A TALE OF TWO APPROACHES TO SOCIAL EUROPE: THE CJEU AND THE ADVOCATE GENERAL DRIFTING APART IN CASE C-201/15 AGET IRAKLIS

Case C-201/15 *AGET Iraklis,* EU:C:2016:972

Konstantinos Alexandris Polomarkakis*

§1. Introduction

Antitheses form the backbone of the European project. Intergovernmentalism versus federalism, enlargement versus containment - these are only some of the contradictory pairs that have informed the development of the European Union (EU). One of them, that between the economic and social elements of the Union might not have featured prominently in academic literature since the start of the European project but has certainly gained increasing momentum over time. Is the EU primarily an economic union, or could it also be a social one? What is the significance of the social market economy, the concept introduced by the Treaty of Lisbon? More specifically, how far should fundamental freedoms yield when confronted by social rights?

These questions have occupied an important place in the Court of Justice's (CJEU) jurisprudence, yet it was not until the so-called *Laval Quartet* series of cases that the CJEU's approach provoked an overwhelmingly vivid debate. Not much has changed since then, at least not fundamentally, despite voices putting forward a reformulation of the balancing exercise. Subsequent case law has not managed to turn the tide, thereby showing that the CJEU was slow to pick up the developments that took place at the institutional level post-Lisbon, with the introduction of the social market economy paradigm, and the empowerment of the Charter, but also to respond to the critique of neoliberal deregulation that was promoted through the various bailout packages in crisis-hit Eurozone countries.

This all-important issue was revisited by the CJEU in *AGET Iraklis*. The case concerned the compatibility of a Greek pre-authorization regime based – amongst other things – on

* Teaching Assistant and Doctoral Researcher, University of Bristol Law School, United Kingdom. E-mail: k.alexandris-polomarkakis@bristol.ac.uk

assessment criteria linked to employment and workers' protection, with Directive 98/59/EC on collective redundancies[1] and with the freedom of establishment contained in Article 49 TFEU. The result, interestingly enough, was two divergent analyses produced by the Advocate General and the CJEU respectively. The Advocate General easily side-lined any welfare consideration in the light of fundamental freedoms; the CJEU, on the other hand, adopted a much more socially infused approach, perhaps hinting at a departure from the *Ancien Régime*. This case note aims to shed some light on this disjunction, by firstly presenting the facts of the case, followed by summaries of Advocate General Wahl's Opinion and the CJEU's judgment respectively.

§2. Factual and Legal Background

AGET Iraklis (AGET) is the brand leader for cement production in Greece, whose majority ownership was taken over by the multinational group Lafarge (now LafargeHolcim) in the early 2000s.[2] The economic crisis impacted its activities, forcing it to send invitations for consultations between November 2011 and December 2012. With its decision of 25 March 2013, Lafarge's board of directors chose to permanently close the company's plant in Chalkida.[3] On that basis, two further letters were issued on 26 March 2013 and 1 April 2013, inviting the workers' union to consultative meetings.[4] In the absence of the union's participation, on 16 April 2013 the company submitted a request for the approval of its redundancy plans to the Minister for Labour, Social Security and Welfare.

A prior authorization is required for collective redundancies according to Article 5(3) of Law No. 1387/1983,[5] which implemented Directive 98/59/EC on the approximation of the laws relating to collective redundancies into Greek law, allowing the relevant Minister or prefect to intervene, by either extending the consultation period, or, as was the case here, by rejecting all or part of the proposed redundancies. In AGET's case this request was denied by

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[1] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies. [1998] OJ L 225/16.
[2] LaFarge, 'LaFarge in Greece', http://www.lafarge.gr/wps/portal/gr/1_1_1-Cement.
[3] Case C-201/15 *AGET Iraklis*, EU:C:2016:972, para. 13-14; Opinion of Advocate General Wahl in Case C-201/15 *AGET Iraklis*, EU:C:2016:429, para. 12-13.
[4] Case C-201/15 *AGET Iraklis*, para. 15; Opinion of Advocate General Wahl in Case C-201/15 *AGET Iraklis*, para. 14.
[5] (GR) Law No. 1387/1983 on the Control of Collective Redundancies and Other Provisions (*Νόμος 1387/1983 Έλεγχος ομαδικών απολύσεων και άλλες διατάξεις*).

the Minister's decision of 26 April 2013, for reasons related to the absence of plans in place for the affected workers in light of Greece's high unemployment levels, and the lack of concrete evidence on the need to proceed with the redundancies.[6]

AGET appealed the decision before the Greek Council of State, which chose to make a preliminary reference to the CJEU under Article 267 TFEU, asking for the CJEU's view on the compatibility of the prior authorization regime with Directive 98/59/EC and Articles 49 and 63 TFEU.[7] In its second question, the referring court sought guidance as to the suitability of the high unemployment levels and the overall impact of the on-going economic crisis in Greece, as overriding social reasons justifying any potential incompatibility between the national regime in place and the provisions of EU law cited supra.[8]

§3. The Advocate General's Opinion

In his Opinion, the Advocate General chose to give precedence to fundamental freedoms. He considered the provision of Greek law independent to the scheme laid down by Directive 98/59/EC and incompatible with the freedom of establishment. His analysis began by finding that Article 5(3) of the Greek law fell outside the scope of Directive 98/59, as it imposed substantive obligations through its prior authorization regime, affecting the employer's decision to proceed with the redundancies.[9] The fact that it fell outside the Directive's remit, meant that it could not constitute a more favourable measure towards workers' protection under Article 5 of the Directive,[10] yet it could not be precluded by the Directive either.[11]

