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ABSTRACT

This article aims to identify continuity between the main neoliberal schools that had a role in making the European legal order and the conception of labour and 'work activity' embedded in the European legal framework. The consequences of this contiguity are also discussed. In particular, the concepts of 'working activity' and 'undertaking' elaborated by the Court of Justice are used as a driver of the analysis to detect signs of the mentioned influences. A two-phase approach is adopted to develop the research. First, a review is provided of relevant ECJ judgments that testify to the Court's position on the topics discussed in the article. Second, the cultural common ground between the interpretation of the legal framework found in case law and specific neoliberal theories is highlighted. The meta-principles that are identified through the analysis are then compared with those derived from the rights recognised in the constitutions proclaimed in the second half of the 20th century to show the significant discontinuity that endangers the very existence of the European Union as a political project and has destabilised the constitutional order of many European countries. As the founding principles of the EU legal order kickstarted a containment of labour and social rights, the call for change at the roots of European "Constitutional law" is becoming increasingly urgent. The formal proclamation of the Charters of Fundamental Rights at the European level (not least because of the way in which rights are recognised) has not in itself proved to be capable of transcending the original matrix of the European order.

KEYWORDS: Neoliberalism, European labour law, work activity, undertaking, collective rights

The Effects of Neoliberalism in European Labour Law: The Value of Labour and the Need for a Different Constitutional Compromise

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1. Introduction

The European Union's institutions tried to cope with the 2008 economic crisis by introducing large doses of austerity. Some scholars² connected the deployed policies to the enduring influence that a specific understanding of capitalism had on politicians and, in turn, on European institutions. This kind of capitalism, i.e. ordoliberalism, was elaborated and applied for the first time in post-war Germany. The debate on the roots of the internal mechanisms that led to austerity is expected to experience a new phase. The new policy course adopted both at the national and European levels to contrast the turmoil of the 'Covid era' will be assessed to understand whether the "next generation EU programme" can mark a turning point from a Europe based on austerity to a new Europe based instead on solidarity.

In this article, the debate on the origins of the European institutions and legal order is taken into account to investigate a different issue. Legal scholars largely agree that ordoliberalism exerted a substantial influence on the EU's competition law.³ Several other scholars consider this to be a myth⁴ or underline the influence that, at a later stage, the Chicago economic school had on European competition law.⁵ In fact, both the Chicago school and the Freiburg school are two species of the same genus that is neoliberalism, and, during the negotiations for the Treaty of Rome, both schools, if anything, contrasted with the French economic interventionism.

² On this debate, refer to (among others): V. Berghahn and B. Young, 'Reflections on Werner Bonefeld's "Freedom and the Strong State: On German Ordoliberalism" and the Continuing Importance of the Ideas of Ordoliberalism to understand Germany's (Contested) Role in Resolving the Eurozone Crisis', *New Political Economy*, 2013, pp. 768-778; M. Blyth, *Austerity: The History of a Dangerous Idea*, Oxford, Oxford University Press, 2013; P. Nedergaard, 'As I Drifted on a River I Could Not Control': The Unintended Ordoliberal Consequences of the Eurozone Crisis', *Journal of Common Market Studies*, 2015, 53(5), pp. 1094-1109. *Contra* J. Hien, C. Joerges, 'Dead Man Walking? Current European Interest in the Ordoliberal Traditions', *European Law Journal*, 2018, 24(2), pp. 142-162, who instead maintains that the relevance of ordoliberalism declined during the 1960s and that German politicians still refer to ordoliberal platitudes of the 1950s and arguments appealing to underlying Protestant values (p.162).

³ See D. J. Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe' 1994, 42, *The American Journal of Comparative Law*, pp. 25-84; N. Giocoli, 'Competition versus property rights: American antitrust law, the Freiburg School, and the early years of European competition policy', *Journal of Competition Law and Economics*, 2009, 5(4), pp. 747-786; H. L. Buxbaum, 'German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement', *Berkeley Journal of International Law*, 2005, 23, pp. 474-495.

⁴ P. Akman, H. H. Kassim, 'Myths and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy', *Journal of Common Market Studies*, 2010, 48(1), pp. 111-132; Y. Karagiannis, 'The Origins of European Competition Policy: Redistributive versus Ideational Explanations', *Journal of European Public Policy*, 2013, 20(5), pp. 777-794.

⁵ D. Bartalevich, 'Do Economic Theories Inform Policy? Analysis of the Influence of the Chicago School on European Union Competition Policy', *Copenhagen Business School [PhD]. PhD series n°34*, 2017, pp. 1-91.

The aim of this article is to define the influence and consequences of neoliberalism on the conception of work activities in the first place and consequently on the same 'constitutional' idea of 'work' ('labour' is used in this paper as a synonym) and on the collective rights of European workers in the European space. This target is achieved with a two-step approach. First, through a review of important Court of Justice (hereinafter ECJ) landmark judgments that testify to the Court's position on the issues discussed in the article. Second, the cultural contiguity between the conceptions of 'work', 'undertaking', and collective bargaining emerging in the ECJ case law and the corresponding ideal types of specific neoliberal theories will be highlighted. This is necessary since, disregarding any formal declaration of rights and embedding of specific statutory law, the role of the Court in interpreting the *corpus* of the EU law and in ensuring the alignment of the States' internal regulation with the *acquis communautaire* made the case law of the Court crucial to the whole edifice.

The article's topic is also inevitably linked to the development over time of a social dimension of the European Union and the role it plays in the whole project. Ultimately, the architecture built for the European institutions from the beginning has proved to be able to resist both the recovery from the original amputation of any social dimension and the formal proclamation of the European Charter of Social Rights, the Charter of Fundamental Rights, and the recognition of the European Convention of Human Rights. This is due to the mindset and ideas around which these institutions were conceived that permeated the subsequent development of the Community and the later Union and created long-lasting effects that are far from being overturned.

In some Member States' constitutions, labour itself assumes a central role that testifies to an underlining idea, i.e. that 'labour' is not simply a 'good' with an economic value or a simple economic asset which must be bound to the law of economics. 'Labour' is instead a gateway for other dimensions of human-associated life. Workers are considered primarily citizens whose participation in the social and political whole is far more fundamental than their participation in the country's economy. In view of the established primacy of EU law, a misalignment between the two levels of the European legal system brings a high risk of depriving labour of the most complex apparatus of functions it has for people who work and for the collectivity in which each citizen is placed. This issue is carefully evaluated in this article, which is structured as follows. The next

section is devoted to two relevant premises on the object of study. Then the most relevant concepts developed within the neoliberal ideology are discussed to connect them to the European Treaties' provisions and the ECJ's landmark judgments relevant to this article's topic with the aim of stressing path-dependency. Finally, in the conclusions, the results of this investigation are positioned in the frame of constitutional law theory.

2. Two premises about the interrelated object of this analysis: the specific meaning of neoliberalism used in this article and clarification about the perspective used on the events of interest

The subject this article intends to debate is rather complex, and the necessary synthesis risks implying a too high degree of approximation. Therefore two premises are indispensable.

As the first premise, it is important to define what is here addressed as neoliberalism to avoid using this word as an 'all-purpose denunciatory category', a 'conceptual trash-can'⁶ or as a synonym of 'almost any political, economic, social or cultural process associated with contemporary capitalism'.⁷

Starting from the pioneering work of Foucault,⁸ in this article the term neoliberalism is circumscribed to a limited range of schools or forms of thought that were afterwards transformed in practices and policies concerned with the construction of the market and market-like relations within society. Within this specific cluster of theorists, it is also possible to highlight a common mindset that they shared, despite the differences and nuances of the respective theories (some of which are addressed further below).

All authors who have been leading proponents of neoliberalism have worked mainly in three specific centres and universities. The centre of the German ordoliberalism was the University of Freiburg, while Vienna was the city of economic neo-marginalism. Lastly, the School of Chicago was the epicentre of neoliberalism in the US. All these universities are linked by the figure of Von Hayek since he started working in Vienna with Von Mises, afterwards moving to the London School of Economics. The latest and more mature

⁶ Sic. T. Flew, *Six theories of neoliberalism*, Thesis Eleven, 2014, Vol. 122(1), 67.

⁷ D. Nonini, *Is China becoming neoliberal? Critique of Anthropology*, 2008, 28(2), pp. 145–176.

⁸ M. Foucault, *The Birth of Biopolitics: Lectures at the Collège de France [1978-1979]*, Palgrave-Macmillan, 2008.

time of his career was instead spent at the University of Chicago and at the Freiburg University. His long journey made him the point of reference of a net of neoliberal thinkers and scholars.

Two of the above-mentioned schools are of particular relevance for the topic of this article. The glue that binds them is their consciousness of the necessary relationship linking law and institutions with the market. All the exponents of the neoliberal ideology were concerned about the best way to ensure an undistorted market and to favour it by creating the best possible legal and institutional frame.

According to Eucken, the economic system should be thought out and deliberately constructed by establishing rules that are most suitable for the State's economy to work correctly. Therefore, governments should not direct the economy. They should rather create suitable structural conditions for the economic process to work efficiently.⁹ As for Hayek's thinking, he described the market economy as a *spontaneous order* with no purpose and the market as an information processing device that is able to utilise independent actions of large numbers of individuals, each with limited and local knowledge, to bring out the right price. For this reason and for his polemic against constructivism he argued that there is a need for the State to ensure the best condition for competition since the market is self-regulating. Notwithstanding this, he admits the need for what he calls *rules of just conduct*,¹⁰ which aim to frame the subject's conduct. These rules create an environment within which individuals remain free to pursue their own purposes while dealing with all others solely on the basis of voluntary exchange. The price mechanism can then function properly only if it is embedded within a net of rules of just conduct. Therefore, in reality, also within this logic, an admissible normative purpose exists: to create and favour what he calls *Kosmos*.¹¹

Ultimately, all the new nuances of liberalism considered here give the same centrality to the value of freedom, which is understood, however, in a specific way. In their view, political freedom coincides with economic freedom, therefore the individual's freedom depends on the proper functioning of the economy,

⁹ This idea was clarified by W. Eucken in *The foundation of economics, history and the theory of economic reality*, William Hodge & Co., London Edinburgh-Glasgow, 1950, p. 314.

