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**EUROPEAN CITIZENSHIP, LABOUR LAW AND  
SOCIAL RIGHTS IN TIMES OF CRISIS**

## KEYWORDS

Citizenship, European Union, social rights, labour law, solidarity

## ABSTRACT

### **EUROPEAN CITIZENSHIP, LABOUR LAW AND SOCIAL RIGHTS IN TIMES OF CRISIS**

The paper explores the limits and potentials of European citizenship as a transnational form of social integration, taking as comparison Marshall's classical analysis of the historical development of social rights in the context of the national Welfare State. It is submitted that this potential is currently frustrated by the prevailing negative-integration dimension in which the interplay between Union citizenship and national systems of Welfare State takes place. This negative dimension pervades the entire case law of the Court of Justice on Union citizenship, even becoming dominant – after the famous *Viking* and *Laval* judgements – in the ways in which the judges in Luxembourg have built, and limited, what in Marshall's terms might be called the European collective dimension of 'industrial citizenship'. The new architecture of the economic and monetary governance of the Union, based as it is on an unprecedented effort towards a creeping constitutionalisation of neo-liberal politics of austerity and welfare retrenchment, is destined to strengthen the de-structuring pressures on the industrial-relations and social protection systems of the member States. The conclusions sum-up the main critical arguments and make some suggestions for an alternative path for re-politicising the social question in Europe.

## INTRODUCTION

European citizenship has celebrated its twentieth anniversary in the most difficult and uncertain moment of the Union's crisis. The real economy has now been fully swayed by the financial crisis, far beyond the borders of the Euro-Mediterranean area, with devastating social effects in the countries that have been affected the most. The prolonged vertical drop of the gross domestic product in Greece, the epicentre of the crisis, has been intertwined with a dramatic and unprecedented growth of levels of unemployment and social suffering, in a destructive vortex, to the point of validating the perception, now widespread among not only the bewildered public opinion of that unfortunate country, that the rescue of the Union has determined a cure that is worse than the illness that it sought to remedy.<sup>1</sup> The recent general elections in Italy, which is a key country for the stability (and indeed the survival) of the Euro-zone, have produced a situation of fragmentation and political instability that is both unprecedented and disquieting, in which among the few elements of certainty stands a widespread Euro-scepticism, if not an openly anti-European mood, that is also unprecedented in the history of the country's public opinion which was historically among the most favourable towards a strengthening of the integration process. With the worsening of the economic and social crisis, the very tenacious confidence in Europe as a (positive) 'external constrain', which has supported Italy's efforts towards reforms from the country's admission into the Euro-zone in the second half on the nineties (Ferrera and Gualmini 1999) until the most recent experience of the technocratic government headed by Mario Monti (Goulard and Monti 2012) seems to have declined. But everywhere in Europe, in recent years, a sense of frustration and distrust has shown to prevail towards the Union and its frantically sought capacity to respond to the crisis, without finding truly effective landings.

In such a scenario – as a keen observer of the European scene elegantly disclosed – the idea of European citizenship as a '*statut d'integration sociale*' (Azoulay 2010) seems to take on the savour of a counter-intuitive paradox that is capable, if anything, of illuminating by contrast the miserable state reached by the integration process more than twenty years after the entry into force of the Maastricht Treaty.

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<sup>1</sup> See Scharpf (2011).

But like any (at least apparent) paradox, such a representation also contains an essential core of truth, from which this paper intends to take its commencement in order to place the relationship between European citizenship, labour law and social rights in a broader prospective than the one prompted by a resigned look on the current crisis of the Union. That is what we will try to accomplish in the pages that follow, firstly through the – apparently contradictory – lines along which the case law of the European Court of Justice (ECJ) has built the relationship between European citizenship, labour law and access to social rights (§ 2 e 3).

Moreover, today this relationship – which has been built by the Court primarily around the transnational dimension of European citizenship – is part of a political-institutional framework, in some respects much more complex and articulated than the one established by the Maastricht Treaty, which nonetheless had foreshadowed scenarios of differentiated integration into the inner core of a project for an ever closer union among the European peoples (§ 4). On one hand, in fact, this relationship is destined to be affected by the new constraints arising from the complex architecture of the European economic and monetary governance, which has been redesigned – most recently with the entry into force of the *Fiscal Compact*<sup>2</sup> – to counteract the effects of the financial crisis. On the other hand, such an architecture, which is widely entrusted to unprecedented intergovernmental mechanisms lying outside the institutional framework of the Union, opens up new scenarios in which prospects of differentiated integration could resume effect with potential consequences on the social dimension of European citizenship. These scenarios will have to be carefully explored, along with the new framework of the reformed economic constitution of the Union, before attempting to submit any concluding remarks on the relationship between European citizenship, labour law and social rights in times of crisis (§ 5).

Therefore, the argument will proceed as follows. At first the potential of European citizenship as a transnational form of social integration will be outlined, taking as comparison Marshall's classical analysis of the historical development of social rights in the context of the national Welfare State. In fact, in this perspective we shall argue that Union citizenship may play a potential role as a transnational guarantee for basic social and labour rights that underpin the European project. However, we will argue that this potential is currently frustrated by the prevailing negative-integration dimension in which the interplay

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<sup>2</sup> The Treaty on stability, coordination and *governance* of the economic and monetary Union, signed on 2 March 2012 by all the member countries of the Union except United Kingdom and Czech Republic.

between Union citizenship and national systems of Welfare State takes place. This negative dimension pervades the entire case law of the Court of Justice on Union citizenship, even becoming dominant – after the famous *Viking* and *Laval* judgments – in the ways in which the judges in Luxembourg have built, and limited, what in Marshall's terms might be called the European collective dimension of 'industrial citizenship'. The new architecture of the economic and monetary governance of the Union, based as it is on an unprecedented effort towards a creeping constitutionalisation of a neo-liberal politics of austerity and welfare retrenchment (Brancaccio, Passarella 2012; Streeck 2013), is destined to strengthen the de-structuring pressures on the industrial-relations and the social protection systems of the member States. The conclusions will sum-up the main critical arguments and make some suggestions for an alternative path for re-politicising the social question in Europe.

## 1. UNION CITIZENSHIP AS A TRANSNATIONAL STATUS FOR SOCIAL INTEGRATION

The idea of citizenship as a status for social integration is still owed to the seminal reconstruction done by Marshall in the early fifties of the twentieth century.<sup>3</sup> When Thomas H. Marshall first described it in the aftermath of the Second World War, 'in the context of the great transformation of organized labour rights and systems of protection of individuals against the typical risks of the proletarian condition' (Balibar 2012, 66), the notion of social citizenship bore the promise of integration and recognition of the majority of the population living from its work, and upon which the European Constitutions of the time founded the revival of the State as a democratic and social Welfare State<sup>4</sup> (Milward 1992; Judt 2005).

In Marshall's reconstruction, the full embodiment of social rights in the citizenship *status*, with the recognition of 'a universal right to real income which is not proportionate to the market value of the claimant',<sup>5</sup> in fact, presupposes the full maturity of 'a secondary system of industrial citizenship',<sup>6</sup> in which the role performed by the trade union through collective bargaining is directly linked to the assertion of fundamental rights and, along with the role played by the State, it

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<sup>3</sup> See Marshall, Bottomore (1992). The first edition of the work is from 1950.

<sup>4</sup> Think of the Italian Constitution of 1948 and the German one of 1949. Cf. Costa (2001, 369 ff.).

<sup>5</sup> Marshall, Bottomore (1992, 28).