As the Directive was of no relevance, it was crucial to establish which of the two fundamental freedoms invoked, that of the free movement establishment or of capital, each enshrined in Articles 49 and 63 TFEU respectively, applied to the examined proceedings.[12] It

[6] Case C-201/15 *AGET Iraklis*, para. 17-18.
[7] Ibid., para. 25.
[8] Ibid.
[9] Opinion of Advocate General Wahl in Case C-201/15 *AGET Iraklis*, para. 29-31. This was also affirmed in Case C-449/93 *Rockfon*, EU:C:1994:420, para. 21; and Case C-187/05 to C-190/05 *Agorastoudis and Others*, EU:C:2006:535, para. 35-36.
[10] Here, the Advocate General dismissed parallels between AGET and similar recent cases such as Case C-12/08 *Mono Car Styling,* EU:C:2009:466 and Case C-426/11 *Alemo-Herron*, EU:C:2013:521.
[11] Opinion of Advocate General Wahl in Case C-201/15 *AGET Iraklis*, para 34.
[12] Ibid., para. 35.

was easily asserted that the freedom of establishment covered the factual situation at issue, due to Lafarge's position as the majority shareholder.[13] It therefore followed that the prior authorization was liable to constitute a restriction on Article 49 TFEU, by interfering with the managerial decisions of an undertaking established in another Member State. Moreover it impeded the exercise of Article 16 of the Charter of Fundamental Rights (the Charter), which contains the 'sister' provision to Article 49 TFEU, that is the freedom to conduct a business.[14]

Having established that the national measure was capable of restricting the freedom of establishment, Advocate General Wahl subsequently examined whether this could be justified, by evaluating if '[it is] (…) applied in a non-discriminatory manner; [it is] (…) justified by overriding reasons in the public interest; [it is] (…) suitable for securing the attainment of the objective which they pursue; and [it does] (…) not go beyond what is necessary in order to attain that objective'.[15] The first three were easily satisfied, making the fourth test of proportionality, stricto sensu, of paramount importance for the outcome of the case.[16] To summarise, is workers' protection compatible with the freedoms of establishment and the freedom to conduct a business?[17]

According to the Advocate General there was no place for the solidarity part of the Charter in the balancing exercise, as neither Article 27 nor 30 of the Charter were deemed relevant to the proceedings, and, in any case, they contained provisions that were 'weaker' in comparison to other parts of the Charter or the fundamental freedoms.[18] Only limited deviations from the latter were permitted for social purposes,[19] contrary to overzealous efforts that were already rejected by the CJEU.[20] After all, in the realm of collective redundancies Directive 98/59 aims to maintain the balance between workers' protection and the employer's right to downsize.[21]

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[13] Ibid., para. 36-44. The Advocate General also stated that *ad majorem* the freedom of establishment incorporates aspects of the free movement of capital.
[14] Ibid., para. 47-50.
[15] Ibid., para. 51. Applying essentially the proportionality-based test that was use in Case C-55/94 *Gebhard*, EU:C:1995:411, para. 37.
[16] Ibid., para. 53-56.
[17] Ibid., para. 57.
[18] Relying on Case C-176/12 *AMS*, EU:C:2014:2.
[19] Opinion of Advocate General Wahl in Case C-201/15 *AGET Iraklis*, para. 61, 64.
[20] Case C-426/11 *Alemo-Herron*, which concerned a case where over-implementation of a directive was found, by the CJEU, to jeopardize the freedom to conduct a business.
[21] Opinion of Advocate General Wahl in Case C-201/15 *AGET Iraklis*, para. 63, 65.

After those preliminary remarks, the proportionality test was applied to the justifications found in Article 5(3) of the Greek law. National economic interests cannot, a priori, justify any restriction to the freedom of establishment, as they embody only purely economic objectives, whereas the conditions existing in the labour market might lead to counter-productive scenarios.[22] Neither can the situation of an undertaking justify such restrictions, as this would undermine the employer's decision-making capacity.[23] In addition, legal certainty as well as the consultation process might be jeopardized by the prior authorization regime, for which no elaborate defence was submitted by Greece, making it all the more difficult to ascertain whether it was intended to genuinely protect workers in a proportionate manner.[24] In any case, 'the idea of a balancing exercise is in fact a fallacy: protecting the workers concerned is not at odds with either the freedom of establishment or the freedom to conduct a business'.[25]

After finding that the national measure could not pass the proportionality test, the Advocate General examined the propriety of the argument surrounding the acute negative socio-economic impact of the crisis. As this was primarily economic in nature, this could not override the freedoms of establishment and the freedom to conduct a business, which have also been affected by the crisis.[26] At this point, and before his concluding remarks, Advocate General Wahl offered one suggestion: in lieu of retaining over-protective measures, countries should conform to the - primarily deregulatory - best practices promoted by various institutions, in order to lure new business and stimulate economic growth.[27]

§4. The Judgment

The judgment of the CJEU, although quite similar in structure to the Opinion of the Advocate General, presented noticeable differences, specifically by being more accommodating towards the case's social aspects. At first, the CJEU more or less sided with the Advocate General, concluding that substantive conditions affecting the triggering of

