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LABOR RIGHTS IN THE ERA OF GLOBALIZATION

Collective Labor Rights and the European Social Model

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Abstract

This article explores the tension between competing discourses within the European Union, as this regional trading bloc seeks to capture further gains from market integration, whilst simultaneously attempting to soften the social impact of regional competition within its borders. This article analyzes the difficulty of maintaining the European social model, or a revised version of it, in the context of increased market integration. Through a close reading of two cases decided by the European Court of Justice in 2007, the article interrogates the extent to which discourses on social rights at the EU level can be made sufficiently robust to ensure the application of international or national labor standards as a buttress against increasingly mobile capital, in order to prevent "social dumping." It concludes, however, that the terms on which the foundational texts of the EU integration project operate—elevating "market" rights to equal, fundamental, status with social and labor rights—means that the exercise of social rights such as the right to strike is ultimately contingent on their compatibility with market integration.

KEYWORDS: European social model, globalization, labor rights, Laval case, Viking case

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Introduction

In this Article, I consider the tension within the European Union (EU) between fundamental social rights, in particular the right to strike, and the economic rights which underpin European economic integration. I focus my analysis on two cases decided by the European Court of Justice (ECJ) in late 2007, which provide the clearest examples to date of the conflict between the values of social solidarity and those of the internal market, between collective labor rights and free trade. After a brief introduction to the facts of the cases which were brought before the ECJ, the Article explores the nature of internal market law, in particular in its interface with non-market values, EC social law and policy, and more specifically, the question of the horizontal application of EC internal market law—can the guarantee of free trade within the EU be relied on by private individuals exercising free movement rights as against others exercising rights of collective action in defense of their interests? The Article then examines the meanings given to the right to strike within EC law, given the potential clash between free movement rights and the right to collective action.

In conclusion, the Article assesses the prospects for a formalization or constitutionalization of the balance between social rights and market rights in the context of the recent European Union Reform Treaty and the codification of the EU Charter of Fundamental Rights. The Article's main contention is that, in its recent jurisprudence, the ECJ neatly mirrors the tension at the heart of the European project between its social and its economic aims. However, given the constitutional structure of the EU's foundational texts, in particular, the European Community Treaty of 1957,[1] and given the elevation of the right to strike and the right to trade to equal status as "fundamental" rights in the EU legal order, I argue there is a certain inevitability that judicial intervention will result in a privileging of what one might call "market rights" over more familiar, internationally recognized, social and labor rights.

In such a context, any attempted reconciliation of these competing rights is more appropriately conducted within the political arena where a choice can be made to prioritize social rights where need be, rather than in the course of adjudication over the merits collective action.

I. The Dispute and The Background to the Cases Before the European Court of Justice

In both these cases, legal persons seek to invoke EC law rights before national courts (which serve as ordinary courts in matters of EC law) in areas where EC law

[1] The European Community Treaty, 298 U.N.T.S. 11 (1957).

is unclear.[2] In such a situation, the preliminary reference procedure under Article 234 EC (the Treaty Establishing the European Community) allows, and in some circumstances requires, a national court to seek the assistance of the ECJ on a point involving the interpretation or validity of community law. Formally, however, it is for the referring national court to take the final decision, applying the interpretation handed down by the ECJ to the facts of the case. In this process of interpretation, the European Court is assisted by Advocates-General, whose role is to provide detailed reasoned opinions which, whilst not binding on the Court, nevertheless offer it guidance.

The facts of *Viking* are as follows:[3] Viking Line, a Finnish passenger ferry operator, owned the *Rosella*, a ferry which employed mainly Finnish crew and operated under the Finnish flag on route between Estonia and Finland. The *Rosella* had been operating at a loss, and Viking Line sought to reflag the ferry and register it in Estonia in order to staff it with Estonian crew whose wages would be considerably lower. The existing Finnish crew of the *Rosella* were members of the Finnish Seamen's Union (the FSU), an affiliate of the International Transport Workers' Federation (the ITF), headquartered in London.

The ITF had a long-standing campaign against flags of convenience where "the beneficial ownership and control of the vessel is found to lie elsewhere than

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[2] A note on terminology: The Treaty on European Union 1992, July 29, 1992, 1992 O.J. (C 191) 1 also known as the Maastricht Treaty, created a new entity, the European Union, which is *founded* on the original European Communities. The EU consists of three "pillars": the "EC" pillar, comprising the 1957 European Economic Community, the European Atomic Energy Community also dating from 1957, and the 1951 European Coal and Steel Community, which expired in 2002; second, the almost entirely intergovernmental Common Foreign and Security Policy (CFSP) pillar; and a third pillar covering police and judicial cooperation in criminal matters (PJCC). In contrast to the EC, the EU does not have separate legal personality, further, the EC rather than the EU is responsible for almost all law-making, whilst the intergovernmental second and third pillars provide decision-making via consensus. Thus it is more accurate to refer to EC law, rather than EU law.

However, following ratification of the Treaty of Lisbon (also known as the EU Reform Treaty), the EU's pillar structure will be abolished, whilst the different rules on decision-making and the jurisdiction of the Court of Justice as regards foreign policy will be maintained; in addition, a single express legal personality will be created for the EU, subsuming the current express legal personality of the EC and the implied separate legal personality of the EU: Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, Dec.13, 2007, 2007 O.J. (C 306) 1; to be ratified by the Member States by Jan. 1, 2009.

[3] Taken from Case C-438/05, The International Transport Workers' Federation and The Finnish Seamen's Union v. Viking Line ABP [2007] ECR I-10779 [hereinafter *Viking*], the Opinion of Advocate General (AG) Poiares Maduro delivered May 23, 2007.

in the country of the flag"[4] and, together with the FSU, planned to boycott the *Rosella* and other Viking vessels in order to halt the proposed reflagging. In anticipation of such industrial action, Viking brought an action in the High Court in London, seeking declaratory and injunctive relief, restraining the ITF and FSU from breaching, *inter alia*, Article 43 EC Treaty, which provides that restrictions on freedom of establishment shall be prohibited.[5] At first instance, the High Court found the unions to be in breach of Article 43 EC Treaty in having interfered with Viking Line's right to freedom of establishment and/or interfering with the right of free provision of shipping services contrary to EC Regulation 4055/86.[6] On appeal, the Court of Appeal was less convinced a breach of Article 43 or Regulation 4055/86 had occurred, and even queried the logically prior question, whether the free movement provisions of EC law applied to the facts in question, and accordingly made a preliminary reference to the ECJ.

The questions put before the European Court focused on whether, provided that the actions of the trade unions did not fall outside the scope of EC internal market law altogether, EC law could have horizontal effect so as to confer rights on a private undertaking (Viking) against another private party, in particular in the context of collective action. Further, where collective action by trade unions is found to restrict free movement, in what circumstances such action might nevertheless be justified as being the exercise of fundamental social rights respected under EC law.

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[4] "The primary objectives of the FOC (flags of convenience) campaign are first, to eliminate flags of convenience and to establish a genuine link between the flag of the ship and the nationality of the owner and second, to protect and enhance the conditions of seafarers serving on FOC ships. The "Oslo to Delhi" definition treats the vessel as sailing under a flag of convenience "where the beneficial ownership and control of the vessel is found to lie elsewhere than in the country of the flag" *see* para. 24 of the judgment of Waller Lord Justice UK Court of Appeal, The International Transport Workers' Federation and The Finnish Seamen's Union v. Viking Line ABP, [2005] EWCA Civ 1299; [2006] I.R.L.R. 58 [hereinafter *Viking Appeal*].

[5] Treaty Establishing the European Community, art. 43, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter EC Treaty]:

> restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

[6] EC Regulation 4055/86, of Dec. 22, 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, 1986 O.J. (L 378) 1-3. The Regulation gives Member State nationals (and non-Community shipping companies using ships registered in a Member State and controlled by Member State nationals) the right to carry passengers or goods by sea between any port of a Member State and any port or off-shore installation of another Member State or of a non-Community country.

In the second reference, Laval, a company incorporated under Latvian law "posted" Latvian workers to work on a number of construction contracts in Sweden. The work in question, a municipal contract to refurbish a school in the Stockholm suburb of Vaxholm, was undertaken by a subsidiary company, Baltic Bygg, which declined to become a signatory to the Swedish Construction Federation collective agreement with Byggnads, the Swedish construction union. The posted Latvian workers were paid less than €9 per hour, whereas comparable Swedish workers received €15-16.[7] The Swedish construction trade union took industrial action to blockade the work at all Laval construction sites, in which they were joined by the Swedish electricians' trade union in an expression of solidarity.

Laval brought a claim before the labor court seeking a declaration of the illegality of the primary and secondary (solidarity) industrial action by the Swedish construction trade union and the electricians' union, damages from the trade unions, and an interim order to halt the industrial action. Advocate General Mengozzi characterized the dispute in *Laval* as requiring a balance to be struck between "the protection of workers temporarily posted to the territory of a Member State in the context of cross-border services, the fight against social dumping and the need to ensure equal treatment as between domestic undertakings of a Member State and providers of services from other Member States."[8] The concern over "social dumping" has a particular resonance in the EU: It is a common market which allows for free movement, for example, of capital, whilst preserving a certain level of autonomy for Member States to regulate areas such as labor and social standards, environmental standards, and consumer standards.[9] Thus, there is the potential for a state unilaterally to lower its social standards in an attempt to attract business from other states.

As far as the scope for or likelihood of social dumping is concerned, the contrast between the labor markets and industrial relations regimes of Sweden and Latvia could not be starker, as highlighted by Woolfson and Sommers. Whereas Swedish industrial relations is marked by a strong labor movement, which has played an important part in the country's economic prosperity, "among the new market

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[7] For a detailed background to the dispute *see* Charles Woolfson & Jeff Sommers, *Labour Mobility, in Construction: European Implications of the Laval un Partneri Dispute with Swedish Labour*, 12 Eur. J. Ind. Rel. 49 (2006).

[8] Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others [2007] E.C.R. I-11767 [hereinafter *Laval*], Opinion of AG Mengozzi delivered May 23, 2007, para 4.

[9] With regard to the division of competence between the EU and the Member States, labor and social standards (EC Treaty, *supra* note 5, arts. 136-45), environmental protection (*Id.* arts. 174-76) and consumer protection (*Id.* art. 153) are all areas of "shared" or "concurrent" competence.

economies, Latvia has adopted some of the most neo-liberal policies in order to attract foreign direct investment."[10] Woolfson and Sommers characterize Latvia as having a "compulsion to exercise [its] comparative advantage in the wider European context"[11] by aggressively pursuing "cut-price labour and intensive subcontracting," in a context where collective labor relations has "largely disintegrated" in particular in the construction sector, substantially comprised as it is of undeclared work in the informal economy.

At the heart of the reference to the ECJ was the enquiry whether certain trade union action was compatible with EC law on freedom to provide services[12] and the provisions of European Community Directive 97/71 on the posting of workers.[13] Under scrutiny was the trade unions' attempt, by means of industrial action in the form of a blockade, to force a foreign service provider to sign a collective agreement in the host country in respect of terms and conditions of employment, against a backdrop where the legislation intended to implement the Directive had no express provisions concerning the application of terms and conditions of employment in collective agreements.

II. Negative Integration, Mutual Recognition and the Encroaching Reach of EC Internal Market Law

At stake in both the *Viking* and *Laval* references is the question whether Community (internal market) law has any relevance to situations of national social policy in general, and to industrial action in particular. As will be seen below, given the structure of the European Union's foundational document (the European Community Treaty of 1957), if it is found that internal market law is triggered by collective or industrial action, it will be necessary for the ECJ to engage in a balancing act between competing visions of the European social market model, between two sets of rights which might equally claim to be "fundamental" to the European project. Such a "balancing" exercise necessarily raises questions as to the identity of the European integration project, questions as to the meaning and importance of the "European social model" in an era of globalization. The phrase European social model is used

[10] Woolfson & Sommers, *supra* note 7, at 51.

[11] *Id.* at 52.

[12] EC Treaty, *supra* note 5, art. 49 which provides that "restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended."

