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## SYMPOSIUM ARTICLE



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# A hidden champion? The European Court of Justice as an agenda-setter in the case of posted workers

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## Abstract

Since the comparative turn in European integration research, analyses of the legislative process of the EU have taken inspiration from research on national political systems. While the consequences of the formal monopoly of initiative of the Commission are much analysed, it is only recently that the role of the Court in EU legislation has been further appreciated. In the literature, it is disputed how far case law constrains the EU legislator. The analysis of the 2016 proposal for a revision of the 1996 Posted Workers Directive allows us to uncover the mechanisms by which the European judiciary shapes and constrains agenda-setting based on the constitutionalization of EU law. In this highly political case, being hailed as a major breakthrough, we ask whether political majorities or case law constraints had the upper hand.

## 1 | INTRODUCTION

How is decision-making power distributed in the European Union (EU)? Following a comparative turn in EU scholarship, a leading stream in political science has insisted that the European Commission's monopoly of initiative translates into an exclusive power to set the agenda (Hix 1994)—giving it key leverage on public policy. Meanwhile, legal scholarship has long insisted on the power of the European Court of Justice (the ECJ or 'the Court') under the Treaties in determining public policy (Shapiro 1980; Weatherill 1995). This argument has found a certain echo from some eminent political scientists (Stone Sweet 2004). But in general, the Court's relevance for policy is seen in its role of judicial surveillance over the member states' obligation to comply with EU law.

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In this article, we argue that analyses of the policy process and the power balance between EU institutions must take better stock of the cumulative effect of case law. Over time, the European Court of Justice has elaborated a doctrine that pushed the policy implication of the Treaty goals (i.e., the four freedoms, citizenship and competition law principles) via the constitutionalization of EU law. Grimm argues that such far-reaching constitutionalization of policy goals amounts to 'over-constitutionalization', withdrawing policy choices from majoritarian decisions (Grimm 2017). Consequently, policy options that are less compatible with the Treaty goals are removed from the agenda, implying that the EU policy agenda is set in the 'shadow' of the Court (Schmidt 2018).

In this article, we explain how the influence of the EU judiciary reduces the agenda-setting power of the competing institutions—the Commission, the Council and the Parliament. The notion of over-constitutionalization implies that the EU legislature must devise EU secondary law closely in line with the authoritative judicial interpretation of the fundamental policy goals of the Treaty. This establishes the Court as a 'hidden champion', whose case law acts as a gate-keeping power in excluding policy options on the agenda. Moreover, as a procedural agenda-setter, it can change the policy status quo unilaterally, the distributive implications of which may push the EU legislator to act. Finally, the framing effects of case law may suggest the choice of one policy over another (Deters and Falkner 2021). In altering the interpretation of core Treaty provisions, the Court is a powerful ally or opponent for the legislative actors (Scharpf 2006).

Empirically, we assess the significance of the Court as an agenda-setter against the analysis of the 2016 proposal (COM(2016) 0128 final) for a revision of the 1996 Posted Workers Directive (PWD). The posting of workers interlinks numerous sensitive policy issues in the areas of labour law, fundamental social rights and market freedoms, which are all instrumental in the process of European integration. This reform had to settle major conflicts between the member states, notably involving social dumping. Hence, high distributional stakes translate into pressures to overcome a status quo that is imprinted by judicial constraints. In so far as EU legislative actors have had to endorse existing judicial constraints in spite of fundamental preferences, the case law can be regarded as a 'hidden champion' in the selection of policy alternatives.

Section 2 specifies the research question, theoretical framework and case selection, section 3 empirically analyses the 2016 reform on posted workers, and section 4 takes stock of this analysis and concludes.

## 2 | SHAPING POLICY ALTERNATIVES IN THE EU

### 2.1 | Types of agenda-setting and the Court

Analyses of the legislative process in the EU are dominated by concepts borrowed from the paradigm of comparative politics. Yet, the intense attention given to the agenda-setting power of the Commission can be seen as an anomaly in this regard, as it concerns one of the *sui generis* features of the EU, where the Commission has the formal monopoly of initiation.

We suggest that the power of the ECJ in the policy-making process is relatively underestimated, although it has recently received more attention. Why would the Court matter in the EU's policy-making process? Dieter Grimm (2017) has coined the term 'over-constitutionalization' to characterize the constraints that the Treaty and the Court may impose on EU policy-making. The unusually important role that the ECJ plays in the EU's political system can be traced back to the nature of the de facto European constitution that results from an intergovernmental treaty. Unlike national constitutions, such a treaty aims as much to define the policy objectives of the foreseen intergovernmental cooperation as it does to settle the institutional modalities of that cooperation.

The establishment of the principles of direct effect (26/62 *Van Gend en Loos* [1963]) and supremacy (6/64 *Costa v. ENEL* [1964]) by the Court in the early 1960s granted constitutional status to these policy objectives. This laid the ground for an accumulating line of case law, defining and broadening the four freedoms (of goods, services, persons, capital) and competition law principles, creating the EU's economic constitution. Subsequently, citizenship rights

were similarly shaped by case law after their introduction through the Treaty of Maastricht. EU secondary law and national policies need be compatible with these Treaty policy goals including their interpretation by the ECJ; sheltered from elected officials' preferences and competing EU institutions (Schmidt 2018). We must provide some avenues for a more systematic understanding of how the Court and its case law can specifically affect the policy process, especially at the early stage of agenda-setting.

