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# **Viking, Laval and All That: Consequences of ECJ Rulings and Developments in the Area of Industrial Conflict in an Enlarged EU**

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Anno Accademico 2011/2012  
IUS/07 Diritto del Lavoro



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## INTRODUCTION

The Swedish town of Karlsudd, one of the various small centers of the Stockholm archipelago, can be considered as a place of great symbolic relevance for the recent European labour law.

Sitting in the Vaxholm municipality, it is less than five kilometers distant from the grounds of the now infamous Söderfjärd school where the dispute that gave origin to the *Laval* case first erupted; from its easternmost point, furthermore, it is possible to spot the transiting Viking Line ferries as they cruise the waterways between the multitude of islands and islets in their way towards the Baltic Sea.

While nothing physically highlights its importance, this nondescript town came to represent the epicenter of an earthquake that has shook the European labour law and industrial relations framework to the core in the context of the enlargement processes of the European Union, characterized by an increasing legal and economic diversities and by a even greater relevance of labour and services mobility in the internal market, which have highlighted the underlying tensions in the reconciliation of the social and economic dimensions of the Union.

The balancing by the European Court of Justice in the rulings of what has become known as the “Laval quartet” referred to one of the most sensitive and relevant matters for any system of labour law and industrial relations, *id est* the ability for workers and trade unions to undertake collective bargaining and action with a view of ensuring workers’ protection and social standards, and represented a deep innovation with respect to the previous European “neglect” on collective action, as well as a significant interference with the generally accepted regulatory autonomy of the Member States in the field, testified by the exclusion of these key areas of labour law from the EU competences, which ultimately left a high discretionary power to the European Court of Justice in reconstructing the features of the rights in question.

The decisions taken by the ECJ in these cases undoubtedly represent a fundamental landmark in the debate on collective action in a trans-national setting,

giving rise to a wide debate and extremely abundant analyses and responses both in the academic community and in the political arena: alongside the strict and almost unprecedented scrutiny carried out by the Luxembourg Court on the aims and the concrete unfolding and effects of the collective action when rights and freedoms recognized at European Union level are involved in the dispute, the solutions adopted by the Court in balancing the economic demands and the protection from social dumping have also triggered a whole series of largely unpredicted consequences in national legal systems and in the reasoning of several domestic courts.

Furthermore, the developments occurred up to the present time do not appear adequate to provide social partners and economic actors with a sufficiently complete framework to which refer for an EU-compatible exercise of collective labour rights, nor to reduce the fragmentation of the right to strike in the various national settings and the uncertainties deriving from the epiphenomenic indications deriving from the Luxembourg Court, whose rulings, while proceeding in a seemingly definite direction, are inextricably linked with the specific circumstances of the cases and the specific features of the national system considered, and lack the necessary degree of detail to constitute the basis for the adoption of sound and clear policy options and shared regulatory trends by the Member States in this field.

The work carried out is the result of the consideration of the political, economic and legal context and occurrences linked in particular with the latest rounds of the European enlargement process, which represent the inevitable background to the emersion of the balancing carried out by the ECJ, and the most relevant elements which have lead to the issuing by the ECJ of the rulings at hand.

The main features and developments of the reconstruction of collective action elaborated in different national systems was analyzed with specific regard to the Italian, German and British situations, which were chosen as examples of the high degree of variance in the domestic labour and industrial relation legal frameworks and cultures. Alongside this reconstruction, a description of the features of the right to strike in international instruments is provided, as well as it is considered the progressive emergence of the right to collective action in the European Community and Union law, from the first partial acknowledgement by the Community Charter of

Fundamental Social Rights of Workers, to the cautious approach of the *Monti* Regulation of the late Nineties and its positive recognition in the Charter of Fundamental Rights of the European Union which, on the other hand, has not solved the inadequacy of the provisions of EU labour law instruments in relation to national implementation and transnational aspects of collective trade union rights.

Having closely followed the adjudicating process by the European Court of Justice and the following political and academic debate, it appeared of fundamental importance to conduct a deep analysis in particular of the consequences of the rulings both at national and EU level, and specifically of the developments occurring in the various domestic settings considered, in order to assess the impact of the main elements deriving from *Viking* and *Laval* in the single Member States, by inducing changes in the domestic frameworks directly involved by the rulings, and in particular the Swedish autonomous collective bargaining system, or being applied in Courts, such as the British ones, which have appeared to be rapidly absorbing the principles issued by the ECJ, as well as the potential interactions of this restrictive judicial course with the Italian and German systems.

The developments occurred since the first half of 2008 in the area of European fundamental rights, furthermore, have highlighted a certain ambiguity for what it refers to the right to collective action which also needed to be analyzed and assessed, with particular reference to the responses conceived in order to prevent further negative consequences for social rights and to readdress the judicial options undertaken by the ECJ in order to provide a more detailed balancing, more attentive in particular to the renewed relevance of the of the social rights in the new EU architecture deriving from the adoption of the Lisbon Treaty, which has attributed to the Charter of Fundamental Rights the same legal value as the Treaties, as well as the planned accession to the European Convention of Human Rights, capable of producing significant effects upon the EU's institutional and judicial system as a whole, in particular for the possibility for the European Court of Human Rights to become a competent forum to review EU law and ECJ judgments.

The resurgence of the importance of social right in the EU framework has also been testified by political initiatives such as the "Monti Report" and the Single Market Act by the Commission which explicitly underlined the need to rebalance



economic freedoms and fundamental social rights, including collective action and strike, in a *de iure condendo* perspective whose first result should soon see the light with particular reference to a proposal for a regulation clarifying the extent to which trade unions can use the right to strike in the case of trans-national activities.

In recent cases before the ECJ, and in particular in the AGs' legal reasonings, a larger scope and importance was given to the promotion of social rights, although the solutions ultimately adopted by the Court did not significantly differ from previous case-law; however, in the field of collective labour rights the developments in the ECtHR jurisprudence in cases such as *Demir and Baykara* and *Enerji*, in which the Strasbourg Court granted protection to the right to collective bargaining and right to strike under European human rights law, need to be taken into account, since the European Court of Justice and the national courts need to recognize the fundamental principles guaranteed by the Convention as general principles of European law.

However, notwithstanding the wide recognition and the comprehensive multi-source reconstruction of the right to collective action undertaken by the ECtHR, it appears difficult to hypothesize a marked shift in jurisprudence by the European Court of Justice on the basis of such indications, or deriving from the reasonings of other supranational bodies such as the ILO Committee of Experts or the European Committee for Social Rights, whose conclusions significantly differ from those reached by the ECJ, in particular because of the peculiar role and political relevance of the latter in the current Union framework; furthermore, it must be considered that national adjudicating bodies have appeared reluctant to establish an institutional dialogue with the Luxembourg Court or to take into account supranational human rights jurisprudence in this field.

In absence of significant amendments to the constitutional structure of the Union, and of a clear political will oriented towards dialogue and cooperation in such matters, a balanced reconciliation of economic freedoms and collective labour rights, capable of accommodating the tensions underlying the promotion of the internal market and the protection of social rights, remains therefore an unresolved legal and political optative.

# **1. THE EVOLUTION OF THE “EUROPEAN” RIGHT TO STRIKE: AN HISTORICAL PERSPECTIVE**

## **1.1 – Domestic developments, international protection, European neglect**

The history and development of labour law and industrial relations show an indissoluble link with the rise and the evolution of organized movements by workers; the sound changes in the world of labour taking place across the end of the XIX and the beginning of the XX Century, in particular, can be traced back to actions undertaken collectively by workers in order to promote their interests and pursue changes in the laws and policies by governments: the main and most prominent instruments utilized in this pursuit by workers and trade unions has been strike action, usually taken to consist the combined and co-ordinated withdrawal of labour<sup>1</sup>, originally used to obtain union recognition and therefore create the condition to proceed in collective bargaining or to influence the working conditions when claims and demands had remained unresolved or unanswered, but also to foster social progress and present demand for political change in general as part of broader social movements.

In their historical unfolding collective actions, notwithstanding the risks often taken by the workers carrying them out, have continued to be at the centre of the major social, political and juridical transformations concerning labour and underwent a parallel evolution in their various practical expressions, in the aims pursued

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<sup>1</sup> The term “strike” is mostly used to refer to the total cessation of work by part of the workforce, but may also encompass partial stoppages or other activities, organized either by trade unions or by informal groups of workers outside an institutional framework, hindering the productivity of an employer’s business. See also Novitz 2003, p. 6.

through their exercise and, most importantly, in their legal qualification in the various European (especially Western European) countries.

The initial regulatory trends were in fact characterized in terms of a general prohibition for strike action, primarily caused by the management's opposition to the workers organizing, through its qualification as a tort and the provision of criminal sanctions. The earliest examples of law removing the criminal ban<sup>2</sup> still did not grant full status of right to the collective action, whose effective use was prevented also by restrictive judicial courses and which was in any case still considered a breach of contract, and could therefore justify dismissals by the employer and intervention by public force and law enforcement officials.

Among the ways in which the opposition to organized forms of collective action by employees were the use of strikebreakers, the substitution of striking workers and the possibility to impose lock-outs – the deliberate exclusion of workers from the workplace and the refusal by the employer to pay them for the availability of their labour, used either as an “offensive” strategy to impose terms and condition to the workers, or as a “defensive” response to a strike being carried out - with the deriving concept of “equality of arms” for the case of industrial disputes, implying that strike and lock-outs would be equally legitimate since they both represented the ultimate piece of “industrial weaponry” respectively for trade unions and employers.

These various orientations (both in binding legislation, case-law and juridical doctrine) have been gradually substituted by an accommodation in the legal systems of a “right to strike” as a key element of the labour relations, in particular as part of the democratic transitions that have involved several European countries over the course of 50 years since the ending of World War II, through the fall of the fascist regimes in Spain and Portugal, and to the dissolution of the Soviet Bloc in Eastern Europe; however, the legal form in which this entitlement is enshrined, its explicit or implicit recognition, its positioning in the hierarchy of the sources vary greatly between States, in accordance with the different equilibria shown by the

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<sup>2</sup> Specifically, France's Loi Olliver of 1864 and the Prussian Trade Act (Preußische Gewerbeordnung) of 1869.

particular industrial relation system, which not seldom the very exercise of the right in question has contributed to shape.

In the current European context it is possible to identify four main types of legal basis for collective action<sup>3</sup>: national constitution, the most common one, legislation and case law, often specifying and/or complementing the constitutional provisions and, more rarely, collective agreements<sup>4</sup>.

While some common regulatory trends have possibly appeared in specific sectors, for instance the strike the public/essential services, the national systems still present extreme differences with regards to virtually all the aspects of the right (or freedom) to strike and the way in which they are practically combined: of particular relevance are the provisions regarding the entitlement to the right itself and the different types of collective action that can be used, but also the procedural requirements for the proclamation of a strike, the possible restrictions<sup>5</sup> to and exclusions from the right to take collective action, the allowed responses by the employer and the potential consequences for the workers deriving both from a legitimate or an unlawful withdrawal of labour.

### 1.1.1 – Three models in comparison: Italy, Germany, United Kingdom

In the drawing of a general background for the evaluation of the *Viking* and *Laval* judicial course, it can be useful to carry out a juxtaposed analysis of three models illustrating the wide differences in the regulation of strike among EU Member States: the Italian system, the German *ultima ratio* model and the “limited” right to strike as defined in British industrial relations are therefore considered: the main focus will be on the titularity of the strike, its legal qualification, and the main possibilities for restrictions for certain categories of workers or sectors of activity.

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<sup>3</sup> Stewart & Bell 2008, p. 5.

<sup>4</sup> The regulation of this field of labour law by the social partners themselves, by means of collective agreements, is a feature highly specific to Denmark, Finland, Sweden and Ireland. See Warneck 2007, p. 8

<sup>5</sup> Such as the widespread peace obligation, prohibiting strikes for the duration of a collective agreement, the respect of dispute settlement procedures (and possibly the obligation to strive for peaceful settlement) before collective action can be taken.

Apart from the legal technicalities and the possibility for comparison, the responses of the systems to the challenges posed by *Viking* and *Laval* are strictly connected with the nature and the technical specificities of the single systems, and therefore to define the main features of the right or freedom to strike in this Country is essential in determining the reasons behind certain developments, in particular for the German case, directly affected by one of the ECJ rulings, and the British judicial evolution in the wake of the European rulings, and the possible criticalities in a system such as the Italian one which is yet untouched by the most evident consequences of the judicial course in object.

### *Italy*

The Sardinian Code, extended to the whole Italian territory after its unification in 1860, gave relevance to the strike as a criminal offense; with the introduction of the Criminal Code of 1889, the strike as non-violent withdrawal of labour ceased to be a crime and came to be considered as a breach of contractual duties, and therefore could imply the dismissal of the worker.

However in 1926, with the inception of the fascist “corporative” framework<sup>6</sup>, strike (included the political and solidarity ones) would be once more criminally repressed<sup>7</sup>, alongside with other actions linked to industrial disputes such as lock-outs, boycott, occupation of undertaking, interruption of public service and sabotage.

With the promulgation of the republican Constitution the strike came to represent one of the cornerstones of the renewed democratic arrangement; already in the drafting stages it appeared clear that the treatment and qualification of strike action should have reflected (and tested) the capacity of the system to assimilate the reality of the world of labour, granting it full expressive capacity. Furthermore, the

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<sup>6</sup> An economic and social doctrine central to the Italian Fascist regime, corporativism was presented as a model providing responses to the limitations of both the capitalist and the communist doctrines by reducing the marginalization of singular interests, and fostering the harmony between classes in a “superior synthesis”. While the 1926 Labour Charter formally provided for trade union freedom, Fascist corporation were associations comprising both employers and employees, not directly formed by their constituency but created by the political power in the context of a state-directed control of the economy: instrumental in reducing the chances for opposition to the regime while rewarding political loyalty, with 1934 their *de facto* dependence from the political power was sanctioned in a law granting the State the right to approve their statutes and budget, to confirm or revoke their officials and, in general, to closely monitor and direct their activity.

<sup>7</sup> Articles 502-508 Criminal Code

concretization of the “social program” that should have been a prominent feature of the Fundamental Law<sup>8</sup>, should have been delegated to the initiative and pressing ability of the workers and of their organizations: capacities that couldn’t be envisioned without the main tool that had historically ensured the effectivity of the claims for socio-economic emancipation of the working class, for which any proposed regulative framework for the exercise of the right to strike was felt as a potential decommission of the right itself, and subordinated the acceptance of the social in the social and political relationships, to the dismissal to self-government of the unfolding of the collective action<sup>9</sup>.

The outcome of the constitutional debate was the fundamental norm for the matter of labour disputes - art. 40 - stating that

“The right to strike shall be exercised in compliance with the law”<sup>10</sup>

The provision can be considered as a “transaction” between the party opposing any interference on the right to strike and those pressing for the direct provision in the Constitution of limitative criteria for the exercise of the right to

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<sup>8</sup> The debated crucial importance of labour and social progress as key features of democracy in the drafting of the Constitution would then find a clear enshrinement in articles 1 (“Italy is a democratic Republic founded on labour”), 3.2 (It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country) and 4 (The Republic recognizes the right of all citizens to work and promotes those conditions which render this right effective), fundamental principles of the Constitution.

<sup>9</sup> Nania 1995, p. 10

<sup>10</sup> “Il diritto di sciopero si esercita nell’ambito delle leggi che lo regolano”, translation by Senato della Repubblica 2007. It should be noted that this “hybrid” solution (see *infra*), for which a more literal translation would read “the right to strike shall be exercised within the laws regulating it”, giving relevance to the possibility a future regulatory option for the right to collective action, intentionally reproduces the wording contained in the Preamble of the contemporary (27 October 1946) French Constitution, where it is stated that “Le droit de grève s’exerce dans le cadre des lois qui le réglementent”. The constitutional recognition of the right to strike in Italy, as also occurring in France and Spain, cannot be dissociated from an historical *momentum* to redraft their Constitutions (lacking in countries such as Belgium and the Netherlands, which favored a legislative reconstruction of the right in question). The recognition of the right to strike constitutes an antithesis set against the preceding era which did not refrain from penalizing collective action, and also transcends the approach defining the right to strike as a factor of disorder (such as the one undertaken in the early German experience by BAG, see *infra*). The ability to take collective action is deemed to be an essential element of a democratic legal order. See Dorssemont in Dorssemont, Jaspers & van Hoek 2007, p. 247

strike<sup>11</sup>, and while delegating the legislator to issue a legal framework for the right to strike, it did not provide for guidelines to be followed in defining the regulation<sup>12</sup>.

Article 40 intended to strike at the root the corporative standpoint suppressing the conflictual dimension of the industrial relations, and elevated the professional interest (theoretically to be exercised even in contrast with the general interest) to the rank of the other fundamental rights whose protection, even if they are structured as individual rights, is considered essential for the existence of the State.

The exercise of the right to strike is therefore directly linked to art. 3.2 of the Constitution, collective action being one of the means granted to workers to remove obstacles which hinder their effective equality and their full participation in the economic, social and political life of the country and furthermore grants effectiveness to the trade union freedom principle stated by art. 39 of the Constitution, acting as a guarantee of the freedom itself.

The focus of the doctrinal debate in the wake of the approval of the Constitution concerned in particular the titularity of the right to strike: among the earliest reconstructions are to be underlined those promoting, with different tones, the idea of a collective titularity of the right in question, subordinating the exercise of the right to strike to a declaration or proclamation, notwithstanding the subjective right to strike pending on the single worker, defining the proclamation of the strike as only available to trade unions and representative association -while the single workers had the right to adhere to a strike that had been called - or referring the power to call a strike only to the trade unions that had signed collective agreements, being the only ones capable of evaluating its opportunity. In the following years, these positions would result minority, while it would regain importance the

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<sup>11</sup>Such as “free and democratic” proclamation, previous conciliatory procedures, maintaining of services essential for the collective living.

<sup>12</sup> However, their persisting non-compliance with the Constitution, created a situation in which any regulatory hypothesis through law brought forward was seen not as reception of the indications by the Fundamental Law, but rather as to further attempt to offset the potential for pressure of the right, or at least to give priority to the containment and limitation of the right to strike instead that to the autonomous management of the process by the social partners. See Nania 1995 and also Treu 2000, underlining how the various reasons for the absence of a regulatory framework are substantially to be ascribed to the opposition by the trade unions, afraid that the regulatory “reins” could have constrained the much yearned right to collective action.

promotion of the individual dimension of the phenomenon, linking the exercise to the right to strike to the abstention from conferring the due performance identified by the individual contract. Progressively, the thesis limiting to the implementation phase the collective value of the right strike found irrevocable room in the doctrinal debate: therefore the right to strike came to be defined as “an individual right with a collective exercise” or as a “unitary act of collective nature”, in which a common aim and an unanimous withdrawal of labour are identified<sup>13</sup>.

It is generally known that a law defining the “framework” in which the Constitutional right to strike would be exercised has never been issued, so much that the observation according to which the Italian trade union law remains still for great part, a “law without norms”<sup>14</sup> holds, to this day, true; therefore, in the absence of a general regulation, the actual features of the right to strike were determined by means of interpretation by the courts, which have not only operated in a “normative” fashion through the elaboration of orientation and principles, but have also governed the evolutions of the industrial conflict.

While the prominent positioning of the right to strike would mean that the State should have not only avoided to restrict the recourse to collective action, but to promote its use, the Italian legal framework still provided for various prohibitions deriving from the Fascist criminal code, relating in particular to political and solidarity strikes which, furthermore, were not as clearly linked with the equality principle as the “economic strike” directed at improving the working conditions or raising the wages<sup>15</sup>.

The Constitutional Court has, however, recognized the principle of political strikes, declaring the illegitimacy of article 503-504 of the criminal code because

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<sup>13</sup> The debate on the titularity of the right to strike will regain pace with the emergence of the issues relating to the regulation of the strike in the essential public services (see *infra*): article 2 of the law 146/90, in fact, by imposing a written declarative act, and a series of procedural obligations and possible sanctions for the collective subject calling the action, has been seen as configuring the right to strike as a collective right (see also Tiraboschi 2008). This reconstruction, however, does not necessarily revert the traditional thesis and configure the right to strike as a collective right exercised individually: instead, it is possible to juxtapose to the collective titularity an individual right to abstain from work in the occurrence of a strike. Furthermore, the resolution of the interpretative doubts on the titularity of the strike in the essential services does not seem decisive for the good performance of the system. See D’Elia, Perna & Viola 2011, pp. 3-4

<sup>14</sup> “Un diritto senza norme”. See Persiani 1992, p. 13

<sup>15</sup> Decision n. 29/1960



contrasting with articles 39 and 40 of the Constitution<sup>16</sup>. Similarly, article 505 sanctioned solidarity strikes and lock-outs: in relation to this form of strike the Constitutional Court<sup>17</sup>, linked their legitimacy (and consequent immunity from criminal sanctions) to a genuine community of interest between the workers or groups of workers involved by the action<sup>18</sup>, to be defined and verified by the judge of the trial.

The qualification of the recourse to strike action as a right implies the exclusion of the breach of contract, does not expose the worker to disciplinary liability, provokes what has been defined as a mere suspension of the contractual relationship between employer and worker<sup>19</sup>: on the employers' side, the lock-out is not mentioned, being protected only the workers' right to industrial conflict<sup>20</sup>.

With particular reference to the individual consequences for the exercise of the right to strike, the major evolution is constituted by article 4 of the law n. 604/1966, which declared null and void the dismissal caused by the participation to trade union activities<sup>21</sup>, such as collective action, a protection that was further enlarged with articles 15-16 and in particular, 28 of the Workers Statute of 1970<sup>22</sup>.

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<sup>16</sup> Decision No. 141/1967 and 290/1974

<sup>17</sup> Decision No. 123/1962

<sup>18</sup> Since the right to strike is considered an individual right of the worker (although to be exercised collectively, see *supra*), also secondary strikes can be called by any group of workers, as well as by trade union or company works councils. In an early link with the trans-national dimension analyzed it has also to be noted that solidarity strikes in support of workers abroad are to be considered legitimate on the same basis of the community of interest between the Italian workers and the foreign workers involved by the dispute, and provided that the Italian action is in other respects lawful (Cass., Sez. Lav. 3rd of October 1979, no. 5053). See also Warneck 2007, p. 43

<sup>19</sup> While the suspension operates without doubt, on the workers' side, with regards to the remuneration, a point on which a judicial agreement is not still met is the possibility for the employer to reduce the additional installments (such as the so-called "tredicesima", retirement pay, or holidays) in proportion to the workdays missed by the employee in occasion of a collective action.

<sup>20</sup> Titularity of the right to strike is granted to dependent employees in both the private and public sector. The withdrawal of labour by "autonomous" workers gave origin to contrasting interpretations: some judicial courses have considered the one to strike as a right exclusively linked to the employment relationship, others have ruled in favor of the protection of the interests of workers that present a certain degree of autonomy in their contractual situation, but are still working at the dependence of an employer, such as workers/partners in social co-operatives, business agents, insurance salesmen, etc. Naturally, it cannot be considered strike the abstention from work of the self-employed.

<sup>21</sup> As well as dismissal caused, "whatever the reason given by the employer", by reasons of political orientation, religious faith or trade union membership. "Il licenziamento determinato da ragioni di credo politico o fede religiosa, dell'appartenenza ad un sindacato e dalla partecipazione ad attività sindacabili è nullo, indipendentemente dalla motivazione adottata".

<sup>22</sup> Statuto dei Lavoratori, Legge no. 300 of the 20th May 1970

This comprehensive normative instrument did not specifically address the protection and regulation of the right to strike; however, in the framework of the rights granted to the worker in the workplace and during the employment relationship, the law guaranteed the enforcement of the trade union freedom and activity rights through art. 28, a norm that sanctions any kind of anti-trade union activity<sup>23</sup> by the employer, included the hindering of the exercise of the right to strike and/or any retaliatory behaviour against those who legitimately exercised such a right.

As the jurisprudence worked out the actual content of the constitutional provision on the right to strike, a detailed regulation on the legitimate exercise of the right emerged. A strike, therefore, must protect the direct and legitimate common interests of the participants, be aimed at the conclusion of a collective agreement and cannot violate the rights and interests of others, such as private property rights or the right to work.

The employers' right to profit from its economic activity has been therefore deemed incapable of overruling the more fundamental demands for better working conditions coming from the workers' side, that justify the damage to production.

While art. 41 of the Constitution protects the freedom of economic undertaking, it has to be interpreted, along with art. 4 of the Constitution as defending the employer's core right to economic initiative, that is its productivity, from an irreparable prejudice: to be kept safe from negative consequences are therefore the productive capability of the undertaking and the consequent employer's ability to keep on carrying out its economic initiative<sup>24</sup>.

A collective action has to be decided upon freely and voluntarily by the employees as a group, acting on their own behalf or through a trade union or a works

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<sup>23</sup>The debate on the art. 28 SL obviously escapes the scope of the current analysis, therefore it will suffice to clarify its main features: the anti-union activity is not analytically defined, while its ability to prejudice the trade union rights (therefore even if the activity has ceased but continue to produce its effects), and the intentionality of the conduct (which may include juridical acts, or factual behaviors) are evaluated. The subjects legitimated to take legal action against the employer are "the local bodies of the concerned national trade unions": therefore, the single workers (directly or indirectly) involved and the trade unions which are not representative at national level are excluded from entitlement to action ex art. 28. It also has to be underlined that with Decree n. 165/2001 the provisions of the Workers' Statute were extended to the public employees.

<sup>24</sup> Decision n. 711/1980. The damage to the production, therefore, remains covered by the legitimate exercise of the right to strike. In several undertakings working nonstop, on the basis of agreements between trade union and employers, a minimum staff has to keep on working in case of strike, in order to allow the damage to the production deriving from the slowdown of the productive cycle, but to avoid any damage to the productivity (and the consequent liability for damages).

council, and does not need any previous communication to the employer, except the case in which a suspension of work could cause damages to people and plant structures and equipments<sup>25</sup>: wildcat strikes<sup>26</sup> are therefore completely legitimate.

The recognition of the right to strike implies also the recognition of all those behaviors instrumental in promoting the adhesion to the action to all the components of the group, association or trade union involved by the collective action: such conducts can include, for instance, advertising and canvassing, promoting demonstrations also on the employers' premises.

The residual hypothesis of criminal relevance of the strike concern a strike aimed at subverting the constitutional framework, and a political strike that would convert itself in an instrument capable of preventing or hindering the free exercise of rights and powers through which the popular sovereignty is directly or indirectly expressed<sup>27</sup>.

The legitimacy of the articulated strike<sup>28</sup> is generally recognized, although only for the workers of the private sector, the jurisprudence until 1980 ruled against the "checkerboard" and start-and-stop strikes<sup>29</sup>, used to produce the maximum damage to the employee and the minimum wage loss for striking workers in chain productions where the work of the various groups of employees was interdependent in the productive organization.

While the legitimacies of such collective action has been ultimately determined by the Italian Supreme Court<sup>30</sup>, the predominant judicial orientation admits the possibility for the employer to suspend the work (and the remuneration) in those division where the strike is not occurring but that are impeded in their functioning.

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<sup>25</sup> Traffic air controllers were bound by notice regulation even before the law regulating the strike in the essential public services sector (see *infra* in this paragraph) by L. n. 242/1980.

<sup>26</sup> Defined in the Italian context by the milder expression "spontaneous strike".

<sup>27</sup> Constitutional Court, Decision n. 290/1974

<sup>28</sup> An abstention from work during less than a working day or spread over the course of a working week.

<sup>29</sup> The first of these two typologies of collective action is characterized by short-timed suspensions of work in single departments or floors of the undertaking, which can cause the stoppage of the whole production. Similarly, the start-and-stop hinders especially the more complex productive processes through a series of frequent and very short stoppages.

<sup>30</sup> With the aforementioned Decision 711/1980

Lastly, picketing is usually considered a typical form of the exercise of the right to strike, and therefore a legitimate act, as long as it remains a peaceful demonstration aimed only at persuading the other workers to participate to the strike; any kind of psychological constriction or physical violence are prohibited.

As noted before, the jurisprudence has indicated as the only substantial boundary to the right to strike (trespassing which the entire system is called to intervene) its jeopardizing or breaching other rights protected at constitutional level: therefore the only restrictions to the right to strike are those deriving from its balancing with other constitutionally guaranteed interests; furthermore, through this perspective the jurisprudence provided a fundamental contribution to the juridical culture, paving the way for the emergence of the relevance and need for protection of the interests by third parties extraneous to the industrial conflict<sup>31</sup>.

When the damaged interest is not simply the employers' one to the profit, but the one of the users of the interrupted activities and services, the need for reconciliation and balancing between constitutionally protected rights is much more sensed, even if the judicial substitute regulatory and governing activity is not appropriate to predetermine rules controlling the right to strike, nor can make use of specific and adequate sanctions, since the judicial evaluation of the modalities of the exercise of the right to strike does not take place *ex ante*, but only intervenes *ex post*, and solely in order to define the legitimacy of the passed action.

The absence of a law in the field, which delegated for long time the concrete regulation of several aspects of the exercise of the right to strike to trade unions and judicial intervention, and has been only recently and partly supplemented by actual regulation for the strike in the field of essential public services, with a view of balancing the protection of the right to strike and that of other rights of

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<sup>31</sup> Persiani 1992, p. 16

Constitutional stature which may be jeopardized by the exercise of the right of strike<sup>32</sup>.

The regulatory option chosen aims at regulating the strike through a complex procedure through a network made up by a wide plurality of sources, both of a public and social-private nature<sup>33</sup>. The Act itself sets out some basic rules, delegating the actual management of the dispute to the social partners and an *ad hoc* Committee, and proceeds to identify the rights protected<sup>34</sup>, and the services to which the procedure applies, by using a teleological standard, qualifying as essential those services, publicly or privately delivered, aimed at guaranteeing the implementation fundamental rights<sup>35</sup>; the wide-ranging list includes, but is not limited to sectors such as: health, public hygiene, civil protection, urban waste management, energy and basic necessities supply, administration of justice, transportation, public education, mail service and public TV and radio

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<sup>32</sup> Law n. 146/1990, amended by law n. 83/2000, “Norms on the exercise of the right to strike in the essential public services and on the safeguarding of the human rights protected by the Constitution. Establishment of the Commission guaranteeing the implementation of the law”. Before this item the matter was regulated by articles 330 and 333 of the criminal code defining the offenses of individual and collective neglect of public service. A specific discipline limiting the right to strike had furthermore been introduced for certain categories of workers in some sectors, such as the employees working in nuclear plants (Decree no. 185/1964). traffic air controllers (with the aforementioned Law no. 242/1980) and policemen, for which the right to strike was banned by Law No. 121 of 1981 that, in order to offset such restriction, also provided for conciliatory bodies and procedures. Traditional trade union freedoms, included the right to strike, are generally denied to military personnel (which can associate in representative bodies), in order no the jeopardize national safety or the physical welfare and property of citizens.

<sup>33</sup> See Treu 1994, p. 461. The subtended *ratio* to this peculiar public policy choice is connected to the intention of allowing the largest possible participation by the actors of the dispute in the setting up of the rules to be respected for the cases of collective action in the sector considered. The social partners, in fact, are involved in every step of the regulatory procedure for the matter at hand, in order to ensure, through a high degree of consensus about the actual norms applied to the individual disputes, effectiveness to a law intervening in such a “sensitive” field. The participation of trade unions and employers’ associations to the regulation of the right to strike dates at the drafting stages of law 146/90, which the aforementioned organizations have contributed to define (See Loffredo 2005, p. 567)

<sup>34</sup>The fundamental rights protected by the act in question are: the right to life, health, freedom, security, freedom of movement, social prevention and assistance, education and communication. It must be noted that the use of a wording associated with fundamental human rights (“diritti della persona”) excludes the possibility that the rights with an economic-proprietary content can be considered or utilized as limitations for the right to strike: the balancing does not concern the interests of the employers See Persiani 1992, p. 18.

<sup>35</sup> It has been noted (*ibid.*) that the “essentiality” of the service has to be referred to the interests of the users and to the degree of prejudice that can derive to them by the suspension or reduction of the service.

broadcasting<sup>36</sup>.

The 1990 text did not affect the abstentions by autonomous workers, self-employed and small entrepreneurs, able to influence the functionality of essential public services; this relevant juridical gap was filled with Law no. 83/2000. The scope of application of the regulation was therefore extended to all the forms of withdrawal of labour, regardless of the dependent or autonomous nature of the work: further expansions of the scope of application, this time with reference to the object of the regulation, came to include in the notion of essential public services the activities instrumental to the effective enjoyment of the core fundamental rights protected by the law, because of their objective link with the delivering of the final service<sup>37</sup>, that has to be evaluated on the basis of the incidence of the exercise of the right to strike (taking into account its actual modalities and its duration) on the functioning of the service and on the delivering of the indispensable levels<sup>38</sup>.

The initial framework of the structure provided for a duty for the workers to provide the employer<sup>39</sup> an advance notice of 10 days; such a notice has to be in written form and has to provide information regarding the duration and the terms of the strike, and the guarantee of a minimum of presence in order not to interrupt the supply of an essential service.

The law provides for intervals between the proclamation of subsequent strikes, in order to offset the chance that strikes called by different trade unions can

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<sup>36</sup>The reason for the illustrative character of the list can be found in the fact that “essentiality” of the services is an ever-changing concept that has to be adapted to the evolution of social structures and needs. In any case, integrations of the list should not take place necessarily by intervention of the legislator; instead, they should be carried out by also by the social partners, on the basis of potential indications coming from the competent Authority. See Persiani 1992, p. 19.

<sup>37</sup> Ferrari 2005, p. 19

<sup>38</sup>The instrumentality of the service (or at least the objective identifying criteria) should gain relevance only if provided for by a collective agreement or a deliberation by the Committee evaluating the suitability of the indispensable levels of services, or regulating temporarily. It has to be considered also if the instrumental services must be identified by an *ad hoc* agreement or can be determined in the agreement regulating the main service. Lastly, the context in which the instrumental services are carried out must be considered: a situation in which the instrumental services are managed by the same undertaking delivering the final services presents far less complexities than a more dynamic organizative context, characterized by outsourcing procedures, where segments of the essential and instrumental services are provided for by contractors. Santoro Passarelli 2005, p. 10

<sup>39</sup> While the employer is the formal recipient of the document, the ultimate aim of the notice is to provide the users with the necessary information concerning the strike; the duty of communication to the users resides on the employer.

compromise the continuous provision of the essential public service; furthermore, with the evident intent to reduce the conflictuality and the recourse to collective action, the law was amended integrating a provision binding the partners to include in the collective agreements mandatory conciliatory procedures to be carried out before the calling of a strike<sup>40</sup>, which can also be replaced by the intervention of the Minister of Labour, the Prefect's offices and the local administration, whether the dispute has national, provincial or local reach.

According to the same Act, the indispensable levels of services<sup>41</sup> to be performed by the workers, whose delivering produces the effective balancing between the exercise of the right to strike and the other constitutional rights, have to be established through collective agreements, because only the latter can grant effective room and relevance to the technical experience concerning the peculiarities of the services and the sectors involved by the dispute needed to identify the essential levels of services<sup>42</sup>.

The individuation of the essential services and their actual delivering constitute the main factor from which depends the effectiveness of the protection of the constitutional rights of the users: therefore, the duty to provide the essential services falls without doubt on the workers, bound in performing their work notwithstanding the dispute, but also on the employers, which have to exercise their organizative powers and prepare what is needed for the effective provision of the essential services.

In order to evaluate the suitability of the balancing measures provided for by the collective agreements, the Strike Regulatory Authority was established: this body is composed by 9 members chosen by the Speakers of the Chambers of Parliament and appointed by the President of the Republic, and carries out its

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<sup>40</sup> Effectively defining the strike as a means last resort in the sector of the essential public services, and introducing in the Italian legal system the concept of *ultima ratio* through the imposition of the exhaustion of the conciliatory procedures as requisite for a legitimate exercise of the right to strike, the mandatory inclusion in the collective agreements, and their binding force for the parties, once established. See *amplius* Ales 2003

<sup>41</sup> It has to be underlined how the notion of "indispensable" service does not correspond to the one of "minimum" service; the latter, in fact, does not necessarily guarantee the effective enjoyment of the rights involved, providing only a "limited" protection, and therefore, in the perspective of the aims of the regulation, an absence of protection. The level of services for the case of strikes can obviously present reduced performances or temporary stoppages, but cannot compromise the full enjoyment of the rights of the users.

<sup>42</sup> The suitability of the provisions deriving from the agreement is then the object of an evaluation by the competent Committee, see *infra*.

attribution in an impartial way, executing a monitoring role on the entire legal framework but also of institutional support to the regulation by consent of the industrial conflict<sup>43</sup>, deliberating on the conformity to the legal standards set out in the law and on the suitability to serve the purpose of the agreements in a para-normative role.

The involvement in the regulation of the strike of the parties involved in the dispute is, however, derogated in at least two important hypothesis: *in primis* for the case of autonomous workers, when the indispensable services are defined by self-regulation codes, and therefore the negotiating counter-party is absent, the Authority has to provide its confirmatory opinion<sup>44</sup>.

Perhaps more importantly, the Commission intervenes also when the parties were not able to conclude an agreement, or in the aftermath of a declaration of unsuitability by the same Commission: while it is duty of the parties to resume the negotiations in order to reach a new agreement, the Commission, in order to avoid a temporary regulatory void, can provide a proposal of regulation on which the parties have to give their opinion in 15 days, and subsequently provide a temporary regulation identifying the indispensable services, which will remain into force until the approval of the new collective agreement in the meantime negotiated and reached.

The enforcing role of the Commission is embodied in the possibility for this authority to evaluate the behavior of the parties in conflict according to the established rules, and to preemptively intervene communicating, in a persuasive rather than repressive role, potential violations of the rules for the case of the calling of strikes, notwithstanding the reinforcement of the centrality of the sanctionatory framework operated by the l. 83/2000<sup>45</sup>.

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<sup>43</sup>The collective agreements on the essential services could not by themselves regulate a phenomenon involving subjects extraneous to their stipulation, if the law had not explicitly assigned them this specific function: the further reinforcement of the competences of the Authority carried out with the 2000 amendments, however, means that the confirmatory acts by the Commission represent the true legal sources for the regulation of the strike in the essential public services, notwithstanding the peculiar position of the Authority which does not represent any of the parties involved by the dispute, not even the users (Loffredo 2004). The legal value of the collective agreements is the one of indirect source of individuation of the essential services and only in the case in which the typical procedure has been successfully carried out with the issuing of an administrative act, therefore they have no self-standing efficacy as the regulatory source of the strike, even if they are a very important part of a complex legal instrument.

<sup>44</sup> Art. 2.1 of the law 83/2000, introducing art. 2bis in law 146/1990.

<sup>45</sup> See Loffredo 2004, p. 186



For the case of verified non-compliance, at the end of a para-judicial procedure, the Commission can issue sanctions against the striking workers<sup>46</sup>, their organizations<sup>47</sup>, the managers or the legal representatives of the service providers<sup>48</sup>; however the sanctioning role of the Commission in decreasing stage, in particular because of the high level of compliance to the agreements reached by the parties and to the communications and temporary regulations by the Authority.

### *Germany*

Strikes, lock-outs and other possible forms of collective action are not explicitly guaranteed as a “right” or a “fundamental right” in the wording of the German *Grundgesetz*<sup>49</sup>, which in turn protects collective bargaining as the legal heart of German industrial relations<sup>50</sup>; recognition and protection of the right to strike are therefore to be derived from the interpretation of the constitutional freedom of association (Art. 9 §3 GG), fully recognized<sup>51</sup> as the leading principle of collective

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<sup>46</sup> The sanctions provided for workers are effectively carried out by the employer. Dismissal, however, is not contemplated.

<sup>47</sup> For the trade unions the sanctions provided for by law 146/1990 are: the suspension of leave periods for trade union representatives, the loss of the trade union contributions and the exclusion from negotiations.

<sup>48</sup> On the employers’/provider’s side the sanctions are mainly of economic nature.

<sup>49</sup> See Däubler in Dorssemont, Jaspers & van Hoek 2007, p. 138

<sup>50</sup> It guarantees the “right to form associations to safeguard and improve working and economic conditions.” See also Kocher 2008, p. 389

<sup>51</sup> It has to be noted that the recognition of this freedom that went through an evolution similar to those of other European countries: in a initial period, until 1869, freedom of association was not legally recognized but instead subject to criminal sanctions. Between 1869 and 1918 freedom of association it was semi-legalized, meaning that it was recognized in principle but at the same time prevented from being used effectively. Since the inception of the first German republic, freedom of association has been therefore recognized, with the major exception of the Nazi period, when trade unions and employers’ associations were dissolved and recombined in the so-called German Labour Front (*Deutsche Arbeitsfront*), based on the idea of harmony between all actors on the industrial scene.

labour law<sup>52</sup>.

Therefore, even if in Germany virtually no statutory provisions refer to industrial action, this matter is nevertheless regulated in detail, since the legal regulation of industrial action is fundamental for the structure and functioning of the German system of collective bargaining<sup>53</sup>; however, because of the mentioned absence of a constitutional recognition of the right to strike, the complex of German labour dispute regulations has almost entirely materialized on the basis of case law of the Federal Labour Court (*Bundesarbeitsgericht* - BAG) and of the Constitutional Court (*Bundesverfassungsgericht* - BVerfG), which have been characterized by an high degree of discretionary power exercised by the judges<sup>54</sup>.

The basic leading principles elaborated by the jurisprudence on the right to

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<sup>52</sup>The analysis of the German situation presents the major complexity of its partition as a fundamental issue of its post-war developments, evidently also concerning labour law. In fact, while the Nazi structures regarding collective labour law were abolished, and trade unions were reorganized as “unified” organizations, the way in which they were shaped greatly differed in the zones under Allied or Soviet control and, since 1949, in the Federal Republic of Germany and the German Democratic Republic. In particular, trade unions in the GDR were not primarily considered associations to represent employees’ interest versus employers, but their main task was to guarantee the performance of the economic plan and thereby to execute the Socialist Party’s and the government’s intentions, to which they were closely linked, by means of an ideological community of interests; employers’ association did not exist. Similarly, in the FRG the possibility for collective bargaining and industrial action was re-established, while in the GDR so-called collective agreements were a sort of additional legislation linked to the economic planning by party and government, rather than to the composition of collective conflicts and the setting of minimum conditions for workers.

With specific reference to collective action, since the idea of conflict between collective actors was eliminated, mechanisms of conflict resolution never were developed; strikes and lock-outs were considered to be incompatible with such a system. With the 1990 Unification, the GDR program for the development of a structure of social standards “by way of a mutual reform of both systems of social protection in the two German states, integrating their positive elements” met strong opposition in the FRG, interested in transferring its system to the territory of the GDR. Apart from few temporary exceptions, all law of the FRG – including individual labour law – was, in fact, extended to the former GDR; the socialist trade unions were dissolved and the FRG organizations – including those representing the employers’ side - extended their scope of activity, effectively exporting the West German legal and institutional framework for labour law and industrial relations, which is therefore the only one analyzed with regards to the issues of freedom of association and strike. See *amplius* Weiss and Schmidt 2008

<sup>53</sup> Warneck 2007, p. 32

<sup>54</sup> One important legislative evolution on the matters regards the so-called Emergency Acts (*Notstandsgesetze*) of 1968. Article 9 Para. 3 GG has been in fact amended to include a provision according to which certain emergency measures may not be directed against industrial action (*Arbeitskämpfe*) undertaken to safeguard and to improve working and economic conditions. This amendment, while not defining the legal boundaries of industrial action, grants industrial action constitutional protection against measures of emergency. Therefore, industrial action must be considered to be legal, at least to a certain extent and when called with a certain objective. See Weiss and Schmidt 2008

strike strictly connects the latter with collective bargaining<sup>55</sup>; industrial action has to be understood as being exclusively complementary to collective bargaining, and therefore is allowed in so far as its purpose is the achievement of a collective agreement, and the achievement of aims that can be regulated in a collective agreement<sup>56</sup>.

A major implication of the proposed framework is that industrial action may legally only be carried out by parties competent to conclude a collective agreement (*i.e.*, for the employees' side, trade unions); therefore, the individual or non-unionized worker, while individually entitled to the decision to engage in the conflict, can only exercise the right to strike in a collective context, by adhering to a strike legitimately called by a trade union, which can be considered the only subject effectively granted with a full entitlement with reference to the right in question<sup>57</sup>.

