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Comparing Labour Laws in the EU Internal Market: A Social Actor Perspective

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The discipline of comparative labour law suffers from a dual crisis: comparative law may seem irrelevant if nation states are pushed back by ever accelerating globalization, and labour law may be rendered irrelevant by the digitalized economy. This article argues that, since states are becoming interdependent instead of superfluous, and work remains a dependent quantity, there is a future for comparative labour law. This future requires an even higher degree of interdisciplinarity with a strong recovery of disciplinary (doctrinal) research. This article develops a social actor-centred approach for comparing labour law and policy in the context of economic integration beyond states, as pursued by the European Union. A comparative project relating to collective labour rights in the EU internal market is outlined as an example of this methodology.

1 INTRODUCTION

Comparison of labour laws within the EU Internal Market must account for the interaction of national labour laws and policy with EU level law and policy, which is shaped by legal institutions as well as by the interaction of economies and societies in the internal market. EU internal market law provides directly enforceable legal safeguards enabling business to trade and provide services across borders as well as free movement rights for workers, self-employed persons and companies. The principle of equal treatment in the host countries, for persons who move aims to ensure upward harmonization of working and living conditions. Formally, the interaction of EU and national law is embedded in a hierarchical relationship, since EU Treaty and secondary law enjoys supremacy over national law. In practice, EU integration has eased transnational business activities alongside some movement of individual workers, as well as transnational engagement of their collective representations. These transnational socio-economic actors strategically utilize legal institutions of different levels, as well as establishing contractual and negotiated legal frames at different levels, which may or may not interact.

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In order to comprehend the interaction of national labour laws and practices with each other in the EU internal market, comparative research needs to move beyond traditional methods. Comparative labour law scholars' methods already are informed not only by law in the books, but also by social practice in applying the law, frequently relating to industrial relations studies as well as to the changing role of comparative labour law under globalization in refining their methods.

This article promotes a specific method for comparing labour laws in the context of economic integration beyond national borders. It focuses on how social actors utilize different levels of legal regulation and social practice in pursuing their frequently antagonist interests. This approach is particularly apt for analysing consequences of multilevel regulatory regimes for the world of work. While the focus is on the European Union, the ideas can also inform the comparison of labour laws in other regions. After all, other world regions take the European Union's more glorious past as a template for generating interpenetration of societies and economies.

The article will first recapitulate current challenges for comparative labour law stemming from challenges for its constitutive sub-disciplines. Next it will discuss the continuing relevance of comparative labour law in an age of transnational economic integration, especially in the European Union. Discussing different approaches to comparing law and policy of EU Member States, the last part demonstrates a methodology to address these challenges.

2 COMPARING LABOUR LAWS: CURRENT CHALLENGES

2.1 Labour law and comparative law: a match made in heaven?

Comparative law in Europe is closely linked to labour law, not least because renowned comparativists such as Otto Kahn-Freund and Franz Gamillscheg were also labour lawyers, and renowned labour lawyers such as Bill Wedderburn and Bob Hepple, Antoine Lyon-Caen, Miguel Rodriguez, Silvana Sciarra and Ann Numhauser Henning were and are also comparativists.[1]

This proximity is no coincidence: both disciplines depend on interdisciplinary cooperation for their success. While it is possible to conduct comparative studies by compilations of positive law, methods of comparative law were derived from socio-legal studies from an early stage: the traditional functional method of

[1] The European Comparative Labour Law group, set up by the German comparative lawyer Thilo Ramm in 1978, constituted a basis for the emergence of many larger collaborations and subsequent landmark publications in the field (*see* preface of *The Transformation of Labour Law in Europe* (B. Hepple & B. Veneziani eds, Hart Publishing 2009; B. Aaron & K. V.W. Stone, *Comparative Labour Law – Bridging the Past and the Future*, 28 Comp. Lab. L. & Policy J. 377–392, and subsequent articles in this special issue in honour of the Comparative Labour Law group).

comparative law[2] had close links to sociology,[3] and links between comparative law and socio-legal studies are of continuing relevance.[4] The common core method, informed by Sacco's teaching,[5] shares methods such as the use of templates with social scientists. More recent approaches such as comparative legal cultures, law and economics and empirical comparative law[6] expand the array of methods beyond strictly doctrinal law.[7] Comparative law, while in constant self-reflection upon its own uses,[8] acquires 'subversive'[9] potential not only by the necessity of transcending parochial perspectives but also through its interdisciplinary tendencies.[10]

Labour law, as also expanded upon in other articles in this volume, is distinguished from other doctrinal divisions of legal scholarship by its focus on a real-life phenomenon: the subordination of those who offer their labour for sale under those who combine labour with capital for producing marketable goods and services. Accordingly, labour lawyers need to engage with the world of labour beyond law, which presupposes some versatility in sociology, political economy and industrial relations (another field of study lacking a primary disciplinary home).[11]

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2 For an overview of the functional method *see* R. Michaels, *The Functional Method of Comparative Law,* in *The Oxford Handbook of Comparative Law* 339–382 (M. Reimann & R. Zimmermann eds, Oxford University Press 2006); for a critical assessment *see* G. Samuel, *An Introduction to Comparative Law Theory and Method* Ch. 4 (Hart Publishing 2014).

3 Durkheimian functionalism is identified as one of the decisive influences by R. Michaels, n. 2 above, at 349–350, who also exposes the tensions between sociological critique of functionalism and the insistence of comparative lawyers that its categories remain useful (at 361–362). Functionalism also informs European integration studies E. Haas, *Beyond the Nation State: Functionalism and International Organizations* (Stanford University Press 1964), while constituting another cross-over of sociology and political science *see* S Saurugger, *Theoretical Approaches to European Integration* (Palgrave McMillan 2014), who also stresses the necessity to maintain the focus on non-state actors (*ibid*., at 35–37). T. Börzel refers to neo-functionalism as a society-centred theory of EU integration *Theorizing Regionalism*, in *The Oxford Handbook of Comparative Regionalism* 51–78, 57 (T. Börzel ed., Oxford University Press 2016).

4 *See Comparative Law and Society* (D. Clark ed., Edward Elgar 2012).

5 R. Sacco, *Legal Formants. A Dynamic Approach to Comparative Law*, 39 Am. J. Comp. L. 1–34, 343–401 (1991). Further U. Mattei, *Comparative Law and Critical Legal Studies*, in *The Oxford Handbook of Comparative Law* 816–836, 825–826 (n. 2 above); G. Frankenberg, *How to Do Projects with Comparative Law: Notes of an Expedition to the Common Core*, in *Methods of Comparative Law* 120–143 (P. G. Monateri ed., Edward Elgar 2012).

6 *See* on each of those the respective chapters in *The Oxford Handbook on Comparative Law* (M. Reimann & R Zimmermann eds, Oxford University Press 2006).

7 M. Schlachter, *Arbeitsrecht und Rechtsvergleichung*, 52 Recht der Arbeit, 118–136.

8 It is hardly a coincidence that the lecture *On Uses and Misuses of Comparative Law* was delivered by a comparative labour lawyer O. Kahn-Freund, 37 Modern L. Rev. 1–27 (1974).

9 G. P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 Am. J. Comp. L. 683–700 (1991).

10 While interdisciplinarity is a necessity, cooperation of legal scholars and those from other social science disciplines is not always positive. The failures of the 'legal origin theory' are quoted by several authors as a symptom of those difficulties J. Husa, *A New Introduction to Comparative Law* (Hart Publishing 2015); G. Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014).