[13] Directive 96/71/EC of the European Parliament and of the Council of Dec. 16, 1996 concerning the posting of workers in the framework of the provision of services, 1997 O.J. (L 18) 1.

so often in discussions of European Union economic and social policy, as if it does not require definition. However, in essence, it can be understood as an aspiration towards sustainable economic growth, competitiveness and a dynamic knowledge-based economy, whilst also striving for social cohesion and social protection.[14]

The drafters of the original EC Treaty, the 1957 Treaty of Rome, considered it essential to guarantee free movement of the "factors of production"—goods, persons, services, and capital—to attain the perceived economic advantages of integration in general and common market in particular, namely: enhanced efficiency in production made possible by increased specialization in accordance with law of comparative advantage, due to the liberalized markets of participating countries; increased production levels due to better exploitation of economies of scale; improved international bargaining position, made possible by larger size, leading to better terms of trade; enforced changes in efficiency brought about by intensified competition between firms.[15] Thus, in addition to free movement of goods governed by Article 28 of the EC Treaty, and the free movement of capital governed by Article 56 EC Treaty, Article 39 EC Treaty provides for free movement of workers, and Article 43 EC Treaty for the free movement of self-employed individuals and freedom of establishment for companies.

To these four freedoms the objective of avoiding distortion of competition in the single (or "common") market must be combined together with the four freedoms guaranteed by the EC Treaty, the competition provisions of Articles 81, 82 and 87 EC Treaty,[16] "provide the framework for the establishment and functioning of the common market."[17]

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[14] The Conclusions of the European Council meeting in Lisbon in 2000 committed the EU to a new strategic goal for the next decade: "to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion." The European Council is an intergovernmental meeting of heads of state and government, defined by Article 4 of the Treaty on European Union 1992 as providing the Union with the necessary impetus for its development and defining the Union's general political guidelines, *Presidency Conclusions, Lisbon European Council*, Mar. 23 & 24 2000, Bull EU-3/2000, 7-17. *See also* the analysis at *infra* notes 140-142 and accompanying text.

[15] *See* Stephen Weatherill, Cases and Materials on EU Law ch. 9 (6th ed. 2003).

[16] EC Treaty, *supra* note 5, art. 87 provides that any aid granted by a Member State which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market. *Id.* art. 81 prohibits agreements or associations between undertakings, "which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market." Finally, Article 82 of the EC Treaty prohibits abuse by undertakings of a dominant market position.

[17] Simon Deakin, *Labour Law as Market Regulation: The Economic Foundations of European Social Policy*, *in* European Community Labour Law: Principles and Perspectives, Liber

The prevailing wisdom was that the goal of market integration did not require social policy harmonization, that national systems of labor law and industrial relations would be unaffected by European economic integration. According to the report produced by the International Labour Organization's Committee of Experts in 1956 (the Ohlin Report),[18] it was not necessary, in creating a single market, for national systems of labor and social law to be harmonized. The theory of comparative advantage which underpinned the Report held that differences in levels of social protection or labor law or wage costs between states engaged in international trade did not, in themselves, pose a serious obstacle to competition or efficiency because these differences broadly reflected differences in productivity.

> The conclusions of the Ohlin Report, which had been commissioned by the prospective Member States, were substantially adopted by the inter-governmental Spaak Report of 1956, on which the Treaty of Rome was based. The goal of economic liberalization at the centre of the putative Community was thus founded on the idea that: competition does not necessarily require a complete harmonisation of the different elements in costs; indeed, it is only on the basis of certain differences – such as wage differences due to differences in productivity – that trade and competition can develop. ... In addition, wage and interest rates tend to level up in a common market – a process which is hastened by the free circulation of the factors of production. This is a consequence rather than a condition of the common market's operation.[19]

Just as it was assumed that differences between states' labor law and industrial relations regimes would be absorbed in the process of creating a common market, the possibility of conflict between EC trade or competition law and the requirements of national labor relations (such as collective autonomy for the social partners) was similarly assumed away. However, an extension of the scope of internal market law through negative integration[20] and the principle of mutual recognition soon gave rise

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Amicorum Lord Wedderburn 71 (Paul Davies, Antoine Lyon-Caen, Silvana Sciarra & Spiros Simitis eds., 2006).

[18] International Labour Organization, *Social Aspects of Economic Co-operation: Report of a Group of Experts*, 46 Stud. & Reports, New Series (1956) [hereinafter the Ohlin Report] summarized as International Labour Office, *Social Aspects of Economic Co-operation,* 74 Int'l Labour Rev. 99 (1956).

[19] Comité Intergouvernemental Créé par la Conférence de Messine, Rapport des Chefs de Délégation aux Minstres des Affaires Etrangères (1956) [the Spaak Report], summarized in English in *Political and Economic Planning*, 405 Planning (1956).

[20] "Negative integration" is so called as it involves the integration of disparate national markets into a single European market by judicial activism (typically in response to litigation by

to the potential for a clash between social policy at national level and the principles of the internal market. Over the decades, policy areas previously believed to be the preserve of national regulatory autonomy have become enmeshed in the logic of the internal market.

The European Court of Justice, initially in its decisions on free movement of goods, and subsequently in decisions on free movement of workers, services and the freedom of establishment, promoted a "negative" form of market integration. This was done by applying EC internal market law to strike down a wide range of national rules which were found deliberately or inadvertently to have an adverse affect on the free circulation of economic resources and hence on inter-state trade. The response of the Court to physical, technical and fiscal barriers to trade in goods was a *de facto* deregulation of national laws. This gave a particularly significant fillip to market integration at a time of political and economic stagnation when (prior to the introduction of institutional changes to the Community's law-making processes the Single European Act of 1986) the Community's legislative institutions were unable and often unwilling to engage in positive integration by developing Community rules to harmonize Member States' laws. A key feature of the ECJ's case law discussing "goods" was its imaginative use of Treaty provisions on free movement—primarily Article 28 EC Treaty—to strike down national obstacles to inter-state trade, developing doctrines such as the principle of mutual recognition in the *Cassis de Dijon* case.[21] Thus goods lawfully marketed in one Member State are to be admitted to the market of any other Member State, unless the importing State can invoke a "mandatory requirement" to justify the exclusion. Whilst Member States have on occasion been able to defend maintaining national regulations which effectively exclude or impede foreign products, the key point to bear in mind is that the default position has been to presume the application of internal market rules to national laws governing such disparate activities as shop opening hours, the distribution of films for home entertainment, or sale of medicines over the internet.[22]

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traders) to eliminate national restrictions on or barriers to trade, which have the effect of partitioning markets; "positive integration," in contrast, involves the proactive enactment of Community rules by the political institutions to harmonize the laws of Member States.

[21] Case C-120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), 1979 E.C.R. 649.

[22] Respectively: (Sunday opening) Case C-145/88, Torfaen BC v. B & Q plc 1989, E.C.R. 3851; (video sales) Cases C- 60 & 61/84, Cinéthèque, 1985 E.C.R. 2605; (internet sales of medicines) Case C-322/01, DocMorris, 2003 E.C.R. I-14887. The Court of Justice did, however, take note of the increasing tendency of traders to invoke internal market law to challenge national measures which disrupted their commercial freedom, even if this had nothing to do with cross-border trade, and introduced a requirement to show a stronger impact on cross-border trade: "in view of the increasing

The advantages of this deregulatory approach from the perspective of market integration was in theory to stimulate competition in quality and in price; further, national markets which previously were isolated are subject to cross-border competition through the elimination of technical and other barriers. Traders are able to abandon the constraints of producing goods for relatively small domestic markets, and can take advantage of a Community-wide market place, which in many cases will permit a dramatic reduction in the costs of production; and these reductions in costs can be passed on to the consumer as a reduction in prices. This same market integrationist logic can equally be applied to the provision of services and freedom of establishment, as suggested by a 2002 Report from the European Commission:[23]

> The principle of mutual recognition applies *mutatis mutandis* to the freedom to provide services in the single market. This implies that a provider lawfully established in a Member State must be able to provide his services in all the other EU Member States, which must normally allow him to do so without imposing any further restrictions on him. The only admissible barriers are those which are non-discriminatory, justified by overriding reasons of general interest, likely to achieve the objective in question and, in any event, proportionate.

For both service providers and individuals or companies seeking to establish in another Member State, the Court's case law increasingly began to take market access into account. After an initial period when it required that a national rule contain some element of discrimination before it could be found to breach Articles

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tendency of traders to invoke Article 28 as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter." Case C-267 & 268/91, Keck & Mithouard, 1993 E.C.R. I-6097. The Court chose to restrict the scope of Article 28 of the EC Treaty in an attempt to increase the certainty of its application. In *Keck*, it drew a distinction between product requirements and selling arrangements, and found that genuinely non-discriminatory national rules restricting the use of certain selling arrangements would not fall within Article 28 of the EC Treaty. This self-denying ordnance appears to apply solely to its case law on goods; with regard to services, workers and establishment, the Court appears to have continued to promote a 'market access' rather than a 'discrimination' approach to determining whether EC internal market law has been triggered; although this clear distinction between the approach to goods, and the approach to services has been somewhat softened in the decision in *Mobistar*: Joined Cases C-544 & 545/03, Mobistar SA v. Commune de Fléron a.o., 2005 E.C.R. I-7723. *See infra* note 24 and accompanying text.

[23] Report from the Commission of the European Communities, *Second Biennial Report on the Application of the Principle of Mutual Recognition in the Single Market*, para. 1.1, COM (2002) 419 final (July 23, 2002).

43 or 49 EC Treaty, the Court became willing to find that even non-discriminatory measures could in principle breach Articles 43 or 49 EC Treaty if they were liable to prevent or otherwise impede access to the market, or make less attractive the exercise of the commercial freedom granted by the EC Treaty.[24] Thus the current thinking of the Court is that it is no longer necessary for any kind of direct or indirect discrimination to be established, but merely an impediment to free movement or a restriction on access of a service provider or free mover to the market of another Member State. Such a broad conception of EC internal market law inevitably means that national measures which disrupt commercial freedom will routinely be treated as sufficiently obstructive of trade, even where they apply to domestic and foreign traders alike and do not put foreign traders or businesses at any disadvantage.

What of competing values which, it could be claimed, are equally central to the European project and which might militate against the assumption that Member State action and rule-making must be understood through the lens of market integration and free trade? On several occasions, Member State governments have argued before the ECJ that national rules governing a given policy area fall entirely out with the scope of the Community internal market law, for example because they concern national constitutional principles, social security provision in the gift of the Member State, public provision of medical services, or are based on non-market values such as solidarity. The Court has, however, consistently used such opportunities to insist on a broad reading of internal market law, in the context of services and establishment.

The judicial methodology adopted by the European Court in reply to assertions that allegedly non-market activities fall outside the scope of Community law is well illustrated in the *SPUC* litigation, in which the Irish branch of the Society

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[24] With regard to services: Case C-76/90, Säger v Dennemeyer, 1991 E.C.R. 4221, para. 12:

> [Article 49 of the EC Treaty] requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.

With regard to establishment: Case C-55/94, Gebhard, 1995 E.C.R. I-4165, para. 37:

> national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.

for the Protection of Unborn Children sought an injunction to prohibit the provision of information by students in Ireland about the identity and location of abortion clinics in the UK. In relation to the question whether the medical termination of pregnancy was a "service" within meaning of the EC Treaty, SPUC maintained that the provision of abortion could not be so regarded, on the grounds that it is grossly immoral and involves the destruction of the life of a human being, namely the unborn child. The response of the European Court was to assert that "[w]hatever the merits of those arguments on the moral plane, they cannot influence the answer to the national court's .... question. It is not for the [European] Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally."[25] It accordingly found such an activity constituted a service within Article 50 EC Treaty. This is a somewhat disingenuous argument.

The European Court *is* substituting its view by permitting a majoritarian standard to prevail, such that an activity considered grossly immoral within at least one Member State can nevertheless be considered as a market activity and hence a service.[26] For instance, having held that medical and healthcare services are services within the meaning of the EC Treaty, and thus extending the reach of internal market law into national welfare and healthcare policy,[27] the onus is then placed on the Member State whose policy is alleged to impede free movement to proffer an acceptable justification, which will be subject to close scrutiny by the Court.[28]

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[25] Case C-159/90, Society for the Protection of the Unborn Child (SPUC) v. Grogan, 1991 E.C.R. I-4685, para. 20.