The Federal Labour Court has established further requirements in order for a strike to be legal: the "social adequacy" principle was substituted in 1971 by proportionality<sup>58</sup> as the governing principle for strike law, according to which the use of industrial action shall be suitable and necessary to reach the intended purpose,

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<sup>55</sup>A strike is defined as the jointly planned and executed stoppage of work by a substantial number of employees in an industry or plant, with the aim of achieving settlement of a collective labour dispute. Such action is the means of coercion necessary to the conclusion of a collective agreement; if it were not available, the collective bargaining autonomy provided under constitutional law would be meaningless. The right to bargain collectively presupposes that the social partners can establish and maintain a balance of bargaining power (see Kraemer 2009, p 3). The groundbreaking ruling on the matter was the one by the BAG on the 28 of January 1955. Grand Senate, 28 January 1955 – GS 1/54.

<sup>56</sup> The BAG described the strike as having an auxiliary function for collective bargaining; Collective action serves to guarantee the "material correctness" of collective agreements.

<sup>57</sup> A collective exercise of rights is not to be considered as a "collective action", and the potential pressure of this kind of behavior on an employee does not emerge as a legally relevant aspect. Important examples of such a situation are: the case of an employer not fulfilling its contractual duties, where the employees have the right to refuse performance until counter-performance is effected; the veto power exercised by an employee on the transfer of his labour contract to another employer, on the basis of the Acquired Rights Directive (77/187/EEC), if not expressed collectively to improve working condition or hinder (or make impossible) the transfer. More importantly, and with a closer reference to the matters in question, on the basis of the conception that there can be no obligation to break solidarity, employees called by an employer (directly in substitution or through a contract with another undertaking) to take up the concrete tasks of striking workers (the case is the one of *Direkte Streikarbeit*) can refuse to perform the work of strikers. It has to be noted that this last principle was accepted by BAG even in cases where the strike as such was unlawful. See Däubler in Dorssemont, Jaspers & van Hoek, 2007, p. 137-141

<sup>58</sup> BAG, Grand Senate, 21 April 1971 – GS 1/68. The previously used *Sozialadaequanz* referred to what is generally accepted as legal in the society.

and may not be inappropriate to reach the intended purpose<sup>59</sup>.

Notwithstanding its apparent vagueness, has been used to determine specific prerequisites for the industrial action and in particular the respect of peace obligations<sup>60</sup>, the fairness of the action, the use of the strike as a mean of last resort<sup>61</sup>, and the carrying out of a ballot between the union members<sup>62</sup>.

With reference to the other types of collective action that can be undertaken, political strikes, putting pressure on the state administration or on the legislator are regarded as unlawful<sup>63</sup>: also solidarity strikes are, generally speaking, unlawful, safe for very exceptional cases and circumstances, under which they can be legitimized.

In order to be legitimately carried out a secondary action has to be lawful with reference to the general criteria of labour law and must refer to a lawful primary action; furthermore it has to benefit the workers supported rather than aiming at promoting the participants' own interests<sup>64</sup>, also by affecting a party in the primary dispute.

The guiding principle remains, however, the one of proportionality which implies that the strike has to be suitable in supporting the main action, that it has to be necessary for the resolution of the primary dispute and that the fundamental rights of the trade unions have to be balanced with the equally constitutional

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<sup>59</sup> See *infra* par. 3.1.2 for a more detailed comparison with the indication deriving from the ECJ jurisprudence on the matter.

<sup>60</sup> In many sectors, trade unions and employer organizations have concluded a joint dispute resolution agreement. Such resolution agreements usually define when the peace obligation expires and therefore when a trade union can call an official strike. Kraemer 2009, p. 7

<sup>61</sup> A major evolution on the matter is constituted by the legalization of the so-called "warning strikes", conducted for short periods of times during ongoing negotiations. Also in this case see *infra* par. 3.1.2 with regards to the possible interactions with the ECJ judicial course.

<sup>62</sup> In practical terms, the importance of the ballot has very much diminished from a legal standpoint; however, the reasons for the continuing use and regulation of this instrument by the unions can be found in its efficiency in limiting the strike frequency.

<sup>63</sup> The opinions on the matter vary from considering the political strike unlawful simply because not connected to the achievement of a collective agreement or the resolution of a dispute to regarding the political action as trying to put an undue pressure on the legislators, and therefore unconstitutional; recently, divergent opinions have emerged, particularly admitting (only to a certain extent) political strikes on the basis that collective bargaining is only one mechanism among others, which is becoming less important compared to state regulation on employment, working and economic conditions. *Ibid.*

<sup>64</sup> A condition which would violate the respect of peace obligations, which represents, as previously mentioned, one of the main restrictions to the right to strike. Industrial action, in fact, is prohibited over issues which are subject of an agreement in force. On the other hand, issues not dealt with in the agreement, or concerning which the collectively agreed provisions have expired, may be the subject of action.

employer's rights.

Further conditions that have to be taken into account and were found by the Federal Labour Court as making secondary action lawful are that the employer of the secondary dispute has not remained neutral in relation to the primary dispute or that the employers of the primary and secondary disputes constitute an economic entity<sup>65</sup>; solidarity strike, therefore, remains illegal if there is no link between the strikers and the main conflict.

The proportionality principle should also serve in order to define the lawfulness of industrial action in essential services: notwithstanding a general consensus on the absence of a prohibition and on some possible regulatory aspects relating to this type of strike, the interpretative efforts of the Courts on the matter have been unable to provide for specific criteria to be applied in individual cases, only clarifying that emergency services for a variety of sectors of public interest<sup>66</sup> may not be defined and shaped by the employer alone, but in cooperation with trade unions.

On the employers' side, the German framework on industrial action developed by courts presented the so-called "equality of arms" approach: trade unions and employers' associations should be treated equally, and should consequently have equally powerful means in order to defend their interests in the case of industrial action<sup>67</sup>: furthermore, until 1971, lock-outs were intended to provoke a termination of the employment contract, rather than a simple suspension as for the case of strike.

The formalistic reading of the equal treatment of strikes and lock-outs was then abandoned in favor a balancing of bargaining power, recognizing the strike as an indispensable lever in collective bargaining<sup>68</sup>, and strongly limiting the legal

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<sup>65</sup> As for the case of company groups, or highly close cooperation with subcontractors. See Dec. of 19 June 2007 - 1 AZR 396/06, in which the the BAG found that the solidarity strike was not unlawful because both employees - one publishing house, one printing company - belonged to the same group. The argument behind this is that the employer of the secondary dispute shall have the possibility to influence the employer of the primary dispute. See also Warneck 2007, p. 32

<sup>66</sup> Such as medical services, police, fire, military, water, power etc. This requirement was also extended to the operation of the Parliament, Government and the Federal Constitutional Court.

<sup>67</sup> BAG, Grand Senate, 28 January 1955 – GS 1/54.

<sup>68</sup> Without the right to strike at trade union's disposal, collective bargaining would simply result in "collective begging". See Decision of 10 June 1980 – 1 AZR 168/79 and 1 AZR 822/79.

scope of lock-outs which remain permissible inside the limits of a complex framework established by the Court and based on to the proportion of employees covered by collective agreements and affected by strikes in a determined region and the possible negative consequences on competition.

As previously mentioned, during strikes and lock-out the employment contract of the workers legally participating in the strike is considered to be suspended, with the consequent loss of their right to remuneration for the duration of the strike or lock-out respectively, while the employment relationship and the consequent duties continues. The Workers which do not take part in a strike and who continue to work obviously maintain their right to remuneration; however, for the hypothesis of the impossibility for them to work on account of the strike, they can be no longer paid.

One of the predominant features of the German system with reference to the effects of strikes and lock-out certainly is constituted by the payment by the trade unions of strike compensation to the union members, and in certain cases also to non-union members. The actual amount of strike pay received is generally governed by the level of union subscription paid and the duration of union membership; a family supplement is often granted, while the basis of strike pay usually amounts to two-thirds of net wages.

The qualification of a strike as legal or illegal is a focal point in the industrial dispute regulatory framework, since the potential consequences are extremely far-reaching, both for workers and for trade unions; in fact, if the employer has dismissed an employee for participation in a legal strike, the employee may file an action for reinstatement on the job and for subsequent payment for the time between dismissal and reinstatement.

On the other hand, since the participation to an illegal strike constitutes a contravention of the employment contract, the worker may have to pay damages and/or may be exposed to dismissal by the employer. The possibility of sanctions is an effective threat in the German system, even if the dismissal is almost certainly excluded for the case of participation to strike which had been unlawfully called by a union and even in the case of an unofficial action, at least for those only

participating to the latter, without holding any specific position<sup>69</sup>.

Provided that a strike is illegal, trade unions can face unlimited liability for the damages caused by the collective action, even for the case in which the damages were caused by local branches or organizers, through excessive activities not covered by the right to strike; in some cases agreement are reached between trade unions and employers' associations in order to provide limited liability for damages resulting from unlawful actions.

### *United Kingdom*

The British system is characterized by the absence of a written constitution, therefore no positive fundamental right to strike can be found in the legal framework, since the law regulating workers' collective industrial action was initially shaped by common law perspectives, under which it was typically unlawful.

Furthermore, under UK law, the provisions which allow for the organization of industrial action and participation in such action are framed in terms of "statutory immunities" from the tortious and criminal liability that would otherwise attach<sup>70</sup>: the organizers of and participants in industrial action can therefore be made liable for

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<sup>69</sup> BAG, 14 February 1978 - 1 AZR 103/76. The employee liability is based on the understanding of the unlawful nature of the strike called by the trade union. While the unlawful nature of the action is evident for the case of non-union strikes, the judicial interpretation limits liability on those employees which are considered to have held an organizing and "representative" role in the strike, against which the employer will take legal action.

<sup>70</sup>As highlighted by Dukes 2010, p. 82, the wording of this peculiar legislation came to be considered as reflecting the fact that industrial action is an interference with the employer's 'natural' right to manage. As Lord Denning famously stated in 1979, "Parliament granted immunities to the leaders of trade unions, it did not give them any rights. It did not give them the right to break the law or to do wrong by inducing people to break contracts. It only gave them immunity if they did". The immunities provided for by the Trade Disputes Act 1906 did not survive the new liabilities in tort created by the courts beginning in the 1950s. Attempts to combat these developments were made by extension of immunities in the Trade Union and Labour Relations Act 1974. But these immunities were reduced by legislation of 1982 which repealed some of them and their scope was further restricted by narrowing the meaning of "trade dispute". At the other end of the doctrinal spectrum are the views maintaining a substantial equivalence between the negative protection afforded by the statutory immunities and the positive protection of the right to strike found in other jurisdictions, relating the different kind of protection for the right to strike to an issue of legal drafting techniques. It may however be argued against this opinion that the limited extent to which the right to strike has been recognised and supported in the UK experience by unnecessarily convoluted legislation and intolerant court practice does not seem to confirm what seem an overly optimistic view: the right to strike in the UK is without doubt subject to very relevant restraints, such as the unions' liability for economic torts of inducing breach of contract, or trade or business intimidation and conspiracy, the Government emergency powers (see *infra* with reference to the essential services) and the residual criminal liability, which is mainly concerned with conspiracy and control of picketing.

damages<sup>71</sup> if the action is not protected by statutory immunities. Industrial action will also amount to a breach of the employment contract or of the contract for services, allowing the employer to dismiss the worker once the period of statutory protection has expired<sup>72</sup>.

Some circumscribed definitions for collective action can be determined from the Trade Union and Labour Relation (Consolidation) Act of 1992 (TULRCA), defining a strike as “any concerted stoppage of work”<sup>73</sup> or from the Employment Rights Act 1996, stating that strike means the cessation of work by a body of employed persons acting in combination, or a concerted refusal, or a refusal under a common understanding, of any number of employed persons to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer or any employed person or body of employed persons to accept or not to accept terms or conditions of or affecting employment<sup>74</sup>.

The main legal issue arising in the course of a strike or other industrial action relates to trade union liability: the general principles<sup>75</sup> regulating collective action in the British system is that the statutory immunities will apply, and trade union or individuals will not be liable in tort for industrial action taken “in contemplation or

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<sup>71</sup> By employers and others (such as customers and suppliers) who are damager or likely to be damaged. See BIS 2010b, p. 6

<sup>72</sup> The existence of a right to strike in this country has sometimes been disputed, and indeed even a superficial analysis of these very basic features already may induce to define the protection accorded to collective action as a freedom, rather than a right to strike. Illuminating in order to comprehend the legal positioning of the strike in relation with other workers’ rights and freedoms is the statement that must be contained in each voting paper: “If you take part in a strike or other industrial action, you may be in breach of your contract of employment. However, if you are dismissed for taking part in a strike or other industrial action which is called officially and is otherwise lawful, the dismissal will be unfair if it takes place fewer than twelve weeks after you started taking part in the action, and depending on the circumstances may be unfair if it takes place later.” That statement must not be qualified or commented upon by anything else appearing on the voting paper. See BIS 2010a, p. 13

<sup>73</sup> TULRCA 1992, s. 246

<sup>74</sup> ERA 1996, s. 235.5

<sup>75</sup> The leading principles on the matter were established in a series of rulings already in the late years of the XIX Century. Since 1906 the Parliament has intervened with legislation granting immunity to trade unions and their offices for otherwise tortious conducts, in order to ensure that trade union may lawfully engage in industrial action; the current set of rules regarding trade union immunities is to be found in the TULRCA 1992 (as amended). It has to be noted that in 1906 trade unions only were give immunity from liability on tort, therefore proceedings could still be brought against officials: as noted before, the immunity was re-enacted in 1974, but eventually repealed in 1982; this explains why pre-1982 cases are against individuals (generally trade union officials), while post-1982 cases are typically against the union itself. See Ewing in Dorssemont, Jaspers & van Hoek 2007, p. 219



furtherance of a trade dispute”, and provided that certain procedural steps have been taken.

The term “trade dispute”, in relation to which immunity may be granted, has a statutory definition provided by the TULRCA, and relates only to a dispute between the workers and their employer, or between workers, relating wholly or mainly to specific issues at the workplace, and in particular terms & conditions of employment, health & safety issues, engagement or non-engagement, termination or suspension of employment, allocation of employment, disciplinary matters, worker’s membership or non-membership of a trade union, facilities for officials of unions and Recognition of an independent trade union by the employer for the above matters and provision of negotiating facilities<sup>76</sup>.

Any action by a trade union, which does not come within the definition of a trade dispute will be non-protected<sup>77</sup>; the accepted motivation for the collective action tends to be restricted to economic reasons. Therefore political strikes, unconnected with the terms and conditions of employment<sup>78</sup>, have been often struck down by the courts which have considered them as not fulfilling the term of being a trade dispute between an employer and its workers, and therefore not attracting the immunity from tort for the union or the participants.

Similarly, all kinds of secondary industrial action are to be considered non-

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<sup>76</sup> *Mercury Communications Ltd v Scott-Garner* [1984] ICR 74 CA., and also TULRCA 1992, which provides definitions for “trade dispute” in s. 218 (a wide definition which applies for general industrial relations purposes.) and particularly in s. 244 (narrower definition, specifically linked with immunity from civil action for acts done “in contemplation or furtherance of a trade dispute”). Lastly to be considered, for purposes of the Jobseekers Act, is the definition of a trade dispute as “any dispute between employers and employees, or between employees and employees, which is connected with the employment or non-employment or the terms of employment or the conditions of employment of any persons, whether employees in the employment of the employer with whom the dispute arises, or not” (see Jobseeker Act, s. 35) .

<sup>77</sup> For instance, actions intended to promote union closed-shop practices, or to prevent employers using non-union firms as suppliers (TULRCA 1992 s 222 and 224). See BIS 2010a

<sup>78</sup> In the case of *BBC v Hearn*, the Association of Broadcasting Staff (ABS) threatened to prevent the transmission of the FA Cup Final to the rest of the world unless the BBC agreed not to broadcast to South Africa. The BBC sought an injunction against ABS and this was granted by the Court of Appeal (the controversial decision was then endorsed by the House of Lords). The threat was not found as amounting to action in contemplation or furtherance of a trade dispute; it was a politically motivated threat and thus did not fall under the necessary category, but rather was configured as a “coercive influence” by the trade union. *BBC v Hearn* (1977) ICR 686 (CA), see Stewart & Bell 2008 and Ewing in Dorssemont, Jaspers & van Hoek 2007, p. 222

protected industrial action<sup>79</sup>; this would include secondary picketing and inducement to others to break or interfere with their contracts of employment, and interference with an employee's contract of employment where the employer in question is not involved in the dispute.

Strikes organized by either individuals or by non-independent trade unions without the support of a ballot and an endorsement by an independent trade union are also not recognized in the UK as being a protected industrial action<sup>80</sup>; furthermore, a union which fails to repudiate unofficial industrial action will be vicariously liable for damages flowing from the tort committed by the group or individuals<sup>81</sup>, also implying that no action can be undertaken in support of any employee dismissed while taking unofficial industrial action.

There is no guarantee of any minimum public services in the event of a strike under English law. However, there are certain measures in place which make it unlikely for public services to be completely absent: individuals have the right to work through a strike, and this right is protected by law.

In the event of a strike by, for example, an emergency service, the State may intervene using police powers or emergency measure: the Emergency Powers Act 1964 states that the government may use troops for "urgent work of national importance" without emergency regulations<sup>82</sup>.

The procedural requirements relating to the industrial action involve two sets

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<sup>79</sup> Except for lawful picketing, done near the place of work of the striking workers, for the purpose of peacefully obtaining or communicating information or peacefully persuading another person to abstain from working. As an example, striking workers manning a picket line outside their employer's premises may use peaceful means to attempt to persuade, drivers working for a supplier not to deliver goods to their employer. But if they succeed in turning drivers (or use violent or intimidatory tactics), they (or their union) may be sued for damages by the supplier whose commercial and employment contracts have been interfered with (TULRCA 1992, s.224).

<sup>80</sup> Any employees taking part in such unofficial action are likely to lose their right to claim unfair dismissal if dismissed for taking part and may be held personally liable for any losses incurred by the employer.

<sup>81</sup> A committee or any other person, such as a shop steward, will be *prima facie* liable for their action: however, the only way for the union to avoid liability for the actions of its officials is to publicly disavow those actions, through a formal written communication to the victim of the unlawful action and to each member of the group or to the official concerned, stating the repudiation of the action and the withdrawal of support (TULRCA 1992, s. 21.3).

<sup>82</sup> Stewart & Bell 2008, p. 101

of obligations<sup>83</sup>: *in primis*, if a trade union decides to call on its members to take or continue industrial action, there will be no loss of immunity only if the action has the support of the members under a properly-conducted secret ballot<sup>84</sup>: furthermore, the action will not be called unless the union has provided the required notice of official industrial action to employers likely to be affected, in advance<sup>85</sup> and in the aftermath<sup>86</sup> of the ballot.

With specific reference to the ballot, it must be conducted by post, and it must include all the “relevant workers”, that is all the union members who – it is reasonable for the trade union to believe – will be called upon to participate in the action<sup>87</sup>: the planned action must be supported by a majority of those workers in order to be legitimate.

As mentioned, the union must provide the employers of the relevant workers with specified information and notice relating to the ballot and to the pursuant

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<sup>83</sup> The first set of provisions, relating to the obligation to ballot, was introduced in 1984 by Trade Union Act 1984, Part II: Democracy in Trade Unions with the stated aim of strengthening the democratic right of union members not to be called upon to take industrial action without having had the opportunity to vote on whether such action was desirable. The second set, relating to the provision of information and notice was introduced under the 1993 Trade Union Reform and Employment Rights Act. The aim in that case was to assist the employers’ side in the dispute, by requiring the union to provide such information as was necessary to allow the employer to influence the members’ votes, and thereafter to take action to reduce the effect of any pursuant industrial action.

<sup>84</sup> The ballot, in fact, has to have been held before the trade union asked its members to take, or continue taking, industrial action.

<sup>85</sup> TULRCA 1992, s. 226A, in writing and at least seven days in advance to the ballot.

<sup>86</sup> *ibid.*, ss. 231A and 234A. The union must communicate the outcome and it must provide certain information prior to the commencement of industrial action. In particular, the employer must receive, at least 7 days before the start of the industrial action, written notice stating which categories of workers will be involved, where they work, whether the action will be continuous or discontinuous, the starting date or dates, and whether the action is strike action or action short of a strike, e.g. overtime ban. See Dukes 2010 and Warneck 2007

<sup>87</sup> Further requirement to be met by a properly conducted ballot are: scrutiny by a qualified independent person appointed by the trade union, voting paper includes information about the voting process, as soon as the trade union can, after holding the ballot, it tells everyone entitled to vote how many votes were cast and the number of 'yes' votes, 'no' votes and spoiled voting papers.

industrial action<sup>88</sup>; if the union fails to comply with any or all these obligations, statutory protection from liability in tort is excluded, and protection against unfair dismissal is lost for the employees taking industrial action<sup>89</sup>.

To summarize the current UK regulation regarding the right to strike, which present itself as a fragmented set of norms loosely connected rather than as a unitary legal *corpus*, the best point of view is the one concerning the rules surrounding unfair dismissal of a worker.

The protection granted to anyone organizing a lawful strike or action short of a strike under the 1992 Act is restricted to what would otherwise be the following civil offenses, or torts, such as inducing another person to break a contract or interfering with its performance, threatening a breach of contract, interfering with the trade or business or employment of another and conspiracy<sup>90</sup>.

Following the reforms introduced by the Employment Relations Act 1999, a dismissal of employees who take part in a "protected" industrial action may be automatically unfair if the reason or principal reason for dismissal is that the employee took part in the action, unless the industrial action has lasted for more than twelve weeks<sup>91</sup> and the employer has taken such procedural steps as are

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<sup>88</sup> To date, the provisions regulating the obligations to inform and give notice have been amended twice, in 1999 and 2004 (Employment Relations Act 1999, s 4, Schedule 3; Employment Relations Act 2004, ss. 22, 25). On both occasions, the aim of the amendments was to simplify and clarify certain aspects of the law. Despite the amendments, however, the provisions remain very complicated, so that the exact nature of the steps which trade unions must take is not always clear. Among those, the specifications on whether the union intends the industrial action to be "continuous" or "discontinuous" and the date on which any of the affected employees will be called on to begin the action (where it is continuous action), or the dates on which any of them will be called on to take part (where it is discontinuous action), or the provision of a list of the categories and workplaces of the employees that the union is going to ballot, figures on the numbers of employees in each category, figures on the numbers of employees at each workplace, the total numbers of affected employees, together with an explanation of how the figures provided were arrived at. Since 2004, the TUC has been in discussions with the Government regarding the possibility of further reforming the relevant provision. See *amplius* BIS 2010b, and Dukes 2010, p. 84.

<sup>89</sup> Where more than one employer is involved, the protection is excluded only in relation to the employers in respect of whom the default occurs, TULRCA 1992, s. 238A(1)

<sup>90</sup> See Warneck 2007, p. 71

<sup>91</sup> The protection from dismissal applies if the employee is dismissed within 12 weeks from the start of the protected industrial action or after 12 weeks, if the employee has ceased taking part in the industrial action within the protected period. It should also be noted that lock-out days, where an employer prevents striking employees from returning to work, are disregarded when determining this twelve week period.

reasonable<sup>92</sup> to try to resolve the dispute.

Outside of these exceptions the law prevents an employment tribunal from considering a claim of unfair dismissal on its merits if the employee was dismissed while taking part in industrial action<sup>93</sup>; this means that the employment tribunal cannot find the dismissal of the employee to be unfair, regardless of the cause of the strike<sup>94</sup>.

If the tribunal finds that an employee has been unfairly dismissed, it does not automatically follow that the worker will be reinstated in his post: the tribunal may, in fact, award compensation<sup>95</sup> for the employee, which he has to accept, or order its re-instatement or re-engagement.

Contracts of employment are technically suspended during any periods of strike; therefore, although the employee remains at the service of the employer, the period of the strike does not count towards that employee's continuity of employment.

Beside the the most serious consequence of the potential loss of the right to bring proceedings for unfair dismissal, participation in a strike or other industrial action is likely to have a highly detrimental effect impact on an employee's statutory employment rights<sup>96</sup>.

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<sup>92</sup> With reference to the reasonable steps taken by the employer to solve the dispute, the tribunal will not consider the merits of the dispute but will have regard to whether the employer and union had complied with the procedures in any applicable collective or other agreement and whether, after the protected industrial action had begun, they had offered or agreed to start or restart negotiations; unreasonably refused a request to make use of conciliation services; unreasonably refused a request to make use of mediation services in relation to the procedures to be used to resolve the dispute; or where the parties have agreed to use the services of the mediator or conciliator, s.28 of the ERA 2004 introduces new matters which the tribunal is to have particular regard to when assessing whether an employer has taken reasonable procedural steps to resolve the dispute with the union. See BIS 2010a, pp. 5-6

<sup>93</sup> The tribunal will only be able to consider the complaint on its merits if the employer has discriminated between the participants to the action by selectively dismissing or re-engaging them

<sup>94</sup> For obvious practical reasons, however, dismissal is not always a possible response for employers in a trade union, though the incidence of dismissals in British industrial relations appears to have grown in recent years, beginning with the decision by News International to dismiss and replace over 5000 striking workers in 1986. See Ewing in Dorssemont, Jaspers & van Hoek 2007, p. 219

<sup>95</sup> Such compensation comprises a fixed amount award based on the age and length of service (basic award) and a compensatory award for the loss which the employee has suffered as a result of the dismissal (subject to a limit of £50,000). BIS 2010a, p. 4

<sup>96</sup> Employees who take industrial action will know that there may be damaging financial consequences for them, since they are unlikely to receive any pay if they withdraw their labour. They should also be aware that they are putting their jobs at risk. *Ibid.*

Lastly, the compliance or non-compliance with the legal requirements governing the organization of an industrial action implies extremely relevant consequences for the unions; an employer, in fact, can sue the union which has taken industrial action not in contemplation or furtherance of a trade dispute or otherwise unprotected. The damages that a union can be ordered to pay are limited according to the union's size, ranging from £10,000 if the union has fewer than 15 members, to £250,000 for 100,000 members or more<sup>97</sup>.

### *1.1.2 – International and European Sources on the right to strike*

#### *International Labour Organization*

The right to strike is not directly governed by ILO Conventions and Recommendations; notwithstanding the absence of explicit international standards, the right of strike has been recognized as one of the principal means by which workers and their associations may legitimately promote and defend their economic and social interests.

The basis for such recognition were Convention No. 87 on Freedom of Association and the Protection of the Right to Organise (1948), establishing the right of workers' and employers' organizations to "organize their administration and activities and to formulate their programmes"<sup>98</sup> and the aims of such organizations as "furthering and defending the interests of workers or of employers"<sup>99</sup>, and Convention n. 98, concerning the right to organize and bargain collectively, which are now designated among the ILO's "basic human rights Conventions"<sup>100</sup>; freedom of association is a fundamental human right and, together with collective bargaining rights, a core ILO value. The rights to organize and to bargain collectively are enabling rights that make it possible to promote democracy, sound labour market

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<sup>97</sup> See *infra* par. 3.2.2 with reference to the uncertainties linked to the existence of the cap for damages in EU-level disputes

<sup>98</sup> ILC 87, Article 3

<sup>99</sup> *ibid.*, Article 10

<sup>100</sup> Declaration adopted on 25 June 1970, on the occasion of the 54th session of the International Labour Conference.

governance and decent conditions at work<sup>101</sup>.

Since 1952, the relevant Committee has held that the right to strike is an "essential [element] of trade union rights"<sup>102</sup> and not simply a social act, laying down the principle that collective action is a means for the promotion and defense of workers' economic and social interests.

This position was reinforced not only through extensive analysis by the two bodies set up to supervise the application of ILO standards<sup>103</sup>, which defined a body of principles connected to the recognition of right of strike, but also through various Resolutions which, however focused in general on trade union rights, emphasized the recognition of the right to strike in member States<sup>104</sup>.

The evolution of the principles emanated from the interpretative activity of the two mentioned bodies has concerned almost all the main features of a legitimate strike, including its objectives, the subjects entitled to the right in question and the protection granted to them, the conditions for the exercise of the right (as well as sanctions for potential abuses) and the possible restrictions for certain types of actions or specific categories of workers, although no ILO Convention explicitly requires any Member States to ensure protection of the right to strike<sup>105</sup>.

The definition of a worker organizations as any organization "for furthering and defending the interests of workers" in particular, entails a series of considerations on the nature of the collective action that can be undertaken and its definition as an individual or collective right.

Through the exercise of the right to strike occupational, trade union and

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<sup>101</sup> ILO 2008

<sup>102</sup> *Second Report*, 1952, Case No 28 (Jamaica), para 68

<sup>103</sup> That is, the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations. In particular, the latter consists of eminent judges and jurists appointed by the ILO Governing Body and meets once a year to consider the extent to which member states are in compliance with the Conventions they have ratified.

<sup>104</sup> The "Resolution concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation", adopted in 1957, called for the adoption of "laws ... ensuring the effective and unrestricted exercise of trade union rights, including the right to strike, by the workers" (ILO, 1957, p. 783). Similarly, the "Resolution concerning Trade Union Rights and Their Relation to Civil Liberties", adopted in 1970, invited the Governing Body to instruct the Director-General to take action in a number of ways "with a view to considering further action to ensure full and universal respect for trade union rights in their broadest sense", with particular attention to be paid, inter alia, to the "right to strike". See Gernigon, Otero & Guido 2000, p. 7

<sup>105</sup> Novitz 2003, p. 110

political demands can be pursued by the workers; while the former two have been considered legitimate by the Committee on Freedom of Association, political and sympathy strikes have presented more complexities in their recognition. Purely political strikes have been deemed as falling outside the scope of freedom of association, although it is often very difficult to determine a clear separation between the various aspects of a strike; as for sympathy strikes, which are called for motives not affecting directly the workers withdrawing their labour, the Committee of Experts, considered that no general prohibition for sympathy strikes should be set and that workers should be able to take such action, provided the initial strike they are supporting is itself lawful.

As for the titularity of the right to strike, provided that it is a collective right exercised by a group<sup>106</sup>, it should be extended beyond the trade union federations or confederations, which should not be the sole organizations authorized to call a strike; striking workers, furthermore, should be protected from dismissal, which is not an acceptable response to a call for strike.

The ILO bodies have recognized a number of restrictions on the right to strike as being compatible with ILO Conventions; for what it refers to essential services, the Committee has drawn two lists, one pertaining to essential services in a strict sense<sup>107</sup>, where the right to strike may be subject to major restrictions and prohibitions, and another, voluntarily non-exhaustive, for which an outright ban should not be imposed.

As for the conditions for exercising the right to strike, the prerequisites should be “reasonable and ... not such as to place a substantial limitation on the means of action”, nor the legal procedures should for calling a strike should be so complicated as to make it “practically impossible to declare a legal strike”<sup>108</sup>; the

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<sup>106</sup> “Under Article 3(1) of Convention No. 87, the right to organize activities and to formulate programmes is recognized for workers' and employers' organizations. In the view of the Committee, strike action is part of these activities under the provisions of Article 3; it is a collective right exercised, in the case of workers, by a group of persons who decide not to work in order to have their demands met. The right to strike is therefore considered as an activity of workers' organizations within the meaning of Article 3”, *ILO General Survey 1994*, 149. The same text, however, underlines that the protection provided for by the Abolition of Forced Labour Convention, 1957 extends to individuals, and that the right to strike recognized by the various international instruments referred to in the Survey (among those the International Covenant on Economic, Social and Cultural Rights and the European Social Charter of 1961) also applies to workers as individuals.

<sup>107</sup> The hospital sector; electricity services; water supply services; the telephone service; air traffic control.

<sup>108</sup> ILO 2006, Para. 547 and 548



Committee has however accepted several prerequisites as not violating the freedom of association, among which stand the provision of (voluntary) conciliation and arbitration in industrial disputes, notice to the employer, and the exhaustion of procedures for negotiation, conciliation and arbitration. With reference to ballots and their relative *quorum*, the obligation to take strike decision by ballot has been deemed acceptable; however, the provision of large majorities may severely hinder the exercise of the right to strike, especially when large numbers of workers are considered.

### *The right to strike and the European Social Charter*

The European Social Charter of 1961<sup>109</sup>, concluded within the framework of the Council of Europe, was the first international treaty to explicitly recognize the right to strike: article 6(4) of both the 1961 and 1996 versions of the Social Charter impose a duty on those States which have ratified the Charter to recognize “the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike”, with a view of “ensuring the effective exercise of the right to bargain collectively”; the right in question, therefore, must be read in conjunction with Article 5, concerning the freedom to organise and stating that the Member States “undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom”, and Article 31<sup>110</sup>, which circumscribes its scope.

While the right to take collective action clearly encompasses all forms<sup>111</sup> of

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<sup>109</sup> The 1961 instrument was then supplemented by various Protocols and, in particular by the issuing of the Revised Social Charter in 1996.

<sup>110</sup> In the RevESC Article G - Restrictions: “The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed.”

<sup>111</sup> The ECSR considers that the form that domestic legal protection takes is unimportant; what is crucial is that any limitations placed on the right to strike do not contravene with Articles 6 and G of the ESC. See Novitz 2003, p. 280

industrial action in cases of conflict of interest<sup>112</sup>, it does not protect political strikes<sup>113</sup>: however, because of its link with the right to bargain collectively, which is not confined to workers' and employers' organization, it must be considered as being conferred to an individual and not to a member of an union.

The concept of collective bargaining to which the strike must be directed in order to attract protection should not be restricted to claims relating to working conditions but, once interpreted extensively, should also cover strikes called in order to ensure compliance by the employers with safety regulations, in cases of conflicts of right - i.e. as to the existence, validity or interpretation of a collective labour agreement or its violation – but also to challenge any decision which can be subject of collective negotiation, including entrepreneurial decisions like rationalization, closing down of plants, decisions of investment, announcements of dismissals and demands for co-determination<sup>114</sup>. Any bargaining between one or more employers and a body of employees (whether *de jure* or *de facto*) aimed at solving a problem of common interest, whatever its nature may be, should be regarded as collective bargaining within the meaning of Article 6.

From this wide-ranging interpretation it follows that sympathy strikes and secondary action should be regarded as legitimate; furthermore, the concentration on “collective bargaining” in the construction of the right to strike may suggest that workers can, in fact, strike against government policies which affect either their terms and conditions of employment or their benefit and leave entitlements. Other policies that cannot so readily linked to collective bargaining, would fall outside of the permissible objectives of a strike, since their “political” nature would prevail.

In any case, while the mentioned Article G seem to provide a potentially broad basis for restrictions to the right to strike, the European Committee of Social Rights has interpreted this notion restrictively; with reference to compulsory

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<sup>112</sup> The Governmental Committee of the Council of Europe has described Art.6(4) of the Charters in the following terms: “... Art. 6(4) recognised those aspects of the right to strike which were essentially common to the Western democracies, and the Committee's approach was to attempt a definition - albeit incomplete - of this common denominator by clarifying the maximum restrictions on the right to strike permitted by Art. 6(4), and to ascertain whether any particular feature of existing national rules would be liable to conflict with it.”

<sup>113</sup> European Committee of Social Rights *Conclusion II 27; Conclusions XIII-4*.

<sup>114</sup> Novitz 2003, pp. 287-288

arbitration procedures, it noted that “the absence of any limitation on the government’s power to intervene in strike action” is unacceptable, depriving the workers of any protection and ultimately causing a failure in recognizing the right as provided for by the ESC. On the other hand, with specific reference to the sector of essential services<sup>115</sup>, it is permissible for a collective agreement to contain considerable restrictions<sup>116</sup>, even if they would be unacceptable if imposed by law; this is because such restrictions are the product of a mutual consent aimed at protecting the interests of the community or the users of the services, by reducing the recourse to collective action<sup>117</sup>.

With reference to the possible responses by the employers, the ECSR has found that employers should not be able to dismiss workers on the basis of their organization of or participation to a collective action, irrespectively of the time at which the dismissal occurs; the Governmental Committee has also underlined that it would be difficult to reconcile recognition of the right to strike with termination of the work contract, therefore considering termination of the work contract as a result of strike - unlike the suspension of that contract - incompatible with the European Social Charter, especially when the dismissal can be based on strikes that are legitimate according to national regulation and included in the scope of article 6(4).

## **1.2 – European Community and Union developments**

The European normative option regarding the collective labour rights seems one of non-interventionism: the article 137.6 EC Treaty, stating that “the provisions of this article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs”, excludes these aspects of labour law, and particular for the analysis at hand the organization and defense of interests by the workers, from the competences of the European Union.

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<sup>115</sup> Where “simply banning strikes [...] is not deemed proportionate to the specific requirements of each sector.” ECSR Conclusions I, Statement of Interpretation on Article 6(4)

<sup>116</sup> To be applied only for the matters contained in the agreement and to the members of the organization covered by the agreement.

<sup>117</sup> ECSR Conclusions VIII , Statement of Interpretation on Article 5

In more general terms, the establishment of a functioning common market was the main objective in the early process of European integration; by differentiating economic integration from the promotion of fundamental rights the ECSC and the ECC were able to prioritize market building while minimizing interference with well-established and jealously guarded systems of social protection, labour law and industrial relations<sup>118</sup>. Social standard setting was, therefore, limited: with reference to labour standards, the issue of their provision arose only in relation to regulation of the terms of “fair competition”, and that their scope was expected to be minimal<sup>119</sup>.

Until a concept of a politically integrated Europe providing transnational protection to social rights started to emerge<sup>120</sup>, the social dimension of the Community was mainly related to a wide network of diverse policies and programmes in the very restricted fields of employment and “workplace” interests, and to the commitment to the idea belief that economic integration would rapidly improve, and indeed harmonize, working and living conditions in the Member States, and would be supported by collateral developments in social standards at national level.

Furthermore, it wasn't until the 70s that the ECJ adopted a protecting stance with regards to “social rights”, and while incapable of elaborating comprehensive set of rights, deemed them adequate to be recognized as fundamental rights, also making reference to international instruments such as the European Social Charter and the ILO Conventions<sup>121</sup>.

The marked choice against a regulation on the right to strike carried out by EU institutions can be considered as incoherent both with the structuring of a European and trans-national field of economic action in which, nonetheless, the exercise of rights regulated and developed through the specificities of the singles national systems will unfold their effect, but also with the increasing commitment of

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<sup>118</sup> See Kenner in Hervey and Kenner 2003, p.5

<sup>119</sup> The key concession was Article 119, which provided for equal pay for men and women. See Novitz 2003, p.151

<sup>120</sup> Providing effective citizenship to social rights through the issuing of the key directives on collective redundancies (Dir. 75/129) and on the transfer of undertaking (77/187/EC)

<sup>121</sup> Such as in *Defrenne*, paras. 26-28. *Defrenne v Sabena (no. 3)*, C-149/77

the Community for social integration testified by marked developments occurred between the '70s and the '80s<sup>122</sup>, and in particular with the issuing, at EU level, of instruments making direct reference to collective action.

The Community Charter of Fundamental Social Rights of Workers of 1989, in fact, acknowledged the significance of freedom of association and the right to strike as fundamental social rights<sup>123</sup>; in the context of the adoption at Community level of protective standards for rights which should not be jeopardized by competitive pressure.

The right of strike was explicitly mentioned in defining the recourse to collective action in the event of a conflict of interests, linking it in particular to the collective bargaining procedures<sup>124</sup>: furthermore, given the promotion of the dialogue between management and labour by the Charter, the establishment and utilization of mediation and arbitration procedures was encouraged in order to “facilitate the settlement of industrial disputes”.

Two main problems can be underlined with reference to this recognition: *in primis* the wording of article 13 provides that the right to strike is subject to the obligations arising under national regulation and collective agreements; therefore the right to take collective action would lack a legally binding effect.

Secondly, The Community Charter can be considered as only sketching the outline of a European “social constitution” - all references in the draft to “citizens”, and more significantly the title of the document, had been deleted and replaced with “workers” or “persons” - and was not granted the legal status of binding Community law, being only a “solemn declaration” whose implementation is left to the Member States: its effectiveness is furthermore restricted by article 28, which limits the adoption of legal instruments by the Commission to those coming “within the Community’s area of competence”.

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<sup>122</sup>The importance of these social developments is testified by the EC's first *Social Action Programme* which was proposed by the Commission and accepted by the Council in 1974, the 1985 *White Paper*, and the *Single European Act* adopted in 1986, introducing significant changes to speed up and facilitate the social policy-making process. The developments relating to the introduction of Articles 118a and 118b, while can be regarded as promising from the perspective of European level bargaining, as well as defining the beginning of a new phase in the Community action in the matter of social policy, offered nothing with regards to the protection of the right to strike

<sup>123</sup> CCFSRW, Articles 11 and 13

<sup>124</sup> *Ibid.*, Art. 12

While articles 27 and 28 can also be intended as promoting the implementation of the instrument<sup>125</sup>, and the Community Charter has been referred to in many legal instruments during the 1990s, the reluctant approach towards the right to take collective action has been confirmed in the Agreement on Social Policy and the Amsterdam Treaty, which on the other hand resulted in a renewed interest in the labour law field and, in particular, in the reconciliation of the economic objectives of the Union with the pursuit of improved social welfare.

In both sources the competence of the EC to regulate the right of association and consequently the right to strike is *expressis verbis* excluded despite the explicit reference made to the European Social Charter and the Community Charter of 1989, both recognizing the right to take collective action<sup>126</sup>.

This inactive position, justified by means of the recourse to subsidiarity and the attention to the national diversities<sup>127</sup>, has to be considered also from another point of view; par. 1 letter *f* of the same article 137 EC which limits the action with reference to the right to strike states the support and complementation by the Community to the activities of the Member States in the areas of “representation and collective defence of the interests of workers and employers”: therefore, while the EU has undoubtedly promoted the information and consultation of employees, it has also reinforced – through the mismatch between recognition and competences referring to the right to strike – a legal framework in which some fundamental rights are recognized, promoted and regulated while others keep on being completely submitted to national regulations, as was also testified by the ECJ’s reticence on the subject; while making reference to other fundamental social rights as “protected

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<sup>125</sup> However, not with regards to collective bargaining and action. The Action Programme for the implementation of the Charter, in fact, provided that “the problems arising from the application of these principles must be settled directly by the two sides of the industry, or where appropriate, by the Member States”. See Novitz 2003, p. 159

<sup>126</sup> Article 2.6 of the Agreement on Social Policy and Article 137.6 of the EC Treaty. See Jaspers 2007, p. 28

<sup>127</sup> “Particular attention should be paid to existing systems, traditions and practice in the Member States ... specifically in Europe, the national identity of the Member States is particularly defined by their individual paths to solidarity within society and social balance”, Council Resolution of 6 December 1994 on certain aspects for a European Union social policy: a contribution to economic and social convergence in the Union (OJ C 368, 23.12.1994, Preamble)

under the Community legal order”<sup>128</sup>, the Court did not provide a statement about the right to strike as a fundamental social right, in a context where it was not only recognized by the aforementioned international instruments, but explicitly referred to by the Constitutions of several Member States of the Community<sup>129</sup>.

### *1.2.1 – First clashes, first solutions: Commission v France and the Monti Regulation*

The main feature of the evolution of the right to strike in the boundaries of the European Union is that, from the point of view of the legal discipline to be applied to the industrial conflict unfolding at trans-national level, a general regulatory framework is not provided by Community sources, and therefore the right and its guarantees appear fragmented in the domestic systems of the various Member States in which the actions are carried out.

Furthermore, beside this regulatory delocalization, another decisive aspect for the definition of the right to strike at European level emerged, relating to the possible interactions and contradictions between the exercise of collective action with the respect of the economic and market freedom rules configuring the Union, stirring the attention to the strike as a relevant matter to be addressed in the realization of the European internal market, with particular reference to specific sectors - such as the transport one - whose continuous activity makes practically possible the unfolding of the economic freedoms provided for by the Treaty<sup>130</sup>, and in which more pressing was the question whether it could be possible to consider a set of restrictions or prohibitions for the collective action with a view of preserving these fundamental

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<sup>128</sup> In *Bosman*, freedom of association was recognized as “enshrined in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and resulting from the constitutional traditions common to the Member States, is one of the fundamental rights which, as the Court has consistently held and as is reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order”. Case C-415/93 *Union Royal Belge des Sociétés de Football Association v Bosman*, para. 76

<sup>129</sup> Namely France, Greece, Italy, Portugal, Spain and Sweden. However (at the time, see *infra* for the developments on the ECtHR jurisprudence in *Demir and Enerji*) not recognized by the ECHR, the recognition of the right to strike (or at least, the centrality of the strike at the core of the industrial relation systems) seem widespread enough for it to be considered a common constitutional tradition between the Member States.