<sup>6</sup> Marshall, Bottomore (1992, 26).

assumes 'the guise of an action modifying the whole pattern of social inequality'.<sup>7</sup> But before that, as recently emphasized by Maurizio Ferrera (2012a, 17), the making of a modern system of social citizenship, in that analysis, presupposed the accomplishment of a double process: on one hand, a 'geographical fusion', namely a unification of Welfare State structures within national borders, in which the action of levelling and equalization based precisely on the *status* of citizenship could operate; on the other hand, a 'functional separation', with the creation of administrative bodies responsible for the provision of social benefits and the parallel emergence of a system of industrial citizenship, based on the collective action of organized labour.

Even today, these assumptions are clearly inapplicable to the notion of European citizenship, also since the Court of Justice has decisively reconfigured it as a privileged key for accessing national social spheres. The European integration process, in fact, has been historically founded on assumptions somewhat reversed compared to the dual process of geographical fusion and functional separation, *within the nation-State*, described by Marshall in his historical analysis on the gradual building of social citizenship rights in Europe during the twentieth century. This structural diversity of assumptions has pre-empted the scope of relevance of European citizenship, which today may accomplish the function of social integration – as suggested by Loïc Azoulay – only in the specific and limited sense of defining a transnational *status* of access to social rights as guaranteed within the different solidarity-redistributive national systems in favour of nationals of member States who move within the Union.<sup>8</sup>

The Rome Treaty of 1957 envisioned the integration process along a path of geographical fusion and functional separation in some way specular (and complementary) to the one described by Marshall in relation to the building of a national social citizenship. The unification process was limited to the construction of a common market, geographically co-extended to the territory of the founding member States of the Community and based on the free movement of factors of production (in particular on the freedom of movement of workers and enterprises) and on the guarantee of a competition not distorted by unfair practices engaged by private economic actors or unlawful interference by public authorities.<sup>9</sup> The idea of the Rome Treaty was that the unification process, under the aegis of the fundamental

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<sup>7</sup> Marshall, Bottomore (1992, 28).

<sup>8</sup> Cf. Giubboni (2012, 177 ff.).

<sup>9</sup> Cf. Egan (2002).

principles of the Community economic constitution,<sup>10</sup> was to be limited to the market sphere, without the involvement of the social systems of the founding States, which were supposed to maintain their functional separation within the national borders. Geographical fusion of the common market and functional separation of the national Welfare State systems constituted the EEC as a 'dual system' (Scharpf 2002, 646), where the full effectiveness of the principles enshrined in the Community economic constitution should have been rooted in an equally accomplished guarantee of social rights at the national level, without affecting social and redistribution policies democratically undertaken by the several member States.<sup>11</sup>

Social systems autonomously structured according to the different preferences of the democratic processes taking place within the single member States were seen as a necessary prerequisite of legitimacy of the same Community economic constitution, in so far as they allowed it to perform its function of legal construction of the common market, according to criteria of efficient allocation of factors of production and guarantee of fair competition between economic agents, without trespassing in areas characterized by discretion lying in redistributive policies based on social justice. The common market's legal order was being embedded – and therefore legitimized – within the systems of national social protection that were able to absorb any negative social effects deriving from the economic integration process. The main idea, expressed in the Ohlin Report and also in the one drawn by Paul Henri Spaak for the Messina Conference, was that, if implemented with the necessary gradualism, economic integration would have automatically promoted a harmonization in the progress of national social systems (Art. 117 of the EEC Treaty). In principle, such a spontaneous levelling up of national social systems did not require supranational measures of social policy, which were only provided for in exceptional cases where social dumping had prevented the unfolding of the dynamics of convergence towards higher standards of protection.

Further on, we shall refer to the reasons that, starting from the early nineties of the last century and by decisive aspects, led to the crisis of the model inspired by canons of classical *Ordoliberalismus*. The embryo of today's idea of European citizenship as a transnational *status* of social integration was already present *in nuce* in that model, and particularly in the provisions that the Rome Treaty destined to the

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<sup>10</sup> In this context, the concept of economic constitution represented, on a supranational scale, the projection of the principles developed by the German *Ordoliberalen*, who were very influential at the time the European integration process started, well beyond the borders of their country, also thanks to some prominent figures of Germany's political life in the fifties and sixties of the twentieth century. See Joerges (2004), Rödl (2010), and Deakin (2012, 21 ff.).

<sup>11</sup> Cf. Ferrera (2005) and Giubboni (2006).

freedom of movement of workers, in the terms specified by secondary Community legislation.<sup>12</sup> In fact, along with the right to access the labour market of the host country, the Community migrant worker has always benefited also from a guarantee of full integration, or rather of assimilation (Dougan and Spaventa 2005, 189), within the social protection system of the host State.

The European Court of Justice has always assured the highest *effet utile* to migrant workers' transnational entitlements to social integration within the host State. Such a guarantee of socio-economic integration served as a means for the full deployment of one of the fundamental freedoms enshrined in the Treaty and, at the same time, it was harmonically included in a model for the construction of an integrated market based on the full preservation of the autonomy of national social protection systems. Equal access of migrant workers to the social rights laid down by the host member State, also through the coordination of the social security systems of the countries involved (as provided for since Regulation No. 3/1958),<sup>13</sup> not only did not interfere with the 'social sovereignty' of the member States but it helped to guarantee it by assuring full territorial application of national labour law and social welfare. This explains precisely why such a guarantee has been precociously interpreted extensively by the case law of the Court of Justice starting from the early sixties of the last century.

This well-known case law does not need to be analysed in this context.<sup>14</sup> Here it is sufficient to recall how, on one hand and in absence of an express legal definition, the Court has adopted a very broad notion of employee, up to encompassing in such a definition all activities, having any minimal effective economic consistency, carried out under the direction of another person; on the other hand, it allowed the holders of this fundamental freedom of movement, and their families, to access the whole panoply of social rights guaranteed to the citizens of the host State in conditions of full equality, even beyond situations and entitlements linked to the protection of the employment relationship. On the first side, the Court was able to extend the guarantee of equal treatment in the host State also to atypical workers, and in particular to part-time (even minimal) and fixed-term workers, well in advance in relation to the unstoppable expansion of non-standard types of employment in national labour markets during the last decade;<sup>15</sup> on the second side, according to Art. 7 of Regulation No. 1612/68, the notion of

<sup>12</sup> In particular by Regulation No. 1612/68, repealed and replaced today by Regulation No. 492/2011.

<sup>13</sup> The rules governing the coordination of national social security systems are now contained in Regulations No. 883/2004 and No. 987/2009.

<sup>14</sup> Cf. Barnard (2010, 263 ff.) and Giubboni and Orlandini (2007, 11 ff.).

<sup>15</sup> See e.g. case 53/81, *Levin*; case 66/85, *Lawrie-Blum*; case C-357/89, *Raulin*.

social advantage also undoubtedly included social assistance schemes beside social security ones, such as the guarantee of a minimum income provided for on the basis of a universalistic principle of national solidarity.

In this vein, 'social integration into the host society is seen by the ECJ as an instrument of promoting participation in the EU internal market and its economic goals of free movement of factors of production, even if their productivity would be rather low. The rationale behind this case law has to do more with the internal market than with combating against social exclusion, even if this actually contributes to the latter' (Verschuere 2012, 217). A form of social integration in the host member State – extended to individuals whose contribution to the internal market was actually only potential or very indirect – is thus already firmly assured by the classic case law of the Court of Justice on the freedom of movement of workers. This expansive tread of the ECJ's case law has been further consolidated by secondary Community law, and in particular by the rules on the coordination of the national social security systems, which since the seventies have followed a line of further expansion of the sphere of application (and therefore inclusion) *ratione personae* of the tools of transnational access to the welfare systems of the member States.