[26] The European Court's judgment in this case was brief to the point of evading the sensitive constitutional and human rights issues at stake. It held that whilst the medical termination of pregnancy does constitute a service within the meaning of the Treaty, a restriction of the kind imposed on the students by the Irish Constitution did not breach Community law: in the absence of a commercial link between the student groups distributing the information and the UK clinics providing the abortion services, the matter fell outside the scope of Community law. Compare the opinion of the AG, who reached the same conclusion as the Court that there was no breach of Community law, but considered the matter in more detail. He argued abortion was a service under the EC Treaty, and that the restriction contained in the Irish Constitution did fall within scope of Community law, but that this could be justified since Ireland was nevertheless entitled to maintain in force a restriction of that nature; the ban was justified as "a policy choice of a moral and philosophical nature the assessment of which is a matter for the Member State and in respect of which they are entitled to invoke the ground of public policy": Opinion of AG Van Gerven delivered on June 11, 1991, Case C-159/90, Society for the Protection of the Unborn Child (SPUC) v. Grogan, 1991 E.C.R. I-4685, para. 26.

[27] Joined Cases C-286/82 & 26/83, Luisi and Carbone, 1984 E.C.R. 377.

[28] For instance, in *Kohll*, a Luxembourg national was refused authorization for his daughter to receive treatment from an orthodontist established in Germany on the grounds that the proposed treatment was not urgent and that it could be provided in Luxembourg. The justifications put forward

Conceding that healthcare in general fell within the scope of Community internal market law, Member States have nevertheless attempted to argue that certain types of healthcare provision should be exempt from the harsh logic of internal market law. In *Geraets-Smits and Peerbooms*, in the context of a claim relating to the freedom of patients to access in-hospital treatment across state borders, Member States were concerned that the judgment might result in further encroachment into their regulatory autonomy, and would severely jeopardize long-term financial planning in health and welfare policy.[29] A total of ten Member States (along with the European Commission and the governments of two European Economic Area countries, Iceland and Norway) intervened in the case, submitting observations to the Court which essentially argued that the nature of hospital care—an activity premised on notions of social solidarity rather than an economic service—meant it did not come within the scope of the internal market, in particular given that there is no remuneration within the meaning of Article 50 EC where the patient receives care in a hospital infrastructure without having to pay for it or where all or part of the amount paid is reimbursed to the patient.

The Court rejected these arguments, unwilling to distinguish between care provided in a hospital environment and care provided outside such an environment given the settled case-law that medical activities fall within the scope of Article 50 EC. Further, the Court held that the special nature of certain services does not remove them from the ambit of the fundamental principle of freedom of movement, so the fact that the national rules at issue in the main proceedings are social security rules cannot exclude application of the Treaty.[30]

These healthcare cases are seen by many commentators as the highpoint, or nadir,[31] of the approach taken by the European Court, refusing to permit the solidarity argument to exempt areas of national policy-making from the reach of internal market law. Once the matter falls within the scope of internal market law, it is open to the ECJ to find, for instance, a system requiring prior authorization where treatment is sought from a health care provider in another state to constitute

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by Luxembourg, first, that the prior authorization requirement constituted the only effective and least restrictive means of controlling expenditure on health and balancing the budget of the social security system, and second to ensure the quality of the medical treatment and a balanced medical and hospital service open to all, were both carefully scrutinized by the Court, accepted in principle, but rejected for being disproportionate: Case C-158/96, Kohll v Union des caisses de maladye, 1998 E.C.R. I-1931.

[29] Case C-157/99, Geraets-Smits and Peerbooms, 2001 E.C.R. I-5473.

[30] *Id.* paras. 52-54.

[31] *See* Tamara Hervey, *Social Solidarity: A Buttress Against Internal Market Law?, in* Social Law and Policy in an Evolving European Union (Jo Shaw ed., 2002).

prima facie a "restriction" in the sense of Article 49 EC.[32] The question then becomes whether such a restriction can be justified: The structure of Article 49 EC, and indeed of the other internal market provisions, is such that once a measure is deemed to be a restriction it can only be saved if the Member State can call in aid one of the express derogations contained in the EC Treaty (such as public policy, public security or public health),[33] or rely on one of the more open-ended justifications developed by the ECJ,[34] giving the Court yet another opportunity to scrutinize Member States' regulatory choices.

III. Negative Integration, EC Internal Market Law and Social Policy

As for *Viking* and *Laval*, in both cases, the trade unions (and some Member State governments) argued that collective action taken by a trade union should be outside the scope of Community internal market law, on the basis that application of Community free movement provisions would undermine the right of workers to bargain collectively and to strike with a view to achieving a collective agreement and, further, that the right of association and the right to strike are protected as fundamental in various international agreements, which EC law respects.[35]

This issue of the right to resort to collective action as a fundamental human right is raised in two slightly different ways: first, the argument above, that national social policy falls outside the scope of internal market law, and in particular, that national laws governing the right to strike are exempt from scrutiny for compatibility with internal market law because the right to strike is such a fundamental human right; and second, the argument that even if Community law *does* apply, any breach of internal market law can be justified since the rights in conflict are "fundamental" human rights. So the question here becomes one of the Court's approaches to balancing two "fundamental" rights which clash—that of free movement, and that

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[32] *See* Tamara Hervey, *The European Union and the Governance of Health Care*, *in* Law and New Governance in the EU and the US (Gráinne de Búrca & Joanne Scott eds., 2006).

[33] The express derogations, contained in EC Treaty, *supra* note 5, art. 45 are as follows: "The provisions of this chapter [i.e., on freedom of establishment] shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority"; *id.* art. 46: "The provisions of this chapter [i.e. on establishment] and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health"; *id.* art. 55: "The provisions of Articles 45 to 48 shall apply to the matters covered by this chapter [i.e., free movement of services]."

[34] *See infra* for an analysis of the ECJ's jurisprudence on objective justifications for restrictions on free movement of services or freedom of establishment.

[35] *See* Opinion of AG Maduro, *Viking, supra* note 3, para. 20.

of collective action, when exercise of the right to strike restricts free movement of services or freedom of establishment.

A. Market Freedoms as Fundamental Rights?

It may well seem curious to those unfamiliar with the distinctive nature of the European economic integration project, and certainly not uncontroversial that market freedoms—freedoms to trade in goods, services and capital—are elevated to the level of "rights" and deemed to be "fundamental" rights at that. It may further seem problematic that, once elevated to the status of "fundamental rights," the freedoms relating to commercial activity across state borders should need to be reconciled or "balanced" as against rights more commonly understood on the international plane to be "fundamental" such as freedom of speech or freedom of association. One needs to appreciate the structure of the foundational EC Treaty as discussed above, and the original perception of the EU as essentially a market integration project, a special interest organization devoted to free trade. Prominence is given, in Article 2 of the EC Treaty (the Treaty of Rome) as originally drafted, to "establishing a common market and progressively approximating the economic policies of Member States." It was only with subsequent amendments of the EC Treaty that Article 2 has over the decades been expanded explicitly to include a broader range of objectives, in addition to that of the harmonious development of economic activities. Article 2 EC Treaty now reads:

> The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities… to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Despite such broadening of the objectives of the EU project, the prominence given to the establishment of the common market was nevertheless reinforced in the mid-1980s, with the Single European Act 1986, which inserted Article 14 into the EC Treaty This defined the European internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured."

One lens through which to understand the market integrationist focus of the original European integration project is that provided by ordoliberalism, a

school of thought which perceives the original Treaty of Rome as entrenching a particular version of a free market economic constitution.[36] As with much neoliberal economic thinking, the starting point for ordoliberalism is that a market economy is essentially a self-organizing system,[37] although it does require a coherent legal framework to guarantee individual freedoms and the economic process. Thus, in the European context, in order to allow unimpeded self-coordination of economic actors through market transactions or competition, it is necessary for the Community to eliminate restrictions on the free movement of the factors of production (the "negative integration" described above) and to establish a "system ensuring that competition in the common market is not distorted."[38] The Treaty of Rome is therefore idealized by ordoliberals as the paradigm economic constitution in that it *appeared* to concern exclusively economic rights; those elements of the Treaty (as subsequently amended) which go beyond pure market integration are considered as imperfections.

As for its part, the European Court of Justice has taken on with relish a major role in helping to eliminate restrictions on free movement, through the process of negative integration. The Court's view of the centrality of the four freedoms to the European project is reflected in its language, referring in a series of judgments to the four freedoms as:[39] "fundamental freedoms";[40] "one of the foundations of the Community";[41] a "fundamental right";[42] one of the "fundamental principles of the Treaty";[43] or as "fundamental Community provisions."[44]

Whilst it is important not to read too much into this terminology, the subtle shift from the notion of market freedoms to market rights has nevertheless gained

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[36] Christian Joerges, *European Economic Law, the Nation-State and the Maastricht Treaty, in* Europe After Maastricht: An Ever Closer Union*?* (Renaud Dehousse ed., 1994).

[37] Manfred E. Streit & Werner Mussler, *The Economic Constitution of the European Community: From "Rome" to "Maastricht,*" 1 Eur. L. J. 5, 8 (1995).

[38] EC Treaty, *supra* note 5, art. 3(g).

[39] *See* discussion in Peter Oliver & Wulf-Henning Roth, *The Internal Market and the Four Freedoms*, 41 Common Market L. Rev. 407 (2004).

[40] Case C- 281/98, Angonese, 2000 E.C.R. I-4139, para. 35 (a case on free movement of workers); Case C-112/00, Schmidberger v. Austria*,* 2003 E.C.R. I-5659, paras. 62 & 74 (goods).

[41] Case C- 443/98, Unilever Italia v. Central Food, 2000 E.C.R. I-7535, para. 40 (goods).

[42] Case C-152/82, Forcheri v. Belgium, 1983 E.C.R. 2323, para. 11; Case C-222/86, UNCTEF v. Heylens, 1987 E.C.R. 4097, para. 14. Both cases relate to free movement of workers. Case C- 228/98, Dounias v. Minister for Economic Affairs, 2000 E.C.R. I-577, para. 64 (goods).

[43] Case C- 205/84, Commission v. Germany (Insurance), 1986 E.C.R. I-3755, paras. 4 & 27 (services).

[44] Case C- 49/89, Corsica Ferries France v. Direction Générale des Douanes Françaises 1989 E.C.R. I-4441, para. 8 (all four freedoms).

widespread (though not universal) acceptance, with some commentators pointing to a fundamental right to freedom of trade.[45] However, a better view would be to say as Bogdandy does that with the exception of free movement of workers and their access to employment, the market freedoms do not amount to fundamental rights and the jurisprudence of the ECJ on these issues is not one of human rights.[46] Bogdandy's argument is that, in contrast with the human rights case law, the Court of Justice applies the market freedoms contained in the EC Treaty only where there is no secondary Community legislation. In other words, a decision of the Court that a national obstacle violates a market freedom can in theory be overturned by a subsequent regulation or directive of the EU's legislative institutions, whereas a human rights decision is, arguably, beyond the reach of the normal political process.[47] Nevertheless, the Court of Justice has on at least one occasion ruled that: "The principle of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of law of which the Court ensures observance."[48]

Ironically, the elevation by the Court of Justice of market freedoms to the status of fundamental rights has gone hand in hand with the growing acceptance that the EU needs to recognize and protect fundamental rights more broadly, to both humanize and give greater legitimacy to the integrationist project. From an initial silence on the issue of human rights or general principles of law in the founding treaties, the gradual development of human rights *jurisprudence* and human rights *instruments* for the EU, as well as the development of a free standing social policy, mark the evolution of the Union from being an "elite-driven liberal trade regime"[49] toward something akin to a constitutional polity. Such fundamental rights, in the traditional sense of human rights, were originally recognized on a case by case basis by the Court of Justice, but have now been codified in Article 6 of the Treaty on the

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[45] Ernst-Ulrich Petersmann, *Constitutional Principles Governing the EEC's Commercial Policy*, *in* The European Community's Commercial Policy after 1992: The Legal Dimension 40-41 (M. Maresceau ed., 1993).

[46] Armin Von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union,* 37 Common Market L. Rev. 1307, 1326-27 (2000).

[47] *Id*. at 1327.

[48] Case C-240/83, Procureur de la République v. ADBHU, 1985 E.C.R. 531, para. 9. *See* discussion in Joanna Krzeminska, *Free Speech Meets Free Movement: How Fundamental really is 'Fundamental'?*, *in* Zentrum Für Europäische Rechtspolitik an der Universität Bremen, ZERP-Diskussionspapier (Mar. 2005).

