equality' (2005) 7 *European Journal of Migration and Law* 181.

[88] See also Article 11(1)(c) LTD mentioning the recognition of professional diplomas, certificates and other qualifications, 'in accordance with the relevant national procedures' and Article 11(1)(h) mentioning free access to the entire territory of the Member State concerned 'within the limits provided for by the national legislation for reasons of security'.

[89] K Groenendijk, 'Security of Residence and Access to Free Movement for Settled Third Country Nationals under Community Law' in E Guild and C Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Hart Publishing 2001) 230 maintaining that the Community approach to third-country nationals 'tends to produce instruments that are close to the lowest common multiple'.

[90] Directive 2003/109, in particular Arts 11(2), 11(3) and 11(4) provide three different sets of grounds on which the Member States are allowed to restrict equal treatment. Respectively, paragraph 2 allows the restriction of equal treatment for most of the areas covered by equality to cases where the registered or usual place of residence of TCNs lies within the territory of the Member State concerned; paragraph 3 regards both the access to specific work positions reserved to EU or citizens of the European Economic area and some prerequisites that can be imposed for the equal access to education and training; last,

The *Kamberaj* ruling[91] partly contradicts this view demonstrating that the risk of fragmentation can be mitigated through a comprehensive interpretation of national law combined with EU law. The Court, inspired by Article 34(3) CFR, held that housing benefits consisting in a contribution to the payment of the rent for low-income tenants fall within the notion of 'core benefits' pursuant to Article 11(4) LTD and, thus, that Member States cannot derogate from equal treatment on this point.[92]

The equality-based model has reached far beyond the LTD and is replicated in virtually all the legislation stemming from Article 79(2)(a) and (b) TFEU and dealing with migrant workers.[93]

Within this landscape, Directive 2011/98 on the Single Work Permit (SWP)[94] – which at the time of writing is about to be repealed by Directive 2024/1233[95] – stands out as one of the most comprehensive instruments, as it targets all third-country national workers legally residing in a Member State with a few exceptions.[96] In addition to the procedures for the stay and access to employment in the territory of the host State, the Directive includes also a common set of rights for those who obtain the single work permit.[97] In particular, drawing from the structure of Article 11 LTD, Article 12 SWP

paragraph 4 allows the restriction of equal treatment as regards social benefits and social assistance where, more precisely, the Member States can limit such duty to the grant of 'core benefits'.

[91] Case C-571/10 *Kamberaj*, EU:C:2012:233.

[92] Ibid paras 82–92. See also Case C-94/20 *Land Oberösterreich*, EU:C:2021:477 confirming the *Kamberaj* approach to the LTD.

[93] For a comprehensive synthesis of the approach of EU secondary law to migrant workers, see M Evola, *I lavoratori di Stati terzi nel diritto dell'Unione europea* (Giappichelli 2018), in particular chapter 2.

[94] Directive (EU) 2011/98 of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

[95] Directive (EU) 2014/1233 of the European Parliament and of the Council of 24 April 2024 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast).

[96] Nonetheless a number of categories are excluded from the addressees of the Directive, such as third-country nationals family members of EU citizens, posted workers, intra-corporate transferees (see *infra* in this section), seasonal workers (see *infra* in this section), au pairs, asylum seekers, third-country nationals enjoying temporary or international protection, persons who are long-term residents in accordance with Directive 2003/109 and self-employed workers (see Directive 2024/1233, Art 3(2)). Notably in the Impact Assessment Directive 2011/98 was defined 'a "light" framework directive' (European Commission, 'Annex to the Communication from the Commission – Policy Plan on legal Migration – Impact assessment', SEC(2005) 1680).

[97] The existence of a twofold objective emerges clearly from Article 1 thereof which, similar to Article 1 LTD, includes in the scope of Directive 2011/98 'a single application procedure for issuing a single permit for third-country nationals' (a) and also 'a common set of rights to third-country workers legally residing in a Member State, irrespective of the purposes for which they were initially admitted to the territory of that Member State, based on equal treatment with nationals of that Member State'(b). This structure remains overall unaltered in the recast version under Directive 2024/1233.

outlines the familiar equality provision covering a rich and detailed list of areas which largely corresponds to the LTD and that the recast version will further enrich and detail.[98]