Following Kingdon, 'agenda-setting determines whether or not political attention is devoted to an issue, whether or not that issue becomes part of the formal decision-making process, how the issue's underlying problems are defined and which alternatives are considered as solutions' (Kingdon 1984, p. 3). In the general view, the Court acts through authoritative decisions, settling case-specific interpretations of established legislation. Therefore, its eventual influence on the policy agenda appears relatively distant. But case law influence is cumulative and benefits from over-constitutionalization. 'Whoever is able to shape the agenda also has a chance to shape the policies that are eventually adopted. Political actors struggle to hold an extent of control over the policy agenda, because it gives them an extent of power over policy decisions that are eventually made' (Princen 2007, p. 21; Deters and Falkner 2021). We argue that Court decisions often get such leverage and extent of control.

Deters and Falkner (2021) identify various patterns through which actors affect the policy agenda, which can shed further light on the role of the Court in agenda-setting that is either overlooked or undertheorized. Those patterns are agenda leadership, procedural agenda-setting, gate-keeping power, and a framing effect.

Agenda-setting through leadership seems *prima facie* less relevant to the Court, since the institution will never actively intervene to 'rally consensus' (Pollack 1997). Procedural agenda-setting power typically rests with the institutions that have the formal power to 'log' an issue on the legislative agenda. While this formal power belongs to the Commission, we have already suggested that some Court decisions which change the status quo may be interpreted as a conditional procedural agenda-setting power. In the same sense as argued by Garrett and Tsebelis (1996) for the Parliament, the decision rules make it far easier to accept than to amend the status quo set by the Court. The Court can also exercise gate-keeping power, by removing policy options from the agenda. Finally, the pattern described under framing is particularly relevant to the Court, as its decisions have the potential to influence stakeholders' views regarding the relative technical validity of certain policy options. Court decisions may also generate conceptual precedents that can durably shape the terms of a policy issue, creating a relatively systematic bias in favour of certain solutions or, on the contrary, invalidating others. In the following, we will mainly focus on procedural agenda-setting and the gate-keeping role of the Court, as a systematic detection and differentiation of framing effects would require engaging further in legal analysis than is possible within the context of this article.

Given these constraints of case law on legislative options, the Commission's control over the agenda through its power of initiative may be overemphasized in the literature. It is generally assumed that policy alternatives available to the agenda-setter mostly depend on the preference constellation among the institutional lawmakers—the Council and the EP (Tsebelis and Garrett 2001, p 365). Depending on the policy issue and its roots in the EU Treaties, the Court plays an additional role as an agenda-setter. The Court and the EU legislator act in parallel as policy-makers, putting the EU in a unique situation. Within our analysis, should the Court only play a role as a law enforcer and not restrain policy options, this would be equivalent to a null hypothesis. One important aspect has to be noted: whenever the Court interprets law, its rulings impose a bias in favour of this new status quo, because of the joint-decision trap (Scharpf 2006, 2011). It is important to differentiate this general bias from the effects of over-constitutionalization, where political actors (short of a Treaty revision) have to legislate within the realms of the Court's interpretation of the Treaty.

## 2.2 | Absence and presence of the Court in EU legislation

Studies of EU legislation in the comparative paradigm analyse the Commission's agenda-setting powers but largely ignore the Court. This is apparent when regarding important contributions to the field. Thus, Thomson (2011), when

analysing a large dataset of 125 legislative proposals, does not even have an entry for the Court in its index, against 366 mentions of Parliament/EP in the text, more than 700 mentions of Commission/Commissioner, and 411 mentions of Council. Similarly, in reassessing the relevance of the Commission in agenda-setting, Kreppel and Oztas mention the Court once in the context of the annulment procedure, against 288 occurrences for the Commission, 55 for the Council, and 49 for the Parliament/EP (Kreppel and Oztas 2016).

This disregard of the role of the Court in the interplay among the EU institutions in the legislative process contrasts with early research on the EU policy process. For example, the seminal article of Tsebelis and Garrett paid tribute to the role of the Court in policy-making, by noting: 'First, given that the EU's treaty base can only be modified by the unanimous agreement of the member governments, we would expect that the Court would have considerable latitude in interpreting "constitutional issues" (aided and abetted by the Commission's bringing cases to the Court)' (Tsebelis and Garrett 2001, p. 365). These authors discuss the Court on a par with the other EU institutions (Court: 105 mentions; Commission: 107; Council: 165; Parliament: 137). But the focus is on 'the Court in implementing and interpreting ... legislation' (Tsebelis and Garrett 2001, p. 365), not on the direct impact of judicial interpretations of the Treaty on secondary law.