<sup>130</sup> Baylos 2007a

principles of the Union<sup>131</sup>.

In November 1997, a French lorry drivers' strike<sup>132</sup>, stemming from the failure of negotiations in a dispute relating to the enforcement of early retirement policy, quickly unfolded its effects on freedom of movement and on free circulation of goods<sup>133</sup>, within the country and even beyond the national dimension, disrupting road haulage in particular to and from Spain, UK and Ireland; concerns for the possible negative consequences of the French dispute on international circulation were also voiced by the Commission, in the person of its member responsible for transport – Neil Kinnock – who in the immediate eve of the strike urged its French national counterpart to inform foreign drivers about alternative routes provided to allow international traffic to pass unhindered in transit through France<sup>134</sup> and, with the road-transport crisis still underway, asked the French Government to take all the measures to ensure freedom of movement within France, also not ruling out not ruling out the possibility of instituting legal proceedings against France for hindering freedom of movement if the blockade was not lifted quickly, although recognizing

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<sup>131</sup> See Orlandini 2003, pp. 245-. It has also to be noted, with regards to the prudent approach to the matter by the EU institutions, that the PWD Directive (96/71/EC) already contained an attempt by the European legislator to define the relationship between the right to take collective action and some free movement principles: recital 22 of the PWD, in fact, stated that the Directive is “without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions”. See in particular Dorssemont 2008, but also *infra* with reference to the use of a Monti-style clause in the recitals of the AWD (2008/104/EC).

Furthermore, with reference to an indirect protection of the exercise of the right to strike, it has been underlined how the Directive on collective redundancies contains the potential for legal tactics defending strikers against dismissal, since they should be considered as occurring on the employer's initiative “for one or more reasons not related to the individual workers concerned” (art.2.1) and therefore assimilated to redundancies. See Bercusson 2008, p. 314.

<sup>132</sup> The fourth since 1984 and the third in just five years; In 1984 and 1992 the actions (blocking of the main axes of circulation and access to fuel depots and warehouses) were undertaken by the entire category (workers and employers) in order to protest against a strike by custom operators and the introduction of a point system for the driving license, while the two last conflicts were more closely linked with living and working conditions of the employees and workers of the sector. See EIRO, *Lorry drivers' strike raises European issues*, 28 November, 1997 available online at <http://www.eurofound.europa.eu/eiro/1997/11/feature/fr9711177f.htm>

<sup>133</sup> Even if, in contrast to preceding strikes, the blockades did not completely block the motorways but rather filtered down traffic, allowing through private vehicles and stopping lorries, the demonstrations still closed access to fuel depot, heavily disrupting the entirety of circulation. Striking truckers furthermore quickly pinpointed key targets, blockading ports (among those Cherbourg and Le Havre, and entry points into France from the UK such as Dieppe and Calais, whose blockade was criticised by the Commission) and supermarket distribution warehouses.

<sup>134</sup> See Europolitics, *Transport: EU Warns France over fresh lorry drivers' strike*, 1st November 1997, available online at <http://www.europolitics.info/transport-eu-warns-france-over-fresh-lorry-drivers-strike-artr163676-20.html>



that “this would be a very serious matter”. Therefore, the duty of enforcing articles 30 and 5 of the EC Treaty on free movement was carried out by the Commission without calling into question the right to strike; in any case the French Government while insisting that it upheld the right to strike, deployed police to dismantle the blockades that had been erected at French border crossings, and was also keen not to let the situation “stagnate” calling back the UFT – the major employers’ association, which had walked away from negotiations - to the negotiating table with a view of concluding an agreement that was reached on the 8th of November, effectively excluding the possibility of a violation of the Treaty, having done what was necessary and feasible in order to reduce the disruption derived by the action and having promoted negotiation to solve the dispute originating it.

The clash between the right to collective action and the fundamental economic freedoms underlying the internal Market was also analysed by the ECJ in the *Spanish Strawberries* case<sup>135</sup>, concerning an infringement procedure initiated by the Commission against the Republic of France.

To be contested by the Commission was “the passivity of the French authorities”<sup>136</sup> in face of violent acts committed by private individuals and protest movements directed against products<sup>137</sup> from other Member States; the omission to react against the collective actions of French farmers was deemed by the ECJ as amounting to State liability, since the provisions on free movement of goods not only imply that the Member State have to avoid restrictions or the creation of obstacles on the freedom itself, but have also to ensure respect of the latter in their territory by prevent offences and disruption stemming by actions undertaken by private individuals and actors<sup>138</sup>.

It has also been noted<sup>139</sup> that the “collective action” in question could not have been covered by the constitutional and/or international recognition of the right to take collective action because the French farmers were not acting in the capacity

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<sup>135</sup> ECJ , 9 December 1997, C 265/95, *Commission v Republic of France*.

<sup>136</sup> *Ibid.*, par. 2.

<sup>137</sup> Those acts consisted, *inter alia*, in the interception of lorries transporting such products in France and the destruction of their loads, violence against lorry drivers, threats against French supermarkets selling agricultural products originating in other Member States, and the damaging of those goods when on display in shops in France”, *ibid.*

<sup>138</sup> *ibid.*, par. 32

<sup>139</sup> Dorssemont in De Vos 2009, p. 65

of workers or employers, to which is limited entitlement to such a right, and mainly because, the nature of their guerrilla actions was too violent to warrant the conclusion that the actions could be covered by the protection granted by the mentioned article 6.4 of the European Social Charter<sup>140</sup>. However, the analysis of article 28 EC carried out by the ECJ left unclear several aspects regarding the scope of the duty of the Member State to ensure free movement: the conducts analyzed in case 265/95 were criminal in nature, involved a physical threat to imports and were prolonged in duration<sup>141</sup>; nothing was said for actions potentially frustrating the single market by restricting the free movements of economic factors other than goods (namely, workers and services), on the effects of the lawful nature of the action on the duty to intervene, and on the temporal issues in the ensuring of free movement by the Member State<sup>142</sup>.

The following year, the interpretation of the obligations deriving from the Treaty provisions on free movement was codified in the Council Regulation No. 2679/98<sup>143</sup>, which also introduced an *ad hoc* monitoring procedure involving the Member States and the Commission with regard to clear, unmistakable and

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<sup>140</sup> See *supra*, par. 1.1.2

<sup>141</sup> As early as 1985, French farmers began to take destructive actions against Spanish products (particularly strawberries and tomatoes) imported into France and the Commission had asked French authorities to undertake measures to combat the acts of vandalism disrupting the common; however, tensions continued to escalate for approximately ten years. In 1993, French farmers engaged in a “systematic campaign to restrict the supply of agricultural products from other Member States” (see C-265/95, par. 3), threatening wholesalers and retailers, attempting to coerce them into stocking only French agricultural products and imposing minimum selling prices. One of the groups involved, Coordination Rurale, also instituted a system of checks to ensure compliance with the imposed requirements. See Hinton 1998

<sup>142</sup> See Ryan in Hervey & Kenner, 2003, p. 79

<sup>143</sup> Council Regulation (EC) No. 2679/98, OJ L 337, 12.12.1998 emanated from a proposal by D-G XV (Internal Market), headed by then Commissioner Mario Monti, and often referred to as the *Monti* (or *Strawberries*) Regulation. When an obstacle (defined by art. 1 as leading to serious disruption of the free movement of goods, causing serious individual loss, requiring immediate action and attributable to the Member State, whether involving action or inaction on its part) occurs or when “there is a threat thereof”, any Member State concerned has *in primis* an informative duty to the Commission and to other Member States, which will in turn provide relevant responses regarding the potential obstacles and the proposed action. Beside this information exchange, the Member State in which an obstacle occurs shall adopt all necessary and proportionate measures so that free movement of goods is ensured against any disruptive action (that is, with the limitation provided for by art. 2) and inform the Commission of the action undertaken by its authorities. Inaction is considered to be existing when a Member State, in the presence of actions taken by private individuals, fails to implement the measures for safeguarding the free movement of goods without adversely affecting the exercise of fundamental rights recognized under national law. See Reg. 2679/98, art. 3-4.

unjustified obstacles to the free movement of goods<sup>144</sup>; after criticism during the drafting stages that an intervention mechanism would imply intervention by the Commission in national labour disputes, as well as granting the economic factors dominance over the social dimension<sup>145</sup>, the Council of Ministers included at the article 2 of the Regulation a provision that ultimately came to be referred to as the “Monti clause”, aiming to protect the exercise of fundamental rights in Member States;

This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike.

These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States.

Two aspects in particular stand out with reference to the wording chosen in the drafting of this article: the unambiguous aim of the normative instrument is the protection of the free movement of goods and not the regulation of the right to strike nor the composition of the potential contrast with the economic freedoms deriving from its exercise; this provisions furthermore, while granting immunity to domestic legislation regarding fundamental rights from instruments related to free movement, do not recognize collective action as a general principle of EU Law, even if it presuppose its interference with the exercise of economic freedoms. From an institutional point of view, this reluctance is consistent with the Community

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<sup>144</sup> The rapid intervention mechanism, built in order to ensure prompt and effective responses from the Member States by putting pressure to adopt measures aiming at removing potential obstacles to free movement, contemplates a specific procedure for a formal complaint by the Commission for the case of an obstacle occurring in a Member State, based on mutual informative duties (the Member States has to respond in five days from the receipt of the complaint) and the request by the EU institution to remove the identified obstacle within a period determined “with reference to the urgency of the case”. Reg. 2679/98, art. 5. See Orlandini 2003, pp. 284 ff.

<sup>145</sup> For the purposes of this reasoning it is necessary to recall the essential contents of the draft Regulation, as published by the Commission in January 1998. Namely, it first included a somewhat vague reference to fundamental rights (Article 1). Then, notably, its draft Article 2 contained the right of the Commission to decide on the legality of strike action blocking the cross-border trade: “Where the Commission establishes the existence in a Member State of obstacles within the meaning of Article 1, it shall address a decision to the Member State directing it to take the necessary and proportionate measures to remove the said obstacles, within a period which it shall fix”. OJ C10, 15.1.1998. Even the name of the draft instrument was telling: Proposal for a Council Regulation (EC) creating a mechanism whereby the Commission can intervene in order to remove certain obstacles to trade. See Hellman 2007, p. 51

legislator's constitutional inability to intervene in a direct way<sup>146</sup>.

It appears evident that the Regulation cannot be used to affect the level of protection granted to collective actions by domestic law: the provision in question explicitly excludes from the notion of obstacle or disruption to the freedom of movement of goods, that the Member States have to prevent, the exercise of collective action, which must be preserved from any possible restriction from EU legislation and institutions<sup>147</sup>, a necessary exclusion<sup>148</sup>, consistent with the respect of the exercise of fundamental rights on which the EU legal framework has to be based; the potential setting and enforcement of restrictions and limitations to the exercise of the right to strike in a European context and in sectors involving the economic freedoms is therefore remitted to the various legal framework of each national system in which the collective action is carried out.

On the other hand this proof of prudent abstentionism<sup>149</sup> makes it clear that it does not exist a trend in homogenizing the possible restrictions on the exercise of the right to strike at either, generally, at trans-national European level or in particular, for specific sectors and/or circumstances producing effects on the economic freedoms provided for by the Treaty; in a strict enforcement of the subsidiarity principle, the composition of the potential contrast emerging between fundamental rights and economic freedoms is realized in the disparity of the juridical solutions administered by each domestic frameworks in settling it.

This latter element leads, to another set of considerations: it is to be positively underlined the very precise definition by article 2 of the strike in terms of "right" or "freedom", and the reference to other types of collective actions which reflects the

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<sup>146</sup> The provisions do *not* state that the instruments *will not apply*. If they would not apply, no clause providing immunity would have been needed. Thus, the legislator gives the impression of broadening the scope of the exclusion laid down in Article 137.5 EC (153 TFEU) applicable to EC competences in the field of Social Competences, acting as if other Treaty provisions conferring competences (in the particular case, Article 308 EC, now 352 TFEU) also did not allow the legislator to impede the domestic recognition of the right to take collective action; a spillover effect is thus being prevented. See Dorssemont in De Vos 2009, p. 60

<sup>147</sup>According to art. 5 of the Reg. 2679/98, the Commission, in "reaching its conclusion" when evaluating the possibility of an obstacle to free movement occurring in a Member State, shall have regard to Article 2.

<sup>148</sup>An exclusion reprising the Resolution of 7 December 1998, in which the Council and the national representatives agreed that Member States shall "undertake to do all within their powers, taking into account the protection of fundamental rights, including the right or freedom to strike, to maintain the free movement of goods and to deal rapidly with actions which seriously disrupt the free movement of goods, as defined in Regulation (EC) No 2679/98".

<sup>149</sup> Dorssemont in De Vos 2009, p. 60

extreme diversity still present today in the normative framework and industrial relations systems of the various Member States<sup>150</sup>.

At the same time, this highly detailed statement can also be considered as lacking clarity, in so far as it relates with industrial action<sup>151</sup>; the protection of the right to strike found in the first sentence, in fact, is based upon “fundamental rights as recognized by Member States”. Given the fact that there is no common standard at European level for the right to strike, and that its potential setting explicitly escapes the aims of the Regulation, the protection seems to be deriving from the framework present in the individual Member State or States involved by the dispute.

The uncertainties extend also to the second sentence, which highlights the possibility for specific types of industrial actions to be protected by the immunity under article 2; a more precise wording should have clearly linked the industrial actions with the national context in which they are exercised, given that is very difficult to imagine that specific types of industrial action other than the strike can be considered lawful across the Member States, even in countries in which they are not<sup>152</sup>.

In any case, the EU drew back from asserting that its regulatory power on free movements could prevail over national regulation of collective action, at least in so far as these took the form of the exercise of fundamental rights<sup>153</sup>: to be contested by the Commission for their effects on the economic freedoms would have been only the *consequences* of strikes or other collective actions and demonstrations<sup>154</sup>, as the cases following the entry into force of the Regulation have shown<sup>155</sup>.

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<sup>150</sup> A wording possibly conditioned also by suggestions coming by those systems (not least the French one, directly involved by the 1997 ECJ ruling) in which the right to strike encounters the highest recognition even in absence of a legislative definition of its modalities of exercise and a broad concept of collective action tends to prevail on the exercise of all but the very core of economic freedoms by the employer.

<sup>151</sup> See Ryan in Hervey & Kenner 2003, p. 80

<sup>152</sup> And *vice versa*, lawful action in some Member States could be excluded from an hypothetical common standard based on Reg. 2679/98

<sup>153</sup> See Bercusson 2008, p. 18

<sup>154</sup> Taking into account that EU citizens are entitled to the fundamental right to peaceful assembly

<sup>155</sup> GHK and Technopolis 2007. A total of 90 “obstacles” were notified/reported by Member States and economic operators to the Commission, or identified by the Commission from the beginning of 1999 to the end of 2006.

### 1.2.2 – Art. 28 of the Charter of Fundamental Rights of the EU and the right to take collective action

Originated in a context characterized by the need to the reprise of the social dialogue and the promotion of social policy in order to more attentively address labour market concerns linked with the changing demography, unemployment and social exclusion, as well as issues such as the legitimacy of the EU institutions and the impending enlargement processes<sup>156</sup>, the Charter of Fundamental Rights of the European Union was proclaimed at the meeting of the European Council held in December 2000 at Nice<sup>157</sup>. This solemn political declaration should have represented an encompassing instrument providing the EU with an indivisible foundation of core economic and social rights, and was the outcome of a peculiar deliberative process, led by a self-nominated “Convention”<sup>158</sup> composed by the EU Commission President, representatives from the Governments of the Member States, national parliaments and the European Parliament<sup>159</sup>; the Convention had a restrictive mandate in the drafting of the Charter, which prevented it from including substantial innovations for the competences and duties of the Union<sup>160</sup> and, with specific reference to the matter of economic and social rights, the recourse to directions derived from other acts of the Community<sup>161</sup>.

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<sup>156</sup> In these period two reports were published in 1996 (by the *Comité des Sages*, presented at the first Social Policy Forum) and in 1999 (by an Expert Group established by the Commission) stressing the need to affirm at EU level the fundamental rights contained in the aforementioned international instruments (cf. *supra*). The late 90s, furthermore, saw the adoption of the Revised ESC and the launch of ILO’s Declaration on Fundamental Principles and Rights at Work.

<sup>157</sup> It was left to the Nice European Council to define the integration of the Charter into the EU Treaties. However, at the Meeting the Council was unable to reach an agreement on inclusion of the text in question in the Nice Treaty.

<sup>158</sup> Actually a working group appointed by the European Council at the 1999 Meeting in Cologne. See Cologne European Council, 3-4 June 1999, Presidency Conclusions, pp. 44-45 and Annex IV.

<sup>159</sup> Representatives of other EU institution such as the Economic and Social Committee and the Committee of Regions, as well as representatives of the civil society (including trade unions) and applicant countries did not participate in the final decision but were able to contribute their views at public hearing. See Novitz 2003, pp. 164 ff.

<sup>160</sup> Cfr. Art. 51.2 : “This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.”

<sup>161</sup> The Convention, contravening to the mandate, has transcribes principles enunciated in other international instruments, in large part acquired in the EU “legal asset” thanks to the interpretations by the ECJ and their inclusion in EU legislation. See Arrigo 2000. For a detailed reconstruction of the deliberative process, see also Guizzi 2003, pp. 389 ff.

The main aim of the Charter was (and still is) the organic definition of the indefeasible prerogatives of the European citizens deriving from appartenance to the Union<sup>162</sup> and, beside some objectionable omissions, it can be affirmed that contains not only the the main civil rights and freedoms of the liberal tradition, but also the most important social and economic rights, along with “third generation” rights such as those regarding bioethics, information technologies and the protection of the environment, not seldom innovating even with respect to recent and wide-ranging national Constitutions<sup>163</sup>.

The right to strike was included in the Charter of Fundamental Rights in the Solidarity Chapter along with other core labour rights, such as the protection against unfair dismissal, fair and just working conditions, prohibition of child labour and protection of young workers, protection from dismissal connected to maternity and the right to maternity and paternity leave<sup>164</sup>.

With specific reference to collective labour rights, they include also the workers’ right to information and consultation within the undertaking (art. 27) and right of peaceful assembly and the freedom of association (art. 12), and, according

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<sup>162</sup> While not preventing Union law to provide more extensive protection (cfr. art. 52.3); the Charter, furthermore, places all its enunciated rights on the same legal level, and boldly affirms their indivisibility, even if it is possible to distinguish, in its provisions, between specific enforceable rights and freedoms (many of which are conditioned) and general unenforceable principles.

<sup>163</sup> With reference to the Italian case, examples of the broader protection granted by the Charter can be considered the protection against unfair dismissal, the workers’ right to information and consultation and, with particular reference to the combat of social exclusion, “the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources”. See CFREU, art. 34

<sup>164</sup> CFREU Artt. 30-33 The labour rights make up the main core of social rights stated by the Charter, alongside which are to be considered also the right of the family to legal, economic and social protection (art. 33), the entitlement to social security and services (art. 34), the right of access to a free placement service for job seekers (art. 39), health care (art. 35), and a “high level” of environmental and consumer protection (artt. 37-38). However, as also noted before, it is apparent that the catalogue provided by the Charter is a highly selective and less than comprehensive list; key omissions include the right to work and the right to fair remuneration. It is perhaps not coincidental that these rights fall in areas that touch most closely upon national sovereignty and have significant resource implications. See Kenner in Hervey & Kenner 2003.

to the Explanatory Document, find their origins in previous instruments such as the ECHR and the ESC, together with the Revised European Social Charter of 1996<sup>165</sup>.

According to art. 28 of the Charter of Fundamental Rights, therefore:

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interests, to take collective action to defend their interests, including strike action.

As in other articles, the affirmed rights are also stated to be limited by reference to national laws and practices; nonetheless, in the formulation of this article the precise definition and the attention to national diversities of the “safety valve” constituted by Art. 2 of Reg. 2679/98, however possibly flawed, seem completely lost, diluted in the very general assertion that, despite earlier doubts regarding Community competence, the right to collective bargaining, collective action and strike are to be enjoyed “in accordance” not only with “national law and practices” but also with “Community law”<sup>166</sup>.

While going well beyond the rights which had previously been recognised in EU law and jurisprudence, the Charter appears also to be promoting a specific kind of collective action, linking it in particular with collective bargaining procedures (with the possible outcome of an agreement) between actors identified as workers, employers and their organizations, and conducted at the appropriate levels<sup>167</sup>.

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<sup>165</sup> On the normative basis of art. 28 it has been underlined how “the account of Article 28 EUCFR given in the Explanatory Document is remarkable for its inexactitude”, both with respect to article 6 ESC, to which six MS have expressed reservations, and with reference to points 12 to 14 of the Community Social Charter (in particular, the possibility for limitation provided by the latter point does not appear in the face of the Charter), and lastly for the reference to art. 11 ECHR which (at least at the time of the proclamation of the Charter) was interpreted in the sense that strike could be considered as one possible method used by trade unions to protect the interest of their members. See Ryan in Hervey & Kenner 2003, p. 74.

<sup>166</sup> See Bercusson 2008a, p. 328

<sup>167</sup> Two main issues have to be underlined with reference to the highlighted link: *in primis*, the fact that art. 28, while seeking to strengthen the practice of collective bargaining deals only with some of the issues regarding this fundamental rights: nothing is said with reference to coverage and scope of the agreements, different degrees of engagement by the actors, effects, form or type of bargaining structure. Secondly, the instruments referred to by the Explanatory Document (in particular the Community Social Charter and the ESC) present relevant differences with art. 28, since they contain provisions encouraging and promoting conciliation, mediation and arbitration procedures and machinery for negotiations with a view of the regulation of terms and conditions of employment by collective agreements. *Ibid.*



In particular, the reference to the actors involved confirms the instrumental conception of the right to industrial action provided for by the Charter<sup>168</sup>, which indicates workers *or* their respective organizations<sup>169</sup> as the subjects granted titularity of the right, in the case of conflict of interests; this choice is consistent with the stated promotion of collective bargaining, but on the other hand it may be read as lacking the necessary strength to generally affirm the right of individual workers to engage in collective action, and protect them for example from retaliatory tactics by the employer.

Furthermore, it appears to be reprising the concept of “equality of arms” between workers and employers in industrial disputes, therefore possibly granting European coverage and protection to the right for the employers to impose lock-outs<sup>170</sup>, even if the Explanatory Document underlines how the “modalities and limits for the exercise of collective action, including strike action, come under national laws and practices, including the question whether it may be carried out in parallel in several Member States”.

Member States, however, were not the principal addressees of the Charter of Fundamental Rights; the provision of the CFREU are mainly directed towards “the institutions, bodies, offices and agencies of the Union”<sup>171</sup>, consistently with the application of the the principle of subsidiarity. However, even if they must act and legislate consistently with the Charter, the EU institutions, remained bound by the pre-defined sphere of powers competences provided under the Treaty, which could not be extended by the application of the Charter<sup>172</sup>.

Therefore, the combined provisions deriving from art. 137.5 EC and 52.2 CFREU implies an exclusion of the possibility for the Commission to issue legislation on the matter of collective bargaining and action, possibly with a view of detailing

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<sup>168</sup> Hartzén 2009, p.86

<sup>169</sup> It has to be noted that ESC art. 6 refers to workers *and* employers, without reference to their organizations and under ILO Convention 87 the right to strike is a fundamental right of workers *and* their *representatives* (and not necessarily their “respective organisations”). In all of the cases the emphasis is by the author).

<sup>170</sup> Which, contrary to strike, is often implicitly excluded or referred to as a mere freedom in the majority of the Member States, and whose recognition would be a highly controversial issue.

<sup>171</sup> CFREU Art. 51.1

<sup>172</sup> *Ibid.*, Art. 51, end of par.1 and par. 2

the provisions of art. 28 CFREU in connection with the freedom of association, and linking them with the various experiences deriving from the national systems of industrial relations<sup>173</sup>.

### *1.2.3 – Legal uncertainties in the application of the Charter*

The fundamental rights as guaranteed in the Charter are a declared part of the construction of the Social Europe, and their enforcement and development is crucial for the European integration project<sup>174</sup>. Its objectives, as underlined, have to be secured through the rigorous exercise of the competences and powers allocated by the Treaties, in strict application of the proportionality principle, in certain ways denying the EU institutions with the capacity or the instruments to pursue the promotion of the fundamental rights that they have to protect in their activity.

The problems of defining a common set of trade union rights deriving from a single European text are highlighted specifically with reference to article 28 CFREU, which is probably the most prominent example of a Charter provision seeking to guarantee collective rights that may be very well regarded as falling outside EU competence, or at the very least, outside the social provisions<sup>175</sup>.

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<sup>173</sup> The fundamental issue of the exercise of the right to strike in relation to internal market freedoms is made more complicated due to the diversity of substantive national strike laws and practices. However, that situation is, regarding fundamental rights, not unique to strikes. In *Omega (C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn)* the Court had to assess fundamental values, i.e. human dignity, enshrined in the German Constitution, in relation to the free provision of services. The referring court had asked whether the ability which Member States have to restrict fundamental freedoms guaranteed by the Treaty, should be subject to the condition that that restriction be based on a legal conception that is common to all MS (par. 23); the ECJ found that “It is not indispensable in that respect 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”. (par. 37). See Hellsten 2007, p. 108

<sup>174</sup> The social and economic rights in the EU Charter go beyond trade unions to include others of a more programmatic nature. Implementation of the Charter aims to build a bridge between *programmatic* (social and economic rights) and *justiciable* (civil and political) rights. Justiciable rights equate to effective and enforceable rights. The challenge is to *establish* clearly *justiciable trade union rights*: e.g. trade union freedom of association, information and consultation, collective bargaining and collective action, and, further, to *develop* implementation of *programmatic* social and economic rights: e.g. health, education, etc. See Bercusson in ETUI Expert Group 2009, p. 151

<sup>175</sup> See Hervey & Kenner 2003. Furthermore, collective bargaining and collective action (Article 28), in some MS, these assumed to be fall within the right of “freedom of association”

Any attempt to legislate with a view of harmonizing national law and regulation on the right to strike at EU level would have conflicted not only with the aforementioned exclusion provided for by the Treaty, but also with article 52.2 CFREU which, according to the Explanatory Document, aims at preserving the systems of rights and conditions conferred by Treaties and Community legislation<sup>176</sup>; the asserted European right to strike was therefore not provided with an actual regulatory content, nor was defined its relationship - or at the very least the guiding principles needed to identify it - with the economic freedoms provided by the Treaty, in order to clearly link, since its inception in the EU legal framework, the possible limits to its promotion with the most relevant issues deriving from its possible exercise at trans-national level. The recognition of the right to take collective action as a general principle of EC Labour Law, in the way in which has occurred, does therefore not clarify whether an clash between that right and the fundamental economic freedoms underlying the common market is conceivable and how this alleged conflict needs to be legally construed<sup>177</sup>.

Furthermore, the legal status of the Charter itself was uncertain<sup>178</sup> during the troubled EU constitutionalization process, and the non binding nature of this act was substantially confirmed during the period stretching from its promulgation to the entry into force of the Lisbon Treaty<sup>179</sup>, as the Charter did not come to represent the

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<sup>176</sup> Even if the proposal were to be based on the need to approximate the common market (Article 94), in order to prevent social dumping, Article 51.2 might inhibit the Community from exercising its powers in this respect. By contrast it is to be underlined how article 31.2, automatically and unconditionally granting “every worker” the right to limit their maximum working hours, to daily and weekly rest and an annual period of paid leave, is not fettered by any reference to “national laws or practices”. Each element contains a right that is *per se* justiciable.

<sup>177</sup> Given the devolution of the regulation of the right to strike in the single domestic systems deriving from the Treaty and Charter provisions, potentially very relevant issues concerning the “selection” by private actors of specific legal frameworks to be applied to industrial action in function of their own interest have to be considered. On the matter, beside the groundbreaking *Viking*, see the *Weber* case of 27 February 2002 (C-37/00 *Herbert Weber v Universal Ogden Services Ltd*); while the ruling itself does not specifically concern the legitimacy of a strike action, the case already highlights the possible use of national regulations with a view of restricting the exercise of the right to collective action in the European space.

<sup>178</sup> As it was its potentially creative nature or its features of “restatement of law” with reference to fundamental rights.

<sup>179</sup> Even in the current context in which the Charter has been granted full legal status, it is the possible effect on national systems of the rights listed that can be questioned (especially in consideration of the *opt-outs* carried by various MS). Under the Lisbon Treaty, in fact, the Charter was not incorporated in the Treaty as happened in the Treaty establishing a Constitution for Europe, but is conferred by art. 6 “the same legal value as the Treaties”

core of a new system of fundamental rights in the European Union; in fact, while the Charter was used by EU institutions to set self-established limits to their own action, the system of the protection of fundamental rights in the European legal framework remained based on art. 6 EC, as interpreted by the ECJ and the CFI, and the reference to constitutional traditions common to the member States as general principles<sup>180</sup>.

The plurality of levels involved in the establishment of fundamental rights and the absence of a clear hierarchy between texts and sources of law can cause several interpretative problems; therefore the EC Courts were remitted with the definition of the borders and the interaction between different rights.

In this sense, albeit not enforceable in a trial by citizens<sup>181</sup>, the CFREU has been growingly used (either directly or, more often, as an interpretative aid, or referring to its political authority) as an authoritative guide to European rights in the proceedings before the CJEU, and in particular by Advocate Generals: the Charter, denied any creative feature, played a “confirmative role”<sup>182</sup> in the above mentioned system of rights protection, reaffirming the rights as they result from the constitutional traditions and international obligations<sup>183</sup>; whenever the Charter has been quoted by the ECJ, it has been mentioned after and not before the fundamental rights inferred by the Court<sup>184</sup>.

It has to be noted, however, that the procedural asymmetry between rule and exception with relation to possible restrictions to Treaty-based freedoms still prevents a clear recognition of an equal status between economic freedoms and fundamental social rights; furthermore, the relevant differences in the degree of

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<sup>180</sup> As article 6.3 TEU clarifies, the drawing up of the Charter is not exhaustive.

<sup>181</sup> See Gianfrancesco 2008, p. 3

<sup>182</sup> In the early *BECTU* case, AG Tizzano commented on the legal status of the CFREU. While underlining its not having “genuine legislative scope in the strict sense”, he considered that it contained statements reaffirming rights enshrined in other instruments., and could act as a “substantive point of reference” for the EU institutions. On the basis of article 31, therefore, he advocated the protection of paid annual leave under EU law, since “the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitute a fundamental rights” Case C-173/99 *Broadcasting, Entertainment, Cinematographic and Theatre Union (BETCU) v Secretary of State for Trade and Industry*, AG’s Opinion, paras. 26-28. On the matter see Ryan in Hervey & Kenner 2003 and Novitz 2003, as well as Gianfrancesco 2008.

<sup>183</sup> ECJ Decision of 20 June 2006, C-540/03 *European Parliament v Council*

<sup>184</sup> In a decision of 30 January 2002 in *Max.mobil Telekommunikation Service GmbH v. Commission*, the CFI twice referred to provisions of the EU Charter, first Article 41 (Right to good administration), and then Article 47 (Right to an effective remedy and to a fair trial).

doctrinal and judicial evolution between the recent and still fragmentary assertion of social rights and the corresponding definition of the content and the functioning of economic freedoms, which represent the staple of European integration, may hinder the protection and promotion of the social dimension provided by the Charter.

If the fundamental rights of the workers are no more to be questioned from the point of view of principles and policy objectives, the problem shifts on the existence of concrete institutional mechanisms capable of preserving and enforcing the rights asserted by the fundamental texts and Treaties<sup>185</sup>.

In this sense, the inadequacy of the current provisions of EU labour law instruments in relation to national implementation and transnational aspects of collective trade union rights provided by the Charter must be underlined, as well as the underdevelopment of common regulatory trends in the sector.

The continuing absence of competences, for instance, has meant that the EU institutions were only able to include oblique references to strike in “negative” provisions, such as recital 20 of the Temporary and Agency Workers Directive<sup>186</sup>, which states that the provisions of the AWD on restrictions or prohibitions on temporary work are to be considered “without prejudice to national legislation or practices prohibiting striking workers being replaced by temporary workers”<sup>187</sup>; the EU circumspection in mentioning the right to strike in a normative instrument is evidently confirmed when it is considered that, while the restriction in question is decidedly widespread among the Member States, this immunity was not construed

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<sup>185</sup> See Zoppoli in Andreoni and Veneziani 2009, p. 227

<sup>186</sup> Dir. 2008/104/EC

<sup>187</sup> The prohibition on the use of temporary agency workers as substitute labour in the course of an industrial dispute is by far the most common form of restriction on agency work in the EU-27 legal systems, along with the the case both of present and past redundancies, and as noted in the main text, the provisions of the AWD are to be considered without prejudice to national prohibitions regarding the substitution of striking workers.

With specific reference to the way in which this legal restriction holds in the three systems more closely analyzed, in the UK a ban on supplying agency workers to do the work of those on strike, or to do the work of other employees transferred to cover the work of strikers, was introduced in the UK by the Conduct of Employment Agencies and Employment Business Regulations 2003, and it applies only to “official” trade disputes. In Germany, it is lawful to use temporary agency workers in the course of a strike; however, under the provisions of the AÜG, agency workers are entitled to refuse to work at the user company directly affected by the strike, and the agency must inform its workers of this right. For what it refers to the Italian situation, strikers cannot be replaced by other workers recruited from outside. Employers may not offer financial inducements to employees not taking part in the strike. Even the temporary recruiting of strike-breakers from outside might be considered an illegal anti-union activity under Art. 28 of the Workers’ Statute.

as part of the relevant article<sup>188</sup> in the body of the implemented Directive, which excludes from the review national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporary work agencies.

Another tentative recognition<sup>189</sup> of the fundamental right to take collective action is represented by the Services Directives<sup>190</sup> in which, however, the legislator opted for a more cautious statement respecting, in a redundant way, the primacy of the Treaty of the European Union over secondary legislation instruments. The European Parliament insisted that fundamental rights should not be affected, and article 1.7 states, in a wording similar to the “Monti clause”, that the Directive “does not 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*”<sup>191</sup>, enriching the debate on the right to strike by bringing about the question of a possible uniformity on the application of the right to strike at EU-level; this statement, however is preceded by a more generic clause which states that the Directive “does not affect the exercise of fundamental rights as recognized in the Member States and by Community law”; such a differentiation highlights the right to strike as a fundamental right potentially not recognized by Community law, and whose exercise is an activity potentially in contrast, however recognized, with the latter.

On the other hand, in recital 14, the issue of “industrial action” is downgraded as an issue of ordinary labour standards, covered by the definition of industrial relations and it is repeated that it is part of the enumerative definition of labour law in Article 2.6.

#### 1.2.4 – Schmidberger and the ECJ’s balancing through proportionality

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<sup>188</sup> Art. 4 AWD, Review of restrictions or prohibitions

<sup>189</sup> See Jaspers in Dorssemont, Jaspers & Van Hoek 2007, p. 56

<sup>190</sup> Directive 2006/123/EC

<sup>191</sup> The juxtaposition in the Services Directive of the formula “does not affect” opposite the formula “shall not apply” (comparing articles 1 and 2 of the Services Directive) also confirm the distinction between the “immunity” granted to the exercise of fundamental rights and the “exclusion” from the sphere of application provided for certain sectors. See Dorssemont 2008

The decisive role played by the EC Courts in interpreting the actual meaning of the provision concerning fundamental rights, and in particular their interaction with the economic freedoms, assumed to be in a position of predominance in EC law, was confirmed in 2003, when the ECJ in the *Schmidberger* case<sup>192</sup>, although insisting that this kind of exception should be interpreted narrowly, allowed for restrictions to the economic freedoms stemming from the exercise of fundamental rights, albeit under specific conditions., giving precedence to the social dimension of the EU when contrasting with the economic one.

The Court had already ruled on cases concerning a collision between EC law and fundamental rights; in *Albany*<sup>193</sup> and *Van der Woude*<sup>194</sup>, concerning European competition law, the Court had granted immunity to the collective labour agreement in so far they were pursuing social objectives.

In the particular situation concerned by the *Schmidberger* ruling, a demonstration by an ecologic action group had interfered with the free movement of goods, since *Transitforum Austria Tirol* when had blocked access to the Brenner Motorway for 30 hours; a transport company started a liability suit against the Austrian Government, objecting to the passive stance adopted by the Austrian Government with regard to the “collective action” undertaken, since it had decided to authorize the demonstration - which had been duly notified – instead of preventing the potential obstruction to the economic freedom in question.

The circumstances of the case were evidently very different from those of *Commission v France*<sup>195</sup>; only one route had been blocked, for a short period and in consequence of a lawful demonstration not involving any criminal activity nor directed to a specific restrictive aim.

Furthermore, the Austrian authorities had allowed the demonstration since the demonstrators were exercising their fundamental rights of freedom of expression and freedom of assembly provided by the Austrian constitution<sup>196</sup>, and which the Court recognised as general principles of EC Law which might justify, in principle, a

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<sup>192</sup> C-112/2000, *Eugen Schmidberger v Republik Osterreich*, Decision of 12 June 2003

<sup>193</sup> C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*

<sup>194</sup> C-222/98 *Van der Woude v Stichting Beatrixoord*

<sup>195</sup> *Schmidberger*, AG's Opinion, par.78

<sup>196</sup> Nonetheless, the freedom of expression is entirely absent in the preliminary questions.

restriction to the free movement of goods<sup>197</sup>; it is also to be underlined that, in its balancing the Court also acknowledged the recognition in the ECHR of the freedom of expression and association, referring once again to its fundamental rights doctrine where it has established that fundamental rights are a part of Community law and have to be respected.

In *Schmidberger*, in order to reconcile the contrasting requirements deriving from the freedom of movements and from the safeguarding of fundamental rights, the Court assessed the fairness of the balance struck by the Austrian Government<sup>198</sup>, instead of establishing a clear-cut hierarchy<sup>199</sup>; the basis for such an assessment was the proportionality test.

While declaring that the specific aim of the demonstration was immaterial in such legal proceedings, the necessity to safeguard the freedom of expression and assembly was considered to constitute a legitimate aim, justifying the restriction to the free movement of goods<sup>200</sup>; the procedures and the relevant features of the demonstration were also taken into consideration, and the fulfillment of information duty towards economic operators, as well as the putting into place of measures limiting the disruption to the economic freedoms were acknowledged.

Other aspects considered in the assessment of proportionality were the possible alternative means at disposal for the demonstrator to express their views<sup>201</sup>, and the substantial damage produced by the exercise of the fundamental right to the free movement of goods<sup>202</sup>; once it was defined that the decision of the Austrian Government to allow the demonstration was justified, the economic damage suffered by the company was not taken into account.

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<sup>197</sup> *Schmidberger*, par. 74 .

<sup>198</sup> *Ibid.*, par. 77 and 81.

<sup>199</sup> See Dorssemont in De Vos 2009, p. 66

<sup>200</sup> The Court did not take a teleological approach in proportionality, and did not adjudicate on the purposes sought by *Transit Forum* when making use of the freedom of expression and assembly. Nevertheless, the Court took into consideration that the “purpose of that public demonstration was not to restrict trade in goods of a particular type or from a particular source”. *Schmidberger*, par. 86.

<sup>201</sup> In this sense, the obstruction of the Brenner Highway was considered as the *ultima ratio* option for the group by both the AG and the Court. See *Schmidberger*, AG’s Opinion par. 110 and 118, and *Schmidberger*, par. 86 89, 90 and 92. They considered that *Transit forum* did not have an alternative means to express its views in an equally effective manner They considered that there was no means for the demonstrators to make their point known which would have obstructed the free movement of goods in a less drastic way, without depriving the action of a substantial part of its impact.

<sup>202</sup>The latter was limited by a comparison with both the geographic scale and the intrinsic seriousness of the disruption caused in the case of *Commission v France*.



## 2. VIKING, LAVAL, RÜFFERT AND LUXEMBOURG

### 2.1 - The Enlarged EU as the background for the ECJ *revirement*

The historical development of the European Community is characterised by a definite tendency to expansion; a growing membership, in fact, has been an integral part of European integration right from the start of this experience. Since 1957, therefore, the number of the Member States has grown, in several stages<sup>1</sup>, from the original six to the current twenty-seven; furthermore, since right after the decline of the Soviet regime in the late 80s and the democratic transitions<sup>2</sup> occurred in the countries formerly falling under Soviet influence the Community has actively pursued the objective of a European “re-unification”, a process which has been carried out

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<sup>1</sup> And precisely in 1973 (involving Denmark, Ireland and the UK), 1981 and 1986 (Greece, Spain and Portugal, the so-called Mediterranean enlargement), 1995 (Austria, Finland and Sweden), 2004 and 2007 (considered by the European Commission as part of the same round, and involving Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia). For what it concerns future expansions current candidate countries are Croatia (whose accession, after the closing of negotiations decided by EU Member States on the 30 of June 2011m, is foreseen for 1 July 2013), Iceland, Macedonia and Montenegro which are considered “official” candidates along with the long-term applicant Turkey (which officially applied for EU membership in 1987) and, lastly, the remaining Western Balkans countries (Albania, Bosnia and Herzegovina, Serbia and Kosovo under UNSC Resolution 1244/99) which are considered as “potential candidates”. The challenges posed by the so-called “Eastern enlargement”, which will be further analyzed *infra*, can easily be appreciated also simply by considering the fact that before 2004 the enlargement had involved a maximum of three countries per round. See [http://ec.europa.eu/enlargement/5th\\_enlargement/index\\_en.htm](http://ec.europa.eu/enlargement/5th_enlargement/index_en.htm), European Commission’s press release *EU closes access negotiations with Croatia* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/824&format=HTML&aged=0&language=EN&guiLanguage=en> and [http://ec.europa.eu/enlargement/the-policy/countries-on-the-road-to-membership/index\\_en.htm](http://ec.europa.eu/enlargement/the-policy/countries-on-the-road-to-membership/index_en.htm)

<sup>2</sup> From a political point of view, a similar motivation for expansion of EU membership to former-Soviet countries is to be found with regards to the Mediterranean enlargement, where Greece, Spain and Portugal had emerged in the 1970s from dictatorships, and aimed at consolidating the renewed democratic regime through EU membership.

through the “post-cold war” enlargement round in 1995 and has been - at least formally - completed with the “Eastern” enlargement in 2004 and 2007<sup>3</sup>; in particular, the accession of a significant number of Eastern European Countries (CEECs)<sup>4</sup>, alongside the smaller Cyprus and Malta, represents the most radical transformation in the EC (and subsequently EU) composition up to date, and possibly a fundamental landmark for the European Union history when globally considered; the Commission referred to enlargement as the “Union’s most successful foreign policy instrument”<sup>5</sup>.

The ex-Communist Member States, in particular, had faced a series of very relevant challenges with a view of accession to the Union, mainly linked to the transition from authoritarian regimes to pluralistic democratic frameworks, from centrally-planned to free-market economic systems, and with the transformation of a party-dictated system of industrial relations into one compatible with political freedom and a market economy<sup>6</sup>, which have caused loss of economic prowess of most CEECs, a generalized severe recession during the 90s, and a steep rise in unemployment levels.

Furthermore, notwithstanding their integration into international trade and capital flows, and the access to the EU Structural Funds in a variety of sectors, by the time of their accession the income levels of the new Member States were still low when compared to those of the EU-15 and, after an initial rise in foreign direct investment<sup>7</sup>, attributable by a wide series of factors ranging from the low land prices and low level of business tax to the strategic geographical location and the

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<sup>3</sup> Under Article 49 of the Treaty on the European Union, any European country may apply for membership if it meets a set of established political and economic criteria. In addition, the EU must be able to absorb new members, so the EU can decide when it is ready to accept a new member. The criteria for EU membership require candidates to achieve “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union; the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union”.