11 It also lacks a uniform terminology: titles such as industrial relations and employment relations are expressions of substantive orientations as well as disciplinary markers *Comparative Employment Relations in the Global Economy*, (C. Frege & J. Kelly eds, Routledge 2013).

While these similarities suggest the proverbial match, the amorous relationship between labour law and comparative law seems one-sided to the detriment of labour law. Comparative law has long been established as one of the foundational subjects for the study of law in many jurisdictions. Consequently, its study focuses on legal sub-disciplines with a comparable standing, notably private law subjects such as contract and tort. Labour law, by contrast, is a less established legal discipline: its disciples straddle contract law, tort law and criminal law, constitutional law, company law, as well as specific fields such as the law of collective bargaining and collective agreements, employee codetermination, workplace participation, health and safety at work – in effect covering wider grounds only to earn less recognition. It also constitutes a recent addition to comparative law,[12] where it too is less recognized: a search for terms such as 'labour' and 'employment' in recent publications of comparative law[13] only brings few hits, and among those books only Husa's 'New Introduction to Comparative Law' refers to the subject of labour law in the substance of its text. Despite this limited coverage, labour law is intrinsically comparative: it emerged as a response to industrialization of the Western world, which established the notion 'worker'. These socio-economic developments were transnational, if not global, in character, though legal responses were inevitably national: this obviously invited comparison.[14] Comparison in labour law is specifically encouraged by the long tradition and extensive scope of international standard setting,[15] enhanced by European integration,[16] but also a genuine interest in improving the law.[17] Labour law as an aspirational field does not simply reflect established order, but instead aims to shape reality through social regulation,[18] which fosters a better regulation agenda in some labour law research.[19]

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[12] M. Finkin, *Comparative Labour Law,* in *The Oxford Handbook of Comparative Law* 1131–1160 (n. 6 above); G. Mundlak & M. Finkin, *Introduction to the Comparative Labor Law Handbook*, in *Comparative Labour Law Handbook* 1–18 (M. Finkin & G. Mundlak eds, Edward Elgar 2015), on comparative constitutional law *see* R. Hirschl, *Comparative Matters. The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) and M. Claes & M. de Visser, *Reflections on Comparative Method in European Constitutional Law*, in *Practice and Theory in Comparative Law* 143–169 (M. Adams & J. Bomhoff eds, Cambridge University Press 2012).

[13] Husa, n. 10 above; Samuel, n. 10 above; *Methods of Comparative Law* (n. 5 above), M. Siems, *Comparative Law in Context* (Cambridge University Press 2014).

[14] Mundlak & Finkin, n. 12 above, at 1–2.

[15] F. Gamillscheg, *Das Werkzeug der Arbeitsrechtsvergleichung*, in *Festschrift fürKonrad Zweigert* 433–450 (H. Bernstein et al. eds, JCB Mohr (Paul Siebeck) 1981).

[16] Finkin, n. 12 above, at 1147–1149.

[17] Mundlak & Finkin, n. 12 above, at 3–4.

[18] D. Schiek, *Enforcing Employment Discrimination Law – Potential Transplants from Italy to Britain and Vice Versa?* 28 (2012) Intl. J. Comp. Lab. L. & Indus. Rel., 489–512 (at 492–494).

[19] A. Bogg & K. Ewing, *Freedom of Association*, in *Comparative Labour Law* 296–329, 297 (M. Finkin & G. Mundlak eds: Edward Elgar 2016).

2.2 Challenges for comparative labour law

Challenges for comparative labour law emerge from the disciplinary crisis of labour law as such, as well as the diminishing relevance of national laws – the latter constituting a challenge for comparative law generally, but affecting comparative labour law in specific ways.

2.2[a] *New Futures of Labour and the Law?*

Labour law's disciplinary crisis[20] derives from its origin at the height of twentieth-century industrialization, which gives rise to doubts about its currency for a post-industrialized world.[21] Two main challenges have been identified: the emergence of internet-based services alongside the use of internet for production ('Internet of things') and the accelerated globalization of the economy.

The changes emerging from communication technologies, recently by the so-called gig economy, allow fragmenting labour at the local level into ever smaller units.[22] While this may seem exciting and new to some, experienced labour lawyers may view this as strangely reminiscent of the roots of labour law: an insecure, precarious existence of those who only had their labour to rely on for their existence bred the countervailing set of rules today known as labour law.[23] Even the trades where the 'gig economy' flourishes – transport, hospitality, contingent manual services such as cleaning, cooking meals and contributing to construction – are hardly new.[24] Mainly, opportunities for on-line communication are used to re-establish the principles of nineteenth-century day-labour, though with a higher degree of fractioning work: workers compete for jobs of under an hour, forgoing payment for travelling and waiting times. As the labourers of early industrial times, they are considered as independent, free of any bonds and protection. Labour law will have to adapt, but apart from ideological preferences there are no reasons for it to become extinct.[25]

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[20] *Regulating Labour in the Wake of Globalisation* (B. Bercusson & C. Eklund eds, Hart Publishing 2008), *The Idea of Labour Law* (G. Davidov & B. Langville eds, Oxford University Press 2011), *Rethinking Workplace Regulation* (K. V. Stone & H. Arthurs eds, Russell Sage Foundation 2013).

[21] Notions such as labour law after labour sum up this element of doubt (H. Arthurs, *Labour Law After Labour*, in *The Idea of Labour Law* 13–29 (n. 21 above).

[22] In lieu of even attempting to provide full coverage of the digital economy *see* G. Valenduc & P. Vandrame, *Work in the Digital Economy: Sorting the Old from the New* (Working Paper 3/2016) (Brussels, European Trade Union Institute 2016).

[23] Finkin, n. 12 above, at 1134.

[24] *See* M. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 Comp. Lab. L. & Policy J. 577–602 (2016).

[25] G. Davidov, *a Purposive Approach of Labour Law* (Oxford University Press 2016).

The accelerated globalization of the economy is facilitated by these technological developments among others – but it would not flourish without regulatory environments favouring transnational and global economic cooperation. The facilitation by new transnational rules as well as by the technology of economic cooperation across borders allows employers to choose the local employment markets most advantageous for them, for example by using global supply and distribution chains efficiently. Some perceive transnational liberalization of markets brought about by the increasing ideological dominance of market-based societies and market-liberalization as its (de-)regulatory counterpart as an 'existential threat to labour law'.[26] Other perspectives may stress that the exportability of labour-intense production as well as the movability of service workers across borders create employment opportunities where none existed before, by redistributing industrial and post-industrial work across the globe. The view from the global south-east may profoundly differ from the view of the global north-west in this regards, mirroring globally diverging interests not only between business and labour, but also within the global labour force.[27]

The underlying conflicts of interests within the workforce may not be fundamentally newer than those emerging from internet-based production and service provision. Protection of profitable and well-protected posts by excluding female and migrant workers emerged even before industrialization. In industrial times, newly established labour laws entailed regulatory displacement of women towards unpaid work or occupations not considered as worthy of protection, spurning feminist critique of labour law.[28]

The changes of the world of work may require labour law to cooperate with more disciplines than hitherto necessary, including specialisms in communication technology relevant for manufacturing and service industries. Comparison can contribute to enhance understanding of these new developments. Comparative law particularly can help to identify the different ways in which legal institutions are used to respond to the needs of those serving ever more complex and globally structured industries.[29] Critical approaches will be needed to recognize how commercial law, IT law, collectively agreed standards, unilaterally set standards

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[26] *See* e.g. M. Rigaux, *Labour Law or Social Competition Law? The Right to Dignity of Working People Questioned (Once Again)*, in *From Labour Law to Social Competition Law?* 1–13 (M. Rigaux et al. eds, Intersentia 2014).

