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Minimum Harmonisation after *Alemo-Herron*: The Janus Face of EU Fundamental Rights Review

European Court of Justice, Third Chamber
Judgment of 18 July 2013, Case C-426/11, *Alemo-Herron v
Parkwood Leisure Ltd*

Marija Bartl & Candida Leone

While *Alemo-Herron v Parkwood Leisure Ltd* (case C-426/11) has received much criticism in recent months, one fundamental constitutional question has passed by unnoticed. In *Alemo-Herron*, the Court of Justice expanded the scope of EU fundamental rights review in the field of minimum harmonisation to include, in particular, member states action that goes beyond the EU minimum rules. This expansion of EU fundamental rights review is bound to unsettle the division of powers both horizontally (between the EU institutions) and vertically (between the EU and the member states), and at the same time, perhaps counter-intuitively, poses a significant danger for the level of social and environmental protection in Europe.

INTRODUCTION

The recent case law of the European Court of Justice (ECJ), including cases such as *Aziz*¹ and *Morcillo*², are often praised for their social and fundamental rights ‘minded’ interpretation of EU law.³ This mood of optimism renders it all the more

¹ ECJ 14 March 2013, Case C-415/11, *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa*.

² ECJ 27 July 2014, Case C-169/14, *Sanchez Morcillo And Abril Garcia v Banco Bilbao Vizcaya Argentaria SA*.

³ C. Mak, ‘On Beauty and Being Fair – The Interaction of National and Supranational Judiciaries in the Development of a European Law on Remedies’, in K. Purnhagen and P. Rott (eds.), *Varieties of European Economic Law and Regulation* (Springer International Publishing 2014) p. 823; G. Comparato and H.W. Micklitz, ‘Regulated Autonomy between Market Freedoms and

necessary to return to another judgment, *Alemo-Herron*, which suggests that, to the contrary, fundamental rights review may lower the levels of social protection in the EU.

We argue that to submit member states' legislation that goes beyond the EU minimum rules to the ECJ's fundamental rights review will have important constitutional, institutional and social consequences. In this vein, given the usually 'socially minded' or protective logic underpinning the EU minimum harmonisation legislation, which leaves an option to member states to offer a *more favourable protection regime* to consumers, workers or the environment, we contend that the challenge to these rules, and European interference, will predictably come from one corner of the political spectrum. In particular, the expansion of the fundamental rights review allows businesses to contest more protective labour, consumer or environmental regulations of EU member states on the grounds of EU fundamental rights (such as the freedom to conduct business), granting the Court a power to lower the level of protection, if that happens to be – as in *Alemo-Herron* – in line with its economic theory.

Alemo-Herron may also be seen as following a series of ECJ decisions on the posting of workers, limiting the discretion of member states to go beyond the level of protection established through minimum harmonisation. What is most remarkable about *Alemo-Herron*, however, is that unlike in *Laval* and related cases, the limitation of workers' rights is not offered up on the altar of fundamental freedoms but fundamental rights. Claiming to protect the 'core' of the freedom to conduct business, the *Alemo* Court⁴ could enforce its own interpretation of proper economic policies without the need to justify such deregulatory move either by internal market exigencies or by an attempt to use established legal interpretation instruments.

This contribution is structured as follows. First, we describe the facts and the background of the ECJ's decision and then briefly discuss the teleological interpretation of the Directive on the Transfer of Undertakings, and the new purpose ('fair balance') that the Court has read into this Directive. This discussion prepares the ground for the main argument of this contribution, namely, the ambivalent fate of minimum harmonisation after *Alemo*. The social and redistributive implications of expanding the Charter's scope of review become

Fundamental Rights in the Case Law of the CJEU', in U. Bernitz et al. (eds.), *General Principles of EU Law and European Private Law* (Kluwer Law International 2013) p. 121.

⁴We will often refer to 'the *Alemo* Court'. While this practice might appear unusual, we aim by it to underline, on the one hand, that we hope *Alemo* will stay a contingency in the ECJ's case law and not become the Court's standard approach in similar matters; on the other hand, that there is something odd to a decision of this importance being swiftly taken by a five-judge chamber, largely relying on the (re)interpretation of a previous decision authored by the same *rapporteur* (see *infra* for the discussion of this older decision).

easily discernible once the right to be protected is the 'freedom to conduct business'. We conclude by asking for whose benefit is the expansion of fundamental rights review in the field of minimum harmonisation.