<sup>4</sup> 10 out of 12 Countries involved by the enlargement round in question. Although here considered as a whole, some relevant differences between the national situations will be further analyzed *infra*.

<sup>5</sup> COM (2003) 104, March 11, 2003, p.4.

<sup>6</sup> Weiss 2006, p. 170

<sup>7</sup> Even before the enlargement, in the period 1995-2002, the economic exchanges had almost trebled and the FDI of EU-15 countries towards the candidate countries had increased fourfold, on account of the free trade agreements signed between the EU and the would-be new members. See Inotai 2009, p. 94

high literacy rates in the working population, the inflows of capitals towards the CEECs has decreased, mainly because of the competition with strong extra-European actors such as Russia and the rapidly-growing China and India.

The CEE states were also required to transpose all EC legislation (the so-called *acquis communautaire*) into their respective legal systems; in general, the candidate countries had no difficulty meeting this precondition for accession. With the help of external experts through the so-called “screening” process, they have largely succeeded in transposing EU law into their respective legal structures; however, as long as the institutions and actors that guarantee satisfactory implementation in actual practice are not available or inefficient in their action, it would be erroneous to assume that the mere transposition of EU law has an effective impact on the reality of the CEE states<sup>8</sup>, in particular in the areas that require the involvement of social partners and/or workers’ representatives<sup>9</sup>.

As a direct consequence of the 2004-2007 Enlargement round, the surface area of the EU has increased by one third, while the total population has grown by approximately 100 million people, roughly one quarter; this geographical expansion carried relevant consequences in the composition of the institutional bodies of the EU: both the European Parliament and the Council have widened their size and currently see consistent numbers of representatives and national votes assigned to new Member States such as Poland, Romania, Czech Republic and Hungary<sup>10</sup>; however, while the enlargement has always been considered a goal “in itself” by the

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<sup>8</sup> As already underlined by Vaughan-Whitehead 2003.

<sup>9</sup> Such as those on working time or H&S.

<sup>10</sup> Respectively, 50 (out of 736 EP representatives) and 27 (out of 345 votes in the Council) for Poland (in both cases like Spain, and only less than Italy, Germany, France and UK), 33 and 14 for Romania (more than founding members such as Netherlands and Belgium) and 20 and 12 each for Czech Republic and Hungary. The average number of European Parliament representatives is around 27, considering the exceptions constituted by Germany (99 representatives), France, Italy and the UK (with 72 each); on the other hand in the Council the average is around 12 national votes per MS, but the aforementioned countries (which maintain their positions of primacy) are only assigned 29 votes. The modification introduced by the Lisbon Treaty state that the European Parliament shall be composed of representatives of the Union's citizens and that there can only be 750 members, plus the President, bringing the maximum number up to 751 MEPs; the allocation of seats shall follows the principle of degressive proportionality, with a minimum threshold of 6 members per member state. While no member state can have more than 96 seats, the 2009 Parliament elections took place under the Nice Treaty, and therefore there are currently 99 German MEPs. All of them will continue until the end of the 2009–2014 legislature. This explains why the total number of MEPs until then will not be 751 as laid down in the Lisbon Treaty, but 754, as there are still 3 "Nice Treaty" German MEPs in Parliament. See <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+IM-PRESS+20100223BKG69359+0+DOC+PDF+V0//EN&language=EN>

EU institutions, and it is considered to have facilitated the spread of democratic values and protection of human rights and increased the EU's global role, doubts and critics have been cast<sup>11</sup> on the long-term impacts of this process on the ways of an effective management and governance of the Union, and on possible reforms in particular of decision-making procedures going beyond what has been accomplished with the adoption of the Treaty of Lisbon<sup>12</sup> in order to avoid "enlargement fatigue", but rather to consolidate and deepen the process of European integration.

In particular, due to the lack of effective industrial relations structures in the majority of new Member States the EU was faced with the difficult task of creating an integrated system of industrial relations and social dialogue within the European Social Model, which had provided, in previous occasions, European trade unions with the opportunity to coordinate national responses to the changing opportunity and regulatory structures of which the Directives on fixed-term<sup>13</sup> and part-time work<sup>14</sup> are an example.

However, as a result of the very different industrial relations systems prevalent in the new Member States and in their slower response to the aforementioned societal, political and economic changes, the legislative aspects of the European social dialogue have slowly but increasingly been substituted by *soft law*

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<sup>11</sup> With particular reference to the issues that surfaced as a consequence of the European Constitutional Treaty's rejection in 2005.

<sup>12</sup> Among the latest emerging proposals, the former French President and Chairman of the European Convention Valéry Giscard D'Estaing has highlighted the continuing lack of the strong political structures needed for governing the widened Union, and of an European public space, underlining the need for a Congress of the Peoples of Europe (an experience mutated from other large and populous countries such as China or the U.S.A.), and of a restructuring of the Commission, which should be composed by no more than 13 members chosen through a rotation system", in order to revitalize the European integration process. <http://www.euractiv.com/en/future-eu/giscard-europe-needs-peoples-congress-interview-506083>

<sup>13</sup> Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP

<sup>14</sup> Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by ETUC, UNICE and CEEP

mechanisms like the OMC<sup>15</sup>.

From an economic point of view, it has to be considered that several small Countries (and small economies) have joined the Union, and while EU's GDP has only increased by 5%, the per capita GDP has in turn declined by approximately 18%<sup>16</sup>; the enlarged Europe has come to represent the largest internal market in the world, accounting for more than 17% of world trade<sup>17</sup>, and more than 30% of the world's GDP. However, significant gaps in wage and per capita income levels (around 60-70%)<sup>18</sup> between older (EU-15) and newer (NMS-12) Member States have to be highlighted; furthermore, there are continuing significant differences, in particular between the various CEECs, and it would be incorrect to lump them together, notwithstanding some common features, with respect to their responses to European, international and internal challenges deriving from their inclusion in the internal market: on one hand, Member States such as Poland, Slovakia and the Czech and Slovak Republics have shown greater shares of GDP deriving from

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<sup>15</sup> While this instrument has the potential to increase the exchange of ideas and policies amongst Member States and the social partners on a trans-national level and thereby to gradually "europeanise" labour market and employment policies across the EU, the results thus far have fallen short of this goal. In particular, the approach of the OMC seems to rest more easily with the economic goals of, *inter alia*, deregulation and flexibility as favored by a majority of MS Governments. See Zahn 2008, p. 13, 15. *infra* in this paragraph (pp. 65-66) with reference to the potential for deregulation inherent in the application on the Treaty provisions on free movement, and in par. 2.3.2. with respect to the misgivings on the possibility for a EU intervention in "rebalancing" the conclusions adopted by the ECJ in the "Laval quartet"

<sup>16</sup> See Weiss 2006, p. 169 and Cremers 2002, p. 29

<sup>17</sup>excluding intra-EU trade, [http://ec.europa.eu/enlargement/5years/documents/impact/commission\\_communication\\_5\\_years\\_enlarged\\_en.pdf](http://ec.europa.eu/enlargement/5years/documents/impact/commission_communication_5_years_enlarged_en.pdf)

<sup>18</sup> With reference to the income convergence of the CEECs with the enlarged EU average GDP per capita, it has to be underlined that the reviving inflation, erosion of competitiveness, the growing pressure on the national currencies and the economic and financial crisis have significantly slowed and in some cases reverted (as for the case of the Baltic States, those with the highest catching up speed in the last years) the pre-accession process of narrowing the development gap between EU-15 and NMS. As highlighted, already at the "starting point" of the EU accession in 2004-07 the various MS presented relevant differences in this respect, with Slovenia entering the single market at almost 90% of the EU average, Poland, the Slovak Republic and the Baltic States attesting between 45 and 60%, and the late-comers Bulgaria and Romania around 40%; as a (limited) comparison with previous rounds, for the case of Spain and Portugal enlargement the differential in the per capita income was attested around 20-30%, almost a half with respect to countries such as Bulgaria and Romania (The data derive primarily from Reuters EcoWin source). It has also to be underlined how, in a way similar to the experience of some EU-15 MS, catching up on national economic level has not always been accompanied by narrowing of the existing regional gaps internal to the MS involved.

exports of goods and services<sup>19</sup>, high growth rates when compared with the EU-15<sup>20</sup>, not seldom outperforming them on a variety of indicators<sup>21</sup>, while a certain degree of economic cyclical volatility of some of the NMS was highlighted by the dramatic and far-reaching consequences of the economic and financial crisis on the Baltic States systems or in Member States such as Romania and Hungary<sup>22</sup>. Furthermore, the delivery of the pace of growth by the CEECs was based on heavy inflow of cheap funds, propelling of domestic consumption, continuing low level of national savings coupled with growing public spending, similarly to what happened to the Southern and Western rim Member States which joined the EU during the 70s and the 80s; the current economic hardships of many of these countries, raise therefore some relevant questions with regards to the general economic prospects of CEECs, since the former's successful integration was an important evidence for the possibility of the latter catching up with Western Europe<sup>23</sup>.

Besides the national economic systems, the performance of different types of economic operators also vary greatly: in most countries, both from the EU-15 and NMS-12 area, the bigger transnational companies and their subcontracting networks can be identified as the actors which have most benefited from the accession to the internal market, while small- and medium-sized domestic firms, bound in their action by clear clear geographic, financial and logistic constraints, have been only able to partially exploit the opening up of a vast market, and have

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<sup>19</sup> The trade orientations following the enlargement have shown not only a high degree of exchanges between the EU-15 and the NMS-12 Member States, but also the rapidly growing importance of intra-NMS trade, as well as the use by some MS of their new membership position to increase their extra-EU trade, both towards neighboring countries (Russia, Ukraine, Balkans) and in the global market, above average.

<sup>20</sup> However, it has to be noted that accession seems to have dampened the speed of structural change and the political willingness to undertake fundamental reforms practically in all NMS. The knowledge, and maybe, even more, the feeling that a "safe harbour" had been reached, did not maintain the quality and speed of adjustment that characterized the pre-accession period (some experts try to identify a certain "accession fatigue" in several NMS). See Inotai 2009, p. 94

<sup>21</sup> With the distinctive example of Poland, which also in the midst of the economic and financial crisis of 2008-09 maintained a positive rate of growth, becoming the one of the better EU performer in this respect.

<sup>22</sup> See Galgóczi 2009, p. 5

<sup>23</sup> While it is clear that the existing development model will not deliver the expected results anymore, and there is considerable uncertainty on what could provide a sustainable development path, it has however been noted that these countries did not have the time to "inflate the bubble" to similar proportions as to the PIIGS and in most of the cases problems appear to be still manageable without major EU intervention. CEECs have all the instruments at their disposal to avoid the fate of PIIGS, unless the overall European economic situation deteriorates rapidly. See Deák 2011, p. 4-5

mainly remained concentrated on cross-border trade.

In the European integration process the pursuit of the main objectives related to the creation and consolidation of the single market<sup>24</sup>, with the consequent expansion of the freedom of action (both in geographical and juridical terms) for economic operators, has often brought the EU institutions to reconcile diametrically opposite needs and demands coming from different MS, social partners, internal market operators, with specific regards to the subjects of economic freedoms and fundamental social rights, in particular when it is considered that, notwithstanding the explicitly stated objective of the promotion of a European social policy, on account of the interactions between the social policy-decision making provisions of the Treaty and the exclusion of certain key areas of labour law from the EU competences, the increased national diversities not seldom overcome the curdling of economic factors throughout the Union and the removal of obstacles by the MS<sup>25</sup>.

The “homemade globalization” carried out with the enlargement of the EU<sup>26</sup> has been characterised by a heightened mobility of undertaking and services, as well

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<sup>24</sup> From the very beginning of membership, all NMS considered the access to EU funds as a historical and unprecedented chance of socio-economic modernization. Expectations were particularly high from 2007 on, when the NMS became full-fledged members also from the point of view of EU transfers. Institutional, legal and financial preparation for successful application started everywhere, although at different speed (and quality). For the 2000-2006 period, these transfers accounted for one third of the EU budget, or 213 billion euro; 195 billion euro were spent through the four Structural Funds (the European Regional Development Fund, the European Social Fund, the Financial Instrument for Fisheries Guidance and the Guidance Section of the European Agricultural Guidance and Guarantee Fund). EU transfers, however, represent one of the most important elements of catching up but should never be considered as the most important goal or factor explaining accession; successful membership in the EU depends on a number of other factors as well, even if it is clear that the efficient use of EU resources can evidently enhance the degree of success.

<sup>25</sup> In a situation where the scope of national regulation is limited, and given the general absence of harmonized labour standards, is a central issue of concern whether the EU law allows for social dumping scenarios, related to the lowering of labour standards in order to attract investment (which is less likely to occur, given also the specific “non-regression” clauses provided by EU legislation in several fields), the replacement of high-cost producers by low-cost producers from countries in which wages, social benefits and direct and indirect costs entailed by protective legislation are lower, and exercising the possibility of business relocation to countries presenting lower labour standards and costs, or utilizing the threat in order to put pressure on local levels of bargaining. See Hendrickx 2009, p. 55

<sup>26</sup> “a laboratory of globalization in one continent”. See Dølvik 2008, p. 3

as an increased relevance of posting of workers<sup>27</sup>, which have decidedly raised the level of competition between the various economic actors, and the political friction between Governments of “sending” and “receiving” MS<sup>28</sup>; the possible clash between the promotion of the internal market’s economic freedoms with the labour law and social policy provision of the various MS became clear in the adoption process of the Services Directive<sup>29</sup>, ultimately issued in December 2006.

The original *Bolkenstein* proposal<sup>30</sup> of 2004, emerged as part of the economic reform programme adopted by the Lisbon European Council in 2000 with the aim of making the EU the most competitive and dynamic knowledge-based economy in the world; the completion of an internal market for services, through the liberalization of the sector and the removal of barriers hindering the expansion of service activities across Member States, was deemed to be a core element in the pursuit of the objective of economic reform.

The basis for the issuing of such an instrument was the 2002 Commission report on the state of internal market for services<sup>31</sup> in which, along with practical problems such as the lack of information and cultural/language problems and administrative constraints on the service providers the barriers hindering the development of the sector in question were also identified in national labour law

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<sup>27</sup> With respect to the two different legal forms (moving in another Member State as an employee or establishing as an independent entrepreneur) in which internal market movement of persons earning their living can take place. An “unintended consequence” of the restrictions on the free movement of workers has been “an increase in outsourcing, temporary work and a flourishing secondary market for services and posted labour”. Providers of services move from one MS to another exercising their entitlement to freedom of establishment (*ex* Article 43 EC) and use independent contractors or cheaper labour, in ways which undercut terms and conditions of domestic workers; this trend is further complicated by the actions of service providers within EU-15 MS which create subsidiaries in NMS-12 so as to take advantage of reduced regulatory requirements and lower labour standards. See Fitzpatrick in Dorsemont, Jaspers & Van Hoek 2007, p. 92 and *infra* with specific reference to labour mobility and the Accession agreements.

<sup>28</sup> It has also to be noted that, in the wake of the enlargement processes and of the issuing of the “Laval quartet” rulings, trade unions have also been involved in this polarization of position, along the EU-15/NMS-12 divide rather than on the classical labour-management contraposition.

<sup>29</sup> Directive 2006/123/EC of 12 December 2006 on services in the internal market.

<sup>30</sup> COM (2004) 2 final.

<sup>31</sup> COM (2002) 441



provisions<sup>32</sup>, as in the case of posted workers<sup>33</sup>; the *Bolkestein* proposal, therefore, provided for the application of the “country of origin” principle, according to which a service provider is subject only to the law of the country in which he is established and Member States may not restrict services from a provider established in another Member State<sup>34</sup>, and that, in the case of posting of workers in the context of the provision of services, the allocation of tasks between the Member State of origin and the Member State of destination and the supervision procedures applicable.

Perceived as paving the way for social dumping<sup>35</sup>, potentially leading to the lowering of social standards across Member States and to the demise of the European Social Model, the proposal was opposed by trade union and various MS, and both the European Parliament version and the 2006 McCreevy draft were rendered “labour law neutral” as possible: the provisions of the Services Directive

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<sup>32</sup> The term "legal barriers" covers all obstacles to the development of service activities between Member States deriving directly or indirectly from a legal constraint and which are liable to prohibit, impede or otherwise render less advantageous such activities. Such barriers also stem from difficulties caused by divergent national regulations, as well as from problems relating to the behavior of national authorities, or from the legal uncertainty caused by the complexity of some cross-border situations. COM (2002) 441, § I.A.

<sup>33</sup> The application to posted workers of the host country's labour-law provisions, without account being taken of the obligations and charges already met by the employer in the country of establishment, could lead to amounts being levied twice and to additional administrative costs and burdens having to be borne by service providers from other Member States. Such cases of duplication, notably as regards the minimum wage or paid leave could have particularly restrictive effects in the case of short-term service provision and with regard to SMEs and service providers established in border areas who would like to post workers to several Member States on a regular basis in order to provide their services there. *Ibid.*, p. 23

<sup>34</sup> This principle is accompanied by derogations which are either general, or temporary or which may be applied on a case-by-case basis; a number of derogations from the country of origin principle that are directly linked to the specific characteristics of certain activities, or necessary in order to take account of differences in the level of protection of the general interest in certain fields, the extent of Community-level harmonization, the degree of administrative cooperation, or certain Community instruments. COM (2002) 2 final, § 3.a-b

<sup>35</sup> Defined as the “climax of neoliberal market logic”. See Barnard in De Vos 2009, p. 30 and Baumann 2009, p. 20.

provided an exclusion for labour law<sup>36</sup> and fundamental rights<sup>37</sup>, through a technique similar to the one used by the ECJ in *Albany*<sup>38</sup>, and aimed at avoiding competition between Member States on the basis of labour law standards and preserving the national labour law and social policy frameworks from the impact of the “legal mechanics”<sup>39</sup> of the DSIM and, in general, of the application of the European free market principles.

For what it refers to labour mobility, it has to be underlined that since its inception, the European Union has provided a structured framework in which transnational migration can occur, mainly through the provisions of the European Community Treaty establishing the right of free movement of persons; these provisions grant individuals both the right to move and the right to claim certain welfare benefits in the host state on the same terms as nationals<sup>40</sup>.

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<sup>36</sup> The fairly wide wording used, in absence of a Community definition of labour law, provides that the “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”. DSIM art. 1.6. Further specification is found in rec. 14, stating that the DSIM does not “affect terms and conditions of employment [...], nor [...] Member States' social security legislation”.

<sup>37</sup> “This Directive does not affect the exercise of fundamental rights as recognized 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”. DSIM art. 1.7. With specific regards to the right to collective action, further guidance is provided by the aforementioned recital 14, making specific reference to the “relations between social partners, including the right to negotiate and conclude collective agreements, the right to strike and to take industrial action in accordance with national law and practices which respect Community law”.

<sup>38</sup>In which the nature and purpose of the collective agreement establishing a supplementary pension scheme were deemed by the ECJ as falling outside the scope of Article 81. A similar conclusion was reached in *Van der Woude v. Stichting Beatrixoord*; a collective agreement establishing a health care insurance scheme was found as contributing to improving the working conditions of employees (by reducing costs and ensuring the means to meet medical expenses), and therefore excluded from the application of art. 81.1. See *supra* §1.2.4 and Barnard in De Vos 2009, p. 29

<sup>39</sup> See Hendrickx 2009, p. 65

<sup>40</sup> Although the original EEC Treaty granted free movement rights not to persons but to individuals which had to hold the nationality of one of the MS (a matter for national law) and be economically active either as a worker under Article 39.1, or as a self-employed person under Article 43. Article 39, in particular, provided that the right of free movement for workers included freedom from discrimination based on nationality between workers of the MS, the respect of employment, remuneration and other conditions of work and employment, and comprised the right to accept offers of employment actually made; to move freely within the territory of the member states for this purpose; to stay in the member state for the purpose of the employment, and to remain in the member state after having been employed, and can be subject to derogations on the grounds of public policy, public security and public health. See Barnard 2006, p. 225

However, with specific reference to the enlargement process, transitional arrangements were agreed upon in the Accession Treaty of 2003, allowing for limited derogations to the free movement provision in the post-enlargement phase<sup>41</sup>, through the application of the “country of employment principle”; therefore, while official rhetoric during the pre-accession phase stated that free movement was an entitlement of fundamental importance that, especially for citizens from behind the former Iron Curtain, should be heeded from “day one”<sup>42</sup>, circulation of labour was granted only by some of the EU-15 Member States at the moment of accession (UK, Ireland and Sweden) while the others maintained restrictions for access to their territory, mainly by applying a work permit regime, sometimes combined with quotas<sup>43</sup>.

Due to low inflows of foreign workers, rises in bogus service mobility and distortions of competition, several Member States, included Italy, chose to repeal their TAs before the transitional period had expired, opening their labour markets as early as 2006<sup>44</sup> and paving the way for a fairly swift transition to free movement for workers from NMS; furthermore, rising concern about the future supply of human capital and growing competition over skilled labor led both old and new member states to rethink their options and develop strategies to attract more labor

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<sup>41</sup> Furthermore, the NMS had also to accept important restrictions with reference to agricultural structural fund (direct payments for farmers started at a fraction of the amount provided to EU-15 farmers, progressively closing the gap in an annual process lasting until 2013). Participation in the EU budget became a reality as of January 2007, when the new seven-year financial framework of the European integration entered into force; during the first 32 months of membership all NMS had only accessed the pre-accession fund, a fraction of the money they became entitled to as of 2007. Furthermore, the Schengen requirements had to be fulfilled (in a three-and-a-half-year process of adjustment) and the compliance of the conditions for membership in the European Monetary Union and for the eventual introduction of the common currency had to be ensured.

<sup>42</sup> See Dølvik 2008, p. 4

<sup>43</sup> The derogation was shaped in the so-called ‘2+3+2’ formula, i.e. old member states were permitted to restrict the principles of internal market with regard to labour following a three-stage pattern: (1) from May 1, 2004 until April 30, 2006; (2) from May 1, 2006 until April 30, 2009 and, finally, (3) from May 1, 2009 until April 30, 2011; upon accession of Bulgaria and Romania the model of graduality has now shifted to ‘1+2+1’ formula. The third derogation is the most serious one since in order to justify itself it requires evidence of ‘serious disturbances’ or a ‘threat of serious disturbances’ for labour market (the so-called ‘standstill clause’). Moreover, those MS within EU-15 who already opened their markets could still invoke another provision (the so-called ‘safeguard clause’) which permits them to impose restrictions up until the ultimate terms if there is an evident threat of serious disturbances in their labour markets. In particular, this provision is especially interesting in the light of *Laval* the threat for the standard of living or the level of employment in a given region or occupation was the argumentation *Leitmotif* of the Swedish government. See Belavusau 2008, p. 2294

<sup>44</sup> Finland, Greece, Netherlands, Portugal, Spain, followed in 2009 by Denmark and France.

immigration<sup>45</sup>. At the time of writing, there are no longer any special restrictions on the free movement of citizens of these NMS, since the transitional period irrevocably came to a end on 30 April 2011.

In this context, it has also to be put particular attention to the increased relevance of posting as the most important factor of labour mobility in the enlarged EU; the main difference between the legal forms and consequent applicable discipline is based on the potential access of the trans-national worker to the labour market of the hosting Member State<sup>46</sup>. With regards to the applicable EU law, ever since *Rush Portuguesa*, it is without doubt that the posting of workers of a company established in one EU country is a trans-national service to which Art. 49 EC is

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<sup>45</sup> It was also suggested that migration was a “win-win” game contributing to growth, brain-gain and brain-circulation, and - although somewhat in contradiction with the previous assertion - that migration, in view of the generally low mobility in the EU and limited net flows during the former Southern enlargement in the 1980s, most likely would be modest anyway. See Dølvik 2008, p. 4

<sup>46</sup> In particular, “where there is a temporary movement of workers who are sent to another Member State [...] as part of a provision of services by their employer. In fact, such workers return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State.” Case C-113/89, *Rush Portuguesa Lda v Office national d'immigration*, par. 15

applicable<sup>47</sup>; in the context of the EU enlargement this has meant that, since free movement of services was fully granted immediately after the accession of the NMS-12, an increase in the flow of worker mobility via Article 49 EC has been expected as well as favored.

The gradual attraction of the regulation of the employment relationship in the area of the intra-Eu regulatory competition derives from the fundamental distinction between mobility *towards* the employment<sup>48</sup> and mobility *within* the employment relationship<sup>49</sup> which, after its inclusion in the *acquis communautaire*, provides that the starting point for the regulation of posting, even if the requirements aiming at protection of the posted workers are not obliterated, is given by the economic interest of the service provider of carrying out its transnational activity without unjustified obstacles.

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<sup>47</sup> See Reich 2008, p. 8. The complex and decisive “hiving off” of art. 39 EC from the hypothesis of “indirect” worker mobility in the context of a trans-national provision of services was realized in two following steps. The first is evidently realized by *Rush Portuguesa*, which follows the *Webb* and *Seco* rulings, in which the ECJ had already classified the posting of workers as a service, and affirmed that in this context the principle of non-discrimination does not imply that “all national legislation applicable to nationals of that State and usually applied to the permanent activities of undertakings established therein may be similarly applied in its entirety to the temporary activities of undertakings which are established in other Member State” (Case 279/80, *Criminal proceedings against Alfred John Webb*, par. 16); in *Rush Portuguesa*, the ECJ on one hand clarifies that the posted workers follow their employer carrying its transnational service activity, on the other underlines how Community law does not “preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means” (par. 18). The context in which the PWD was approved is also characterized by a more general principle related to the application of art. 49 EC; it was affirmed by the ECJ in *Säger* (C-76/90, *Manfred Säger v Dennemeyer & Co. Ltd*), that art. 49, in fact, does not only prohibit direct or indirect discriminations against the service providers, but requires 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” (par.12). Through this judgement the ECJ abandoned the “same conditions” found in article 50.3 EC and held that all restrictions had to be abolished, and removed the need to classify the measures as discriminatory in order to establish that the measure was non-compatible with the Treaty. The “not only” of the formulation indicates that the expansion of the concept of restriction did not include an abandonment of the prohibition of discrimination. In this perspective, however, the ECJ can therefore adjudicate on virtually every single piece of national legislation potentially interfering with the freedom recognized by art. 49 EC, with a view of an effective realization of a internal market for services requires. See Carabelli 2006, pp. 25-31, Giubboni 2008, p. 16 and Sjödin 2009, p. 29

<sup>48</sup> The genetic core of the pursuit of occupation is embraced by the legal matrix of free movement of persons. See Belavusau 2008, p. 2283

<sup>49</sup> “forme di mobilità rispettivamente verso l’impiego (le sole a rimanere inquadrate nell’art. 39 Tratt. CE) ed all’interno dell’impiego (fatalmente attratte, invece, nell’orbita dell’art. 49 del Trattato)” See Giubboni 2008, p. 15

The issue of posting of workers was, as noted, a long discussed item in the European debate, and the Posting of Workers Directive<sup>50</sup>, an integral part of the European Commission Action programme linked to the CCFRW, was meant to establish a clear legal frame for posting activities, providing legal certainty as to which areas of the host MS labour law would apply, and to guarantee the position and the condition of the posted workers.

This objective was pursued through close interaction and dependence between economic and social factors, promoting the recourse to this transnational instrument while respecting fair competition and providing measures guaranteeing the rights of workers<sup>51</sup>, on the basis of the the regulation provided by previous ECJ case-law<sup>52</sup>, which already did not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, on condition that EC Treaty rules, and in particular Article 49 EC, are complied with.

The main amendment achieved through the PWD was represented by the obligation for the host Member States to ensure a “nucleus of mandatory rules for minimum protection” for posted workers, transforming what earlier was a simple freedom for the Member States into an obligation under EU law<sup>53</sup>; the Preamble of the Directive characterized the structure of Article 3.1 PWD as a “hard core” of protective rules, to be observed regardless of the duration of the posting, defined by law or generally applicable collective agreements and concerning specific terms and

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<sup>50</sup> Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

<sup>51</sup> PWD, recitals 3-5

<sup>52</sup> The aforementioned Cases 279/80 *Webb*, 61-62/81 *Seco*, C-113/89 *Rush Portuguesa*, but also C-43/93 *Vander Elst*, C-55/94, *Gebhard*, in which the ECJ stated that extending national labour law could be a restriction of the free movement of services, which could be justified in accordance with the so called *Gebhard*-formula, relating to all the four freedoms: a restriction could be accepted only if justified (by overriding reasons of public interest) and proportional (that is, suitable for securing the attainment of the objective pursued and not going beyond what is necessary in order to attain it), and C-369/96 and C-376/96 *Arblade*.

<sup>53</sup> Hellsten 2007, p. 50

conditions of employment<sup>54</sup>. It is also appropriate to note that art. 3.7 provides that the rules laid down do not prevent the application of terms and conditions of employment which are more favorable to workers, and that Member States may impose other provisions on foreign service-providers only for the case of public policy provisions, ensuring at the same time compliance with the Treaty<sup>55</sup>.

The main implication deriving from the analysis of these recital and articles, as well as from the labour law “neutrality” option carried out in the DSIM, would be that the PWD was not simply thought as a normative item linked to the economic goal of facilitating the provision of services, and should be considered as a minimum labour law directive, rather than an instrument exhaustively coordinating the measures that the Member States are allowed to adopt in the context of posting<sup>56</sup>.

As it was later testified by the judicial course undertaken by the ECJ in *Viking* and *Laval*, the issue of the exercise of the right to strike is deeply connected with the application of the PWD, notwithstanding the Preamble stating explicitly that “this

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<sup>54</sup>In particular, art. 3.1 lists: (a) maximum work periods and minimum rest periods; (b) minimum paid annual holidays; (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (g) equality of treatment between men and women and other provisions on non-discrimination. Article 3.1 also specifies that the concept of minimum rates of pay remains defined by the national law and/or practice of the Member State to whose territory the worker is posted.

<sup>55</sup> PWD, Article 3.10. Apart from the indications coming from the ECJ, particularly in *Commission v Luxembourg* (see *infra*), as early of 2003, the Commission, in its Communication on the implementation of the PWD, specified the nature of the standards applicable concerning matters other than those explicitly referred to in article 3.1; the Commission considered that the first indent of Article 3.10 has to be interpreted bearing in mind the objective of facilitating the free movement of services within the Community. Member States are not free to impose all their mandatory labour law provisions on service providers established in another Member State. They must comply with the rules of the EC Treaty, and in particular Article 49 EC, as interpreted by the ECJ in particular in the the *Portugaia Construções* (C-164/99) and *Mazzoleni* (165/98) judgments. *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions - The implementation of Directive 96/71/EC in the Member States*, COM/2003/0458 final, par. 4.1.2.2. It is appropriate to underline that, already in this early stage (on the eve of the Eastern enlargement), the references to the Community Charter of Fundamental Rights of Workers and to the joint promotion of the economic and social dimension of the Union had given foot to a definite neo-liberal attitude favorable to the liberalization of services and to the abolition of restrictions, granting precedence to the economic dimension and to the activities of the service providers across Europe in the interpretation of the Treaty.

<sup>56</sup> Of course, for what it refers to its legal base, the PWD was adopted with reference to EU competence in the field of free movement of services, mainly in order to circumvent the demanding unanimous agreement in the Council and the opposition of Poland and UK.

Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions”<sup>57</sup>.

The PWD, in fact, operates on three types of collective agreements on the basis of art. 3.8:

- a) those declared to be of universal application (*erga omnes*);
- b) those generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned<sup>58</sup>,
- c) those concluded by the most representative employers' and labour organizations at national level which are applied throughout the national territory<sup>59</sup>.

Each of these three types of agreement, as well as the ones signed at undertaking level, may raise the question about the possible relation between the exercise of the right to strike, for the negotiation for the reaching of a collective agreement or during its application, in the context of a posting situation, where the regulatory item involved, i.e the PWD, applies as an elaborating instrument in the legal framework of the Treaty<sup>60</sup>.

The main questions, therefore, relate to the possibility for Article 49 and 50 EC of having horizontal direct effect, and being relied upon for the case of industrial

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<sup>57</sup> PWD, recital 22. It should be noted that the inclusion of this provision in the Preamble of the PWD was generated especially by the accession of Austria, Finland and Sweden in 1995. With specific regard to Sweden, this provision was directly linked also to the labour market Declaration attached to the Accession Act and it was intended to safeguard – in the form of assurances given by the Commission – “the Swedish practice in labour market matters and notably the system of determining conditions of work in collective agreements between the social partners” (*Declaration No. 46 by the Kingdom of Sweden on social policy, annexed to the Accession Act of Austria, Finland, Norway and Sweden*, OJ C241, 29.8.1994). This was fundamental in gaining the general public’s support for the accession. See Hellesten 2007, p. 80

<sup>58</sup> This kind of national agreements was intended to cover the Nordic MS situation of a *de facto erga omnes* efficacy of the collective agreements concerned, due to the high degree of organization in those countries, complemented with separate company level agreements concluded by the national trade unions or their local constituents with the non-organized employer, whether domestic or posting workers from another Member States. See

<sup>59</sup> the latter types (b and c) of collective agreements are secondary and also subject to additional provisions on equal treatment between domestic and foreign undertakings. It has to be noted that the report by the Commission on implementation of the Directive in 2003 defined the question of the applicability of collective agreements is particularly important, since wages are “chiefly determined by collective bargaining”. While most MS’ legislations, provide for the application or extension of universally applicable collective agreements to posted workers, some national legal frameworks do not allow for universally applicable collective agreements; consequently, the only rules that these States apply to posted workers are those contained in the law or in other legislative texts. See also Bercusson 2008b, p. 52

<sup>60</sup> Particularly of article 49 and 50 EC.



action between private parties, and, secondly, to the compatibility of national strike rules with the Treaty, in particular when it is considered that, on the basis of the diversities in the transposition of the PWD in the various legal frameworks, various national law allow for the collective defence of actual wages or wage level through industrial action.

On the other hand it has to be considered that PWD Directive, rather naturally allows relevant pressure to lower actual wages, which often and sometimes even widely exceed the compulsory provisions in several Member States<sup>61</sup>; in the context of EU enlargement, the gap in wages and costs between the EU-15 and NMS-12 highlighted the importance of the extension drawn by the ECJ as early as 1982 with *Seco*, and ultimately confirmed also in *Vander Elst* and *Arblade*<sup>62</sup>: posting of workers in the European Union should not be based on low-cost competition but on a reasonable compromise between the interests of workers and employers, of which the PWD should be the enforcement means.

It appeared therefore evident, from the several possible alternative approaches in the definition of the potential contrast between the exercise of the right to strike and the provision of services<sup>63</sup>, and from its increasing application of the market

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<sup>61</sup> Furthermore, the PWD leaves untouched the possibility for the Member States to utilize a competitive advantage in social security costs.

<sup>62</sup> That is to say, in posting situations involving Member States (Belgium and France) with essentially similar level of wages and other labour costs. In particular, in *Arblade* the ECJ underlined how, “even if there is no harmonization in the field, the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by rules justified by overriding requirements relating to the public interest and applicable to all persons and undertakings operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established” (paragraph 34). Beside the overriding requirements related to the public interest, and the prohibition for duplication of the same for the case of equivalence with the country of origin legislation, the Court also defined the proportionality test, stating that the “application of national rules to providers of services established in other Member States must be appropriate for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it.” (paragraph 35). Labour law, therefore, does not escape the overall justification test applicable under Article 49.

<sup>63</sup> Among the alternative hypotheses to be underlined are “strike exclusion” on the basis of EU competences, an *Albany*-style immunity, a ‘fundamental rights’ exclusion, a public policy defense, and a justification by convergence of the doctrines on restrictions on services (*Arblade*-test) and fundamental rights.

access approach to posting of workers cases<sup>64</sup>, the role of the ECJ as a fundamentally central actor<sup>65</sup> in the development of the whole framework of rules and guarantees for workers, with a view of reconstructing a more mature European labour law in the face of increasing cross-border economic and trading relations, globalisation and the Europeanization of markets<sup>66</sup>, but also in the governance of the more clearly economic processes related to the renewed economic structure of the enlarged EU and the changing trends in labour mobility, in order to respond to the need of a fair balance between the social protection instances coming primarily from older MS and trade unions' side, and the request for access and integration in the single market coming from the newer EU Members and economic operators.

## 2.2 - Analysis of the rulings

The rulings of the “Laval quartet” by the ECJ cover very different matters such as the possible limitations of right to strike and to undertake collective bargaining by

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<sup>64</sup> For example in *Mazzoleni*, the ECJ stated that the Belgian law breached article 49 by subjecting service providers to all conditions required for establishment, depriving the provision on services of practical effectiveness. It however said that the requirement to pay the host MS' minimum wage could be justified on ground of worker protection, although it concluded by suggesting that the application of Belgian rules might be disproportionate. The “national authorities of that State must, before applying them [...], consider whether the application of those rules is necessary and proportionate for the purpose of protecting the workers concerned”. Case C-165/98, *Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL*, par. 34-36. See Belavasau 2008, p. 2289 and also Barnard in De Vos 2009, p. 35-36

<sup>65</sup> The European Court of Justice is, with reference to several fundamental right and to highly salient policy areas, a major centre of policymaking. Its institutional mission comprises not only an interpretative role, but also a more “political” balancing and promotional role in the framework of EU institutions: this role is highlighted in the case of the clash between fundamental social rights (among which particular relevance have the “new” labour rights) and the economic freedoms, linked to the defense of the original mercantile logic of the Community. In this sense, since 1989 the “compatibility strategy” elaborated by the ECJ provided that the fundamental rights are not absolute, but must be considered in relation to their social function. Restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights (Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, par. 18). Its peculiar positioning in the EU institutional framework, furthermore, raises relevant normative questions and issues; especially from from a democratic point of view, the Court's influence on policy-making is indeed problematic. See *infra* par. 4.1.1, and in particular Scharpf 2009, but also Veneziani 2008, p.3

<sup>66</sup> See Blanke 2007

trade unions, the direct horizontal effect of articles 43 and 49 EC, in particular when applied to the PWD, and the balance of public policies with the economic freedoms established in the Treaty. However, what was unavoidably center stage<sup>67</sup> in the circumstances of the four cases considered were the actual features of the EU enlargement in terms of differences in wage costs and labour standards between older and newer Member States, and of the marked divide between “competition-friendly” NMS-12, favoring market access and opening, and the Nordic and continental social States, keen in protecting their advanced labour and welfare framework.

The judicial course eventually undertaken by the ECJ in such cases would have also represented a fundamental test in evaluating the ECJ’s commitment in the promotion of fundamental rights, on whose respect the development of the Community should be based, at least when the solemn proclamations of the 2000s and their undergoing constitutionalization are considered, when confronted with the free movement provisions which had always maintained a very high status in the EU law because of their historical importance in the creation and consolidation of the internal market and had seen their centrality reconfirmed in the first years of the further “market building” stage consequent to the Eastern enlargement.

It can be affirmed that the often tortuous reasonings by the ECJ and its marked attitude in promoting market freedoms to the detriment of the protection of social interests have produced a series of rulings which not only can be questioned in their more technical aspects, but which also represent fundamentally a failure by the Court in striking an appropriate and impartial balance between the fundamental rights and economic freedoms, a setback in the progress of its instrumental role in the development of the Community, which it had held since the 1960s, and the creation of regulative frameworks prone to deeply affect workers’ rights in various Member States as well as solidarity at European level, and capable of putting in jeopardy the very process of European integration.

As a methodological note, the facts of the cases, the Opinions by the Advocate Generals and the Court’s findings in the four main ECJ judgments will be analyzed singularly, and the connection points as well as discrepancies, in particular

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<sup>67</sup> Bercusson 2007b, p. 305

between the two rulings on the trade union rights to collective bargaining and action will be highlighted. Also the main doctrinal findings and critical responses with reference to the various items tackled by the rulings will be set out, while a more comprehensive overlook on the judicial course will characterize the analysis of its consequences in the various national systems involved as well as in domestic disputes and the responses proposed in the next chapters.

### 2.2.1 – Viking<sup>68</sup>

The setting of the Viking case was deceptively simple, in so far it concerned a collective action against the reflagging of a vessel from Finland to Estonia.

Viking Line Abp, a shipping company incorporated under Finnish law, owned and operated seven vessels, including the passenger and cargo ferry *Rosella*, registered under the Finnish flag, which traded on the route between Tallinn and Helsinki; the crew of the vessel was predominantly Finnish, and its members were covered by a collective agreement negotiated by the Finnish Seamen's Union (FSU).

In 2003, Viking decided to re-flag the *Rosella* to Estonia<sup>69</sup>, which would allow the company to replace the existing, predominantly Finnish, crew with Estonian seafarers (while however retaining some Finnish key workers onboard) and therefore be able to negotiate lower terms and conditions of employment in order to better compete with other operators<sup>70</sup> on the Helsinki-Tallinn route; the decision of the transfer of *Rosella* to a foreign ship register was notified to the FSU and to the crew of the *Rosella*, raising concerns on possible collective redundancies linked to the operation, and on its potential clashing with the long-standing and well-known Flag of Convenience Campaign (FOC) carried by the International Transport Federation (ITF), which is precisely directed at establishing a genuine link between the flag of the ship and the nationality of the owner and against the use of flags which do not

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<sup>68</sup> C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union c. Viking Line ABP, Viking Line Eesti*, in Racc., p. I-10779

<sup>69</sup> or Norway, see Dorsemont in De Vos 2009, pp. 68-69

<sup>70</sup> Mainly Estonian-flagged.

correspond to the State where the beneficial ownership and the control over the vessel are situated<sup>71</sup>, typically in order to benefit from lower labour standards<sup>72</sup>.

On the basis of the FOC policy, affiliates to the ITF agree that the wages and conditions of employment of seafarers should be negotiated with the affiliate in the country where the ship is ultimately beneficially owned; being affiliated to ITF, the Finnish FSU, would keep the negotiation rights for the *Rosella* even in the event of a re-flagging.

In support of the FSU, on 6 November 2003 the ITF issued a circular to its affiliates organizing Seafarers, Inspectors and Coordinators, not to conclude a collective agreement with the subsidiary of the beneficial owner<sup>73</sup>.

The negotiations between Viking and the FSU for a new collective agreement for the *Rosella* were unsuccessful and on 17 November 2003 the FSU gave notice that it intended to commence industrial action measures in relation to the *Rosella* on

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<sup>71</sup> Often with little or no maritime heritage. It is to be noted that change of register and reflagging of a vessel are “abstract” forms of delocalization, and can occur over the course of as little as 24 hours. See Chaumette 2008, p. 9

<sup>72</sup> The flags of convenience campaign is perhaps a unique example of international labour solidarity in action. It was formally launched at the 1948 World Congress in Oslo (therefore pre-dating the functioning of the distinct economic region constituted by the European Community), and is constituted by two main elements: a political campaign designed to establish by international governmental agreement a genuine link between the flag a ship flies and the nationality or residence of its owners, managers and seafarers, and so eliminate the flag of convenience system entirely, and, more importantly for the case at hand, an industrial campaign designed to ensure that seafarers who serve on flag of convenience ships, whatever their nationality, are protected from exploitation by shipowners. The policies developed by the ITF in the following years in order to protect and enhance the conditions of seafarers (in particular in the 70s which saw an acceleration of shift to FOCs and the increased supply of seafarers from developing countries) form the basis of the Standard Collective Agreement which is normally the only one available to shipowners running into industrial action; while the political campaign has not so far succeeded in preventing a constant growth in ships using FOC registers, according to ITF estimates, about a quarter of FOC vessels (nearly 5,000) are covered by standard agreements. Compliance is monitored by a global network of part-time and full-time inspectors; ITF’s membership consists of approximately 624 trade unions in more than 142 countries. See *amplius* Chaumette 2008, Fitzpatrick in Dorssemont, Jaspers & Van Hoek 2007, pp. 85-92. and <http://www.itfglobal.org/flags-convenience/index.cfm>. See *infra* on the possible negative consequences of the interplay between EU enlargement, re-flagging and ECJ judicial course on the ITF’s activities: the establishment of free movement within EU apparently renders very likely situations in which actual ownership, MS of establishment, prevalent nationality of the workforce and country of operation may differ significantly, with relevant consequences in terms of the working and employment conditions applied.

<sup>73</sup> Therefore, the “collective action” of the affiliates called for by the ITF boils down to a co-ordinated exercise of the freedom not to engage in a process of collective bargaining. See Dorssemont in De Vos 2009, p. 68

2 December 2003<sup>74</sup> since, having expired the manning agreement, it was no longer under an obligation of industrial peace<sup>75</sup>.

