



**UvA-DARE (Digital Academic Repository)**

**Minimum Harmonisation and Article 16 of the CFREU: Difficult Times Ahead for Social Legislation?**

Bartl, M.; Leone, C.

*Published in:*

European Contract Law and the Charter of Fundamental Rights

[Link to publication](#)

*Citation for published version (APA):*

Bartl, M., & Leone, C. (2017). Minimum Harmonisation and Article 16 of the CFREU: Difficult Times Ahead for Social Legislation? In H. Collins (Ed.), *European Contract Law and the Charter of Fundamental Rights* (pp. 113-124). (European Contract Law and Theory; Vol. 2). Cambridge: Intersentia.

**General rights**

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

**Disclaimer/Complaints regulations**

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <http://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

## Minimum Harmonisation and Article 16 CFR: Difficult Times Ahead for Social Legislation?<sup>1</sup>

Marija Bartl, Candida Leone  
University of Amsterdam

Two years later, as other contributions in this volume show, it still seems worth discussing *Alemo-Herron*.<sup>2</sup> The case was a particularly bad surprise for those who had been more favourably impressed by previous decisions such as *Aziz* and *Morcillo*,<sup>3</sup> in which the Court of Justice had seemed willing to use the Charter of Fundamental Rights to grant relief to people being crudely hit by the economic crisis. *Alemo-Herron* seems to indicate a different path, providing the application of EU fundamental rights to private law questions with a somewhat bitter aftertaste.

So many contributions<sup>4</sup> have appeared by now that it is perhaps not necessary to go through the facts of the case in detail. We will only recall some essential information. First, the context: the case concerned the former leisure department of a London borough, which had been transferred to private owners. The individual employment contracts contained a clause providing for the “dynamic” incorporation of a collective agreement, including the related pay increases. EU law was involved because transfers of undertakings, such as the one which had taken place in this case, are regulated by the so-called “Acquired Rights Directive”,<sup>5</sup> which seeks to secure the rights of employees in case of transfers. The Directive is a minimum harmonisation directive. In proceedings before UK courts, a conflict had arisen as to whether the dynamic clause could be opposed to the new employer. The conflict was induced by the CJEU’s own precedent in *Werhof*.<sup>6</sup> In this case, the court had only affirmed that EU law did not *require* the opposability of dynamic clauses. However, one argument used suggested that dynamic clauses might actually be problematic in themselves: the decision evinced that, if the directive would impose dynamic clauses referring to collective

---

<sup>1</sup> This chapter draws on and develops the arguments presented in our case-note *Minimum Harmonisation after Alemo-Herron: The Janus Face of EU Fundamental Rights Review*- European Court of Justice, Third Chamber Judgement of 18 July 2013, Case C-426/11, *Alemo-Herron v Parkwood Leisure LTD*, EUConst 2015, 140.

<sup>2</sup> ECJ 18 July 2013, Case C-426/11, *Alemo-Herron v Parkwood Leisure Ltd*.

<sup>3</sup> ECJ 14 March 2013, Case C-415/11, *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa* and ECJ 27 July 2014, Case C-169/14, *Sanchez Morcillo And Abril Garcia v Banco Bilbao Vizcaya Argentaria SA*.

<sup>4</sup> Only to mention some English language publications: S Weatherill, ‘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.

<sup>5</sup> 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

<sup>6</sup> ECJ 9 March 2006, Case C-499/04, *Hans Werhof v Freeway Traffic Systems GmbH & Co. KG*.

agreements, it might infringe the employer's (negative) freedom of association. Thus, the directive did not require more than the "static" incorporation approach already adopted in Germany.<sup>7</sup>

As we have argued elsewhere,<sup>8</sup> the question posed by the UK Supreme Court (UKSC) to the European Court of Justice would have been a candidate for a very simple answer. In this case, what was at stake was a national rule, which went beyond the directive's requirements in providing more protection to employees. The Acquired Rights Directive is a minimum harmonization directive; its article 8 expressly allows more stringent rules in the interest of the employees; finally, as noted by the UKSC, freedom of association was not an issue in the UK context. How did we, then, get to *Alemo-Herron's* conclusions?

The Court's reasoning consists of three steps- although one of them, perhaps the most important, has remained concealed:

- 1) reinterpreting the Directive's telos, in order to overcome the "employee interest" clause;
- 2) down-playing the relevance of the Directive's minimum harmonisation approach by reference to the Charter;
- 3) introducing a normative standard - the freedom to conduct a business and, with it, freedom of contract.