[27] S. Koch-Baumgarten & M Kryst, *Trade Unions and Collective Bargaining Power in Global Labour Governance*, in *Global Governance of Labour Rights* 150–169 (A. Marx et al. eds, Edward Elgar 2015), at 152–154, for a principled analysis *see also* B. Hepple, *Labour Law and Global Trade* (Hart 2005).

[28] S. Fredman & J. Fudge, *The Legal Construction of Personal Work Relations and Gender*, 9 Jerusalem Rev. Leg. Stud. 112–122 (2013).

[29] Note that industry does not refer only to manufacturing, but also to the industrialized scale of servicing, including services traditionally provided as public service, such as health care and (higher) education.

and traditional labour law contribute to this response in different combinations in different countries.

All this gives rise to challenges for labour law, but these challenges require its expansion rather than its demise. Accordingly, we can proceed on the assumption that the discipline where comparison is being conducted still exists.

2.2[b] *Globalization as a Challenge to Comparative Law*

The intensified levels of globalization, which are changing the world of work, also challenge the wider discipline of comparative law. Globalization reduces the relevance of national regulatory frames, by replacing the Westphalian model of fully sovereign states with a new paradigm,[30] resulting in scepticism towards any heuristic value of comparing national laws.[31]

While the regulatory authority of states may be threatened by evasion strategies on the part of businesses, as well as the emergence of non-state regulatory systems, national laws still exist, and the continuing existence of states is decisive for the new paradigm of sovereignty required by globalization. States become interdependent rather than superfluous, competing with corporate regimes for power, and creating supranational legal regime such as the EU in order to avoid ceding ever more power nolens-volens to multinational companies, religious orders and other non-state actors.

It is submitted that the diminishing relevance of national laws does not cast doubt on the relevance of comparing laws. However, the simultaneity and interaction of national, sub-national, transnational, supranational and global laws as well as the creation of laws by public actors such as states and rules of similar practical impact by private actors, particularly multinational companies, requires a change in direction for comparative law. These challenges are compounded by the fact that globalization is by no means a static phenomenon, but subject to periodic trends which again shape the need for comparative legal research.

2.2[c] *Challenges for Comparative Labour Law*

All these challenges impact on comparative labour law generally, but in specific ways as well.

The competition between state regulation and regulation by non-state actors is nothing radically new for labour law: industrial or employment relations have, since the industrialized world ceased to demonize trade unions, constituted a

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[30] R. Michaels, *Transnationalizing Comparative Law*, 23 Maastricht J. Comp. & Eur. L. 352–358 (2016).
[31] *See* Siems, n. 13 above.

supplementary regulatory model to state legislation.[32] However, if industrial relation systems remain tied to national socio-economic institutions and legal traditions, globalization becomes a two-fold challenge to labour law and its comparative branch. First, if national regulation is insufficient to address labour markets structured by offshoring and migration (also referred to as 'in-shoring'),[33] the heuristic value of comparing national labour laws is of limited interest. Second, if any regulation of the world of work moves to transnational levels, national collective labour laws lose relevance, along with their comparison.

There are different proposals to approach this conundrum. Rittich and Mundlak[34] suggest shifting the attention to comparing solutions within states and in transnational regions, taking the blurring boundaries of the world of work into account. From this perspective, comparative labour law must consider the interoperability of internal 'laws' of multinational companies with state law, the diffusion of norms stemming from international organizations as well as the comparison of national responses to transnational institutions.[35] All this changes the comparative project profoundly, without making it superfluous. Ewing and Bogg[36] seem to be more fundamentally critical of the continuing relevance of comparative labour law. Starting from a normative perspective, they suggest that collective regulatory models of labour at national levels are in decline, while international standards for regulating the world of work are increasingly relevant. Therefore, comparative labour lawyers should shift their attention from ascertaining differences between national systems towards identifying trends and patterns in the global regulation of labour, pursuing a normative agenda by comparing these trends with international human rights standards. They observe as mega trends a global convergence towards de-unionization and worker disempowerment amounting to the Anglo-Americanization of labour regulation. This seems to invite an increased focus of labour law scholarship on UK and US labour law and international human rights law at the expense of comparative studies of labour and the law in different cultural contexts.[37]

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[32] We consider this to be true notwithstanding important differences in legal approaches to industrial relations, which lead to the distinction between a bargaining and regulatory concept of industrial relations (*see Comparative Employment Relations in the Global Economy* (n. 11 above), *Introductory Chapter*; A. Bogg & K. Ewing, *Freedom of Association*, in *Comparative Labour Law (Research Handbook)* 296–329 (M. Finking & G. Mundlak eds, Edward Elgar 2015).

[33] K. R. Rittich & G. Mundlak, *The Challenges to Comparative Labour Law in a Globalized Era*, in *Comparative Labour Law (Research Handbook)* 80–111 (M. Finkin & G. Mundlak ed.,Cheltenham: Edward Elgar 2015).

[34] *Ibid*.

[35] S. Sciarra, *The 'Autonomy' of Private Governments. Building on Italian Labour Law Scholarship in a Transnational Perspective,* in *Normative Patterns and Legal Developments in the Social Dimension of the EU* 65–75 (A. Numhauser-Henning & M. Rönnmar eds, Hart 2013).

[36] Bogg & Ewing, n. 32 above.

[37] Conveniently, this makes knowledge of languages other than English and legal cultures beyond the 'Anglosphere' superfluous, and may justify limiting the authorship of a research handbook on

2.3 Futures for comparative labour law

The question for the future of comparative labour law can be summarized as the question as to whether and how the mission of labour law – safeguarding the interests and the livelihood of those serving in various sectors of industry – can still be realized. There are similarities, but also important differences with the times when labour law as a discipline emerged, concerning how global phenomena impacted on the world of work: industrialization then and the increasing reliance on the internet for production and service provision now changed the character of work. The 'first globalization' then and new globalization now enhanced international economic cooperation. However, while the regulatory responses to these phenomena mainly remained within the confines of nation states in earlier times, today national laws and practices are complemented and partly overridden by laws, rules and practices transcending national borders.

The development of regulatory globalization is contradictory, though. Partly, there is decline: the ambition of setting global standards for work, which characterized the heyday of the International Labour Organisation (ILO) and the UN, has been largely abandoned. While core labour standards at the ILO level and the steady increase in anti-discrimination covenants at UN level constitute viable efforts to establish a minimum level of labour rights to be accepted globally, it is safe to say that progress remains limited. Beyond the setting of global standards, international economic law establishes a framework for intensified economic integration beyond borders, aiming at lowering tariffs and non-tariff barriers for international trade in goods and services. What is frequently referred to as liberalization in fact constitutes a re-regulation of economic interaction beyond national borders,[38] mainly pursued by the WTO at global levels. The increase in laws, rules and practices transcending national borders is even more pronounced at regional levels,[39] and increasingly also at interregional levels.[40] These legal instruments focus, as in the case of the WTO, on the re-regulation of trade in goods and services, partly aiming at economic integration in wider fields.