After having commenced proceedings in the Finnish District Court seeking an urgent *interim* injunction against the FSU's industrial action against the *Rosella*, and another round of negotiations before the National Conciliator, on 2 December 2003, in accordance with the terms of a settlement agreement, the parties entered into a revised manning agreement for the *Rosella*, with Viking putting an end to the dispute by fundamentally accepting the trade union's demands<sup>76</sup>; the reflagging was therefore suspended and the FSU decided to withdraw the call to strike, before any action had effectively taken place<sup>77</sup>.

However, anticipating that a renewed attempt to reflag the *Rosella* would have entailed once more collective action from the ITF and the FSU<sup>78</sup>, on 18th August 2004, shortly after the accession of Estonia to the EU<sup>79</sup>, Viking brought an action before the High Court of Justice of England and Wales, Queen's Bench Division (Commercial Court), requesting it to declare that the action taken by ITF and FSU in preventing the pursued re-flagging of the *Rosella* was contrary to Article 43

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<sup>74</sup> Right to strike is protected by Article 13 of the Finnish Constitution as a fundamental right in Finnish law, which has long since regarded the right to take industrial action as an inseparable part of the freedom of association. Therefore, it was common ground between the parties, and accepted by the judge, that the FSU had a right under Article 13 of the Finnish Constitution to take strike action in the circumstances of the dispute, in particular to protect its members' jobs and in respect of vessels operating from Finnish ports to enforce a collective bargaining agreement to improve the terms and conditions of the new crew.

<sup>75</sup> In accordance with the Finnish Act on Mediation in Labour Disputes. It should be noted that on the same date Viking commenced proceedings before the Finnish Labour Court seeking a declaration that the then existing manning agreement covering the *Rosella* remained in force after 18 November 2003, even if no new agreement had been reached before then.

<sup>76</sup> Viking Line conceded the 8 extra crew members requested by FSU and agreed not to commence reflagging before 28 February 2005. It also agreed to discontinue the proceedings before the Labour Court (extension of validity of collective agreement) and the District Court (*interim* injunction).

<sup>77</sup> However, in line with the FOC campaign, the ITF refused to withdraw the circular; because of that the ITF request to affiliated unions from the ITF not to negotiate with Viking in relation to the *Rosella* remained in effect while, on the other hand Viking still planned to reflag the vessel to Estonia after the expiry of the new manning agreement on 28 February 2005.

<sup>78</sup> *Viking*, AG's Opinion, par. 11

<sup>79</sup> Which notoriously occurred in May 2004. While the action was pending, the manning agreement for the *Rosella* was renewed until February 2008. As a consequence, the date of 28 February 2005 ceased to be of critical importance, but the *Rosella* continued to operate at a loss, as a result of working conditions that were less favourable for Viking Line than Estonian working conditions. *Ibid.*

EC, to order the withdrawal of the ITF circular and to order FSU not to infringe the rights which Viking enjoys under Community law<sup>80</sup>.

By decision of 16th June 2005, High Court (of London), Queen's Bench Division, Commercial Court granted the order sought by Viking Line, issuing an injunction against any industrial action, even against the defendants causing such an action by other trade unions, related to wages applicable to seamen after the re-flagging of MS Rosella in Estonia<sup>81</sup>, on the grounds that the collective action by the ITF and FSU imposed restrictions on freedom of establishment contrary to Article 43 EC and, alternatively, constituted unlawful restrictions on freedom of movement for workers and freedom to provide services under Articles 39 EC and 49 EC.

Both ITF and FSU were to refrain from taking any action to prevent the re-flagging and ITF was further required to publish a notice withdrawing its letter to its affiliated trade unions<sup>82</sup>; furthermore, the injunction was customarily equipped with a penal notice against possible contempt of Court, and further strengthened by a threatened sequestration of the defendants' assets.

On 30 June 2005 the two trade unions brought an appeal against that decision of the High Court; in this occasion, Viking's Estonian subsidiary, Viking Line Eesti OÜ, joined the proceedings and claimed to reconfirm the injunction by invoking its freedom to engage in the provision of maritime transport services between Estonia and Finland under Regulation 4055/86/EEC.

The Court of Appeal found that the case raised serious issues of European law, mainly referring to the uncertainties on the applicability of Article 43 to unions and, in case of breach, whether the unions' actions<sup>83</sup> amounted to direct or indirect

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<sup>80</sup> While at first sight surprising, Viking was able to start proceedings in England because the ITF has its secretariat in London and is therefore domiciled in the UK. The jurisdiction, in fact, was clearly established pursuant to the Brussels Regulation (Reg. 44/2001, artt. 2 and 6.1), which allows the claimant to choose where to litigate (the possible choice, obviously, was between England and Finland). See Davies 2006, Pallini 2008 and Ewing in Dorssemont, Jaspers & Van Hoek 2007, pp. 218 ff.

<sup>81</sup> Decision [2005] EWHC 1222 (Comm) of the High Court

<sup>82</sup> It should be noted that the Commercial Court in its decision substantially ignored the maritime services rules laid out by EC law and ECJ rulings and based its judgment on the sole article 43 EC. See *amplius* Hellsten 2007, p. 215

<sup>83</sup> Which, for the case of FSU, was confirmed as lawful under national law by the Court of Appeal, "by virtue of the right to freedom of association protected by Article 13 of the Finnish constitution"; par. 26 i) of the judgement

discrimination and could be justified; therefore it determined that the case should be referred to the ECJ<sup>84</sup>.

The reference from the English Court of Appeal of 3 November 2005<sup>85</sup> contained ten highly significant and technically complex questions to the ECJ<sup>86</sup> regarding the extent to which unions are able to use industrial action to resist social dumping<sup>87</sup> in the EU; the ECJ was asked to decide on the applicability of article 43

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<sup>84</sup> Two more aspects were addressed by the Court of Appeal. *In primis*, the trade unions had argued before the High Court that the international law principle of comity— that one state does not pass judgment on the activities of another state— would be infringed if the case was heard in England. This argument was rejected on the basis of the recognition by Finnish law of the legitimacy to restrict the right to strike in order to comply with Community law. The English courts would, therefore, not interpret Finnish law but would only be ruling on Community law. The Court of Appeal agreed with this reasoning on the comity point; however, the desirability of involving the Finnish government in the proceedings was a significant factor in the Court’s decision to make a reference to the ECJ. The second issue is the one of the *interim* relief sought by Viking because of the probable length of the proceedings before the ECJ. The Court of Appeal set aside the order granted by the Commercial Court against the ITF and the FSU, lifting therefore the previous permanent injunction and, after detailed consideration, denied this relief, because of the lack of clarity on the applicability of Article 43 EC to the unions, and on the consequences of its potential breach by the collective action. See Davies 2006. The Court of Appeal judgment is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2005/1299.html>

<sup>85</sup> *Reference for a preliminary ruling from the Court of Appeal (Civil Division) (England and Wales), by Order of that court of 23 November 2005 in 1) The International Transport Workers' Federation 2) The Finnish Seamen's Union v 1) Viking Line ABP 2) OU Viking Line Eesti (Case C-438/05)*, 2006/C 60/34, in OJ C 60/16 11.3.2006.

<sup>86</sup> Written and oral submissions were also addressed to the ECJ by 14 Member States and Norway, as well as the parties and the Commission. Furthermore, the European Trade Union Confederation (ETUC) intervened by submitting a letter attached to the written submission of the International Transport Workers’ Federation (ITF): the various submissions addressed some or all of the questions posed by the English Court of Appeal, but often, more directly tackled the underlying issues; as it was highlighted, in the *Viking* case “the new Member States making submissions were unanimous on one side of the arguments on issues of fundamental legal doctrine (horizontal direct effect, discrimination, proportionality) and the old Member States virtually unanimous on the other.” See Bercusson 2007b, p. 305

<sup>87</sup> In the specific form re-flagging of a shipping company from a “higher-wage” country (*in casu* Finland) to a “lower-wage” one (Estonia). It should however be noted that under the Maritime Services Regulation 4055/86/EEC the right to liner traffic is not bound to flagging in one of the two (or more, such as the hypothesis of “triangle traffic”) Member States of operation, but the flagging within the Community is sufficient; see Articles 1.1 and 1.2.



EC<sup>88</sup> in the litigation<sup>89</sup>, of its horizontal direct effect, which had not previously been addressed by the Court, and its possible justifications in the circumstances considered<sup>90</sup>; in more general terms, the case concerned the policy of the ITF aimed at precluding negotiations with “black list” subsidiaries, with a view enhancing the conditions of seafarers<sup>91</sup>.

The Assessment by the Advocate General underlined the fact that the promotion of the economic freedoms and the protection of fundamental social rights (or the pursuit of the Community’s social policy) are not irreconcilable, since the attainment of both objectives is included in the Treaty with a clear view of bringing

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<sup>88</sup> As well as the specific Regulation 4055/86 giving precise expression to the principle of freedom to provide services in the maritime transport between MS in an intra-EU setting but also between MS and third countries. It was however found that the reflagging of the *Rosella* by Viking Line would amount to an exercise of the right to freedom of establishment, as a prerequisite for the effective exercise of the freedom to provide services, as already held in *Factortame and Others* (Case C-221/89, par. 20-22). The ECJ indicated that the issues related to the freedom to provide services were premature, since they could only become relevant after the reflagging had taken effect. This reconstruction follows what the ECJ had held in *Omega*, stating that “where a national measure affects both the freedom to provide services and the free movement of goods, the Court will, in principle, examine it in relation to just one of those two fundamental freedoms if it is clear that, in the circumstances of the case, one of those freedoms is entirely secondary in relation to the other and may be attached to it”. *Viking*, AG’s opinion par. 17-18 and *Viking*, par. 30-31. See Hinarejos 2008, Hallesten 2007 and also C-275/92 *Schlindler*, par. 22-25.

<sup>89</sup> Or “in particular, by analogy with the Court’s reasoning in [...] *Albany*, paras 52-64”, the exclusion of collective action such as that under consideration from the scope of Article 43 EC and/or Article 1.1 of Regulation 4055/86 by virtue of the Community’s social policy. See *Viking*, Court Reference, par. 1-2

<sup>90</sup> *Ibid.*, par. 7 and 9. With specific reference to question 9, the Court of Appeal fundamentally asks to define whether the collective action that has been taken strikes “a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services and is it objectively justified, appropriate, proportionate and in conformity with the principle of mutual recognition” (it can be underlined that the same wording is used in the autonomous reference question regarding the objective justification on the ITF’s policy, see following note).

<sup>91</sup> *Ibid.*, par. 8. It has to be underlined how trade unions, and ITF in particular, welcomed the Court of Appeal’s decision (the reference being considered as “a crucial win”, or in the words of ITF General Secretary “the first step to a complete vindication of the right of trade unions to show international solidarity and provide legitimate support for their members”), on the basis that, independently from its effects on the *Rosella* dispute, it constituted an important opportunity for the ECJ to address the relationship between the free movement provisions and industrial action (press release <http://www.itfglobal.org/news-online/index.cfm/newsdetail/645>), in particular when it is considered that not even the company Viking Line had maintained that seafarers were not covered by the ILO right to strike/industrial action. It is appropriate to note that what has ultimately occurred is that the *Viking* case itself has been withdrawn from court, therefore depriving the process of the last judicial step in the determination of the matters involved after the ECJ ruling; however the consequences of the *Viking* ruling by the ECJ have significantly rippled through the whole European setting, and in particular in the UK. See *infra* 3.2

them together, and therefore none of them can be considered as absolute or as having an *a priori* precedence.

On the question of horizontal direct effect, the rules on freedom of movement were considered as not being clearly assigned such effect by the Treaty; however, along with the rules on competition, they are instrumental in ensuring the functioning and efficiency of the common market by granting market operators and participants the opportunity to compete on equal terms; furthermore, the Treaty does not preclude horizontal effect of the provisions on freedom of movement, and it can imply that these provisions can protect the rights of the market participants by limiting the powers of the Member States but also the autonomy of private parties<sup>92</sup>, which cannot be allowed to act without appropriate concern for other parties' rights<sup>93</sup> when their actions "by virtue of its general effect on the holders of rights to freedom of movement" are capable of hindering and restricting the exercise of those rights beyond what can be reasonably circumvented<sup>94</sup>.

With specific reference to the dispute at hand, the two types of collective action undertaken by FSU and ITF have to be distinguished: the protection of the crew of the *Rosella*<sup>95</sup> by restricting the possibility for the undertaking to relocate was deemed to represent, in principle, a legitimate way for workers to preserve their rights, if corresponding to what would happen for the case of domestic relocations<sup>96</sup>. The more general action carried out at European level in order to improve the terms of employment of seafarers could also constitute "a reasonable method of counter-balancing the actions of undertakings" seeking to exploit their entitlement to free movement in order to lower their labour costs; however, such

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<sup>92</sup> *Viking*, AG's Opinion, par. 33-38

<sup>93</sup> The AG also underlined that the case, could have come to the Court in the "framework of proceedings against the Finnish authorities for failing to curtail collective action against Viking Line" (similarly to *Schmidberger*, which was notably constituted an action by a private against a Member State, see *supra* par. 1.2.4), without affecting the "substance of the problem" constituted by the reconciliation of freedom of movement and right to strike on the basis of the consideration that "indirect horizontal effect may differ from direct horizontal effect in form; however, there is no difference in substance" *Ibid.*, par. 40.

<sup>94</sup> As for the case of intellectual property rights holders and professional sports associations. *Viking*, Opinion, par. 48.

<sup>95</sup> Through coordinated collective action aimed at securing wages and working conditions, at preventing redundancies or obtaining equitable compensation.

<sup>96</sup> And provided that action undertaken against the intra-EU relocation would not hinder the subsequent trans-national provision of services of an undertaking which had eventually relocated.

coordinated action, if entailing an obligation for support by the national unions to the primary action, could easily be abused in a discriminatory manner<sup>97</sup>.

AG Poiares Maduro therefore concluded against the *Albany*-style exemption for the collective action<sup>98</sup> and in favour of the direct horizontal effect of Article 43 EC and of Regulation No 4055/86<sup>99</sup>, and in particular suggested that the Court should rule in the sense that Article 43 EC would not “preclude a trade union or an association of trade unions from taking collective action which has the effect of restricting the right of establishment of an undertaking that intends to relocate to another Member State, in order to protect the workers of that undertaking”<sup>100</sup>. The national court should determine the lawfulness of such action in the light of the applicable domestic rules, provided that cases of intra-Community relocation are not treated less favourably than cases of relocation within the national borders.

The Court’s reasoning took its start from the consideration that the questions referred by the national court could be answered only insofar as they concerned the provision on freedom of establishment, and proceeded in underlining how article 43 EC, along with articles 39 and 49, determines not only the limits of the action of public authorities of the Member States, but is to be extended to agreements of different nature, which collectively regulate subordinate and autonomous work, as well as the provision of services; the judicial course defining collective agreements pursuing social objectives as excluded from the EU competition law provisions

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<sup>97</sup> Even to the extent of protecting the collective bargaining power of some national unions at the expense of the interests of others. *Viking*, AG’s Opinion, par. 70-71

<sup>98</sup> In particular because “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”, and because of the absence of the possible contradiction between the encouraging of social dialogue by Treaty provisions and the potential prohibition of such agreements, stemming by the Treaty itself, by reason of their inherent effects on competition characterising the *Albany* case; since the provisions on the freedom of movement can be reconciled with social rights, there is no need to extend the “limited antitrust immunity” previously provided by the ECJ to collective agreements. See *Viking*, AG’s Opinion par. 26-27

<sup>99</sup> *Ibid.*, par. 28, 56 and 73 (2)-(3)

<sup>100</sup> *Ibid.*, par. 73 (3). The compatibility with article 43 EC is to be on the other hand excluded for the case of “a coordinated policy of collective action by a trade union and an association of trade unions which, by restricting the right to freedom of establishment, has the effect of partitioning the labour market and impeding the hiring of workers from certain Member States in order to protect the jobs of workers in other Member States”. See par. 73 (4).

cannot be transposed with reference to the movement freedoms set out in Title III of the Treaty<sup>101</sup>.

Furthermore, since on the basis in particular of *Defrenne*<sup>102</sup> the prohibition on restricting a freedom provided by the Treaty lies on all agreements intended to regulate paid labour collectively<sup>103</sup>, and that restrictions on free movement can be determined also by the actions of individuals or groups rather than caused by the State, the ECJ held that Article 43 could be directly invoked in the case at hand by an individual (the private undertaking Viking) against a trade union or a confederation (FSU and ITF), even if national law provided for the trade unions the right to undertake collective action and the actors involved are not associations exercising a regulatory task and having quasi-legislative powers but which are only exercising the legal autonomy conferred to them by national law<sup>104</sup>.

Having determined that collective actions by trade unions fall within the scope of application of Article 43 EC, and that the exercise of fundamental rights has to be reconciled with the rights and freedoms protected by the Treaty, the ECJ proceeded in determining the existence of the restriction to a Treaty freedom and its possible justification.

While recognizing the right to take collective action as a fundamental right in EU law<sup>105</sup>, the Court found that the unions' actual or threatened actions amounted a restriction on freedom of establishment by making Viking's intended reflagging "less attractive, or even pointless"<sup>106</sup>; the Court, in analyzing the situation presented by

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<sup>101</sup>Along with the exclusion of the *Albany*-style immunity, the Court has also ruled out the Danish submission proposing an exclusion from the application of article 43 EC on the basis of the lack of EU competence on the matter set out by Article 137.5 EC (parr. 39-41), and the Danish-Swedish submission highlighting a "fundamental rights exclusion": on the latter, in particular, the ECJ held that recognizing the strike as a fundamental right provides that its protection can justify restrictions to the obligations imposed by Community law as determined by its case-law (which shows a settled course in assessing rivaling or overlapping internal market freedoms and fundamental rights, as in *Schmidberger* and *Omega*, with reference to the freedom of association and the respect of human dignity), but also that its exercise "may none the less be subject to certain restrictions"(parr. 42-47).

<sup>102</sup> Case 43/75 *Defrenne*, parr. 31, 39

<sup>103</sup> The Court had also held that the terms of the collective agreements are not excluded from the scope of the freedom of movement provisions of the Treaty. *Viking*, par. 54

<sup>104</sup> *Viking*, parr. 56-66

<sup>105</sup> *Ibid.*, parr. 43 "the right to take collective action, including the right to strike, must [...] be recognized as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures".

<sup>106</sup> The Court also rapidly addressed (parr. 70-71) the inclusion of reflagging into the definition of establishment, in continuity with the judicial course set in *Factortame and Others*.

the *Viking* case in the framework of the *Gebhard*-formula<sup>107</sup>, underlined how the protection of the rights of workers constitutes, in fact, an overriding reason of public interest<sup>108</sup>, and emphasized that the Community is not only a single market, but also pursues “a policy in the social sphere”<sup>109</sup>; it subsequently demanded to the national court to decide “whether the objectives pursued by FSU and ITF by means of the collective action which they initiated concerned the protection of workers”<sup>110</sup>.

National courts have therefore to rule on justification, necessity and proportionality of the single actions<sup>111</sup>: with regards to the FSU, the Court stated that, in order for its action to be considered as falling within the objective of protecting workers it had to be shown that the jobs or conditions of employment at issue were under serious threat and, even in that case<sup>112</sup>, the national court would have to ascertain whether the action threatened or initiated by the trade union was “suitable for achieving the objective pursued” and did not “go beyond what was necessary to attain that objective”<sup>113</sup>: the ECJ then proceeded to provide a certain degree of guidance to the to national court.

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<sup>107</sup> In order to determine, *in primis*, if the restriction pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest and, secondly, if it is suitable for securing the attainment of the objective pursued and not going beyond what is necessary in order to attain it. See *Viking*, par. 75, *Gebhard*, par. 37 and *Bosman*, par. 104

<sup>108</sup> In particular on account of the fact that Viking Line (or its subsidiaries) would be prevented from enjoying the same treatment in the Member State of reflagging as other economic operators, and would probably continue, in the particular situation previously detailed, to operate at a loss. See *Viking*, par. 74.

<sup>109</sup> *Ibid.*, par. 78. See also Articles 2 EC and 3.1) (c) and (j) EC.

<sup>110</sup> *Ibid.*, par. 87. The EU-Court ruled that such a collective action is not excluded from the scope of Article 49 TFEU (ex 43 EC) on the right of establishment. The Court also stated that Article 49 TFEU is capable of conferring rights on a private undertaking which may be relied upon against a trade union. Finally, the Court held that a collective action, such as that at issue in the dispute, constitutes a restriction of the right of establishment. The restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is proportional (according to the *Gebhard*-formula). It was for the national court to ascertain whether the restriction could be justified.

<sup>111</sup> National courts have “sole jurisdiction to assess the facts and interpret the national legislation”. *Ibid.*, par. 85

<sup>112</sup> That is, if the national court, following that examination “came to the conclusion that, in the case before it, the jobs or conditions of employment of the FSU’s members liable to be adversely affected by the reflagging of the Rosella are in fact jeopardised or under serious threat”. *Ibid.*, par. 84

<sup>113</sup> *Viking*, par. 84

To determine whether and to what extent the collective action meets the aforementioned requirements, national courts would have to check in particular<sup>114</sup> whether the union did not have<sup>115</sup> other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into, and whether the union had exhausted those means before initiating the collective action<sup>116</sup>.

With regards to ITF's secondary action aiming at ensuring the implementation of the FOC policy, the Court was even less accommodating<sup>117</sup>: the ECJ, in fact, found that, while the policy of combating the flags of convenience also pursues the objective of protecting and improving seafarers' terms and conditions of employment<sup>118</sup>, the solidarity action initiated by ITF action after being asked by the national affiliates cannot be justified, in particular because the restriction on freedom of establishment deriving from it would be placed on the reflagging undertaking regardless of whether the exercise of this freedom would actually be liable to have "a harmful effect on the work or conditions of employment" of the workers<sup>119</sup>.

The ECJ, therefore concluded that collective action in order to induce an undertaking to enter into a collective agreement whose terms are liable to deter it from exercising freedom of establishment, is not excluded from the scope of Article

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<sup>114</sup> With regards to the appropriateness of the action undertaken by FSU, the Court underlined that "it should be borne in mind that it is common ground that collective action [...] may [...] be one of the main ways in which trade unions protect the interests of their members *Viking*, par.86. It is also noteworthy that the Court indicated in support of this conclusion ECtHR jurisprudence, in particular *Syndicat national de la police belge (Syndicat national de la police belge v Belgium*, of 27 October 1975) and *Wilson (Wilson, National Union of Journalists and Others v United Kingdom* of 2 July 2002).

<sup>115</sup> "Under the national rules and collective agreement law applicable to that action". *Viking*, par. 87

<sup>116</sup> It is however to be noted that after the ruling issued by the ECJ, the parties in the dispute arrived at a private settlement, and the case has been therefore withdrawn from the national court. See *infra* par. 3.2.2

<sup>117</sup> *Hinarejos* 2008, p. 720

<sup>118</sup> *Viking*, par. 88

<sup>119</sup> Specifically, the ECJ highlighted that, as also *Viking* had argued during the hearing (without being contradicted by ITF), "the policy of reserving the right of collective negotiations to trade unions of the State of which the beneficial owner of a vessel is a national is also applicable where the vessel is registered in a State which guarantees workers a higher level of social protection than they would enjoy in the first State." (that is, the policy would "kick in" even if the ferry were to be re-flagged in a Member State offering better employment standards to its workers, see *Hinarejos* 2008, p. 720). *Ibid.*, par. 89

43 EC, and that the article itself can have direct horizontal effect by conferring rights on a private undertaking against the action of trade unions<sup>120</sup>.

With specific reference to the action in question the Court found that it constitutes a restriction that can, in principle, be justified by reason of public interest, insofar as it is necessary and proportionate to the pursuit of the objective of the protection of workers<sup>121</sup>.

### 2.2.2 – *Laval*<sup>122</sup>

If the setting of the *Viking* case can be considered simple, even more apparently devoid from any kind of complexities were the factual premises that ultimately brought the ECJ to the issuing of the *Laval* ruling.

The Vaxholm dispute regarded the right to a collective agreement at a large workplace carrying out public works (*i.e.*, the renovation and extension of school premises - formerly military structures - in Söderfjärd, within the Vaxholm municipality near Stockholm) that had been awarded, following a tendering procedure<sup>123</sup>, to a Latvian company (the Riga-based Laval un Partneri, henceforth Laval) through its Swedish-established subsidiary, L&P Baltic Bygg AB (henceforth Baltic).

The construction works were actually carried out by around 35 workers posted from Latvia by the parent corporation and from various subcontractors, and while the company, in settling with the Vaxholm municipality, had agreed to a contract explicitly providing that Swedish collective agreements and tie-in agreements<sup>124</sup> were to be applicable to the workers constructing the building site, that clause was not respected in practice and Laval ultimately decided to apply

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<sup>120</sup> *Viking*, Operative part of the Judgment (2008/C 51/17), par. 1-2, in OJ C 51/11, 23.2.2008

<sup>121</sup> *Viking*, Operative part of the Judgment, par. 3

<sup>122</sup> Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet* [2007] ECR-I 11767

<sup>123</sup> The work on Söderfjärdsskolan was procured by the City of Vaxholm in accordance with the regulations in the law (1992:1528) as to public procurement, based on the comparable EC directive on procurement.

<sup>124</sup> A tie-in agreement (also “application agreement”, *hängavtal*) is a standard collective agreement concluded at local level, between the local branch of the trade union involved and an employer who is not already bound by a collective agreement, and who is not members of any employer organization. Furthermore, under the Law on workers’ participation in decisions (MBL), once a collective agreement or a tie-in agreement are signed, they apply to all workers in the workplace, whether or not they are affiliated to a trade union.

instead to its posted workers the collective agreement concluded with the Latvian trade union<sup>125</sup>.

At the beginning of June 2004, when it appeared clear that a company without a valid agreement had begun to work on a large commission within the trade union division's area, contact was taken by the local branch<sup>126</sup> of the Swedish trade union of the construction sector with the representatives of Laval and its subsidiary with a view of concluding a tie-in agreement; the union objected to the presence of posted workers from Laval on the building site which had not signed a Swedish collective agreement, and should therefore not be allowed to carry out their work in Sweden.

While Byggnads<sup>127</sup> evidently represents Swedish workers, and none of its members were employed by Laval, its demands for an agreement hardly constituted an exception in the Swedish labour market; according to the Mediation Institute's annual accounts book, about 240 agreements were signed in 2004, affecting almost two million employees in private undertakings and civil services, of which Byggnads

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<sup>125</sup>Baltic, according to its articles of association and bylaws, conducted repairs, renovations and construction additions of buildings, and since its establishment, had conducted operations with its own employed personnel and had signed collective agreements with Byggnads of the same type of the one eventually pursued in the Vaxholm dispute. It has also to be noted that such collective agreement was concluded long after the start of the building activities, on September 14, one day before the last attempt for conciliation carried out before the outbreak of industrial action in the Vaxholm dispute and October 20 (extending the application of the agreement to all the posted workers and not only the members of the union); therefore, during almost the whole duration of the negotiations Laval was not bound by any collective agreement. According to information from Laval, around 65% of the workers were members of LAC, the Latvian building workers' union; however, the actual wage levels and working conditions of the Latvian workers were from the start at the centre of a harsh dispute between the company and the trade union. Laval held, including in its summons before the Labour Court, that the figures of 13,600 Kr per month (and benefits for further 7,000 Kr) contained in the employment agreement as well as the working, lodging and transportation conditions (according to the description, laced with "paternalistic overtones", provided by Laval, posted workers were entitled with free accommodation, three meals a day and transport) illustrated in a Swedish trade journal were correct. The union, on the basis of details from income to the Latvian tax authorities, was able to determine that some of Laval's workers made only 35 kronor an hour - a far cry from the 138 to 145 Kr hourly wage laid down in the collective agreements (but also from the wage provided by a potential fall-back clause in a sectoral agreement); however, even a monthly income of 4,000 Kr would represent an attractive offer when compared with the Latvian minimum wage - attesting at 1,400 Kr. See Persson 2005, p. 23, 27-30, Rönngren 2005, p. 2 and Eklund 2008, p. 552

<sup>126</sup> Byggettan (Section 1 of the Swedish Building Workers' Union)

<sup>127</sup> Svenska Byggnadsarbetareförbundet, the Swedish construction workers union, including 128,000 members, of which approximately 95,000 are of working age. Byggnads organizes workers including carpenters, cement workers, bricklayers, floorers, construction workers and road workers as well as plumbers. Approximately 87% of the country's construction workers are members in Byggnads..



alone had signed 98 with foreign construction companies<sup>128</sup>, and which had requirement the Arbitrators' intervention in order for the signature of the agreement only in 9 cases. The aim in all these cases was to apply a collective agreement ensuring that the employees are paid wages reflecting the average wage paid in the geographical area in which the undertaking is located; *in casu* the request by Byggnads was that 145 Kr (*circa* 16 €) be paid per hour<sup>129</sup>.

It has to be noted that the Swedish national collective agreement for the building sector does not contain provisions on minimum wage, but includes a “fall-back clause” which is to be applied in case of failure by the parties in reaching an agreement on an higher wage level upon the conclusion of a collective agreement, for which negotiations are carried out on a case-by-case basis at the level of undertaking<sup>130</sup>; Baltic, however, was not a party in the sectoral agreement, therefore the fall-back clause would not apply<sup>131</sup>.

While the first contacts also proceeded routinely, during the summer-autumn 2004, despite repeated negotiations, Byggnads and Laval had failed to reach a compromise and, instead of signing the agreement or backing off, the company had decided to pursue the matter, challenging Swedish legislation, the Swedish trade union movement and the conditions of the domestic labour market<sup>132</sup>; on October 7 it made it known that it did not intend to sign any collective labour contract<sup>133</sup>.

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<sup>128</sup> As a view of comparison, Persson 2005 underlines (p. 11) how the Metal Workers trade union had signed agreements for about half this figure.

<sup>129</sup> This amount was based on statistics on average wages for the Stockholm region for the first quarter of 2004, relating to professionally qualified builders and carpenters. See Malmberg & Siegman 2008, p. 1123

<sup>130</sup> As confirmed by the Swedish trade unions, the “fall-back” wage in fact represents only a negotiating “last-resort” mechanism, and does not constitute a minimum wage; at the time of the dispute, the clause stipulated for the second half of 2004 an hourly wage of 109 Kr. (approx. 12 €) See Eklund 2008, p. 551-552.

<sup>131</sup> It should be mentioned also that Sweden did not make use of the possibility of invoking a transitory regime against the posting of workers, as had been conceded to Germany and Austria during the accession negotiations with the new member countries, including Latvia. See Reich 2008, p. 134

<sup>132</sup> It was noted by Swedish trade union officials participating at meetings and discussion with Laval, that the involvement of lawyers occurred at a very early stage, and that the ideologically motivated opponent was determined not to sign an agreement but to consciously challenge the Swedish labour market system, a unusual decision, not least economically. Person 2005, p. 19-24

<sup>133</sup> And therefore, the Latvian posted workers were not covered by any Swedish instrument related to minimum wages, because of the absence in the Swedish system of a statutory regulation of minimum wages and of the possibility of an *erga omnes* extension of the sectoral collective agreement; the demand for a conclusion of a Swedish collective agreements remained.

As a consequence of the oppository stance taken by Laval, after due notice given on October 19, at the beginning of November Byggnads imposed a blockade on the Latvian company, calling for a boycott of construction work at all Laval construction sites<sup>134</sup>; however, as there were no members of the Swedish union on either of the buildings that Laval was working on in the Stockholm region, the conflict measures did not initially lead to major consequences, at least until when Elektrikerförbundet, the Swedish electricians' union, initiated sympathy measures in support of Byggnads' demands<sup>135</sup> and was quickly followed by several other unions expressing their support<sup>136</sup>.

Notwithstanding the eventual findings by the ECJ with reference to actual impediments for the Latvian goods and employees to access the Söderfjärd premises<sup>137</sup>, with the exception of two minor incidents<sup>138</sup>, Latvian workers in particular were free to enter and leave the construction site; however, as a result of the continuing blockade<sup>139</sup>, construction works eventually stopped.

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<sup>134</sup> The *blockad* carried out by Byggnads, in fact, amounts to the labour union organization encouraging its members to refuse to perform their contract of employment to the benefit of Baltic as a client of their employer at its workplace.

<sup>135</sup> Still far from a violent escalation of the dispute, and actually a completely legal form of sympathy action under Swedish industrial action rules (*sympatiåtgärd*, see *infra* par. 3.1.1), the blockade undertaken by the electricians' union produced relevant effects: without electrical installation the work on the Söderfjärd building would, in fact, soon come to a standstill (Swedish law, in fact, provides that electrical installation work may be performed only by tradespeople licensed in Sweden). See EIRO 2005, p. 2, Persson 2005, p. 31 and Dorssemont 2008, p. 20

<sup>136</sup> In particular after the decision by the Labour Court to reject the claim for an *interim* injunction on the action.

<sup>137</sup> The ECJ found that the blockading consisted, *inter alia*, of preventing the delivery of goods onto the site (deliveries of concrete were stopped on 8 December, but Laval managed to find concrete suppliers employing non-unionized staff, and was able to allow the continuation of the work), placing pickets and prohibiting Latvian workers and vehicles from entering the site. Laval asked the police for assistance but they explained that since the collective action was lawful under national law they were not allowed to intervene or to remove physical obstacles blocking access to the site". See *Laval*, par. 34

<sup>138</sup> On 12 November 2004 a truck delivery was called upon not to deliver goods to the plant. After comments and inquiry from Laval, the delivery finally took place some days later; on December 13 a protest demonstration outside the Söderfjärdsskolan site was carried out, which effectively blocked the only access route and the gate, therefore forcing the Latvian workers to dismount from the bus carrying them to the workplace and to cross the picket line composed by Swedish union members, who sought to talk to the Latvian workers about their rights (also by handing out information sheets in Latvian), hampering them from entering the building site. As noted in previous footnote, the police force was called but did not intervene directly. See Persson 2005, p. 43-47

<sup>139</sup> Which would have eventually lasted several months, see *Sweden pushes to protect collective agreements*, *The Local* 7 April 2005, available online at <http://www.thelocal.se/1240/20050407/>

On December 7, 2004, Laval brought an action before the Swedish Labour Court against Byggnads and the Elektrikerförbundet, requesting a declaration that the industrial action to be unlawful, an *interim* injunction, and also demanding that the aforementioned unions should pay damages to Laval as a compensation for the moral and material losses in which it incurred. Furthermore, Laval requested that the Labour Court should submit a request to the European Court of Justice for a preliminary ruling on the matter; the unions contested all the claims<sup>140</sup>.

The Labour Court, however divided<sup>141</sup>, decided to reject Laval's request for an *interim* decision to discontinue the industrial action, ruling that Byggnads' blockade could continue until the whole matter of the Latvians' legal rights in Sweden were clarified in further hearings<sup>142</sup>.

The Labour Court proceedings took place in March 2005<sup>143</sup>, and the Latvian group argued that while the union blockades may have been legal under Swedish law, they violated European regulations on the free circulation of labour and services; the *Arbetsdomstolen* concluded that issues relating to EU law had in fact been raised even though the trade union action was lawful according to Swedish law<sup>144</sup> and as a result, reversing its earlier decision, sought a preliminary ruling from

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<sup>140</sup>The Vaxholm conflict quickly gained attention in both the diplomatic and Swedish political arena. In particular, the Latvian Minister for Foreign Affairs demanded explanation for the "illegal measures" the Swedish union was engaged in, and a parliamentary debate on the matter was started in December 17, 2004; responses and commentaries to the dispute also came from the Latvian Construction Contractors Association and the Latvian trade unions. See *amplius* EIRO 2005, p. 2-4 and Persson 2005, pp. 40-43

<sup>141</sup> It was reported that union representatives on the tribunal supported Byggnads' action, whereas the two representatives of the employers' organizations found in favor of the Latvian company. However, "Even those members of the court that found against [the action] did not say that [the union was] breaking EU law." See *Swedish court backs action against Latvian builders*, *The Local* 22 December 2004, available online at: <http://www.thelocal.se/762/20041222/>

<sup>142</sup> Labour Court decision 2004 No. 111 (dated Dec. 22, 2004)

<sup>143</sup> It should be noted that, in the meantime, in February 2005 the Vaxholm municipality had requested to terminate the contract with Baltic, since it risked not being able to complete the school building on time, and the company consequently left the working site; the work was then completed by a Swedish construction company which used Swedish workers paid approximately 163 Kr. per hour. In March, furthermore, the Swedish subsidiary was declared bankrupt and entered liquidation procedures. Laval, in the wake of the December decision by the *Arbetsdomstolen* had also expressed, through its legal counselors, the will of pursuing the matter by taking into account EU law and also not to sign any agreement with the Swedish union.

<sup>144</sup> Labour Court decision 2005 No. 49 (dated Apr. 29, 2005)

the European Court of Justice, referring two very wide questions<sup>145</sup> on the interpretation of content of Articles 12 and 49 of the EC Treaty and the Posting of Workers Directive with specific regards to whether a contractual industrial action against a foreign company wanting to perform a work contract under Swedish procurement rules through the use of posted workers<sup>146</sup> could be justified, as well as the interconnections of EU freedom to provide services with the specific structure of Swedish labour law in transposing and implementing the PWD<sup>147</sup>.

The Law on the posting of workers<sup>148</sup>, in fact, does not require posting employers to apply collective undertakings<sup>149</sup> and, in indicating the terms and conditions of employment applicable to posted workers regardless of the law applicable to the contract of employment itself<sup>150</sup>, does not provide a definition for minimum rates of pay as referred to in the Article 3.1<sup>151</sup> of the PWD<sup>152</sup>, confirming the dominant role of the Swedish social partners in defining terms and conditions of employment though collective agreements; this instrument, in particular, is regulated

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<sup>145</sup> Reference for a preliminary ruling from the Arbetsdomstolen by order of that court of 15 September 2005 in *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Avdelning 1 of the Svenska Byggnadsarbetareförbundet, Svenska Elektrikerförbundet* (Case C-341/05), 2005/C 281/18 in OJ C 281/10, 12.11.2005

<sup>146</sup> In particular considering a situation in the host country such as Sweden in which “the legislation intended to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements” and “has no system for declaring collective agreements to be of universal application”. See *Laval*, Reference, par. 1 and *Laval*, AG’s Opinion, par. 1

<sup>147</sup> A relevant procedural remark is that, while subsequent as date of reference, *Viking* was an injunction case, and it was therefore given priority by the ECJ under Article 55 of its Rules of Procedure. Thus, the judgment in *Viking* ultimately came before the one in *Laval*.

<sup>148</sup> *Lag om utstationering av arbetstagare*, LUA (Official Gazette 1999:678, Government Bill 1998/99: 90)

<sup>149</sup> With a view, in particular, to avoid discrimination between foreign employers eventually bound by a declaration of universal application and those Swedish ones which were not parties of a collective agreement. The Swedish liaison office is in charge of providing information to posting employers with regards of the existence of applicable collective agreements. See also *Laval*, par. 7-9

<sup>150</sup> LUA, Art. 5

<sup>151</sup> Article 3.1, first subparagraph, (c)

<sup>152</sup> Nor does it refer to terms and conditions of employment relating to matters other than remuneration that are governed by collective agreements. (art. 3.10 PWD). The issue of implementation of the provisions of the Directive on minimum rates of pay was considered extensively in the *travaux préparatoires* for the LUA; As the legislator upon the passing of the Act assumed that the PWD was a minimum directive and that Community law also allowed the trade unions to continue to have the right to take industrial action in order to establish customary collective agreements with posting employers from other EEA countries, no provisions were introduced for the matters at hand. See *Betänkande av Lavalutredningen - Förslag till åtgärder med anledning av Lavaldomen*, p. 48, Statens Offentliga Utredningar (SOU) 2008:123

by the Law on workers' participation in decisions (MBL)<sup>153</sup>, which also sets out the limitations on the right to resort to collective action, with a view of ensuring the the good labour relations between the parties of a agreement.

In this regards, as a 1989 Labour court judgment<sup>154</sup> established that industrial action aimed at replacing or altering an existing collective agreement applicable to a given workplace is prohibited even if those taking the action are not bound by the agreement concerned, the MBL was amended in order to limit the possible consequence of this ruling. Through the subsequent *Lex Britannia*<sup>155</sup>, introduced in 1991, the legislature made it clear that this restricting principle does not hold where a union takes industrial action in connection with employment relationships to which the MBL is not directly applicable<sup>156</sup>, effectively grounding *Lex Britannia* as the cornerstone of Swedish system, in particular in its relations with foreign national

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<sup>153</sup> *Lagen om medbestämmande i arbetslivet ou medbestämmandelagen* (1976:580)

<sup>154</sup> Arbetsdomstolen (AD) 120:1989, commonly known as the *Britannia* case, by the name of the container ship (which flew a flag-of-convenience, employed a Filipino crew and was bound by the terms of a Filipino collective agreement) whose crew's working conditions were the object of the dispute. See Eklund 2006, p. 203

<sup>155</sup> Official Gazette 1991:681, Government Bill 1990/91:162. Introducing three new provisions in the text of MBL, and in particular art. 25a, providing that a collective agreement which has become invalid under foreign law on the ground that it was concluded after collective action shall nevertheless be valid in Sweden if the collective action in question is authorized under Swedish law, art. 31a stating that in the event that an employer bound by a collective agreement, to which the present Law would not apply directly, thereafter concludes a collective agreement [...], the subsequent collective agreement shall apply whenever the agreements contain provisions conflicting with each other and, most importantly, art. 42.3, which provides: "Employers' organizations or workers' organizations shall not be entitled to organize or encourage illegal collective action in any way whatsoever. Nor shall they be entitled to participate in any illegal collective action, by providing support or in any other way. If any illegal collective action is commenced, third parties shall be prohibited from participating in it. The provisions of the first two sentences of the first subparagraph shall apply only if an organization commences collective action by reason of employment relationships falling directly within the scope of the present Law." See *Laval*, AG's Opinion, par. 32-34

<sup>156</sup> See Bruun, Jonsson in Bücker, Warneck 2010, p. 19

labour providers<sup>157</sup>, by lifting the prohibition on collective action against a foreign employer carrying out temporary activities<sup>158</sup>.

Sixteen Member States filed submission to the ECJ, laying out their position on the Vaxholm case; of these, the majority said that they supported the union's right to take action against the Latvian builders, a view partially shared by the Commission, which agreed on the fact that Swedish unions should be allowed to take action to defend collective agreements. It also said, however, that as the Swedish collective agreements cover more than just wage levels they are a disproportionate hindrance to the free movement of services and did not comment directly on the action taken by the union in the Vaxholm case<sup>159</sup>; on the other hand,

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<sup>157</sup> It should be mentioned, with reference to the context of the EU enlargement, that Sweden did not make use of the possibility of invoking a transitory regime against the posting of workers, as had been conceded to Germany and Austria during the accession negotiations with the new member countries, including Latvia. See Reich 2008, p. 134 and *supra*, par. 2.1

<sup>158</sup> The purpose of *Lex Britannia* (according to the legislative history of the instrument, to give the trade unions the possibility of acting in order to make all employers conducting activities on the Swedish labour market apply wages and other working conditions corresponding to those generally applied in the sector, and to create favorable conditions for fair competition on equal terms between Swedish companies and service providers from other countries for which the connection to Sweden is deemed so weak that the MBL is not directly applicable to the working relationship) therefore is similar to the extension of the collective agreement, which has been upheld by the Court, and which is a frequently used device in many continental countries in order to combat social dumping (see, for example, *Rush Portuguesa*). In other words, collective agreements based on *Lex Britannia* put into practice the equal treatment principle enshrined in Article 50.3 EC; this is besides in line with Article 137.3 EC which refers to the implementation of directives (like the PWD) by means of collective agreements. In both cases is the national collective agreement to which the foreign service provider is party will have to yield; the main difference (and a one which was bound to have relevant consequences in the ECJ's reasonings) is that the Swedish regime of law enforcement is governed by private law, whereas the continental *erga omnes* model is governed by public law. See Eklund 2006, p. 208, Bruun in Dorsemont, Jaspers & Van Hoek (eds.) 2007, pp. 213-214, Hellsten 2007, p. 203

<sup>159</sup> Charlie McCreevy, at the time Commissioner for Internal Market and Services, had previously expressed the less moderate opinion that Sweden's handling of the conflict was "a breach of the European Union's treaty", since the case regarded the freedom of movement, and answered "yes" to the direct question of whether he would argue against the builders union Byggnads in the EU Court, stirring up strong reactions from Swedish trade union, in particular pointing out the express statement contained in the PWD with regards to collective action and the fact that the statements by Commissioner McCreevy were not followed by any official document by the EU Court in connection with the matter (*EU to fight Sweden over Latvian builders, The Local* 5 October 2005, available online at <http://www.thelocal.se/2226/20051005/>), and by European Parliament, which summoned him in order to explain his statements; he responded by stating that "Just because Latvia is a new member state and one of its smallest states does not mean its concerns are less important", backed up by by Commission President José Manuel Barroso, who said he would not "attack Sweden's or Scandinavia's social model", but vowed at the same time to "respect and defend the rules spelled out in the European treaties." (*McCreevy defends support for Latvians, The Local* 26 October 2005, available online at <http://www.thelocal.se/2367/20051026/>)

a number of countries mainly in the Baltic region, stated their support for the Latvian company<sup>160</sup>.