If we read it in light of the historical evolution briefly presented here, starting from the leading case *Martínez Sala* to the more recent *Zambrano* judgement,<sup>16</sup> through which the Court has extended the principle of equal treatment in the access to social rights recognized in the host country to all economically inactive European citizens, then it seems fair to say that this case law does nothing but generalise the status of social integration already widely acquired by EU law on the free movement of workers. By considering being a citizen of the Union as the fundamental status of a person in the supranational order,<sup>17</sup> this case law undoubtedly has the merit of universalizing<sup>18</sup> the social integration logic hitherto anchored to the functioning of the internal market, also including people who do not carry out an economic activity in its protective *status*, centred on the principle of equal treatment. In fact, the main innovation in this case law is the universal projection of

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<sup>16</sup> See respectively case C-85/96, *María Martínez Sala vs. Freistaat Bayern* and case C-34/09, *Gerardo Ruiz Zambrano vs. Office national de l'emploi*.

<sup>17</sup> According to the well-known formula consolidated by the judgement of the Court of Justice in case C-184/99, *Rudy Grzelczyk vs. Centre public d'aide sociale Ottignies-Louvain-la-Neuve*.

<sup>18</sup> In some cases, far beyond what a literal interpretation of secondary law, and particularly of Directive 2004/38/EC, would allow, but – obviously – still within the scope of the European membership, which requires the possession of the citizenship of a member State of the Union (and, therefore, excludes citizens of third countries).

the transnational model of social solidarity already foreshadowed by the Rome Treaty in favour of migrant workers within the Community in a way that, as such, was still related to the actual functioning of the common or internal market.

In this case-law some commentators have recognized a change in the legal paradigm of European social solidarity.<sup>19</sup> If the access to social protection systems in the member States was initially functional to the effectiveness of the common labour market, according to this case law, it now becomes a self-constitutive element of Union citizenship, as a *status* of social integration that is completely separate from a market-rationale and from the original idea of *homo oeconomicus* (Pinelli 2007, 186). According to this analysis, a paradigm-shift has to be detected from a selective and category-based model of 'market solidarity' (De Witte 2012) to the recognition of 'a transnational personal status' (Azoulai 2012, 8), which establishes a general claim of social integration in the member State of the Union in which the European citizen freely decides to move to, not unlike what happens in federal-polities.

However, even by sharing such an opinion, we cannot avoid highlighting the intrinsic limits of a model of solidarity that – being *transnational* and *not supranational* (Pinelli 2007, 190) – fails to ensure economically inactive European citizens an unconditional freedom of residence in the host country, and, correspondingly, the right to access the social protection system of that State on the basis of complete equality of treatment with its citizens, at least until the person has acquired the *status* of long-term resident under Art. 16 of Directive 2004/38/EC. In fact, on one hand, the right to reside in another member State for a period exceeding three months is, at least in theory, conditional upon the reverse-means-test of having a comprehensive health insurance and more importantly sufficient economic resources to ensure that the economically inactive citizen does not become a burden on the welfare system of the host State (Art. 7 of Directive 2004/38/EC).<sup>20</sup> On the other hand, transnational access to the systems of social solidarity in the member States under equal treatment follows an incremental criterion, also in the Court's case law, according to which, whenever the Union citizen does not carry out an activity that is useful for the internal market, the person concerned shall prove a sufficient degree of integration in the society of the host country (or, for

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<sup>19</sup> E.g. see Golyner (2006).

<sup>20</sup> This implies the right of the host State to expel those who become an unreasonable burden for its social assistance system (although such a power cannot be exercised in the guise of an automatic-punitive-reaction against the needy European citizen and must be yielded in accordance with the principle of proportionality according to Art. 14.3 of the Directive).

those seeking employment, the existence of a real link with the labour market of that country).

These limits have a precise rationale: since we are not dealing with a supranational form of social solidarity based on the partial pooling of the resources deriving from the different national social protection systems, but only with the creation of a certain degree of financial solidarity towards needy migrant citizens of another member State,<sup>21</sup> the host State may legitimately require that access to its welfare system be based on a minimum substrate of social integration *already legitimately acquired* by the individual (in order to prevent an opportunistic use of the freedom of movement for the mere sake of benefit-tourism) and which, however, does not turn into an unreasonable burden for the national social assistance system. In this perspective, the genuine link of integration within the society of the host country becomes a sort of 'counter-limit applied by the Court against the limits that member States can legitimately be opposing to their financial solidarity obligations towards Union citizens' (Azoulai 2010, 18).

Therefore, the exclusively transnational dimension of social solidarity connected to European citizenship must deal with an inherent tension which inevitably reappears every time that the freedom of movement, not functional to the internal market, ends up impinging on the public finances of the national welfare system. Since this tension cannot be resolved from the perspective of a *status* of social integration (and, thus, of a solidarity system) that is truly supranational (*i.e.* regulated and at least partly financed directly at the Union level), it must be dealt with by using similar techniques to those characterizing the balance between fundamental freedoms and limits founded on overriding reasons of general interest legitimately raised by the member State concerned. The peculiarity, in this case, is that the reasons of general interest, in light of which the States are authorized to limit the freedom of movement and the subsequent claim to equal social treatment of economically inactive European citizens, are based on the need to ensure the sustainability of their social protection systems, or rather to preserve the redistributive capacity of their national systems of social solidarity. In this perspective, it can be said that the active or expansive use of the principle of European transnational solidarity becomes tense – and, therefore, needs to be balanced – with the defensive use of the principle of national social solidarity (Barnard 2005) in a similar way to what happens in the context of the internal market (Barbou des Places 2012). The core of these balancing attempts is represented by the

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<sup>21</sup> As explained by the Court, especially at paragraph 44 of *Grzelczyk*.

graduation in the principle of proportionality in relation to concrete facts of individual cases. And similarly to the context of the free provision of services in the internal market, such attempts of balancing the interests at stake are systematically biased, by virtue of a strict application of the principle of proportionality,<sup>22</sup> in favour of the individual freedom of movement of the (economically inactive) European citizen.

Thus, the individualistic root of the *status* of social integration conferred to the individual through European citizenship comes into conflict with the collective foundation of the solidarity systems operating within the nation-State (Somek 2011, 14 ff.; Williams 2010, 132 ff.). With the result that, even on behalf of social integration for European citizens in light of the principle of equal treatment, the constitutional social-freedom entrusted to the European mobile citizen is likely to exert additional pressure on the heavy-burdened welfare systems of the member States, fostering the social-levelling-down dynamics on-going within these systems. While there is little evidence of the emergence of a supranational dimension of Union citizenship,<sup>23</sup> the de-bounding logic of openness dominant in its transnational dimension is likely to become an additional destabilizing factor for the national Welfare State systems, which are already burdened by the consequences of the economic and financial crisis and by the measures that the Union itself demands to adopt in order to cope with them. And lacking the socio-political requirements for the emergence of an even minimal pan-European solidarity-system at the Union level, 'the paradox of the *civis europaeus* status, which has not reached a complete legal consistency yet, and which could already summarize the crisis of the whole European project, is no surprise' (Pinelli 2007, 198).

## 2. FREE MOVEMENT OF SERVICES, LABOUR LAW AND COLLECTIVE SOCIAL RIGHTS IN THE INTERNAL MARKET

The fragility of the status of social integration guaranteed by the Union citizenship in a merely transnational dimension emerges in a

<sup>22</sup> Most recently see Court of Justice, 26 October 2012, case C-367/11, *Déborah Prete vs. Office national de l'emploi*.