In contrast, legal scholarship characterizes the relationship between the EU judiciary and the EU legislator the other way around. For example, Gareth Davies conceptualizes the legislature as an 'agent' of the Court (Davies 2016). Comparing different policies, among them posted workers, he argues that EU legislation largely codifies earlier case law, given the Court's unusually broad remit in the Treaty. Whereas political science largely disregards the Court, in this perspective it is the legislator that can largely be ignored. While the argument of Davies may state the power of the Court rather bluntly, the recognition of relevance of the Court's case law for legislation is well established in legal scholarship regarding specific policies such as procurement (Bovis 2006) or the relationship between the Court and the legislature in general (Syrpis 2012; Garben 2014).

In political science, the relationship between the EU's legislative and judicial branches has attracted more attention recently. Larsson and Naurin (2016) show that the Court is influenced by the risk of legislative override. Similarly, Carrubba and Gabel (2014) explain how the ECJ's rulings often reflect the observations submitted by member states in court proceedings. They claim that the Court tries to anticipate and avoid member states' noncompliance with adverse rulings. These works empirically support Garrett and Tsebelis' argument: 'that the Court's behavior is affected by the reactions it anticipates from the EU's legislative branch' (Tsebelis and Garrett 2001, p. 365). Thus, both the analyses of Carrubba and Gabel and of Larsson and Naurin would imply that EU legislation is very little constrained by case law. After all, they share the view that 'everything happens conditionally on implicit government acquiescence' (Carrubba and Gabel 2014, p. 213). If case law is largely designed to reflect member states' preferences, there is little need to give separate attention to the Court.

Yet, the statistical analyses of these authors describe a general picture. If member states support the Court on a so-called 'more Europe dimension', in 57 per cent of the cases, as Larsson and Naurin (2016, p. 395) find, there is still a sufficiently broad range of rulings where the Court deviates from member states' preferences. This is particularly true if we take the structural implications into account that follow from over-constitutionalization. Rulings like *van Gend en Loos*, *Costa v. ENEL* or *Dassonville* set a precedent for those to follow, impacting subsequent EU legislation.

Martinsen (2015) analyses this interaction between case law and legislation qualitatively. She questions the Court's power, emphasizing the political constraints of its operation by differentiating between four legislative reactions: codification, modification, non-adoption, and override. Finding very few cases of legislative override but many cases of modification, Martinsen detects greater political influence of the legislature at the expense of the Court. However, when emphasizing that the legislative process modifies case law, Martinsen implicitly assumes that Court rulings already represent whole policies that could regulate a field on their own. Whether the legislator builds policies around the constraints of case law or overcomes these constraints needs to be differentiated, however.

We argue that a more valid strategy to assess the impact of the Court consists in examining how case law developments can exclude certain policy options from legislative negotiations, hence revealing the gate-keeping power of the Court. In addition, the Court can be a major procedural agenda-setter, whose case law changes the policy status

quo, and can alter the salience of policy issues. In revisiting the role of the ECJ within the legislative process, we examine the impact of case law as an independent variable to explain policy output as a dependent variable. By contrast, rational-institutionalist theories emphasize member states' preferences, party positions in the European Parliament and decision-making rules to explain policy outputs.

Accordingly, our key question is whether member states can pursue policy options that contradict case law, assuming that they can agree on such policy, or whether they are prevented from doing so because of over-constitutionalization. Before we turn to our analysis, we will discuss the range of relevant actors and their assumed preferences and explain our case selection.

## 2.3 | Actors and preferences in policy negotiation

Following established rationalist assumptions, the Commission strives to preserve the existing extent of integration and eludes any policy option that creates more autonomy for the member states (Dür and Mateo 2010). Once co-decision between the Council and the EP has started, the Commission's influence erodes, but it can still resort to strategic legal argumentation to favour its preferred policy options, given case law. Regarding posted workers, the tendency of case law to promote market freedoms before social standards feeds into the power-maximizing objective of the Commission, because deregulatory measures tend to erode member states' control to the benefit of single market rules.

The rational-institutionalist perspective posits that the co-legislators maximize their margin of manoeuvre to favour policies best serving their interest. However, a free-market status quo favours lower-wage, lower-standard (Eastern) relative to other (Western) member states. The resulting heterogeneity of preferences in the Council and the EP impede the unity required to challenge the policy constraints of case law, although their collective interest in the inter-institutional power struggle would achieve more policy-making leeway.

In the over-constitutionalization perspective, the role of the Legal Services of the legislative institutions also deserves special attention (Rasmussen 2012). They advise on the compatibility of any given policy proposal with the Treaty. Legislative proposals can revise secondary law, but the Treaty in the interpretations of the Court can only be changed by a Treaty revision (or by the Court itself). The confidential material produced in the Legal Services can therefore hardly be challenged by political actors (Menéndez 2018). At the same time, the Legal Services are careful to present their views in recommendatory terms only, keeping the decision-making leeway for their institutional masters and shielding their credibility in the event that their position is overridden.

## 2.4 | A crucial case: 2016–18 posted workers revision

High distributive implications and political salience are more likely to result in preference heterogeneity, for which a wide range of policy options should reflect the diversity of interests. The selection of a case featuring those characteristics allows us to examine whether case law forces certain options from the agenda. For salient issues, a wide range of policy options facilitates reaching a compromise. Should case law limit the available set of policy options, actors would likely attempt to overcome these constraints. Should this prove impossible, our argument would be supported. The revision of the Posted Workers Directive features the necessary characteristics, providing a particularly instructive 'crucial' case (Eckstein 1975).