AG Mengozzi gave his response on the questions submitted by the national court in May 2007; he underlined how the Posting of Workers Directive constitutes an instrument to ensure fair competition and respect for the rights of the workers in the context of the promotion of the freedom to provide services, by providing “a ‘nucleus’ of mandatory rules for minimum protection” to be observed by the posting employer in the host Member State, set out in particular by art. 3 of Directive 96/71<sup>161</sup>.

He maintained that industrial action<sup>162</sup> does fall within the scope of EU law<sup>163</sup>, overcoming the objections by Denmark and Sweden linked with the exclusion of competences of EU institutions on the matter provided by art. 137.5 EC<sup>164</sup> and with the recognition of the right to strike as a fundamental right in various international instruments concerning the protection of human rights<sup>165</sup>; a collective action such as

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<sup>160</sup> *EU countries support Swedish union, The Local* 29 May 2006, available online at <http://www.thelocal.se/3936/20060529/>

<sup>161</sup> And specifically paragraphs 1, 8 and 10, which specifically lay down the minimum terms and conditions of employment (and in particular the minimum rates of pay, along with work and rest periods, holidays, H&S and equality of treatment), the options to be undertaken in case of absence of a system for declaring collective agreements to be of universal application, and the possibility for the Member States to apply terms and conditions of employment on other matters than those referred to in article 3.1 in the case of public policy provisions. See *Laval* AG’s Opinion, par. 14 and 16

<sup>162</sup> It was duly noted by the AG that, according to recital 22 of Preamble, the Directive is without not prejudice the national right concerning collective action to defend the interests of trades and professions

<sup>163</sup> And it must therefore take account of freedoms protected under Community law, including the freedom to provide services. See *Laval*, Ag’s Opinion, par. 91

<sup>164</sup> Since “Article 137(5) EC seeks only to exclude from measures which may be adopted by the Community institutions [...] the aspects of the social policy of the Member States relating to pay, the right of association, the right to strike and the right to impose lock-outs” and hardly lends itself to extensive interpretation (possibly not referring to other types of collective action, otherwise supported and supplemented by the EU). Furthermore, even if art. 137.5 would amount to exclusive competence for the MS on the matter, the MS would still have to ensure the respect of the fundamental freedoms within their territory. *Laval*, AG’s Opinion, par. 50-59

<sup>165</sup> In particular, on the basis that ECtHR jurisprudence (which is however described as having been accorded “special significance” by the ECJ) indicates the right to strike only as one of the means of defence of the workers’ interests (and not directly upheld until 2009, see *infra* par. 4.4) which can be subject to limits and restriction by national law, also provided by the European Social Charter and the Community Charter of Fundamental Social Rights, and on the absence of legal binding value of the CFREU, which reaffirms rights stemming from constitutional traditions of the Member States and the international instruments. Furthermore, “to recognise such a status and such protection for the right to take collective action does not result in the inapplicability of the EC Treaty rules on freedom of movement”, in particular with relation to the means of exercise of collective action, which encounter restrictions in all the Member States and were, in fact, balanced by the ECj in cases such as *Schmidberger*. *Ibid.*, par. 60-90

the one undertaken by Byggnads is capable of dissuading foreign undertakings from exercising their freedoms to provide services in the Kingdom of Sweden, and therefore constitutes a restriction on the freedom to provide services<sup>166</sup> which must be justified.

The solution adopted by the Swedish Government in transposing the PWD, which provides by law to both sides of the industry the “mechanisms and the procedures” ensuring compliance with the terms and conditions of employment laid down by the collective agreements, was found to provide a suitable means of attaining the objective referred to in Article 3.1 of the PWD<sup>167</sup> and could not be considered as constituting inadequate implementation of said Directive<sup>168</sup>, nor it discriminated against foreign service providers when their situation was compared with the regime applied to domestic undertakings in the building sector not affiliated to an employers’ organization<sup>169</sup>.

According to these reasonings, the AG concluded in the sense that, even for the cases in which there is no system for declaring collective agreements to be of universal application trade unions may seek to impose on service providers from another Member State to provide equivalent terms and conditions of employment through the use of collective action, provided that such action is motivated by public interest objectives<sup>170</sup>.

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<sup>166</sup> *Laval*, AG’s Opinion, parr. 234-240

<sup>167</sup> Approving therefore the Swedish Governments’ view, stating that the autonomous Nordic model would facilitate the attainment of the objective of the protection of posted workers. *Ibid.*, parr. 166, 187

<sup>168</sup> In particular by the combined reading of recitals 12 (stating that “Community law does not forbid Member States to guarantee the observance of [rules for the protection of workers] by the appropriate means”) and 22 (the PWD does not prejudice the national right to collective action), and on the basis of the consideration that article 3.8 PWD expresses only “a possibility offered to Member States that have no system for declaring collective agreements to be of universal application”, contrary to the opinion expressed by *Laval* (as well as the Estonian, Latvian, Lithuanian, Polish and Czech Governments) that Sweden, not having availed itself of the second subparagraph of Article 3.8 PWD, waived the right to apply to workers posted temporarily to its territory by a foreign service provider the terms and conditions of employment laid down in collective agreements, and that the Swedish option does not ensure equal treatment and is a source of legal uncertainty (in particular, the service providers are not apprised of all the terms and conditions of employment, which will apply to them when they temporarily post workers to that MS). *Ibid.*, parr. 169, 177, 179-187

<sup>169</sup> *Ibid.*, par. 193, 202

<sup>170</sup> Such as the protection from workers and the fight against social dumping (See *Arblade*, par. 36), a requirements which also underlie the PWD. AG Mengozzi had also underlined how “the aims pursued by the collective action taken by the defendants in the main proceedings are [...] decisive in the context of a dispute to which only private persons are parties.” See *Laval*, AG’s Opinion, parr. 245, 249 and 309.



Furthermore, in applying the principle of proportionality, the *Arbetsdomstolen* should have considered whether the terms and conditions sought by the trade unions, and in particular those relating to pay, were in conformity with public policy provisions as provided by article 3.10 of the PWD and significantly contributed to the protection of posted workers<sup>171</sup>; with particular regards to the rate of pay sought by Byggnads, the AG stated that the collective would not be disproportionate, given the fact that the actual wages paid by Laval could not be considered equal or similar than those deriving from the Swedish collective agreement<sup>172</sup>.

The ECJ<sup>173</sup> assessed the questions stemmed from the Vaxholm dispute from two angles, the Posting of Workers Directive and article 49 EC<sup>174</sup> and, in both instances, it came to a conclusion implying infringement of EU law<sup>175</sup>, reverting almost completely the AG's position on the matter.

Article 3.1 PWD, in fact, was deemed to be imposing on service providers only the *minimum* rates of pay, and could not be relied upon to impose on the foreign employer a workplace case-by-case negotiation on terms and conditions which do not constitute minimum wages<sup>176</sup> and are not laid down in accordance

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<sup>171</sup> And, in particular, did not duplicate any identical or essentially comparable protection available to those workers under the legislation and/or the collective agreement applicable to the service provider in the Member State in which it is established. *Laval*, AG's Opinion par. 310

<sup>172</sup> *Ibid.*, parr. 263-273

<sup>173</sup> With regard to applicable Community law ever since *Rush Portuguesa* and *Arblade*, it is without doubt that the posting of workers of a company established in one EU country is a service to which, for the case of its trans-national provision, article 49 EC is to be applied. The workers employed by Laval are not seeking access to the Swedish labour market but will be removed once the construction work as contracted is finished (see Case C-445/03, *Commission v. Luxembourg*, par. 38). In principle, they remain under Latvian jurisdiction and therefore the provisions concerning free movement of workers (article 39) and non-discrimination (article 12 EC) could be disregarded in this context. See *Laval*, parr. 54-57

<sup>174</sup> The Court dismissed the trade unions' claims of "artificiality" of the dispute, which in their opinion had been raised with the exclusive aim of enabling Laval to circumvent Swedish law, on the basis that that the questions referred do have a bearing on the subject-matter of the case in the main proceedings. See *Laval*, parr. 42-49, and declared unnecessary to rule on Article 12 EC, since when the freedom to provide services is concerned, the principle of non discrimination is given "expression and effect" by Article 49 EC (*Laval*, par. 55)

<sup>175</sup> See *Hendrickx* 2009, p. 69

<sup>176</sup> *Laval*, par. 70-71

with the possibilities available to the Member States<sup>177</sup> for determining the terms and conditions<sup>178</sup> applicable to posted workers; furthermore, the principle of application of the more favorable terms to posted workers<sup>179</sup> cannot allow the host Member State to render the provision of services conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection<sup>180</sup>: the *maximum* level of protection for posted workers imposed on foreign undertakings, therefore, is limited to the provisions of article 3.1 of the PWD<sup>181</sup>.

These considerations rippled on the assessment of the Vaxholm industrial actions: the Court, in fact, while sharing the opinion that the right to collective action is to be recognised as a fundamental right which forms an integral part of the general principles of Community law, it is nonetheless subject to EU law<sup>182</sup> and its exercise may encounter restrictions when reconciled with the Treaty freedoms.

The Swedish right to take collective action to impose terms going beyond the minimum provisions of article 3.1 PWD constitutes a restriction on the freedom to provide services<sup>183</sup>; the ECJ reaffirmed the social purposes of the EU<sup>184</sup>, underlining also that the protection of fundamental rights is a legitimate interest<sup>185</sup> and that the

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<sup>177</sup> Even if the Court recognized that “since the purpose of Directive 96/71 is not to harmonize systems for establishing terms and conditions of employment in the Member States, the latter are free to choose a system at the national level which is not expressly mentioned among those provided for in that directive”. *Laval*, par. 68

<sup>178</sup> For the case in question it should be noted that the determination of the minimum rates of pay was the only item of Article 3.1 to be entrusted to social partners’ agreements; the other terms and conditions were, on the other hand, laid down by law.

<sup>179</sup> Provided for by article 3.7 PWD.

<sup>180</sup> *Laval*, parr. 78-80. In the main case, in particular, these terms regarded working time and annual leave and derived from the application of the collective agreement in the building sector.

<sup>181</sup> For the case at hand, moreover, the pecuniary obligations regarding pay review and insurance deriving from the signing of a collective agreement were imposed without the national authorities’ having had recourse to Article 3.10 of the PWD, in particular because the social partners involved in the definition of the collective agreement are not bodies governed by law and “cannot avail themselves of that provision by citing grounds of public policy” to maintain that collective action complies with EU law. *Laval*, parr. 83-84

<sup>182</sup> *Ibid.*, par. 88

<sup>183</sup> By rendering less attractive, or more difficult, for foreign undertakings to carry out construction work in Sweden, and forcing them to enter workplace negotiations of unspecified duration. *Ibid.*, parr. 99-100

<sup>184</sup> Against which the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital have to be balanced. *Ibid.*, par. 105

<sup>185</sup> *Ibid.*, par. 93, referring to *Schmidberger*

right to take collective action for the protection of the workers against possible social dumping may constitute an overriding reason of public interest<sup>186</sup>, which may justify a restriction of the obligations imposed by Community law<sup>187</sup>.

However, when the specific features of the blockading actions undertaken and of the obligations sought by the trade unions were considered, the obstacle to the freedom to provide services was found to be unjustified, on the basis in particular of the lack of national provisions clearly determining the obligations for the foreign service provider as regards minimum pay<sup>188</sup>; trade unions, therefore, are precluded to undertake collective action aiming at the signature of a collective agreement imposing on a foreign service provider rates of pay which are not laid down according to the PWD and more favorable terms than those already contained in legislative provisions, as well as referring to matters outside of the scope of mandatory provisions<sup>189</sup>.

The signature of a collective agreement in the Member State of establishment by a service provider, moreover, has to be taken into account by national rules on posted workers; *Lex Britannia*'s provisions subject to the preliminary ruling, fail to do so<sup>190</sup> and give rise to a discrimination against such undertakings which are treated in the same way to those national undertakings which are not parties in a collective agreement; this discrimination cannot be justified.

The motivations produced by the Swedish Government for the application of *Lex Britannia* - ensuring wages and conditions of employment in line with those usual in Sweden and creating a climate of fair competition between national and foreign undertakings - cannot be considered grounds for public policy, public

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<sup>186</sup> *Laval*, par. 105, with particular reference to the principles elaborated in *Arblade*, *Mazzoleni*, *Finalarte and Others* and lastly *Viking*.

<sup>187</sup> Furthermore, the "Community law [...] does not prohibit Member States from requiring [foreign] undertakings to comply with their rules on minimum pay by appropriate means". *Laval*, par. 109

<sup>188</sup> *Ibid.*, par. 110

<sup>189</sup> *Ibid.* par. 111 and *Laval*, Operative part of the Judgment par. 1. 2008/C 51/15 in OJ C 51/9, 23.2.2008

<sup>190</sup> By authorizing collective action against undertakings bound by a collective agreement subject to the law of another MS in the same way as against domestic undertakings which are not bound by any collective agreement. *Laval*, par. 113

security or public health; Article 46 EC<sup>191</sup>, in the ECJ's view, must be interpreted strictly, and the prohibition for a collective action seeking to set aside or amend a collective agreement must therefore hold also for the situations in which the national law is not directly applied<sup>192</sup>.

### 2.2.3 – *Rüffert*<sup>193</sup> and *Luxembourg*<sup>194</sup>

Pursuing in the course set with *Laval* the ECJ issued two more rulings in the first half of 2008, clarifying the interactions between economic freedoms provided for by the EC Treaty and fundamental social rights; the focus was on the relationship between the mandatory minimum terms and conditions for posted workers set by the PWD and the restrictions to transnational provision of services that can be justified as being in protection of the workers, as well as the definition of the mandatory application of national social policy measures to foreign service providers and of the extension of the scrutiny on the public policy justifications in the light of the freedom to provide services.

As for the facts of the *Rüffert* case, the German Land Niedersachsen, following a tendering procedure, had awarded a German company (Objekt und Bauregie, henceforth O&B), a contract for construction work; the agreement provided that employees should be paid at least the wage resulting from the collective agreement in force at the place and time where the contract was

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<sup>191</sup>“The provisions of this chapter 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”, applied in conjunction with Article 55 EC.

<sup>192</sup> *Laval*, par. 120 and *Laval*, Operative part of the Judgment, par. 2

<sup>193</sup> Case C-346/06, *Dirk Rüffert v Land Niedersachsen*

<sup>194</sup> Case C-319/06, *Commission of the European Communities v Grand Duchy of Luxembourg*

performed<sup>195</sup> and that the contractor should impose those obligations on potential subcontractors and monitor their compliance.

O&B, in effect, went on to use as a subcontractor the Polish firm PKZ<sup>196</sup>; however, the discovery that the company paid to workers posted from Poland lower wages than those provided for in the German collective agreement<sup>197</sup> caused the Land to terminate the contract, to issue a punishment order on the subcontractor, but also to seek the enforcement of a penalty clause against O&B, on the basis that the breach by the PKZ must have been known to the main contractor<sup>198</sup>.

In appeal, the liquidator of the contractor (supported by the Polish Government) claimed damages from the German authority, maintaining that the application of the sanctions provided for by *Landesvergabegesetz* was incompatible with the freedom to provide services set out in Article 49 EC<sup>199</sup>; in particular, the court of reference observed that the that wages set in regional collective agreements are much higher than the minimum wage applicable nationwide under the AEntG<sup>200</sup>,

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<sup>195</sup> As set out in the list of representative collective agreements which applied to building work in the public sector; those terms were in accordance with Land Niedersachsen's law on the award of public procurement contracts (*Landesvergabegesetz*), and in particular par. 3.1; the request for adherence to these so-called "social clauses" is a decidedly common occurrence in the German public procurement system. With regards to the normative context, it should be noted that the original Act on Obligatory Working Conditions in the Event of Posting of Employees (*Arbeitnehmer-Entsendegesetz - AEntG*) had been in force since 1996 (originally only for the building and construction sector), and had been amended after the issue of PWD to implement the EU legislation on the matter. According to Section 1 AEntG, the normative provisions of an extended collective agreement of the building and construction industries concerning minimum wages (including overtime, holiday duration and pay/allowance), are applicable to the employment relationship between a foreign employer, and a posted worker performing work in the territorial scope of application of the respective collective agreement, provided that the activity falls within the sector in question and that German employers are also obliged to grant their employees the working conditions deriving from the collective agreement (as a consequence of the extension of any collective agreement in terms of Section 1 AEntG not only employees posted to Germany but also those regularly employed by an employer seated in Germany are covered). Compliance with these rules is ensured by several control measures (among those, the duty for the employer to formally affirm that the posted workers will be granted the working conditions provided for in Section 1 AEntG) and severe sanctions (termination of ongoing contracts, fines, exclusion from competition for public authorities order). See Arthur 2008, p. 1., Weiss and Schmidt 2008, p. 53-54

<sup>196</sup> Also having a German branch established in the same Land Niedersachsen.

<sup>197</sup> *i.e.*, 46.57% of the statutory minimum wage. *Rüffert*, AG's Opinion, par. 37

<sup>198</sup> The regional authority also maintained that the payment of wages at below the collectively agreed pay rate constituted a separate infringement for each of the 53 posted workers. The court of first instance granted the payment of a fine corresponding to 1% of the value of the contract in favor of Land Niedersachsen and dismissed the remainder of the action by the regional authority.

<sup>199</sup> See Arthur 2008, p. 12

<sup>200</sup> Which defines what is necessary in order to ensure posted workers' protection. See *Rüffert*, AG's Opinion, par. 44

and the duty to comply with such agreements imposed on foreign service providers removes their main competitive advantage, based on lower labour costs<sup>201</sup>.

The question to be assessed by the ECJ<sup>202</sup>, therefore, did not directly relate to the issues of collective bargaining and industrial action, but rather refers to the limits that each Member States encounters in defining its public procurement norms through mandatory rules which rely on the outcome of local collective bargaining procedures in order to complete their provisions<sup>203</sup>.

In the AG's opinion, the PWD should not be interpreted as precluding such measures<sup>204</sup>, since the specific collective agreements represent the national implementation of enhanced national protection, authorized under article 3.7 PWD<sup>205</sup>; furthermore, it was maintained that the reference to such agreements by collective agreements universally applicable<sup>206</sup> constituted a system for determining minimum rates of pay in the construction industry compatible with the provisions of the PWD<sup>207</sup>.

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<sup>201</sup> Therefore constituting an impediment to the effective unfolding of the freedom to provide services. The court of reference (*Oberlandesgericht Celle*) also underlined how the of complex of the provisions of the Lower Saxony law contributed in protecting German building undertakings from competition from other MS, since "as far as foreign workers are concerned, the obligation to pay the collectively agreed wage does not bring about actual equality with German workers but instead prevents them from being employed in Germany because their employer is unable to exploit his advantage in terms of labour costs"; the economic purpose pursued by the law, therefore, could not amount in the Court of Appeal's view to an overriding requirement of public interest justifying a restriction on the economic freedoms. *Ibid.*, par. 42-44

<sup>202</sup> "Does it amount to an unjustified restriction on the freedom to provide services under the EC Treaty if a public contracting authority is required by statute to award contracts for building services only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement in force at the place where those services are performed?". *Reference for a preliminary ruling from the Oberlandes- gericht Celle (Germany) lodged on 11 August 2006 — Rechtsanwalt Dr Dirk Ruffert, as the liquidator of the assets of Objekt und Bauregie GmbH & Co KG v Land Niedersachsen (Case C-346/06)*, 2006/C 294/38 in OJ C 294, 2.12.2006

<sup>203</sup> and specifically, collective agreements which have not been declared universally applicable. See Angiolini in Andreoni and Veneziani 2009, p. 52

<sup>204</sup> *Ruffert*, AG's Opinion, par. 66

<sup>205</sup> The rules on terms and conditions of employment set by art 3, par. 1-6 "shall not prevent application of terms and conditions of employment which are more favourable to workers."

<sup>206</sup> Within the meaning of the first subparagraph of Article 3.8 PWD.

<sup>207</sup> *Ruffert*, AG's Opinion, par. 95-98. The AG also highlighted the German Government submission stating that the objective of worker protection is provided not only by the higher wage levels of the regional agreements, but also by the fact that such agreements allow more differentiated and appropriate remuneration according to the work performed, setting more detailed and different wage levels than those provided by the federal level one TV Mindestlohn). *Ibid.*, par. 121 and footnote 39

The legislation on the public contracts, while imposing additional burdens on foreign service providers, was applied without distinction of nationality<sup>208</sup>, with a view of protecting workers and preventing social dumping; since it did not go beyond what was necessary to secure these objectives, it could justify the restriction on the economic freedom<sup>209</sup>.

The ECJ, however, adopted also in this case a far stricter stance in assessing the case; the PWD, in fact, is to be intended as clearly defining the regulatory options to lie down the minimum terms and conditions that Member States intend to ensure to posted workers<sup>210</sup>; the Court found that Lower Saxony law did not set any minimum rates of pay - and could not therefore be considered a law under art. 3.1 PWD<sup>211</sup> - and that the collective agreement on which the law relied in order to determine them could be not considered as “universally applicable” since it only covered construction contracts in a particular geographical area, and even then, only contracts in the public sector<sup>212</sup>, nor as setting more favorable terms and conditions of employment for posted workers<sup>213</sup>.

Therefore, the relevant provisions of Lower Saxony law, and the corresponding provisions in the building contract, were not permitted by EU law; directly referring to *Laval*, the Court maintained that a Member State cannot render

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<sup>208</sup> The difference of treatment between private and public contractors, in fact, was deemed to be irrelevant, given also the provisions of Directive 93/37, and in particular article 23 which “expresses the notion that the performance of the work following the award of a public contract must comply with the employment protection provisions and the working conditions in force in the place where the work is to be carried out”. *Ibid.*, par. 17, 59

<sup>209</sup> The national judge, in the AG’s view, should have assessed whether the rules of the Lower Saxony law conferred “a genuine benefit on the workers concerned, which significantly augments their social protection”; in particular, the national court must compare the gross amount of wages paid in the MS of establishment and those in which the service is provided in order to determine if the protection enjoyed by workers is similar or equivalent (which does not appear to be so in the case). *Rüffert*, AG’s Opinion, par. 116-118.

<sup>210</sup> The AG and the Court agreed in determining that “the mere fact that the objective of the legislation of a Member State, in this case the Landesvergabegesetz, is not to govern the posting of workers does not have the effect of precluding a situation such as that in the main proceedings from coming within the scope of Directive 96/71.” See *Laval*, AG’s Opinion, par. 64 and *Laval*, par. 20

<sup>211</sup> *Laval*, par. 24

<sup>212</sup> Not fulfilling therefore the conditions set by articles 3.1 and 3.8 PWD with regards to its *erga omnes* nature or the extension of its application. The Court also underlined how the option provided by art. 3.8 PWD is applicable only where there is no system for declaring collective agreements to be of universal application, which is not the case in the Germany, since the AEntG extends the application of provisions on minimum wages in collective agreements which have been declared universally applicable in Germany to employers established in another Member State which post their workers to Germany. *Rüffert*, par. 25-31

<sup>213</sup> The derogation provided by Article 3.7 PWD therefore did not apply. *Ibid.*, par. 32

the provision of services in its territory conditional to the observance of terms and conditions going beyond the mandatory rules for minimum protection.

Art. 3.1 PWD, therefore, completely defines the level of worker protection that the Member State is entitled to require from foreign service providers<sup>214</sup>, and the Lower Saxony law enabling the public authority to require that a contractor must pay wages in line with the relevant regional collective agreements consequently constitutes a restriction of the freedom (in particular of the Polish subcontractors involved by the case) to provide services<sup>215</sup>.

The ECJ went on to determine that since the minimum rates of pay to which the German authority had sought adherence by its contractor and its Polish subcontractor went beyond the minimum requirements set by PWD, the restrictions to the freedom to provide services could not be justified under article 49 EC by the objective of ensuring the protection of workers<sup>216</sup>.

The last ruling of the “Laval quartet” is constituted by the one issued in the *Commission v Luxembourg* case on 19 June 2008, which had been brought forward by the European Commission for “failure in fulfilling obligations deriving from the Treaty” under Article 226 EC<sup>217</sup>, in relation to the application of the national labour laws of the Grand Duchy of Luxembourg to workers posted from another Member State.

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<sup>214</sup> Unless those workers already enjoy more favorable conditions in the MS of origin. *Ibid.*, parr. 33-34

<sup>215</sup> Thus, its application is precluded by virtue of the provisions of the PWD, interpreted in the light of article 49 EC. *Ibid.*, par. 43 and Ruffert, Operative Part of the Judgment, 2008/C 128/13, in OJ C 128, 24.5.2008

<sup>216</sup> In particular because of the limited geographical and sectoral scope of the collective agreement in question. Furthermore, the Court dismissed also the submission by the German Government aiming at justifying the provisions by the objectives of ensuring “protection for independence in the organisation of working life by trade unions” (also on the basis of the limited scope of the agreements) or “the financial balance of the social security systems” (the application of such measures did not appear necessary). See Ruffert, parr. 39-42

<sup>217</sup> *Action brought on 20 July 2006 — Commission of the European Communities v Grand Duchy of Luxembourg (Case C-319/06)*, 2006/C 224/50 in OJ C 224, 16.9.2006



The normative item whose legitimacy was questioned was the law transposing Directive 96/71/EC<sup>218</sup>, that went beyond the terms of PWD by imposing additional obligations on other Member States' undertakings wishing to operate in Luxembourg, stating in particular that the terms of all collective agreements should apply, and that the cost of living adjustments relative to pay "to reflect changes in the cost of living" should be honored; the also law required for the posting undertaking the establishment of an agency resident in Luxembourg in order to retain the documents necessary for monitoring, and set up a reporting and monitoring system on the service providers.

The Luxembourg law, moreover, provided that the various matters associated with the employment relationship constituted mandatory provisions "falling under national public policy"<sup>219</sup>, and therefore applicable to all workers (including temporary posted workers) performing an activity in Luxembourg, regardless of the duration or purpose of the posting, and of the nationality of the worker or the undertaking<sup>220</sup>.

The main arguments brought by the Commission to the attention of the ECJ were that the Luxembourg law went beyond the scope of the PWD, by wrongly describing the national provisions as mandatory provisions falling under national public policy; furthermore the reporting conditions imposed to the service providers and the establishment of an agency were unnecessary and unclear, and the minimum work and rest periods were not regulated by the PWD transposition law<sup>221</sup>.

The Commission had questioned the automatic adjustment of rates of remuneration to the cost of living provided by Luxembourg Law<sup>222</sup>, and in particular

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<sup>218</sup> *Loi du 20 décembre 2002 portant: 1. Transposition de la directive 96/71/CE du Parlement Européen et du Conseil du 16 décembre 1996 concernant le détachement de travailleurs effectué dans le cadre d'une prestation de services; 2. Réglementation du contrôle de l'application du droit du travail*, concerning the transposition of PWD and the monitoring of the implementation of labour law, *Journal Officiel du Grand-Duché de Luxembourg A* - n° 154, 31 december 2002

<sup>219</sup> As stated in response to the Commission during the pre-litigation procedure. See *Luxembourg*, par. 9

<sup>220</sup> "Les dispositions [...] s'appliquent aux travailleurs, quelle que soit leur nationalité, au service de toute entreprise, sans préjudice quant à la nationalité et au lieu juridique ou effectif du siège social de celle-ci [...] et] également aux entreprises, à l'exception du personnel navigant de la marine marchande maritime, qui, dans le cadre d'une prestation de services transnationale, détachent des travailleurs sur le territoire du Grand-Duché de Luxembourg." Law of 20 December 2002, artt. 1.2 and 2.1

<sup>221</sup> *Luxembourg*, AG's Opinion par. 17

<sup>222</sup> Excluding from the submission the adjustment of minimum wage. see *Luxembourg*, par. 19

the fact that the indexation covered all wages, including those which do not fall within the minimum wage category; this measure was aimed, in the perspective brought by Luxembourg, at ensuring good labour relations within the national borders and that, on that basis, it constitutes a public policy with the scope of limiting the effects of inflation, protecting the purchasing power of workers and ensuring good labour relations; the Commission took the view that the transposition was based on too broad an interpretation of the concept of “public policy provisions” in Article 3.10 of the PWD.

The ECJ<sup>223</sup>, in assessing the various questions brought forward, confirmed that the list of matters in respect of which Member States can and must ensure the protection set out in the PWD has to be considered as exhaustive<sup>224</sup>; it then dealt with Luxembourg’s contention that the employment-related matters which the national law was designed to protect were covered by Article 10 of the PWD and that it was open to Member States to define the concept of public policy.

Also in this case, the Court reinforced the position already expressed in *Laval* that, when the notion of public policy is used as justification, it must be interpreted in a strict sense, so that it is not left to the Member States to unilaterally determine the scope of their mandatory provisions of their employment law, in particular on foreign service providers<sup>225</sup>, without any control by EU institutions; only “crucial” public policy provisions<sup>226</sup> can justify the imposing of further terms and conditions of employment.

Accordingly, the Court ruled that Luxembourg had failed to fulfill its obligations<sup>227</sup> by wrongly seeking to define the protected employment-related areas as matters of public policy; the national transposition of the PWD therefore created unjustified obstacles to the free provision of services.

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<sup>223</sup> in this case in agreement with the AG’s conclusions (See *Luxemborug*, AG’s Conclusions, par. 90)

<sup>224</sup> *Luxembourg*, par. 26

<sup>225</sup> The public policy exception was defined by the Court as “a derogation from the fundamental principle of freedom to provide services”. *Luxembourg*, par. 30

<sup>226</sup> The Court also referred to *Arblade* (its par. 30) in recalling that “the classification of national provisions by a Member State as public-order legislation applies to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State”. *Ibid.*, par. 29

<sup>227</sup> In particular, under under Article 3.1 of PWD, read in conjunction with Article 10 thereof, and with articles 49-50 EC. *Ibid.*, par. 97

With regards to the reporting conditions and the establishment of an agency, it was noted by the ECJ that the reporting requirements<sup>228</sup> imposed on foreign service providers were not sufficiently clear, that were liable to create uncertainty and that, in the case of the establishment of an agency, imposed additional burdens (both administrative and financial) on such undertakings; the Court also considered that the monitoring of compliance was the responsibility of the Member State in which the undertaking was established, to which was also left the imposing of the necessary reporting requirements.

Non-discriminatory rules restricting the freedom to provide services may be justified in so far as the public interest protected is not safeguarded by the rules applied in the Member State of establishment of the service provider; to require monitoring from both the origin and destination State would dissuade undertakings from exercising their freedom to provide services<sup>229</sup>.

Lastly, in relation to the working time submission, the Commission had complained that Luxembourg had failed to transpose the PWD, not regulating daily maximum work periods and minimum rest periods<sup>230</sup>; the Luxembourg Government agreed that the complaint was justified and that it had subsequently amended in 2006 the national legislation to guarantee working time rights, but the ECJ ruled that Luxembourg had not done so in a reasonable period of time, therefore not taking into account the subsequent changes in national law, and upholding also in this case the complaint.

### **2.3 - Assessment of the rulings**

Extra-legislative processes traditionally mark the forming of labour law, both at national and Community level, and the decisions issued by the ECJ in the cases

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<sup>228</sup> In particular the prior notification procedures.

<sup>229</sup> The ECJ held the same solution in relation with the Luxembourg rules on part-time and fixed-term work. *Ibid.*, parr. 56-60

<sup>230</sup> Art. 1, 3 of the Luxembourg Law, in fact, provided only for “working time and weekly rest periods”.

of the “Laval quarter” represent without doubt a fundamental landmark in the debate on collective action in a trans-national setting; the identity of the European labour law appears, in the wake of the ECJ rulings, contended between the protection of its link to the social values enshrined in national Constitutions, and the adapting individual and in particular collective labour rights to the to the logic of the internal market.

### 2.3.1 - *The recognition of the right to strike and the limits to its exercise*

The first major element stemming from the analysis of the cases in question - and one which received a widespread welcome - is the clear recognition of the fundamental nature of trade union rights, such as the right to take collective action in the European legal framework; for the first time the ECJ, questioned on the exercise of the right to strike, consecrated it among the general principles of Community law, drawing inspiration from European as well as international sources<sup>231</sup>.

Both *Laval* and *Viking*, have explicitly recognized the legitimacy of the trade unions' role and of the social objectives underlying the core activities of regulating terms and conditions of employment and fighting against social dumping; this results is closely linked to the consideration that the European Union is more than

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<sup>231</sup> In particular, in affirming a convergence of the international juridical instruments in recognizing the right to strike, the ECJ made reference to the ESC (also referred by article 136 EC), ILO Convention n. 87, the Community Charter of fundamental rights of Workers 1989 and the Charter of Fundamental Rights of the European Union (*Viking*, par. 43 and *Laval*, par. 90) as well as the ECtHR jurisprudence (*Viking*, par. 86). *Viking* and *Laval* constitute a sort of paradigm of use of the Charter as an instrument of “semi hard law”, but they also highlight the intrinsic limits in the lack of legal bindingness of the same deriving from its being (at the time) proclaimed but not ratified. The daring recognition by the ECJ - in particular when considered vis-a-vis the lack of MS initiatives aiming at at EU recognition of fundamental social rights - would be tarnished by the severity of the control carried out by the Court, that leaves very little space for the exercise of the right itself. See Nivard 2008, 1193-1195 and *supra* parr. 1.1.2 with regards to the contents of the instruments in question.

just a free trade area, but its social sphere represents also an element of constitutive importance<sup>232</sup>.

The Court however, by overcoming a series of conceptual hurdles and the various differences between the facts of the cases<sup>233</sup>, did not provide immunity for the right to take collective action against the unfolding and operation of the Treaty freedoms reflecting the internal market objectives of the European Union, but rather affirmed the relative nature of the right in question and proceeded to reconcile these two contrasting aspects<sup>234</sup>.

The question therefore remains as to the actual contents of the right to strike as structured by the Court; if on one hand, the recognition of the right to take collective action would appear a facilitating factor as to the adoption, in the exercise of the right concerned, of a legitimate objective justifying a restriction on the free movement provisions on the other, the ECJ determined that in order to determine the legitimacy of a collective action, it is necessary to go beyond the assessment of

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<sup>232</sup> In *Viking*, furthermore, the ECJ appears as going as far as “validating” collective actions where the relocation of the undertaking would result in a serious threat to the jobs and conditions of employment of workers. (Picard 2008, p. 164). It was also underlined that even in absence of such a reconstruction by the ECJ the CFREU would have been ultimately granted full legal efficacy by its recognition in the Lisbon Treaty, and therefore the most important aspect of *Viking* and *Laval* concern the recognition of trade union objectives and of of the social dimension of the EU.

<sup>233</sup> Bercusson 2007b, and Ballestrero 2008, pp. 384-385

<sup>234</sup> In this sense, it was underlined that in *Viking* and *Laval* the Court has recognized the right to take collective action in the same terms of art. 28 of the CFREU (Hinarejos 2008) and that a greater role of the Charter (maintained by Lo Faro 2008) in reconstructing the right to strike would not have brought different results (see Ingravallo in Vimercati 2009, p. 40). It is however to be highlighted a general poor performance of the Charter (and in particular of its horizontal clauses) in the disputes at hand (Serrano 2009, p. 171 ff.): the Court, in adjudicating of the compatibility of collective action with Community law, possibly disregarded art. 52 CFREU, stating that any limitation on the exercise of the rights and freedoms recognized by Charter “must be provided for by law and respect the essence of those rights and freedoms”, and conducted an operation of “free balancing” (see Caruso 2008, p. 736), in which the results could have been different if the fundamental social rights to strike and of collective action, here implicated, had drawn their origins from a primary source legislative source. (Caruso and Militello 2008, p. 15). See also *infra* with reference to the multi-source reconstruction by the ECtHR in *Demir and Enerji*

the purpose of the exercise of the right; its fundamental nature does not shield its exercise from the application of a proportionality test on the action undertaken<sup>235</sup>.

In *Viking* and *Laval* the inclusion of the right to collective action among the fundamental rights and the assertion that the protection of labour can justify restriction to the economic freedoms represented the two counterintuitive assumptions on which the ECJ based an interpretative operation turned to the definition of substantial limits to its exercise<sup>236</sup>; the theoretical importance of the recognition of a fundamental “right to strike”<sup>237</sup> is overshadowed, so much to be rendered irrelevant, by the “inevitable” structural and functional restrictions set by the Court<sup>238</sup>.

According to the ECJ’s reasoning in *Viking* and *Laval*, collective actions liable to make it less attractive, or more difficult for employers to relocate or provide service in another Member State were considered restrictive of the economic freedoms, and therefore could be warranted if pursuing an objective compatible with the Treaty and justified by overriding reasons of public interest; moreover, the action undertaken must undergo a rigorous control in order to ascertain whether it is

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<sup>235</sup> The so-called “*Schmidberger* line” was also followed by the AGs in both cases, and derived from their denial in applying the *Albany* immunity (on the basis that the freedom of movement provisions are not inherently contradicting with collective bargaining autonomy, to the contrary of the Treaty provisions on free competition ex artt. 81 ff. EC), the fundamental rights and the lack of competences deriving from art. 137.5 EC arguments: in particular the latter provision was found as preventing Community institutions from passing laws on these matters, but at the same time indicating that Community principles are not to be infringed by the regulation and exercise of the right to strike. This reconstruction by the ECJ trims down the fundamental importance previously recognized by the Community to collective action as grounding element of the industrial relation systems and of the fundamental laws of the various MS. The Court, furthermore, did not acknowledge the various features differentiating the two disputes involved in *Viking* and *Laval* from *Schmidberger*; among those, the fact that (in *Viking*) no public authority was involved and the dispute regarded an employer seeking to preclude to other private parties, the trade unions, from exercising fundamental rights, with a view of preventing them to take any action in the future. See Bercusson 2007b, p. 451 Blanke 2007, p. 4, Carabelli 2008, pp. 154 ff., Gragnoli in Andreoni and Veneziani 2009, pp. 163-164 and *infra* par. 2.3.2 for assessment and criticism of the application of the proportionality principle.

<sup>236</sup> See Carabelli 2008. It has been underlined that the reasoning carried by the ECJ was based on assumptions that could have been reconstructed in a different way, not only politically preferable but also perfectly compatible with the norms of the Treaty, and what was reached was substantially an “avoidable” balance. See Bercusson 2008, Lo Faro 2008

<sup>237</sup> Also with respect to potential immunities from the application of EU law. It was however suggested that classifying the right to strike as a fundamental right was not necessarily helpful as fundamental rights are essentially individualistic and are not geared to the protection of collective interests. Stewart & Bell 2008

<sup>238</sup> *au contraire* Hinarejos 2008 underlines that the while right to strike is, in effect, considered a restriction to the economic freedoms and therefore subject to the proportionality test, this also implies that the economic concerns are not automatically considered as superior.

suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it<sup>239</sup>.

The central question regards therefore the bargaining aims of the collective action; the strikes undertaken in the Rosella and Vaxholm disputes were deemed as aiming at *forcing* the employers to the conclusion of a collective agreement, interfering in a purely “voluntary” regulation of the terms and conditions of employment, in particular when no such obligation can be derived from the law of practices of the Member State of establishment of the undertaking<sup>240</sup>; this questionable reconstruction created the necessary opening for the evaluation of the compatibility of the contractual demands with the exercise of the economic freedoms by the employer<sup>241</sup>.

The compatibility of the former is linked therefore with the assumption of the collective bargaining performing a residual (and subsidiary) function with respect to the legislative setting of minimum standards for terms and conditions of employment<sup>242</sup>, in particular with reference to posting hypotheses; in *Laval* the Court, while recognizing that collective action to impose “terms and conditions of employment fixed at a certain level, falls [in principle] within the objective of protecting workers”, the requested compliance by the service provider could be related only to minimum rates of pay set in strict accordance with the PWD<sup>243</sup>.

With reference to the actual terms and modalities of the collective action, the previous rulings in *Spanish Strawberries* and *Schmidberger* could constitute only indirect terms of reference for the ECJ<sup>244</sup>; however the Court completely rejected the

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<sup>239</sup> See *Viking*, par.47, *Laval*, par. 95

<sup>240</sup> By that implying, that the economic freedoms protected by the Treaty cannot be breached by collective agreement which the employer voluntarily agreed or adhered to. See also *Laval*, par. 81, where the Court expressly states “the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a commitment made to their own posted staff, the terms of which might be more favourable”, where the focus, of course, should be on the wording “of their own accord”.

<sup>241</sup> See *Lo Faro* 2008, p. 92

<sup>242</sup> And in particular wage setting. See *amplius* *Ales* 2008 and *Veneziani* 2008,

<sup>243</sup> It follows that in practice almost any trade union action is to be considered automatically disproportionate in posting hypothesis, as its underlying rationale is always that of trying to impose on undertakings something that they are not required to meet. See *Orlandini* 2008

<sup>244</sup> As noted before (parr. 1.2.1 and 1.2.4) in both cases the disputes did not involve aspects of industrial conflict between workers and employers, and the assessment of the ECJ was mainly directed at the Member State’s stance and attitude in governing the clash between social rights and economic freedoms. Furthermore a functional evaluation of the aims was not carried out by the Court.

solutions found in these precedents and opted for more radical modules of assessment implying direct liability of the trade unions and an evaluation in the merit of the union demands underlying the collective action undertaken.

Collective action was listed by the ECJ among those means by which trade unions pursue workers' protection<sup>245</sup>: however, this assumption does not entail that it should not be automatically considered as imposing appropriate restrictions to the fundamental freedoms but the assessment of its legitimacy necessarily needs to be linked to the circumstances of the case, and in particular with the possible negative consequences on terms and conditions of employment deriving from the exercise of the collective freedom; therefore, if jobs and conditions of employment are not as "jeopardised or under serious threat", the action cannot be considered as concerning the protection of workers at all<sup>246</sup>.

Another element of possibly more general application is the provision by ECJ that strike action should be deemed compatible with the Treaty provision only when utilized as *ultima ratio* by the trade unions; as noted, national judges have to examine whether the union did not have other, less restrictive, means at its disposal in order to pursue its objectives and if it exhausted them before initiating collective action<sup>247</sup>.

This conditional framework set by the ECJ, characterised by relevant constraints on legitimate objectives coupled with the strictness of the proportionality

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<sup>245</sup> Like collective negotiations and collective agreements, collective action "may [...] be one of the main ways in which trade unions protect the interests of their members". *Viking*, par. 86

<sup>246</sup> In *Viking* the national court is demanded the role of verifying such condition (and in particular the fact that the relocating company had not undertaken any legally "binding" commitment not to affect the jobs or conditions of employment of its employees), although the Court suggested that this was unlikely with reference to the facts of the case, because Viking had given an undertaking that no Finnish workers would be made redundant (see *Viking* par. 11). On the other hand, in *Laval* the same ECJ proceeded to rule against the action undertaken by the Swedish union (*supra* par. 2.2.2). In any case the ECJ made it clear that "simple" threat or the "possibility" that conditions of employment may be jeopardized is not enough to call a collective action, paving the way for a questionable judicial interference in trade unions' strategic choices. See Orlandini 2008, p. 578

<sup>247</sup> this examination must be carried out respecting "national rules" and "collective agreement law applicable to that action", and therefore does not add *per se* any restriction on the right to strike, while however providing a very clear policy guidelines to those countries in which the strike is not considered and instrument of last resort for industrial disputes (see *infra* par. 3.1.2 with reference to the Italian situation). The application of the proportionality principle, however, should preserve the exceptions to the *ultima ratio* principle provided by national legislation such as the German "warning strikes" (see *supra* par 1.1.1 and *infra* par 3.1.2)



test carried out<sup>248</sup>, contributes to the idea of “limited” right to strike, especially when exercised in a context where it could collide with the with the unfolding of the economic freedoms provided by the Treaty and in particular with the entitlements to free movement of an employer.