FACTS AND BACKGROUND OF THE CASE

The *Alemo* judgment concerns the interpretation of Directive 2001/23/EC, aimed at 'safeguarding of employees' rights in the event of transfers of undertakings'.⁵ The applicants, a Mr. Alemo-Herron and his colleagues, were employed by the London Borough of Lewisham. Subsequently, the division in which they worked was 'privatised', and their contracts transferred to Parkwood Leisure Ltd., a private company (hereafter 'Parkwood'). This direct transfer of employees' contractual rights and obligations to a new employer is secured under United Kingdom law by the Transfer of Undertakings (Protection of Employment) Regulations 2006, which implemented the relevant Directive.

The employment contracts entered into by the applicants contained a term stating that, while the employees worked for the London Borough of Lewisham, their terms and conditions of employment would be determined 'in accordance with collective agreements negotiated from time to time by the [NCJ] ...', supplemented by agreements reached locally through [Lewisham]'s negotiating committees.⁶

Therefore, the relevant collectively agreed terms had been, *prima facie*, incorporated in the contract, making those terms applicable to the individual employment relationship. The body in charge of establishing such terms was the National Joint Council (NJC), a negotiation body including representatives from local public employers and trade unions. The transferee, a private company, was not involved or represented in the negotiations that led to a series of salary increases being agreed after Parkwood acquired the business. When Parkwood decided not to follow the salary determinations of the NJC, the applicants brought proceedings before the Employment Tribunal to have those pay increases recognised.

To decide whether the pay increases negotiated by the NJC were to impact the individual employment contracts, the question to be answered by the Employment Tribunal was whether the relevant term should be interpreted as incorporating into the contract of employment the collective agreement(s) in force *at the time the transferee acquired the business* (the so-called 'static' approach) or also

⁵ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, *OJ* 2001 L82/16.

⁶ Cited from *Alemo-Herron*, para. 10.

agreements which were concluded at a later point in time (the ‘dynamic’ approach). Under English law, earlier case law held that once collectively bargained terms had been incorporated into an employment contract, they became contract terms like any other, and thus were transferred with the contract with no need for further adjustments. This interpretation, which incorporated common law ‘contractual orthodoxy’⁷ into the system established by the Directive, can be labelled as a dynamic approach in that it considers the term incorporating external rules to be capable of following a change in the latter rules. The opposite or static approach links the term’s effectiveness to the substantive content to which it refers, making later alterations of that content incapable of affecting the contract.

The reason why the ECJ was eventually involved in the case is that the effects of a transfer of enterprise on existing employment contracts have been the object of European harmonisation. The Acquired Rights Directive provided for the automatic transfer of the employment contracts, in Article 3 paragraph 1, and the limited⁸ applicability of collective agreements, which were in force in the unit at the time the transfer occurred in Article 3, paragraph 3.

In its previous *Werhof* decision, the Court of Justice had ruled that Article 3(1) of the Directive

must be interpreted as *not precluding*, in a situation where the contract of employment refers to a collective agreement binding the transferor, that the transferee, who is not party to such an agreement, is not bound by collective agreements subsequent to the one which was in force at the time of the transfer of the business.⁹

The issue on which different national courts in the *Alemo-Herron* case had come to disagree was, in essence, the meaning to be given to *Werhof*: did the fact that a ‘static’ approach was allowed merely imply its literal meaning, or should (in this case) the courts read the judgment as actually *imposing* such an approach?

Prima facie, it might seem hard to justify such purported uncertainty in interpretation. The wording of the Court’s conclusion do not seem to

⁷ C. Wynn-Evans, ‘TUPE, Collective Agreements and the Static–Dynamic Debate’ [case note on *Alemo-Herron and Others v Parkwood Leisure Ltd* [2010] IRLR 298, CA], 39 *ILJ* (2010) p. 275 at p. 278.

⁸ Limited in time, since the concerned agreement remains applicable ‘until it expires or is replaced by a new agreement’. The article also grants member states the option to limit in time this ‘extended applicability’ of collective agreements – an option which, in any case, the UK did not make use of.

⁹ ECJ 9 March 2006, Case C-499/04, *Hans Werhof v Freeway Traffic Systems GmbH & Co. KG*, para. 37, emphasis added.

impose anything. However, the *reasoning* in the case in question provided a possible counter-argument to an otherwise clear interpretation, ventilating the possibility that a dynamic interpretation might affect the employer's negative freedom of association. In particular, the Court in *Werhof* had stated that (imposing) a dynamic approach 'would mean that future collective agreements apply to a transferee who is not party to a collective agreement and that his fundamental right not to join an association could be affected'.¹⁰

The Court's reasoning had indeed clouded the compatibility of the 'dynamic' clauses with EU law, read in light of EU fundamental rights. This is probably the reason why the English Court of Appeal had decided to overrule the applicable precedent to comply with EU law. The UK Supreme Court was not, however, convinced of *Werhof's* relevance to the case at hand, since the reference to negative freedom of association did not seem to play a role in *Alemo*.¹¹ The Supreme Court thus asked whether in light of *Werhof*, the Directive required, allowed or prohibited such dynamic clauses.