Despite the clear similarities, some of the indents covered by the SWP equality clause differ slightly. [99] One major difference concerns the very scope of the notion of social security, which is among the most comprehensive entitlements addressed therein. In particular, unlike the original LTD – which defers to national law – Article 12(2)(e) SWP refers to the 'branches of social security' as defined in Regulation 883/2004.[100] Although this distinction may appear minor, it carries significant practical implications: depending on the applicable legal framework, third-country nationals may qualify either for the benefits provided under the law of the Member State of residence, or for those determined under EU law through the combined operation of the SWP and Article 3(1) of Regulation 883/2004.[101]

Also, several other directives based on Article 79 TFEU include an isolated equality clause inspired by the LTD model. Directive 2021/1883, so-called Blue Card Directive[102] similarly provides that Blue Card holders shall enjoy equal treatment in a list of eight social and economic indents.[103] Following the reform completed in 2021,[104]

[98] N.B. The present work considers the indents of Directive 2011/98.

[99] See for instance Directive 2003/109, Art 11(1)(a) 'access to employment and self-employed activity, provided such activities do not entail even occasional involvement in the exercise of public authority, and conditions of employment and working conditions, including conditions regarding dismissal and remuneration' and Article 12(1)(a) SWP referring to 'working conditions, including pay and dismissal as well as health and safety at the workplace'.

[100] Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems. Article 3(1) contains the following list of social security branches: (a) sickness benefits; (b) maternity and equivalent paternity benefits; (c) invalidity benefits; (d) old-age benefits; (e) survivors' benefits; (f) benefits in respect of accidents at work and occupational diseases; (g) death grants; (h) unemployment benefits; (i) pre-retirement benefits; (j) family benefits.

[101] For a critical view based on the previous version of this legislation cf. A Beduschi, 'An Empty Shell? The Protection of Social Rights of Third-Country Workers in the EU after the Single Permit Directive' (2015) 17 *European Journal of Migration and Law* 210.

[102] Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment and repealing Council Directive 2009/50. See also, European Commission, 'The implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment ('EU Blue Card')', COM(2014) 287 final. Cf. S Peers, 'The Blue Card Directive on Highly-Skilled Workers: Why isn't it Working and How Can it be Fixed?' (EU Law Analysis, 4 June 2014) at eulawanalysis.blogspot.com.

[103] The core of the Directive consists in providing a special temporary residence permit for work purposes called 'Blue Card' subject to the conditions laid down in Article 5 thereof including, *inter alia*, the proof of a valid job contract or of a binding job offer for a highly qualified position (a) and documents attesting the higher professional qualifications (b). For a deeper and comprehensive analysis of the Blue Card Directive, see B Fridiksdottir, *What Happened to Equality?: The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration*, Brill, 2017, in particular at 117–164.

[104] The reform introduces several significant novelties, including, *inter alia*, the simplification of the substantive conditions for issuing the Blue Card (Article 5) and the expansion of its personal scope

Article 16(1)(e) provides that equal treatment applies also to the 'branches of social security referred to in Article 3 of Regulation (EC) No. 883/2004'.[105]

Directive 2014/36 on seasonal workers[106] is another of this kind. While conceived for providing a flexible admission system to cope with seasonal labour shortages,[107] the regulatory framework applicable to seasonal workers is familiar: upon admission with a special temporary residence permit,[108] pursuant to Article 23 seasonal workers are entitled to equal treatment with nationals of the host Member State in a narrower – yet broad – range of fields[109] which, notably, is quite exclusively focused on labour.[110] Same as in the SWP, Article 23(1)(d) mentions the concept of 'social security branches, as defined in Article 3 of Regulation 883/2004/EC'.

Another example of sectoral legislation concerning the status and rights of TCNs is found in Directive 2014/66 on Intra-Corporate Transferees (ICT).[111] With the function to facilitate the entry into the Union of a specific category of temporary workers in order to meet the specific short-term needs of the multinational company

by reducing the categories excluded from its application (Article 3). For a comprehensive analysis of the new Blue Card regime, see, *ex plurimis*, S Kalantaryan, 'Revisions in the Blue Card Directive: Reforms, Constraints and Gaps' (EUI Working Paper RSCAS 2017/59) and T de Lange, 'A New Narrative for European Migration Policy: Sustainability and the Blue Card Recast' (2020) 26 *European Law Journal* 274. See also S Peers, 'The Revised Blue Card Directive: the EU's Search for More Highly Skilled non-EU Migrants' (EU Law Analysis, 20 May 2021) at eulawanalysis.blogspot.com.