The decline in governance capacity of states and their conglomerates in matters of social policy and labour rights is thus not paralleled by a concurrent

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European Labour Law to academics working in English and at institutions in Britain *Research Handbook on European Labour Law* (A. Bogg, C. Costello & A. C. L. Davies eds, Edward Elgar 2016).

38 S. Picciotto, *Critical Theory and Practice in International Economic Law and the New Global Governance*, 7 Eur. Y.B. Intl. Econ. L. 1–20, 8, with further references (2016).

39 *See* Börzel, n. 3 above, from social science perspectives, for an overview of legal aspects *see* R. Leal-Arcas, *Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?*, 11 Chi. J. Intl. L. 597–629 (2011); for regular legal coverage of WTO law as well as regional economic integration *see* European Yearbook of International Economic Law.

40 The most recent one is the EU-Canada Comprehensive Economic and Trade Agreement (CETA), ratified in Oct. 2016.

renationalization of the economy: economic globalization prevails. The resulting interaction between national, transnational, regional and global laws, rules and practices changes the central questions for comparative labour law research. These now focus on how labour and the law at local levels are impacted upon and interact with the multilevel network of legislated, judicial and negotiated rules. The multiplicity of sources for laws, rules and practices suggests the potential for strategic use of rules by socio-economic actors, for example by playing regulators at different levels off against each other. Even if national labour relations and employment practices are gradually converging, this process will neither be uniform nor unidirectional. If there are differences between national systems, comparative research can contribute answers to the question about how strategic use of rules across level can occur, and be counterbalanced, by highlighting different reactions in different local, national or regional settings. In answering these questions, comparative research should not be constrained to fields traditionally subsumed under the notion of labour law. Instead, comparison needs to embrace a wider field, including economic law and policy.[41] These challenges may seem overwhelming, and in turn have a stymying effect. The remainder of this article will argue that maintaining the close connection between sociological methods and comparative law research offers a manageable and rewarding approach for comparative labour law research in the context of economic integration. It takes the European Union as an example, though the extension of the method to other regions is certainly not excluded.

3 COMPARING LABOUR LAWS AND EU INTEGRATION: A SOCIAL ACTOR PERSPECTIVE

3.1 The relevance of the European Union for comparative labour law

The European Union is still the most widely recognized example of regional economic integration in so far as the legally binding character of its law within the Member States is widely acknowledged, which has not (yet) been achieved by the global economic trade law of the WTO,[42] and is not necessarily achieved by other regional integration systems.[43] This alone could justify making the EU the focus of this article.

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41 *See* for an appreciation of economic policy for comparative labour law N. Bruun & B. Hepple, *Economic Policy and Labour Law,* in *The Transformation of Labour Law in Europe* 31–57 (n. 1 above).

42 *See* P. van den Bossche, *The Law and Policy of the World Trade Organisation* 65–71 (3d ed., Cambridge University Press 2013), for an overview.

43 *See* above n. 39.

In addition, the EU constitutes a unique combination of the law of international economic integration and a system of regional standard setting, through specific legislation, lately complemented by a legally binding human rights catalogue. As a body of economic integration law, the EU Treaties – like the WTO – aim at providing a legal framework for transnational economic interaction. Going beyond the WTO, the four economic freedoms not only encompass free movement of goods and services, but also freedom of establishment for natural persons and companies as well as free movement of workers, alongside free movement of capital. These economic freedoms are complemented by a supranational competition law system, which also includes a prohibition of state aid (subject to authorization by the EU Commission), and from 1993 by economic and monetary union, culminating in a common currency for most of its Member States. All this constitutes a profound legal architecture aiming at integrating national market economies into the EU internal market. The EU far surpasses the WTO, as well as most regional economic integration systems, in its endeavour for economic integration.

As regards standard setting, the EU is endowed with legislative competences for completing the Internal Market through positive harmonization, as well as for coordinating policy approximation. Thus, economic integration is complemented by a system for creating regional labour standards with legally binding force. For some time, during the 'Golden Age' of EU labour law from 1970 to 1990,[44] these competences were used to achieve a modicum of social integration complementing its market-making project, in effect delocalizing labour law.[45] Finally, the EU has evolved from the European Economic Community's (EEC) initial focus on economic integration to encompass a wider policy agenda, as symbolized by the introduction of EU citizenship and the widening of its competences from 1985 onwards. In the early 2000s it also equipped itself with a Charter of Fundamental Rights of the European Union (CFREU), which became legally binding in 2009. The CFREU safeguards a number of social and labour rights alongside more traditional human rights, as well as the right to engage in business. While the EU is not, thanks to the resistance of its court,[46] bound by a comprehensive international human rights catalogue, the interpretation of the CFREU must rely on and be aligned with international human rights instruments.[47]

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[44] The notion of the Golden Age goes back to R. Blanpain & J. Baker, *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (The Hague et al.: Kluwer 2004).

[45] This era has been remarked upon as making 'comparativists of the European bench and bar' Finkin, n. 12 above, at 1150.

[46] ECJ Opinion 2/13, EU:C:2014:2454, on the EU accession to the ECHR, rejected the relevant agreement.

[47] M. Schlachter, *Stärkung sozialer Rechte durch Grundrechtsschutz im europäischen Mehrebenensystem?*, 20 Europarecht 478–490 (2016).

The interrelation between directly effective Treaty law, EU legislation in the field of social policy and constitutional guarantees of social and labour rights is far from harmonious. For one, the substantive integration process enabled by ever increasing legislative competences has rapidly decelerated with the expansion of the EU's membership to twenty-eight states in 2004, 2007 and 2013. In combination with the determined enforcement of the EU's economic freedoms by the EU Commission and activist national courts before the European Court of Justice, this has resulted in processes which are criticized as decoupling of economic integration and social policy,[48] and the degrading of the EU social dimension to 'cheap talk'.[49] In particular the toughening of freedom of establishment in parallel with freedom to provide services has enabled entrepreneurs to engage in strategic 'forum shopping' by moving to business-friendly regulatory environments and providing services across borders.[50] Further, the socio-economic interpenetration of the national societies may incite Member States to engage in beggar-my-neighbour strategies in providing the said regulatory environments, and similar tendencies may affect management and labour when defining employment conditions at regional or even national levels.[51]

Researching the complex interaction between EU primary law and legislation on the one hand and law and practice at national levels on the other hand is even more complex. For example, the Treaties uphold the free movement of workers alongside the right to be treated equally with other workers in the state to which a worker moves. At the same time, they guarantee freedom to provide services for business. The provision has been read as containing a wide-ranging prohibition of any restrictions on this freedom. According to European Court of Justice case law, requiring an employer to apply local law to an employee who is posted to another Member States in the course of service provision constitutes a restriction of the Treaty's guarantee of free movement of services.[52] If one endorses this standpoint, a worker who moves temporarily to another Member State at the request of his employer cannot claim equal treatment under local employment law without

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48 F. W. Scharpf, *The European Social Model: Coping with Challenges of Diversity*, 40 J. Com. Mkt. Stud. 645–670, 646 (2002).

49 F. W Scharpf, *The Asymmetry of European Integration, or why the EU Cannot Be a 'Social Market Economy'*, 8 Socio-Economic Rev. 211–250, 211 (2010).