At the level of textual interpretation of the Directive, the questions the UK Supreme Court posed called for a simple response. The objective of Directive 2001/23 was 'to provide for the protection of employees in the event of a change of employer' (recital 7) by setting minimum level of protection, while allowing 'Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees' (Article 8). The 'dynamic interpretation', according to the ECJ, is an unambiguous instance of such heightened employee protection.¹² This response, one may argue, is further legitimised by the fact that the Union's legislature has confirmed the minimum harmonisation character of the Directive twice already – in the original Directive and in its recodification.

Yet, the Court of Justice demurred and declared the dynamic clause incompatible with Directive 2001/23. Such a conclusion is justified by means of two different routes. First, within EU secondary law, the Court reinterpreted the *telos* of the Directive to claim the Directive's objective is to 'ensure a fair balance' between competing interests. This balance would be jeopardised if dynamic clauses were allowed. Second, the Court considered primary law and concluded

¹⁰ *Werhof*, para. 31.

¹¹ It 'had been of relevance [in *Werhof*] because of the way German employment law deals with collective agreements. It was not a concern in this case, because the matter depended entirely on the domestic law of contract', see *Parkwood Leisure Ltd v Alemo-Herron and others* [2011] UKSC 26, para. 47. The UK Supreme Court had already considered that the solution to the case was unambiguous, in light of the fact that the precedents on which it was based 'amount to no more than a conventional application of ordinary principles of contract law to the statutory consequences apparently created by regulation 5 of TUPE'.

¹² *Alemo-Herron*, para. 24.

that EU fundamental rights and freedom of contract, in particular, also preclude a dynamic interpretation.

INTERPRETING THE DIRECTIVE ON ITS OWN TERMS: WHOSE ‘FAIR BALANCE’?

Before we turn to discuss the fate of minimum harmonisation, we will briefly examine the Court’s first argument, which allegedly militated against the dynamic interpretation. As noted by several observers,¹³ the Court of Justice has interpreted the purpose of the Directive as establishing a ‘fair balance’ between the rights of employers and employees.

Directive 77/187 [now Directive 2001/23] does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but *seeks to ensure a fair balance* between the interests of those employees, on the one hand, and those of the transferee, on the other.¹⁴

Yet the Directive itself, it has been remarked,¹⁵ at no point mentions such a ‘fair balance’. The whole Directive may indeed be seen as the outcome of balancing by the legislature. Against the background of an economic reality increasingly characterised by mergers and acquisitions, privatisations, out-sourcing and other forms of changes in ownership of enterprises, the Directive has established a *minimum* protection for the employees affected. Furthermore, the fact that the Directive itself sets a time limit to the applicability of previously agreed collective agreements and allows member states to further limit in time such applicability (Article 3.3) suggests that employers’ interests have also been taken into account. The minimum harmonisation clause is also part of the ‘balancing act’ that was performed throughout the Directive.

While finding little support for the new reading of the purpose of the Directive (‘fair balance’) in the text itself, the Court places great stress on its decision in *Werhof*. Yet at the same time, the *Alemo* court ‘adjusts’ the *Werhof* judgment in a fundamental manner. In particular, while the *Werhof* court¹⁶ claims that the interests of the transferee ‘should not be disregarded’, in *Alemo* these interests *must* be *positively* protected: [T]he transferee *must be in a position to make the adjustments*

¹³ S. Weatherhill, ‘Use and Abuse of the EU’s Charter of Fundamental Rights: On the Improper Veneration of ‘Freedom of Contract’’, 10 *European Review of Contract Law* (2014) p. 167; 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 Case C-426/11 *Alemo-Herron and Others v Parkwood Leisure Ltd*’, 42 *ILJ* (2013) p. 434.

¹⁴ *Alemo-Herron*, para. 25, emphasis added.

¹⁵ For criticism: see Prassl, *supra* n. 14, and, more generally, Weatherhill, *supra* n. 14.