[22] Ibid., para. 66-69.
[23] Ibid., para. 70.
[24] Ibid., para. 71-73. The Advocate General found that the Directive could adequately ensure that.
[25] Ibid., para. 74.
[26] Ibid., para. 78-79.
[27] Ibid., para. 80.

collective redundancies, such as those contained in Article 5(3) of Law No. 1387/1983, did not fall within the scope of the Directive and thus could not be precluded by it, so long as its practical application was not rendered practically impossible.[28] While AGET contended that the Greek law was liable to dilute the Directive's objectives, the CJEU did not provide an answer to this, essentially leaving this matter for the Greek Council of State to determine.[29]

After proclaiming that the freedom of establishment was the more relevant of the two fundamental freedoms, the CJEU added that the Greek law might also constitute an obstacle to the freedom to conduct a business, as contained in Article 16 of the Charter.[30] Both freedoms can be limited by overriding reasons of public interest, an issue that was conceptually set out in a very similar, albeit not identical manner to Advocate General Wahl's Opinion.

At this point, the CJEU undertook a preliminary assessment of the overriding reasons of public interest in relation to the prior-authorization regime.[31] The first reason invoked, namely that of the interests of the national economy, was dismissed on the basis of the CJEU's settled jurisprudence.[32] Notwithstanding that, the remaining two reasons of workers' protection and the promotion of employment, had already been acknowledged as legitimate justifications by the pertinent case-law, leading the CJEU to the same outcome.[33] At this stage, the judgment and the Advocate General's Opinion begin to diverge. In the following paragraphs, the CJEU highlighted the importance of social objectives, which have been incorporated in the Treaties as quasi-equal counterparts of the internal market,[34] against whose freedoms they need to be

[28] Case C-201/15 *AGET Iraklis,* para. 27-41. Although one should note the CJEU's more detailed reasoning, invoking Article 5 of Directive 98/59 on the ability of the Member States to adopt more favourable measures towards workers in para. 32 coupled with the introduction of the words 'in principle' in para. 33.
[29] Ibid., para. 42-43.
[30] Ibid., para. 45-70.
[31] Ibid., para. 71.
[32] Ibid., para. 72.
[33] Ibid., para. 73-75. The CJEU cited the following case law in relation to the protection of workers: Joined Cases C-369/96 and C-376/96 *Arblade and Others*, EU:C:1999:575, para. 36; Case C-411/03 *SEVIC Systems*, EU:C:2005:762, para. 28; and Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union*, EU:C:2007:772, para. 77. In relation to the promotion of employment and recruitment, the CJEU cited Case C-208/05 *ITC*, EU:C:2007:16, para. 38, 39; Case C-385/05 *Confédération générale du travail and Others*, EU:C:2007:37, para. 28; and Case C-379/11 *Caves Krier Frères*, EU:C:2012:798, para. 51.
[34] Found in Article 3(3) TEU and the objectives of a social market economy, in Article 9 TFEU and the need to incorporate employment and social protection-related considerations in the various EU policies and in Chapter X of the TFEU.

balanced.[35] Nevertheless, and despite the discretion that the Member States enjoy in this area, they cannot undermine any economic freedoms guaranteed by the Treaties or the Charter.[36]

Moving on to its balancing exercise, the CJEU found that Article 5(3) of the Greek law could, prima facie, be read in conformity with both the freedom of establishment and the freedom to conduct a business, which according to the CJEU 'must be viewed in relation to its social function'.[37] The only limitation being that a national measure cannot curtail a freedom's essence, as was the case in *Alemo-Herron*.[38] This was not the case here, where a procedural framework requiring a pre-authorization was imposed, without barring collective redundancies altogether.[39] Article 30 of the Charter on the protection against unjustified dismissal was also applicable, thereby allowing restrictions on Article 16 of the Charter.[40]

Since the decisions of an undertaking in situations such as the one at issue could severely affect workers, and in the absence of relevant EU rules on their protection, provisions similar to the one contained in Article 5(3) of Law No. 1387/1983 were appropriate in order to ensure workers' welfare.[41] They were also necessary, as this objective could not be achieved through less onerous means.[42] Contrary to the Advocate General's suggestion, the CJEU found that, in principle, restrictions on the freedom of establishment and to conduct a business may be justified, in this sort of case.[43]

While the objectives underpinning the national law appeared compatible with the fundamental freedoms, the regime in place exceeded what is acceptable for the CJEU, by not being specific enough, something that might risk eliminating an undertaking's freedoms.[44] Moreover, that lack of precision might negatively impact the effectiveness of the procedure's judicial review by the national courts.[45] The proportionality test, therefore, failed, and the

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[35] Case C-201/15 *AGET Iraklis*, para. 75-78, recalling Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union*.
[36] Ibid., para. 79-81 and the case law cited therein.
[37] Ibid., para. 85, citing Case C-283/11 *Sky Österreich*, EU:C:2013:28.
[38] Case C-426/11, *Alemo-Herron and Others*.
[39] Case C-201/15 *AGET Iraklis*, para. 87-88.
[40] Ibid., para. 89.
[41] Ibid., para. 91-92.
[42] Ibid., para. 93.
[43] Ibid., para. 94.
[44] Ibid., para. 95-99, citing Case C-483/99 *Commission v. France*, EU:C:2002:327, para. 50, 51; and Case C-326/07 *Commission v. Italy*, EU:C:2009:193, para. 51, 52.
[45] Ibid., para. 101.