In the coming paragraphs, we will unfold the Court's reasoning - something which the decision itself quite evidently fails to do - and its implications for the future of minimum harmonisation. By the end of the chapter, it will hopefully be clear why this institutional question should be of great interest - and a source of concern - to contract lawyers.

### **Fair Balance: Cutting Out the Broader Picture**

The first part of the decision concentrates on the Directive's objectives and concludes that dynamic clauses would be "liable to undermine" the achievement of such objectives. But what is the Acquired Rights Directive aimed at?

The Directive's recitals<sup>9</sup> succinctly provide the context for the instrument's adoption: since

*economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers [...] to other employers as a result of legal transfers or mergers", it is "necessary to provide for the protection of*

---

<sup>7</sup> See case-notes above for more details.

<sup>8</sup> See fn. 1.

<sup>9</sup> See the Directive's "old" version, Council Directive 77/187/EEC of 14 February 1977 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 businesses.

*employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded.*

In other words, the Directive's drafters started from the observation that certain changes in business relationships were threatening to unsettle the equilibria reached in the Member States with reference to workers protection. As a counterbalancing act, the Directive provided for a minimum degree of protection for the employees affected by the said changes. The original choice for minimum harmonisation was further reinforced by a reference to the Rome Treaty: the Directive aimed to harmonise MS legislation "while maintaining the improvement" in working conditions promised by then-article 117 EC Treaty.<sup>10</sup> Thus, the Directive's recitals contain a strong non-regression clause.

The protective stance adopted by the Acquired Rights Directive, then, aimed to (re)establish a fair balance between employers taking advantage of the business climate and employees whose jobs are transferred or privatised. But the Court of justice had a different take:

*Directive 77/187 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.*<sup>11</sup>

With one sentence, *Alemo-Herron* shifts the focus on a very different spot: the balance should no longer be struck on a *structural* level, where the legislation tries to offset certain socio-economic changes, but *within* the Directive itself. The concern for such an internal balance had already been advanced in *Werhof*. In that decision, however, the claim was that the interests of the transferee "should not be disregarded";<sup>12</sup> in *Alemo-Herron* those interests acquire a precise content which must be protected. The Court spends considerably more words on explaining how this should happen than it did on justifying its "fair balance" approach: the transferee "must be in a position to make the adjustments and changes necessary to carry on its operations"; in particular, "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".<sup>13</sup>

The fair balance argument does not exhaust the decision's justification, but contributes to concealing the relevance of the minimum harmonisation clause. This sets the right

---

<sup>10</sup> Article 117 read: "Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained." The reference has been dropped during the recast and replaced by a reference with similar content to the meanwhile adopted European Social Charter of 1989.

<sup>11</sup> *Alemo-Herron*, Para 25.

<sup>12</sup> *Werhof*, para 31.

<sup>13</sup> *Alemo-Herron*, Para 27.

background for the next step- the “hidden” argument- in which the Court nonchalantly downgrades member states prerogatives through a rather swift use of fundamental rights.

### Trampling Over Minimum Harmonisation

Stimulated by the discussion in Werhof and by the Advocate General’s opinion, the Court then proceeds to interpret the Directive in light of EU fundamental rights. Although the decision reads as if this were an entirely plain move, it is not. In effect, the Court tests the law of a member state, providing more protection to workers as allowed by the context of minimum harmonisation, against the European Charter of Fundamental Rights.

Article 51(1) of the ECFR sets certain limits to the Charter’s effects:

*The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.*

As former ECJ judge Rosas has convincingly argued, unlike fundamental freedoms, the Charter is only applicable to “national” cases when at least one other provision of European law is directly applicable.<sup>14</sup> Perhaps counterintuitively, this might not have been the case in *Alemo-Herron*.

A crucial question, which the Court didn’t address, is indeed whether member states making use of the Minimum Harmonisation clause are implementing EU law- differently put, are national “stricter rules” ultimately national or European law? Only in the latter case would the scrutiny of UK legislation through interpreting the directive “in light” of the Charter be legitimate. The question is not entirely new, but has not found a clear answer yet,<sup>15</sup> with doctrine and case-law finding it equally difficult to settle.