¹⁰ F. V. Hayek, *Law, legislation and liberty*, Routledge, 1982.

¹¹ Von Hayek used the classical Greek word *kosmos* to point to orderly structures which are the product of the action of many individuals but not the result of human design, and to distinguish it from a made order called *taxis* in classical Greek. The free market in his idea of the Great Society is a paradigmatic example of *kosmos* as the outcome of a process of evolution whose results nobody can foresee or design in advance (see p.36 *Law, Legislation and Liberty, op. cit.*, first published in *Rules and Order*, 1973). Since Hayek tried to outline a constitutional order that could favour the *kosmos*, I think that his point of view is not at all free from the constructivist approach he so much abhorred.

and the problem of justice boils down to creating an unencumbered field for all to play in. All the neoliberalism schools shared two central values of classical liberalism. First, society is considered to be formed of individuals who need to be liberated from the State's interference, on the one hand, and institutions are supposed to ensure freedom with a proper legal frame, on the other. Therefore, institutions should operate to create a negative space for the market and the economic freedoms first and foremost instead of a space for any person's aspiration and personality. This approach does not consider that a field full of inconsistencies and preclusions already exists from anyone's birth. Furthermore, it does not take at all into account the link between freedom and emancipation, with the latter historically implying forms of resistance from the economic domain as well as the struggle for inclusion in political institutions.¹²

The peculiarity of German ordoliberalism was that its exponents also focused on the threats that private powerful economic institutions could bring to society and individuals and, in particular, to their economic freedom. Therefore, not only political power but also economic concentration should be dispersed. For this reason it was deemed necessary to create a body of the State to oversee private business and to avoid concentration and distortion of competition. Moreover, this institution should have had enough power to resist the influence of aggregation of economic power. A difference, on this point, can be detected between the ordoliberal who called for a 'strong state' and Hayek who instead favoured a minimal state.

The Chicago school has its Holy Grail instead in the market efficiency so that, in this perspective, only rules that make the market more efficient (and thus more liberal) should be enacted by the legislator, as they are considered indirectly capable of improving the well-being of individuals as well. As a parameter to facilitate proper decisions and policies, they still point to the neoclassical market efficiency model. From this perspective, a difference emerges with ordoliberals since the Chicago school considers a concentration of economic power in private hands permissible if it does not disrupt market efficiency or even welcome it wherever that efficiency is favoured.

¹² On the issue of the emancipatory potential of the EU law, see F. De Witte, Emancipation Through Law, in Loïc Azoulay, Ségolène Barbou des Places, Etienne Patat (eds), *Constructing the Person in the Eu Law. Rights, Roles, Identities*, Oxford and Portland, Oregon, Hart Publishing 2016 pp. 15-33.

The Chicago school is also known for the crafting and dissemination of the human capital doctrine. According to this idea, any person in the labour market is no longer a means of production among many, but instead, a capital asset made of non-fungible skills embodied in the person. As Shultz put it, 'the distinctive mark of human capital is that it is part of a man. It is human because it is embodied in man and capital because it is a source of future satisfaction, or future earnings or both'.¹³ As will be clarified below, this doctrine seems to fit well in the European legal framework, where any person has been placed from the onset of the project within the market, first as a potential labour force in movement within the European Community and at a later stage as a bearer of skills and capabilities to be exploited in and for the market.

To have sketched the main characteristics of these schools of thoughts in this premise will become beneficial in order to verify in the further paragraphs how much the described features correspond with the European legal framework.

The second premise concerns the focus of this article on investigating the ideological background of the law in force and its consequences.

It is useful to clarify that this article does not intend to diminish a historical perspective, understood as a succession of historical and social facts, in favour of an exclusively theoretical approach based on the influence or prevalence of ideas in the making of history. However, it should come as no surprise that theories can directly affect law and institutions.¹⁴ This is even more true if we consider the case of the European

¹³ T. Shultz, *Investment on human capital: The Role of Education and Research*, The Free Press, New York, 1971 p. 48. Previously a very similar article appeared with a similar title, 'Investment in Human Capital', *The Economic Review*, 51(1), pp.1-17. Shultz earned the Nobel Prize in 1979, becoming a very influential economist. The human capital doctrine was also elaborated by his colleague G. S. Becker (see Becker, *Investment in human capital: A theoretical analysis*, *Journal of Political Economy*, 1962, 70, 9–49, and Id., *Human capital: A theoretical and empirical analysis, with special reference to education*, Chicago, University of Chicago Press, 1964). The term was first used by J. Mincer in 'Investment in Human Capital and Personal Income Distribution', *Journal of Political Economy*, 1958, 66(4), 281.

¹⁴ This is evidenced, for example, by studies on the age of codification and I refer in particular to the work, G. Tarello. See, among many works by this author, *Le ideologie della codificazione. Dal particolarismo giuridico alla codificazione napoleonica. Dispense I*, Anno accademico 1968-69, Genova, CLU, pp. 183 (also in the matter of labour law see *Teorie ed ideologie nel diritto sindacale, L'esperienza italiana dopo la Costituzione*, Edizioni comunità. 1972). Thus, to take one example, it is evident that the Napoleonic Code and its content would never have been possible without the sequence of historical and social events that brought the bourgeoisie to the helm of European societies. Nevertheless, while the content of the Code was, at least in part, placed *ex novo* in contradiction with the natural law that had preceded it, the codification itself was based on ideologies that had developed before the bourgeoisie gained power precisely as corollaries of natural law and rationalism, particularly descriptivism and systematicism.

experience, which is a legal order crafted directly by the leaders of several European countries. The whole project was born as a top-down process through an international deal between States.

Neoliberalism could easily spring into action on the shoulders of German politicians¹⁵ who, in some cases, were even theorists of ordoliberalism themselves. Their theories soon reached across Germany's borders, influencing important politicians in other European countries¹⁶ (such as Einaudi, Italian minister of economy, Bank of Italy governor and second president of the Republic). Later, from the 1980s, neoliberalism found broad support among many governments (a well-known example is the UK led by Margaret Thatcher, who was an enthusiast of Von Hayek's theories). The author is well aware that the Treaties are a political compromise between different visions and different needs brought by the Member States, and this implies that those different visions have competed and swapped predominance over time. The history of the Union covers several decades, so the changes made over time also depend on the political conflict in each country, which was consequently reflected at the level of the European Community. Furthermore, a debate on the destiny of Europe is always open within the European institutions as the contraposition between Parliament and Commission over time shows.

For the mentioned reasons, different approaches can be found between the lines of the Treaties and EU law, but it can be maintained that, particularly at the foundation of the Community, there was a predominant alignment between the legal and institutional order of the Economic Community with the neoliberal theories and that also at a later time, on many occasions, neoliberal ideas left their well-distinguished fingerprints on the Union. Afterwards, putting the market at the centre of the village triggered path-dependent outcomes that are still affecting European societies and citizens' social spheres and are still the markers of the EU's *raison d'être*. Those effects are bonded with the European Union's constitutional

¹⁵ Erhard, Ropke, and Müller-Armack were all exponents of ordoliberalism and had prominent roles in the post-war Federal Republic. The creator of the idea of the social market economy (which has been crafted as a way to make the neoliberal ideas more appealing to the left by including some form of social policy in the compromise), Müller-Armack was the Undersecretary of the Federal Ministry of Economy delegated to European affairs. The social market economy received official recognition in 2009 in Art. 3 of the Treaty on European Union (TEU) as one of the main goals of the EU. Walter Hallstein, who showed appreciation for ordoliberalism, was the first President of the European Commission.

¹⁶ As stated above, ordoliberalism influenced many politicians of other nationalities. Hans Von der Groeben was the Belgian Foreign Minister in Brussels and one of the principal drafters of the report (the so-called 'Spaack Report'), which set out the broad lines of a future European Economic Community (EEC) and European Atomic Energy Community (EAEC). He had strong ties to ordoliberalism. On this point and more broadly on ordoliberalism and its role in Germany and in shaping the European schema of competition law, see D. J. Gerber (1994), *op. cit.* 71-75.

matrix, which should be overcome in order to recognise the rights acknowledged in many member States' constitutions.¹⁷ The following section is devoted to showing the enduring effects of the political and economic options chosen by the early founders.

3. Neoliberalism and European labour law

3.1 From the initial design of the European project to the enduring consequences on the meaning of worker and work activities

The words Foucault uses to describe the design that Erhard and the *Wissenschaftliche Beirat* envisioned for post-war Germany¹⁸ can also be used to describe the creation of the common European economic space. According to the French intellectual, West Germany tried to create a point of attraction for the formation of political sovereignty by guaranteeing freedom in the economic domain. The economy produced legitimacy for the State that guaranteed it, and this, in turn, granted a form of sovereignty. Also, this circuit brought a permanent consensus to all those who may appear as agents within these economic processes.