The rules on posted workers as laid out in the 1996 Directive regulate the conditions under which employees may perform work across borders under Article 56 TFEU on the freedom to provide services. The ECJ interpretation of that article has profoundly marked the area. Over time, the Court has had to specify measures that member states can take to fight letterbox companies, the documents that can be required from posting firms and workers, the regime applicable to long-term posting and the implications for temporary services delivery. The *Laval un partneri*

case (C-341/05) case law heavily interfered with collective rights, triggering several subsequent policy initiatives (Joerges and Rödl 2009). Hence, the policy status quo is under intense pressure for change from dissatisfied member states and stakeholders.

But the salience of posting can also be disputed. Workers posted across borders represented only 0.9 per cent of total employment in 2015, and the average duration of posting remains below four months. Yet, the posting of workers has increased by 41 per cent between 2010 and 2015 (European Commission 2016) and it has an acute impact in sectors like construction, care and road transport, creating distributive tensions between member states.

Empirically, we carried out a qualitative legal analysis of the status quo, the impact assessment, the Commission policy proposal, the report of the EP lead committee and 'tabled' amendments. When possible, we retrieved internal legal analyses under the confidentiality clause. Finally, elite interviews provided further evidence from actors close to the file, including four MEPs' collaborators, two political group advisers and four Commission officials.<sup>1</sup>

### 3 | ANALYSIS OF THE POSTED WORKER REVISION

There are a number of crucial legal distinctions to be made to understand the regime applicable to posted workers. The free movement of workers (Article 46 TFEU) concerns EU citizens employed in another member state, under the same terms and conditions as nationals. Self-employed workers can use the freedom of establishment (Article 49 TFEU) to work in another member state. By contrast, the posting of workers allows employers to send employees temporarily across borders in the exercise of their freedom to provide services (Article 56 TFEU). Under that regime, social security contributions are paid in the home country, according to Article 12 of regulation 883/2004 coordinating the social security systems. In addition, under the posting regime, employers mostly have to comply with the home state legislation due to the temporary nature of the provision.

The foundational elements of the status quo were settled in the 1996 PWD (96/71/EC) as a result of a long-drawn-out policy process which started in 1991.

#### 3.1 | Directive 96/71/EC

Of the three different posting situations, the posting of workers by companies providing services received the greatest political attention. In comparison, intra-group posting and posting by temporary work agencies faced milder contestation. The 1996 PWD concerns workers who are in a contractual relation of subordination with a sending employer. For them, the directive aims to guarantee a minimum set of rules, while promoting market openness, as laid down in the Recital: 'fair competition and measures guaranteeing respect for the rights of workers'. As Dhéret and Ghimis (2016) emphasize, those two goals are essentially contradictory: the promotion of the free market together with a level playing field of social standards for workers. The directive aims to reconcile this contradiction in ensuring minimum standards in the promotion of market integration.

Article 3(1) of the PWD sets the list of host states' standards that can be part of a 'nucleus of mandatory rules for minimum protection' (Recital 13). They include the maximum work and minimum rest periods, the minimum rate of pay and overtime rates, paid holidays, health and safety standards in the workplace, the conditions of maternity leave and employment conditions. These standards shall apply to posted workers under the condition that they are enshrined in universally binding collective agreements or legislative instruments. Most member states use a mix of both types of instruments, so the directive takes account of this diversity. As a general principle, host states shall not discriminate against foreign firms. Thus, foreign employers cannot be forced to apply obligations that national ones can opt out of.

<sup>1</sup>Although one of the authors was not directly involved in the negotiations and had no influence whatsoever on the file, he was able to benefit from participant observations creating the opportunity for many more informal discussions with closely involved decision-makers and interest groups.

Even before 1996, the member states' bargaining positions were already heavily affected by the case law on the freedom to provide services. In *Rush Portuguesa* (C-113/89), the Court allowed the host country to enforce its 'legislation, or collective labour agreements' (No. 18) on posted workers. The decision confirmed the right of France, as the host state, to apply its core rules, including its minimum wage, to workers posted from Portugal under the free movement of services (Eichhorst 2000, p. 137). This strengthened the bargaining position of more highly regulated member states. Indeed, at the time of adoption, many thought that the directive would result in greater compliance with host states' labour standards in posting situations (e.g., Biagi 1996). Member states' expected pay-offs as net senders or net recipients of posted workers largely explain their respective positions on the 1996 PWD initiative. After the 1980s' enlargement, net recipients (particularly Belgium, Denmark, France, Germany and Luxembourg) supported more protective regulation while net senders (Greece, Ireland, Portugal and the UK) opposed it, leading to a negotiation deadlock. The equilibrium shifted toward a more stringently protective compromise with the 1995 enlargement to Austria, Finland and Sweden, in which workers generally enjoy better wages and protection (Biagi 1996).