Greek legislation was found to be incompatible with both freedoms enshrined in Article 49 TFEU and Article 16 of the Charter respectively.[46]

Thereafter, the second question dealing with the merits of the acute economic crisis and high unemployment levels as overarching social justifications was examined. In a situation where the practical effect of Directive 98/59/EC was bereaved by reason of national law, the afore-mentioned social justifications cannot be invoked and, consequently, alter this outcome.[47] As for the freedom of establishment, there is no additional way of derogating from it other than with recourse to the balancing exercise identified above.[48] These serious social reasons referring to purely domestic situations cannot do much - if anything - to alter the legal outcome after all.

§5. Comments

The outcomes of both the Advocate General's Opinion and the CJEU's judgment do not differ substantially. In principle, Directive 98/59/EC does not preclude the national legislation in question, except for when its provisions render the application of the Directive practically impossible. Furthermore, the limitations that the Greek law imposes on the freedoms of establishment and to conduct a business cannot be proportionally justified by the rationale underpinning the regime in place, and any claims based on the severe welfare crisis ravaging a Member State cannot act as overarching justifications either. The bar continues to remain high for social justifications to pass the CJEU's proportionality test in the context of the fundamental freedoms. This will come as no surprise, but instead is an embodiment of the well-known jurisprudence on the topic, which culminated in the *Laval Quartet*.[49] Therefore, what is so noteworthy about this case that makes it distinguishable from the others?

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[46] Ibid., para. 100, 102-104.
[47] Ibid., para. 106.
[48] Ibid., para. 107.
[49] Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti*, EU:C:2007:772; Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbundet*, EU:C:2007:809; Case C-346/06, *Rechtsanwalt Dr. Dirk Rüffert v. Land Niedersachsen*, EU:C:2008:189; and Case C-319/06, *Commission v. Luxembourg*, EU:C:2008:350.

AGET Iraklis was decided almost a decade after the *Laval Quartet*.[50] The latter stirred much debate, quite critical for the most part - at least from labour law scholars - on the hierarchy between economic and social values in the European edifice.[51] While such narratives, might or might not be assimilated by the CJEU in its future decision-making, other, certainly more institutionalized developments should. To that end, 2009 marked the entry into force of the Lisbon Treaty, which heralded the EU as a 'competitive social market economy' and endowed the Charter, presumably without excluding its social solidarity chapter, with equal status to the Treaties.

Certainly, the introduction of these concepts at the core of the Union's norms is not merely semantics; it normatively represents a move towards a more social Europe, an aim that should be considered in the CJEU's future judgments. After all, Article 3(3) TEU declares that internal market policies must conform with the aims and objectives of the social market economy paradigm. This change did not go unnoticed by the CJEU, its importance was hinted at in two respective Advocate Generals' Opinions.[52] Nonetheless, the present judgment represents the first time that the CJEU has, per se, highlighted this occurrence.

It is not only the introduction of social market economy that has been mentioned by the CJEU and its Advocate Generals. The Charter has also been invoked by the latter, in order to establish the existence of fundamental social rights, which might as well be directly effective.[53] The CJEU in itself has never gone that far, but it has, nonetheless, recognized that there are certain fundamental social rights, not mere principles, enshrined in the Charter.[54] Perhaps, in the current post-Lisbon regime, such considerations, if assessed under the said context, would end up having a decisive role in the Court's determination on the existence of proportionate justifications to the exercise of the fundamental freedoms.[55] Nevertheless, these considerations have yet to substantially impact the CJEU's jurisprudence. Despite that, and considering their

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[50] Ibid.
[51] E. Christodoulidis, 'The European Court of Justice and "Total Market" Thinking', 14 *German Law Journal* (2013), p. 2005.
[52] Opinion of Advocate General Trstenjak in Case C-271/08 *Commission v. Germany,* EU:C:2010:183; and Opinion of Advocate General Cruz Villalón in Case C-515/08 *Santos Palhota*, EU:C:2010:245.
[53] Opinion of Advocate General Trstenjak Case C-282/10 *Dominguez*, EU:C:2011:559; and Opinion of Advocate General Cruz Villalón in C-176/12 *AMS*, EU:C:2013:491.
[54] Case C-149/10 *Chatzi*, EU:C:2010:534, where the CJEU proclaimed the right to parental leave as a fundamental social right found in Article 33(2) of the Charter.
[55] As suggested vis-à-vis the freedom to conduct a business in the Opinion of Advocate General Cruz Villalón in Case C-426/11 *Alemo-Herron and Others*, EU:C:2013:82.

novelty, just acknowledging the new playing field could bring us a step closer to finding what Europe's social market economy stands for.[56] In that sense, the CJEU's judgment in *AGET Iraklis* can be perceived as such a victory.

The case at hand, in addition to the reasons mentioned supra, merits paying attention to the differences in reasoning between the Advocate General's Opinion and the CJEU's judgment concerning the importance of social considerations to the functioning of the internal market. In turn, this antithesis might recall not only the competing visions of Europe's constitutional identity, but also the struggle between fundamental economic freedoms and fundamental social rights, which rose to fame in the post-*Viking* era. In this section, there will also be some reflections on the extenuating social reasons pleaded by Greece, especially in relation to the CJEU's case law on the Economic and Monetary Union (EMU) and the European Stability Mechanism (ESM).