[49] Gráinne de Búrca, *The Case for an EU Human Rights Policy, in* Convergence and Divergence in European Public Law (Paul Beaumont, Carole Lyons & Neil Walker eds., 2002).

European Union 1992,[50] and more recently and comprehensively in the Charter of Fundamental Rights of the European Union.[51]

This is the backdrop against which the trade unions in *Viking* and *Laval* must make the case for the right to take collective action: a context in which human rights are recognized, but market freedoms are also constitutionally protected. By way of consolation for the trade unions, market freedoms do not assume automatic priority over human rights. As the Advocate General in the *Omega* case pointed out, fundamental (human) rights are applicable as general legal principles of Community law, they "are to be considered part of its primary legislation and therefore rank in hierarchy at the same level as other primary legislation, particularly fundamental freedoms."[52]

B. Internal Conflicts: Social Policy Versus Market Integration

There is, as many commentators have observed, undeniably a common thread between the free movement and competition provisions of the EC Treaty, in that they both seek to abolish barriers to trade between Member States.[53] It thus makes sense to draw upon case law in which the European Court has explored questions of a clash between Community competition law and national social policy. Conflict between the values of national level social policy on the one hand, and market integration and competition policy at EU level on the other was scrutinized in a

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[50] *See* Maastricht Treaty, *supra* note 2, art. 6 provides that: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

[51] The Charter of Fundamental Rights of the European Union was originally adopted by a Solemn Proclamation of the European Parliament, Council and Commission at the Nice European Council in December 2000, (O.J. (C 364) 1) and, following the signing of the Lisbon Treaty, an adapted version of it was proclaimed in Charter of Fundamental Rights of the European Union, Dec. 14, 2007 O.J. (C 303) 1 [hereinafter Charter of Fundamental Rights] and, by virtue of being annexed to the new Treaty, will become legally binding if and when this Treaty is ratified. The Charter of Fundamental Rights of the European Union was originally adopted by a "Solemn Proclamation" of the European Parliament, Council and Commission at the Nice European Council in December 2000, (O.J. (C 364) 1) and, following the signing of the Lisbon Treaty, an adapted version of it was proclaimed in December 2007 (O.J. (C 303) 1) and, by virtue of being annexed to the new Treaty, will become legally binding if and when this Treaty is ratified.

[52] Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, 2004 E.C.R. I-9609 and Opinion of AG Stix-Hackl, para. 49 [hereinafter *Omega*].

[53] *See* Nicolas Bernard, *Discrimination and Free Movement in EC Law*, 45 Int. Comp. Law. Q. 82, 104 (1996).

series of ECJ decisions during the 1990s,[54] which illustrated that the Court is, on occasion, willing to admit of circumstances where Community internal market and competition law does not apply, where it is prepared to accept that the principle of solidarity is sufficient to insulate certain social policies from their reach. In the case of *Albany*, employers in three different industrial sectors brought a complaint against legislative schemes in the Netherlands which made it compulsory for them to affiliate to supplementary pension plans based on collective agreements between multi-employer organizations and trade unions. The argument was that the Dutch legislation making affiliation to the pension funds compulsory favored or furthered an agreement between undertakings which was contrary to the competition provisions of Article 81(1) EC Treaty.

The ECJ recognized, first, that collective agreements could theoretically restrict competition, but that since the Treaty as a whole also recognizes social policy objectives, and promotes freedom of association and collective bargaining, then such agreements must be regarded as falling outside the scope of Article 81(1) EC Treaty. However, the Court imposed an important proviso to this exemption of social law from the competition provisions: Collective agreements are only immune from antitrust scrutiny if they are in the context of collective bargaining, and if they relate to the traditional subject matter of collective bargaining, i.e., wages and working conditions. Second, the Court held that the pension fund was an undertaking within the meaning of Article 81 EC, because it engaged in an economic activity. It was immaterial that the pension fund was non-profit making, or that it pursued an essential social function, or that it was based on the principle of solidarity.[55] The Court seems to be saying that collective agreements are outside the scope of Article 81 EC where they are concluded in the context of collective negotiations between management and labor, and are seeking to improve conditions of work, but possibly not where they exceed these objectives.

This is an important recognition of the legitimacy of collective bargaining (and social policy) within the European legal order[56] and some recognition of its autonomy. However, this autonomy is circumscribed to the extent that collective bargaining must still be subject to scrutiny to see what its *effects* are: "the agreement

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[54] Case C-41/90, Klaus Höfner and Fritz Elser v Macroton GmbH, 1991 E.C.R. I-1979; Cases 159 & Case C-160/91, Poucet and Pistre, 1993 E.C.R. I-637; Case 67/96, Albany International BV, 1999 E.C.R. I-5751. The following discussion draws on Diamond Ashiagbor, The European Employment Strategy: Labour Market Regulation and New Governance 273-76 (2005).

[55] *Albany International BV, supra* note 54, paras. 84-87 of the Court's judgment.

[56] *See* Catherine Barnard & Simon Deakin, *In Search of Coherence: Social Policy, the Single Market and Fundamental Rights*, 31(4) Ind. Rel. J. 331 (2000)*, see especially* 331-37.

at issue in the main proceedings does not, *by reason of its nature and purpose*, fall within the scope of [Article 81(1)] of the Treaty."[57]

By analogy with the Court's finding in *Albany*, the trade unions in *Viking* and *Laval* hoped to convince the ECJ that collective action falls entirely outside the scope of the EC Treaty. However, as Bernard points out, state activities or activities premised on the basis of solidarity will not always fall to be considered for compatibility with EC competition rules or law of the internal market, but the ECJ does not assume a prima facie non-economic character of such activities: it will carefully scrutinize the characteristics before coming to a conclusion about applicability of internal market rules.[58] Unfortunately for the trade unions in *Viking* and *Laval*, there was scope for the Court in *Albany* to find that since the trade union was neither an undertaking nor association of undertakings, there was no relevant agreement between it and the employers. Ultimately, the Court in *Viking* closed off this avenue, adopting almost verbatim the observation of the Advocate General that "the fact that an agreement or activity is excluded from the scope of the competition rules does not necessarily mean that it is also excluded from the scope of the rules on freedom of movement,"[59] since the two sets of provisions are applied in different circumstances.

A related argument, aiming to exclude collective action at national level from the scope of Community internal market law, concerns the question of the Community's competence.[60] In both *Laval* and *Viking* the Danish government submitted that the right to take collective action fell outside the scope of Article 43 EC Treaty (*Viking*) and Article 49 EC Treaty (*Laval*) because the Community had no competence directly or indirectly to regulate such action. However, in both cases, the Court acknowledged that—whilst Article 137(5) of the EC Treaty does indeed exclude pay, the right of association, the right to strike, and the right to impose lock-outs from the scope of Community competence—this article forms part of a Title and Chapter of the Treaty (on Social Policy, Education, Vocational Training and Youth), which clearly envisage Community competence over some aspects of social

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[57] *Albany International BV, supra* note 54, para. 64 of the Court's judgement (emphasis added D.A.).

[58] Nick Bernard, *Between a Rock and a Soft Place: Internal Market versus Open Coordination in EU Social Welfare Law*, *in* Social Welfare and EU Law 267-68 (Michael Dougan & Eleanor Spaventa eds., 2005).

[59] *Viking*, opinion of AG Maduro, *supra* note 3, para. 26.

[60] The European Community is a creature of attributed or conferred powers in that it can act only in areas where such competence has been conferred upon it, by specific or general legal bases in the EC Treaty, leaving Member States as the default holders of competence. By extension, the Community cannot act where competence to do so has been expressly excluded by a Treaty provision.

policy broadly defined. So, although the Community lacks the power to legislate in relation to the right to strike, Article 137 EC cannot be interpreted more generally to mean that the social sphere as such falls outside the scope of Community law, or that in regulating the right to strike, Member States can ignore the need to ensure respect for the fundamental freedoms of movement within their territory,[61] thus, even when exercising their competence over such collective labor rights, Member States must still comply with Community internal market law.[62]

The Danish and Swedish governments further submitted that this inapplicability of Community law, and in particular Community internal market law, was due to the status of this right of collective action as a fundamental human right.[63] In *Viking*, the trade unions contended that application of the free movement provisions in the context of collective action taken by a trade union or an association of trade unions would undermine the Community's social policy objectives and deny the fundamental character of the right of association and the right to strike.[64] However, the Court in both *Viking* and *Laval* gave short shrift to these arguments. For his part, AG Maduro in *Viking* held that Community law on freedom to provide services and freedom of establishment was "by no means irreconcilable" with the protection of fundamental rights or with the attainment of the Community's social policy objectives.[65]

The Court in both *Viking* and *Laval* agreed with the two Advocates General, that there is no general exemption of social policy from the reach of internal market law and, further, that fundamental human rights are not hierarchically superior such as to be immune from scrutiny for compatibility with internal market law: "far from

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[61] *Laval*, judgment of the Court, *supra* note 8, paras. 87-88; *Viking*, judgment of the Court, *supra* note 3, paras. 40-41. *See also Laval*, opinion of AG Mengozzi, *supra* note 8, paras. 50-59.

> Apart from the difficulties inherent in precisely defining the expression "social sphere," such a position would be manifestly indefensible and anachronistic: first, the social laws of the Member States do not enjoy any general exemption from the application of the Treaty rules, in particular those concerning the freedoms of movement provided for by the Treaty, and in exercising the powers they retain in that sphere the Member States must comply with Community law; and, second, the Community, under Chapter 1 of Title XI of the Treaty, also has powers, albeit limited, in the social sphere, which are intended to support and supplement the action of the Member States, under the conditions laid down in Articles 137 EC to 145 EC.
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> *Id.* para. 50 (footnotes omitted D.A.).

[62] *Viking*, judgment of the Court, *supra* note 3, para. 40; *Laval*, judgment of the Court, *supra* note 8, para. 87.

[63] *Laval*, opinion of AG Mengozzi, *supra* note 8, paras. 48-9.

[64] *Id.* para. 22.

[65] *Id.* para. 23.

being excluded… application of the fundamental freedoms of movement provided for by the Treaty must, in fact, be reconciled with the exercise of a fundamental right."[66] Indeed, there have been several cases in which Community free movement provisions have been found to conflict with fundamental rights: here, the approach of the ECJ has not been to treat internal market law as inapplicable, but rather to consider whether the restriction which exercise of the fundamental right imposes on free movement can be justified and is proportionate.[67] And this was the case in *Viking* and *Laval*, where the Court held that the fundamental nature of the right to take collective action was not such as to render Articles 43 or 49 EC Treaty inapplicable.[68]

IV. Horizontal Application of Community Internal Market Law

The High Court in *Viking* made the ready assumption that Article 43 EC Treaty had horizontal effect that it applied to the trade unions even if they were found to be private actors serving no public role.[69] However, the question of the applicability of free movement rules within the private sphere, i.e., whether individuals, corporations, private associations, etc., are to be included within the circle of addressees of the internal market law, is a question which has long troubled the ECJ, and similarly gave the Court of Appeal in *Viking* pause.[70] The term direct effect is used to refer to the capacity of a norm of Community law to be invocable and enforceable by an individual before a national court. Initially, Treaty provisions found to have direct effect concerned the relationship between the state and its subjects: that is, vertical direct effect, such that the Treaty obligation fell on a Member State and was enforceable against that Member State. However, the ECJ subsequently confirmed that Treaty provisions could have horizontal direct effect, namely, could be relied on by one individual against another before a national court. The crucial factor was not to whom a provision of Community law was addressed, but the nature of

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[66] *Laval*, opinion of AG Mengozzi, *supra* note 8, para. 85.

[67] *See, e.g.,* Case C-112/00, Schmidberger v. Austria, 2003 E.C.R. I-5659 and *Omega*, *supra* note 52; *Schmidberger* is examined in more detail below, in respect of the horizontal application of Treaty provisions: justification and proportionality.

[68] *Viking*, judgment of the Court, *supra* note 3, para. 47; *Laval*, judgment of the Court, *supra* note 8, para. 95.

[69] For a discussion of the decision of Gloster J in the High Court, *see* A.C.L. Davies, *The Right to Strike Versus Freedom of Establishment in EC Law: The Battle Commences*, 35 Ind. Law. J. 75 (2006).