¹⁶ At the hand, as was mentioned *supra*, n. 4, of the same judge *rapporteur*.

and changes necessary to carry on its operations.¹⁷ These adjustments seem also to have a particular content in this specific context:

Since *the transfer is of an undertaking from the public sector to the private sector*, the continuation of the transferee's operations will require significant adjustments and changes, given the *inevitable differences in working conditions* that exist between those two sectors.¹⁸

Therefore, the *Alemo* Court seems unsatisfied with the 'fairness of the balance' set by the Directive in its potentially high level of employee protection in the process of privatisation. Thus, insofar as they have not explicitly prohibited member states imposing the old (public-sector) working conditions on the new (private) employer, the drafters of the Directive seem to have failed to understand the 'inevitable' differences in the operation of public as opposed to private enterprises, which seem to automatically require the worsening of the position of employees. This line of reasoning of the Court is, incidentally, entirely at odds with its previous case law on the Directive on Transfer of Rights, where the ECJ had insisted that the transfer of an undertaking is *not* per se a reason for the change of employment conditions.¹⁹

EU FUNDAMENTAL RIGHTS AS A CHALLENGE TO MINIMUM HARMONISATION

Alemo-Herron has highlighted a fundamental constitutional question, which has received scant attention in the debate thus far. Namely, does (and should) the action of EU member states that goes beyond the EU minimum rules fall within the scope of EU law in the meaning of the Charter and is it thus subject to EU fundamental rights review?

The question of the *scope of application* of the EU Charter of Fundamental Rights is set to play a pivotal role in the European legal discourse in the years to come. EU fundamental rights have a specific character. Unlike the Treaty's four fundamental freedoms, whose violation brings a question automatically into the scope of EU law, EU fundamental rights – at least in principle – do not have such an effect. Not every alleged threat to fundamental rights is of concern to European Union²⁰ – instead, the operation of EU Charter is limited to a certain internal space already covered

¹⁷ *Alemo Herron*, para. 25, emphasis added.

¹⁸ *Alemo Herron*, para. 27, emphasis added.

¹⁹ ECJ 10 February 1988, Case 324/86, *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall* paras. 15 and 17; ECJ 6 November 2003, Case C-4/01, *Martin and others v South Bank University*, para. 40.

²⁰ Needless to say, we need not mourn the fate of fundamental rights protection in such a case. Such protection obviously takes place also outside the 'scope' of EU law; it will just be other (national and international) institutions to engage in their interpretation and enforcement.

by EU law.²¹ As Rosas has convincingly put it, in contrast to EU fundamental freedoms, EU fundamental rights are meant to apply only when other EU law provisions are applicable to the situation.²²

The status of minimum harmonisation remains unclear in this regard. Minimum harmonisation can be found in several EU fields of law and policy such as consumer protection, environmental protection or social protection.²³ It has been considered as a preferred regulatory solution to the extent that, as a less intrusive intervention into national legal orders, it gives the best expression to the principles of subsidiarity and proportionality of EU action. At the same time, member states were never free to violate the Treaty freedoms when going beyond EU minimum rules. As Craig has succinctly argued, EU minimum harmonisation sets the floor, while the Treaty sets the ceiling within which the EU member states are free to pursue their own policies.²⁴

The ECJ case law is ambiguous. On the one hand, in one of the few cases in which the ECJ addresses the issue squarely,²⁵ the Court was reluctant to apply the principle of proportionality to the more protective measures of the member state going beyond the EU minimum, suggesting that this domain falls outside of the scope of EU law.²⁶ On the other hand, in *Karner*²⁷ the Court appears to espouse the contrary view. In particular, in response to the argument of one of the parties, the ECJ discussed the compatibility of a national measure going beyond the EU minimum rules with fundamental rights *after* finding that the measure did not violate the fundamental freedoms, which suggests that such measure falls within the scope of EU law in the sense of Article 51 of the Charter. While only ancillary to the main argument, and applying a very undemanding level of scrutiny, this

²¹ See also ECJ 7 May 2013, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, para. 29.

²² A. Rosas, 'When is the EU Charter of Fundamental Rights Applicable at National Level?', 19 *Jurisprudence* (2012) p. 1269, <repository.mruni.eu/bitstream/handle/007/10752/101-209-1-SM.pdf?sequence=3>, visited 13 January 2015.

²³ J.H. Jans, 'Minimum Harmonisation and the Role of the Principle of Proportionality', in M. Führ et al. (eds.), *Umweltrecht und Umweltwissenschaft: Festschrift für Eckard Rehbinder* (Erich Schmidt Verlag 2007) p. 705, <www.user.uni-bremen.de/~avosetta/janjansarticle1.pdf>, visited 13 January 2015.

²⁴ P.P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2008) p. 626.

²⁵ ECJ 14 April 2005, Case C-6/03, *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz*.