### 3.2 | Case law developments and policy challenges

As was true for the original compromise, the Court's interpretation of the PWD and of the Treaty's services freedom continues to be relevant for agenda-setting, the bargaining positions of member states, and the range of available policy alternatives on posted workers. A 300-page Commission document (European Commission 2016) summarizes the accumulated case law on free provision of services. The case law defines the Treaty's protection of cross-border service provision, restricting member states' regulation to measures that are non-discriminatory, proportionate, and necessary to achieve an overriding goal of public interest (Case 33/74 *van Binsbergen*). The services freedom covers 'cross-border' 'economic activities' of a 'temporary character' that need to be of an 'independent nature', and these characteristics of services have been defined and redefined by many rulings, as is true of the proportionality of member states' regulatory restrictions.

These rulings circumscribe the policy options available, and they favour the bargaining position of some member states over others. Just as *Rush Portuguesa* broadened the means of France to make its minimum pay obligatory, other rulings constrained member states' options to control cross-border services providers. Only in recent years has the Court shown more understanding towards market regulation, providing the ground for the revision of the PWD. The Court thus partly acts as a gate-keeper, in removing policy options, and partly as a procedural agenda-setter.

Important for our context, the Court specified the scope and extent of the situations covered by the concept of posting. In that regard, the means to fight the unlawful practice of letterbox companies poses acute problems, which explains the salience of the issue; posted workers must have their habitual place of work in the home country, and cannot be employed for the sole intention of being posted. Furthermore, the employers must demonstrably have their actual economic activities in the home state (C-202/97 *FTS*). Finally, posted workers must be tied to the home employer exclusively and perform work independently from the host-service recipient, who cannot act as a secondary employer.

An additional issue concerns the duration of posting, since the services freedom covers only temporary activities. In the 2003 *Schnitzer* case (C-215/01, No. 30), the Court confirmed that posted employees could provide work 'over an extended period, even over several years', following a broad definition of the services freedom. But when asked in *Alpenrind* (C-527/16) to set a maximum time to posting, the ECJ found that the same position cannot be filled by another posted worker, even if the sending employer is different, and that the host state's social security regime now had to apply. In that case, the employee had been replaced by another worker, from another employer established in the same state, to perform an identical task. Prior to that decision, one could assume that, although the first employer could not send a replacement within the next 24 months, another worker from another firm could still fill that position—as argued at the time by Advocate General Saugmandsgaard Øe.

The tensest disputes certainly stem from the shifting balance between the home and host states' social rights that may be applicable to posted workers. In that regard, the *Laval un partneri* case (C-341/05) was decisive: the



Court decided that under the freedom to provide services, foreign employers could not be forced to comply with more favourable collective agreements, above the minimum standards required by law. Suddenly, the Court no longer interpreted the PWD as securing minimum standards for posted workers, but as a maximum protection. Subsequently, the Swedish court even held the trade union financially liable for the damage the strike caused to the employer in the exercise of his Treaty-based market freedom.

The implications of the *Laval* principle for the fundamental right to strike and its subsequent confirmation by other rulings created such resistance that the Commission was forced to acknowledge the emerging crisis at the core of the internal market edifice. With the support of the French Presidency, the Commission encouraged the social partners (including Business Europe, CEEP (Community Education and Enterprise Projects), EUAPME (European Association of Craft, Small and Medium-Sized Enterprises) and ETUC (the European Trade Union Confederation)) to develop a common position. The resulting joint report (Business Europe, European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest, European Trade Union Confederation, and Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises 2010) identified a range of problems, but also revealed insurmountable obstacles: any compromise would not only need to balance market freedoms and social rights, but have to preserve the existing diversity in industrial relation systems. In response to *Laval*, in 2012, the Commission proposed the so-called 'Monti II' regulation on the right to take collective action (COM(2012)130 final), which attempted to reconcile the exercise of the right to strike with the freedoms of services provision and establishment (Höpner and Ehret 2016). The Monti II initiative is an example of the procedural agenda-setting power of the Court. But the initiative failed. Unions would have wanted to overrule the case law, but this was not possible given over-constitutionalization. The legislative proposal therefore largely aimed at codifying the case law, to which unions could not agree.

While the political conflict lay open and could not be solved with Monti II, the Court gradually amended its initial position. The *Regio-Post* case (C-115/14) of late 2015, dealing with minimum wages in public procurement, showed a Court more willing to protect social rights. And in the case of *ESA* (C-396/13), about a Polish company posting workers to its branch in Finland, the Court conceded that the minimum pay could encompass travel costs, accommodation and daily allowances.

Regarding control measures, the main issue lies in achieving smooth administrative cooperation across borders. While social security contributions are paid in the home country, host state authorities must accept the so-called A-1 forms (formerly E-101) that are issued to the posted workers as proof of insurance (Vogel 2016). The ability of the host state to require additional documents and impose more stringent control measures is strictly limited to specific conditions and situations (C-490/04). One important issue concerns how to handle suspicions of forged A-1 forms (C-178/97 *Banks*, C-620/15 *A Rosa Flussschiff*). In principle, the Court requires member states to recognize each other's administrative acts. When in doubt, they are called upon to intervene with an infringement procedure (C-2/05), rather than rejecting documents. In case C-359/16 *Altun*, however, the ECJ agreed that evidently forged A-1 certificates can be directly rejected if host state authorities fail to respond. This requires objective indications for fraud. Crucially, in the *Alpenrind* case (C-527/16), the Court specified that A-1 forms may be withdrawn at a later stage, creating a new risk for employers to have to pay employees' social security retroactively in cases of illegal posting (Felisiak 2018). With *Alpenrind*, one could argue that the ECJ responded favourably to an increasing political wariness about illegal posting, thereby broadening the agenda of available posting options.