50 A. Supiot, A *Legal Perspective on the Economic Crisis of 2008*, 149 Intl. Lab. Rev. 151–162 (2010), D. Schiek, *Economic and Social Integration. The Challenge for EU Constitutional Law* 84–90 (Edward Elgar 2012); Z. Adams & S. Deakin, *Freedom of Establishment and Regulatory Competition,* in *The Oxford Handbook of European Union Law* 537–561 (A. Arnull & D. Chalmers eds, Oxford University Press 2015).

51 A. Dufresne, *The Trade Union Response to the European Economic Governance Regime. Transnational Mobilization and Wage Coordination,* 21 Transfer 141–156, 148–150 (2015).

52 *Case C-43/93 Vander Elst* [1994] ECR I-3803, para. 21–22, *case C-369/96 Arblade & Leloup* [1999] ECR I-8453, paras 33–36 as a summary of former case law. *See also* H. Verschueren, *The European Internal Market and the Competition Between Workers*, 6 Eur. Lab. L.J. 128–151 (2015).

giving rise to a restriction of his employer's freedom to provide services. Member States may be able to justify the restriction. The Court has been reluctant to accept justifications for collectively agreed labour standards, which have not been made generally applicable through legislation or administrative acts, and even more so for industrial action used to compel employers to grant equal working conditions to posted workers.[53] Obviously, this construct – even disregarding the complex legislation and case law responding to the legislation – invites strategies of employers who frequently provide services in different regions, as well as potentially by national legislators and trade unions attempting to profit from the economic opportunities or to avoid the detriment of unequal treatment.

The dynamics unleashed by the different density of regulation at national, subnational and supranational levels are compounded by another complexity. While national societies within the EU, given the vast differences in language and culture, remain distinct, societies and economies are also interlinked through the exchange within the Internal Market and citizens' movement independent from market considerations. These mutual influences do not result from the mere existence of legal frameworks, though. They only have an impact to the extent to which social actors utilize the legal frameworks to further their own interests of to confront other actors through litigation strategies. Social actors in this concept not only comprise management and labour, but also other societal actors as well as institutions such as governments, courts and parliaments at national and EU levels. Taking into account the agency of socio-economic actors with diverging interests is a particularly rewarding approach for comparative labour law, as it may not only expose differences in responses to EU law at national levels, but also offer potential policy advice for those in different Member States on how to mitigate or even avoid a Europeanization of national laws which is only driven by benchmarks derived from international economic law. The challenges identified under 2.2 thus turn into opportunities for research approaches engaging with the dynamic interaction of different levels.

3.2 Social actors in european legal studies and beyond

The proposal for a social actor perspective for comparing labour laws in the EU internal market draws on comparative law studies of EU phenomena as well as on European studies beyond the discipline of law.

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[53] This is a crude summary of the pivotal rulings in the Laval and Viking cases (Case C-341/05 Laval un Partneri Ltd *v.* Svenska Byggnadsarbetareförbundet [2007] ECR I-11767 Case C-438/05 ITWF & Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti [2007] ECR I-10779).

3.2[a] *Comparative Labour Law in the European Union*

Since comparing labour laws is intrinsically sociological,[54] it is not surprising that several comparative labour lawyers in their EU-focused research refer to social actors, while not always using this term.

Comparative study has been employed to identify general trends in the development of labour law in the European Union. For example, the Supiot report identified the transformation of work and the future of labour law in Europe.[55] Its thematic analysis was based on country reports collated by theme rapporteurs, whose generic reports were discussed in focus groups (though the term was never used) consisting of policy-makers and socio-economic actors. It formed the basis of a ten-year work programme by the EU Commission on labour law. Conducted in parallel to the Supiot report, though for a longer period, a comparative analysis of fifteen EU Member States, led by Silvana Sciarra,[56] endeavoured to gauge the impact of EU law on the evolution of labour law, developing the term 'evolution' in this context. National rapporteurs were asked to adopt a 'mainly legal' method, complemented by an introductory presentation of the industrial relation systems and economic conditions in the relevant country.[57] The report identified trends, such as the combination of flexibility and security, which became influential for EU Commission policy making and informed labour law research.

Both studies combine comparative legal research based on country reports detailing the legal frame with empirical study based on expert interviews or focus groups, complemented by secondary sources from other disciplines than law. Their remit was mainly labour law in a narrow sense, comprising EU legislation in the field as well as national legislation, the interaction between EU economic law and labour law at both levels was only a secondary interest.

Comparative studies can also be useful to analyse the emergence of new socio-legal fields conditioned by EU legislation in the area. Certain examples derive from specific legislative projects of the EU: for instance, all Member States must implement a set of directives aiming to combat discrimination on grounds of racial and ethnic origin, sex, sexual orientation, disability, age and religion and belief in

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54 *See* ns 3–4 above.

55 European Commission, *The Transformation of Work and the Future of Labour Law in Europe* (European Communities 1999); A Supiot (with P. Meadows), *Beyond Employment. Changes in Work and the Future of Labour Law in Europe* (Oxford University Press 2001).

56 S. Sciarra The Evolution of Labour Law (1992–2003), General Report (Brussels: EU Commission 2005, http://www.metiseurope.eu/content/pdf/n8/4_sciarra.pdf) (accessed 6 Dec. 2016), partial summary: S. Sciarra, *The Evolution of Collective Bargaining*, 29 Comp. Lab. L. & Policy J. 1–28 (2007).

57 *Ibid.*, at 5.

employment.[58] The degree to which these directives are implemented, and how that implementation is achieved, will differ according to national traditions. Case law emerging from referrals and infringement actions relating to specific national laws may be taken as a starting point by citizens and non-governmental organizations to influence the law or its application in other Member States, thus creating mutual influences of legal orders. Comparing national laws can become a means to identify the potential of accelerating such learning processes.[59] These studies are characterized by analysing developments in case law and legislation alongside the evaluation of social actor perspectives based on secondary sources.

The focus on a special field can also prompt a more direct interaction with social actors. The Ales report on the practice of transnational collective bargaining in multinational companies complying with the EU Works Council Directive constitutes an example.[60] The rapporteurs held meetings with EU-level actors in the field in addition to providing expansively detailed legal analysis of existing EU law and transnational agreements. This culminated in a specific policy proposal: the adoption of an optional legal frame for transnational collective bargaining.

These studies do not investigate the interaction between internal market law and labour law, though. Research focusing on that interaction only developed more recently, partly inspired by the much-debated *Laval* quartet of rulings by the European Court of Justice (ECJ).[61] For example, the FORMULA project explored 'Free movement, labour market regulation and multilevel governance in an enlarged EU/EEA' from a Nordic and comparative perspective from 2008 to 2013. Focusing on cross-border provision of services, and in particular on transnational labour provision by the posting of workers,[62] the researchers' methods comprised conceptual exposition of the EU economic freedoms and their interaction with national labour laws and industrial relations. Along with legal doctrinal analysis, the studies evaluated secondary literature from industrial relations, labour

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58 *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (D. Schiek, L. Waddington & M. Bell eds, Hart 2007), J. Mulder, *EU Non-Discrimination Law in the Courts. Approaches to Sex and Sexualities Discrimination in EU Law* (Bloomsbury 2016).

59 Schiek, n. 18 above.

60 E. Ales et al., *Transnational Collective Bargaining: Past, Present, Future* (European Commission 2006); *see also* E. Ales, *Transnational Collective Bargaining in Europe: The Case for Legislative Action at EU level,* 148 Intl. Lab. Rev. 149–162 (2009).