²⁶ ECJ 14 April 2005, Case C-6/03, *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz*, para. 64: 'Deponiezweckverband the Community-law principle of proportionality is not applicable so far as concerns more stringent protective measures of domestic law adopted by virtue of Article 176 EC and going beyond the minimum requirements laid down by a Community directive in the sphere of the environment, inasmuch as other provisions of the Treaty are not involved'.

²⁷ ECJ 25 March 2004, Case C-71/02, *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH*.

step of the Court has raised the question whether the Court has abandoned its previous case law, which sees such measures as falling outside the *scope* of EU law.²⁸ In *Werhof* the Court also relied on an argument derived from EU fundamental rights. In particular, the Court suggested that requiring the dynamic interpretation of the clause may interfere with the freedom of association of a trader. This conclusion, however, concerned the review of the European ‘minimum’ rule rather than the national ‘maximum’ rule.

In *Alemo-Herron*, the Court of Justice does not consider these issues and goes directly to review the member state measure on the basis of EU fundamental rights. Advocate General Cruz Villalón is, however, somewhat more revealing in his reasoning:

[A]s we know, even where European Union law expressly gives Member States freedom of action, this must be exercised in accordance with that law. This obligation naturally includes, *inter alia*, fundamental rights, as expressly provided in Article 51 of the Charter. Accordingly, although the United Kingdom may permit the parties^[29] to include dynamic clauses referring to collective agreements in their contracts of employment, this must not result in conduct contrary to the fundamental rights referred to in the Charter, including the freedom to conduct a business mentioned in Article 16.³⁰

It is not self-evident from the Advocate General’s opinion how Article 51 of the Charter should ‘naturally’ grant the review of the measures that go beyond minimum harmonisation. The Advocate General does not state why a member state’s action should fall within the scope of EU law, and indeed it is not obvious that this is the case. In the context of measures going beyond the requirements of minimum harmonisation the member states do not seem to act as *agents* of the EU in the sense of the *Wachauf*³¹ line of case law: EU law does not require them to act at all, nor to act in a specific way. If member states decide to take action, they can

²⁸ J. Stuyck, ‘Case C-71/02, *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, Judgment of the Fifth Chamber of 25 March 2004’, 41 *CMLRev* (2004) p. 1683; A. Egger, ‘EU-Fundamental Rights in the National Legal Order: The Obligations of Member States Revisited’, 25 *YEL* (2006) p. 513 at p. 515.

²⁹ Almost incidentally, the Advocate General seized an important point: are member states (not) allowed to *permit* the parties to include dynamic clauses? Does EU freedom of contract require, in this case, setting aside the contractual principle of *pacta sunt servanda*?

³⁰ *Alemo-Herron*, Opinion AG Cruz Villalón, para. 47.

³¹ ECJ 13 July 1989, Case C-5/88, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*. Catherine Barnard, notices how, with reference to the fundamental principles of EU law, the case law in turn addressed cases in which the states were implementing EU law (*Wachauf*), derogating from it (*ERT*) or, more recently, *acting within its scope* (*Annibaldi*). What this scope is supposed to encompass, however, is precisely the question which appears most relevant here. See C. Barnard, *EU Employment Law* (Oxford University Press 2012) p. 31.

do so in the manner that they deem suitable, provided that it does not infringe on the EU minimum level of protection or violate the Treaty, i.e. free movement provisions. The action of the member states also does not ‘derogate’ from EU law, as would be required by the *ERT*³² line of cases. On the contrary, national measures seem to enrich the original pursuit of EU legislation.³³

While the Advocate General fails to provide satisfactory reasons why UK law should be submitted to Charter review, the Court does not engage in any justification as to why the more protective national measure falls in the scope of EU law – with reference to its previous case law or otherwise. The silence of the Court on this constitutional question amounts to an attempt to assume a significant power ‘by stealth’.³⁴

THE FREEDOM TO CONTRACT AND THE ASSAULT ON SOCIAL REGULATION

Structurally, the expansion of the scope of EU fundamental rights review to the more social regulation enabled by EU minimum harmonisation renders such protective measures vulnerable to the Court’s review on the basis of more economically liberal fundamental rights. While the challenge to these protective rules will presumably come from the side of business, the fundamental right to freedom to conduct business – including the freedom of contract – is one of the most likely candidates to be invoked and eventually found in need of a (European) safeguard.