The case of the European Community is analogous. Soon after the war, the necessary conditions to implement a federation of States was not available, even though some dreamed of this design,¹⁹ and therefore only agreements in the economic domain were implemented. As a result, like the case of West Germany, the legitimacy of the European institutions in the face of the citizenry descended from the efficiency of the designed common economic institutions to ensure well-being for all. Consequently, a free area of exchange was created, and it was decided not to also develop a unitary social policy, for two main reasons. First, Member States had no intention of relinquishing competence over such a challenging area for

¹⁷ This remains the case despite the great variability of constitutional models in the 27 Member States of the Union and therefore also through the constitutions of the Eastern European countries that emerged from the Soviet bloc, which have demonstrated less friction with the EU legal order since they opted for neoliberal constitutional models after the fall of the Berlin Wall. On the process of constitution-making in those countries, see J. Elster, 'Constitutionalism in Eastern Europe: An Introduction', *The University of Chicago Law Review*, 1991, 58(2), pp. 447-482.

¹⁸ 'Let us suppose that the function of this institutional framework x is not, of course, to exercise sovereignty, since, precisely, there is nothing in the current situation that can found a juridical power of coercion, but is simply to guarantee freedom. So, its function is not to constrain, but simply to create a space of freedom, to guarantee a freedom, and precisely to guarantee it in the economic domain'. M. Foucault, *The Birth of Biopolitics*, *op. cit.*, p.82.

¹⁹ The ideal of a European federation had been circulating in Europe for a century and a half, at least from the project envisioned in 1814 by H. de Saint-Simon and A. Thierry. More recently, the *Manifesto of Ventotene* by A. Spinelli and E. Rossi in 1941 was the point of reference of all the supporters of a European federation.

their budgets. Second, according to the founders' point of view, this choice was supported by the idea that more significant economic growth, resulting from a progressive development of the Member States' economic activities through the Common Market, would have indirectly facilitated the signatory countries' social policies themselves.²⁰ This was a perspective that has its foundation in a liberal mindset and could be considered a sort of application, in a macro-scenario with States as players, of the Kuznets curve.²¹

Article 117 of the Treaty establishing the European Community clarified that the Member States agreed upon the need to promote improved working conditions and an improved standard of living for workers by means of the functioning of the Common Market and the procedures provided for in the Treaty. This would also have led to the harmonisation of social systems in the long run.²² On this issue, the original structure of the European deal seems to have paid reference to a liberal approach according to which the market, if left to itself, is able to promote economic growth and consequently enhance social welfare.²³ In other words, it was thought that a trickle-down effect would have favoured the welfare of the whole population of States joining the Common Market.

At that stage of European integration, workers enjoyed a more limited freedom of movement that operated as a tool of efficient labour allocation within the Common Market. Even those rights enjoyed by the worker, such as the right not to be discriminated against (whose first nucleus was the right to equal pay for

²⁰ According to M. Ferrera, 'the limited competences assigned to the supranational level in the social policy sphere reflected the explicit objective of a division of labour between national and EC rulers that was seen as virtuous for both the market and the welfare state' (*The Boundaries of Welfare. European Integration and The New Spatial of Social Protection*, Oxford, Oxford University Press, 2005, p. 94).

²¹ S. Kuznets, 'Economic growth and income inequality', *The American Economic Review*, 1955. v. XLV (1), March, pp. 1-28. The curve described in this paper was considered the mathematical explanation of the so-called *trickle-down effect* along with the *Laffer curve*.

²² The community's abstention from social policy legislation was also reflected in the Treaty provisions on the sources of community law. A legal basis for adopting this kind of legislation was introduced only in the Treaty of Amsterdam in 1999 (art. 155 TFEU). Before this, labour legislation binding all Member States had to be introduced by means of Art. 115 related to the establishment or functioning of the internal market (as happened for the directives on equal pay, collective redundancies, transfer of undertakings and insolvencies) or on the general catch-all clause of Art. 352 TFEU. From 1992, with the Agreement on Social Policy, 11 Member States, with the exception of the UK, agreed to a major extension of EC competencies in employment and industrial relations, allowing for qualified majority voting with respect to some of the new competencies.

²³ In the current Treaties, Art. 3 of the European Union Treaty stands out and ideally replaces Art. 117 of the Treaty of Rome inasmuch as it refers to 'a highly competitive social market economy' as one of the aims of the Union. This expression (*social market economy*) was coined in 1946 by Muller Armack to make the political programme of ordoliberalism in the post-war German debate more appealing. For an historical reconstruction, refer to C. Watrin, 'The Principles of the Social Market Economy – its Origins and Early History', *Journal of Institutional and Theoretical Economics*, 1979, pp. 405-425.

equal work for the female workforce²⁴), as well as the competence on social policies and social security, were all market-oriented and 'directed towards the achievement of this specific freedom, essentially constructing subjects that move in a purposeful direction'.²⁵ It is not possible to examine the subsequent evolution of the European social policy within the limits of this article, but a general idea can be given.

Initially, the EU social measures were designed to flank the single market project. It has been argued that this approach set up a 'market citizenship'²⁶ and that progressively this status developed in the current EU citizenship according to a path that followed the internal transformation of the *homo economicus* in economic liberalism theories. That is to say, from a relatively passive subject tied to external economic mechanisms to an individual who is an active bearer of economic capability or 'human capital'.²⁷ Therefore, at the initial stages, freedom of movement enabled workers to move where there was a need for a workforce. Following the introduction of European citizenship, workers have been free to move where their 'human capital' could be valorised. This currently implies that the economic perspective has become the *de facto* internal limitation of free movement of persons and the rights attached to it within the European area.²⁸ In this context, individuals are pressured to perceive themselves as self-entrepreneurs and become 'well-functioning participants of the competitive market society in the making'.²⁹ Accordingly, social policies focus

²⁴ Art. 119 Treaty of Rome. This clause was due to the pressure of those countries (particularly France) that were bound by the ILO Convention 100 requiring equal pay and that were therefore afraid of being disadvantaged in the Common Market compared to countries that could leverage a cheaper female labour supply. See, among others, C. Barnard 'The Economic objectives of Art. 119', in T. Hervey and D. O'Keeffe (eds.), *Sex Equality Law in the European Union*, Wiley, Chichester, 1996 and M. Forman 'The Equal Pay Principle under Community Law', A Commentary on Article 119 EEC' *Legal Issues of European Integration*, 1, 1982. Things partially changed with *Defrenne II* 149/77, 1978 since the ECJ stated that Art. 119 was not only based on an economic objective, but 'this provision forms part of the social objective of the Community' and that the latter is intended also to ensure social progress and improvement of working conditions. Similarly, the freedom of movement for workers (art. 48 EEC) entailed a prohibition of discrimination on the grounds of nationality.

²⁵ D. Kramer, 'From worker to self-entrepreneur: The transformation of homo economicus and the freedom of movement in the European Union', *European Law Journal*, 2017, 23, pp. 172-188, 181.

²⁶ For a definition of the concept of 'market citizenship' refer to S. Kadelbach, 'Union Citizenship' *Jean Monnet Working Paper*, 9, 2003, p. 5 and T. Kostakopoulou, 'European Union Citizenship: Writing the Future', *European Law Journal*, 2007, 13(5), pp. 623-646, p. 625.

²⁷ D. Kramer (2015), *op.cit.*, 181.

²⁸ Only an economically active worker whose human capital never sleeps is entitled to long-term residence in a Member State and to the support of a full set of rights, including public welfare. On this point Dir. 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, and the related ECJ case law are of crucial relevance. On this topic, see (among others) C. R. O'Brien, *Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights*, *Common Market Law Review*, 2016, pp. 937-977.

²⁹ A. Somek, 'The Individualisation of Liberty: Europe's Move from Emancipation to Empowerment', *Transnational Legal Theory*, 4(2), 2013, pp. 258-282, at p. 274. See also S. Deakin, 'The "Capability" Concept and the Evolution of European

on assisting each worker to train and retrain when they lose a job to enhance their career credentials to capitalise the self at any given point in their active working life.

One further step in this analysis brings to light how the same concept of ‘work activity’ is entangled with that of ‘economic activity’. In the *Walrave* case³⁰ the Court specified that the practice of any activity is subject to EU law only in so far as it constitutes an *economic activity* disregarding ‘the character of gainful employment or remunerated service’.³¹ This means, in other words, that the formal arrangement through which the activity is carried out is not decisive, but also that the spotlight of the European law is only attracted if the activity in question has an economic value that can be placed within the internal market. Of course, this does not mean that all the activities are protected by the same regulation. Workers who perform tasks for others are protected by freedom of movement (current Art. 45 TFEU) while all other economic activities are classified as temporary and accordingly protected by the freedom to provide services (current Art. 56 TFEU) or continuous and stable and therefore protected by the freedom of establishment (current Art. 49 TFEU). In the last two cases, therefore, the given economic activity is addressed by the European legislation as an undertaking. Moreover, this design has two corollaries. First, a difference can be detected between the rationale and functions, on the one hand, of the notions of ‘employee’ at the national level – historically developed with the function to connect labour standards to it – and the European notion of ‘worker’, developed by the ECJ to identify the holder of the freedom of movement in the Common Market.³² Secondly, this classification also explains why a self-employed is equated to an undertaking in the EU law and the EU competition law sector in particular. The status of ‘worker’ to which the freedom of movement was connected has been considered integrated by the Court’s case law when a person, who receives a valuable

Social Policy’ in M. Dougan and E. Spaventa (eds), *Social Welfare and EU Law*, Oxford, Hart Publishing, 2005, pp. 3-24, at pp. 6-8.