61 In addition to the *Laval* and *Viking* cases (n. 53 above), the quartet comprises Case C-346/06 *Rüffert v.* Land Niedersachsen [2008] ECR I-1989 and Case C-319/06 Commission v. Luxembourg [2008] ECR I-4323.

62 The results of the project were published in two volumes by the University of Oslo, Faculty of Law, which each summarize the overall aims, and stress the interdisciplinary aspirations of the project. *Cross-Border Services, Posting of Workers and Multilevel Governance* (S. Evju ed., University of Oslo, Faculty of Law 2013); *Regulating the Transnational Labour in Europe: The Quandaries of Multilevel Governance* (University of Oslo, Faculty of Law 2014). These books, alongside working papers as their precursors, are available at http://www.jus.uio.no/ifp/english/research/projects/freemov/publications/papers/ (accessed 6 Dec. 2016).

economy, and sociology. In analysing policy developments at EU and national levels, they complemented documentary analysis and a literature survey with expert interviews.[63] The final report claims that there are persistent dilemmas in the EU level regulation and adjudication of transnational service provision and work: the promotion of regime shopping by employers will be cherished by some interest groups, but also certain Member States, but condemned by others,[64] and generally does not allow aligning economic freedoms with social rights.[65] While it is too early to fully assess impact on actual policy-making some FORMULA researchers were also engaged in programme research for the EU Commission whose results are referenced in the relevant legal proposals.[66] The ReMarkLab project also analysed tensions between EU economic freedoms and national labour laws,[67] as reported in a special issue of this journal in 2014.[68] These country reports on remedies for unlawful industrial action map the potential impact of an aspect of the so-called *Laval* quartet. This series of articles is informed by human rights analysis as well as a realistic assessment of industrial relations, but remains focused on doctrinal legal analysis. Lovén-Seldén has conducted a study more directly involving social actors by exploring the 'mobilising potential' of *Laval*.[69] Providing a legal analysis of the judgment's potential effects on trade unions' activities around posted and migrant workers in the EU, the author also interviewed trade union officials as experts, ascertaining the degree to which they would or would not engage in transnational cooperation to avoid some of the negative impacts.

To sum up: legal scholars are open to include industrial relations aspects in their research, and partly take part in expert interviews or focus groups with real social actors in order to achieve this, as well as using secondary sources. Their

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63 The methods can be obtained from the project web page: http://www.jus.uio.no/ifp/english/research/projects/freemov/description/comprehensive-description.html (accessed 6 Dec. 2016).

64 S. Evju & T. Novitz, *The Evolving Regulation*, in *Regulating the Transnational Labour in Europe* 27–94, 86 (n. 62 above), on Regime shopping *see* Houwerzijl in the same volume.

65 C. Barnard, *Free movement and Labour Rights – Squaring the Circle?*, Regulating the Transnational Labour in Europe 359–362, 361–362 (n. 62 above).

66 A. van Hoek & M. Houwerzijl, *Comparative Study on the Legal Aspects of Posting of Workers in the Framework of the Provision of Services in the European Union* (European Commission 2011), *Complementary Study on the Legal Aspects of Posting of Workers in the Framework of the Provision of Services in the European Union* (Brussels: European Commission 2012).

67 FORMULA is part of the larger ReMarkLab project (Regulating Markets and Labour – Nordic, European and Global Perspectives, funded by the Swedish Research Council for Health, Work Life and Welfare from 2010–2016. The concluding conference of the project was held in May 2016, and the proceedings have not yet been published.

68 *See* N. Bruun, *Guest Editorial: Sanctions and Remedies for Unlawful Collective Action in an International and European Perspective*, 30 Intl. J. Comp. Lab. L. & Indus. Rel. 243–251 (2014).

69 K. Lovén-Seldén, *Laval and Trade Union Cooperation: Views on the Mobilizing Potential of the Case,* 30 Intl. J. Comp. Lab. L. & Indus. Rel. 87–104 (2014).

studies also offer a sound doctrinal analysis of the field, frequently combined with the sort of policy analysis referred to as process tracing by social scientists.

3.2[b] *European Studies Beyond Law*

European studies[70] as an interdisciplinary field expands beyond legal studies. It is dominated by political scientists,[71] but recently broadening to include sociology, economics, integration studies, and even anthropology.[72] Social actors, or socio-economic actors, have been central to a number of theoretical approaches in European studies.

Haas's neo-functionalism viewed the integration process as contributing to shifting loyalties of 'groups and individuals'[73] from the national to the supranational levels, among others through the spill-over process, placing societal actors at the centre of his theory.[74] Constructivist approaches to European integration, deemed to be the natural successor to neo-functionalism,[75] analyse European integration through a focus of human beings and their interaction, which implies a focus on social actors.[76] Some European sociologists also focus on interaction between individuals, referring to revised notions of transactionalism.[77] Like legal researchers, social scientists do not always use interviews or questionnaires with real persons in social actor research. Documentary analysis can evaluate the attitudes and actions of individual as well as institutional actors,[78] and the secondary analysis of opinion polls, such as Eurobarometer, are other methods of choice.[79] Anthropological approaches to EU studies[80] add participant observation through practical work in the EU institutions. These approaches can also be used to compare engagement

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70 Overall: Saurugger, n. 3 above, *The Oxford Handbook on European Union* (E. Jones, A. Menon & St. Weatherill eds, Oxford University Press 2012).

71 G. Ross, *Arriving Late at the EU Studies Ball. Dilemmas, Prospects and Strategies for a Sociology of the European Union*, in *Sociology of the European Union* 215–224 (A. Favel & V Guiraudon eds, Palgrave Macmillan 2011).

72 R. Alder-Nissen, *Towards a Practice Turn in EU Studies: The Everyday of European Integration,* 54 J. Com. Mkt. Stud. 87–103 (2016).

73 E. Haas & D. Dinan, *The Uniting of Europe: Political, Social and Economic Forces 1950–1957* 5 (Indiana: University of Notre Dame Press 2004).

74 Haas, n. 3 above; A. Niemann & Ph. Schmitter, *Neofunctionalism*, in *European Integration Theory* 45–66 (A. Wiener & Th. Dietz eds, Oxford University Press 2009).

75 E. Haas, *Introduction: Institutionalism or Constructivism*, in *The Uniting of Europe* (n. 73 above, at i–xxix).

76 D. N. Chryssochoou, *Theorizing European Integration*, 110–113 (2d ed., Routledge 2009).

77 N. Fligstein, *Euroclash. The EU, European Identity and the Future of Europe* (Oxford University Press 2008), *id.*, *Markets and Firms*, in *Sociology of the European Union*, 100–124 (A. Favell & V. Guiraudon eds, Palgrave Macmillan 2011), more recently: S. Israel et al., *Connected Europe(ans): Does Economic Integration Foster Social Interaction?*, J. Contemp. Eur. Stud. 26, 1–19 (2016).

78 M. Eigmüller, *Europeanization from Below: The Influence of Individual Actors on the EU Integration of Social Policies*, 23 J. Eur. Soc. Policy 363–375 (2013).