<sup>23</sup> Attempts to strengthen the supranational dimension of Union citizenship by applying the rights connected to this *status* in situations lacking any degree of trans-nationality and cross-border element were ambiguously made in the *Zambrano* judgment. The potential scenarios envisioned by that ruling, immediately downsized by the *McCharty* judgement of 5 May 2011 (case C-434/09), were further limited by subsequent rulings of the Court of Justice: see judgements of 15 November 2011, case C-256/11, *Murat Dereci vs. Bundesministerium für Inneres*, and of 6 December 2012, joined cases C-356/11 and C-357/11, *O., S. vs. Maahanmuttovirasto and Maahanmuttovirasto vs. L. Cf. Spinaci* (2011).

conspicuous way when its important external limits of application are taken into account. The example of the posting of workers under a cross-border provision of services within the internal market is paradigmatic of those limits and it illustrates, better than any other case-study, the contradictory outcomes of a notion of European social citizenship that is framed within the individualistic conceptual landscape of the freedom of movement. The four well-known judgements *Viking Line*, *Laval*, *Rüffert* and *Commission vs. Luxembourg* became famous for having altered, probably irreversibly, the relationship between national social systems and internal market law, as originally configured by the Rome Treaty with the system-decision of 'de-coupling' the two spheres (Scharpf 2002) by maintaining a strict functional separation between them. That case law – which brings to completion the transformation of the constitutional doctrines of the internal market implemented by the Court at the beginning of the nineties with leading cases, such as *Rush Portuguesa* and *Säger* – has inverted the original constitutional balance between market unification and the preservation of the autonomy of the national systems of labour law, with a paradigm-shift 'from ordoliberal to neoclassical conceptions of the market in EU law' (Deakin 2012, 21).

As originally conceived, the autonomy of the social systems of the member States is a prerequisite for the establishment of the common market, as it is capable of providing the necessary social counterbalance to the phenomena of economic dislocation induced by the European market integration at national level. In this context, accepted in the Treaty of 1957 on the basis of the theoretical-political infrastructure contained in the Ohlin and Spaak Reports, a European labour code is neither necessary nor desirable (Nogler 2010), since the diversity of the national regulatory models in itself is not a factor of distortion of competition and of free movement of resources of production within the common market. Within this concept, a Community selective harmonising intervention – in an upward logic of harmonization of national systems – may be rather appropriate in exceptional cases in which the different labour law standards of protection do not reflect a real difference in the levels of work productivity nor can they be neutralized by adjusting the exchange rates, therefore being able to determine an actual distortion of competition in the form of social dumping.

This idea is simply overturned by the neo-liberal or neoclassical judicial turn undertaken by the Court of Justice. 'The common idea underpinning *Viking*, *Laval* and the subsequent case law in the same line is that national-level labour law rules are capable of constituting a distortion of competition within the internal market and, as such, must

be justified by reference to a strict test of proportionality' (Deakin 2012, 24). In particular, the strict application of the so-called market access test also to the obstacles to the free provision of services deriving from the higher standards of labour protection in force in the country in which the service is supposed to be carried out (Davies 2010), puts the system of labour law of that State under a pressure which is completely inconceivable in the constitutional design originally taken up by the Rome Treaty. In the system laid down by the EEC Treaty, as promptly implemented by Regulation No. 1612/68, in fact, no exception was made to the full territorial application of national labour law of the host country according to the principle of equal treatment on grounds of nationality, also in cases of temporary mobility of posted workers within a transnational provision of services. On the contrary, the new *Laval* ideology not only bars the full application of the whole labour law (legal and collective) rules of the host country to the worker temporarily posted within a provision of services, but, according to the Court's interpretation of Art. 3.7 of Directive 96/71/EC, it even prohibits raising the standard of protection above the threshold set by the rules on minimum protection of that State. In fact, in *Laval* and *Rüffert* the Court has clarified that the level of protection ensured to the posted workers according to Art. 3, par. 1, of the Directive is only the minimum protection guaranteed in the member State concerned. Therefore, pursuant to a very restrictive interpretation of the *favor*-clause provided for under par. 7 of Art. 3, the core of minimum protection set by par. 1 also ends up determining the maximum level of protection applicable to the posted worker. These rules, therefore, also determine the maximum level of protection within the very broad context of a transnational posting of workers. In this way, 'in *Laval* and in its later judgment *Rüffert*, the Court overturned the presumption in favour of the territorial effect of labour legislation, at least in the context of freedom to provide services' (Barnard and Deakin 2011, 260).

With the only exception of the core of mandatory rules of minimum protection, labour law was attracted within the regulatory competition in the internal market of services at the time when, with the great EU enlargement, the Eastern countries with weaker standards of protection and industrial relation systems entered the Union. The possibility of, at least partially, applying to posted workers the less-protective rules of labour law and the lower collective standards of the service-provider's country of origin has been considered co-essential to a proper functioning of the enlarged internal market, as a legitimate option of exploitation of the competitive advantage gained by eastern Europe's companies.

The overturning of the original idea of the founding Treaties produced by the affirmation of this neoclassical – or ‘ultra-liberal’ (Supiot 2011, 292) – conception of internal market law has important, and only apparently indirect, consequences on the idea of a European citizenship as a *status* of social integration. The first obvious consequence is the rupture of the universalistic and unifying claims of that idea, which actually requires the founding character of a European *status civitatis* in the new constitutional order of the Union, according to the same fundamental rights language of the Court’s case law. With the sole exception of the minimum rules of mandatory protection in the host State, the worker posted within a transnational provision of services is not entitled to benefit from this fundamental *status* entrusted to him by European Union law but is, rather, attracted towards the protective *status* of the economic freedom of the enterprise that is employing him in the cross-border provision of the service. We are in the presence of a subtle attempt of re-commodification of the posted worker, whose labour-force tends to be assimilated to the other productive factors organized by the employer provider of the service and indeed considered an important element of the competitive advantage enjoyed by the company in the internal market for its lower cost.

The main argument used for that purpose by the Court is that the worker posted within a temporary provision of services does not belong to the labour market of the host member State, but rather to the one of the country of origin. It is a weak argument, at least in relation to all the cases in which the work carried out under the posting, although temporary if considered in the very broad and quite undetermined sense endorsed by the Court’s case law, lasts for a long time, years even, in the territory of the host country. The key point is that the mobility of the worker posted within the employment relationship formally established in the country of origin is no-longer qualified under the aegis of the free movement of workers protected by Art. 45 TFEU, as originally conceived, but according to the freedom to provide services under Art. 56 of that Treaty.<sup>24</sup> In the Court’s reasoning this justifies an otherwise clear rupture of the principle of equal treatment, on which the idea of European citizenship as a transnational *status* of social integration for the person moving within the Union is based, even when such free movement takes place for reasons unrelated to market integration. The worker posted in the member State in which the service is carried out is not to be treated the same way as workers who belong to the labour market of that country (and with whom, in fact, he carries out his work), since the full extension of labour law of the host

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<sup>24</sup> Critically see Lo Faro (2010).

country would determine an illegitimate disproportionate obstacle to the economic freedom of the provider of the service. But this 'gross violation of the principle of equality' (Supiot 2011, 301; Lo Faro 2011, 207), in eroding the territoriality of national labour law (Barnard and Deakin 2011, 260; Giubboni 2012, 91 ff.), has precisely the effect of excluding the workers posted under the different elusive modes of a transnational provision of services from the *status* of social integration, to which Union citizenship would otherwise give access.