³⁰ Case *Walrave*, 36/74, EU:C:1974:140; see also Case *Gaetano Donà v Mario Mantero*, 13/76, EU:C:1976:115 and the Case *Bettray*, 344/87, EU:C:1989:226, § 13.

³¹ See also regarding self-employment Case *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*. C-268/99, ECLI:EU:C:2001:616.

³² S. Giubboni, ‘Worker’, Bartolini A., Cippitani R., Colcelli V. (eds) *Dictionary of Statuses within EU Law*, Springer, 2019, 645-652. On this topic see also E. Menegatti, ‘The Evolving Concept of ‘worker’ in Eu law’, *Italian Labour Law e-Journal*, 2019, 1(12), pp. 71-83. To compare the definitions used by the Court in the fields of the free movement of workers and in the Social Policy Directives, see V. Février, ‘The concept of ‘Worker’ in the Free Movement of Workers and the Social Policy Directives: Perspectives from the Case Law of the Court of Justice’, *European Labour Law Journal*, 2020, 1(16), pp. 1-16.

consideration in exchange, performs an economic activity under the direction of another person.³³ Thus, the employment contract and subordination are used as a solid approximation to evaluate an ‘economic activity’ that should not be covered by the EU law related to the business undertaking and which does not make use of the freedoms of establishment or service.

Unless the *Kunsten* case – analysed below – is interpreted as an innovation on this point, the EU law does not distinguish the area of work from an enterprise by means of the prevalence of personal work over the organisation of a business.³⁴ The Court was already clear in its 1996 judgment in the case of a director of a company of which the person was the sole shareholder. At the time, the Court specified that, since the activity of Mr Asscher was not carried out in the context of a relationship of subordination, he should have been treated not as a ‘worker’ within the meaning of Article 48 of the Treaty but as pursuing an activity as a self-employed person within the meaning of Article 52.³⁵ In other words, a solo self-employed is treated as an undertaking and so can move in the market thanks to the right of establishment. As will be clarified in the next section, the concept of ‘undertaking’ is relevant to establish the scope of application of the Art. 101 TFEU (ex Art. 85).

Taking a step back, the Court has also specified what it means when an activity needs to have economic value to be considered within European law. Indeed, according to its judgments, the activity must have an economic nature, meaning that purely marginal and ancillary activities or those whose main purpose is not economic³⁶ are excluded from the ruling and protection of European law. The Court often used the expression ‘marginal and ancillary activities’ as a sort of *obiter dictum*. However, clarifications on the issue

³³ Case *Deborah Lawrie-Blum v Land Baden-Württemberg* C- 66/85 ECLI:EU:C:1986:284, § 17 in particular specifies that a worker is one who ‘is obliged to provide services to another in return for monetary reward and who is subject to the discretion or control of another person as regards the way in which the work is done’.

³⁴ Based on a completely different perspective, the Italian legal framework assigns the regulation of both self-employed persons and micro-entrepreneurs’ activities who bear a contractual obligation of predominantly personal service to labour law. Therefore, only when the debtor obligation is performed without relying predominantly on someone’s working activity but rather on an impersonal business economic organization, is that relationship regulated by commercial law. This also has implications for collective rights. For detail on this issue and on the roots of this regulative frame see O. Razzolini, ‘The Labor Movement And Self-Employed Workers: A Necessary Response To Increasing Income Inequality’, *WP C.S.D.L.E. “Massimo D’Antona”*, INT – 155/2021.

³⁵ Case *P. H. Asscher and Staatssecretaris van Financiën*, C-107/94, ECLI:EU:C:1996:251.

³⁶ As is the case, for instance, with activities performed for national teams and therefore for pure sporting interest. See Case *Walrave and Koch v Association Union Cycliste Internationale et altri*, C- 36/74 ECLI:EU:C:1974:140, § 8.

can be found, on the one hand, in the case law related to the remuneration of subordinate workers and, on the other, in the case law related to the integration of disadvantaged workers.

As for the first group-related judgments, in the *Levin* case³⁷ the ECJ specified that a worker enjoys the freedom of movement also when they yield an income lower than that which is considered to be the minimum required for subsistence in a given Member State. In the *Steymann* case, the Court held that participation in a community based on religion, or another form of philosophy, can be framed as an economic activity 'in so far as the services which the community provided to its members may be regarded as the indirect *quid pro quo* for genuine and effective work'³⁸ (in that case the worker's income consisted of board and lodging). Therefore, it can be maintained that wherever an exchange whose value is appreciable from an economic point of view and valuable on the 'labour market' exists, the activity is not marginal for the Court, while there is neither a focus on the fairness of the exchange itself nor on other functions that labour can have for a person beyond the economic exchange.

Even more interesting and enlightening on this point is the analysis of the second group of judgments mentioned above. In the *Bettray* case,³⁹ the claimant was a drug addict who was employed under the Dutch Social Employment Law, a law aimed at enabling a specific target group of people 'to recover their capacity to take up regular employment'. The Court specified that work under the Social Employment Law could not be regarded as an effective and genuine economic activity since the employment relationship constituted merely a means of rehabilitation or reintegration for the persons concerned. Therefore, according to the Court, a person working under that scheme could not be regarded as a worker for the purpose of European Law and so could not enjoy freedom of movement. Once again, labour is considered as a protected activity only when it has an economic value to exchange in the labour market. Afterwards, the Court tried to amend this landmark judgment partially in three circumstances. In the *Birden* case, the Court dealt with another case of publicly subsidised work under a scheme of ancillary public utility work intended to enable persons to build up social security contributions and improve their chances of finding other work. The Court merely asserted

³⁷ Case *Levin*, 53/81, EU:C:1982:105.

³⁸ Case *Udo Steyermann v Staatssecretaris van Justitie*, 196/87, EU:C:1988:ECJ 1988, § 8-14.

³⁹ Case *Bettray and Staatssecretaris van Justitie* (Secretary of State for Justice), 344/87, ECLI:EU:C:1989:226.

that the conclusion reached in *Bettray* could be explained only by the particular characteristics of that case and could not, therefore, be applied in the case at stake.⁴⁰ In other words, the two cases were not comparable according to the Court, but the ECJ failed to explain in what regards the cases differed. In *Trojani* (a French national who was undergoing a reintegration programme in Belgium), the Court again used the same line of reasoning as the *Birden* case, i.e. the circumstances of the *Bettray* case were different. Advocate General Geelhoed, comparing this case with both *Bettray* and *Steymann*, concluded that Mr Trojani could not base his right of residence in the Kingdom of Belgium on the status of ‘worker’. From the advocate general’s perspective, in this case more than in the others, it was clear that the products of that work were not placed on the market and the economic aspect of the activities was of even less importance than in the *Bettray* case.⁴¹ The ECJ referred to the national Court to establish whether the paid activity in question was real and genuine and to ‘in particular, ascertain whether the services actually performed by Mr Trojani are capable of being regarded as forming part of *the normal labour market*’⁴² (emphasis added). Some years later, in *Fenoll*, at stake was the applicability of Art. 7 of Directive 2003/88/EC (which lays down minimum safety and health requirements for the organisation of working time) to the case of a person with a severe disability who was employed in a specialised centre of employment therapy (CAT). In this case, the point was not to investigate a potential limitation of the freedom of movement but rather to avoid a worker being deprived of the important protection granted by the directive. Therefore, the Court reiterated that it was for the national Court to ‘ascertain whether the services actually performed by Mr Fenoll can be regarded as forming part of the normal labour market’, but gave some clues to steer the national judge’s decision. According to the CJEU, this case differed from *Bettray* since the activities carried out by disabled persons within the CAT, ‘although adapted to the capabilities of the persons concerned, have a certain economic value too’. Moreover, according to the European judge, the activities valorised the residual productivity of the worker and were not directed only to provide occupation for the person concerned.⁴³

⁴⁰ Case *Mehmet Birden v Stadtgemeinde Bremen*, C-1/97, ECLI:EU:C:1998:568, § 31.

⁴¹ Opinion of AG Geelhoed in ECJ case *Michel Trojani v Centre public d'aide sociale de Bruxelles*, C-456/02 ECLI:EU:C:2004:488, § 55-59.

⁴² Case *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)*, C-456/02, ECLI:EU:C:2004:488, § 24.

⁴³ Case *Gérard Fenoll v Centre d'aide par le travail 'La Jouvène', Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon* C-316/13, ECLI:EU:C:2015:200, § 40.

The European regulations discussed above and the string of judgments reported can both be read through the human capital narrative. Mobility and migration, in particular, have been seen by human capital theorists as an investment decision process leading to an improvement of status and remuneration in the future,⁴⁴ a future earning whose initial investments consist of moving itself plus the psychological costs involved in breaking ties with the community of origin. In EU law, workers and the self-employed are guaranteed the possibility of moving and residing in all Member States as long as they are investing in their human capital or, in other words, they are valorising their capabilities and abilities in the common economic space by placing them on the labour market. Therefore, the economic freedoms are set in favour of those economic activities (and thus for the capability of the single person in the case of a worker) that have a measurable economic value on the normal labour market, while all the activities that have a value for society as a whole or as a tool for the personal search of life's driver or meaning provide no access to entitlements. The case of persons with disabilities is paradigmatic. The typical policy in the social state era was directed towards the inclusion of any individual, especially marginalised persons, into a web of political, social and economic relations, and labour was deemed to be a keystone in this process. The *Fenoll* case suggests that, in the European design, the point is not the social exclusion itself but eventually, in the vein of the 'advanced liberalism',⁴⁵ to bring marginalised individuals back into the labour market.