[70] For analysis, *see* Julio Baquero Cruz, *Free Movement and Private Autonomy*, 24 Eur. L. Rev. 603 (1999).

the provision itself.[71] The Court in *Viking* and *Laval*, and the Advocate General in *Laval* sought to rely on an extension of case law dating back thirty years to find that Articles 43 and 49 EC Treaty applied even as between private parties:

> According to settled case-law, Articles 39 EC, 43 EC and 49 EC do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services. … Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, limiting application of the prohibitions laid down by these articles to acts of a public authority would risk creating inequality in its application.[72]

The Advocate General in *Laval* did, though, acknowledge that there were differences between the instant case and previous case law, in that the horizontal direct effect of Article 49 EC, or Article 39 on free movement of workers, had been upheld in cases mainly involving sporting or professional associations whose (collective) agreements performed a regulatory or quasi-public role.[73]

The present case differed in that, as opposed to examining the compatibility with free movement rules of regulations or other rules drawn up by private associations, it concerned the exercise by trade unions of their right to resort to collective action against a foreign service-provider.[74] As Anne Davies notes, there is an "important conceptual difference between the ability to bargain for terms and conditions of employment and the ability to dictate terms and conditions of employment in the manner of a quasi-public regulatory agency."[75] Nevertheless, neither the Advocate General nor the Court considered that this difference had any bearing on whether trade unions were in principle obliged to comply with the prohibitions contained in Articles 43 or 49 EC Treaty.[76]

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[71] Case C-43/75, Defrenne v. Sabena (No.2) 1976 E.C.R. 455, paras. 31-33.

[72] *Viking*, *supra* note 3, paras. 33-34, referring to Case C-36/74, Walrave and Koch v. UCI, 1974 E.C.R. 1405; Case C-415/93, Bosman, 1996 E.C.R. I-4921; and Case -281/98, Angonese, 2000 E.C.R. I- 4139.

[73] *See, e.g.,* Case C-415/93, Bosman, 1996 E.C.R. I-4921 (Belgian Football Association); Joined Cases Case C-51/96 and Case C-191/97, Deliège, 2000 E.C.R. I-2549 (judo league); Case C-281/98, Angonese, 2000 E.C.R. I- 4139 (banking sector collective agreement); Case C-309/99, Wouters and Others, 2002 E.C.R. I-1577 (Netherlands Bar Council).

[74] *Laval*, opinion of AG Mengozzi, *supra* note 8, para. 158.

[75] Davies, *supra* note 69, at 77.

[76] *Viking*, judgment of the Court, *supra* note 3, paras. 33-34; *Laval*, opinion of AG Mengozzi, *supra* note 8, para. 159.

The approach adopted by Advocate General Maduro to this same question was, however, more complex, relying on a comparison with the Court's case law on Article 39 EC, and with rules on competition. Drawing together the Community's competition and free movement rules under a single rubric of ensuring the rights of market participants, Advocate General Maduro outlined the orthodox position—that the rules on competition have horizontal effect, whilst the rules on freedom of movement have vertical effect.[77] This arises from the need to grant market participants rights against those actors most likely to interfere with or restrict their rights on the market—against private undertakings where they have the capacity to act in collusion or hold a dominant position in a substantial part of the common market (competition law provisions) or against Member State authorities which are in a position to intervene in the functioning of the common market (free movement provisions). However, the Advocate General went on to find that such a dichotomy does not preclude the horizontal effect of provisions on free movement. Indeed

> private action – that is to say, action that does not ultimately emanate from the State and to which the competition rules do not apply – may very well obstruct the proper functioning of the common market, and … it would therefore be wrong to exclude such action categorically from the application of the rules on freedom of movement.[78]

The language used here implies that private action will not automatically trigger application of the free movement rules, a discretionary approach which may undermine legal certainty. The Advocate General seeks to distinguish those circumstances where private actors simply do not wield enough influence successfully to prevent others from enjoying their free movement rights (giving the example of an individual shopkeeper refusing to purchase imported goods) from those situations where "private action that, by virtue of its general effect on the holders of rights to freedom of movement, is capable of restricting them from exercising those rights, by raising an obstacle that they cannot reasonably circumvent."[79] As examples of the latter, the Advocate General refers to the cases involving professional or sporting associations,[80] where, for instance, the associations in question have "a commanding influence over the organisation of professional sports as a cross-border economic activity."[81]

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[77] *Viking*, opinion of AG Maduro, *supra* note 3, para. 34.
[78] *Id*. para. 37.
[79] *Id*. para. 48.
[80] *See* cases referred to at *supra* note 73.
[81] *Viking*, opinion of AG Maduro, *supra* note 3, para. 45.

Although the horizontal direct effect of Article 39 EC, governing free movement of workers (as opposed to free movement of the self-employed and companies) has been established for some time now, it is submitted that there is no inevitability about adopting the same approach to Article 43 EC and that there is in fact no clear authority for the proposition that Article 43 EC has horizontal direct effect. One could, as the trade unions in *Viking* did before the High Court, adopt a narrow reading of the case law of the ECJ to argue that this case law has not extended the application of Article 43 EC to purely individual private conduct, but only to the extent that collective actors are effectively self-regulating and possess quasi-legislative powers akin to public law.[82] The reliance on Article 39 EC cases, such as *Angonese*,[83] is seen by a number of commentators as a questionable basis for understanding the correct approach to Article 43 EC,[84] since the European Court has not been consistent in adopting a uniform approach to the "personal" freedoms.

Those with an understanding of the workings of industrial relations would readily distinguish between a situation where trade unions could be said to be engaged in collective bargaining which amounted to a form of delegated state regulation—for example, collective bargaining leading to the setting of terms and conditions of employment for an entire industrial sector—and a situation where trade unions engage in collective bargaining at the level of the enterprise or establishment. Only the former could realistically be said to approximate to "exercising a regulatory task and having quasi legislative powers."[85] Nevertheless, the Court in both *Viking* and *Laval* held, first, that collective bargaining and collective action were "inextricably linked" and, second, that collective action fell within the horizontal scope of the free movement provisions: even when organizations are not exercising a regulatory task or having quasi-legislative powers, "in exercising their autonomous power … to negotiate with employers or professional organisations the conditions of employment and pay of workers, trade unions participate in the drawing up of agreements seeking to regulate paid work collectively,"[86] and it is this fact which brings private conduct within the scope of the Treaty.

Finally, it is far from clear that the application of fundamental (market) rights to private entities is justified on the basis of comparative analysis of the approach of other legal systems to the question of horizontality of constitutional norms. The European Court of Justice was, in my view, rather too quick to apply the fundamental

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[82] Viking Line Abp v. The International Transport Workers' Federation and The Finnish Seamen's Union, [2005] E.W.H.C. 1222, para. 110.

[83] Case C- 281/98, Angonese, 2000 E.C.R. I- 4139.

[84] *See* Paul Craig & Gráinne de Búrca, EU Law 794 (2007).

[85] *Viking*, judgment of the Court, *supra* note 3, para. 64.

[86] *Id*. para. 65.

freedoms to private parties. As Oliver and Roth argue, the starting point should surely be that "applying the four freedoms to the acts of private persons may constitute an inappropriate interference in their autonomy."[87] The U.S. is traditionally viewed as the paradigm of the "strictly vertical" approach to constitutional rights,[88] rejecting the proposition that constitutional rights should bind private parties. However, even in legal systems where interference with private autonomy is allowed, *direct* horizontal effect is unusual. One of the most mature and thorough-going debates on horizontality is that from within the German constitutional tradition. Whilst a full engagement with this debate is outside the scope of this Article,[89] what is relevant is that, whilst not allowing direct horizontal effect, the German theory of *mittelbare Drittwirkung* permits indirect horizontal effect, accepting that constitutional values permeate the entire legal system, rather than being confined to cases involving the individual and the State. Advocate General Maduro in Viking sought to transpose this doctrine to the European context.[90] But the actual impact of such a transplant would be highly questionable, as Christian Joerges explains.[91]

In light of the earlier discussion of the problematic nature of market freedoms being treated as fundamental rights, *Drittwirkung* or indirect horizontal effect would seem to be particularly inappropriate in the EU context. As Joerges and Rödl show, readiness to assign horizontal effect not just to fundamental rights, but also to economic freedoms contrasts markedly with the origins and meaning of the *Drittwirkungsdoktrin* as developed by the German Federal Constitutional Court.[92] In such a case as Viking or Laval, it would have the effect of requiring the actions of private parties to be subject to the market freedoms which have been granted constitutional status, but not necessarily subject to fundamental human rights.

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[87] Oliver & Roth *supra* note 39, 427.

[88] But for analysis of why "the US position is in fact far more horizontal than supposed" *see* Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 Mich. L. Rev. 388 (2003).

[89] *See* Ralf Brinktrine, *The Horizontal Effect of Human Rights in German Constitutional Law: The British Debate on Horizontality and the Possible Role Model of the German Doctrine of* Mittelbare Drittwirkung der Grundrechte, 6 Eur. Hum. Rts. L.Rev. 421 (2001) and references therein.

[90] *See Viking*, opinion of AG Maduro, *supra* note 3, para. 39.

[91] Christian Joerges, *Democracy and European Integration: A Legacy of Tensions, a Re-Conceptualisation and Recent True Conflicts*, EUI Working Articles, Law 2007/25.

[92] Christian Joerges & Florian Rödl, *On De-formalisation in European Politics and Formalism in European Jurisprudence in Response to the "Social Deficit" of the European Integration Project*, 4 Hanse L. Rev. 3 (2008); referring to the seminal *Lüth* judgment, *Bundesverfa ssungsgericht*, judgment of 15 January 1958, BVerfGE 7, 198.

V. Reconciling Internal Market Law with Non-market Values of EU

Having determined that collective bargaining and collective action does fall within the scope of the free movement provisions, the focus then turns to the question first, whether the instance of collective action somehow serves to restrict the exercise of one of the four freedoms and, second, the issue of justifications for breach of the free movement provisions, including a proportionality assessment. As Hervey points out, the potentially disruptive effects of the extension of the internal market provisions are partially mitigated by the fact that the judicial structure within which such litigation occurs, the preliminary reference procedure, gives national courts the final say in determining the application of the ECJ's interpretation of Community law and in particular of the principle of proportionality, to the facts of the case, such that some account can in theory be taken of the wider economic and political context.[93] One useful starting point for an analysis of the approach of the European Court is to consider the terminology adopted.

The ECJ has peppered the term "fundamental" throughout its descriptions of the four freedoms,[94] highlighting the centrality of the "common market" to the European project, an importance which has been further underscored since the original Treaty of Rome by the Single European Act of 1986, and its aspiration to progressively establish an "internal market"—an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.[95] This begs the question to what extent, if at all, the four free movement rights are to be regarded as "fundamental" rights on a par with fundamental human rights. Arguably,

> [s]ince they relate to the individual's right to live and work in the country of his choice and not be separated from his immediate family, the freedoms relating to the movement of natural persons can more readily be seen as fundamental rights of the kind enshrined in the European Convention on Human Rights than can the free movement of goods.[96]

The very fact that the four freedoms have such a status conferred on them suggests that any competing interests or values are likely to be scrutinized closely

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[93] *See* Hervey, *supra* note 32, at 184-85.

[94] *See, e.g.,* Case C-152/82, Forcheri v. Belgium, 1983 E.C.R. 2323, para. 11; Case C-222/86, UNCTEF v. Heylens, 1987 E.C.R. 4097, para. 14; Case C-281/98, Angonese, 2000 E.C.R. I-4139, para. 35; Case C-112/00, Schmidberger v. Austria, 2003 E.C.R. I-5659, paras. 62 & 74. *See* discussion in Oliver & Roth, *supra* note 39.

[95] EC Treaty, *supra* note 5, art. 14, introduced into the EC Treaty by the Single European Act 1986.