In the literature, an image used by Stephen Weatherhill<sup>16</sup> seems to have become the mainstream view,<sup>17</sup> suggesting that the more protective rules adopted under a minimum harmonisation clause are only subject to scrutiny for compliance with the Treaty Freedoms. In his words, the community legislation sets a floor, the Treaty a ceiling and the Member

---

<sup>14</sup> A. Rosas, ‘When is the EU Charter of Fundamental Rights Applicable at National Level?’, *Jurisprudence* 2012, p. 1169, available online ([https://www.mruni.eu/upload/iblock/c5c/002\\_rosas.pdf](https://www.mruni.eu/upload/iblock/c5c/002_rosas.pdf), last accessed 18 September 2015).

<sup>15</sup> Even if we consider the apparent lack of consideration in *Alemo-Herron* as a signal that the Court considers the matter as settled, normative questions as to the appropriateness of the solution remain pending.

<sup>16</sup> S. Weatherhill, ‘Beyond pre-emption? Shared competence and constitutional change in the European Community’, in O’Keeffe and Twomey (eds.), *Legal Issues of the Maastricht Treaty* (Wiley 1994),.

<sup>17</sup> See Dougan *Minimum Harmonisation and the Internal Market*, CMLR 37 (2000), p 853, at 855, P.P. Craig and G. De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2015), p. 626, X. Groussot, G.T. Pétursson and L. Pech, *The Scope of Application of EU Fundamental Rights on Member States’ Action: in Search of Certainty in EU Adjudication*, p. 14 (fn 65).

States are free to pursue an *independent domestic policy* within these boundaries (emphasis added).<sup>18</sup>

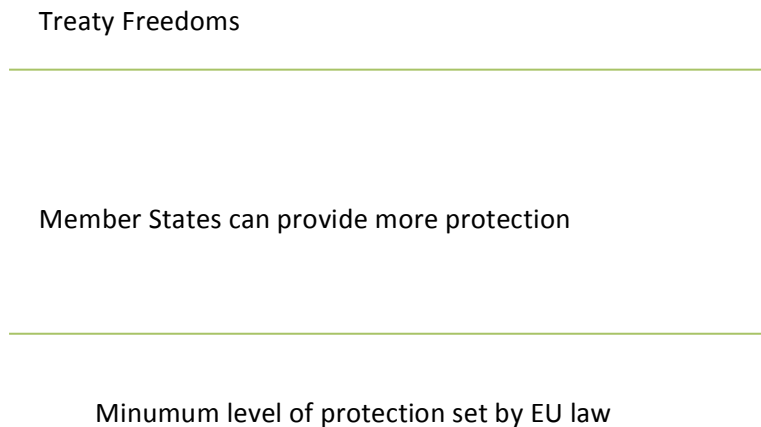


Figure 1

As shown in figure 1, a potential violation of the fundamental freedoms brings a seemingly internal question automatically into the scope of EU law. EU Fundamental Rights, on the other hand, are not designed to have such effect.<sup>19</sup> In this respect, it is interesting to mention that, while the treaty and its four freedoms are originally “European”, fundamental rights have an anchoring in national constitutions; excluding the application of European fundamental rights, thus, merely leaves the national courts to apply their own fundamental rights framework.<sup>20</sup> If an asserted violation of EU fundamental rights does not in itself grant scrutiny by the ECJ, it is the question of the scope of EU law that remains determinant.

The ECJ case-law is ambiguous. On the one hand, in one of the few cases in which it has addressed the issue squarely,<sup>21</sup> the Court was reluctant to apply the principle of proportionality<sup>22</sup> 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.<sup>23</sup> On the

<sup>18</sup> P.P. Craig and G. De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2008), p. 626.

<sup>19</sup> De Cecco, for instance, has tried to argue in favour of a fundamental right scrutiny of the more stringent rules, concluding that there was no room maintain a judicial review “directly linked” to the respect of (general principles of Community law and, among those) EU fundamental rights. See F. De Cecco, Room to Move? Minimum Harmonization and Fundamental Rights, CMLR 2006, p. 9.

<sup>20</sup> See again Rosas, and, in a similar vein, the German Constitutional Court’s response to Fransson in Judgment 1 BvR 1215/07 of 24 April 2013. For a comment of this latter decision, F. Fontanelli: Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog, *European Constitutional Law Review* 2013 Vol. 9 p.315-334

<sup>21</sup> ECJ 14 April 2005, Case C-6/03, *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz*.