3.2 The initial design of the European project and its lasting consequences on the collective rights of workers

Ordoliberalism detached itself partially from the neoclassical economists. In effect, according to the former, not all the potential market structures fairly serve the economy and individuals. The only way to achieve sustained economic performance, stability and political and social justice was through an order based

⁴⁴ See T. Schultz, 'Investing in human capital', *The American Economic Review*, 1961, Vol. 51(1), 1-17. Schultz was the first to look at the mobility of workers from this perspective, but also refer to G. Becker, '*Investment in Human Capital: Rates of Return in Human Capital*' (New York: National Bureau of Economic Research), 1964, pp. 36-66, available on [c11231.pdf](https://www.nber.org/papers/w11231/pdf) (nber.org). Becker explicitly formulated the integrated investment approach theory, according to which the process of migrating is an economic decision that each person takes after pondering the present value of benefits and costs of moving with the higher income that can be pursued in the new destination, which can include a more pleasant social and physical environment.

⁴⁵ For a definition of 'advanced liberalism' see N. Rose, *Advanced Liberalism* (Chapter 4), *Powers of Freedom*, Cambridge, Cambridge University Press, 2009, pp. 137-166.

on fair competition. Only in this way could equal opportunity of participation be ensured to all the members of a given society. Therefore, it was not sufficient to avoid state interventionism in the economy to achieve competition since it was also crucial to liberate the market from a concentration of economic power in private hands. In fact, in their view, a market ultimately left alone cannot ensure this achievement since, when private undertakings are free to act, they tend to generate a concentration of economic power in the market. This vision is the main heritage that ordoliberalism left to the European project, and it can still be found in the current Treaties. For this reason, the compromise reached by the Treaty of Rome ahead was considered acceptable by the ordoliberals. For the sake of the analysis carried out here, it is worth emphasising that, from the ordoliberals' perspective, there is no difference between distortion of the market generated by a public or a private intervention. The consequence is that, from this point of view, a collective agreement between private association is also assessed in the EU for the effects it has on competition in the common market as will be clarified below.

In this frame, a key concept elaborated further by ordoliberalism was that of 'economic constitution'. It was meant to signify that a country's economy depends on general principles that are deliberately adopted in this sphere at a political level. They believed that the process would resemble that which applies in the political sphere, where the political constitution envisions the social and political systems that a community wants to achieve. Unlike the classical liberals, they were aware that the economy could not be separated from law and politics, which was probably what made their theory so successful among some politicians. The issue with this theory is that they considered the law to be an instrument which serves the needs of an economy of perfect or complete competition,⁴⁶ with the latter perceived as an end more than an instrument. They thus introduced a gateway for ideologies whose goal is a legal order where every other aspect of human society but the economy is secondary, since it depends on the economic system's proper functioning (this positioning can also be found in Hayek's theories, though the departing point of this author is different). In Eucken's conception of *Ordnungspolitik*, only laws that spring from the economic constitution's principles

⁴⁶ On this point, refer directly to the English translation of the original Eucken work, 'Competition as the Basic Principle of the Economic Constitution', in T. Biebricher and F. Vogelmann (eds.) *The Birth of Austerity: German Ordoliberalism and Contemporary Neoliberalism*, Rowman & Littlefield int. London-New York, 2017, pp. 81-98.

should be implemented. Additionally, government action is constrained by the economic constitution. The scheme resembles an idea of strict positivism in law that *mutatis mutandis* is applied to the economic scenario. As in the French school of exegesis, the judges were considered '*bouche de la loi*'; in the same way, Eucken and the ordoliberals considered governments to be the mouthpiece of the economic constitution. Any discretion should be avoided while courts control the alignment between law and the 'economic constitution'. According to Eucken,⁴⁷ a competitive market order is based on a few constituent principles: the maintenance of a proper market price mechanism free from controls; a stable currency (since inflation distorts the price mechanism); free entry and exit to the markets; consequent economic policies; private property and freedom of contract. Constituent principles need so-called regulatory principles to function, i.e. monopoly control, income policies and correction of technological effects.

The aforementioned principles are all enshrined in the European legal framework. In particular, monetary stability is still enshrined in Article 127 of the Treaty on the Functioning of the European Union (TFEU).⁴⁸ Art. 108 TFEU forbids aids granted by a State or through State resources that are not compatible with the internal market. These are typical examples of 'regulative' principles that translate the 'constitutive principles' of the ordoliberal economic constitution. Art. 101 and 102⁴⁹ embed a prohibition of cartels and of abuse of a market-dominant position, with the latter concept having no correspondence with other models of the time, except for the German one. Also, the drafting of those articles has been largely inspired by the ordoliberal idea. Indeed, any conduct that aims at cutting rival firms off from the market or limiting them to operate within it is prohibited, while conduct that is beneficial to the market and consumers or makes the products more attractive is permissible. Furthermore, an independent body has been given the power to check and sanction in case of non-compliance with EU competition law while the ECJ oversees compliance with the Treaty's provisions. The system approximately resembles the ideal type envisioned by Eucken. To have set those rules to build and defend a competitive market economy carried consequences for the social

⁴⁷ W. Eucken, 'A policy for establishing a system of free enterprises' (1952), in L. Erhard and V. Bonn (eds.), *Standard Texts on the Social Market Economy: 2 centuries of discussion*, Fischer, Stuttgart-New York, 1982, pp. 115-132.

⁴⁸ Article 127-1 (ex Article 105 TEC). The primary objective of the European System of Central Banks (ESCB) shall be to maintain price stability. The same ESCB statute is largely modelled on the German Federal Central Bank.

⁴⁹ Former Articles 85 and 86 of the Treaty of Rome.

field and created a predominance of antitrust law over labour law. This image becomes especially clear in the intersection between antitrust law and the right of collective bargaining.

The ECJ was asked to assess the concept of 'undertaking' for the sake of applying Art. 85 of the EEC Treaty (currently 101 TFEU) and clarified that 'any entity carrying on activities of economic nature, regardless of its legal form, constitutes an undertaking within the meaning of the mentioned article'.⁵⁰ Here again, as in the case of the concept of work, the stress is on the activity's economic relevance for the internal market with no regard to the nature of the activity itself or the weight of organisation over labour performed. Thus, differently from most national legal frameworks, in the EU legal order any activity of economic value can be framed alternatively as work activity when performed in a subordinate position or as a business undertaking with the aim to attach economic freedoms on the one hand and to limit economic concentration for the sake of the competition in the internal market on the other.

For neoliberal economists,⁵¹ union activity drives up the level of wages in favour of unionised workers while simultaneously pushing down the wages of other workers and the self-employed, and moreover creating unemployment. In their view, this is a distortion of the market that is made possible because the law ensures privileges to trade unions. The same authors consider that, in the end, unions would like to suppress competition by acting collectively and, in this sense, they act the same way as undertakings would. Actually, as mentioned in the previous sections, other scholars who have worked within this same cultural aggregate have emphasised that all human beings are actually self-entrepreneurs, and this closes the circle. Any worker acts in the market like any other player since workers are human capitalists, and therefore, in the mindset of the proponents of this ideology, they should accept in full the competition rules abandoning the idea that 'on the labour side power is collective power'.⁵² These assumptions are nothing more than a

⁵⁰ In particular, see Case *Walrave v. Union Cycliste Internationale* (1) *cit. supra* and ECJ case *Hoefner v. Elser/Macrotron* 41/90, ECLI:EU:C:1991:161. The Court also specified in Case *Italy v. Commission*, 41/83, ECLI:EU:C:1985:120 that an activity of economic value means any activity that involves economic trade, even if it is not profit-making.

⁵¹ See on this point the work of E. H. Chamberlin, *The Economic Analysis of Labor Union Power, American Enterprise Association*, Washington, 1958 and F. Von Hayek who both dwell on the supposed monopolistic behaviours and privileges of unions, for example in *Individualism and Economic Order*, Chicago University Press, 1948 and in the more famous *The Constitution of Liberty*, University of Chicago Press, 1960 (in particular see, Part III. Freedom in the Welfare State, 18, Labour Unions and Employment) and *Law, Legislation and Liberty* (1982), *op. cit.*

⁵² As famously stated by O. Kahn-Freund in *Labour and the Law* (p. 17, 3rd edition edited by P. Davies and M. Freedland, Stevens, 1983).

refined, reworked version of classical economic ideas. Even if labour is no longer treated as a poor labour force but instead as a capital asset, they depart from the same starting point according to which, from a macro perspective, the market of labour is like all the other commodities' markets and, therefore, concentrations of power on the labour side should be forbidden. In this view, collective negotiations – above all if they relate to wages – naturally undermine the efficiency of the market.

Because of the original design of the European institutions, collective rights entered the European legal framework only as a potential hamper for the internal market since the European institutions are theoretically deprived of competencies on both the right to strike and the right of collective bargaining.⁵³

In the famous *Albany*⁵⁴ case, which scholars have received positively as a first recognition of the right of collective bargaining, the Court was asked whether a supplementary pensions fund managed by collective schemes should have considered an undertaking within the meaning of the competition law and, therefore, if the fact of making membership of the sectoral pension compulsory entailed a restriction of the competition. The statement according to which the collective negotiation between management and labour concluded in the pursuit of social policy objectives recognised by the EU law falls outside the scope of Art. 85 (currently 101 TFEU) was an *obiter dictum* in the reasoning of the Court (point 39-40). It is worth underlining that the Court considered collective agreements to be out of the scope of competition law by reason of the social policy objective pursued by the Treaties and not because it recognised the right of collective bargaining as a fundamental right that descends from the constitutional traditions common to the Member States (as stated in Art. 6 TUE) or since it was enshrined in the Social Charter, for example (the Charter of Fundamental Rights was to yet to come).