The first two questions that we need to address are whether there is anything that makes the application of the freedom to conduct business, and freedom of contract in particular, extraordinary in this context. And why, if at all, should we be concerned by the resuscitation of this ‘human right’ by the Court of Justice? To begin with freedom of contract (and freedom to conduct business) is missing from many international human rights instruments – one might add, for good reasons. More contingent than its companion – the right to property – freedom of contract is tightly linked to the interpretation of the scope of the market in a particular community. Its content follows narrowly the community’s understanding of the relation between market and society. The dependence of this right on the social, political and economic framework in a particular community is so comprehensive, that it seems difficult to make a claim that there is any real ‘essence’ to this right – beyond, indeed, the requirement that there *is* a market economy.³⁵

³² ECJ 18 June 1991 Case C-260/89, *Elliniki Radiophonia Tileorassi AE (ERT) v. Dimotiki Etairia Pliroforissis and Siotirios Kouvelas*.

³³ See for instance P.P. Craig and G. de Búrca, *supra* n. 25, or Egger, *supra* n. 29.

³⁴ For a compelling analysis see G. Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press 2009).

³⁵ R.L. Hale, ‘Coercion and Distribution in a Supposedly Non-Coercive State’, 38 *Political Science Quarterly* (1923) p. 470; K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, 2nd ed. (Beacon Press 2002).

The conceptual emptiness of the freedom to contract (and the freedom to conduct business for that matter) is also reflected both in the lack of 'a satisfactory definition' at the EU level, as the Advocate General notes in his opinion on the *Alemo-Herron* case, as well as in the very broad interference allowed by the very case law of the Court of Justice of the EU.³⁶ Historically, then, freedom of contract has been used to argue for a *specific* kind of market: the 'Lochner era' of the US Supreme Court is perhaps the most famous example thereof.³⁷

When it comes to its place in the European legal order, strictly speaking, freedom of contract is also not among the rights that the Nice Charter protects as 'fundamental' in Europe, but the Court (and the Commission) considers it to be encompassed by the freedom to conduct business.³⁸ Importantly, even if the freedom to conduct business can be found in Title II of the Charter, thus among the 'hard core' rights, both the wording of the right ('the freedom to conduct business [...] is recognised') and the Court's previous case law suggest that this is a 'weak' right.³⁹ The freedom to conduct business has been introduced as a 'counterweight' to the social rights contained in the Charter's Chapter IV and the Court has recognised its principle-like character, including the openness to large interventions in public interest.⁴⁰

³⁶ P. Oliver, 'What Purpose Does Article 16 of the Charter Serve?', in U. Bernitz et al., *General Principles of EU Law and European Private Law* (Kluwer Law International 2013) p. 281.

³⁷ H. Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Duke University Press 1993).

³⁸ The guidelines can be found online <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF>, visited 13 January 2015. In particular, freedom of contract is said to be based on, *inter alia*, ECJ 28 June 1978, Case C-151/78 *Sukkerfabriken Nykøbing Limiteret v Ministry of Agriculture*, and ECJ 5 October 1999, Case C-240/97, *Spain v Commission*. Both cases indeed recognised the existence of freedom of contract as something that, broadly speaking, is not to be restricted without an appropriate procedure and legal basis, without saying much as to its nature or as to what it entails. In addition, Weatherill in his comment argues that the cases fail to tell much about the status of freedom to contract in EU law. More generally, Prassl, *supra* n. 14, p. 442, notes how 'even proponents of the recognitions and strengthening of freedom of contract as a general principle of Union law have noted that the notion does not currently form part of the EU legal order'.

³⁹ X. Groussot et al., 'Weak Right, Strong Court - The Freedom to Conduct Business and the EU Charter of Fundamental Rights', *Lund University Legal Research Paper Series* No 01/2014, <papers.ssrn.com/sol3/papers.cfm?abstract_id=2428181>, visited 14 January 2015; P. Oliver, *supra* n. 36.

⁴⁰ See ECJ 22 January 2013, Case C-283/11, C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk*, para. 47: 'On the basis of [the Court's] case law and in the light of the wording of Article 16 of the Charter, which differs from the wording of the other fundamental freedoms laid down in Title II thereof, yet is similar to that of certain provisions of Title IV of the Charter, *the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest*', emphasis added.