A. The Rift Between the Advocate General and the CJEU

1. The liberal Advocate General

What is striking about the Advocate General's Opinion is that he chose not to build on the trend started by his peers post-Lisbon, as described above, by giving more serious consideration to the Union's social dimension. Instead, the Opinion relied on a pro-market, neoliberal rationale, giving primacy to fundamental freedoms. For the Advocate General, the European Union 'is based on a free market economy',[57] a statement that is redolent of the pre-existing regime before the inclusion of the social market economy paradigm into the Treaties. If that development had not taken place, then nothing in the Opinion would have come as any surprise.

In a free market economy, economic freedoms are, a priori, in a higher hierarchical position, and only very limited exceptions thereto are permissible, even when evaluated against social justifications, drawing analogies with *Viking*. In theory, such justifications could be accepted as derogations, but they neither enjoy equal standing to the freedoms affected, despite

[56] S. Deakin, 'In Search of the Social Market Economy', in N. Bruun, K. Lörcher and I. Schömann, (eds.), *The Lisbon Treaty and Social Europe* (Hart Publishing, 2012), p. 19-43.
[57] Opinion of Advocate General Wahl in Case C-201/15 *AGET Iraklis*, para. 1.

the emergence of Social Europe and the rearranging of the EU's priorities to accommodate this, nor is it easy for them to be practically upheld by the CJEU.[58] Indeed, the relationship between the interests protected by the national measure on the one hand, and the fundamental rights enshrined in the Charter on the other, does not appear to play any significant role.

On the contrary, by invoking *AMS*, the Advocate General aimed to highlight the 'weaker' power of the Charter's social section vis-à-vis the freedom of establishment and its inextricable link to the freedom to conduct a business. Social rights are not strong enough on their own, and, thus need to be further specified in order for them to gain effectiveness.[59] Article 27 of the Charter, at issue in *AMS*, was perceived as being unrelated to the case's proceedings, rendering Article 30 of the Charter on the protection from unjustified dismissals the sole relevant part of the Charter. This is, nonetheless, conceived in a similar halfway house position as its information and consultation counterpart. It represents a weaker right than the freedom to conduct a business under Article 16 of the Charter principle, which cannot bear much weight in the ensuing balancing exercise.

Thus, the only weapon left for workers is Directive 98/59, which aims to ensure a balance between the competing interests of employees and employers. This is translated into a ceiling on how far social considerations could go, not surprisingly so, if one considers that Advocate General Wahl emphasized the Directive's internal market aim in a separate Opinion.[60] Under this rationale, Member States must not act unilaterally to protect workers since this might 'not take into account the employers' situation'.[61] While it is true that the Directive in question was enacted on the basis of both social and economic considerations, this led to rather deferential CJEU jurisprudence towards 'the employer's managerial prerogative and commercial power';[62] the fact that employers' protection was over-stressed was inconsistent with settled case law of the CJEU underscoring the workers' side.[63] It also collides

[58] C. Joerges, 'A New Alliance of De-Legalisation and Legal Formalism? Reflections on Responses to the Social Deficit of the European Integration Project', 19 *Law and Critique* (2008), p. 246; C. Kilpatrick, 'Laval's Regulatory Conundrum: Collective Standard-Setting and the Court's New Approach to Posted Workers', 34 *European Law Review* (2009), p. 844.
[59] F. Dorssemont, 'The Right to Information and Consultation in Article 27 of the Charter of Fundamental Rights of the European Union', 21 *Maastricht Journal of European and Comparative Law* (2014), p. 704, 716.
[60] Opinion of Advocate General Wahl in Case C-80/14 *USDAW and Wilson*, EU:C:2015:66.
[61] Opinion of Advocate General Wahl in Case C-201/15 *AGET Iraklis*, para. 63.
[62] J. Kenner, *EU Employment Law: From Rome to Amsterdam and Beyond* (Hart Publishing, 2002), p. 29.
[63] Case C-383/92 *Commission v. UK*, EU:C:1994:234; and Case C-385/05 *Confédération générale du travail and Others*, EU:C:2007:37.

with classic labour law theories, whereby the worker is seen as the weaker party of the employment relationship, necessitating protective measures in their favour.[64]

The Advocate General, by invoking *Alemo-Herron* to reinforce his view that employers' interests merited enhanced protection, recalled neoliberal trajectories; protecting the interests of the employer can often be achieved to the detriment of workers' protection, thus underplaying Directive's 98/59 social part in a similar way that the Acquired Rights Directive was in the cited judgment.[65] While employers' and employees' interests are not always irreconcilable, such an interpretation of secondary law, which partly aims at ensuring workers' protection, essentially strips it out of the discretion given to Member States for enacting higher labour standards, by subjecting it to strict scrutiny vis-à-vis the interests of the employer.[66] It may not be constitutionally problematic, since a piece of secondary EU law is subordinate to the economic freedoms contained in the Treaties and the Charter, yet such a proposition fails to encompass the social solidarity part of the Charter and Article 3(3) TEU's social market economy paradigm, which should have at least resulted in a more flexible interpretation of the Member States' discretion in this area.

After such argumentation, it is unsurprising that the three criteria of the Greek law were found to be neither appropriate nor necessary; in an arguably far-fetched scenario, they might even have led to the undertaking's insolvency. The situation was not aided by Directive 98/59/EC, whose tight interpretation does not leave much discretion to go beyond minimal protection levels. After all, 'the idea of a balancing exercise is in fact a fallacy',[67] as if the Greek measure included only minimum standards, disturbing the exercise of any economic freedom would have been avoided.