It is noteworthy the fact that in *Viking* and *Laval* one of the main features of the Swedish and Finnish systems of industrial relations, that is a strong systems of collective bargaining, also represented the focus of the ECJ’s restrictive analysis; the Swedish trade unions, entrusted with significant regulatory powers by the State<sup>249</sup>, are nonetheless clearly separated from the concept of public actor and therefore do not pursue a public aim of general interest<sup>250</sup> but are considered as parties of a “classical” contraposition of economic interests<sup>251</sup>.

In consideration in particular of the transnational dimension of the disputes<sup>252</sup>, an adequate response in reconciling the economic freedoms and social rights would have entailed a comparative approach, attentive to the international standards and of the common traditions of the Member States<sup>253</sup>; the balancing carried out by the Court also provided the opportunity to effectively bring the renewed role of the social rights in the EU legal framework closer to the one historically played by the economic freedoms in the process of European integration<sup>254</sup>.

Instead, the ECJ carried out a traditional internal market test, not exploiting this potential for actual incorporation of the social rights, and seemingly refused to

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<sup>248</sup>Among other considerations, the ECJ also confirmed that the magnitude of any restriction to the freedom of movement or establishment is irrelevant; this may entail that trade union action can be challenged by an employer on community law grounds even if it only resulting in a minor hindering. OrNSTEIN, SMITH 2009, p. 3, see also *infra* par. 2.3.5

<sup>249</sup> And the autonomy of the social partners (in “Nordic model” but also in MS such as Italy) is inherently bound to produce norms that escape the authority of the State, See Sciarra in Andreoni and Veneziani 2009, p. 36

<sup>250</sup> *Laval*, par. 84.

<sup>251</sup> Although they were “paradoxically” equiparated by ECJ to “bodies governed by public law” but not in recognition of their autonomous role, but rather in order for the article 49 EC to apply and to determine that fundamental economic freedoms be relied on in regulating the relations between private entities. it must also be noted that the ECJ left open the broader question relating to the full horizontal direct effect of such articles and their consequent application to private individuals. See Ales 2008, p. 12

<sup>252</sup> Obviously deriving from the specific features of the freedoms involved but also, with regards to their European relevance, from their unfolding (with the possible exclusion of *Luxembourg*) along the “border” between EU-15 and CEE Member States.

<sup>253</sup> Sciarra 2008a

<sup>254</sup> See Robin-Oliver and Pataut 2008, p.6

acknowledge the importance of collective bargaining procedures as the main instrument of activity coordination at European level<sup>255</sup>.

The ECJ therefore, demonstrating a poor familiarity with national labour practices and institutions<sup>256</sup>, chose to apply an invasive and dangerous interpretation of the aims of the collective action and of its modalities of exercise; the pursued conformity of this framework with the “spirit” of the internal market, furthermore, severely hinders in particular the possible unfolding of cross-border solidarity aspects of collective action<sup>257</sup> which represented probably the main core of the union activity in *Viking* and *Laval*<sup>258</sup>.

### 2.3.2 - *The principle of proportionality and the prevalence of market freedoms over fundamental social rights*

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<sup>255</sup> The Court lacks the hermeneutical instruments to evaluate the single mechanisms (such as the Swedish *de facto* extension of collective agreement) provided by the various national models of industrial relations and, in particular, to assess the function of the industrial conflict as “functional sanction” in the progress of negotiations for a collective agreement (See *Laval*, par. 110). An even bigger interference in the role of the trade unions is represented by the broad verification of the suitability of the action in securing the objective of the protection of workers carried out by national and EU judges, which is at risk of dispossessing trade union organizations of an essential part of their historical attributions. See Belavusau 2008, Robin-Olivier & Pataut 2008, p. 13 and Sciarra in Andreoni and Vaneziani 2009, p. 36

<sup>256</sup> Especially in comparison with the competence showed with reference to the economic freedoms, whose development and fine tuning, on the other hand, has been historically one of the main drives underlying the harmonizing role of the ECJ.

<sup>257</sup> In particular when is considered that, according to *Viking*, the lawfulness of trade union action cannot be taken for granted when pursuing aims other than the protection of workers employed by the undertaking that intends to relocate, and that in *Laval* an effective equality on terms and conditions of employment for national and foreign posted workers could not be pursued by the trade unions, since the the Court claimed that the needs of protecting posted workers were already safeguarded by what is prescribed in the PWD. Furthermore, in *Laval* the ECJ accepted as a legitimate objective of strike action the “protection of the workers of the host State against [...] social dumping”, in a perspective which leaves the improvement of the terms and conditions of employment of the posted workers only as a (possible) consequence of the collective action undertaken. Therefore, an action carried out directly by posted workers against their employer or its client (and possibly supported by an action by the host MS trade unions), could certainly dodge accusations of protectionism, but would probably still be subject (at least) to an assessment along the lines of *Viking*. See also Hös 2009, p. 22, Orlandini 2008, p. 581

<sup>258</sup> It has also been underlined how fundamental issues underlying the judicial course set by the ECJ in the “Laval quartet” is represented by the continuing lack in the development of a EU social policy model, in line with the realities of the globalization, and in the absence of Community legislation on dedicated instruments directed against social dumping, which on the other hand is further aggravated by the restrictive interpretation provided by the ECJ also on monitoring and reporting procedures in the posting sector (*infra*, par. 2.2.3). See Sciarra 2008a and Hendrickx 2009.

Despite the “social rhetoric”<sup>259</sup> of the Luxembourg Court and the proclaimed equivalence between social and economic aims of the European Union, *Viking* and *Laval* made clear that the “economic” Europe is based on much more solid foundations than the “social” one<sup>260</sup>; from the control on the justification to the proportionality test, to the possible liability of the trade unions<sup>261</sup>, the ECJ envisions a strict regulation for the right to collective action, although recognised as a fundamental right in a European setting.

The recent developments of the case-law of the ECJ, especially in the post-enlargement stage, tend to a less social view of the EU integration by giving a certain precedence to the freedoms of movement in their eventual clash with the social rights; these judgments, in particular, clarify the role played by fundamental rights, which is the one of restricting market rules, and of possibly justifying an exception to their full application<sup>262</sup>; with particular reference to *Viking* and *Laval*, collective actions need, as noted, to be justified on a case-by-case basis, while the exercise of an economic freedom was not required to<sup>263</sup>.

The different hierarchical position between economic freedoms and fundamental social rights can be in particular deduced from the combination of the

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<sup>259</sup> Reich 2008, p. 160

<sup>260</sup> Robin-Olivier & Pataut 2008, p.13. Furthermore a hierarchy - although not schematized - can be envisioned also between the various economic freedoms provided for by the Treaty; in the current timeframe (which has probably produced effects in the evaluation of the ECJ on these and similar cases, see Hendrickx 2009) the freedom to provide services (which, as noted, tends to cover the current model of labour mobility inside the EU) seems to present, in the consideration by the Court, a closer link with the enlargement processes than others, and in particular with the needs and demands of market operators in particular in terms of “market access” (see Lo Faro 2008, p. 66), and with the consolidation of the enlarged internal market.

<sup>261</sup> See *infra* par 2.3.5 and, with specific reference to the national ruling on the Vaxholm dispute, par. 3.2.1

<sup>262</sup> See Orlandini 2008, p. 595

<sup>263</sup> In *Viking* and *Laval* the right to strike is not the starting point for analysis (Davies 2008, p. 141). It was underlined such a reconstruction implies that once the exercise of the right to collective action is found to be a restriction and therefore in breach of EU law, it means that the “social” interests are on the back-foot, having to defend themselves from the economic, in a perspective that inherently restricting rather than promoting the social dimension of the Union. See Barnard 2008b, p. 264

horizontal direct effect of Treaty provision and of the application of the proportionality principle as envisioned by the ECJ<sup>264</sup>.

*In primis*, with regards to horizontal direct effect, the Court has explicitly, if summarily<sup>265</sup>, affirmed it for articles 43 and 49 EC, on the basis of the facts that EU law exacts compliance both from public and private actors<sup>266</sup> and that the promotion of the Treaty freedoms through abolition of State barriers could be compromised by the exercise of their legal autonomy by private associations or organisations<sup>267</sup>.

The provisions on economic freedoms can be consequently applied to trade unions, and the right to collective bargaining and action can affect the economic freedoms of the undertakings only in the limits in which a law or a public act can, *id est* only through non-discriminatory and proportionate restrictions justified by imperative reasons of general interest.

In order to fall under the application of Article 43 or 49 it is sufficient for the collective action to render the free movement of companies or the provision of services “less attractive” or “more difficult” in the internal market<sup>268</sup>; since strike action<sup>269</sup> inherently causes costs to the employer and implies a restriction of its economic freedom, it can be affirmed that the Court provided a presumption for the restrictive effect of collective action, shifting therefore the burden of proof on trade unions to justify their action on the test of proportionality.

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<sup>264</sup> See Picard 2008, p. 164. It was noted that also the solutions adopted by the Court with reference to the assertion of its competence in balancing the right to strike notwithstanding article 137.5 EC contradicts the hypothesis for a judicial *self restraint* by the ECJ with regards to fundamental rights (Jorges 2007, p 28) and represents substantially an “ideological adhesion” to the idea of the primacy of the economic freedoms in the EU legal framework. See Ballestrero 2008, p. 389 Carabelli 2008, pp. 156, Supiot 2008, p. 2.

<sup>265</sup> Ales 2008, p. 11. See also Robin-Olivier & Pataut 2008, p. 8 “Aucun effort d’argumentation ne vient soutenir un tel mouvement”.

<sup>266</sup> *Viking*, par. 33-55 and *Laval*, par.86-91

<sup>267</sup> *Viking*, par. 57 and *Laval*, par. 98.

<sup>268</sup> Even if it was argued that collective action of trade unions making relocations more costly for employers but not preventing them from exercising their economic freedoms and pursuing a legitimate social policy objective should be lawful even in light of the economic freedoms (see Reich 2008), the ECJ made it clear that any kind of hinderance to the economic freedoms allows the application of the Treaty provisions, and consequently the collective action does not (even) need to be fully effective to fall under the scope of application of Article 43 or 49.

<sup>269</sup> Both conducted at a completely national level or in presence of elements of transnationality. See also *infra* par. 2.3.5

In fact, according to the hypothesis that fundamental rights are not guaranteed without limitation, the exceptions to the unfolding of economic freedoms do not escape the Court's scrutiny in the light of the proportionality test and the boundaries and the guarantees of the exercise of collective action need to be circumscribed<sup>270</sup>.

An appropriate application of the proportionality principle would have required the ECJ to respect the essence of both rights to be reconciled; the Court should have therefore counterbalanced the effective protection and enforcement of the fundamental freedoms ex articles 43 and 49 EC and the effective protection and enforcement of the social right collective action, in particular when it is considered that the exercise of fundamental freedoms should not be understood as providing a convenient way for undertakings to circumvent national rules on workers' protection.

However the ECJ did not modify its interpretation on the contents and promotion of the economic freedoms and chose to apply to collective action a very strict form of proportionality test, unmitigated by any references to "margin of appreciation"<sup>271</sup>; in order for the exercise of this fundamental right to be compatible with the Community law, it is not sufficient that the action undertaken would otherwise be lawful<sup>272</sup> under national labour law but its aims need to be considered, as well as the suitability of the action to pursue them<sup>273</sup>.

The test of proportionality has to be ultimately carried out by the national court, which has the sole jurisdiction to assess the facts and to interpret the national legislation, in order to determine whether and to what extent such a collective action meets those requirements; however, with particular reference to the "other means

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<sup>270</sup> Both in *Viking* and *Laval* also the AGs provided that the proportionality test should be taken on a case-by-case basis, as underlined by Blanke 2007. Moreover, the *Säger* approach followed by the Court implies that even in presence of a justification, trade unions have to prove that their action pursues the (legitimate) aim of protecting workers in a "proportionate" manner. This implies that the ultimate recognition by ECJ of the right to strike is only conditional on the satisfaction of the proportionality test. See Davies 2008, p. 141, Orlandini 2008

<sup>271</sup> the strictness of such a proportionality test highlights that the ECJ did not take into consideration the need to preserve the "substance" of the right to strike. See Lo Faro 2008, Barnard 2008b, p. 264

<sup>272</sup> Nor with the framework presented by the Finnish situation, in which strike action is already set up as an *ultima ratio* instrument, decisively connected to the signature of a collective agreement. *Viking* parr., 36, 75 and 90 Sciarra 2008a, p. 253

<sup>273</sup> Since the Court refuted the existence of a justified aim for restricting the freedom to provide services in *Laval*, the aspects relating to the proportionality test have not been developed any further and the legality of the action was defined only as subject to the maximum standards principle of the PWD. Dorsemont in De Vos 2009, p. 95

less restrictive of free movement” that could be used by trade unions in the dispute, the Court failed to acknowledge the relative efficacy of different methods of action in the bargaining process and in protecting workers’ interests<sup>274</sup>.

It is clear from what has been previously analyzed that from an essential “rivendicative” instrument the strike is reconstructed as a mainly “defensive” industrial relation tool to be only utilized against the most serious disturbances on jobs and conditions of employment deriving from the exercise of economic freedoms and in a very limited manner; by this reconstruction, linked in particular with the conditions for the activation of the right in question<sup>275</sup>, the very essence of the right seems greatly undermined<sup>276</sup>.

Furthermore, the potential scope of the both vaguely-defined and widely-applicable proportionality principle elaborated by the ECJ could extend beyond the *ultima ratio* assessment to the concrete features of an otherwise legitimate action; a balancing assessment taking into account also the timing of the action and the economic losses suffered by the employer in the dispute and, in particular, from the precluded exercise of its economic freedom, could entail the risk for more effective actions to be considered disproportionate because of the costs and difficulties

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<sup>274</sup> As noted, a union disposes probably of a wide panoply of protest methods which do not imply a collective abstention from work (such as a leafleting campaign or a demonstration conducted outside the working hours) or whose definition falls short of a strike, such as an overtime ban. All these options may easily be considered “less restrictive”, however it is clear how they may represent also “less effective” means than collective action for the protection of workers. See Davies 2008, p. 143, Hös 2009, p. 29

<sup>275</sup> With a judicial assessment substituting trade unions’ considerations on the necessity of the action. See Davies 2008

<sup>276</sup> With reference to *Viking*, the typical pattern for relocation (excluding the maritime sector regulated by a specific set of norms), involves the closure of a business and the start of a new one in another MS, which does not allow the application of Directive 2001/23, and makes trade union action pointless if pursued in ways and with aims (protecting contractual terms applied prior to the relocation) similar to the action undertaken in the *Viking* case. On the other hand, when the case constitutes in fact a transfer of enterprise (characterized by a “significant” transfer of workers), Directive 2001/23 can be applied; since the directive safeguards the jobs and conditions of employment for the workers transferred, collective action aiming at the same goals becomes pointless, and any collective action aimed at obtaining further protection would be disproportionate. Similarly, in *Laval* the right to collective action seems reduced, for the posting of workers hypotheses, almost to an enforcement tool to impose the respect of national collective agreements on unscrupulous employers. This kind of implementation entails the irrelevance of the recognition of the strike as a fundamental right at EU level and its consequent balancing with the economic freedom involved. The combined application of national law on strike and EU norms on the provision of services would in fact suffice to ascertain the lawfulness of the action undertaken without any need of an recourse to the CFREU. See also Orlandini 2008 p. 599

imposed on the employers<sup>277</sup>, stripping the recognition of the right to strike of any possibility for an effective enforcement in the EU framework.

Historically, the “emancipation” of the labour law from the market rules has passed through the creation or the recognition of space for the exercise of collective action, and through the provision of tendentially general wage-setting mechanisms both by law and by collective agreement<sup>278</sup>.

The ECJ judgments tackled both these instruments; by questioning the workers’ prerogative to organize themselves for the defence of their interests and to determine the appropriateness of an action in pursuance of such objectives and by interpreting formalistically the collective agreement they challenge the disassociation of the labour norms from the market rules and erode the foundations of the national labour law systems<sup>279</sup>.

In absence of a defined and coherent route for the promotion of fundamental labour rights and their reconciliation with other Treaty freedoms, the economic dimension of the European Union cannot but gain once more a clear prevalence<sup>280</sup> over its social aspects<sup>281</sup>, in particular when it is considered that ECJ’s “hard”

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<sup>277</sup> Thus possibly reverting ECJ’s previous findings in *Schmidberger*, in which the ECJ did not proceed in assessing the aims of the demonstration but only conceptualized the MS’ purpose as protecting the fundamental right to strike. See *supra* par. 1.2.4 and also Reich 2008, p. 22

<sup>278</sup> Lyon Caen 2008, p. 2

<sup>279</sup> As famously stated by Bercusson, “nineteenth century doctrinal ghosts of the dominance of market freedoms, long since revised to reflect the social model of industrial relations in twentieth century European welfare states, have returned to haunt EU labour laws of the twenty first century”. (in ETUI Expert Group 2009, p. 462). The Viking and Laval did certainly not represent the first instance in which the ECJ was called to rule on the clash between the fundamental rights and the economic freedoms, but are the first time in which ruled on collective actions which had been undertaken directly against the exercise of economic freedoms strictly connected to the demands and instances deriving from the enlarged EU. The leeway for the exercise of collective action granted by the Court to social actor, entitled to a fundamental social rights, does not match up to the one recognized to the MS (*i.e.*, in *Schmidberger* and *Omega*) in order to determine the modalities for protecting other fundamental rights (Robin-Olivier and Pataut 2008, p.11). This concurs to the idea that the collision adjudicated by the ECJ is strictly connected to the concrete development of the enlarged internal market, and that the Court positioned itself in a central place for the governing of such process.

<sup>280</sup> See Barnard 2008b, p. 264

<sup>281</sup> Sciarra in Andreoni and Veneziani, p. 37

scrutiny on the cases in question is embedded in a context characterised by the use of “soft” modules for governance especially in the field of social policy<sup>282</sup>.

The “Laval quartet” represents therefore a major setback in the construction of a EU social right, and the Court’s “unbalanced” solutions risk to further reduce the democratic features of the EU<sup>283</sup>, while providing more opportunities to circumvent the norms on workers’ protection<sup>284</sup>.

### 2.3.3 - Differences and continuity in the rulings of the “Laval quartet”

While it is evident that in both the *Viking* and *Laval* rulings the relationship between the fundamental right to take collective action and the free movement principles was adjudicated by the ECJ<sup>285</sup>, the two cases also present various differences; in particular, the transposition of the PWD and *Lex Britannia* are peculiar to the Swedish situation, while the events related to the re-flagging of the Rosella

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<sup>282</sup> And, for the particular case of the right to strike, by a continuing lack of competences by EU institutions. See *amplius* Joerges-Rödl 2009. As it was underlined, the balancing undertaken by the ECJ will remain meaningless if it is not possible to effectively test the socially irresponsible exercise of fundamental freedom (going against the principles laid down by art. 52 CFREU) as a restriction to the exercise of collective action as a fundamental right; as noted, in *Laval* the Latvian company was not found to be trying to circumvent the application of national labour law while in *Viking* the Court considered more serious the infringement to economic freedoms than the one to the protection of the working condition (with the possible exception of the “serious threat”). See Ales 2008, p. 15-16, Caruso 2008, p. 35, 40

<sup>283</sup> Or, in other words, to increase its “democratic deficit” See also Carabelli 2008, p. 164, Supiot 2008, p. 7

<sup>284</sup> Furthermore, the restrictions introduced by the ECJ to the exercise of collective action are at odds with the the European Committee on Social Rights case-law on the interpretation of the ESC. In particular, the ECSR maintained that allowing a national judge to determine whether recourse to strikes is premature fails to comply with Article 6.4 ESC; the courts can verify that the exercise of the right to strike is in accordance with the rules on fairness in a dispute, but they cannot supplant the social partners in assessing the appropriateness of taking collective action in view of the interests at stake (*ECSR Conclusions XVI-1 Germany*). Similarly, using the principle of proportionality to judge the strike’s appropriateness in order to impose bans on a strike if the harmful effects of a strike are disproportionate and that strike could be organized at a less damaging time without losing its effectiveness was regarded as restriction of the right to strike going beyond those accepted in article 31 of the Charter (*ECSR Conclusions XVI-1 Belgium*). See also Dorssemont in De Vos 2009, p. 96

<sup>285</sup> Which treated the two cases very similarly, although not homologously, as testified by the (limited) admissibility for the exercise of the right to strike found by the Court in *Viking* which was, on the other hand, excluded in *Laval*.



(before and after the EU enlargement) and ITF's fight against flags of convenience characterize the *Viking* case<sup>286</sup>.

The latter, in particular, is a classic example of frequent occurrences in the global maritime transport, a fact that explains the involvement of the ITF, where employees are exposed in an exceptional manner to a downward spiral of social competition. Moreover, it is to be underlined how, at EU level, the maritime sector concerned by *Viking*, as opposed to the construction sector affected by *Laval*, is regulated by a specific set of rules with reference to the freedom to provide services<sup>287</sup>, which excludes from application both the Collective Redundancies<sup>288</sup> and the Acquired Rights<sup>289</sup> Directives<sup>290</sup>.

The type of action undertaken by the unions involved in the disputes also represents a distinction; in both cases are indicated as boycotts, but in *Viking* the core of the collective action is represented by the refusal to enter negotiation and conclude collective agreement with the reflagging employer, while in *Laval* a partial refusal by the workers to perform their contract of employment is directed against certain clients of their employer<sup>291</sup> that are being blacklisted<sup>292</sup>.

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<sup>286</sup> However, as it was clear from the facts of the cases, in both situations the trade unions entered negotiations and started industrial action in manners compatible with the national and sectoral laws and practices; furthermore, the main element representing a substantial departure from other similar cases was the opposing attitude by the employers and their intention to pursue the matter resorting to legal ways at very early stages of the negotiations or commencing procedures against the as soon as that possibility was granted to them. See *supra* par. 2.2.1 and 2.2.2

<sup>287</sup> As noted, mainly constituted by Regulation 4055/86

<sup>288</sup> Directive 98/59, art. 1.2 c)

<sup>289</sup> Directive 2001/23, art. 1.3

<sup>290</sup> In particular, this exclusion entails that, even without any pronouncement on the matter by the ECJ, outsourcing operations are, in effect, easier to carry out in the European maritime sector for the specific event of reflagging since maritime employers are free to adopt such strategies without risking them being pointless due to the legal safeguarding of employment relationships provided for in the Directive. This exclusion is striking in particular when it is considered that maritime industry has already the single most globalized and deregulated labour market. However, while it must be underlined that while the undertaking's right to change ownership and headquarters is not denied, according to *Viking* workers can take action not to suffer the more detrimental effects of this decision (on the basis of the "serious threat" on the terms and conditions of employment). See Fitzpatrick in Dorssemont, Jaspers & Van Hoek 2007, p. 86, Dorssemont in De Vos 2009, p. 103 and Orlandini 2008, p. 599

<sup>291</sup> Dorssemont in De Vos 2009, p. 69. As noted above (par. 2.2.2) the ECJ tends to refer to the actions in *Laval* primarily as blockade actions.

<sup>292</sup> It must be noted that, on the other hand, the co-ordinated action of FSU and the boycott of ITF was directed only against one part of the business of Viking (the re-flagging of "Rosella"), while the action against Laval made the provision of services through the use of posted workers impossible, insofar as it was conditional to the respect of collective bargaining procedures. See Reich 2008, p. 22

However, it is to be considered that in both cases solidarity actions were undertaken or threatened, and in both cases they were not simply in support of the demands pursued by the trade unions in the main dispute, but were significantly or directly enforcing the effects of the primary ones; for the Vaxholm dispute it was the boycott of the electricians' union which actually hindered the prosecution of work<sup>293</sup>, and action by ITF's affiliates and inspectors represents the core aspect of the FOC campaign<sup>294</sup>.

Lastly, as noted before, in *Laval* the balance was struck with regards to the freedom to provide services ex article 49 EC, while in *Viking* the freedom of establishment is concerned <sup>295</sup>.

Since in *Viking* the exercise of the freedom of establishment was considered as a prerequisite for the provision of services, Article 43 EC was applied directly by the ECJ in defining the dispute<sup>296</sup> to assess the restrictive effect of national and transnational collective action on the freedom of establishment; on the other hand, given the fact the labour law issues connected to the freedom to provide services

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<sup>293</sup>As a matter of fact, the strike implemented by the electricians' trade union to hinder the performance of the contract actually lacked the "main" action that it should have supported since, as noted, there were no trade union members among the construction workers employed at the Vaxholm site. See Orlandini 2008, p. 586

<sup>294</sup> With particular reference to *Viking*, the question arose with reference to the obligatory nature of the ITF's circular on its affiliates; the circular seems to have a declaratory nature clarifying in a concrete case the implications of the FOC (and therefore, its withdrawal would not fundamentally affect the possibility for prosecution of the boycott), in particular because the refusal to conclude a collective agreement with a reflagging employer cannot be carried out by ITF but is operated through the national affiliates. Furthermore, the "obligation" to respect that campaign does not stem from the circular, but from the voluntary affiliation of a national trade union to the ITF. In this sense the idea of a solidarity strike "proportional if voluntary" (as provided by AG Maduro in *Viking*) would stand. See Bercusson 2008, p. 7/465

<sup>295</sup> However, also from this point of view the two cases present an element of connection, when Article 1.2 PWD is considered; the article in question states "This Directive shall not apply to merchant navy undertakings as regards seagoing personnel".

During the course of the Finnish dispute, in particular, *Viking Line* had maintained (before the High Court) that the aforementioned clause would recognize that the principles set down in the posting of workers case-law were not appropriate for seafarers; however already in *Seco* the ECJ maintained that MS are not required to tolerate low-wage or dumping competition within the field of the free provision of services provided by the Treaty. Therefore, secondary legislation like the PWD cannot validly exclude the seagoing personnel from the protection granted by the EC Treaty, and by its interpretation by the ECJ. See Hellsten 2007, p. 220

<sup>296</sup> Although the reference for a preliminary ruling concerned the interpretation, first, of article, and secondly, of Regulation No 4055/86, the Court determined that the question on freedom to provide services can arise only after the reflagging of the *Rosella* envisaged by *Viking* (which had not yet happens), the questions referred could be answered "only in so far as they concern the interpretation of Article 43 EC". *Viking*, parr. 29-31

are dealt with in the Posting of Workers' Directive, the *Laval* judgment concerns more specifically the relationship between this instrument and primary EC Law<sup>297</sup>.

In this sense *Laval*, and not *Viking*, represents the functional connection between the rulings regarding collective action and the two subsequent ones concerning the fight against social dumping and the social public order, and testifies the continuity of the ECJ's reasonings in reconciling collective labour rights and the exercise of economic freedoms<sup>298</sup>.

From this point of view the complex of the four rulings considered represents an "escalation" in the balance carried out by the ECJ; *Viking* and *Laval*, in fact, referred mainly to private disputes<sup>299</sup> while *Rüffert* and *Luxembourg* concerned the public authorities of the host Member States in a posting situation and their freedom in determining public policies; the latter case, in particular, constitutes an infringement proceeding by the Commission and represents a more political rap towards a Member State in its transposition application of the an instrument such as the PWD, directly linked to the promotion of one of the Treaty freedoms<sup>300</sup>.

Furthermore, this growing role in the governing of economic processes is apparently accompanied by a declining attention to the promotion of fundamental social rights; the Court, in fact, reached possibly more "unbalanced" results, since in ruling on *Rüffert* and *Luxembourg* the ECJ did not resort to the Charter of

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<sup>297</sup>And the restrictive effect of the collective action undertaken by national trade unions was apparently scrutinized on the basis of the national legal context.

<sup>298</sup> It has however to be underlined how in all the cases the ultimate goal of trade unions and legislatures was to avoid that the exercise of a fundamental freedom by posting employers would have as a direct or indirect side effect the worsening of wage standards and, consequently, of living conditions, thus contradicting the principle of "harmonisation in the improvement" laid down in art. 151, par. 1 TFEU. See Ales 2008, p. 9

<sup>299</sup> Although, as noted, in *Laval* the Court had in effect questioned the Swedish transposition of the PWD, and the consequently had struck down the right of trade unions of a Member State to take collective action - and not the trade union action as such - as constituting an impediment on the freedom to provide services. See also Hös 2009, p. 20

<sup>300</sup> This course appears supported also by EU institutions such as the Commission; its position was "ambivalent" (both in media appearances by its representatives and in its submissions) in *Viking* and *Laval*, but in *Rüffert* it submitted a series of considerations against the Lower Saxony law on public procurement (which was deemed incompatible with PWD as it did not rely on *erga omnes* collective agreements, and created discrimination between workers of the construction industry on the basis of the public or private nature of the contractor), stressing that the aim of the PWD is to strike a balance between the freedom to provide services and the protection of posted workers, and that the detailed framework provided by this instrument must be complied with by the MS.

Fundamental Rights<sup>301</sup> or other international instruments to reconcile the contrasting social and economic aspects connected to the posting of workers, provided a formalistic and static interpretation of collective agreements and antidumping measures<sup>302</sup> *vis-a-vis* the exercise of the economic freedoms, and underlined that a strict analysis of the reasons justifying the derogations is needed; in particular the requests for “appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated”<sup>303</sup> represent an invasive interference on the national prerogatives in the regulation of the labour market<sup>304</sup>, especially when it is considered that such an analysis should address the desired effects and actual consequences of domestic measures on an indefinite variety of situations possibly covering the entirety of the national system defining labour relations.

#### 2.3.4 - The PWD revirement

Through its rulings in *Laval*, *Rüffert* and *Luxembourg* the Court has completed a substantial reversal from its “strong worker protection” approach set out as early as *Rush Portuguesa* and *Albany*<sup>305</sup>, in which art. 49 EC allowed for a high justification level and the PWD, from its entry into force, set a level of minimum rights for posted workers, to an approach substantially promoting the unfolding of economic freedoms and competition among economic actors at EU level.

By narrowing as much as possible the space accorded to the workers protection justification allowing the Member States to impose legislative or collective bargaining terms on posting undertaking, the ECJ did not recognize the autonomous

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<sup>301</sup> And in particular, article 31 on “fair and just working conditions” which, it should be noted, found application in subsequent ECJ jurisprudence such as *Palhota* (see *infra* par. 4.3.1). See Reich 2008, p. 359

<sup>302</sup> Not taking into account the fact that regulatory options such as the one carried out in the Lower Saxony public procurement law have not only the clear objective of protecting the national labour market, but are also part of a system aimed at guaranteeing a more general adequacy of the contractors with respect to entrepreneurial and organizational standards.

<sup>303</sup> *Luxembourg*, par. 51

<sup>304</sup> See Sciarra in Andreoni and Veneziani 2009, pp. 37-38.

<sup>305</sup> In the competition law context. See *supra* par. 1.2.4

political core right of a Member State to define which of its social policy measures are considered so important that they should apply to all its national service providers, and therefore as well to cross border service providers to counter unfair competition.

In *Rüffert* and *Luxembourg*, in particular, the ECJ has applied the principles developed in *Laval* to declare national collective labour law protection incompatible with the PWD and Article 49 EC: this result has been achieved by repositioning the PWD as an almost exhaustive statement of the art. 49 EC justification for posted workers as well as by tightening the applicability of the PWD with regards to monitoring and reporting conditions<sup>306</sup>.

Therefore, the matters covered by the EU instrument not only represent those areas in which Member States must act in order to provide a coordinated ensemble of national measures protecting workers in posting situations, but also constitute the boundaries beyond which the action of the Member States cannot be justified<sup>307</sup>, and therefore the maximum level of protection that a Member States is entitled to impose on foreign service providers.

The Court's interpretation thus comes rather close to an understanding of the Posting of Workers Directive as a *ceiling*: that is, an almost exhaustive description of the competence of the Member States in relation to the terms and conditions which can be imposed on posted workers<sup>308</sup>.

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<sup>306</sup> Adding to the already existing "inventory of restrictions" mainly deriving from ECJ case-law with reference to various aspects of the posting such as obligatory adherence to funds (*Seco, Arblade*), the the need to obtain a work permit for the staff (*Rush Portuguesa, Vander Elst*), and the "absolute restriction" constituted by the requirement of a permanent establishment which "is the very negation of the fundamental freedom to provide services in that it results in depriving Article [49] of the Treaty of all effectiveness" (C-493/99 Commission v. Germany, par. 19). See Sjödin 2009, pp. 34-50

<sup>307</sup> In the *Laval* case, it was industrial action by Swedish unions that was found to infringe the right to provide services. In *Rüffert*, it is the inclusion of contract compliance conditions in public procurement contracts that not only infringes the right to provide services, but is also unlawful solely because the contract compliance conditions exceeded the protections laid down in the PWD (the wage level, in particular, was transparent and easy to ascertain in advance for a foreign service provider).

<sup>308</sup> Malmberg 2010a, p. 7

The labour law and collective action “neutrality” set by the EU legislation on services<sup>309</sup> seem lost in the ECJ’s reasonings, and the “country of origin” principle set under the initial draft of the Services Directive<sup>310</sup> seems to be partially re-instated by the ECJ with regards to posted workers<sup>311</sup>; the ECJ judgements in question have created a situation whereby intra-EU competition is not required anymore to be on equal terms, since foreign services providers are allowed to widely exploit their competitive advantage on wage levels and do not have to comply with mandatory rules that are imperative provisions of national law and that therefore automatically apply and must be respected by domestic services providers.

While the PWD still does not harmonize the material content of those mandatory rules for minimum protection and a certain degree of autonomy is necessarily left to MS, the clarification that the public interest justification is excluded *a priori* for the cases in which the national provisions regard matters already covered by the EU law, for which minimum requirements are set both by the host country and by the other Member States<sup>312</sup> represents possibly the most disruptive outcome of the judicial course set by the ECJ, and could result in a “free ticket” for social dumping<sup>313</sup>, given the prohibition for the Member States to maintain or adopt measures “more favourable to workers” than the minimum ones.

The ECJ, by interpreting both the PWD and the national laws transposing it<sup>314</sup>, has therefore provided to Member States a series of indications on correctly

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<sup>309</sup> Namely, the PWD (96/71/EC) and the DSIM (2006/123/EC). The ECJ in the rulings at hand has clarified unequivocally a crucial point, declaring that “according to Article 3(1)(a) thereof, Directive 2006/123 is not intended to replace Directive 96/71 and the latter prevails over the former in the event of conflict” (*Luxembourg*, par. 23) because it represents a distinct and more specific source of law. See Sciarra in Andreoni and Veneziani 2009, p. 25

<sup>310</sup> By greatly reducing the possibilities for the application of the “country of employment” principle the ECJ has re-introduced the *Bolkenstein* proposal “through the back door” (Baumann 2009 p. 21). See Pallini 2006 and Hendrickx 2009, p. 72.

<sup>311</sup> See *supra* par. 2.1. In particular the provisions of the DSIM aimed at the protection of the national labour law systems, negotiated by the trade union in order to avoid social dumping, can be threatened by the persisting application of the more general provisions of the EC Treaty, as it has happened in *Viking* and *Laval*, leaving very little room to the possible interference with the four freedoms. See Barnard 2008a

<sup>312</sup> As for the case of fixed-term and part-time work regulated by Directives 97/81/EC e 99/70/EC. See Pallini 2008, p. 9

<sup>313</sup> Picard 2008, p. 165

<sup>314</sup> The AG in *Luxembourg* had also stated that it is standing case-law related to article 49 EU that “all restrictions, even if these are mandatory for domestic service providers” have to be abolished (*Luxembourg*, AG’s Opinion, par. 56).

implementing EU law, with a view of reducing uncertainty and potential burdens for service providers.<sup>315</sup>

Apart from challenging the national labour market policies and industrial relation systems as well as jeopardizing the position of national undertakings, these judgments challenge the original intention at the base of the drafting the PWD<sup>316</sup>, meant to be an instrument to secure national working conditions instead of discarding them; the PWD was aimed since its inception at simplifying and promoting the posting of workers, and clarifying the conditions applicable to them.

On the other hand, the requirements for a “climate of fair competition” and for “measures guaranteeing respect for the rights of workers”<sup>317</sup> are explicitly stated; such objectives coexist in the wording of the Directive and therefore, in its rigidly market-oriented interpretation of this instrument the ECJ disregarded a set of clearly identifiable alternatives<sup>318</sup>.

Furthermore, ECJ’s reductionist interpretation implies the removal of every obligatory notification and registration of the service provider and the workers involved, which have to be guaranteed, along with their monitoring, by the country of origin; this reconstruction, throughly supported by the Commission, is however bound to hinder the reciprocal evaluation and information exchange between national bureaucratic apparatuses and monitoring authorities, with severe risks for the operativity of instruments directed at preventing abuses<sup>319</sup> and ensuring compliance with workers’ rights, which represent a basic element in the fight against

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<sup>315</sup> However the PWD, as noted, provides a certain margin of discretion for the MS while the direct application of home state standards or of a Community-wide set of minimum standards are arguably the best way to achieve clarity. In this perspective it has to be underlined that collective bargaining (while being in effect “uncertain” and potentially time consuming) also presents a set of advantages: in particular, it gives the employer a say in the terms and conditions it must apply to the posted workers and an opportunity to argue, for example, that it cannot afford a proposed minimum wage level; wider benefits may relate to the building up relationships with local trade unions. Davies 2008, p. 144-45

<sup>316</sup> See Giubboni 2008, p. 27

<sup>317</sup> PWD, recital 5.

<sup>318</sup> In particular, there seem to be three feasible perspectives for understanding the PWD: non-discrimination of workers, equality of treatment of undertakings and prohibition of obstacles to freedom of services applicable without distinction. See Borelli 2008a, p. 360.

<sup>319</sup>As, for instance, Luxembourg’s provision requiring a written labour contract for all employees, independent of whether workers are national or foreign citizens. See in Andreoni and Veneziani 2009, p. 25

bogus work agencies and other undeclared practices<sup>320</sup> which the EU nonetheless promotes<sup>321</sup>.

### 2.3.5 - Further considerations

The implications of the judgments need also to be analyzed within the context of the “Europeanization” of labour and collective relations and the European Social Model<sup>322</sup>; the prejudice showed by the ECJ towards social intervention by Member States or trade unions in defense of workers’ interests<sup>323</sup> is at risk of creating negative consequences in the national systems.

Moreover, the framework provided by the rulings is still far from being clear and several elements of the rulings remain in strong need of a clarification, leaving potentially many kinds of actions or normative provisions at risk of being subject to an assessment on the compatibility with the Treaty freedoms<sup>324</sup>.

As noted, it is clear that the *Laval*, *Rüffert* and *Luxembourg* course defines a complex, if not complete, discipline for the interactions of the fundamental social rights, included the one to take collective action, with the hypotheses of transnational posting of workers regulated by the PWD: several elements are clearly stated, although no guidance was issued by the ECJ specifically in order to assess

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<sup>320</sup> Such as the fictitious autonomous work

<sup>321</sup> See *amplius* Cremers and Janssen 2008 and Cremers and Donders 2009.

<sup>322</sup> In particular it was noted how the lack of effective IR systems in the NMS-12 does not help in the creation of an integrated system of IR (for instance, coordinating the systems for collective bargaining) within the European Social Model (see *supra* 2.1); in this context, the ECJ’s reconstruction of collective bargaining and action as auxiliary and residual hypotheses with respect to minimum standard and wage setting through legislative provision, does not seem to promote social dialogue at national level (through, for instance, recourse to art. 3.8 PWD) and, by that, hinders the effective implementation of social legislation in these MS and the ability of NMS-12 social partners to act at EU level (Zahn 2008, p. 16). Major consequences may affect the stability of the Nordic social model, nonetheless praised by the EU as reconciling flexibility and security, and the European Social Model in general, given the apparent precedence of the economic perspective over the social one (see *infra* “flexibility” and the paradox of the Nordic model). As predicted, in fact, national welfare systems like the Swedish one, were modified in order to correctly implement the case-law on the conflict with the rights and freedoms protected by the Treaty. See Barnard 2008b, but especially with reference to the reflections on the rulings on the national systems the following chapter

<sup>323</sup> Which made the ECJ overcome art. 137.5 of the EC Treaty in *Viking* and *Laval*. See Reich 2008.

<sup>324</sup> With the further *vulvns* for the effective enforcement of the right to take collective action deriving from the uncertainty by trade unions with regards to the possibility that a collective action might be ‘disproportionate’ or not. See Picard 2008, p.165



trade union and Member State liability, and, major policy indications can be drawn by the Member States on the matters covered by the rulings<sup>325</sup>.

*Viking*, on the other hand, delegates the concrete definition of the compatibility of the collective action with EU law to domestic courts, which have to operate through the aforementioned criteria in determining the action's justification and its proportionality; its wider scope<sup>326</sup> entails that at the moment the control of proportionality in cases involving the reconciliation of right to take collective action with economic freedoms<sup>327</sup> other than the one to provide services is demanded to the national judges<sup>328</sup>.

While the referral of the analysis on proportionality to national courts can be considered appropriate, It must be underlined that, apart from the strict proportionality test, *Viking* does not provide such courts with sufficient guidance in the balancing of the economic freedoms and the rights involved by the dispute<sup>329</sup>.

Such a situation is liable to produce negative effects, since the application of a proportionality principle in industrial action cases requires highly specialized labour courts with a deep understanding of the industrial relations context<sup>330</sup>, but the national courts actually involved may not have the institutional strength or the technical capacity to fully evaluate the merits and the backgrounds of an industrial

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<sup>325</sup> See *supra* par. 2.3.4. It is not by chance that Sweden, Denmark and Luxembourg amended their national legislation in direct accordance with the main points deriving the ECJ rulings. See *infra* par. 3.1, also with reference to the more complex German situation, which entails significant differences at national and regional level and presents different problematic aspects.

<sup>326</sup> Deriving from the direct application of the Treaty provision to the dispute.

<sup>327</sup>A series of brief observations must be made with regards to the potential useful space of a definition of trans-nationality of the dispute or action in order for the ECJ case-law to apply, and the consequent reduced ability for TUs to take industrial action in transnational situations. However, as confirmed by *Viking* and *Laval*, any kind of restriction allows the application of EU law; therefore, even if required, an indefinitely small element of trans-nationality (see *infra* par. 3.2.2 with regards to the contested strategic outsourcing decision by British Airways that gave origin to the BALPA dispute), would entail the possibility for an employer to challenge collective action by trade unions. It could also be argued that the ability to invoke community rights only where there is an international element is of itself a restriction of Community rights, and that therefore in all "free movement" disputes the rules on the right of strike should follow those set in *Viking* and *Laval*, regardless of the existence of an international or cross-border element (in particular for those situations, such as the German one where different geographical areas present different levels in terms of statutory minimum wages and social protection standards). See Carabelli 2008 and Ornstein, Smith 2008

<sup>328</sup> Which entails the major consequence that these rulings could potentially be recurred against in international Courts and adjudicating bodies such as the ECtHR and the ILO Committee of Experts (see *infra* BALPA case cap.3) for breach of fundamental rights.

<sup>329</sup> As also underlined *supra*, par 2.3.4

<sup>330</sup> Davies 2008, p. 146

dispute (especially in presence of wide-ranging economic considerations or social protections issued linked with the core of the national system), such as whether it would in fact protect workers' rights, the steps taken to resolve the dispute, and the effective use of the conciliatory instruments where provided to the parties<sup>331</sup>.

Allowing reliance to the provisions on economic freedoms against private actors needs for the definition of specific limits and boundaries, especially in consideration of the remedies available to and legitimate reactions by employers; in particular, the direct subjection of the trade unions to the respect of the economic freedoms implies sanctions which are not necessarily identical to the ones imposed to Member States.