[105] This Directive replicates a series of rights connected to working conditions (Article 16(1)(a)); freedom of association and affiliation and membership of workers' or employees' organisations (Article 16(1)(b)) and 'branches of social security referred to in Article 3 of Regulation (EC) No 883/2004' (Article 16(1)(e)).

[106] Directive (EU) 2014/36 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.

[107] So it is stressed in the Impact Assessment. Cf. European Commission, 'Impact Assessment accompanying the proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purpose of seasonal employment', SEC(2010) 887, in particular at 11.

[108] N.B. Directive 2014/36 provides two distinct sets of requirements for issuing permits not exceeding ninety days (Article 5) and permits exceeding ninety days (Article 6).

[109] MH Zoeteweij-Turhan, 'The Seasonal Workers Directive: "… but Some are More Equal than Others"' (2017) 8 *European Labour Law Journal* 28 which, in comparison with the Blue Card Directive, exposes the markedly weaker protection of fundamental rights for low-skilled workers, who are, for example, excluded from family reunification despite being entitled to work in the host State for up to nine months.

[110] Article 23 enumerates a broad range of fields including the terms of employment, minimum working age, remuneration, dismissal, working hours and holiday entitlement, freedom of association and membership in trade unions, and the right to strike. See also J Fudge and P Herzfeld Olsson, 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights' (2014) 16 *European Journal of Migration Law* 439 tracing the Directive's evolution from a proposal focused on immigration to a more balanced instrument shaped by the European Parliament's concern to safeguard migrant workers from exploitation.

[111] Directive (EU) 2014/66 of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

where they are employed,[112] the ICT regime departs slightly from the equality scheme observed thus far. In fact, Article 18(1) thereof cross-references Article 3(1) PWD. This brings up a major point regarding the status of intra-corporate transferees making one wonder whether, based on this reference, they should be regarded as posted workers rather than as migrant workers.[113] However, on top of that, Article 18(2) reaffirms the usual equal treatment formula applicable to a more limited list of fields though: freedom of association and trade union membership, mutual recognition of qualifications, 'branches of social security as defined in Article 3 of Regulation 883/2004/EC', old age pensions and access to public goods and services (with the exception of housing).

A final mention is warranted for Directive 2016/801 on the criteria for entry and residence of third-country nationals for purposes related to study and research[114]. Even this piece of legislation contains a *sui generis* equality clause. In particular, Article 22, through a comprehensive reference to Article 12 SWP, provides for equal treatment for researchers, students, trainees and volunteers.[115]

This extensive legislation reflects a distinctly sectoral approach, under which each category of TCNs is subject to specific sets of economic and social entitlements depending on their qualifications. Naturally, the stronger the link with the territory of the Union, the broader the protection afforded. While the main criterion is the duration of residence, other factors – such as skills and the nature of the occupation – are also relevant.

The *ASGI*[116] ruling shows some tangible effects of the structural problems arising from this legislation.[117] The case concerned a 'family card' issued by the Italian

[112] The Directive provides a set of special conditions and procedures (from Article 5 to Article 8) for the issuing of an *ad hoc* work and residence permit valid for at least one and up to three years.

[113] C Costello, 'EU Migration and Asylum law: A Labour Law Perspective' in A Bogg, C Costello and ACL Davies (eds.), *Research Handbook on EU Labour Law* (Edward Elgar 2016) 299, in particular at 323–324. Costello questions the status of intra-corporate transferees, asking whether they are to be understood as non-nationals temporarily employed in a Member State by a foreign undertaking, or as workers fully integrated into the host labour market. See also Fridiksdottir (n 103), especially 304–307, who notes that such conflicting conceptions were implicitly fostered throughout the legislative process.

[114] Directive (EU) 2016/801 of the European Parliament and the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au paring (recast).

[115] Some rules applicable to all the addressees (see Article 7 'General conditions') while some others apply only to specific categories (e.g., Article 8 and the following provisions for researchers, Article 11 and the following provisions for students etc.). Article 22 itself provides for certain minor distinctions concerning the scope of the equality regime applicable to the three distinct categories of beneficiaries.