A second and no less important implication of the new course of law of the Court of Justice, returning to the historical analysis by Thomas H. Marshall, can be found in what we might call the fundamental conceptual aversion of the Luxembourg judges to the idea of 'industrial citizenship' as an essential element of the gradual affirmation of social rights in Europe in the framework of the national Welfare State. In *Viking* and *Laval*, the innovative affirmation of direct horizontal enforceability of the freedom of establishment and the freedom to provide services also to the obstacles deriving from trade unions' action in the exercise of their private-collective autonomy, for the ways in which the Court carried out the alleged balancing between conflicting interests, ended up rendering meaningless the concomitant statement (also new in the case law of the judges of Luxembourg) for which strike must be guaranteed as a EU fundamental right. Indeed, it is difficult to find traces of a true constitutional balancing of rights that are (at least) equally important at EU level in the Court's reasoning. In evaluating the Court's reasoning in *Viking* and *Laval* in light of the notion of balancing of rights that is prevalent within highly-developed national constitutional cultures,<sup>25</sup> as well as in the most reliable European theoretical thinking,<sup>26</sup> we cannot find any proper kind of balancing-exercise in the two judgements, as the Court's *modus operandi* did not deviate from the classical logical framework of application of a fundamental economic freedom in (any of) the situations where the national measure that is obstructing its exercise is properly related to (any) interests worthy of protection within the legal order of the member State. These interests – as always – will be acknowledged by the Court in so far as they comply with the principles of adequacy, necessity and (strict) proportionality. In spite of the declared reallocation of the right to strike and to take collective action within the circle of EU fundamental rights, 'what the Court has accomplished is not a balancing-act between two equally-footed rights, but a much more traditional scrutiny of compatibility between national rules and Community law' (Lo Faro 2010, 54). And in this logic, the aim is not to

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<sup>25</sup> For the Italian one see Morrone (2008).

<sup>26</sup> See Alexy (2010, 100 ff.).

carry out a balancing between equally-standing rights but, rather, to reaffirm a principle of hierarchy among legal systems according to the classical view of the primacy of Union law affirmed by the Court of Justice.<sup>27</sup>

Thus, the recognition of the right to strike as a EU fundamental right is concretely (and paradoxically) resolved in its 'de-fundamentalization' (Lo Faro 2011). If compared to economic freedoms, the right to take collective action, through which the constitutional systems of Finland and Sweden protect strike-actions in a logic that essentially relies on self-regulation of the collective actors themselves, loses its constitutional (or fundamental) nature and is evaluated 'the same way as any other national legal provision' (Lo Faro 2010, 54). In the Court's approach, the only fundamental right is the economic freedom while strike-actions, considered for their concrete effects as a national measure restricting access to the internal market, are basically downgraded to an exception – allowed under very limited circumstances due to a strict proportionality test – to the exercise of the freedom of establishment or the freedom to provide services.

This actual de-fundamentalization of the right to strike reveals a very simplistic (proto-liberal, rather than neoclassical)<sup>28</sup> view of the function of industrial conflict and more generally of the action of organized labour in the dynamics of the internal market. Obviously, if the right to take collective action is not abruptly denied by the Court, as in the classical proto-liberal model of post-revolutionary France symbolized throughout Europe by the *Le Chapelier* law,<sup>29</sup> certainly an idea of that right that sterilizes its potential effects is accepted, significantly reducing its margins of feasibility and, thus, discouraging (or at least making it very difficult to pursue) the construction of a social counter-power at a transnational level that is able to effectively counteract the increased market-power of enterprises (Rigaux 2009, 47 ff.), which are strategically advantaged by the new options opened up by regulatory (and fiscal) competition in the internal market (Barnard and Deakin 2011; Mückenberger 2011, 245). In particular, the extension to union collective actions of a strict proportionality test already, being conceived to limit the intrusiveness of the State public powers, threatens to undermine the effectiveness of the recourse to industrial conflict vigorously favouring the employer's interests. In fact, such a test quite naturally leads to a tendential (and paradoxical) assessment of illegitimacy of the strike-action at hands, the more effective it is in

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<sup>27</sup> See again Lo Faro (2010, 54 ff.) and Aliprantis (2010).

<sup>28</sup> In criticizing this case law, Joerges (2010, 75 ff.) has provocatively evoked the 'authoritarian liberalism' formula coined by Hermann Heller at the beginning of the Thirties.

<sup>29</sup> Angiolini (2009) provocatively makes such a reference.

pursuing the trade unions' or workers' collective strategies (Somek 2011, 37 ff.).

The de-fundamentalization of collective rights entails an inevitable weakening of the collective dimension in the construction of strong systems of social rights, which Marshall had effectively summarized in the formula of 'secondary industrial citizenship' in his historical analysis of the national Welfare State. But even in the different European and transnational context, the construction of new forms of solidarity among strangers, that are able to respond to the demands of the economic crisis and to the challenges of global markets, would still require the acknowledgement of strong collective rights (Sciarra 2013, 64 ff.), to an extent that, however, the Court of Justice does not seem to be ready to accept yet. In this restrictive approach taken by the Court on the rights to collective action in the internal market, we can grasp a thin but strong *fil rouge* with the case law on access to welfare benefits in favour of economically inactive EU citizens. Even this case law is indeed entirely framed and enclosed within the individualistic paradigm of the freedom of movement. And even when it opens the doors of transnational social justice to migrant EU citizens, it always does so in the name of the underlying pre-eminence of individual-actors' life-chances over the reciprocity-bonds of collective solidarity on which national welfare systems are based. Even when it favours opportunities of social integration in the welfare-solidaristic-communities of the member States (Azoulay 2010, 16; Ferrera 2011, 4), the right to move within the European legal space – imagined as a springboard to overcome the limitations imposed by national decision-making processes (Kingreen 2010) – ends up depreciating the essential collective dimension of the solidarity systems in the different countries, which imply bonds (and constrains) of reciprocity (between rights and corresponding duties), also determined on the basis of inevitable compromises between the different interests at stake in the distributive conflicts mediated by the national Welfare State.

Fundamental freedoms, including the one protected under Art. 21 TFEU, certainly play a typical anti-majoritarian role of crucial importance, which consists especially in correcting the parochialism of national decision-making, and which forces to internalize – in the name of the principle of non-discrimination – the legitimate distributive interests of those who, although external to national communities, however are entitled to be socially integrated in those spheres of solidarity as members of the broader and more inclusive European polity (Poiares Maduro 1998; Kingreen 2010; De Witte 2012a). This is obviously a fundamental – or rather founding – function of EU law and

European integration itself, as a project of transnational civilization (Weiler 1999; Id. 2003).

However, the Court's case law raises a distinct issue, simply made more visible and acute today by the most serious social and economic crisis in Europe since World War II. The seemingly unstoppable spillover of the anti-majoritarian logic of transnational opening to outsiders, that is typical of the fundamental freedoms guaranteed by the Court's case law, in fact, challenges the capability of the member States to maintain adequate levels of social protection and distributive justice within their borders at the same time as the new economic and monetary constitution of the Union, in responding to the financial crisis, imposes increasingly severe and pervasive supranational constraints on the national democratic Welfare State systems. Union law deprives member States of decisive levers of political-democratic control over their welfare systems, without being able to compensate for such a partial loss in delivering distributive social justice at a supranational level. The asymmetry between negative and positive integration, classically analysed by Fritz Scharpf (1999), has never been this evident in the history of the integration process. And with the deepening of this asymmetry, the European integration social deficit risks converting into a crucial factor of crisis for the Union's democratic legitimacy.