79 Fligstein, n. 77 above.

80 Alder-Nissen, n. 72 above.

with EU politics and law at local levels – whether this is used to explore local politics Europeanization or to observe the emergence of a Eurostar class.[81] Ethnographic approaches have also been applied in order to analyse the impact of EU economic freedoms on the world of work and 'industrial citizenship'.[82] This took the form of intensive interviews of over 200 persons involved in posted work, including posted workers, trade unionists, managers and labour inspectors in four EU Member States where posted workers were stationed (Germany, Finland, the Netherlands, UK). The interviewees themselves often were from other Member States, such as Eastern European and Southern European countries. These interviews aimed at revealing the practice of posted work, though the legal scholar is at times puzzled by the inaccurate references to the legal frames.

These analyses may have comparative aspects, for example if they analyse how ideas promoted (or suppressed) by actors involved at Member States levels exert influence on the European integration process.[83] However, they may also be focused on EU institutions and actors therein exclusively, thus forgoing any comparative potential.[84] Finally, they may be focused on truly transnational experience, which challenges the concept of comparison.[85] The research by politic scientists and sociologists rarely contains a serious analysis of national labour laws or of the EU Treaty law or legislation, although some of the studies mentioned here make reference to the legal framework whose impact on national practice was assessed. These studies do thus not qualify as studies in comparative labour law.

However, the method of evaluating experiences and reflections of social actors in the process of comparing policies can be used as inspiration for comparative labour lawyers researching in the EU. If complementing a thorough analysis of the EU level and national legal frames, an analysis of social actor reactions and engagement through document-based process tracing, or expert interviews or focus groups can better observe the interaction of EU level and national labour law and policy, and also provide better policy advice.

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81 This notion was coined by A. Favell, Eurostars and Eurocities: Free Movement and Mobility in an Integrating Europe (Wiley-Blackwell 2008).

82 N. Lillie, *The Right Not to Have Rights: Posted Worker Acquiescence and the European Union Labor Rights Framework*, 17 Theoretical Inquiries L. 39–62 (2016).

83 *See* Eigmüller, n. 78 above.

84 This is characteristic of Fligstein's work (n. 77 above).

85 Lillie's article (n. 82 above) and the studies referenced by him are examples of this.

3.3 New directions for comparison: choosing comparators

In order to identify the contradictory interaction of national labour laws and EU Internal Market law from a social actor perspective, the choice of countries, localities or regions to compare requires specific attention.

Capturing different starting points for engagement with EU-level rules is vital as the aim is to identify different ways in which EU law impacts and is impacted upon by national socio-economic practice. The choice of comparators should thus take account of industrial relations systems at the locus of research as well as the economic positionality of the relevant location (e.g. if there is high level unemployment, exposure to economic crisis or relative wealth). Comparisons using established categories such as the two usually identified varieties of capitalisms[86] have been criticized as insufficiently reflective of the specific constellations in former socialist Member States.[87] In addition to corporate and liberal market economies, the authors propose the category of dependent capitalism to capture the high level of dependency on foreign direct investment on the one hand and expanding the domestic labour market through posting of workers on the other. For the purposes of comparing labour law, it is generally seen as useful not only to refer to the variety of capitalism, but also the variety of welfare models in order to achieve a well-balanced sample.[88] Additionally, differences in the regulatory style of the labour law system should be considered. For example, countries which leave employment regulation to the industrial relations system can be compared with those where employment law is characterized by a high statutory density, as well as countries with a highly developed and legal enforcement system that operates in a cost-efficient manner with those where legal protection before courts is largely unattainable for workers. Finally, in order to avoid the problems of potential underestimation of legal complexity,[89] it is useful to ensure a careful analysis of the EU level legal and practical frame as well as national frames by either legal scholars or social scientists with legal expertise.

3.4 Social actor approach in application

Integrating a social actor perspective into comparative labour law studies can be challenging, but is not impossible, as witnessed by a recent experience.[90] Even the

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86 G. Menz, *Varieties of Capitalism and Europeanisation* (Oxford University Press 2005).

87 J. Drahokoupil & M. Myant, *Dependent Capitalism and Employment Relations in East Central Europe*, in *Labour and Social Transformation in Central and Eastern Europe* 63–80 (V. Delteil & V. Kirov eds, Routledge 2017).

88 D. Schiek, *The EU's Socio-Economic Model(s) and the Crisi(e)s – Any Perspectives?,* in *The EU Economic and Social Model in the Global Crisis* 8–30 (D. Schiek ed., Ashgate 2013).

89 *See* Huusa & Samuels, n. 10 above.

90 D. Schiek et al., *EU Social and Labour Rights and EU Internal Market Law*, ed. by Directorate General for Internal Politics, Policy Department A: Economic and Scientific Policy European Parliament (Brussels:

interpenetration of these disciplinary fields can enrich research if undertaken with sufficient depth and breadth.

The study was commissioned by the European Parliament's Policy Department A with the task of investigating the relationship between EU internal market law and EU Social and Labour Rights, with a view to informing policy conceptualization by the European Parliament's Committee on Employment and Social Affairs. This call was narrowed down to focus on those social and labour rights guaranteed by the CFREU, thus excluding social and labour rights as guaranteed or specified by EU secondary legislation as well as Treaty law. From the CFREU's wide range of social and labour rights, three core rights were chosen as a focus of the study: collective labour rights (Articles 12, 28 CFREU), rights to fair and just working conditions (Article 31 CFREU) and to social security and social assistance (Article 34 CFREU). The EU internal market law was defined as encompassing the Treaty for the Functioning of the European Union's (TFEU) economic freedoms and competition rules. Of the economic freedoms, free movement of workers, freedom to provide services, freedom of establishment were relevant to the questions, and competition rules investigated encompassed the prohibition of cartels as well as the abuse of a dominant market position.

The research report combined analytical and normative aims. Its analytical aims encompassed a legal doctrinal analysis of the interrelation of EU Internal Market Law and EU Social and Labour Rights and a comparative empirical analysis of social actor responses to the results of this analysis. The normative aim was to identify how the EU's and its Member States' legal obligation to respect, protect and promote social and labour rights could be reconciled with perceived tensions between those rights and EU internal market law.

Due to constraints in time and funding,[91] the comparative analysis of social actor responses was limited to the EU level and four Member States: Ireland, Poland, Spain and Sweden. These encompassed voluntary and state-centred industrial relations systems, Member States with different economic strengths as well as Member States that joined the EU more recently and not so recently. The empirical research was conducted by expert interviews. For each Member State, experts from trade unions and employer associations, organizations advising or supporting migrant workers and state actors such as government departments, labour inspectorates and judges were interviewed. For the EU level, experts from umbrella organizations of trade unions and employer associations were

European Union 2015), http://www.europarl.europa.eu/RegData/etudes/STUD/2015/563456/IPOL_STU(2015)563457_EN.pdf (last visited 6 Dec. 2016).