The Advocate General's conclusion was in line with deterministic views on the inevitable superiority of the market element in the European project. So long as a case falls

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[64] L. Blades, 'Employment at will vs. individual freedom: On limiting the abusive exercise of employer power', 67 *Columbia Law Review* (1967), p. 1404-.
[65] J. Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law', 42 *Industrial Law Journal* (2013), p. 434, 439-40; M. Bartl and C. Leone, 'Minimum Harmonisation after Alemo-Herron: The Janus Face of EU Fundamental Rights Review', 11 *European Constitutional Law Review* (2015), p. 140.
[66] P. Syrpis and T. Novtiz, 'The EU Internal Market and Domestic Labour Law: Looking Beyond Autonomy', in A. Bogg et al. (eds.), *The Autonomy of Labour Law* (Hart Publishing, 2015), p. 301-302.
[67] Opinion of Advocate General Wahl in Case C-201/15 *AGET Iraklis*, para. 74.

within the remit of EU free movement law, then proportionately justified restrictions are the only possible limitations on fundamental freedoms; anything that impinges those could only be perceived as such.[68] These perspectives might have held true in the past, but, nowadays, the aforementioned changes brought about by the Treaty of Lisbon must be integrated into the CJEU's application of the balancing test, to give greater weight to social considerations, in order, for its reasoning to conform to the latest constitutional developments at EU level.

2. The more socially-conscious CJEU

It is refreshing to see that the CJEU's judgment was much more accommodating to social concerns. Despite sharing the peculiar reading of the Directive over-emphasizing employers' interests over those of workers,[69] the CJEU ended up being more open-minded towards the social justifications put forward. This is an interesting development, as in recent post-Lisbon case law this role was taken on by the Advocate Generals, who more often than not, recommended a reconsideration of the balancing exercise, so as to give more effect to welfare-related rationales.[70] The social side of the acquis communautaire is accentuated, and play a larger role in the judgment, highlighting the legitimacy of the Greek prior-authorization regime.

Although not fully exploited, the CJEU did not fail to mention in that regard, the Union's aspirations to become a social market economy.[71] This aspect of the EU's constitutional reality allows the CJEU not only to tolerate, but to accept, at least as a theoretical possibility, that measures enacted to achieve such aims shall not constitute infringements of the fundamental freedoms. A harmonious co-existence of the Economic and Social Constitutions would therefore be in place. Unlike the Advocate General's take on the relevance of *Alemo-Herron*, the CJEU found that the Greek measures did not in fact totally curtail the exercise of the economic freedoms in question.

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[68] A. Hinajeros, 'Laval and Viking: The Right to Collective Action versus EU Fundamental Freedoms', 8 *Human Rights Law Review* (2008), p. 714, 728.
[69] And thus departing from cases such as Case C-383/92, *Commission v. UK*; Case C-385/05 *Confédération générale du travail and Others*.
[70] Opinion of Advocate General Trstenjak Case C-271/08 *Commission v. Germany*; Opinion of Advocate General Cruz Villalón in Case C-515/08 *Santos Palhota*, and to a lesser extent even the more deferential stance of Advocate General Cruz Villalón in Case C-426-11 *Alemo-Herron*.
[71] Case C-201/15 *AGET Iraklis*, para. 76.

Clearly, for the CJEU, social concerns had a much higher chances of being accepted as justifiable restrictions to the freedoms of establishment and to conduct a business, in comparison to the Advocate General's Opinion. It was only on the technicalities of its wording and precision that the Greek provision failed the proportionality test. Nonetheless, this came after the CJEU had asserted that Article 5(3) of Law No. 1387/1983 would have otherwise been appropriate to serve its social purpose against the aforementioned freedoms. Is it an omen that the CJEU finally listened to the critics, and recalibrated, even if only marginally, the social compass of its jurisprudence?

The CJEU's pro-social attitude could also be explained by its generally sympathetic stance towards justifications based on workers' protection as limitations to the freedom of establishment. These tend to be accepted as legitimate, only to be struck down by failing the proportionality test later on, meaning that the examined case might not be a novel one.[72] Yet, this should not deflect attention from the fact that the CJEU, for the first time, contemplated welfare rationales as potentially successful justifications of restrictions on fundamental economic freedoms to a large extent. It also alluded, that in an amended form, so as to fulfil all limbs of the proportionality test, the Greek measure, often attacked in the course of the country's economic adjustment programmes, could be compatible with both primary EU law as emanating from the Treaties and the Charter, but also with the objectives of Directive 98/59/EC on collective redundancies.

B. A(Nother) Case of Fundamental Social Rights Versus Fundamental Economic Freedoms?

While the particular issue here did not gain much traction, the connection between the national measures and the social provisions of the Charter having been dismissed by the Advocate General and overlooked by the CJEU, the value judgments undertaken in that regard by both actors cannot help but bring the balancing exercise between fundamental rights and fundamental freedoms into mind. For the purposes of the examined case, the balancing act takes place between welfare considerations, such as the protection of employment and workers on the one hand, and economic freedoms, such as those of establishment and to conduct a business, on the other hand.

[72] At least compared to other fundamental freedoms according to C. Barnard, 'The Workers Protection Justification: Lessons from Consumer Law', in P. Koutrakos, N. Nic Shuibhne and P. Syrpis, *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart Publishing, 2016), p. 123.