### **3. NATIONAL SOCIAL CITIZENSHIP AND NEW ECONOMIC AND MONETARY GOVERNANCE OF THE UNION**

We cannot analyse in detail the complex measures by which the member States of the Union, particularly those that are part of the Eurozone, have tried to come out of the financial crisis by reforming the European economic and monetary governance along with the introduction of instruments of financial aid for the countries that are exposed the most, in some cases up to the risk of default. From the initial measures taken in 2010 to face up to the crisis of the Greek debt, until the adoption of the Treaty on the European Stability Mechanism (ESM) and the entry into force of the so-called *Fiscal Compact*, the Union has undoubtedly made a considerable effort to provide appropriate instruments to counter an unprecedented crisis that has put at risk the survival of the single currency project.<sup>30</sup> These reforms – both those implemented within the institutional framework of the Union, and those adopted through recourse to the intergovernmental method and to the subtly revised instruments of international law – also present a common trait which is important to highlight for the

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<sup>30</sup> Which has become an essential part of the political project of an ever closer Union among the European people since the Nineties: cf. Moro (2013).

analysis developed here. The common trait – critically stressed in many analysis (among others see Scharpf 2011; Somek 2011; Tuori 2012; De Witte 2013) – can be described as the radicalization of the already noted trend to compress the autonomy of the member States (especially those whose common currency is the Euro) in respect of the management of their social policies, with an almost complete overturn of the constitutional constellation originally designed by the Rome Treaty. This trend is intensified, in particular within the new rules of the Stability Pact and of the *Fiscal Compact*, for it assumes the shape of a creeping de-politicization of the issues of social and distributive justice that are central in the definition of the very identity of the different welfare systems of the member States.

It is well known that the single currency project, as conceived by the framers of the Maastricht Treaty, has been built on a model that is exactly opposite to the one with a solidaristic nature *sensu lato*, which generally characterizes federal systems, although according to very different variations. The single currency, the stability of which is ensured by the establishment of a European Central Bank totally independent from national governments and modelled on the German *Bundesbank*, was not based on a partial centralization of competencies regarding fiscal and budget policies at Union level, as in federal entities, nor on a federal budget, as instead was suggested in the seventies by the McDougall Report.<sup>31</sup> As dramatically demonstrated by the financial crisis still under way, without a common fiscal and economic policy and a federal budget, the Union is also completely devoid of automatic stability mechanisms that are necessary to cope with asymmetric shocks. This is due to the fact that the introduction of the single currency was based on a concept ‘that is clearly alien to the idea of solidarity’ (Louis 2011, 110), particularly as demonstrated by the bailout-prohibition, central rule in the monetary union (Art. 125 TFEU). The reforms undertaken by the Union to tackle the financial crisis basically confirm this model, though with some important corrections and additions.

A first type of corrective measure, introduced as part of the so-called *Stability Compact*,<sup>32</sup> is designed to support the instruments already outlined by the Maastricht Treaty, with the purpose of providing the Union with the ability to prevent systemic crisis of the Euro-zone by

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<sup>31</sup> That in designing a possible path of monetary integration among EEC countries, had suggested a gradual construction of a federal budget in stages that should have been completed, in the final stage, with the allocation of 25% of the European GDP to the Community budget.

<sup>32</sup> See the so-called *Six Pack* (consisting of Regulations 1173, 1174, 1175, 1176, 1177 of 2011 and of Directive 2011/85) and the *Fiscal Compact*. In November 2011 the European Commission two further proposals for regulation in jargon known as *Two-Pack*: see COM(2011) 819 and COM(2011) 821.

strengthening the rules on budgetary constraints and fiscal austerity. The new legislation – partly of a EU law nature, partly of international law character – introduces significant innovations, aimed firstly at making the limits on deficit and public debt, provided for by the Maastricht Treaty and the Stability and Growth Pact, effectively liable to be sanctioned. On the other hand, the States signatory of the Fiscal Compact are bound to insert the new rigorous golden rule of budgetary balance in their respective legal orders, preferably through rules of constitutional status.<sup>33</sup> On the other hand, the procedure concerning excessive deficits – which can be activated also in the event of exceeding the limits of public debt – is decisively strengthened through the introduction of a reverse majority rule. Therefore, a qualified majority in the Council becomes necessary in order to reject a proposal from the Commission, by inverting the voting rule traditionally provided for by Union law and contemplated by the Stability Pact. Thus, once initiated by the Commission, the sanctioning procedure assumes a semi-automatic course of action, making it much more difficult to form blocking-minorities for the member State concerned. In addition to the procedure referred to in Art. 126 TFEU, on the basis of Art. 121, the 2011 EU law reform also introduces a new procedure for the prevention and correction of macro-economic imbalances. This procedure broadens the power of the Commission to intervene far beyond the borders of fiscal policy, by extending it to the whole range of economic policies of national governments. And even in this case, any failure to comply with the corrective actions planned by the member State, according to the recommendations made by the Commission and the Council, is liable to be sanctioned by a procedure marked by a reverse majority voting (Tuori 2012, 17 ff.).

By the same token, the *Euro Plus Pact* (Barnard 2012), although having the nature of a political intergovernmental agreement, essentially ends up integrating those new supranational constraints, given the close bond with the new legislation on macroeconomic surveillance. The *Euro Plus Pact* intends *inter alia* to have a direct impact on the wage-setting systems that operate at member States level, which are *per se* excluded from the sphere of legislative competencies of the Union in the field of social policy (Art. 153.5 TFEU). In the chapter on productivity, which is central in regards to the general objectives aimed at promoting the increase of competitiveness and employment within the Union, the *Euro Plus Pact* – while promising to

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<sup>33</sup> See Art. 3 of the Treaty on stability, coordination and governance of the economic and monetary Union, to which Italy has proceeded to adapt by modifying Art. 81 of the Constitution with the constitutional law n. 1 of 2012. Germany had introduced the so-called *Schuldenbremse* already in 2009, by modifying Art. 109 and 115 of its Fundamental Law.

preserve the different national traditions in the field of social dialogue and industrial relations – indicates which are the precise measures that member States should apply in relation to wage-setting arrangements, both in the public and private sectors. Particularly important is the recommendation made to align wages to productivity by proceeding, if necessary, to a decentralization of the systems of collective bargaining and, if appropriate, by reviewing the mechanisms for automatic indexation.

A second and more creative type of legal innovations, totally absent in the structure of the Maastricht Treaty and therefore subject to bitter controversy, concerns the introduction of suitable tools in order to provide the Union, and in particular the Euro-zone, with the effective ability for the management of financial crises, through variously devised mechanisms of financial aid to countries in difficulty. Besides the first modest measures adopted within the *European Financial Stabilisation Mechanism* (EFSM), established with Council Regulation No. 407/2010 according to Art. 122 TFEU, these instruments of financial assistance all operate outside the institutional framework of the Union. The *European Financial Stability Facility* (EFSF), precursor of the ESM, lays evidently outside the legal framework of the founding Treaties as it was actually established as a limited company registered in Luxembourg, according to a very inventive and uneven combination between contract and financial-market law and public international law rules (Tuori 2012, 13-14). On its part, by providing Euro-zone States with a fairly strong permanent instrument of financial aid, the ESM was established as a body of public international law, expressly subtracted to the application of EU law.

In the strongly debated *Pringle* judgement,<sup>34</sup> delivered by the Court of Justice after the authorization given by the German constitutional Court (under specific conditions) of the ratification of the ESM by Germany (Schmidt 2013; Wendel 2013),<sup>35</sup> the Luxembourg judges have basically dismissed all the objections raised by the plaintiff in the main proceeding, an independent deputy of the Irish Parliament, regarding the compatibility of ESM with EU law. The most problematic issue – among the several raised by the Irish Supreme Court in its request for a preliminary ruling – concerned the very suspicious compatibility of the ESM with the prohibition to bailout laid down by Art. 125 TFEU. With an elaborate motivation, the Court of Justice excluded a violation of Art. 125 of the Treaty thanks to an innovative and restrictive interpretation

<sup>34</sup> See the judgement delivered by the Court in plenary session on 27 November 2012 in the case C-370/12, *Thomas Pringle vs. Government of Ireland*. See e.g. the critical comments by Tomkin (2013) and Van Malleghem (2013).