[91] The duration of the project was initially planned for nine months, although in the end a year went by between start and presentation, and funding of less than EUR 150,000 only allowed a pilot in social actor-focused research.

interviewed, as well as a think tank and two organizations giving advice to migrants. Due to the recent coming into office of the EU Commission it was not possible to interview the equivalent to government actors at EU level.[92]

The legal doctrinal research focused on case law, as an indication in which fields EU internal market law might conflict with or reinforce EU social and labour rights. This was based on an analysis of case law relating to EU economic freedoms and competition law, as well as on EU legislation specifying and shaping those conflicts, including the Posted Workers' Directive (Directive 96/71). This research could build on the extensive literature criticizing the EU economic constitution, thus confirming some of the findings of the studies referenced under 3.. It established thirty-four potential fields of interrelation between EU internal market law and EU social and labour rights. For reasons of space, only the matrix related to collective labour rights will be summarized here: Collective labour rights conflicted with freedom to provide services when trade unions engaged in collective action to improve working conditions for posted workers within their host state,[93] freedom of establishment conflicted with collective labour rights if trade unions engaged in collective action to maintain collective bargaining rights after a transnational change of the place of establishment.[94] Further, there are potential tensions between EU competition law and collective labour rights. First, if collective agreements are viewed as cartels in general, or only if multi-employer agreements also constitute agreement between members of employer associations, competition authorities control the bargaining process, endangering its autonomy. The ECJ has only allowed a limited cartel exemption for collective agreements in the 1990s,[95] which has been confirmed recently in an action referring to collective agreements in favour of self-employed workers in the cultural sector.[96] The lack of a competition law exemption for collective agreement in practice has implications for social insurance institutions created by collective agreements: these can be subjected to the prohibition of abusing a dominant market power in principle.[97] Freedom to provide services has also been used to curtail the scope for collective agreements in social security matters: the court has found that a collective agreement must not specify an institution administering funds for retirement pensions as this would violate EU law on public procurement, which is ultimately based on freedom to provide services.[98]

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92 An anonymized list of experts interviewed is printed in the report cited in n. 90 (112–113).

93 *Case C-341/05 Laval* (cited in n 61), *Case C-396/13 Sähköalojen ammattiliitto ry v. Elektrobudowa SA ELI*:EU:C:2014:351.

94 *Case C-438/05 Viking* Line (n. 61 above).

95 *Case C-67/96 Albany* [1999] ECR I-5751.

96 *Case C-413/13 FNV Kunsten Informatie en Media ECLI*:EU:C:2014:2411.

97 This was also an issue in the Albany case (*see* n. 95 above), but more thoroughly explored in *case C-437/09 AG2R Prévoyance v. Beaudout Père et Fils SARL* [2011] ECR I-973.

98 *Case C-271/08 Commission v. Germany*[2010] ECR I-7087; *See also Case C-25/14 UNIS and Case C-26/14 Beaudout Père et Fils*.

The analytical empirical question in relation to this tension then was whether socio-economic actors perceived this tension, how they reacted to it and whether any recommendations for policy change were put forward or could be derived from it. The matrices for the main questions were translated into interview guides in cooperation with the industrial relations experts who were part of the research team.[99] These questions can be summarized[100] as follows: first, in each field interviews would explore the general understanding of the relationship between collective labour rights and freedom to provide services, freedom of establishment and competition law. Second, specific questions for each field were asked. The questions on freedom to provide services explored the extent to which collective agreements were relevant for establishing employment conditions and in how far posted workers would profit from these conditions, and in how far public procurement processes ensured that collectively agreed standards were maintained by companies providing services for the public sector. For freedom of establishment, the questions centred on the relevance of collective bargaining and industrial action in processes of transnational relocation of employers. As regards competition law, experts were asked whether competition authorities had investigated collective agreements or whether there were experiences with so-called crisis cartels which could trigger such investigations.

Initially, the interviews did not seem to offer many surprises, as legal experts with thorough knowledge of the field from earlier research[101] interviewed experts with at least basic knowledge of the legal framework. Thus, interviews confirmed that in Sweden, the definition of employment standards as well as the enforcement thereof is entrusted to the industrial relations process, as a result of which the curtailing of competences for trade unions to take collective action in favour of improving conditions for posted workers was experienced as disruptive. Conversely, interviews in Poland confirmed that the position of posted workers is mainly protected by statute, and any limitations of collective labour rights exercised on their behalf would be seen as of limited value. Unexpected and new findings included the exposition of the first experiences with the changed legal environment for extending collective agreements in Ireland: interestingly, trade union and employer association experts from the construction sector agreed that the former system of extension of collective agreements was preferable to the absence of protection for posted workers, which led to lower payments of any migrant workers in practice. Also, social security for posted workers was affected by the lack of extension of collective agreements in Sweden: the high relevance of

[99] Chris Forde, Gabriella Alberti and Liz Oliver, all University of Leeds.
[100] A more expansive summary is published in an Annex to the research report cited in n. 90, at 108–111.
[101] The country experts were Michael Doherty (Ireland), Joanna Unterschütz (Poland), Julia Lopez and Consuelo Chacartegui Javega (Spain), and Kerstin Ahlberg and Niklas Bruun (Sweden).

collectively agreed schemes in Sweden meant that posted workers would not usually be covered, and lost out especially on unemployment advantages in relation to health and safety. Further, the ECJ ruling alleging a clash between the EU law ban on cartels and collective bargaining on behalf of self-employed workers[102] had an immediate impact in Ireland, where negotiations on behalf of self-employed workers had continued while the case was pending. In relation to public procurement, a Swedish municipal initiative was highlighted, which promoted requiring providers to comply with collective agreements. The implications of the past case law for this project were yet to be explored, and there was hope that the new public procurement directives allowed for a more open approach to requiring compliance with collective agreements by contractors.

Overall, the study demonstrated that expansive doctrinal analysis remains a precondition for establishing hypotheses on the relationship between EU social and labour rights and internal market law. Nevertheless, even though most of the team members had a law degree, it was difficult to systematize the level of detailed analysis in a sufficiently accessible way for achieving comparable information in a series of interviews in different Member States and at EU level. Further challenges emerged from uneven distribution of expertise in legal research and industrial relations across the team. Unfortunately, the fact that the study was short meant that the method could not be fully exploited by interviewing more experts, and possibly also by interviewing workers who were not also deemed experts. Further, follow up interviews were excluded, which could have corroborated some of the findings, and potentially exposed more details and contradictions. Focus groups discussing the recommendations would have been another useful addition of the research. In this way, elements of individual and collective agency could have been identified more clearly. Finally, a longitudinal study would have offered more opportunities to observe the interaction of impacts by EU law on national practice, their adaptation and eventual reactions of EU law and policy in turn.

4 CONCLUSION

Comparing labour laws within the EU internal market remains a valid research strategy, although EU harmonization and the direct effect of EU Treaty rules may result in some convergence of national legal orders in Member States. Nevertheless, this process is likely to lead to a sustained interaction between different levels of regulation, including sub-national and international levels. Further, in Member States where collective agreements are still concluded, substitution between legislation and collective agreements, and interaction between those forms of regulation at different

[102] n. 96 above.

levels might also occur. Comparative studies are necessary to fully comprehend these interactions between labour law and practice in a large number of EU Member States with vastly different and changing traditions.

In order to fully comprehend such interactions, research project exposing social actor perspectives through a variety of methods can be expected to achieve particularly informative results. Devising such research designs can be supported by reference to European integration studies. However, care should be taken to ensure that the methods are adequate to and fully reflective of the specific characteristics of labour law and practice. Interdisciplinary cooperation with industrial relations researchers and/or sociologists and economists should ensure that legal expertise is still informative, ideally at the centre of the research projects. A careful analysis of legal frames at different levels is a precondition to fully evaluate reactions of social actors. A potential problem with providing more scope for social science methods complementing the comparative law aspects might lie in a further loss of recognition for comparative labour law within the more traditional disciplines of comparative law. However, this might be a risk worth taking for the sake of better understanding EU-led economic integration and the potential of containing its negative impact on the world of work through studies exposing more realistically the process of interaction of different levels of regulation as well as the potential impact of alternative policy choices or the activation of human rights.