Years later, the issue of who can be deemed to be an 'undertaking' in the EU legal framework returned with the *FNV Kunsten* case.⁵⁵ The Court was asked to pronounce on a collective labour agreement that laid down, along with the wages of the employees, the minimum fee for orchestra substitutes hired under an employment contract and also for self-employed workers who substitute for 'ordinary' employed

⁵³ Art. 153 TFEU paragraph 5 'The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs'.

⁵⁴ Case *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, 67/96, ECLI:EU:C:1999:28.

⁵⁵ Case *FNV Kunsten*, C-413/13, ECLI:EU:C:2014:241.

members of the orchestra at the will of the orchestra when it needs them. The Dutch government claimed that a collective labour agreement including provisions for professional service cannot be the result of a collective negotiation between employers and employees and therefore cannot be excluded, *by reason of its nature*, from the scope of Art. 101(1) TFEU. This was to stress that the *Albany* exception that was stated in point 40 of the *Albany* case could not be applied to the *Kunsten* case since self-employed persons are undertakings under the EU competition law and therefore this agreement was not signed between a representative of employers and an association of employees. In other words, neither the government nor the ECJ called into question the right of bargaining *per se*. Indeed, the judgment hinges on the dividing line between concepts of 'worker' and 'undertaking'. Therefore, collective bargaining right is limited as much as the latter concept is extended (or, conversely, the former is confined).

In paragraphs 33 to 36 of the judgment, the Court tried to mobilise both the concepts referring to its settled case law. The judge so stated that a self-employed person is not to be considered as an undertaking when they do not bear any of the financial or commercial risks arising out of their activity and operate as an auxiliary within the principal's undertaking. The same conclusion can be drawn, according to the Court, when for the duration of the relationship a worker forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking. In these cases, the worker does not determine their own conduct independently on the market. In the aforementioned paragraphs, the organisational dimension of the relationship between a self-employed and its assumed client is taken into consideration in a way. When the worker is included in an external business, the Court seems to assume that a self-employed person depends economically on its client and therefore cannot be considered as an undertaking (also because they cannot take decisions independently as a true human-capital owner). Moreover, at point 36, the Court listed three different criteria to detect a worker that could be summarised as a criterion of external direction, a criterion of economic dependence, and a criterion of external organisation, but the Court did not specify whether they all must recur contemporaneously or if they can be considered as a stand-alone test. The latest option could enlarge the concept of 'worker' significantly. Therefore, the overall content of the judgment still raises doubts about the aim of the Court and the scope of its operation. Indeed, if on the one hand the ECJ takes on the problem of the area in between dependent employment and business undertaking, on the other

hand, it also recalls the Lawrie Blum formula that is entrenched chiefly in the idea of a worker at the service and under its employer's direction and uses the expression 'false self-employed'. To maintain an interpretation that can create more room for self-employed collective bargaining, it is possible to consider that the Court wanted to clarify at point 37 that the reality of facts prevails on the formal contract between the parties and also over the possible different framing at the national level.⁵⁶ This proposed interpretation⁵⁷ of this landmark judgment is a way to create more room for collective bargaining but does not solve the problem at the root. The European legal system has been created as a connector of public policies aimed at the functioning of a market of perfect competition and, from this point of view, inevitably diverges from the Member States' tradition.

The *Albany* and *Kunsten*, as well as the *Viking* and *Laval*⁵⁸ judgments, to quote only the most famous, all have something in common. The ECJ was called to judge whether collective actions or collective agreements could jeopardise economic freedoms. It was clear that the rule-exception mechanism was always in favour of the economic freedoms that constitute the true constitutional matrix of the European Union, disregarding any formal recognition of other rights. Indeed, the Court operated continuously to defend economic freedoms because they are the pillars that underpin the functioning of the market. Conversely, in

⁵⁶ The reference is at the point when the Court stated that self-employed may be classified as false self-employed and therefore treated as 'workers' under EU law when a national court ascertains that 'apart from the legal nature of their works or service contract, those substitutes do not find themselves in the circumstances set out in para 33 to 36 above' (§37).

⁵⁷ According to scholars, there are many notions of 'worker' in the EU law that depend on the sector of application and by the definition that the case law elaborates in that sector. It has been said that it is possible to differentiate between two notions (see F. Lunardon, P. Tosi, *Introduzione al diritto del lavoro. L'ordinamento europeo*, Vol. 2, Rome, Laterza, 2015, pp. 93-94) or among three notions (S. Giubboni, 'Being a worker in the Eu Law', *European Labour Law Journal*, 2018, 9(3) pp. 223-235, p. 224-226). A broader notion of 'worker' in the sector of competition law could therefore also be possible by decoupling the definition of 'worker' for free movement purposes from that of EU competition law – that is one of the possible techniques that was suggested to reconcile antitrust law with collective bargaining by I. Liannos in 'Reconciling Antitrust Standards and Collective Bargaining Rights: Towards a New Analytical Framework in EU Competition Law', in B. Waas & C. Hiebl. (eds), *Collective Bargaining for Self-Employed Workers in Europe: Approaches to Reconcile Competition Law and Labour Rights*, Kluwer Law International, 2021.

⁵⁸ *Case International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, 438/05, ECLI:EU:C:2007:772 and *Case Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, 341/05, ECLI:EU:C:2007:809. In those two judgments, the CJEU brought liberal ideas to the extreme since it specified that Treaties prohibit any restriction of both the right to establish and provide services not only when they are the result of public actions but also when rules emerge from private agreements such as collective agreements. This is because, according to the Court, notwithstanding that clauses of contracts are not public in nature, they are designed to regulate the provision of services and the right to establishment collectively and can end up endangering the economic freedoms and the proper functioning of the market (see § 88 *Laval* case and § 33 *Viking* case plus the previous case law mentioned by the Court *ivi*).

the tradition of democratic or social constitutionalism collective rights are a means to ensure social and political participation. They are not just reduced to the status of an economic tool to obtain better working conditions vis-à-vis the employer or the company for which a work activity or a service is performed. In other words, in the EU legal framework, the 'economic constitution' of the EU prevails over democratic constitutionalism principles. I will expand on this point in the conclusions.

4. Conclusions: The underlying idea of social rights and 'work' in the Eu legal framework and its misalignment with the democratic (or social) constitutionalism

The analysis showed that once the case of the European Union is analysed with a neoliberal mindset and ideology in mind, contiguity or even an overlapping between the European order and the design of neoliberal economists becomes quite evident.

Foucault explained the nature of the neoliberal ideology by underlining that it is, after all, a technique of government. It is also an analysis of the society from a specific deforming lens that understands social processes and makes them intelligible from the point of view of market efficiency. However, it cannot be reduced to this aspect alone. It involves a permanent criticism that 'scrutinises every action of the public authorities in terms of the game of supply and demand, in terms of efficiency with regard to the particular elements of this game, and in terms of the cost of intervention by the public authorities in the field of the market'.⁵⁹ From this point of view, the 'economic constitution' of Europe has become the yardstick for judging national regulations that are subject to the supremacy of European law and the grid through which the ECJ has interpreted European law but also tested national legal frameworks. Furthermore, as has been written⁶⁰, the interaction between national and transnational levels has triggered a vicious circle based on the competencies delegated to the EU level. Litigation at the ECJ has often resulted in judicial findings of inapplicability of social policy measures at the national level on grounds of infringement of EU economic

⁵⁹ Foucault [1978-79] *Op. cit.* p. 246.

⁶⁰ In those terms, D. Schiek 'Towards More Resilience for a Social EU – the Constitutionally Conditioned Internal Market', *European Constitutional Law Review*, 13, 2017, p. 614.

freedoms or competition law. The impossibility for the Eu to replace any such social policies further enlarges the structural imbalance in favour of economic integration.

Ultimately, within this scenario, social rights have seen their nature change in comparison with their design in the constitutions of the Member States, and this is particularly evident if one considers the relationship between them and economic freedoms.

From a micro-perspective, there is an individual dimension alongside the public one to consider. *Ab origine*, at the European level, Europeans have been conceived not only as individuals acting in their own interests but also as auxiliary agents for the community project identified in creating a transnational space of economic transactions.⁶¹

Consequently, a selection was made about which rights in the labour sphere were going to be protected at the EU level, which were identified from among those that were instrumental or coincident with the supranational policy goal,⁶² such as the right to not be discriminated against and the right to move in the European labour market. At a later stage, the human capital narrative and its false promise of empowerment prospered in this favourable environment since it frames each human activity in its economic dimension only, considering it on the basis of its performability within the market.

This scenario also creates significant asymmetry in the way labour is valorised and evaluated if one compares the EU legal order to many national constitutional frameworks.

The study focused on the influence of neoliberal theories both in the Treaties and on the idea of labour itself as well as on the 'constitutional weight' of labour using the concept of 'working activity' and 'undertaking' elaborated by the ECJ as a driver. The analysis showed that the European citizen⁶³ is conceived

⁶¹ Sic. L. Azoulai, S. Barbou des Places, E. Pataut, *op. cit.* pp. 4-5 who recalls directly the words of the judge Lecourt sitting in *Van Gend en Loos* (Case *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* 26/62 ECLI:EU:C:1963:1) Court's formation in R Lecourt, *L'Europe des juges*, Bruxelles, Bruylant, 1976, p. 260: 'when an individual appears before the judge to defend the rights he derives from the Treaties, that individual does not only act in his own interest, he immediately becomes an auxiliary agent of the Community'.