In this context *Alemo-Herron* becomes a game-changing decision for two main reasons. First, as noted above, the judgment clearly (though surreptitiously) establishes the Court's power to review on the basis of EU fundamental rights more protective measures that go beyond the EU minimum rules. Second, the decision demonstrates the kind of dangers that such protective measures face in this newly established domain of ECJ's adjudication. In particular, as the challenge to these protective measures is likely to come from more liberal corners, these measures become vulnerable to an ideological stance of which the Court's veneration⁴¹ of freedom of contract might be a telling example. It is not insignificant to note that the UK's (mainly) Conservative government has argued for the very same result finally reached by the ECJ.⁴²

The technique the Court has used to reach the desired decision has been to expand the understanding of what constitutes the 'essence' of the freedom of contract. In particular, in an important previous decision, *Sky Österreich*, to which the *Alemo* Court reaches for its justification, the ECJ has considered the 'core content' of the freedom to conduct business to be violated if and only if something 'prevents business activity from being carried out as such'.⁴³ In *Alemo-Herron*, however, that condition seems to be sufficiently fulfilled given the fact that Parkwood was denied the legal capacity to make such 'adjustment and changes'⁴⁴ required in the context of privatisation, 'given the inevitable differences in working conditions that exist between those two sectors'.⁴⁵ According to the Court, Parkwood could 'neither assert its interests effectively in a contractual process' nor 'negotiate the aspects determining changes in working conditions for its employees with a view to its future economic activity'.⁴⁶

This reasoning of the Court is difficult to sustain on both substantive (private law) and procedural (interpretation technique) grounds. Substantively, the Court's reasoning assumes that the National Joint Council was *the only* context in which negotiation could take place. This was, however, hardly the case. First, had the dynamic clause been upheld, Parkwood could have re-negotiated⁴⁷ its

⁴¹ Weatherhill, *supra* n. 14.

⁴² Governments' submissions to the ECJ are not publicly available. The fact is mentioned by Prassl, *supra* n. 14, p. 437, who derives it from <blog.rubensteinpublishing.com/dynamic-interpretation-of-tupe-precluded/>, visited 13 January 2015.

⁴³ *Sky Österreich*, *supra* n. 40, para. 47.

⁴⁴ *Alemo-Herron*, para. 25.

⁴⁵ *Alemo-Herron*, para. 27.

⁴⁶ *Alemo-Herron*, para. 34.

⁴⁷ It might be useful to recall, at this point, that under UK law collective agreements are only binding between two parties if and insofar as they have been incorporated in the individual contract of which, then, they become a part just as any other set of terms. This implies that the parties are in principle free to re-negotiate them at any point in time.

contractual obligations with its contractual counterparts – the employees.⁴⁸ Even if the Directive on the Transfer of Undertakings, and the Court's case law on this Directive, restricts the rights of the transferee to change the terms of the employment contracts *during* the transfer, this constraint is surely not unlimited in time.⁴⁹ Thus, viewed in this light, the struggle underlying the dispute over the 'dynamic clause' was not whether Parkwood *could* negotiate the employment conditions of its workers,⁵⁰ but rather, the question who – Parkwood or its new employees – should be in a superior bargaining position after the transfer. Second, Parkwood could have used its contractual autonomy *when acquiring the undertaking*, to make sure that the burden it was assuming was duly considered in the transfer *price* of the undertaking itself.⁵¹ That was indeed a major occasion for the deployment of freedom of contract in relation to a more equal counterparty.⁵²

In terms of legal interpretation, invoking the violation of the 'core' of freedom of contract⁵³ has unbound the last constraints on the Court's reasoning. As we have discussed above, on the one hand, the teleological interpretation of the

⁴⁸ Such a scenario, by the way, would also have given Parkwood's employees a better chance to exercise *their* freedom of contract in a meaningful way. As an aside, it should be mentioned that the company would not have been required to re-negotiate the whole collective agreement, but merely the pay increase.

⁴⁹ *Martin and others*, *supra* n. 20, paras. 42–43.

⁵⁰ This reasoning is not affected by the ECJ's precedents restricting the possibility to agree contractual amendments *justified by the fact itself of the transfer*, such as *Daddy's Dance Hall*, *supra* n. 20, *D'Urso* (ECJ 25 July 1991, C-362/89, *Giuseppe d'Urso, Adriana Ventadori a.o. v Ercole Marelli Elettromeccanica Generale SpA a.o.*), *Rask* (ECJ 12 November 1992, C-209/91, *Anne Watson Rask and Kirsten Christensen v Iss Kantineservice A/S*) and *Martin*, *supra*, n. 20. The meaning of these decisions cannot be possibly stretched to imply that the parties would at this point be able to re-negotiate their contracts. The Court's precedents should rather be understood as aiming to avoid the circumvention of the Directive's by way of contractual arrangements. As highlighted by its Art. 3, the Directive's effects – including those derived from its interpretation – are not meant to last eternally. If the arguments brought forward in those cases have any bearing in this context, this should rather work against the Court's assumption that transfers automatically require adapting the applicable working conditions. This assumption is not compatible with the courts previous assertion that a transfer alone should not be a sufficient ground for changing the terms of employment.

⁵¹ The proceedings offer no evidence as to whether this has (not) happened in practice.