<sup>35</sup> BVerfG, 2 BVR 1390/12, of 12 September 2012.

of the no-bailout-clause, stating that the (not yet operational) amendment of Art. 136 TFEU<sup>36</sup> has a merely confirmation value of the competencies of member States in this field. In the Court's interpretation, Art. 125 is only intended to prevent member States from relying on a redemption of their public debt by other members of the Euro-zone, in this way, leading them to maintain a sound fiscal policy and, especially, a moderate budget policy. In the terms in which it is set, the ESM does not contradict the rationale and substance of this prohibition, since the financial solidarity that the member States ensure through it to the fellow countries whose difficulties jeopardize the stability of the whole Euro-zone, is subordinate to a strict conditionality requirement, as specified by the same reformulation of Art. 136 TFEU. On one hand, the ESM is fundamentally committed to assuring the European collective interest of protecting the stability of the Euro-zone as a whole, without definitely bearing itself with the public debt of the subsidized member States, which shall remain individually liable anyhow; on the other hand, the strict conditionality-requirement for accessing to ESM financial aid gives adequate guarantees that this does not result in disincentives to pursue sound fiscal and budget policies, avoiding the temptation of moral hazard by the assisted countries.

Also through a brief review, as the one just carried out, it is evident that the reforms introduced within and (especially) outside the structure of the founding Treaties to cope with the financial crisis of the Euro-zone, contribute to determine a significant compression of the autonomy of the member States in the field of social and labour law and policy. The new supranational constitutional constraints to fiscal and budget policies of the member States of the Euro-zone limit the redistributive options available to the national democratic process, with strong repercussions on the national Welfare State arrangements.<sup>37</sup> Overall, the new rigid neo-liberal structure of the European economic and monetary constitution can be characterised as a monumental exercise undertaken by 'the economic' to rule 'the political', which is unprecedented in the history of democracies, at least for the pervasiveness of its ramifications. Having pushed itself to this point, the Union – as has been critically remarked – is not far from the Hayekian ideal of a 'limited democracy' based on dethroning politics in the name of market-discipline as the supreme arbiter (Supiot 2010, 33).

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<sup>36</sup> Article 136 of TFEU was modified according to Decision 2011/99, not yet in force, using the simplified revision procedure introduced by the Lisbon Treaty for the first time. The amendment was intended to clarify the competence of the member States to adopt an instrument of the type of ESM.

<sup>37</sup> See the first comparative analysis by Heise and Lierse (2011) and by Hinrichs and Jessoula (2012).

However, the doubt that such a design is resting on fragile assumptions of democratic legitimacy is dangerously powered by the dramatically ineffective measures adopted by the Union to overcome the economic and financial crisis. The austerity policies, adopted under the pervasive guise of the new European economic and fiscal governance,<sup>38</sup> have so far produced prolonged recession and mass unemployment (especially among young people) in the countries in which they have been more or less mechanically adopted, starting from Greece, while in some cases they have even worsened the ratio between gross domestic product and public debt (as in Italy). In the words of one of the most lucid critics of that disquieting state of affairs, if compared to a fully-fledged federal-State regime or even with the European Monetary System in force until the introduction of the single currency, 'member States in the reformed Monetary Union will indeed find themselves in the worst of these three worlds' (Scharpf 2011, 31). While the EMU does not have the ability to undertake the economic and fiscal manoeuvres that only a truly federal budget allows to draw unto, the Union does not even let its member States autonomously use such residual macroeconomic levers – especially those in the Euro-zone, that have lost any competency related to monetary policy. And while the new instruments of economic governance accentuate its institutional fragmentation, the Union is faced with a double deficit of democratic legitimacy (Scharpf 2012), as a direct consequence of such an asymmetry between (poor) ability to give political answers (*i.e.*, positive integration) and (strong) constraints to the autonomy of the member States in the name of the stability of the market's (negative) integration. The already thin Union's input-oriented legitimacy (utterly weakened by the marginalisation of the European Parliament's role within the structure of the new economic governance) is further aggravated by a dramatic, and perhaps more serious, crisis of output-oriented democratic legitimacy, as demonstrated by the widespread anti-European resentment shown by the national public opinion of the countries most affected by the crisis.

#### **4. CONCLUSIONS**

The sad debate on the Union's new financial perspectives for 2014-2020, in which the European Parliament is called upon to decide on a proposal that aims at reducing the Union budget for the first time in the history of integration, shows that Europe is more than ever far from a possible 'Hamiltonian moment' (Spinelli 2011). A sharp turn in the direction of federalism has been invoked – although with different

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<sup>38</sup> For an effective definition of the *Fiscal Compact* as a form of constitutionalisation of austerity see De Witte (2013).

theoretical approaches and perspectives – from many political and intellectual circles as the only effective way out from the Union's systemic crisis. A 'federal model to enjoy more freedom' – as Giuliano Amato (2012, 61 ff.) has suggested – should entrust a different trade-off between greater integration (with the transfer to the Union of additional shares of State sovereignty in the field of fiscal, economic and social policies, and the creation of an adequate budget at central level) and the reinforcement of European solidarity.<sup>39</sup> The model of 'post-democratic executive federalism' (Habermas 2012, 43), devised by the reformed European economic and monetary governance, currently generates a dangerous and visibly precarious asymmetric imbalance between integration and solidarity.<sup>40</sup> However, a correction of these imbalances appears as necessary as difficult.

There is no intention to undertake a theoretical speculation on the effective perspectives of the construction of a European federal core, as a culmination of a complete economic and monetary Union. At present, these perspectives are highly uncertain and, in any case, they must atone for the almost certain unavailability of (at least) the United Kingdom. Therefore, however framed and conceptualised, a model of federal political Union should most likely be imagined in a logic of differentiated integration, with a central core (or a 'cluster', as Amato would say) that is fully integrated and a series of larger political and economic spheres (including the internal market) that are open to the participation of the other member States of the Union. After all, the institutional devices employed to cope with the crisis – especially the crucial side of the mechanisms of financial aid – are already decisively moving in the direction of a differentiated integration led by the countries of the Euro-zone, guided by Germany and France (Avbelj 2013).

Concluding remarks on the attempt to take stock of the discussion undertaken so far on the idea of a European citizenship as a *status* of social integration must be considered. On one hand, the dominant transnational dimension constitutes both a matter of strength and weakness of Union's citizenship, as it limits the potentials for integration into the national social spheres of the rights conferred to the European mobile citizen having to balance these access-rights with the need to protect the redistributive ability of the welfare systems of

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<sup>39</sup> Also see the proposal by Poiares Maduro (2012).

<sup>40</sup> The first proposals presented in the report written up by the President of the European Council in collaboration with the Presidents of the Commission, of the Euro-group and of the European Central Bank do not seem to actually be able to change this balance and abandon the prevailing logic of 'executive federalism': see European Council – The President, *Towards a genuine economic and monetary Union. Report issued on 25 June 2012*, SN 25/12, Brussels.

the member States, which presuppose the maintenance of bounded-worlds of social justice based on some criterion of territorial belonging. On the other hand, the trajectory imprinted to the European integration process by the case law of the Court of Justice on the internal market and by the recent reforms of the Union's economic governance has created an unfriendly, if not openly hostile, regulatory environment towards the national democratic Welfare State. If its survival is not questioned – as Joerges (2012) provocatively wondered – what is at stake here are rather the normative pre-conditions for what Maurizio Ferrera (2012) has called the 'virtuous nesting scenario' of the national Welfare State within the European integration.