[96] Oliver & Roth *supra* note 39, at 408.

for compatibility, and that it is unlikely the values of the internal market will be readily trumped. However, regardless of their status, the four freedoms are not absolute. The approach of the ECJ to the clash of rights, for instance, between fundamental economic freedoms contained in the Treaty and fundamental human or social rights, is well illustrated by its judgment in *Schmidberger*.[97] *Schmidberger* concerned a demonstration organized by an environmental pressure group, which blocked for thirty hours a stretch of the Brenner pass, the major transit route between Northern Europe and Italy. Schmidberger, a haulage company, sought damages for losses suffered as a result of the blockade. The Court held that Austria's failure to prevent the demonstration was a *prima facie* breach of Article 28 EC, and as such it was categorized as an instance of vertical direct effect of Article 28 EC, rather that horizontal application of a Treaty provision against private parties (between the haulage company and the environmental pressure group): the fact that the competent authorities of the Member State abstained from taking action or failed to adopt adequate measures to prevent obstacles to the free movement of goods caused by private individuals on its territory aimed at imports, was just as likely to obstruct intra-Community trade as a positive act.[98]

However, the ECJ accepted that the action of the authorities was nevertheless justifiable in light of their concern to protect the demonstrators' fundamental freedom of expression and right of assembly—rights guaranteed by the European Convention on Human Rights (ECHR),[99] which form an integral part of EC law. The Court recognized there were two conflicting principles which needed to be reconciled: the requirements of the protection of *fundamental rights* in the Community with those arising from a *fundamental freedom* enshrined in the Treaty, where the former are relied upon as justification for a restriction of the latter.[100] However, the crucial point is that neither set of principles is absolute, both are subject to limitations.

Free movement of goods, as is the case with the other market freedoms, may be subject to restrictions spelled out in the Treaty (such as public policy or public

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[97] Case C-112/00, Schmidberger v. Austria, 2003 E.C.R. I-5659. *See also Omega, supra* note 52.

[98] *Schmidberger supra* note 97, para. 58. Interestingly, AG Maduro in *Viking* cited *Schmidberger* in support of his argument that Article 43 had horizontal effect, arguing that it would be irrelevant to the final determination of the claim if, as was theoretically possible, the case came before the Court in the framework of proceedings against the Finnish authorities for failing to curtail the collective action against Viking Line: *See Viking,* opinion of AG Maduro, *supra* note 3, para. 40.

[99] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

[100] *Schmidberger*, *supra* note 97, para. 77.

health) or those developed through the jurisprudence of the Court (the mandatory or imperative requirements). Similarly, whilst the fundamental rights at issue in *Schmidberger* were expressly recognized in the ECHR, the wording of Articles 10 and 11 of the Convention are also subject to "certain limitations justified by objectives in the public interest." It remains an open question whether the European Court of Justice is the appropriate body to determine how the balance should be struck if there is a clash between the internal market and competing values (in this case, fundamental human rights).[101] However, the Court has been quick to arrogate power to make this determination itself. In *Schmidberger*, the Court followed its usual formula—restriction/breach, justification, proportionality—as it did in both *Viking* and *Laval*, both to the question of the application of the Treaty provisions to private actors and to the question of how a restriction on free movement could be justified. Thus, having determined that internal market law applies, and that a breach has occurred, the measure will be scrutinized to assess whether the rule or measure in question pursues an objective which is consistent or not incompatible with the aims of the Community, whether that rule is proportionate to the objective pursued, and whether that objective could not be achieved by measures less restrictive of intra-Community trade.[102]

As a final coda, the Court on occasion remembers to make clear that the final decision on proportionality is one for the national referring court to take.[103]

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[101] For criticism of the Court's approach, *see* John Morijn, *Balancing Fundamental Rights and Common Market Freedoms in Union Law:* Schmidberger *and* Omega *in the Light of the European Constitution*, 12 Eur. L. J. 15 (2006) (arguing that the ECJ is not well equipped to make this sort of assessment, lacking a proper understanding of the case law on the European Convention or of the relevant methodology of the European Court of Human Rights toward freedom of assembly which the ECJ is purporting to apply).

[102] Examples of this formulation can be found in the Court's judgment in Case C-368/95, Familiapress, 1997 E.C.R. I-3689, paras. 19-25, and in opinion of AG in Case C-159/90, Society for the Protection of the Unborn Child (SPUC) v. Grogan, 1991 E.C.R. I-4685, para. 24. *See also* the definition of justification in Article 15(3) of the Services Directive 2006/123/EC of Dec. 12, 2006 on services in the internal market, 2006 O.J. (L 376) 36.

> (b) necessity: requirements must be justified by an overriding reason relating to the public interest;
> (c) proportionality: requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain that objective and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result.

[103] For instance, in *Familiapress*, *supra* note 102, paras. 27-29:

> it must therefore be determined whether a national prohibition such as that in issue in the main proceedings is proportionate to the aim of maintaining press diversity and whether

The Court's conclusion in *Schmidberger* was that fundamental human rights could be relied on to restrict free movement of goods, since the competent authorities "enjoy a wide margin of discretion in that regard."[104] But it nevertheless subject the exercise of discretion to a detailed proportionality assessment, noting a number of factors: the relatively short duration of the blockade; the extensive cooperation between the authorities, motoring organizations, and the demonstrators (with the goal of limiting disruption); and motivations of the demonstrators (a desire to express their opinion on a matter of public importance rather than a desire to restrict trade in goods).

The Court took pains to distinguish the circumstances leading to the restriction of trade in *Schmidberger* from those in *Commission v. France*, in which the French authorities had done little to prevent violent acts of protest by French farmers against the import or sale of fruit and vegetables from other Member States, characterized as giving rise to "a general climate of insecurity such as to have a dissuasive effect on intra-Community trade flows as a whole [and to] serious and repeated disruptions to public order."[105]

A further feature of the reasoning in *Schmidberger* which gave pause to the unions in *Laval* and *Viking* is the insistence that only those fundamental rights recognized as such in Community law itself can be so protected: the Member State's protection of freedom of speech and assembly was a legitimate interest theoretically capable of justifying a restriction on a Community free movement right precisely because both the Community and the Member States were required to respect freedom of speech and assembly.[106]

Having rejected out of hand the argument that social law merited exclusion from the reach of internal market law, the next step for the Court in following its usual formula was to assess whether a breach had occurred; namely, whether the action of the trade unions amounted to a "restriction" on the exercise of "fundamental" economic rights, then to scrutinize the measure to assess whether it pursued an objective which was consistent with the aims of the Community, and which was

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> that objective might not be attained by measures less restrictive of both intra-Community trade and freedom of expression …. It is for the national court to determine whether those conditions are satisfied on the basis of a study of the Austrian press market.

[104] *Schmidberger*, judgment of the Court*, supra* note 97, para. 82.

[105] *Id.* para. 88.

[106] "Thus, since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods": *Schmidberger*, *supra* note 97, para. 74.

proportionate. These questions are closely connected with the question of whether there is a right to strike recognized in Community law, which is considered below.

VI. Is There a Right to Strike in European Community Law?

Prior to the decisions of the ECJ in *Viking* and *Laval*, European Community law had yet to provide unequivocal affirmation of the right to strike, and indeed at times seemed concerned to exclude aspects of collective labor law from its scope. The Social Chapter of the EC Treaty (Articles 136-145 EC) commits the Community and the Member States to be mindful of fundamental social rights such as those set out in the European Social Charter signed at Turin on October 18, 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, whilst aspiring toward common objectives such as "proper social protection, dialogue between management and labour … lasting high employment and the combating of [social] exclusion." Nevertheless, these provisions, which represent an important step in the creation of a firm legal base for the Community's social policy competence, and as clear a restatement of the "European Social Model" as one is likely to find in a Treaty, expressly exclude competence over important aspects of collective labor law. As noted above, Article 137(5) of the EC Treaty excludes the right of association, the right to strike or the right to impose lock-outs from the scope of Community legislative competence. Similarly, the entire field of labor law has been excluded from the scope of the recent Services Directive.[107] This move to exclude labor law from the scope of the Services Directive is seen by some as a hard-won victory for labor standards, in a political context in which champions of the traditional European Social Model were anxious to minimize the impact of a potentially deregulatory Services Directive on national labor standards. The aim of the Services Directive was to achieve a genuine internal market in services by removing the remaining barriers to free movement of service providers left untouched by direct application of Articles 43 and 49 of the Treaty. However, the fear was that with the "country of origin" principle in the original draft of the Services Directive, which was designed to facilitate the free movement of service providers on a temporary basis to encourage cross-border competition or, more specifically, to encourage individuals or companies to test other markets without first having to establish, national labor rights would

[107] Directive 2006/123/EC of 12 December 2006 on services in the internal market, 2006 O.J. (L 376) 36, Article 1(6) and 1(7).

[108] The "country of origin" principle was defined as follows:

> [S]ervice providers are subject only to the law of the country in which they are established and Member States may not restrict services provided by operators established in another

have been vulnerable.[108] Critics argued that the Directive would erode many national regulations relating to labor, corporate governance and the environment, and lead to competition between workers across the EU, resulting in a downward pressure on wages.[109] The European Parliament, instrumental in attaining a major revision of the original version of the directive including removal of the "country of origin" principle, saw its role as "[s]triking the balance between economic dynamism and workers' rights," in order to "find a way of opening up the internal market in services to cross-border competition without eroding the European social model."[110] In addition to the dropping of the "county of origin" principle, the dilution of the original Bolkestein proposal saw a narrowing of the scope of the Directive to exclude a number of industrial sectors, as well as quasi-market activities, such as healthcare.

The Services Directive, as enacted, also professes to leave national labor law untouched;[111] however, this unwillingness to encroach on national regulatory autonomy over labor and social security law still leaves some ambiguity over the "fundamental" status of collective labor rights. On the one hand, collective labor

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> Member State. It therefore enables operators to provide services in one or more other Member States without being subject to those Member States' rules. This principle also means that the Member State of origin is responsible for the effective supervision of service providers established on its territory even if they provide services into other Member States.

Commission Proposal for a Directive of the European Parliament and of the Council on services in the internal market, at 9, COM (2004) 2 final/3 [hereinafter the Bolkestein proposal].

[109] The Bolkestein proposal, and in particular, the "country of origin" principle became a key *bete-noire* of the "no" campaign in the French and Dutch referendums against the Draft Treaty establishing a Constitution for Europe in June 2005. Critics perceived the Directive as indicative of the domination of "Anglo-Saxon" style economics within the EU, and warned that the Directive would lead to social dumping, as undertakings and jobs relocated to the lower cost and less regulated economies of the newer Member States in the east. *See* Editorial Cmments, *The Services Directive Proposal: Striking a Balance between the Promotion of the Internal Market and Preserving the European Social Model?*, 43 Common Market L. Rev. 307 (2006).

[110] European Parliament Press Release, REF. 2006/1113/IPR/12540 "Services Directive reaches final stage—EP position prevails."

[111] *Id.* art. 1(6):

> This Directive does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects Community law. Equally, this Directive does not affect the social security legislation of the Member States.

rights are described in contrast to fundamental rights;[112] on the other, the preamble to the Directive, which is of uncertain legal status, states that the Directive respects the exercise of fundamental rights applicable in the Member States and as recognized in the EU Charter—which include the right to take industrial action—reconciling them with the fundamental freedoms laid down in Articles 43 and 49 EC Treaty.[113]

The right in Article 28 of the Charter of Fundamental Rights of the European Union,[114] to negotiate and conclude collective agreements, and to take collective action to defend interests, including strike action is, nonetheless, problematic. Does this amount to recognition of a right to strike, thus enlarging the scope of Community competence? Article 137(5) of the EC Treaty quite explicitly excludes the right of association, the right to strike or the right to impose lock-outs from the scope of Community legislative action. The Explanatory Document, intended by the drafters of the Charter to clarify its meaning, states that this Article is based on Article 6 of the European Social Charter and Articles 12 to 14 of the Community Social Charter of 1989.[115] A further issue to bear in mind, restricting the potential impact of Article 28, is that whilst the Charter affirms the right of workers and employers to take collective action, including strike action, in cases of conflicts of interest, this right is to be exercised "in accordance with Community law and national law and practices."

The right affirmed in the Community Social Charter of 1989 is similarly restricted, being subject to the obligations arising out of national regulations and collective agreements. Finally, the ECHR is also referred to as a source for Article 28 of the Charter, although one should remember that there is no express mention of strike action: Article 11(1) of the ECHR asserts the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions. Whilst Article 11(1) ECHR includes trade union freedoms as a specific aspect of freedom of association, there is no express inclusion of a right to strike or an obligation on employers to engage in collective bargaining. At most, Article 11 may be regarded as safeguarding the freedom of trade union members

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[112] *Id.* art. 1(7):

> This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law.