⁵² Incidentally, adopting reasoning which is frequently heard from heralds of laissez-faire in the domain of consumer contracts, the take-it-or-leave-it nature of a deal is not in itself a reason to consider it as less than favourable to the party accepting it.

⁵³ Violation perpetrated – as ironic as this may sound – through the application of contract law orthodoxy and the principle of *pacta sunt servanda*. However, according to the same principle all the other terms in the transferred contract remain applicable. It seems appropriate, therefore, to ask how the line is drawn between terms whose preservation jeopardises the 'core' of contractual freedom and terms which can be safely transferred. This is just another question that the Court leaves unaddressed.

Directive has been ‘taken care of’ by the reinterpretation of the *telos* of the Directive, which ceased to be the protection of workers (as the text of the Directive would suggest), and turned out to be that of pursuing a ‘fair balance’ between interests of employers and the employees as understood by the Court. The reference to a violation of the ‘core’ of freedom to contract, on the other hand, has allowed the Court to avoid the application of ‘standard’ legal tools of interpretation of fundamental rights, such as proportionality or balancing the rights. Once the ‘core’ of a fundamental right is in danger, the limitations of the right stemming from its ‘social function’, or the margin of appreciation of the legislature to regulate it, cease to play a role.

However, if a particular fundamental right has so little intrinsic essence as the freedom of contract does, the mobilisation of constitutional authority of the Court seems to be instrumental to pursuing a purely political – or redistributive – aim. In other words, given the dependence of the freedom of contract on our understanding of what constitutes the ‘right kind’ of market, the reliance on this freedom allows the *Alemo* Court to reshape the (internal) market and newly apportion the benefits thereof, on the basis of its own economic and political theory.⁵⁴

CONCLUSION

After *Alemo-Herron*, one has to ask what remains of minimum harmonisation. If the ECJ establishes its right to review the member states’ action that goes beyond the EU minimum rules, this will not only upset the division of powers between the EU institutions and between the EU and the member states but also, potentially, lead to a lowering of social standards in Europe.

First, in purely formal terms, the extension of the Charter’s scope to the member states’ measures that go beyond minimum harmonisation is far from obvious or (as the Advocate General suggests) ‘natural’, since the member states measures that go beyond the EU minimum rules do not unambiguously fall into the ‘scope’ of the Charter. The member states hardly act as the agents of the EU, and they certainly are not derogating from EU law. The case law of the ECJ on this issue is at best ambiguous. While the Court has explicitly refused to apply the proportionality principle to this area (*Deponiezweckverband*), it has at other places implicitly included these actions in the scope of EU law and ‘by the way’ uttered statements supporting its conclusions reached on other grounds (*Karner*). The result reached in *Alemo*, thus, would have required a completely different level of argumentation.

⁵⁴ And as Oliver Wendell Holmes Jr. remarked in his dissenting opinion in *Lochner v. New York*, 198 U.S. 45 (1905): ‘[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s *Social Statics*’.

Second, while the expansion of the fundamental rights review institutionally empowers the ECJ, it both undermines the capacity of the EU legislature to use one subsidiarity-friendly legal technique and submits the EU member states action in this area to the ECJ's discipline. If relying on freedom of contract, this discipline will be that of the Court's preferred economic theory, possibly changing the character of the politico-economic compromise reached by the Union's and member state legislatures.

The final question that we need to ask is: to whose benefit is all this? First of all, the more protective national rules will be challenged foremost by those who lose from higher protection – i.e. businesses the main agents of EU integration through law.⁵⁵ Secondly, the readiness of the ECJ to interfere may result from its integrationist agenda,⁵⁶ when each national measure struck down means also a new European *fully* harmonised rule. Thirdly, the fact that the ECJ is a supranational institution of a still predominantly economic entity, strongly invested into opening markets, may influence the Court's ideology – especially if that would coincide with the Court's integrationist objectives. Thus, let us once more reiterate the question – if minimum harmonisation is usually about giving more protection to workers, consumers or the environment, what will be the consequences of the Court tacitly assuming the power to review these political choices – in light of what appear to be largely discretionary political standards?



⁵⁵N. Fligstein and A. Stone Sweet, 'Constructing Politics and Markets: An Institutional Account of European Integration,' 107 *American Journal of Sociology* (2002) p. 1206.

⁵⁶E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', 75 *American Journal of International Law* (1981) p. 1; A Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004); H. Unberath and A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', 44 *CMLRev* (2007) p. 1237; A. Vauchez, 'Keeping the Dream Alive: The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence', 4 *European Political Science Review* (2012) p. 51.