Cases continue to reach the Court. Thus, C-6/18 *Dobersberger* concerns posted workers working in trans-border trains, and C-18/17 *Danieli*, workers that simultaneously have an employment contract in the host state.

As has become apparent, the case law of the Court has seen a trajectory of increasing the scope of the services freedom up to the point where rights to collective action were restrained with *Laval*. While it proved impossible to respond to this case law politically with the Monti II legislation, the Court subsequently has become more permissive towards regulation, thereby preparing the ground for the recent reform of the PWD.

### 3.3 | The proposed revision: overview and policy alternatives

In March 2016, Commissioner Marianne Thyssen for Employment and Social Affairs presented the Commission proposal to revise the 1996 PWD.<sup>2</sup> In the preceding 2015 public consultation, a joint letter from Germany, France, Austria, the Benelux countries and Sweden demanded the introduction of the principle of 'equal pay for equal work in the same place' and the adoption of clearer maximum posting duration. The Visegrad Group, as well as Bulgaria, Romania and the Baltic states, opposed the revision, pointing out that Enforcement Directive 2014/67/EU only needed to be transposed by mid-2016. They also maintained that it was legitimate to benefit from lower wages in the single market (Kiss 2018, p. 4). Thus, from the outset the issue of equal pay and maximum posting duration created a clear conflict of interest between Western and Eastern member states.

Notwithstanding the concerns of Eastern member states, the initial Commission proposal aimed not only at minimum rates of pay but included all kinds of remuneration (e.g., bonuses) set by law or universally applicable collective agreements. This bound cross-border subcontractors to the same pay as the main contractor. Posting was limited to 24 months. But at the same time, the proposal also reaffirmed that the four freedoms contained in the Treaty do indeed create rights of a fundamental nature. Recital 3 and Recital 4 state that the objective of the proposal is to balance the freedom to provide services while protecting the rights of posted workers.

Eleven national parliaments supported a yellow-card procedure against the proposal, with a clear consensus building up in Eastern Europe. In addition, Croatia and Denmark joined the Visegrad four, the Baltic States, Romania and Bulgaria. Based on the subsidiarity principle, Denmark was mainly concerned about its competences in the area of labour protection, while 'new' member states were worried about keeping their competitive advantage (Fabbrini and Granat 2013; Fromage and Kreiling 2017). With the exception of Slovenia, there was solid opposition among Eastern member states' parliaments, but the Commission disregarded the yellow card, furthering the search for a policy compromise in the legislature.

### 3.4 | Work in the parliament

The leaders of the European People's Party (EPP) and the Socialists and Democrats (PES), MEP Manfred Weber and MEP Gianni Pittella, immediately realized that the issues of long-term posting and equal pay were politically explosive (European Parliament 2017a, 2017b, 2018).<sup>3</sup> To contain the risks, two influential MEPs from those parties, Élisabeth Morin-Chartier (a French EPP) and Agnes Jongerius (a Dutch Socialist), took the lead as co-rapporteurs with the aim of working out a viable compromise.

In the discussions, the question of the legal basis of the proposal quickly became central. The Commission had based its proposal on Article 53(1) and Article 62 TFEU on the freedom to provide services, as was the case in the initial 1996 PWD. But, in a surprising turn of events, parliamentary debates shifted towards selecting a 'double legal basis' to also include the fundamental social rights of Article 151 and Article 153(1) TFEU (Kiss 2018). Compromise amendments were quickly settled and, in September 2016, the co-rapporteurs agreed to the double legal basis.

There is ample case law on the admissibility of using multiple legal bases in EU legal acts. The legal basis must be objectively linked to the purpose and content of the proposed legislation (C-411/06, C-130/10). When a legislative proposal has more than one identifiable purpose, the legal basis is determined by the major purpose, and the other one is considered incidental (C-155/07, C-490/10, C-137/12). Only exceptionally, if a proposal pursues various purposes and none can be determined as primary or secondary, more than one legal basis may be admitted (C-411/06).