<sup>22</sup> One of the grounding “general principles” of European Law.

<sup>23</sup> *Ibidem*, para 64: “[...] 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

other hand, in *Karner*,<sup>24</sup> 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 the 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 Art 51 of the Charter. While only ancillary to the main argument, and applying a very undemanding level of scrutiny, this step of the Court has raised the question whether the Court has abandoned its previous case-law, which was considered to see such measures as falling outside the *scope* of EU law.<sup>25</sup> The fact that in *Werhof* the Court had also relied on an argument derived from EU fundamental rights<sup>26</sup>, on the other hand, is less telling: in that case the review concerned the directive's "minimum" rule, not the more protective national measures.

While the Court entirely ignored the question, Advocate General Cruz Villalón takes a clear, albeit apodictic, stance, noting that "as 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."<sup>27</sup> Calling nature to witness, however, does little to explain why member states actions in this area should fall within the domain of EU law.

Several criteria have been articulated by the Court in order to identify a direct relation between member states action and European law, and none seems to tailor to our 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*<sup>28</sup> 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 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* line of cases. Even taking into account the Court's recent pronouncement in *Fransson*,<sup>29</sup> considering the "scope"<sup>30</sup> of EU law to cover Member States actions that somehow further the Union's goals, the fact that minimum

---

minimum requirements laid down by a Community directive in the sphere of the environment, inasmuch as other provisions of the Treaty are not involved.'

<sup>24</sup> ECJ 25 March 2004, Case C-71/02, *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH*.

<sup>25</sup> J. Stuyck, 'Case C-71/02, *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*,' 41 *Common Market Law Review* (2004), p. 1683; A. Egger, 'EU-Fundamental Rights in the National Legal Order: The Obligations of Member States Revisited,' 25 *Yearbook of European Law* (2006), p. 515.

<sup>26</sup> Suggesting that requiring the dynamic interpretation of the Directive may interfere with a trader's freedom of association.

<sup>27</sup> *Alemo-Herron*, Opinion AG Cruz Villalón, para 47.

<sup>28</sup> ECJ 13 July 1989, C-5/88, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*.

<sup>29</sup> ECJ (Grand Chamber) 26 February 2013, C-617/10 *Åklagaren v Hans Åkerberg Fransson*.

<sup>30</sup> *Acting within the scope* of EU law was already a connecting factor. What this scope is supposed to encompass, however, a question which can probably not be answered once for all. See C. Barnard, *EU Employment Law* (Oxford University Press 2012), p. 31.

harmonisation is precisely intended to let member states further *their own* goals seems to make a relevant difference.

All in all, neither the AG nor the Court seem to provide sufficient arguments underpinning their conclusions on a matter of great relevance to the relationship between EU law and member states policy.<sup>31</sup> The judgment either assumes that a (purported) violation of EU fundamental rights has the ability to bring a national situation within the scope of EU law, or that “more protective rules” are already within that scope by virtue of some undisclosed parameter. While both assumptions might be problematic, not knowing which of the two is embraced does not help. This confusion would be less striking if it didn’t entail a further expansion of the ECJ’s competence at the expense of a domain, that of minimum harmonisation, which has already been considerably re-dimensioned through different instruments.<sup>32</sup>

The final step to be addressed is the choice of a normative standard within the Charter of Fundamental Rights. The following paragraph will show how both the particular provision embraced by the Court and the way it was handled in *Alemo-Herron* represent a considerable source of concern. Especially, we will conclude, when minimum harmonisation is at stake.

### **Article 16<sup>th</sup> of the Charter: The Unbearable Lightness of Essence**

The ambiguous potential of EU fundamental rights review in the field of minimum harmonisation becomes more evident when one considers the standard concretely adopted by the ECJ: article 16 and the right to conduct a business, in particular in its expression represented by freedom of contract.

In the second part of its decision, the Court concludes that the Directive, interpreted in light of article 16 of the Charter of Fundamental rights, precludes national legislation allowing dynamic incorporation clauses to be transferred along with employment contracts.