Despite being enshrined in the Union's social acquis, social rights cannot act independently, but instead form part of the possible public interest justification that a Member State can plead in order to justify a potential restriction on a fundamental freedom. By doing so, the CJEU and the Advocate General alike, automatically render those subordinate to the exercise of the - primarily economic - fundamental freedoms, but also of the economic rights' component of the Charter, in a similar way that the right to strike was in *Viking*.[73]

They are seen as exceptions to the rule, and not as equal counterparts of the market freedoms, despite the Charter's social solidarity chapter and the progress made in integrating social aspects throughout the recent Treaty amendments. As mentioned above, such an interpretation might appear to undermine any change at legislative and policy level, and has led to fierce criticisms of the proportionality-based approach undertaken by the CJEU, calling it 'fundamentally flawed', [74] and 'a travesty of its former self',[75] due to the contempt shown towards welfare in the course of the balancing exercise.

For the CJEU, however, path-dependence seems to hold strong, making it difficult for it to depart from its long-standing reasoning, which has set the bar too high for social justifications to satisfy the pertinent proportionality test in free movement cases, despite some bright moments in certain Advocate Generals' Opinions, which have nevertheless failed to translate into path-departure.[76] Under this framework, the pro-social attitude of the CJEU in *AGET Iraklis* might be one small step for the operation of the balancing exercise at the moment but could represent a giant leap for Social Europe if this is further built upon in the future.

C. The Competing Visions of European Constitutionalism

[73] A.C.L. Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ', 37 *Industrial Law Journal* (2008), p. 126.
[74] M. Lasser, 'Fundamentally Flawed: The CJEU's Jurisprudence on Fundamental Rights and Fundamental Freedoms', 15 *Theoretical Inquiries in Law* (2014), p. 229.
[75] E. Christodoulidis, 'Social Rights Constitutionalism: An Antagonistic Endorsement', 44 *Journal of Law and Society* (2017), p. 123, 140.
[76] P. Syrpis, 'Reconciling Economic Freedoms and Social Rights—The Potential of Commission v Germany (Case C-271/08, Judgment of 15 July 2010)', 40 *Industrial Law Journal* (2011), p. 222, 227- 228.

More easily discernible through the contrasting argumentation of the two stakeholders is the fact that each represents, in a way, one of the distinct narratives in the literature of European Constitutionalism, broken down into its economic and social elements, and the tensions that arise among them. The Advocate General's Opinion recalled the very beginning of the European Project, drawing on its ordoliberal origins, with their market-oriented approach, and the primacy given to the market's demands, to which social considerations had to obey.[77] Indeed according to this worldview, social justifications can only be construed as limited exceptions, and primacy must be given to economic interests. Social policy thus becomes not an independent actor, but merely a mechanism of the market, finding itself in an inferior position compared to any market-related right or freedoms.

On the contrary, and despite the subordinated depiction of social rights in terms of the balancing exercise, the CJEU's discourse seemed to allocate substantially more space in order to highlight their importance. They are no longer held hostage to market demands, but have the ability to bend the confines of economic imperatives. They gain their own independent legitimization, reinforced with the social reorientation of Europe post-1990s, and particularly post-Lisbon.[78] It is this type of constitutionalism that would allow for national measures such as those in question in *AGET Iraklis* to justify restrictions on free movement.

In practice, though, things are not quite there yet. Despite enjoying the CJEU's recognition as serving legitimate (and for the most part appropriate) objectives, it is hard for the CJEU to find that they do not go beyond what is necessary to achieve those aims. Scharpf has written about the fundamental asymmetry of European Integration, whereby the highly harmonized aspects of the economic constitution retain the upper hand vis-à-vis the largely underdeveloped social one.[79] Under those terms, Article 5(3) of Law No. 1387/1983 seems to have fallen victim to this asymmetry. It is an antagonistic relationship that might surface

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[77] W. Sauter and H. Schepel, *State and Market in European Union Law* (Cambridge University Press, 2009), p. 12.

[78] C. Joerges and F. Roedl, '"Social Market Economy" as Europe's Social Model?', in L. Magnusson and B. Strath (eds.), *A European Social Citizenship? Preconditions for Future Policies from a Historical Perspective* (Peter Lang, 2004), p. 127.

[79] F. Scharpf, 'The European Social Model: Coping with the challenges of diversity', *Max Planck-Institut für Gesellschaftsforschung Working Paper* No. 02/8 (2002), https://www.econstor.eu/bitstream/10419/44265/1/644399538.pdf; F. Scharpf, 'The Double Asymmetry of European Integration; Or: Why the EU Cannot Be a Social Market Economy', *Max Planck-Institut für Gesellschaftsforschung Working Paper* No. 09/12 (2009), http://www.mpifg.de/pu/workpap/wp09-12.pdf.

between the Economic and Social Constitutions, yet the CJEU does not give ex ante unconditional primacy to the Economic one.

C. Extenuating Circumstances for an EMU Member State under the ESM

Although neither the CJEU nor the Advocate General dedicate considerable space to the issue, making it of secondary rather than primary importance, there are still quite a few comments that can be made, especially as the extenuating circumstances put forward by Greece as quasi-force majeure justifications for the national legislation relate to serious social reasons, linked to the acute economic and financial crisis the country has faced since 2008. The consequences of the latter led Greece to enter into the ESM.