[113] *Id.* para. 15 of the Preamble.

[114] *See supra* note 51.

[115] Explanations Relating to the Charter of Fundamental Rights, O.J. (C 303) 17, 14.12.2007.

to protect the occupational interests of their members. While the ability to strike represents one of the most important of the means by which trade unions can fulfill this function, the European Court of Human Rights acknowledged that there are others. Furthermore, Contracting States are left a choice of means as to how the freedom of trade unions ought to be safeguarded.[116]

Writing before the judgments in *Viking* and *Laval*, Tonia Novitz expressed the view that there is "little doubt" that the right of workers to take collective action in defense of their interests must be regarded as a fundamental one, the only uncertainty being over the scope of this right.[117] The approach of ECJ in *Laval* and *Viking* has been, however, to provide a clear statement of the right to strike in EC law but subject this right to potentially debilitating limitations. Also, crucially, the "fundamental" nature of the right to take collective action is not such as to render Community law on free movement of services and establishment inapplicable to such action.[118] The Court in *Viking* set out the pedigree of the right to strike as follows:

> In that regard, it must be recalled that the right to take collective action, including the right to strike, is recognized both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC – and Convention No 87 concerning Freedom of Association and Protection of the Right to Organise, adopted on 9 July 1948 by the International Labour Organisation – and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000.[119]

Whilst this reference to the EU Charter of Fundamental Rights is significant, since the Court of Justice had previously been reluctant to rely on the (at the time)

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[116] UNISON v. UK [2002] I.R.L.R. 497.

[117] Tonia Novitz, *The Right to Strike and Re-flagging in the European Union: Free Movement Provisions and Human Rights*, 2 L.M.C.L.Q. 242, 249 (2006). *See also* Tonia Novitz, International and European Protection of the Right to Strike (2003).

[118] *Viking*, judgment of the Court, *supra* note 3, para. 47; *Laval*, judgment of the Court, *supra* note 8, para. 95.

[119] *Viking*, judgment of the Court, *supra* note 3, para. 43; the same conclusion, expressed in almost identical language, is reached by the Court in *Laval*, *supra* note 8, para. 90.

non-binding EU Charter as a source of rights,[120] nevertheless, in both *Viking* and *Laval*, the Court was careful not to ground the right to strike solely on the Charter, perhaps mindful of the uncertain effects of the Protocol obtained by the UK and Poland, excluding the operation of the Charter.[121] Yet almost immediately, one is reminded that the right to strike is heavily qualified; primarily because the construction of this right in *Viking* and *Laval* appears contingent—the right exists and is understood in terms of its utility as a basis for justification of an interference with a free movement right.

Turning to the question whether a breach of Community law had occurred, whether the action of the trade unions amounted to a "restriction" on the exercise of "fundamental" economic rights, the Court in *Viking* found it undeniable that collective action as envisaged by the FSU and the ITF would make less attractive, or even pointless, Viking's exercise of its right to freedom of establishment, since such action would prevent Viking from enjoying the same treatment in the host Member State as other economic operators established in that State. Further, collective action taken to implement the "flags of convenience" policy, in seeking to prevent ship owners from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, "must be considered to be at least liable to restrict Viking's exercise of its right of freedom of establishment."[122] Similarly, in *Laval*, the Court held that the right of trade unions to take collective action which forced undertakings established in other Member States to sign a collective agreement was liable to make it less attractive, or more difficult, for such undertakings to operate in a host Member State, and therefore constituted a restriction on the freedom to provide services within the meaning of Article 49 EC.[123]

VII. The Right to Strike and the Right to Free Movement Reconciled? The Proportionality Assessment

According to the Court's case law, a restriction on free movement rights is warranted only if it pursues a legitimate objective compatible with the Treaty, and is justified by overriding reasons of public interest. Even then, the restriction must be suitable for

[120] The ECJ had, in previous decisions, sought to rely on the EU Charter as a source of rights only parasitic to other sources, such as the ECHR and its own earlier jurisprudence: *see* for instance, Case C-432/05, Unibet v Justitiekanslern, 2007 E.C.R. I-2271, in which the ECJ held that principle of effective judicial protection is a general principle of Community law, drawn from Articles 6 and 13 of the ECHR and which has also been *reaffirmed* by Article 47 of the EU Charter.

[121] *See infra* note 146 and accompanying text.

[122] *Viking*, judgment of the Court, *supra* note 3, paras. 72-73.

[123] *Laval*, judgment of the Court, *supra* note 8, paras. 99-100.

securing the attainment of the objective which it pursues and not go beyond what is necessary to attain it.[124] However, the proportionality assessment applied to judge the legality of collective action, as will be seen, was applied in such a way that it is difficult to envisage strike action which interferes with exercise of a free movement right being readily justified. The trade unions in *Viking* argued that their actions were justified since they were necessary to ensure the protection of a fundamental right recognized under Community law (namely, the right to strike) and their objective was to protect the rights of workers, which constituted an overriding reason of public interest. The Court, whilst accepting that the rights under the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, nevertheless gave a rather circumscribed scope to the social policy goals it would be legitimate to pursue in this context. Crucially, the Court found that the right, which amounted to a legitimate interest, and potentially justified a restriction of one of the fundamental freedoms, was "the right to take collective action *for the protection of workers*,"[125] or "for the protection of the workers of the host State against possible social dumping,"[126] thus structuring the right to strike not in general terms, but by reference to its goal or purpose.

Therefore, in order for the strike action which interfered with a free movement right to be capable of justification, it would be necessary to assess whether the action in question was indeed aimed at protecting the jobs and conditions of employment of workers. Accordingly, the burden is on the trade union to show (a) that the strike action pursues a legitimate objective; (b) that it is in the public interest, namely for the protection of workers; (c) that the strike is suitable for achieving the legitimate interest; and (d) that it is the least restrictive tool available.

In *Viking* the ECJ left it to the national court to apply the proportionality test to the facts, but was so prescriptive in its restatement of proportionality leaving very little room for the national court to find the strike action justified in this case. In particular, while finding that the trade unions' planned boycott of the *Rosella* was in principle justifiable, the ECJ held that this would not be the case if it could be established that the jobs or conditions of employment of the crew of the *Rosella* were not in fact jeopardized or under serious threat, since the action would then not be for the "protection of workers."[127]

Whether the collective action initiated by the unions was proportionate, the Court of Justice took it upon itself to assess the "appropriateness" of the unions'

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[124] *Viking*, judgment of the Court, *supra* note 3, para. 75; *Laval*, judgment of the Court, *supra* note 8, para. 101.

[125] *Viking*, judgment of the Court, *supra* note 3, para. 77.

[126] *Laval*, judgment of the Court, *supra* note 8, para. 103.

[127] *Viking*, judgment of the Court, *supra* note 3, paras. 81-83.

choice of tactics within this industrial dispute, leaving the final determination to the national court. So, for trade unions seeking to resort to strike action that might infringe on a free movement right, consideration needs to be given to whether the trade union "did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations ... [with the undertaking] .... whether that trade union had exhausted those means before initiating such action."[128]

The requirement that a union employ the "least restrictive" weapon in its industrial relations armory thoroughly undermines the recognition of a right to strike, since it ignores the industrial reality in which the strike weapon would be used. As far as the Court is concerned, to satisfy the requirement that its resort to collective action was proportionate, a trade union would need to show it had pursued other forms of collective action short of strike. Strike action is, in effect, valid only as a weapon of last resort following other, less commercially disruptive, forms of action such as extensive negotiation.

In *Laval*, the Court of Justice went even further, in deciding the outcome of the proportionality test itself, rather than leaving this to the national court, and also in interpreting the Posted Workers Directive in such a way as to call into question the basis of the Swedish industrial relations system. The purpose of the Posted Workers Directive is to ensure that undertakings which post workers temporarily to another Member State observe "a nucleus of mandatory rules for minimum protection" of those workers.[129] With respect to a "hard core" of employment protection rights—(defined by Article 3(1) of the Directive to include, inter alia, health and safety, maximum working hours and minimum wages)—Member States have discretion to rely on national law, regulation, administrative provision, and/or collective agreements or arbitration awards to implement the minimum terms and conditions for posted workers, provided such collective agreements or awards have been declared universally applicable. Although the Swedish state had relied on legislation to prescribe many of the minimum terms and conditions envisaged by the Directive, with regard to the establishment of a minimum wage for posted workers, the Swedish approach had been to leave the setting of wage rates to workplace-level negotiation between undertakings and trade unions, in keeping with the principle of industrial autonomy central to its industrial relations model.

The state thus adopted a form of transposition of the Directive, in relation to minimum wages for posted workers, not envisaged in the Directive in that the

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[128] *Id*. para. 87.

[129] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, O.J. (L 018) 1-6, para. 13 of the Preamble.

collective agreements were not universally applicable.[130] In this context—in which minimum wages for posted workers are set by state-sanctioned workplace-level collective bargaining conducted under the shadow of collective action—the Court of Justice again accepted that collective action which restricted free movement rights was in principle justifiable. However, having held that strike action to protect workers from "social dumping" was a legitimate aim,[131] the Court nevertheless found the unions' action disproportionate: a blockade designed to "force" an undertaking to negotiate on rates of pay in the absence of clear or precise national provisions which would enable the undertaking to predict its obligations in advance could not be justified in the public interest.

The Court was sympathetic toward the employing undertaking on the ground that it would be subject to the unreasonable or unconscionable burden of having to negotiate with trade unions under conditions of uncertainty as to the outcome of such bargaining. However, this suggests a, perhaps willful, refusal to acknowledge the unique nature of collective bargaining, a process of negotiation which is unavoidably open-ended, and a rejection of one of the core rationales for collective bargaining, namely as a legitimate process for collective decision-making and setting of wages.

The proportionality assessment, which is difficult at the best of times, is made more complex by the Court's lack of familiarity with balancing competing interests in the industrial relations context, and between two sets of private actors. The Court has developed the proportionality test in assessing the balance between free movement rights and non-market values, such as the right to freedom of assembly in *Schmidberger*, or the protection of human dignity in *Omega*.[132] However, such examples have primarily centered on the justification of *State* action that restricts a fundamental freedom.

The standard of scrutiny in such cases is strict, especially when compared with the invocation of proportionality as a ground of review of *Community* measures.[133] *Omega* concerned German prohibitions on the commercial exploitation of British

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[130] For further analysis of the Court's interpretation of the Posted Workers Directive, *see* Phil Syrpis & Tonia Novitz, *Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation*, Eur. L Rev. 411 (2008) and A. C. L. Davies, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, 37 (2) Ind. Law. J. 126 (2008).

[131] *Laval*, judgment of the Court, *supra* note 8, para. 103.

[132] *See Schmidberger, supra* note 97; *Omega, supra* note 52.

[133] "By contrast [with review of Community measures] where proportionality is invoked in order to challenge the compatibility with Community law of national measures affecting one of the fundamental freedoms, the Court is called upon to balance a Community against a national

laser/video games involving the simulation of acts of violence against persons. The Court followed the approach in *Schmidberger*, that since both the Community and the Member States respect fundamental rights, the protection of those rights is a legitimate interest that is capable of justifying restriction on fundamental freedom such as freedom to provide services, but measures which restrict the freedom to provide services could be justified on public policy grounds only if they were proportionate, i.e., necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures. Crucially, however, in these cases involving the proportionality of Member State action, the Court adopts a non-majoritarian standard:

> It is not indispensable ....for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected..... On the contrary .... the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State.[134]

However, the intensity of review appears even stricter when it is not Member States, or Community institutions, but *individuals* whose actions are subject to scrutiny. Simiarily as with the scrutiny of Member State action, proportionality is utilized as a "market integration mechanism,"[135] which runs the risk, as in the cases of *Viking* and *Laval*, that it is applied in such a way as to negate one of the very rights the Court is seeking to balance.

Another difficulty with the Court's reasoning in requiring the exercise of the right to strike to be proportionate arises on further comparison of *Viking* and *Laval* with *Schmidberger*. In essence, while it is clear that freedom of expression or freedom of assembly and association cannot be absolute concepts, the necessary restrictions on these rights cannot go so far as to negate the very substance of the rights. The Court of Justice took pains to point this out in *Schmidberger*:

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interest. The principle is applied as a market integration mechanism and the intensity of review is much stronger."