Until *Alemo-Herron*, article 16 could be considered as encompassing a “weak” right. A similar conclusion seemed warranted in light of both its formulation (“The freedom to conduct a business *in accordance with Community law and national laws and practices* is recognised”) and of the fact that, looking at the explanations accompanying the Charter, it

---

<sup>31</sup> Notice that, if taken seriously, the non-applicability of EU law to member states’ more protective measures in the context of minimum harmonisation also undermines the first part of the court’s argument. In this respect, the references to *Werhof* created the impression that the questions asked in both cases were the same- but while interpreting the Directive’s purpose is necessary to determine whether it *requires* something, the matter changes when the question is whether something is allowed- in particular, thanks to the minimum harmonisation clause.

<sup>32</sup> As in the case of product liability, see Bartl, *Legitimacy and European Private Law*, and *ibi* for further references. A further challenge on member states actions going beyond the minima set by European legislation seems to be implied by the Commission’s recently issued Better Regulation Guidelines, so weary of member states unnecessarily “gold-plating” European measures. See [http://ec.europa.eu/smart-regulation/better-regulation/documents/com\\_2015\\_215\\_en.pdf](http://ec.europa.eu/smart-regulation/better-regulation/documents/com_2015_215_en.pdf), p 80 last accessed 16 September 2015.



was hardly more than a bundle of different rights which had not directly found their way in the main text.<sup>33</sup> Still in 2012, Oliver had confidently argued that the Charter had not brought about any changes vis à vis the pre-existing general principle.<sup>34</sup>

As has been observed elsewhere,<sup>35</sup> the cases mentioned by the court in order to support its conclusion, mostly belonging to the pre-Lisbon era, do not go much beyond showing the existence, in its own precedents, of some notion of freedom of contract.<sup>36</sup> Rather, looking back at several decisions where the freedom to conduct a business had been invoked seems to confirm the impression that something might have gone wrong with *Alemo-Herron*.

When embarking on fundamental rights review, Courts have a series of tools of legal reasoning at their disposal, which they *are expected to* use. Within the EU system, article 52(1) of the Charter provides some direction, by indicating that limitations to fundamental rights “must be provided for by law and respect the essence” of the rights affected. The limitations are subject to the principle of proportionality and they have to be “necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

In *Alemo-Herron*, the ECJ did not adopt any of the known standards such as proportionality or balancing of rights. Insofar as it refers to its precedent in *Sky Österreich*,<sup>37</sup> the Court surprisingly ignores both the test that it had employed in that occasion<sup>38</sup> and the considerations that had accompanied it. According to para 45 of that judgment, the freedom of article 16 “is not absolute, but must be viewed in relation to its social function”. This seems to suggest that different institutions enjoy a relative discretion in shaping the freedom to conduct a business. Against this context, the restrictions imposed in the case of *Sky Österreich* do “not affect the core content of the freedom to conduct a business”, in that they do “not prevent a business activity from being carried out as such”, and, while imposing certain duties to contract against no consideration, they do not prevent the right holder from seeking profit elsewhere.

In his opinion, AG Cruz Villalón had interestingly observed that the case law had not provided any definition of the freedom to conduct a business, previous judgments having gone “no further than either referring to the right to property or simply citing the provisions

---

<sup>33</sup> X, Groussot, G.T. Pétursson & J. Pierce, '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](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2428181), visited 16 September 2015;

<sup>34</sup> See 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. In particular, he claims that the court's case-law pre-dating the Lisbon treaty should be considered in toto applicable to the new article 16.

<sup>35</sup> See most comprehensively 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

<sup>36</sup> Other cases, such as the ones carefully recalled in J. Basedow, *Freedom of Contract in the European Union*, ERPL 2008, 901, do not seem to prove much more.

<sup>37</sup> ECJ 22 January 2013, Case C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk*

<sup>38</sup> *Id est*, the one designed by article 52(1).

of Article 16 of the Charter.”<sup>39</sup> The AG’s own reflections on the role of the right in European order, though, led him to conclude that it was meant to ensure “that there are certain minimum conditions for economic activity in the internal market”.<sup>40</sup> However, Cruz Villalón argued, while the right to property (to which the freedom is reconnected) operates “in the sphere of assets”, the freedom to conduct a business “protects economic initiative and the ability to participate in a market” and not a specific outcome to be reached on that market.<sup>41</sup>

The Court, however, seemingly had a much more specific idea of what article 16 CFR stands for and what its “essence” entails. In the context of a transfer of undertaking, it asserted, the “*transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity.*”<sup>42</sup> Otherwise, his freedom of contract is “reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business.”<sup>43</sup>