<sup>2</sup>Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. See the main page for posting: <http://ec.europa.eu/social/main.jsp?catId=471>

<sup>3</sup>See also: European Parliament: Posted Workers: Same Work, Same Country, Same Pay: [https://multimedia.europarl.europa.eu/en/posted-workers-same-work-same-country-same-pay\\_NO1-PUB-171013-WORK\\_ev](https://multimedia.europarl.europa.eu/en/posted-workers-same-work-same-country-same-pay_NO1-PUB-171013-WORK_ev)

Regarding the role of the Court in the policy process, the legal basis issue is of striking interest, since it can be interpreted as an attempt to shield the reform against the uncertain effect of future case law. The social policy provisions of Article 151 and Article 153 could create more legal leeway to balance market freedoms and social rights. By contrast, the exclusive use of the freedom to provide services might do nothing but limit the reach of the reform by linking it to established case law. Interviews confirmed this line of reasoning. Numerous MEPs were worried that the Court would follow its traditional interpretation of free provision to minimize the effect of the principle of equal pay for the same work in the same place. The lawmakers thus sought creative policy solutions to influence case law in new directions. The introduction of social policy, as a legal basis next to the freedom to provide services, could indeed have forced the Court to adapt its doctrine (Barslund et al. 2017). In the opposing camp, MEPs chose to defend the status quo with strict obedience to the internal market case law. Particularly illustrative were the amendments tabled by some Eastern European EPP MEPs to introduce the *Laval* case in the Recitals in an attempt to delegitimize the double legal basis (Eriksson 2017).

Discussions with EP staff confirmed that the practice of legislative drafting helps to downplay the impact of the Court. Taking on the tradition of civil law, drawing explicitly on case law in amendments is generally branded bad practice in the EU and should, in any case, be limited to the Recitals. It is never admitted in the main articles of legislation. Substantive law may not be materially intertwined with case law. On rare occasions, however, some MEPs attempted to refer back to the Court as a way to further imprint judicial policy orientations in written legislation.<sup>4</sup>

MEPs supported the double legal basis for various reasons. Some wanted to send the message to West European voters that the EU is leading the fight against social dumping. Others, maybe joined by some Commission officials, realized that it could create concrete policy leverage. Therefore, the double legal basis was part of a broader strategy to rebalance market freedom and social rights, given the state of the case law. There was a visible and explicit disposition to derail the Court's doctrine. Interviews unveiled lawmakers' political discontent towards the Court's activism in balancing fundamental freedoms. Ring-fencing its agenda-setting interference is, however, difficult because of the constitutional constraints that the case law on the services freedom imposes on policy options for posting. Using a double legal basis was a creative attempt in the EP to have more room for consistent re-regulation, by framing posting explicitly as a social issue. We argue that this finding indeed shows the importance of the Court in agenda-setting.

The double legal basis was eventually included in the EP bipartisan compromise with the support of both rapporteurs in the lead Committee (Council of the European Union 2018), even though a sizeable opposition in the EPP reduced the majority in IMCO and JURI committees.<sup>5</sup> The Commission also publicized its opposition.

The Legal Services of both the Commission and the Parliament strongly argued against the double legal basis. We found that during the debates, arguments constructed in the EP Legal Service were used strategically to foment quasi-constitutional arguments. All parties and actors routinely used this strategy, helped by the fact that Legal Services' advisory interpretations often remain ambiguous.

We were able to obtain precise details regarding legal analysis of the EP Legal Service provided before the vote in the JURI committee. This opinion was drafted to maintain a neutral stand that may not interfere with MEPs' authority. However, the Legal Service suggested avoiding diverging too much from case law. Articles 151 and 153 (1) on social policy were discussed as a possible basis to support measures to improve 'the working environment to protect workers' health and safety... and working conditions'. The EP Legal Service argued that the principle of equal pay was consistent with the goal to improve working conditions. Yet, interviewees in the EP reported that the Legal Service saw this as a secondary objective only. The primary objective remained the promotion of the free provision

<sup>4</sup>For example, Anthea McIntyre's Amendment 374 on Article 1(1)(2) point (a) reads 'remuneration as determined by the settled law of the Court of Justice in lieu of remuneration, including overtime rates'.

<sup>5</sup>See also: Labour Mobility Initiative: Opinion by JURI Committee (Legal Affairs)—A Way to Extend Legal Basis of the Posting of Workers Directive. 17 July 2017: <https://www.mobilelabour.eu/11559/opinion-juri-committee-legal-affairs-way-extend-legal-basis-enforcement-directive/>. And Labour Mobility Initiative: Summary of the Opinion by the JURI Committee on the revision of the Posting of Workers Directive. 17 July 2017: <https://www.mobilelabour.eu/11548/summary-opinion-juri-committee-legal-affairs-revision-posting-workers-directive/>

of services. Crucially, the EP Legal Service—like Commission officials—also insisted that all measures adopted under Article 153 would in fact set minimum requirements,<sup>6</sup> allowing member states to impose posting conditions as high as the conditions applicable to local workers. This could have completely disrupted the free movement of services. The Legal Service of the EP thus concluded that the double legal basis should be removed.

Although the EP did not follow this line, the Council was less sympathetic.

### 3.5 | Decision-making in the Council

The double legal basis would have counterbalanced the free provision of services by applying national rules of working conditions, thus supporting the position of those high-standard member states which advocate fairer competition in the internal market, including France and Germany. Interviews showed that the advice against the double legal basis of the Legal Services of the Commission and Council strengthened the case of opposing member states in the Council. The Council finally decided to drop the double legal basis, instead agreeing on restricting the maximum time of posting (Council of the European Union 2017). Following the close *ex-ante* coordination meeting between France and Germany, backed by the Benelux countries and Austria, these member states successfully made this proposal, which fixes the maximum posting time to 12 months, paired with a possible six-month extension given prior notification, instead of the 24-month proposal of the Commission. Hungary, Poland, Lithuania and Latvia unsuccessfully voted against, while the UK, Ireland and Croatia abstained. The deal also included an extension of the implementation deadline to four years, and left the transport sector out of the new directive, given ongoing negotiations on the Mobility Package.