[116] Case C-462/20 *ASGI and Others*, EU:C:2021:894.

[117] As for some issues arising for the distinction between long-term residents and holder of a single work permit see Case C-449/16 *Martinez Silva*, EU:C:2017:485. This case grapples with the discriminatory treatment afforded to long-term residents and single work permit holders concerning the conferral of a 'family benefit' pursuant to Regulation 883/2004, Art 3(1)(j) of under Italian law. See also Case C-477/17 *Balandin*, EU:C:2019:60.

Government giving access to discounts and price reductions that was denied to the applicants in the main proceedings on the grounds that they did not meet the eligibility criteria set in Italian law. According to the national court, the benefit in question could come alternatively or cumulatively within the concepts of 'social security', 'social assistance', 'social protection', 'social welfare', 'access to goods and services' or 'family benefits'. The questions referred to the ECJ provide a perfect illustration of the struggle involved in qualifying certain benefits and allowances against the numerous economic and social concepts scattered throughout the labour migration acquis.[118] Maybe counterintuitively, according to the Court, the Italian family card in comment should not be regarded as a social benefit or as any other concept with a similar function[119] but, rather, as a means for facilitating the 'access to goods and services' as such covered by Article 11(1)(f) LTD, Article 12(1)(g) of the Single Work Permit Directive and also by Article 14(1)(g) of Directive 2011/95, so-called qualification Directive.[120]

The inherent fragilities at the heart of this legislation become evident in this ruling, which demonstrates that the practical operation of the equality regime triggers an intricate interplay of sources liable to undermine its intended integrative and protective function, as originally envisaged in Tampere. This fragmentation stems from the very structure of the legislation's legal bases, which link the relevant entitlements directly to the recognition of a given status. As it was observed, each instrument displays a dual component: the first, anchored in Article 79(2)(a) TFEU, devoted to defining the conditions for the recognition of a specific status; the second, anchored in Article 79(2)(b) TFEU, establishing a set of social entitlements whose scope varies across the different instruments, depending on the status concerned. To remedy the structural divergences and inconsistencies within this legislation, a systematic reform could be envisaged. Without altering the fundamental rationale – based on the strength of the individual's link with the Union – the equality-related entitlements could be consolidated into a separate, comprehensive instrument eventually grounded also in the Union's *orthodox* social policy competence. Such an approach

[118] More specifically the reference for preliminary ruling addressed: Article 11(1)(d) or Article 11(1)(f) of Directive 2003/109 (referring to, respectively, 'social security', 'social assistance', 'social protection' and to 'access to goods and services'); Article 12(1)(e) or Article 12(1)(g) of Directive 2011/98 (referring to, respectively, 'social security branches' and 'access to good and services'); Article 14(1)(e) or Article 14(1)(g) of Directive 2009/50 (referred to, respectively, 'social security branches' and 'access to good and services') and, last, Article 29 of Directive 2011/95 (referring to 'social assistance').

[119] See for instance *ASGI and Others* (n 116) paras 27–29 as regards the notion of 'branches of social security system' under both Article 12(1)(e) of the Single Work Permit Directive and Article 14(1)(e) of the then Blue Card Directive.

[120] Ibid para 37. Directive (EU) 2011/95 of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

would not amount to a horizontal equalisation of the rights afforded to third-country nationals; rather, it would seek to rationalise and coordinate the existing framework, ensuring greater coherence while preserving the current differentiation of regimes according to the nature and intensity of the individual's connection with the Union's territory. In the past, the solution to situate part of this legislation under the Social Policy Title was also considered by the ETUC arguing that those directives 'are not simply tools to manage movements of migrant workers but also instruments which define the rights of those workers in an employment relationship and should furnish better protection for those workers'.[121] Within the Treaty architecture, such systematisation would be possible under Article 153(1)(g) TFEU, which explicitly addresses 'the conditions of employment for third-country nationals legally residing in Union territory'. Relocating part of the labour migration regime to Title X TFEU would streamline the legal framework and integrate migration law with the Union's social objectives in a more visible manner. This option is all the more recommended considering point 15 of the Preamble to the European Pillar of Social Rights which clarifies that the Pillar's principles apply equally to Union citizens and third-country nationals with legal residence.