⁶² D Chalmers, L Barroso, 'What *Van Gend en Loos* Stands for', in *International Journal of Constitutional Law* 12(1), 2014 pp.105-134 at pp.120–22.

⁶³ This echoes the model of the neoliberal citizen who 'is one who strategizes for her or himself among various social, political, and economic options, not one who strives for others to alter or organize these options. A fully realised neoliberal citizenry would be the opposite of public-minded; indeed it would barely exist as a public. The body politic ceases to be a body but is rather a group of individual entrepreneurs and consumers,' W. Brown, *Edgework: Critical essays on knowledge and politics*, Princeton University Press, 2005, p. 43.

first and foremost as an economic entity moving in the market in order to strengthen it like a river flowing into the sea, from a general perspective, and to earn from their human capital, from an individualistic perspective. Consequently, their work, whether it is classified as 'work activity' or as 'undertaking', must have an economic value for the Common Market and be integrated into it. Moreover, it should not impede the economic freedoms of others and the functioning of full and free competition. This also has, as clarified in section 3.2, consequences for the viability of collective rights. In this article, only the case of the relationship between collective bargaining and competitive law was analysed in detail, but as mentioned in the previous section, the case of strikes is similar. In the case law of the ECJ, collective bargaining is an exception to competition law and can be exercised only by those whose economic activity is not framed as a business undertaking in the EU law. Both the right to strike and the right to collective bargaining cannot be exercised in such a way as to disturb the freedoms of companies to establish or perform services in the internal market, as the *Viking* and *Laval* cases demonstrated.

A space for social rights has been carved out in the EU law based on the social objectives that the Treaties, from a certain time ahead, posed on the Community and the Union at a later stage. Therefore, they have been understood even after their full formal recognition as fundamental rights in an economic perspective, i.e. as an economic instrument, to moderate the possible detrimental effects of the free and competitive market. This flattening of rights to their mere economic functionality and the constraints imposed by the ECJ deprive them of any political dimension. They are no longer an instrument of political and social participation that workers can use to assert their position and needs. In the social state, social rights are at the same time an achievement of social conflict and the guarantee of its institutionalisation as a positive principle, while in the EU legal order those rights appear to be reshaped in the role of facilitator of the single market performance.

In other words, in the EU legal order, fundamental rights, despite their recognition, still did not lose their instrumentality to the objectives of the Union and its 'economic constitution' and this is testified to by a constant scrutiny of compatibility with the latter. This explains why the Charter of Nice did not pass the

proof of the pudding.⁶⁴ A reminder of this instrumentality can be found in the Explanations Relating to the Charter of Fundamental Rights. In that official document, a judgment of the ECJ is recalled to explain Art. 52 of the Charter. It states that ‘restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation of the market, provided that those restrictions in fact correspond to *objectives of general interest pursued by the Community*’(emphasis added).⁶⁵ The Charter explanations add that those objectives have to be found in Art. 3 of the TEU and general interests in art. 4 TEU and Articles 35(3), 36 and 346 of the TFEU. A counter limit to this possible restriction and reframing of the rights should be identified according to the same Art. 52 in the ‘essence of rights and freedom’. Unfortunately, this notion triggered a vigorous debate on its meaning even in the Member State where it was crafted, as well as in those where it was introduced at the constitutional level.⁶⁶ As for the ECJ case law on this point, it does not feature an explanation of the concept’s meaning and importance. Yet one of the few cases where the ECJ recognised explicitly that there was an interference with the essence of a right was a case related to the incorporation of clauses of collective agreements in an employment contract; this concluded with the Court detecting an adverse effect on the essence of the freedom to conduct a business of the company.⁶⁷ Furthermore in the *Viking* case the Court clarified that ‘it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that the economic fundamental freedoms need to be

⁶⁴ This test, as pointed out by F. Dorsemont (in ‘The Right to Form and to Join Trade Unions for the Protection of His Interest Under Article 11 ECHR, in *European Labour Law Journal*, 2, 2010, pp. 333-340), does not lie in the recognition of fundamental rights, but in the legitimacy of restrictions to these rights.

⁶⁵ Explanations Relating to the Charter of Fundamental Rights Dec. 14, 2007, 2007 O.J. (C 303) 17 [hereinafter Charter Explanations], Explanation on art. 52, at 32 (citing Case C-292/97, *Karlsson and Others*, ECLI:EU:C:2000:202 para. 45) (emphasis added).

⁶⁶ The original source of the concept of essence comes from art. 19(2) of the German Constitution and aimed to prevent a new future Nazi-type violation of fundamental rights. Other Member States Constitutions that use this notion are the Spanish, Portuguese, Hungarian, Polish, and Slovakian. The Romanian Constitution refers to the ‘existence of the rights’. In the Austrian legal order, the notion of the ‘essence’ of the right is recognised through the case law of the Constitutional Court. On this complex topic and on the debate developed around it see M. Brkan, ‘The Concept of Essence of Fundamental Rights in the Eu Legal Order: Peeling the Onion to its Core’, in *European Constitutional Law Review*, 14(2), 2018, pp. 332-368. See also, in particular, the introduction of K. Gutman, ‘The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the ECJ of the European Union: The Best Is Yet to Come?’, *German Law Journal*, Volume 20, Special Issue 6: ‘Interrogating the Essence of EU Fundamental Rights’, September 2019, pp. 884-903.

⁶⁷ Case C-426/11 *Alemo-Herron and Others*, ECLI:EU:C:2013:521.

inevitably prejudiced to a certain degree.⁶⁸ A statement that seems to negate a trait that is considered ordinarily essential to the right of strike.

Is the picture that has been sketched above, and that distinguishes the constitutive compromise of the European Union and its real constitutional matrix, in line with the latest phase of constitutionalism? Do we not need a different constitutional compromise to reconnect the evolution of the European Union with the tradition of the European Constitutions?

It is important to briefly recall some of the main characteristics of the cluster of constitutions that were proclaimed in the 20th century, particularly after the Second World War, and that are considered to be an evolution of liberal constitutionalism. This paradigm shift was made visible in the Preamble added to the Constitution of France in 1946. It proclaimed the political, economic and social principles it enumerated as being especially necessary at that time, and therefore they were added to those enshrined in the Declaration of Rights of 1789, which were solemnly reaffirmed.

This set of Constitutions is considered to belong to the phase of the so-called social (or also democratic) constitutionalism. The label is intended to highlight the difference with the previous wave of liberal constitutionalism, even if the strength of the social dimension of these fundamental Charters has a certain variability. On the more intense side of the spectrum there are the Italian Constitution (which directly founds the Republic on work in its Art. 1⁶⁹), the Spanish, and the Portuguese, but other examples are those of Greece, Sweden and Belgium. The case of the Bonn Charter is more ambiguous. Although defining the Federal Republic of Germany as democratic and social,⁷⁰ it was criticised precisely because of its timid recognition of the social sphere with only a few social rights directly listed in the Charter.⁷¹

⁶⁸ Viking *cit.* § 52.

⁶⁹ On the meaning of the founding of the Republic on labour, see: C. Mortati (who was member of the Constituent Assembly in Italy) in Art.1.- Principi Fondamentali artt. 1-12, in *Commentario alla Costituzione in Commentario alla Costituzione*, G. Branca (ed.), Bologna, Zanichelli, 1975, p.11. The degree of social imprinting in constitutions in the aftermath of the Second World War is due mostly to the different weight that the left-wing parties which organised the labouring masses had in each country when the Constitutions were proclaimed.

⁷⁰ Art. 20 (1); Art. 28 (1); Art. 23 in respect of Germany's involvement with the European Union.

⁷¹ In 1981, Chancellor Helmut Schmidt entrusted a government commission of experts with the task of studying the inclusion of 'state purposes' (*Staatszielbestimmungen*) on labour, environment and culture in the Constitution to balance civil rights with social rights. The initiative was not successful, and neither were similar initiatives undertaken after the unification of Germany (on those issues refer in English to J. King 'Social Rights, Constitutionalism, and the German Social State Principle', *Revista eletrónica de derecho público*,1(3), 2014, 19-40). Notwithstanding, the German Constitution shares some characteristics with the other constitutions I refer to in the article as clarified by the references

Liberal constitutionalism was centred on civil and political rights, on the inviolability of private property, and on the individual abstracted from its reality. In fact, it was the ripe fruit of the rise of the bourgeoisie. Social constitutionalism instead came at the end of a process of integration of the mass of labourers in the political frame as a result of their striving.⁷² For this reason, first of all, it is a wave of constitutions that opt for the institutionalisation of the social question valorising opposing normative and political claims. Secondly, social constitutionalism centres labour and the dignity⁷³ of the human person and provides for the possibility of restricting private property and private economic freedoms for social or general interests.⁷⁴ In other words, 'human dignity is established as a principle extending not only to the political, but also to the economic and social spheres' and 'contributes to the goal of taming the markets'.⁷⁵ Therefore any sort of objectification or instrumentalisation is prohibited. Moreover, a link is built between dignity and equality. If one compares liberal constitutionalism with post-war social constitutionalism, dignity is to freedom as substantial equality is to formal equality.

in the following footnotes. Also, it is important to underline that, since Germany is a Federal Republic, Landers also have their Constitutions, each with their own peculiarities.

⁷² Cfr. G. Zagreblesky, *Fondata sul lavoro*, Einaudi, Torino, 2013.