On the one hand, the Council agreed on a more stringent position on the maximum duration of posting than the EP compromise that may not be covered by the Court's definition of the services freedom. In this respect, the gate-keeping power of the Court was overcome. On the other hand, only generally binding collective agreements were made mandatory, following the Court. By contrast, the EP had interpreted the obligation of 'equal pay for equal work in the same place' more broadly. Following the Council's decision, eight Trilogue meetings<sup>7</sup> with the EP and the Commission took place, and a final decision was adopted in spring of 2018 (Kiss 2018).

To summarize, the final compromise shortens the maximum duration of posting while improving the minimum standards of remuneration. Instead of giving member states more leeway to apply their national working conditions, as would have been possible with the double legal basis, the final compromise interprets the content of the freedom to provide services in a more restrictive way.

At the time of writing, Hungary (C-620/18) and Poland (C-626/18) initiated an annulment procedure against the new reform, with the thinking that its regulatory content violates the free provision of services. This will give the Court the opportunity to set out the EU legislator's leeway to shape the Treaty's fundamental freedoms. At the same time, this new move could indicate that the political-legislative success reforming the PWD is rather symbolic, as some members may have agreed to tighter rules knowing that legal compatibility with the Treaty can still be challenged before the Court. Against this, the adoption of the double legal basis would have given member states greater regulatory leeway, but at high cost for the free movement of services.

## 4 | CONCLUSION

The constraining case law of the ECJ and the far-reaching rights under the free provision of services has marked the negotiation over the reform of the PWD. Following the politically contentious case law of the *Laval* ruling, there was

<sup>6</sup>See: Labour Mobility Initiative: Opinion by JURI Committee (Legal Affairs)—A Way to Extend Legal Basis of the Posting of Workers Directive. 17 July 2017: <https://www.mobilelabour.eu/11559/opinion-juri-committee-legal-affairs-way-extend-legal-basis-enforcement-directive/>

<sup>7</sup>See: Labour Mobility Initiative: Posted Workers Directive: Revision Now in Trilogue. 27 October 2017: <https://www.mobilelabour.eu/12089/posted-workers-directive-revision-now-in-trilogue/>

mounting pressure to revise the status quo on posted workers and further prevent opportunities for social dumping. The Court played the role of a procedural agenda-setter. Moreover, it acted as a gate-keeper, restricting the available policy options on the agenda. The PWD reform shows that member states may confront this restraint, as they did by limiting the duration of service provision. At the same time, an overview of the case law reveals that the Court's recent case law also created more leeway for member states to control posting.

This shows how case law includes and excludes policy options from the space of policy alternatives. In that regard, a wide range of actors in the policy process, from MEPs to Legal Services, draw from the case law authority to maximize their influence. The special situation of the influence of the Legal Services deserves further research. While their position draws from the Court, and can then be used in negotiation, their advisory work remains intentionally indecisive and open to interpretation, notably to protect their credibility in the event that their masters decide not to follow their opinion. Their confidential opinions hide this effect on EU policy-making.

In the present case, forces within the EP clearly identified that the objective of the initiative to revise the PWD could fall short of its promises. They saw a high risk that the Court would limit the implication of the revision through a gradual confirmation of its existing and highly technical case law on the freedom to provide services. We accumulated much evidence of an emerging concern about over-constitutionalization and the resulting loss of policy options among lawmakers. The opposition of the Legal Services to the double legal basis illustrates the difficulty for elected lawmakers to change the course of European integration.

Legal doubts on the double legal basis made it more difficult to support it politically. Instead, the EU legislator settled on a more restrictive definition of posting, being challenged soon afterwards by Hungary and Poland in the Court, which are now questioning the legality of the adopted policy in view of the freedom to provide services. Whether the precarious compromise reached on posted workers can hold depends again on the Court; should the Court validate the reform, the case would show the ability of the legislature to overcome existing judicial-constitutional constraints. This could lend some support to our null hypothesis, which is most widely favoured within the comparative paradigm. Indeed, even if the Court was demonstrably crucial in shaping the agenda as the analysis showed, the successful bilateral coordination between France and Germany was also necessary to reach a decision.

Should the Court invalidate the compromise found by the EU legislators in extending their control on posted workers, then the significance of the Court and over-constitutionalization would find a new source of confirmation. Notwithstanding this outcome, the analysis provided ample evidence of how case law rooted in over-constitutionalization constrains the policy-making process, showing the importance of the Court. While the role of the Commission in agenda-setting is widely credited and analysed, the way case law constrains political options or gives additional legislative leeway (as we find following the recent case law on posting) rarely catches the attention of political scientists.

Altogether, the ECJ was indeed revealed as a hidden champion of agenda-setting in our analysis. Although our findings concern a single case, we argue that political science scholarship should examine the policy-making role of the Court more systematically.

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