5. Some concluding remarks on the significance of the choice of the (*unorthodox*) legal bases

Although Title X TFEU provides the main framework for the adoption of measures in the field of social policy, also some other Treaty provisions have continued to play a significant role in grounding social legislation, especially in relation to labour and welfare rights. This paper sought to delineate the operational dynamics of the EU *unorthodox* social competences focusing on the migration and internal market domains, the latter including the free movement provisions. It argues that these policy areas and their empowering provisions compellingly illustrate the expansive reach of the EU social dimension. While all these legal bases allow the Union to intervene in the social sphere, each serves a specific function and rests on a distinct rationale within the constitutional architecture of the Union. In this respect, and in contrast with the explicit – albeit not always consistently effective – equality-based paradigm

[121] ETUC Resolution on equal treatment and non-discrimination for migrant workers adopted at the Executive Committee on 1-2 December 2010, available at www.etuc.org. In particular the ETUC referred to the Single Permit Directive, the Seasonal Workers Directive, and the Intra-Corporate Transfer Directive. Regarding the specific case of the Intra-Corporate Directive, the reliance on Article 79(2)(a) and (b) TFEU was also contested by the European Parliament's Employment Committee. However, the Committee on Legal Affairs, prioritising the migration aspect over the social dimension, determined that the Directive's primary objective is to 'introduce a special procedure for entry and residence and standards for the issue by Member States of residence permits for third-country nationals applying to reside in the EU for the purpose of an intra-corporate transfer' and only secondarily 'to define the rights of the above-mentioned category of third-country nationals'.

prevalent in migration legislation, and now explicitly extended to the PWD, the language used in the directives based on the former Article 100a TEEC (now Article 115 TFEU) is generally quite vague. This vagueness reflects a deliberate choice to preserve Member States' regulatory autonomy and it does so pursuing minimum (and partial[122]) harmonisation thus leaving the Member States free to fill the gaps in areas that have not been directly addressed at EU level. In the case of internal market legislation, although labour standards feature prominently in the titles of these directives, their substance remains loosely defined and, as observed, many uncertainties persist as regards the very notion of the safeguards addressed thereof. Despite being part of the internal market framework, the PWD model is in many respects closer to the migration *acquis*. First, from a practical perspective, the phenomenon of posting inherently concerns migrant workers; second, the PWD does not itself harmonise the standards applicable to posted workers. Rather, following the coordinating function mandated by its legal bases, the PWD provides a conflict-of-laws framework that determines which national labour provisions shall apply to posted workers.

Barnard and Deakin have proposed some justifications for the enactment of social policy at the EU level some of which are particularly inspiring for understanding the rationale standing behind the *unorthodox* competences.[123] The first and the fourth are 'response to the effects of the common market' and 'market-making', this latter corresponding to the function to establish 'a level playing field' in labour market regulation. Barnard and Deakin themselves explicitly acknowledge the first as underpinning Directive 98/59 on collective redundancies and the latter as applying to both Directive 98/59 and Directive 2001/23. In their analysis, they stress that this legislation enhances worker protection while reconciling economic and social objectives.[124] Both directives, in fact, seek to address the impact of major organisational transformations on undertakings and their workforce while harmonising the costs which the rules protecting workers entail for the undertakings. Directive 2008/94/EC on the protection of employees in the event of their employer's insolvency, the original version of which was likewise based on Article 94 TEC, also fits into this framework regarding the situation of workers under some exceptional circumstances affecting the employers' organisation. Overall, the common feature of this strand of legislation is that the employees' entitlements and safeguards addressed thereof are conceived as instruments to mitigate the consequences of market-driven transformations. It is, however, more difficult to situate the PWD within this framework since, as previously noted, in several respects it is more akin to legislation on migrant

[122] On this point see A Garde, 'Partial Harmonisation and European Social Policy: A Case Study on the Acquired Rights Directive' (2003) 5 *Cambridge Yearbook of European Legal Studies* 173.

[123] C Barnard and S Deakin, 'Social Policy and Labour Market Regulation' in E Jones, A Menon and S Weatherill (eds.), *The Oxford Handbook of the European Union* (Oxford University Press 2012) 542.