The reconstruction of a virtuous balance between national systems of Welfare State and European integration requires – according to keen observers – a re-appropriation of the new European social question within the realm of politics and of the political democratic process both at a supranational and national level (De Witte 2013). So far, national labour law and social security systems have shown a remarkable degree of resilience when facing a de-regulative pressure judicially driven by the negative integration of the internal market (Deakin 2012, 40). For example, proof of this are the remarkable adaptability demonstrated by the Scandinavian labour law and industrial relations systems in response to *Viking* and *Laval* (Malmberg 2011; Barnard e Deakin 2012, 263). However, this resilience is currently being challenged again, during the worst economic crisis since the years after the Second World War, within the context of the reformed neo-liberal Union's economic and monetary governance (Deakin 2012). The *Memoranda of understanding* undersigned by Greece, Ireland and Portugal to access Union's financial aid gives a vivid example of what 'negotiating in the shadow of bankruptcy' (Bruun 2012, 270) really means for the 'nesting' of a national Welfare State within the EMU's reformed constitution. The wide-ranging reforms of the labour market approved in Italy and Spain between 2011 and 2012 can be also considered as an indirect but telling example of the new EU politics of conditionality (Ojeda Aviles 2013; Giubboni, Lo Faro 2013; Jessoula 2012).

A re-politicization of the social question capable of counterbalancing these new powerful external constraints to the benefit of Union's democratic legitimacy, first of all, requires the rediscovery of the positive-integration function of European labour law, beyond the open method of coordination. The recent proposal by the former President of the Euro-Group Jean Claude Juncker of a European minimum pay, along with the one – dated farther back – of a guaranteed minimum income regulated at EU level, is very effective in showing how acute the

awareness is that the 'virtuous nesting' of national Welfare States needs to pass through a re-discovery of supranational social harmonization in new forms. Beyond their legal-political impracticability (Verschuereen 2012), both these proposals signal the need to set a common minimum floor of labour and social rights against the risks of de-regulative competition and social-levelling-down pressures inherent in the new EU constitutional landscape. A new strategy of minimum harmonization obviously must take into account the increased social and economic dishomogeneity and differentiation of the Union at Twenty-seven (waiting for Croatia's adhesion). Therefore we need to imagine it under the new guise of framework-directives and legislation by general principles (Klosse 2012) open to flexible national implementation even in the context of principled-differentiation through the enhanced cooperation route envisaged by the Lisbon Treaty (Bruun 2012, 275). A complementary route would be rediscovering at EU level the forgotten virtues of auxiliary legislation, fostering a process of minimum-standard-setting through European collective bargaining of sectoral or transnational nature in the shadow of EU law.

Moreover, the re-politicization of the European social question passes through the retrieval of a true sphere of autonomy of national social regulators (States and social partners) against the excessive intrusiveness of the EU fundamental freedoms and the tinged logic of negative integration. At least in theory, the Lisbon Treaty provides the judges in Luxembourg with a wide range of conceptual tools and new hermeneutic opportunities to reconsider the constitutional doctrines of the internal market in order to assure a broader margin of appreciation for the member States in relation to sensitive choices regarding social policy and distributive justice within their welfare systems.<sup>41</sup> In connection with the meta-principle of the inviolability of human dignity as enshrined in Art. 1 of the EU Charter of fundamental rights (Rodotà 2012, 39), a well-crafted interpretative use of the provisions of Chapter IV of the Nice Charter would enable the Court of Justice – at least in theory – to effectively recast its way of understanding the balancing between social rights and economic freedoms (Caruso 2009; Bronzini 2012). Even a proper reference (and due deference) to the new advanced case law of the Strasbourg Court on the right to strike and the right of collective bargaining<sup>42</sup> could offer the judges in Luxembourg a fresh constitutional starting point under Art. 6 TUE to overcome, or at

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<sup>41</sup> Supiot (2011, 303) argues how a greater deference for these choices is required by the provision on the national constitutional identities now contained in Art. 4.2 TEU.

<sup>42</sup> See the well-known judgements of the European Court of Human Rights *Demir and Baykara vs. Turkey*, n. 34503/97, of 12 November 2008, and *Enerji Yapi Yol Sen*, n. 68959/01, of 21 April 2009.

least mitigate, the interpretative *aporia* of the *Viking* and *Laval* cases in line with the standards of international protection of collective rights (Dorssemont 2011; Sciarra 2013, 92 ff.). A dialogue between the two Courts, renewed on these grounds, would allow to overcome the 'crisis of trust' (Barbera 2012, 6) on the 'social jurisprudence' of the European Court of justice triggered by the *Viking* and *Laval* cases.

In the case *Sindicato dos Bancários do Norte and others*,<sup>43</sup> the Court of Justice was asked for a preliminary ruling that, for the first time, has explicitly raised the question of compatibility of national measures of strong compression of workers' rights – implemented by a member State within the remit of EU-led policies of fiscal consolidation – with the EU Charter of fundamental rights. The reference for a preliminary ruling raised indeed the question of the compatibility with Articles 20, 21.1 and 31.1 of the EU Charter of the measures taken by Portugal at the end of 2010, especially concerning the reduction of salaries of public employees, as a part of the commitments undertaken by that country in order to gain access to Union financial aid. However, the Court on 7 March 2013 declared its incompetence to rule on such a question, concluding that no specific element suggesting that Portuguese law was intended to implement EU law could be identified in the case at hand. But beyond the technical contingencies of this case, the matter raised by the Labour Court in Porto is destined to recur. The central constitutional issue is whether the rigour of the new European conditionality-politics has to be balanced with the social values, objectives, rights and principles enshrined by the Lisbon Treaty, in particular with the provisions of Articles 2 and 3 TEU, also through the horizontal clause provided for under Art. 9 TFEU (Giubboni 2011; Dorssemont 2012; Lecomte 2011), as well as with the endowment of full legal force to the Nice Charter. And the hope is that, in the future, the Court may overcome its negative and elusive attitude and, at least for the *Fiscal Compact*, it may reconsider the bold statement made in *Pringle* according to which the EU Charter is essentially inapplicable to the measures taken under the ESM. A change of approach seems necessary also in order to avoid possible constitutional collisions of a new type, whose spectrum clearly hovers over the recent judgement by which the Portuguese Constitutional Court declared the unconstitutionality of a substantial part of the measures adopted by Portugal through the Financial law for 2013, again within the austerity policies agreed upon with the *Troika*.<sup>44</sup>

Finally, the same ECJ's case law on transnational access of economically inactive European citizens to the welfare systems of the

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<sup>43</sup> Case C-128/12.

<sup>44</sup> See decision n. 187/2013.

member States should take care of conceptualising in a more balanced way the inter-dependence between the territorially-bounded dimension (and delimitation) of these social solidarity systems and the redistributive choices (and trade-offs) democratically expressed therein by the national legislatures. It has been persuasively suggested that a re-conceptualization of the freedom of movement protected under Art. 21 TFEU should take into better account the bonds of political reciprocity that underpin national systems of social solidarity, allowing transnational access to the benefits guaranteed by them only to those EU citizens who can actually meet the necessary conditions of reciprocity as a consequence of the degree of integration achieved and the contribution given to the social life of the host country. In this way, it has been argued, 'the internal capability of electorates to decide on the social question [would be] to a large extent insulated from external pressures, while at the same time preventing discriminatory assessments (by including those migrants who deserve access, by virtue of meeting the preconditions of reciprocity)' (De Witte 2013).

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