Takis Tridimas, *Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny*, *in* The Principle of Proportionality in the Laws of Europe 66 (Evelyn Ellis, ed., 1999).

[134] *Omega, supra* note 52, paras. 37-38.

[135] *Id*.

> Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed.[136]

But this insight was clearly absent from its reasoning in *Viking* and *Laval*. More usually, when assessing a social right such as freedom of association, it is the role of a court to examine the proportionality of a state's restrictions on the exercise of that right. As the wording of Article 11(2) of the ECHR indicates,[137] the question is whether a state can justify interfering with a Convention right. What we have in *Viking* and *Laval* however is the European Court of Justice requiring a trade union to justify the actual *exercise* of the right; the burden is on the holder of the right to show that its exercise is proportionate, thus undermining the earlier step in which the Court recognized the right to strike as in some way "fundamental."

More broadly, what the decisions in *Viking* and *Laval* reveal is that, given the market-orientation of the EC Treaty and of the Court, once market rights have been elevated to "fundamental" status, a proportionality assessment that seeks to balance market rights against social rights is likely to prioritize the former. This will continue to be a problem as long as there is no objective external standard, existing outside the Treaty provisions, which can be used to balance these competing rights. The legitimacy of the exercise of social rights is judged by reference to the project of market integration, rather than a categorical or unconditional valuing of rights. Such unconditional valuing of rights is unlikely to come from the Court of Justice; one must turn to the political institutions in the attempt to realize a more "social" Europe.

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[136] *Schmidberger, supra* note 97, para. 80.

[137] ECHR, *supra* note 99, art. 11(2):

> No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

VIII. Economic Liberalization and the European Social Model

Recent years have witnessed the overuse of the mantra by policy-makers and agenda-setters within the EU, most notably the European Council, that there is an essential link between Europe's economic strength and its social model. The European Council Summit in Lisbon in 2000 saw the launch of a new strategic goal for the next decade: "to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion."[138] So what precisely is meant by the European social model?[139] Lisbon envisaged that the necessary improvements in the EU's economic performance could only come about by an overall strategy which assisted the transition to a knowledge-based economy, with better policies for the information society and Research & Development, as well as by stepping up the process of structural reform for competitiveness and innovation and by completing the internal market; but crucially, also by modernizing the European social model, building an "active" welfare state and active labor market policies, investing in human resources and combating social exclusion.[140] More recently, the European Commission has been looking to alternative means of protecting workers against labor market risks whilst ensuring flexibility for enterprises, and has came out in favor of "well-designed" unemployment benefit systems and active labor market policies, rather than reliance on employment protection legislation, as was traditionally the aspiration of the social model.[141]

Alongside this Lisbon Strategy for growth and jobs, which emphases the reconciliation of economic policy discourses with social policy discourses, must be

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[138] *Presidency Conclusions, Lisbon European Council*, 23 & 24 March 2000, Bull EU-3/2000, 7-17.

[139] The European Commission has sought to define the European social model more closely, stating that "[q]uality is at the heart of the European social model"; that "in its diverse forms within the Union, has played a crucial role in helping maintain continually rising productivity and living standards across the Union, while helping ensure that the benefits are widely shared"; and that the European social model is

> distinguished from others by its framework and design, and by the nature, focus and distribution of the policies. .... funding is mainly public in Europe, and much more private in the US … the benefits appear to be much more evenly spread in Europe than they are in the US.

CEC, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions. *Employment and Social Policies: A Framework for Investing in Quality*, COM (2001) 313 final, Brussels, 20.6.2001, at 3 and 5.

[140] Lisbon Presidency Conclusions, paras. 5-7 & 24-34; *see also* Ashiagbor, *supra* note 54, *see especially* chs. 4 & 5.

[141] Commission of the European Communities, *Green Article, Modernising Labour Law to Meet the Challenges of the 21st Century*, Brussels, 22.11.2006 COM(2006) 708 final.

added another "Lisbon," that of the EU Reform Treaty signed by the heads of state and government in Lisbon in December 2007.[142] The Lisbon Treaty, which arose from a process of constitutionalization of the EU, emerging from the ashes of the failed Constitutional Treaty,[143] seeks to define the EU as "a highly competitive social market economy," and further, seems to bolster the "social" through the conferral of legally binding status on the EU Charter.

As the analysis of *Viking* and *Laval* illustrates, the jurisprudence of the European Court of Justice also mirrors this desire to reach a balance or accommodation between two potentially competing aspects of the European project, the social and the economic.[144] However, the Court's reasoning also suggests that although social rights, including the right to strike, are recognized as part of EC law, the exercise of such rights is contingent on their compatibility with market integration. The Court of Justice drew on the EU Charter of Fundamental Rights, which currently has declaratory force, and is not yet a formally binding source of EC law. However, although the EU Charter will finally be granted legally binding status if and when the Lisbon Treaty is ratified, it is doubtful that this enhanced status will operate as a counterweight to the powerful market orientation of the Court's jurisprudence on the balancing of competing rights, in part due to the Protocol annexed to the Lisbon Treaty.[145]

To elaborate: the EU Charter as originally drafted was potentially a revolutionary document, with its "rights, freedoms and principles" divided between six Chapters: Dignity, Freedoms, Equality, Solidarity, Citizens' rights and Justice. However, the distinctions between the three different categories were not clear and the "Explanatory Note" from the Presidium which originally drafted the Charter did little to clarify the distinction.[146] It was initially thought that the unconventional grouping of rights in the Charter, eschewing the tradition dichotomy between civil

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[142] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, Dec. 13, 2007, O.J. (C 306) 1.

[143] Treaty establishing a Constitution for Europe, Dec. 16, 2004, O.J. (C 310) 01.

[144] "Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy," *Laval*, judgment of the Court, *supra* note 8, para. 105; *see* also *Viking*, judgment of the Court, *supra* note 3, para. 79, in identical terms.

[145] Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom (annexed to the Lisbon Treaty), Dec. 17, 2007 O.J. (C 306) 156.

[146] The 51-page note from the Presidium which oversaw the drafting of the Charter: Text of the explanations relating to the complete text of the Charter ("Explanatory Document") Brussels, 11 October 2000 (18.10), CHARTE 4473/00. The explanations of the Charter's provisions are stated to have no legal value and to be simply intended to clarify the provisions of the Charter.

and political rights on the one hand, and social and economic rights on the other, meant there was potential for an imaginative reading of these rights. Social and economic rights were scattered throughout the Charter, a move which appeared to place them on the same footing as civil and political rights. Additionally, "solidarity," a concept with overtones of collective labor law values, becomes a universal value, placed alongside the other "indivisible, universal" values of human dignity, freedom, and equality on which the Union is founded, such that one would envisage that respect for social rights should be "mainstreamed" throughout all EU policies.[147] However, it was also clear that those who were hostile to social rights being granted such elevated status, such as Lord Goldsmith, the UK Government's representative on the Convention which drafted the Charter, wished to re-introduce the conventional dichotomy by emphasizing the distinction between rights and principles. Accordingly, Lord Goldsmith sought to re-affirm the distinction between the classic civil and political rights, which he argued are individually justiciable, and social and economic rights which were not justiciable in the same way, but rather informed policy-making by the legislator.[148]

In light of the political controversies around the failed Constitutional Treaty, it was important for the political elite in many Member States that the Lisbon Treaty was, and was seen to be, a significantly different document—an "ordinary" Treaty, not a constitutionalizing moment. This departure from the Constitutional Treaty was marked in large part by the treatment of the EU Charter. It was given legally binding status not by full incorporation into the body of the Lisbon Treaty, but by being annexed to the Treaty in a Protocol. A further Protocol, annexed at the behest of the UK and Poland, sought to exempt the Charter from having any effect in those countries.

The main intention of the UK in insisting on a Protocol on the EU Charter was to exclude the application in particular of the "Solidarity" chapter of the Charter, dealing not just with workers' rights such as the right to strike, but also a wide variety of other socially-important but politically sensitive issues such as the protection of young people at work, social security and social assistance, health care, environmental protection and consumer protection. Applying Lord Goldsmith's explanations to the Charter, it would seem that many of the "principles" are to be found in Title IV on Solidarity. These "rights" are arguably not justiciable and enforceable but merely call for State intervention through national legislation. In

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[147] *See* Jeff Kenner, *Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility, in* Economic and Social Rights under the EU Charter of Fundamental Rights—A Legal Perspective (Tamara Hervey & Jeff Kenner eds., 2003).

[148] Lord Goldsmith, *A Charter of Rights Freedoms and Principles,* 38 Common Market L. Rev. 1201-16 (2001).

anticipation of it becoming legally binding following the signing of the Lisbon Treaty, an adapted version of the EU Charter was proclaimed in December 2007,[149] with a new Article 52(5) which for the first time attempts to clarify the distinction between rights and principles. Article 52(5) states that the provisions of the Charter which contain "principles" may be implemented by legislative and executive acts of the EU institutions and by the Member States when implementing Union law. But such measures shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality. So, Charter *principles* do not give rise to direct claims for positive action by the Union's institutions or Member States authorities.

The promise which the EU Charter initially held out, as providing a foundation on which could be built a more coherent "social Europe" seems unlikely to be fulfilled. In the context of the "two Lisbons" we see social and labor rights being accorded an instrumental role: as the European Commission asserts, the aim of EC labor law more widely should be to support a labor market which is "fairer, more responsive and more inclusive, and which contributes to making Europe more competitive,"[150] confounding the hopes of those who argue that European social law should be grounded in fundamental rights, primarily in the EU Charter, rather than in the quest for competitiveness.

That there are few policy areas domestically which fall out with the encroaching reach of European internal market law should come as no surprise to observers of the jurisprudence of the Court of Justice, familiar with the Court's preoccupation with upholding the "fundamental freedoms" to trade. What is relatively new and troubling has been the marriage of free movement guarantees and the horizontal application of Community law, together with the application of internal market law to an area, collective bargaining and industrial relations more generally, which previous case law (as in *Albany*) had suggested was to be exempt. Thus, whilst professing that the European Union has not only an economic but also a social purpose, the Court of Justice nevertheless assesses the merits of the social purpose through the lens of the economic. Coupled with the Court's particular take on proportionality, we have an interesting categorization or conceptualization of social rights; namely the recognition of the right to strike, but with inherent deficiencies, structured such that the limitations on the right are constitutive of the right itself, rather than the more familiar methodology of identifying a right, and then identifying the external restrictions on the exercise of that right. The Court

[149] Charter of Fundamental Rights, *supra* note 51.

[150] Commission of the European Communities, *Outcome of the Public Consultation on the Commission's Green Article "Modernising Labour Law to Meet the Challenges of the 21st Century*," Brussels, 24.10.2007, COM(2007) 627 final, at 1.

does not begin its investigation with the right to strike, but with the right to trade, and analyses the exercise of the right to strike as a restriction, permissible to varying degrees, on the all-important fundamental right to trade.

Reconciling the economic and social dimension of the European project is, surely, a deeply political question with which, as one can see from the "two Lisbons," the political institutions of the EU continue to struggle. Both the Lisbon Strategy which began in 2000 and the Lisbon Treaty of 2007 have sought to recast the EU as a social market economy, with an apparently equal emphasis on both the "social" and the "market." But for the economic and the social dimension genuinely to be placed on an equal footing is an unlikely prospect. The slippage here is also readily apparent: one can witness political reluctance to place the EU Charter unequivocally at the center of the recast EU project, and the tension between a neoliberal flexibility agenda and one in favor of more socially regulation played out in the debate over regulation of labor markets.[151] Permitting such a complex political equation as the reconciliation of the right to strike and the right to free trade to be resolved in the context of adjudication is even more troublesome, given the approach of the Court of Justice to human rights. In the absence of a definitive affirmation, as one might have expected from a document such as the EU Charter, which places respect for human or social rights in the EU above respect for market rights, the Court of Justice has engaged in an assessment of the proportionality of the exercise of collective social rights which leaves social rights vulnerable to being trumped by market rights.

[151] Commission of the European Communities, *Towards Common Principles of Flexicurity: More and Better Jobs through Flexibility and Security*, Brussels, June 27, 2007 COM(2007) 359 final. *See also* Richard Hyman, *Editorial*, 13 Eur. J. Ind. Rel. 139 (2007).