⁷³ References to the dignity of the human person can be found in many European constitutions. For example in Art. 1 of the Portuguese Constitution, which adds that the Republic is committed to a free, just and cohesive society; Art. 1 of the German Constitution (human dignity is intangible); Art. 10 of the Spanish Constitution, according to which 'The dignity of the person, and the free development of the personality are the foundation of the political order and social peace'; Art. 23 (1) of the Belgian Constitution ('Everyone has the right to lead a life in accordance with human dignity'); and Art. 2 of the Swedish Constitution for which social rights are means to ensure welfare and a dignified life to everyone. In the Greek Constitution (art. 2.1) 'Respect and protection of the value of the human being constitute the primary obligations of the State'. The Italian Constitution also contains references to dignity in Art. 3 (2) as a point of reference for the equality principle and at Art. 41 as a limit to economic freedom. B. Veneziani deeply analysed dignity as a constitutional meta-principle in *Il lavoro tra l'ethos del diritto e il pathos della dignità*, in M. Napoli (ed.), *La dignità*, Vita e Pensiero, 2011, 3-68.

⁷⁴ Among others, G. Ferrara, *I diritti del lavoro e la costituzione economica italiana ed in Europa*, *Costituzionalismo.it*, 3, 2005. The Italian constitution provides for those restriction at the second paragraph of Art. 41 where it is stated that the private economic initiative cannot be conducted in conflict with social usefulness or in such a manner that could damage safety, liberty and human dignity and that private economic activity can be oriented and coordinated for social purposes. The constitution of Greece states at Art. 17 that rights deriving from property shall not be exercised against the public interest. Similar constitutional provisions include: Art. 63 (2) Portuguese Constitution; Art. 33 (2) Spanish Constitution; Art. 16 Constitution of Belgium; and Art. 18 Swedish Constitution. Also, the German constitution includes a provision according to which the use of property shall, at the same time, serve the good of the community (Art. 14.2). The Charter of Fundamental Rights of the European Union contains a limit to private property in the public interest (Art. 17) whereas the previous article merely states that economic freedom is recognised without identifying any possible limit.

⁷⁵ M. Dani, *The Subjectivisation of the Citizen in M. European Public Law*, in L. Azoulai, S. Barbou des Places, E. Pataut (eds), *op. cit.*, p. 63

The Charter of Fundamental Rights of the European Union contains a Chapter dedicated to dignity which is however understood as the right to the integrity of the human person according to the ancient principle of *habeas corpus*. There is, instead, no connection between dignity and the right to work, to a fair wage or to the principle of substantive equality. In the ECJ's case law, 'the dignity of the person is used not as a direct source of rights but as a justificatory value which serves as a basis for broadening the scope of the provisions on free movement of workers but also for giving a strict reading of the limitations on free movement'.⁷⁶

A second important characteristic of social constitutionalism is the transformative character of the new arrangement that was crystallised in those Constitutions. The State takes over the issue of the 'substantial equality'⁷⁷ that is a real form of equality that takes into account that the legal person is an abstraction. Thus, the State's institutions are obliged to intervene in society and in the economic field to reach the inclusion of every citizen, regardless of their starting point or constraints descending from their social condition. Greater well-being for all can be reached, according to this principle, only by removing obstacles that prevent the development of any individuals and the participation of the whole population of the political, economic and social organisation. This implies the awareness of the structural fallacy of the market that is not conceived as the best instrument to utilise the knowledge that is distributed among countless individuals that float in the free market, as Hayek thought. Therefore private economic initiative may be restricted if necessary to achieve general objectives, and in any case, the conflict between different social needs and positions is considered valuable and allowed (for this reason the right to strike and similar conflict tools receive a large spectrum of feasibility).⁷⁸ In other words, the post-war constitutions are not the

⁷⁶ L. Azoulay, S. Barbou des Places, E. Pataut (eds) Being a person in the European Union, in *Constructing the Person in the Eu Law* (2016), *op. cit.*, p. 7.

⁷⁷ This principle is enshrined in Art. 3(2) of the Italian Constitution ('It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country'). A very similar wording can be found in Art. 9(2) Spanish Constitution and Art. 9 let. d) Portuguese Constitution. There is no equivalent to the principle of substantive equality in the Charter of Fundamental Rights of the European Union. On the contrary, the principle of non-discrimination on grounds of 'property' is introduced, which has no equivalent in the Constitutions of the Member States.

⁷⁸ Article 28 of the Charter of Fundamental Rights of the European Union differs from some of the constitutional charters of Member States (e.g. Italian and Spanish) in that it states that employers and employees are on an equal footing

mature fruit of a fully completed social revolution as was the case with the bourgeois constitutions, but instead prefigure the vision of a society yet to be fully realised. Therefore, from this point of view, democratic (or social) constitutionalism is at odds with neoliberal thought, especially following Hayek and the Chicago school. This is because neo-liberalism is conservative in relation to society. It considers the market outcomes to be the best achievable result and therefore fair *per se*. It thus tends to preserve the *status quo* or, worse, magnifies economic differences.

As seen in the previous sections, neoliberals appraise individuals' development too, but they are only concerned and interested in the potential development of that part of the individual which is economically valuable as an asset for the economy. This is based on a couple of assumptions: the only dimension of the human being that is considered a herald of future personal satisfaction is the economic one; and only that dimension is measurable from an economic standpoint and so worth being considered in public policies.

The Constitutions analysed in this article give the labour of people a meaning that is entirely different when compared with that which stems from the case law on the economic activity presented in section 3, which seems much closer to the neoliberal point of view. The constitutional provisions which take into account work performance all have as their object the protection and enhancement of the person. Work serves the development of the individual,⁷⁹ and the latter has a duty to contribute to society not from an individual perspective but from a perspective of solidarity: 'At a private level, work is the most tangible way through which individuals express their personality. At a public one, work is viewed as the source of the sacrifices through which individuals contribute to the welfare of the society and, ultimately, may claim their fair share of it'.⁸⁰ A priest or a homemaker, for instance, perform work that is typically not placed on the market, but which has a social function that is worthwhile for the society.

regarding collective action to defend their interests. The economic and social inequality between the parties of an employment relationship disappears and the right to lock-out is enshrined in the same way as the right to strike.

⁷⁹ The free development of the personality is one asset at the foundation of the political order and social peace according to Art. 10 of the Spanish Constitution. According to the Greek Constitution, 'Everyone has the right to develop their personality freely and to participate in the social, economic and political life of the country [...]' (Art. 5). For the Italian Constitution, the development of anyone personality is safeguarded not only individually but also within the social groups where it is expressed. Art. 26 of Portugal's Constitution and Art. 2 of Germany's guarantee everyone the right to develop their personality.

⁸⁰ Sic M. Dani, op. cit. p. 60 who refers to C. Mortati, *Il lavoro nella costituzione*, XXVIII, *Diritto del lavoro*, 1954, pp.149-156.

Also, those Constitutions always ensure that everybody can choose among many professions or activities according to their will and potential.⁸¹ It is not the market that dictates what is a good 'capital' to develop or what is useful or, on the contrary, useless for the individual and society. Freedom is understood in a new way that relates to the concrete chance to search for a meaning or the pursuit of personal happiness despite initial economic and social conditions. At the same time, each person is placed within a society and is not considered only in their individuality. Society becomes 'great' if everyone can contribute to it rather than surfing on a perfect competition market. There is no spontaneous order in human society since the latter is a social construction.

The European legal framework started from a reversed order compared to the political arrangements enshrined in the Constitutions of Member States, that is to say with the economy dictating the policy to be followed in order to create an efficient market and with freedom and rights deformed in the light of this design's needs. 'Economic constitutionalization has influenced developments within other sectoral dimensions as well. The original impetus for social constitutionalization arose from the needs of economic constitutionalization, such as facilitating realization of free movement of workers; subsequently, the submission of healthcare and social security to constitutional free movement and competition law has narrowed the institutional and financial leeway'.⁸²

The lessons of history have been forgotten. Constitutional rights and specifically social rights surround the needs of the citizens in their material and concrete condition. In parallel and in a reverse order, economic freedoms have been placed in the EU legal system to protect the efficiency of the free market. The consequences of the 'economic constitution', which is still the first real constitutional matrix of European

⁸¹ Art. 12 of the German Constitution states the right to freely choose profession, job and education, as does Art. 23 of the Constitution of Belgium. According to the Constitution of Portugal (Art. 58): 'In order to ensure the right to work, the state is charged with promoting: a) The implementation of full-employment policies; b) Equal opportunities in the choice of profession or type of work, and the conditions needed to avoid the gender-based preclusion or limitation of access to any position, work or professional category'. The right to work is protected by Art. 2 of the Swedish Constitution; Art. 4 of the Italian Constitution; and Art. 22 of the Constitution of Greece. Art. 35 of the Spanish Constitution ensures the right to employment, to free choice of profession or trade, to advancement through work. Moreover, both the Spanish and Italian Constitutions disconnect remuneration from pure market value by linking it to a decent life.

⁸² K. Tuori, *European Constitutionalism*, Cambridge University Press, 2015, p. 320. The author also adds that the primary constitution enjoys *prima facie* prevalence in inter-dimensional conflicts, in, for instance, conflicts between different types of rights – such as economic and social rights (Id. p. 322).

law, is one of the most important factors that explains why social rights are still crippled, despite their formal proclamation in the *acquis communautaire* through numerous instruments. Thus, it is time to consider whether it is easier to straighten out a badly grown tree (as is the current course of action) or whether it is necessary to recover the roots that made the plant of the European democracies grow strong. The author of this article is in favour of the second option. Rephrased more simply, the European compromise requires a deep revision to break it free from a specific economic ideology. This revision should instead be grounded in the evolution of the constitutional traditions of Member States.