The Court did not endeavour to find out whether other rights and interests<sup>44</sup> might justify a compression of the employer’s contractual freedom, nor whether such freedom could be meaningfully expressed at other stages or in different procedures than the ones which the clause referred to. It also did not consider, as it did in other circumstances, that its role should be limited to providing guidance as to the applicable standards, leaving it to the national court to decide whether, in the local context, sufficient guarantees were left to enable the transferee to meaningfully conduct its business. As it had done with the dubious balancing exercise in the first part of the judgement, the Court excludes from its argument everything, which could problematise its reliance on the “very essence” of a freedom to contract. By doing so, it gives article 16 an allure of legal intelligibility that would be hard to justify even for less controversial fundamental rights.<sup>45</sup>

The ECJ’s approach is especially problematic insofar as it concerns a “right” that should arguably not be open for constitutionalisation. Freedom of contract, and the right to conduct a business, can only be given a content based on a community’s contingent democratic understanding of the relation between market and society. These rights stand in such a tight relation to the social, political and economic framework in a particular society *at a given point in time* that it seems difficult identify any real ‘essence’ to this right- beyond,

---

<sup>39</sup> Case C-426/11, Opinion of the Advocate General Cruz Villalón, para 49.

<sup>40</sup> AG Opinion, para 50.

<sup>41</sup> AG Opinion, para 51.

<sup>42</sup> *Alemo-Herron*, para 33.

<sup>43</sup> *Alemo-Herron*, para 35.

<sup>44</sup> Groussot, Pétrusson and Pierce, *Weak Right, Strong Court*, p. 16 suggest that “If the Court had engaged in a true balancing it should have then considered that the new Article 16 framework also fitted a mandatory high level of social protection and the safeguarding of the rights of the employees as previously interpreted in its previous case law and required by the entry into force of the Lisbon Treaty.”

<sup>45</sup> See Groussot, Pétrusson and Pierce, *Weak Right, Strong Court*, p 15.

indeed the requirement that there is a market economy. The idea of gold-plating a particular understanding of such freedoms seems contentious even at the national level<sup>46</sup> let alone fixing their content once for all (and everyone) at the European level.<sup>47</sup>

### **Conclusions: Art 16. and the Future of Social Legislation in the EU**

The chapter has aimed to show how the fate of member states legislation going beyond the requirements of minimum harmonisation is in danger after *Alemo-* and why contract lawyers, in particular, should care. The decision is problematic both in view of its discount of the constitutional meaning of minimum harmonisation and to its surprising “gold-plating” of an idiosyncratically understood article 16 CFR.

We would like to submit that the combination of these last two elements is not a chance. Minimum harmonisation as a technique has been often employed in socially sensitive domains<sup>48</sup> in order to accommodate the preferences of those member states whose polities were more sensitive to social or environmental concerns. It has thus been an instrument allowing both the European Union and the member states to interfere with or conform market behaviours for the pursuit of super-individual goals.

If it is true, as Leczykiewicz predicts, that article 16 will increasingly represent a basis for challenges to EU and national acts restricting private autonomy in view of different public goals,<sup>49</sup> the more protective measures adopted by member states in contexts of minimum harmonisation are the ideal target for such challenges. Allowing such measures to be reviewed in light of EU fundamental rights, then, seems an excellent way to open the hunting season, and the “essence” doctrine deployed in *Alemo-Herron* offers a very effective weapon. Let us hope that the first hunters to try this path will meet a more institutionally and socially sensitive Court.

---

<sup>46</sup> See M.W. Hesselink, 'The justice dimensions of the relationship between fundamental rights and private law' forthcoming in ERPL 2015.

<sup>47</sup> See H.W. Micklitz, On the Intellectual History of Freedom of Contract and Regulation, EUI Working Papers LAW 2015/09- pointing out how, even looking at three jurisdictions only- no such thing as a common core of freedom of contract can be identified.

<sup>48</sup> See M. Dougan, Minimum Harmonisation and the Internal Market, CMLR 37 (2000), p 853, for an overview of minimum harmonisation measures at the end of the last century.

<sup>49</sup> D. Leczykiewicz, Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?, in Bernitz, Groussot & Schulyok, General Principles of EU Law and European Private Law, Kluwer Law International 2013, p 171.