[124] Ibid.

workers. Nonetheless, given its function to promote competition, the 'market-making' justification, in the sense upheld by Barnard and Deakin is applicable. A further justification proposed is the promotion of industrial and social citizenship.[125] In their view, such justification emerged in the early stages of European integration process with the view to reassure the EU citizens that, besides market integration, the EU had a 'human face' too. While they possibly attribute Directive 98/59 to this justification, it is argued that such rationale is better reflected in the Long-Term Residents Directive and in the subsequent legislation inspired by its model such as the Single Work Permit Directive. Accordingly, the social entitlements granted to TCNs are primarily conceived as means for promoting social cohesion and facilitating integration through the participation in the economic and social life of the host Member States.[126] This represents a shift from a purely economic conception of migration towards a more holistic model that recognises TCNs as social actors and potential citizens. The logic underlying this approach thus reframes the extension of social rights as part of an inclusive integration strategy.

Nevertheless, the increasing consolidation of a sectoral approach within the EU migration legislation better engages with Barnard and Deakin's capabilities rationale.[127] This justification is particularly evident within the regime applicable to highly skilled and specialised migrants, encompassing instruments such as the Blue Card Directive, the Directive on seasonal workers, and Directive 2016/801 concerning researchers and students. Each of these measures is carefully crafted to strengthen and enrich the Union's labour market and knowledge economy by facilitating the admission and residence of specific categories of third-country nationals whose profiles and potential contributions warrant distinctive treatment. In this context, the extension of a differentiated set of economic and social entitlements performs a strategic function by reinforcing the attractiveness of the Union as a destination for economically active migrants. By recognising and rewarding the added value and specific skills of these workers, such legislation reflects a deliberate effort to channel human capital into the Union's economic growth, innovation potential, and global competitiveness. Accordingly, within the migration *acquis*, this specific set of directives embodies the capabilities rationale, whereby granting enhanced rights represents a strategic investment in the Union's economic and societal objectives.

The systemic and textual differences identified throughout this analysis viewed through Barnard and Deakin's functional lens, confirm that the selection of the legal basis is indeed a matter of 'constitutional importance[128]' not only for the well-known reasons concerning the rules on the exercise of competences. First, such choice is

[125] Ibid.

[126] On this point see M Bell, 'Civic Citizenship and Migrant Integration' (2007) 13 *European Public Law* 311.

[127] C Barnard and S Deakin (n 123).

[128] Cf. *Carthagena Protocol* (n 1) para 5; *Commission v Council* (n 1) paras 46-49; *General Agreement on Trade in Services* (n 1) para 110.

determined and, thus, reflects the underlying rationale for EU social intervention. Secondly, it also has implications on the normative techniques employed. Accordingly, the study of these unconventional legal bases reveals that the EU engagement in social regulation reflects different logics, which are, in turn, expressed through distinct drafting techniques, legal language, and formal structures of the legislation.

In conclusion, while recognising the potential to strengthen social protection through both internal market and migration legislation, this approach carries an inherent risk. When legislative competences are anchored in objectives primarily related to market integration or migration management, the pursuit of social aims is necessarily instrumentalised, fragmented and subordinated to the primary functional goals of the relevant legislative framework. The experience of both the internal market, including free movement law, and the migration *acquis* illustrates this dynamic. Within the internal market *acquis*, social provisions are designed to mitigate the differences between the domestic rules which may harm competition and free movement. In the migration *acquis*, although a more explicit rights-based and social-friendly approach can be discerned, the sectoral nature of the legislation leads to fragmentation, raising concerns about the substantive coherence and effectiveness of the protective devices afforded. Indeed, while the integration of social considerations into non-social legislation reflects a pragmatic strategy theoretically capable of advancing social progress, its coherence and effectiveness may be undermined by the specific logic and objectives embedded in the legal bases employed. All in all, however, the practice to recur to *unorthodox* competences should not be dismissed only because other (more specific) legal bases exist. Rather, the use of *unorthodox* competences reflects a discretionary choice of the legislator to align social objectives with the sectoral and functional architecture of EU regulation which is not *per se* problematic or questionable. Reforms, whether at the legislative level or at the judicial level when this legislation is interpreted and applied *in concreto*, are nonetheless recommended. It is indeed essential to ensure a clearer, more consistent, and systematically articulated set of social objectives, together with a rigorous selection of the appropriate legal basis, to support the genuine and coherent development of the Union's social dimension.