The Advocate General appeared quite daring when answering this question, reciting Greece's obligations under the ESM, and implying the necessity of an overhaul of the country's labour market policies to render Greece more competitive in the global arena.[80] From a social perspective, this cannot be well-received, particularly as it has yet to be proven how beneficial and sustainable constant deregulation may be. This viewpoint allows analogies to be drawn with the concept of downturn-austerity that some view implicit under the ESM, as if it has been normatively constitutionalized, with the CJEU declaring financial stability among the Union's higher objectives in relation to Article 125 TFEU in its *Pringle* judgment.[81]

The CJEU, on the other hand, adopted a much more legalistic reasoning in its judgment. It rejected Greece's argument, that in the absence of any specific safeguard or break clauses in either the Treaties or the Directive, circumstantial reasons related to the situation in one Member State cannot act as justifications. By deciding in that particular way, the CJEU might have wished to avoid non-formalized justifications acting as Trojan horses, enabling Member States to avoid compliance with EU law. On a different note, it is welcomed - if not hopeful - that the CJEU chose to abstain from value judgments on the reforms that Greece must

[80] Opinion of Advocate General Wahl in Case C-201/15 *AGET Iraklis*, para. 80.
[81] Case C-370/12 *Thomas Pringle v. Government of Ireland, Ireland and The Attorney General*, EU:C:2012:75. For an elaborate account of the issue refer to, A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press, 2015), p. 127-129; A. Menendez, 'The Crisis of Law and the European Crises: From the Social and Democratic Rechtsstaat to the Consolidating State of (Pseudo-)technocratic Governance', 44 *Journal of Law and Society* (2017), p. 56, 66-67; C. Kaupa, 'Has (Downturn-)Austerity Really Been "Constitutionalized" in Europe? On the Ideological Dimension of Such a Claim', 44 *Journal of Law and Society* (2017), p. 32, 46-47. Note that the latter seems to suggest a different reading of *Pringle*, as not excluding other socio-economic models of governance.

undertake as part of its financial obligations under the ESM, despite the measure in question having been targeted by the Troika.

The CJEU accepted that, in theory, a prior authorization regime could be compatible with EU law, yet the CJEU chose not to give a precise answer as to how the national pre-authorization regime can be reformed to fully comply with it. This, and especially the part of the judgment which hints that such measures could be part of Directive's 98/59/EC most favourable clause, might give ammunition to the Greek side at the negotiation table, to maintain a revamped version of the scheme, and addresses concerns voiced against further deregulation in the context of austerity measures. On the other hand, its abstractness, might allow for the more precise, albeit deregulatory, authority of the bailout institutions to take over the measure's suggested reform.

The scenario of the Troika's victory would make it hard for the measure to be challenged as part of Greece's rescue deal. Precedence has shown that the CJEU is quite deferential towards such actions, with most of the preliminary references rejected as matters of national law,[82] something that ex ante bars any possibility for interpreting provisions enacted under the various Memoranda of Understanding vis-à-vis social considerations.[83] Yet, even in the rare instances where the CJEU might accept the admissibility of a preliminary reference on the matter, its previous rulings show that it tends to give precedence to the overarching objective of ensuring financial stability, as was the case in *Pringle*.[84]

§5. Conclusion

Quo vadis CJEU in the field of social considerations? The judgment of the CJEU in *AGET Iraklis* can be seen as a hopeful development. It showed a more accommodating judiciary, that takes into account social rights, yet it was cautious enough to still look after its precious fundamental freedoms. Despite the fact that the latter were drawn from both the Treaties and the Charter, this did not impede the CJEU from dedicating a respectable part of

[82] Indicatively: Orders of the Court in Case C-128/12 *Sindicato dos Bancários do Norte and Others*, EU:C:2013149 and Case C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins*, EU:C:2014:2036.
[83] A. Koukiadaki, 'The Legacy of the Economic Crisis for Labour Law in Europe', in A. Bogg, C. Costello and A.C.L. Davies (eds.), *Research Handbook on EU Labour Law* (Edward Elgar, 2016), p. 82-85; C. Barnard, 'The Charter, the Court – and the Crisis', *Cambridge Faculty of Law – Legal Studies Research Paper Series Paper* No. 18/2013 (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2306957.
[84] Case C-8/15 P *Ledra Advertising v. Commission and European Central Bank*, EU:C:2016:701.

its reasoning to defending and acknowledging social rationales as legitimate justifications to the former's exercise, significantly departing from its more dismissive and settled case law. Perhaps finally, the CJEU has listened to the advocates of giving a more prominent position to the concept of social market economy and the social solidarity part of the Charter, especially in the post-Lisbon era.

Interestingly enough, the past jurisprudence of the CJEU found a stronghold in the Advocate General's Opinion, as if the roles have been reversed in this case, considering the more accommodating stance exhibited towards welfare by Advocate Generals in previous cases. For him, economic interests should come above and beyond everything else. The economic constitution does not have any space for the social one, which can only be subordinate to the former. Amidst such an anti-social rhetoric, the CJEU's use of arguments linked to workers' protection comes as a ray of hope for the future. It is the CJEU, together with the political arena of the Union, that has been given the arduous task of balancing these antithetic interests.[85] If Social Europe is to emerge in a more substantial way following the latest reforms, then it is partly the CJEU's task to contribute to its development. Until such ambitions fully materialize, however, one can only hope that the CJEU will not digress from this aim.

[85] J. Snell, 'Economic Justifications and the Role of the State', in P. Koutrakos, N. Nic Shuibhne and P. Syrpis (eds.), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality*, p. 12-31.