The ECJ's decisions, therefore, pave the way for a *Francovich*-style of damage claims against private actors<sup>332</sup> - *in casu* labour unions - for breach of the market freedoms for all the cases in which the collective action is deemed unlawful by the ECJ or by the national courts because of its incompatibility with Treaty provisions; such a solution is at risk of further restricting the exercise of the right to collective action<sup>333</sup> which, in absence of detailed and sound criteria, finds its lawfulness or unlawfulness linked to the problematic judicial reconstruction of justification and proportionality<sup>334</sup>.

As noted, in *Viking* the ECJ followed a different approach in its conclusions concerning the FSU strike and coordinated solidarity action taken in order to implement the ITF's FOC policy; for the latter case, even if the objective of that policy was to protect and improve the conditions of seafarers' terms and conditions of employment, "the restrictions on freedom of establishment resulting from such

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<sup>331</sup> As noted *supra*, the absence of guidance on the application of the "least restrictive alternative" test could entail the risk that the courts "will identify alternatives without considering their effectiveness in the bargaining process". See Davies 2008, p. 143

<sup>332</sup> In *Francovich*, the Court allowed individuals to claim damages against a State that has failed to apply or implement EC law correctly. Case C-479/93, *Francovich v Italy*. Such a claim had only been allowed in "private" cases under the competition rules (see Case C-453/99, *Courage and Crehan*). See *infra* par. 3.2.1 for the Swedish Labour Court findings on the matter.

<sup>333</sup> In particular in consideration of the fact that in many national systems, restrictions to the right of strike are only directed at ensuring the respect of equally protected constitutional-level rights, among which the economic freedoms are only seldom considered. See *infra* with respect to the Italian situation.

<sup>334</sup> And is directed furthermore to the whole organization rather than on the individually identified striking workers (as provided, for instance, by the French and Italian law). See Robin-Olivier and Patout 2008

action could not be objectively justified”, *in casu* because the exercise of the freedom of establishment had been effectively prevented, and more in general because the refusal to enter negotiation and sign agreements with reflagging shipowners undertaken by ITF’s affiliates activates regardless of the presence of actual harmful effects for the workers involved<sup>335</sup>.

However, the coordinated action against the reflagging is evidently composed by two main elements: the circular issued by the ITF, aimed at reserving the right of collective negotiations to trade unions of the State of establishment of the “beneficial owner” of the vessel and the various collective actions carried out by the national affiliates<sup>336</sup>.

The nature of the ITF action appears therefore, modest; the national trade unions, in fact, can autonomously decide whether to enforce the circular or not<sup>337</sup>, and any collective action undertaken should be consistent with the legal framework and social model of the Member State concerned.

However, notwithstanding the fact that ITF’s activity is much less than the action taken by national affiliates, the balancing carried in *Viking* undermines the main purpose of this policy<sup>338</sup>, at least within the boundaries of the European Union,

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<sup>335</sup> Similar doubts and criticism were also expressed by the AG, which concluded that in principle, coordinated collective action can be an effective means to counterbalance the economic power of employers in the case of relocations. However, the obligatory nature of the ITF’s policy enabled “any national union to summon the assistance of other unions in order to make relocation to another Member State conditional on the application of its own preferred standards of worker protection, even after relocation has taken place. In effect, therefore, such a policy would be liable to protect the collective bargaining power of some national unions at the expense of the interests of others, and to partition off the labour market in breach of the rules on freedom of movement.” See *supra* par. 2.2.1

<sup>336</sup> As previously underlined (see *supra* footnote 494), if on one hand in the maritime sector relocation can take place through a merely legal and not physical (and therefore easier) relocation of the work place, on the other hand the trade union strategy (based on a co-ordinated exercise of the freedom not to engage in collective bargaining) appears far less complex than those carried out in a “typical” case of relocation (which often implies more radical pressure means such as blockades or factory occupation). See Jaspers in Dorssemont, Jaspers & Van Hoek 2007, p. 64, Orlandini 2008, p. 578

<sup>337</sup> It has to be noted that the issuing of the circular by ITF falls short of the exercise of the right to collective action, especially when it is considered that is not directly implemented. The decision by trade unions, furthermore, is as autonomous as the one to join ITF in the first place and therefore, as noted, no obligatory nature can be derived by the circular (see *supra* par. 2.2.1), although, of course, to adopt this approach would jeopardize their membership of the ITF; in this sense the effect of the criticised automatism in the application of the FOC policy is greatly downsized. See Bercusson 2008a, p. 685

<sup>338</sup> *id est*, to protect and to enhance the protection of seafarers on ships flying under a “flag of convenience”.

in which its objectives constitute a restriction on the economic freedoms promoted by the Treaty<sup>339</sup>.

It has to be noted, in fact, that the coordinated action against the reflagging employer was far from questioned when it involved a non-EU establishment, nor did the need for reconciliation between social rights and economic freedoms come into consideration<sup>340</sup>; once Estonia became part of the EU, however, a relocation based on exclusively economic consideration was protected by the Treaty provisions without the need for the employer to provide any guarantee with respect to the right of the workers.

The trade union position, in particular with reference to the shift of the burden of proof for the justification and proportionality of the action and the close scrutiny carried out by the ECJ, highlights how there is currently no need to preliminarily verify the respect of EU provisions on terms of employment and working condition, which would ideally offset the risk for social dumping within the Union<sup>341</sup>.

ECJ's interpretation of the PWD in the light of Article 49 EC also tackles the main issues of the national application of the ILO Convention 94<sup>342</sup> on social clauses in public contracts, stating that such contracts shall include clauses ensuring to the workers concerned "wages (including allowances), hours of work and other conditions of labour" not less favorable than those established for similar work in the sector where the work is carried<sup>343</sup>.

In particular, the first option provided by the Convention for the setting of such terms and condition is the recourse to "collective agreement or other

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<sup>339</sup>The Court, questionably, did not sufficiently assess the link between ITF's policy and the circumstances of the case - which could have been established - but addressed directly the objectives and the justification of the policy of the international federation. See Nivard 2008, p. 1203.

<sup>340</sup> That is, it can still be affirmed that such an operation involving third countries would still be seen as "reflagging under a flag of convenience", and consequently as social dumping.

<sup>341</sup> Two main troubling considerations can be drawn: in primis, the continuing lack (beside the definitions by the ECJ with relation to PWD) of an effective discipline on social dumping, and secondly the possible extension of the *Viking* prohibition on coordinated action to other types of social action deriving from trade union affiliation, especially at sectoral level where ETUC and its affiliate organizations would face an inadmissibility of (much needed) cross-border coordination in the enlarged internal market. See Sciarra 2009, pp. 15 ff.

<sup>342</sup> It has to be noted however, that Germany had not ratified ILC 94.

<sup>343</sup> *ILO Convention 94 concerning Labour Clauses in Public Contracts, 1949*, article 2.1

recognised machinery of negotiation”<sup>344</sup>; in adopting and implementing the PWD, the Commission declared that such instrument was fully consistent with ILC 94.

In particular after Rüffert the situation may vary between Member States on the basis of the fact that they have or have not ratified ILC 94, heightening the level of uncertainty on the application of national rules<sup>345</sup>; these Conventions in fact, being part of secondary legislation, could be seen as not “crucial for the protection of the political, social and economic order” and therefore deemed as hinder the free provision of services<sup>346</sup>.

The legitimacy of the continuing development of European integration on social themes depends also on being at the forefront for workers’ protection; the possibly negative consequences of the ECJ’s judicial course on ITF’s “flags of convenience” campaign and on the application of international instruments such as the ILO Conventions jeopardize EU’s role in the promotion of global workers’ rights, in particular when it is considered that a higher level of workers’ protection finds easier application situations involving non-EU countries than in intra-Community ones.

It was noted that the systematic “decoupling” of social issues from the economic integration project has led to a constitutional asymmetry between the social and economic dimensions of European integration, which makes the resolution of any conflict between the economic and social values and goals of the EC Treaty extremely controversial<sup>347</sup>.

With particular reference to the EU initiatives in the areas of employment and social policy and labour law, these have shown a preference for the use of mechanisms such as the Open Method of Coordination and other “soft law”

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<sup>344</sup> Which need to be carried out “between organisations of employers and workers representative respectively of substantial proportions of the employers and workers in the trade or industry concerned”; other options indicated are arbitration award or national laws or regulations. *Ibid.*

<sup>345</sup> Even if the conflict highlighted by Rüffert is of limited scope, not relating to purely domestic situations, or involving non-EU countries, as well as those hypotheses of public procurement which do not involve the posting of workers. See Bruun & Jacobs 2008, p. 10

<sup>346</sup> Cremers 2008, p. 13

<sup>347</sup> See Joerges & Rödl 2008, Scharpf 2009

governance instruments<sup>348</sup>, with the consequent enforcement and monitoring resting at national level, over the use of harmonization and legislative (and in particular of constitutional level) mechanisms to reconcile social policy and the enlarged market order.

Within this approach, the labour law which is being currently advocated and encouraged by the Commission promotes “flexicurity” and social inclusion<sup>349</sup> and therefore foresees a flexible labour market in which workers will routinely be required to re-skill (through comprehensive lifelong learning) and move between sectors and in which active welfare and labour market policies as well as modern social security systems are bound to play a deeply complementary role<sup>350</sup>.

It must however be noted that the rulings of the “Laval quartet” place more emphasis on the promotion of the economic dimension of the internal market and, for the case of *Viking* and *Laval*, ostensibly unfold their most direct effects on the industrial relations, welfare systems and social partnership models of Member States which have been at the forefront of these kind of progress long before the enlargement<sup>351</sup>.

Furthermore, in the European integration process, in which judge-made law has always been of crucial importance, the very role of the ECJ has expanded from a mainly sanctionatory intervention against violations of unambiguous prohibitions in the Treaty and protectionist measures to a quasi-federal and quasi-constitutional activity, gradually involving in its decisions not only partial sectors of the national juridical *corpus*, but the constitutional structures regulating the fundamental social

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<sup>348</sup>As well as programs for direct assistance such as the European Globalization Adjustment Fund (EGAF), which has the aim of “stimulating economic growth and creating more jobs in the EU”, allowing the EU institution to provide support for workers made redundant as a result of structural changes in trade patterns due to globalization (EGAF Regulation, art 1.1). It has been underlined that such a choice may also be derived from the delays and the inaccuracies in the transposition of the EU law into the national systems that have hindered the harmonization processes and have paved the way for the prevalence of the recourse to *soft law* instruments such as the European Employment Strategy. See Sciarra 2008a, De Vos 2009, pp. 120-125, Vandamme 2009.

<sup>349</sup> Michelini & Piccone 2008, p.3. See *infra* par 4.2.1 with reference to the developments in the Single Market Act

<sup>350</sup> On the matter of flexicurity, which evidently escapes the focus of the analysis, see *amplius* De Vos in De Vos 2009, p.105-120.

<sup>351</sup> Barnard 2008b. The “paradox” of the Nordic model was also underlined by Chaumette 2008, Baumann 2009 and Weiss 2010.

rights<sup>352</sup>; the latter need therefore to be reconsidered, in a EU setting, not only with reference to their content but also to the instruments available to guarantee their enforceability<sup>353</sup>, especially when it is considered that ECJ appears to thin out the national protections, rather than integrate the various levels of protection available to workers.

The clearly political stance taken by the ECJ, promoting market deregulation and placing the logic of the internal market above the social protection even at risk of the technical soundness of its juridical reasoning, coupled with the fundamentally secretive and stand-alone nature of this EU institution, interferes decisively with the application national labour rules<sup>354</sup> and public procurement law and undermine national collective agreement systems.

Furthermore, it allows economic freedoms, tampered only by an unspecified “social dimension” of the European Union<sup>355</sup>, to question the labour and social constitution of the most socially advanced Member States, in a context characterised, as noted, by an increased mobility of workers and services, and by the multiplying of possible *stata* for the workers, of which the major part of the workers fall outside the protective umbrella of the trade union affiliation<sup>356</sup>, and in a critical economic situation in which should be paramount to maintain or even

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<sup>352</sup> See Scharpf 2010. It has however been underlined that when national constitutional rights and deep-rooted models of social regulation are involved, the judicial seat - how ever authoritative and enlightened - cannot be “left alone”. See Lo Faro 2008, p. 89

<sup>353</sup> See Caruso 2008.

<sup>354</sup> In particular heightening the degree of uncertainty related to the possible application of the widely recognised collective labour rights. See Van Peijpe 2009

<sup>355</sup> Joerges & Rödl 2008

<sup>356</sup> Union density figures highlighted an average density for the year 2008 of around 26 %. Source: Industrial Relations in Europe, Report 2010, European Commission; the main source used is the ICTWSS - Institutional Characteristics of Trade Unions, Wage Setting, State Intervention and Social Pacts, a database containing around 100 variables for the 1960-2009 period and for 34 countries. See also Amoroso in Andreoni and Veneziani 2009, 74.

extend<sup>357</sup> the level of minimum social protection<sup>358</sup> rather than carry out market deregulation strategies and the watering down of minimum standards.

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<sup>357</sup> Baumann 2009, p. 22

<sup>358</sup> In this sense, it should be underlined that some rulings by the ECJ contemporary to the Laval quartet (*C-268/06 Impact*, in which the Court stated that fixed-term workers are entitled to equality of treatment with respect to pay, benefits, working conditions, promotion, training and opportunities and *C 246/06 Velasco Navarro*, in which it was provided that a guarantee institution must provide equal treatment to all the cases of indemnity for unfair dismissal, without distinction between those established by courts and those agreed by the parties in a pre-procedural conciliation) lay at the core of their analysis the protection of fundamental rights and also provide that the principle of equality can be relied upon directly before a national court. These decisions can be welcomed with somewhat cautious optimism, since they highlight the need for a nucleus of protection for the social dimension of the EU less and less exposed to attacks from mercantile demands, but at the same time underline a fundamental difference in reconstructing individual and collective employment and labour rights by the ECJ. See also Michelini & Piccone 2008, p. 9



## 3- CONSEQUENCES AND DEVELOPMENTS

### 3.1 - Impact and Influence on national Industrial Relation systems

#### 3.1.1 - Sweden: a paradigm for the Nordic MS

Among the most evident effects of the judicial course undertaken by the ECJ in the aforementioned cases is the series of amendments of national legislation in the Member States directly concerned by the rulings, *in primis* those experiencing the so-called “Nordic model” of industrial relations, the scene the two most relevant cases of the Laval quartet; the restrictions to the demands of host MS’ trade unions constitutes a new concept in Sweden: the impact of the judgments is of great importance in such an industrial relation system, where the social partners have enjoyed great freedom to negotiate and conclude collective agreements in just about any issue concerning the relationship between employers and employees.

The Swedish experience, in fact, has historically presented as its main feature an autonomous involvement by social partners<sup>1</sup> in the definition of the labour regulation, and a corresponding non interventionism by the State; this attitude, providing for little or no state authority overseeing the activities and operations by the social partners, has been made possible by the pervasiveness of multi-level collective bargaining systems, an high degree of membership in the representative organizations<sup>2</sup> and by the spirit of cooperation and partnership which have carachterised the self-governance by the social partners.

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<sup>1</sup> The main confederations, LO (*Landsorganisationen i Sverige*) on the trade union side, and on the other hand *Svenskt Näringsliv* (formerly SAF), have in fact, been active since the end of the XIX Century. See Rönmar 2004, p. 95.

<sup>2</sup> Around 70-75% for the trade union side (73% at the thime of the *Laval* decision), a data in line with the average for the Nordic countries, which present a minimum of 60% in Norway and a maximum of about 90% in Iceland.

Notwithstanding the relevance of the standard setting role of collective bargaining in the Swedish experience<sup>3</sup>, collective agreements are still regarded as private law instruments; signature of collective agreements on employment and working conditions and relationships between workers and employers can occur at national, sectoral and company level.

The three levels in collective relations maintain their autonomy and progressively complement the higher one, producing a very flexible system, in particular at local level, where the wage bargaining occurring between the individual employer and the local branch of the trade union, which allows a high degree of adaptability in the autonomous standard setting by social partners; as noted before<sup>4</sup>, an employer not affiliated with any representative organization (including a foreign employer) can sign directly with the union an application agreement (*hängavtal*) which usually extends the provisions of the sectoral collective agreement in force in that particular branch of activity to all workers in the workplace, regardless of their affiliation to a trade union.

The highlighted ideological and political consensus on cooperative self-regulation does not necessarily imply the absence of conflict in the relationships between trade unions and employers' organisations<sup>5</sup>: the Swedish industrial action legislation presents at its core a constitutional protection for the right to strike<sup>6</sup>, coupled with the restrictions to its exercise set by the rules of the 1976 Co-Determination Act<sup>7</sup> for both unions and employers.

It has to be underlined how also for this sector State intervention has been kept to a minimum, and while the Parliament has maintained the possibility of issuing legislation on the matter, the main premise of action by the legislator was to leave to the social partners the responsibility of ensuring a correct use of the

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<sup>3</sup> The "centre of gravity" of the Swedish system, collective agreements concluded between the representative organizations cover around 90% of workers, and represent, as noted *supra* (par 2.2.2) the only source of regulation with regards in particular to pay and other remuneration. See Swedish Government 2008, p. 9

<sup>4</sup> See par. 2.2.2

<sup>5</sup> See Bruun-Jonsson in Bücken and Warneck 2010, p. 17

<sup>6</sup> Complemented by the still valid 1936 *Saltsjöbaden* agreement (signed between SAF and LO), which contains rules for industrial action and for bargaining and for disputes regarded as posing a danger to society. See Eurofound 2003

<sup>7</sup> *Lag on Medbestämmande i arbetslivet* (1976:580), literally Act on Employee Consultation and Participation in Working Life and following amendments (hereby MBL), designed to promote "labour stability".

collective action instruments.

According to Swedish Instrument of Government<sup>8</sup>, Chapter 2, Section 17, any trade union or employer or association of employers is entitled to take strike or lock-out action or any similar measure unless a law or an agreement provide otherwise; the starting point in the Swedish experience is therefore one of a very wide recognition, both in terms of entitlement to the right to take collective action, encompassing both workers' and employers' associations<sup>9</sup>, and in terms of the features of the specific actions that can be undertaken<sup>10</sup> and aims pursued, although collective action must exert pressure on the opposite party in a work-related dispute and, to be legal, it must take place in an organized manner and following a decision taken in accordance with the rules of an organization entitled to

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<sup>8</sup>The Instrument of Government (*Regeringsformen*, RF) is the most important of the fundamental laws composing the Swedish Constitution, the others being the Act of Succession regulating the access to the monarchy, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. It sets out the basic principles of Swedish political life, as well as the fundamental rights and freedoms

<sup>9</sup> In Sweden, therefore, non-union workers cannot exercise the right to strike, which cannot be considered as an individual right but of exclusive union entitlement. In 2004 a Council of Europe committee found that fact alone did not violate the European Social Charter, on the basis of the fact that that a vast portion of the Swedish workforce is unionized and that workers are free to form trade unions without excessive Government intervention. The MBL, in fact, prohibits any interference with the right of association; in particular sect. 8 provides that an infringement of the right in question occurs when an employer or employee, or their representatives, take action "detrimental to the other party" or "for the purpose of inducing that party not to exercise" the right of association. With more specific reference to the right to collective action, the Employment Protection Act (LAS, covering almost all workers in both private and public sector) protects workers, including union members, against dismissals for taking part in a legal strike; striking workers are still employees and entitled to their jobs after a legal strike ends. See 2011 OSCE (Office for Democratic Institutions and Human Rights) Report, available online at <http://legislationline.org/topics/country/1/topic/1/subtopic/17>

<sup>10</sup> The starting point of both of the constitution and of the MBL, therefore, is that that of an unrestricted right to strike. Collective actions are lawful and allowed unless specifically prohibited, and may include strikes, boycotts, blockades, go-slow, work-to-rule and overtime ban and, more importantly, solidarity strikes. Industrial action must not be taken against companies without employees, and it must also not be used against companies where the person running the business or the family of the person running the business are the sole employees and sole owners, or in order to support "someone who wishes to reach a collective bargaining agreement with such a business" (Sect. 41b MBL); however, a union may urge its members and other individuals not to enter into employment in the enterprise concerned. A set of rules "absent" from the MBL is the one regulating the strike in essential public services and important societal functions: however, according to the Public Employment Act, public sector employees also have the right to strike and take other forms of union-authorized collective action. See Warneck 2007, p. 68, Bruun-Jonsson in Bücken-Warneck 2010, p. 16, and *infra* for a more detailed analysis of the solidarity strike.

sign a collective agreement<sup>11</sup>.

Notwithstanding some attempts dating to the late '90s<sup>12</sup>, a general principle of proportionality for collective action is still absent from the Swedish legal framework on industrial disputes, in particular due to the Government's restraint from putting forward any proposals for its introduction<sup>13</sup>.

Among the more detailed legislation contained in the aforementioned MBL, of fundamental importance for the definition of the Swedish industrial relation systems are the rules governing the peace obligations, which constitute key limitations to the industrial conflict right<sup>14</sup>, those regarding the lawfulness of secondary action and, lastly the role of mediation authority in the arising disputes.

Therefore, according to Sect. 41 of the MBL, an employer and employee who are bound by a collective agreement may not "initiate or participate" in industrial action<sup>15</sup> if the action is in breach of a provision on peace obligations included in a

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<sup>11</sup> While collective action must be duly "sanctioned" or "ordered" (see Sect. 41 MBL), and approval by the union is therefore to be considered mandatory, no legislative instrument requires a prior union membership vote. In practice, the decision is taken by the board of the sectoral union. With reference to the possibility of the undertaking of a collective action for political purposes, it is not automatically unlawful but it cannot compress the other party's rights in such a way to be considered a strike aimed at achieving any change to the agreement (see *infra*). Political strike is, on the other hand, tendentially excluded for the public sector (through the 1994 Public Employment Act, imposing a ban on political action in work involving the exercise of public authority, and more in general prohibiting action directed at influencing Sweden's political situation). See also Warneck 2007, p. 68

<sup>12</sup> In 1998, following an inquiry, the Mediators' Institute presented its final report (SOU 1998:141), proposing the introduction of a proportionality rule in order to provide a reasonable balance between the social partners by limiting the possibility of industrial action, causing significant costs for the other party or third parties. These proposals, however, did not find any place in the following interventions of the Government on the MBL, which was nonetheless the object of changes including an extended period of notice and opportunity to postpone industrial action (see *infra*). See Labour Committee Report 2010/11:AU10

<sup>13</sup> More recently, in June 2011, the Swedish Parliament rejected (approving by *consensus* the Labour Committee's proposal) motions to include a proportionality principle in the Swedish legislative framework on industrial conflict (in line with the proposal in the aforementioned SOU 1998:141). The Committee had noted that the National Mediation Office estimates that Sweden highlighted a relative calm in the national labour market (for the 2005-2009 period, Sweden had on average fewer than 10 days lost per 1000 workers, while the EU-15+Norway presented averages exceeding 40 days), and therefore there was no need to reconsider the previous positions (and in particular the government choice to implement changes in the MBL but not to impose an explicit proportionality principle in for collective action). See Labour Committee Report 2010/11:AU10 and Review of Proposals (*Redovisning förslagspunkter*) 2010/11:AU10, § 7

<sup>14</sup> Defined as "labour-stability obligation", these agreement cannot however result "in the removal or limitation of rights or obligations under this Act". MBL sect. 4.1

<sup>15</sup> Defined as "a stoppage of work (lockout or strike), blockade, boycott, or other industrial action comparable therewith". MBL, sect. 41.1. It follows further from Sect. 42.1 MBL, that an employers' organization or a trade union may not organize or in any other manner induce unlawful collective action, nor participate, through support or otherwise, in unlawful industrial action.

collective agreement; the MBL provides for a mandatory labour-stability obligation which prohibits strikes during the period when a collective agreement is still valid.

Furthermore, most collective agreements contain clauses prohibiting strikes or other types of industrial action during their validity; a peace obligation more extensive than that prescribed by the MBL may be stipulated by collective agreement<sup>16</sup>.

The key element of the statutory peace obligation as defined by Sect. 41 is that collective action is not unconditionally prohibited, but it may not be used with a view to achieving changes to the agreement in force; this prohibition covers what is expressly regulated in the agreement but also its implied supplementary rules<sup>17</sup>. Similarly, industrial action may not be used in order to force a settlement or agreement on terms and conditions that would be applied after the expiration date of the agreement in force<sup>18</sup>; furthermore, in the event of disagreement or dispute over the interpretation or application of the agreement, the opposing parties are required to submit the matter to conciliation committees, and also for this case the use of industrial action must be considered unlawful<sup>19</sup>.

The main exceptions to the restrictions set by the MBL refer to the cases in which the objective of the action is not covered by the collective agreement, and the

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<sup>16</sup> According to the SFS 2005:392 amendment, in particular, “collective bargaining agreement may also prescribe more extensive labour-stability obligations than those mentioned in Sections 41, 41 a, 41 b and 44, as well as more extensive liability for damages” than those prescribed by the MBL. See 4.3 MBL. modern-day collective agreements contain exhaustive rules on permitted actions and sanctions for non-compliance.

<sup>17</sup> For example regarding the employer's right to direct work and right to exercise management.

<sup>18</sup> MBL, Sect. 41.1.1-2-3. Strikes are to be deemed permissible only if a collective agreement has terminated or expired and after all channels for mediation provided for in the collective agreement, or any other agreement binding the parties, have been exhausted; when there is no collective agreement a trade union is free to take industrial action, including sympathy action, to induce the employer to sign an agreement, regardless of whether the trade union has members at the workplace or not.

<sup>19</sup> An unlawful breach of industrial peace can give rise to damages against the trade union, while individual participants may be fined (or, for the case of serious offences, dismissed) only if they have participated in a strike non sanctioned by the union (*i.e.* wildcat/spontaneous; in this sense it must be read the provision stating that “where any person has taken unlawful industrial action, no other person may participate in such action”). Sect. 42 MBL also provides that “An organisation that is bound by a collective bargaining agreement shall also be obliged, if unlawful industrial action is imminent or is being taken by a member, to attempt to prevent such action or to endeavor to achieve a cessation of such action”; furthermore if employees have in fact undertaken an unlawful action the employer and the employees' organization concerned (including, if existing, the local chapters) must immediately enter into discussions and “jointly” work for its cessation (Sect. 43)

so-called “collection blockade”<sup>20</sup>, in order to recover payable and unpaid wages or other remuneration for work completed that are clearly due; however, also for these cases the precondition of the duly order of boycott decision by the trade union stands.

More importantly, since there is no requirement in the MBL that industrial action shall be directed against the opposing party, the solidarity strike (*sympatiåtgärder*) encounters a very broad recognition in Swedish law; representative organisations and their members, while bound by peace obligations with their primary counterpart, may therefore participate in secondary actions (for instance through boycotts and/or blockades) in support of those engaged in a lawful dispute<sup>21</sup>.

The MBL does not present any requirement for reasonable proportionality between primary and secondary action and for a legal or economic connection between the targeted parties<sup>22</sup>; therefore, the main element to be considered is the lawfulness of the primary action<sup>23</sup>; as long as the primary action is lawful, the peace obligation does not apply to secondary action, and therefore a trade union is free to take industrial action to induce the employer to sign an agreement<sup>24</sup>.

With regards to procedural requirements, formal notice of the industrial action (containing information of the reason and the scope of the action) must be submitted seven working days in advance by the party undertaking it both to the

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<sup>20</sup> Sect. 41.3 MBL, as amended by SFS 1993:1498

<sup>21</sup> Sect. 41.1.3, in fact, explicitly refers to collective action undertaken “to aid someone else” (that is, the party in the primary conflict); this, combined with the fundamental tenet of 2:17 RF (see *supra*), provides for a general lawfulness of secondary action. See Fahlbeck 2006, p. 8

<sup>22</sup> As for the case of sub-contracting companies, or when the third party has expressed loyalty with the opposing party in the dispute.

<sup>23</sup> Difficult legal issues may arise when assessing the lawfulness of the primary action, in particular in an international perspective. If the action is permitted by a foreign country's law the Swedish sympathy action is also lawful. On the other hand, if sympathy action is illegal under the law of the country, the secondary action undertaken in Sweden should be considered illegal, if such a prohibition does not stand in clear violation of Swedish public policy.

<sup>24</sup> In a sense, the rule allowing secondary action derived from Sect. 41.1.4 MBL refers to collective measures simply intended to support the primary conflict; if the secondary opposing party becomes part of the conflict, the actions undertaken will then have to be evaluated in the light of the collective agreements in force between the opposing parties. In line with this is that sympathy action, as stated above, requires that the primary conflict is not undertaken merely for appearance's sake (1989, No 120 and AD 1990 No 113, limiting the possibility of recourse to “offensive” solidarity strikes) and that solidarity action must be temporary (see *supra* for similar considerations with regards to the political strike). See Fahlbeck 2006, p. 10

opposing party and to the Mediator Office<sup>25</sup>, which appoints<sup>26</sup> independent mediators on a case-by-case basis; in order to seek an agreement between the parties, the appointed mediator may summon the parties to negotiations or implement other appropriate measures<sup>27</sup>; in particular, following previous consultations and if it promotes the “good resolution of the dispute”<sup>28</sup>, it may propose that the Mediator Office decides the postponement of an action for at most 14 days<sup>29</sup>.

It is of the outmost evidence that the Vaxholm conflict and the subsequent ECJ ruling on the matter have represented a watershed in the Swedish labour market regulation<sup>30</sup>, and can be considered the cause for substantive changes in the Swedish legal framework; one of the major aspects covered by the ECJ in the *Laval* ruling was, as noted before, the compatibility of *Lex Britannia*<sup>31</sup>, which allowed

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<sup>25</sup> MBL Sect. 45, which also specifies that “the obligation to give notice does not apply if there is a valid impediment to giving notice” and for the case of industrial actions to recover unpaid wages. These provisions shall also apply to secondary action.

<sup>26</sup> Both at the request by the parties, but also in specific cases provided by law, in absence of such request. the Mediation Institute can also appoint regional mediators to be used for the case of company-level disputes.

<sup>27</sup> MBL, Sect. 48. Organizations that have reached an agreement on collaboration and negotiation procedure, defining rules governing the appointment and the powers of mediators, are exempt from this rule (The first agreement of this type was the Industry Agreement, signed in 1997). See Svenskt Näringsliv 2005, p. 5

<sup>28</sup> MBL, Sect. 49

<sup>29</sup> Sect. 49 of the MBL states that such decision by the Mediation Office may entail that “a party shall postpone industrial action for which notice has been given for a consecutive period of at most 14 days for each industrial action or extension of an industrial action”. This kind of decision may only be issued once for dispute/mediator assignment; the mediator “shall also work to ensure that a party postpones [...] industrial action” (MBL Sect. 48)

<sup>30</sup> Persson 2005, p. 7. In particular, with respect to the Court’s analysis of the content of art. 3.8 PWD it can easily be seen that the collective agreement has been greatly tarnished as a regulatory instrument on the Swedish (and also the Danish) labor market. Eklund 2008, p. 569

<sup>31</sup> It should however be noted that *Lex Britannia*’s compatibility with EU law was discussed already in the preparatory works to the legislation even though Sweden at that time had not joined the Community; since the legislative procedure concurred with Sweden’s application to join the EU and the compatibility was again discussed when Sweden joined the EEA agreement and then later the Union, and the item in question became the object of a separate investigation in which it was concluded that it was not necessary its amendment (Ds 1994:13 *Lex Britannia*). See Ahlberg 2010b, p. 4

industrial action directed against a foreign company temporarily active in Sweden and bringing in its own workforce<sup>32</sup>, with the Treaty provisions on free movement<sup>33</sup>.

As the ECJ found *Lex Britannia* incompatible with Articles 49 and 50 EC<sup>34</sup>, in particular because it was not justified on grounds of “public policy, public security or public health”, a Governmental Committee was set up with a view of harmonizing the protection granted by the Swedish labour market model, which was left substantially untouched especially with reference to the principle of autonomous regulation by social partners for pay and other employment conditions, with the respect of EU law, including in particular the case of posting of workers, the principle of non-discrimination and the PWD<sup>35</sup> and, by that way, “ECJ-proofing”<sup>36</sup> the legal framework while protecting its main features.

The proposed amendments contained in a governmental inquiry report<sup>37</sup>, therefore, didn’t provide for legislative imposition of a minimum wage nor towards a system for extending the effects and scope of application of a collective agreement; instead they focused on the drafting of a special rule containing a conditional restriction of the trade unions' powers to take industrial action to force foreign companies to sign up to a collective agreement, should the voluntary negotiations fail<sup>38</sup>.

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<sup>32</sup> And therefore in the context of the posting of workers as defined by Directive 96/71. *Lex Britannia* was intended as an instrument for trade unions to ensure that all employers, both domestic and foreign, would apply rates of pay and other terms and conditions of employment “in line” with normal conditions in the Swedish labour market and that they would thereby be able to combat unfair pay competition; Furthermore, the aim was also to facilitate international solidarity actions within the merchant navy. See Swedish Government 2008, p. 17 and *supra*, par. 2.2.2

<sup>33</sup> It must be noted that in Sweden the *Laval* judgement by the ECJ has given rise to two different processes: *in primis*, a legislative process undertaken in order to amend the Swedish law on collective actions in relation to foreign service providers. In second place, the judicial process between *Laval* and the trade unions in the Labour Court: in this case the main issue was under which conditions a trade union shall be liable for damages. See Malmberg 2010b, p. 13

<sup>34</sup> Now Article 56 and 57 TFEU.

<sup>35</sup> As well as in line with the requirements established by the ECJ in *Laval* (par. 110) with regards to predictability and transparency for the foreign employers of the pay and working conditions deriving from the application of collective agreements, which has ultimately led to the provision of an obligation for the parties of a collective bargaining agreement to submit to the Swedish Work Environment Authority the conditions in the collective bargaining agreements that are to be applied applied to posted workers. See Nordegran-Ahlén 2010, p. 4

<sup>36</sup> See Blauburger 2011.

<sup>37</sup> Governmental Inquiry Report SOU 2008:123, presented in December 2008

<sup>38</sup> Trade unions are described as having “other possibilities” of using industrial action against employers responsible for posting. See *Laval* case brings new Swedish law, Ahlberg 2010a,



Subsequently, in November 2009, the Swedish Government submitted a governmental bill<sup>39</sup> to the Riksdag, largely linked to the governmental inquiry report<sup>40</sup>, proposing legislative changes to the MBL and the LUA<sup>41</sup>.

The provisions<sup>42</sup> resulting from an heated legislative debate<sup>43</sup> (which were given the label of *Lex Laval*) introduced Section 5a in the LUA, and came into force on 15 April 2010; the right for Swedish trade unions to take collective industrial action with the aim of regulating the employment conditions of posted workers against a foreign employer established in another EEA country, while explicitly stated, was also subjected to a series of conditions<sup>44</sup>, whose fulfillment is ultimately necessary for the action to be lawful under the MBL<sup>45</sup>.

Under *Lex Laval* industrial action against a foreign employer may be undertaken only if the conditions demanded by the union correspond to the

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<sup>39</sup> Prop. 2009/10:48 of 5 november 2009

<sup>40</sup> Rönmar 2010, p. 285. It should however be noted that the amendments contained in the inquiry report present several differences with the bill ultimately presented before the Parliament; in particular, while the core of the legislative changes to the LUA (*i.e.*, the conditional restriction to the right to strike in posting situation) was already present, the *addenda* to sect. 5 of the LUA envisioned by the report featured three more elements which did not find any recognition in the proposed bill. These were sect. 5a stating that “an employees’ organization may make demands for an employer to apply conditions according to a collective bargaining agreement in Sweden in relation to its posted workers”, sect. 5c, providing that the application of more favorable terms and conditions was not prevented, and the possibility for the posted worker to claim work and employment conditions provided by a collective agreement entered by a Swedish trade union and an EEA-established posting employer, “even if he or she is not a member of the contracting organization” (sect. 5d).

<sup>41</sup> *Lag om utstationering av arbetstagare*, Posting of Workers Act (Official Gazette 1999:678, Government Bill 1998/99: 90), see *supra* par. 2.2.2

<sup>42</sup> SFS 2010:228 of 25 March 2010

<sup>43</sup> Characterised, in particular, by a strong opposition by the Social Democrats, which tried to suspend the adoption of the normative instrument in question, by making use of the of the possibility (provided by Ch. 2, s. 12 of the Instrument of Government) to request to have a Bill declared dormant for a year for the case of the restriction of fundamental rights protected by the Constitution (in the case at hand, the right to freedom of association and right of industrial action), and also formed a working party together with the trade unions at central level, to deliver a new legislation in the event of a change of Government after the general elections of September 2010. While the bill was accepted by the Parliamentary Committee on the Constitution and the Parliament could therefore commence the process for its adoption, it should be noted that the parliamentary opposition made reference to the at the time recent ECtHR case law in the cases *Demir and Baykara* and *Enerji* (however it was stated that a potential limitation of fundamental rights was to be interpreted solely in relation to national constitutional provisions). See Rönmar 2010, p. 286, *infra* in this paragraph and in par. 3.2.2

<sup>44</sup> See Bruun, Jonnson and Olauson in Bücken and Warneck 2011, p. 29

<sup>45</sup> It should be noted in this sense that the original proposal stemming from the 2008 report provided for a separate restatement for the right to collective bargaining by trade unions (Sect. 5 a) and to the restrictions on the right to strike (Sect. 5 b), while the resulting amendments directly affirm the right to collective action for the case of posting and subject it to several conditions. See Swedish Government 2008, p. 41 and LUA sect. 5a

conditions contained in national level collective agreements which are generally applied in the relevant sector<sup>46</sup>.

In second place, with reference to the kinds of conditions and the relative level of such conditions which may be demanded with the support of industrial action, the demands may only involve minimum levels as regards rates of pay or other conditions, covered by the Swedish law on the posting of workers, derived from the central sector agreement<sup>47</sup>; such conditions, furthermore, must be more favorable to employees than what specified points of the Swedish legislation on the posting of workers ensures<sup>48</sup>.

In addition to this, industrial action is nevertheless unlawful if the posted workers already enjoy essentially the same conditions in their home countries<sup>49</sup>; while this condition derives directly from the terse rejection by the ECJ of the difference of treatment for firms on the basis of the signature of a collective agreement under Swedish or foreign law, it also addresses also the problem of verifying whether the firms involved find themselves in an effectively comparable situation.

This provision is linked to an “evidential requirement”<sup>50</sup>, and therefore a collective action cannot be undertaken if the employer proves that the posted workers have conditions which are essentially at least as favorable as the minimum conditions in the collective agreement<sup>51</sup>; in this case, the employer may be obliged throughout the period of the posting to provide proof that the conditions applied are

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<sup>46</sup> Such an agreement is a nationwide sector agreement that regulates terms and conditions of employment for the category of workers to which the workers posted to Sweden belong. The first part of the provision aims to qualify the Swedish collective agreement model so that it falls within the scope of Article 3.8, second paragraph, first indent of the PWD. See Swedish Government 2008, p. 29

<sup>47</sup> It must be noted that in Sweden the term ‘minimum rates of pay’ applies not only to basic pay, but also to mandatory overtime rates and supplements for inconvenient working hours, night and shift work. Moreover, basic pay may be differentiated according to type of work, experience and skills, and the level of responsibility involved. See Ahlberg 2010b par. 4.1.2

<sup>48</sup> The efforts of the Swedish Government to preserve the existing model of industrial relations implies that *Lex Laval* provisions prevails on those deriving from *Lex Britannia* for the posting situations in order to determine the lawfulness of industrial action, but also that the latter remains intact outside the circumstances specified.

<sup>49</sup> The terms and conditions in question must be “in substance [...] as favorable as the minimum conditions in the central collective agreement”. LUA, sect. 5a.2

<sup>50</sup> See Swedish Government 2008, p. 31

<sup>51</sup> See Malmberg 2010b, p. 9

at the same level than those demanded<sup>52</sup>.

The Social Democrats and the trade unions have long criticized<sup>53</sup> the Government for the introduction of the *Lex Laval*, being seen as limiting the right to take collective action further than what is stipulated in EU law, possibly colliding with the national commitments with the ILO Convention on the right to association<sup>54</sup>, and - while applying to a small number of individual posted workers and posting situation<sup>55</sup> - bound to have serious consequences for Sweden's autonomous collective bargaining model<sup>56</sup>, and in particular for its parties' ability to make sure that foreign employers companies posting workers to Sweden provide wages and working conditions on par with Swedish collective agreements<sup>57</sup>.

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<sup>52</sup> According to the Swedish Work Environment Authority, which acts as a liaison office for posting-related issue, providing information to employers on the terms of work and employment that may be applicable to postings in Sweden, "the employer may be required to show documentation or similar evidence to certify that this really is the case"; furthermore the Authority provides information with regards to the content of collective agreements received to the trade unions, which have in turn to submit the conditions in the collective bargaining agreement which they are to demand through the use of industrial action.

<sup>53</sup> in particular, a LO (Swedish Trade Union Confederation)-TCO (Swedish Confederation of Professional Employees) joint opinion on the Laval inquiry was issued during the preparation stages of the legislative changes, criticizing in particular the evidential requirement provided for by the proposal, described as an unnecessary loophole advantaging unscrupulous employer. See *LO och TCO i remissvar till Lavalutredningen: EGs lagstiftning måste ändras* (Press Release in Swedish), available online at [http://www.tco.se/Templates/Page1\\_\\_\\_\\_238.aspx?DataID=8807](http://www.tco.se/Templates/Page1____238.aspx?DataID=8807)

<sup>54</sup> See also Ahlberg 2010c. Furthermore, comments were filed by LO and TCO unions to the Committee of Experts on the Application of Conventions and Recommendations of the ILO concerning Sweden's application of C. 87 and 98, mainly on the basis of violation of the principles of equal treatment and non-discrimination of workers due to national origin (deriving from the imposition of peace obligation for agreements setting inferior wages and benefits for posted workers), as well as the inability to monitor employer's compliance with the asserted standards provided; given the importance of the matters raised by the unions and the significance of the potential effect of the mentioned measures, the Committee has requested the Swedish Government to monitor the impact of the legislative changes on the rights under the Convention and provide a detailed report in time for its examination at the CEACR's next meeting in 2012. (See CEACR Individual Observation nr. 062011SWE098)

<sup>55</sup> The Swedish Minister of Labour, in presenting the amendments to the LUA, reiterated that there are only 2,000 people stationed in Sweden and that most of them are covered by Swedish collective wage agreements. see *Sweden presents new law on collective wage agreements, The Local* 8 October 2009, available online at <http://www.thelocal.se/22548/20091008/>

<sup>56</sup> It has been however noted that, while under *Lex Laval* collective agreements cannot be effectively enforced by trade unions, a short-term effect of the media attention on the Laval case in Sweden appears to be that foreign service providers were increasingly willed to sign application collective agreements with Swedish trade unions (thereby avoiding negative media coverage) instead of entering in confrontations. and Bruun and Jonsson in Bückler and Warneck 2010, 28.

<sup>57</sup> On the other hand the Swedish Confederation of Enterprise (*Svenskt Näringsliv*), which had supported - also from an economic point o view - the Laval undertaking in the dispute, contended that the proposal was still not in line with some aspects of EU law, in particular not introducing legislated minimum wages.

In June 2011<sup>58</sup> the Swedish Parliament, at the initiative of the political opposition to the (minority) centre-right Government in the Swedish Parliament's Committee on the Labour Market, decided to submit three notices to the Government, prompting it to "urgently"<sup>59</sup> initiate a review of *Lex Laval* and to assess the necessary amendments required to protect and reinforce the Swedish labour model<sup>60</sup> in an international perspective<sup>61</sup> and subsequently present to the Parliament a legislative proposal on the matter<sup>62</sup>.

Furthermore, it was also indicated to the Government the need to take new political initiatives at EU-level to ensure that the PWD maintains its character as a minimum-requirements directive, in particular for wages; lastly, the Labour Committee required the Parliament to ratify ILO Convention 94 on social clauses in public contracts<sup>63</sup>, guaranteeing that wages, working hours and other employment terms and conditions cannot be less favorable than those provided for by collective agreement or through other accepted bargaining methods, arbitration or the national

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<sup>58</sup> Approving the Labour Committee Report (*Arbetsmarknadsutskottetsbetänkande*) 2010/11:AU10. See Protocols 2010/11: 16 and 2010/11:117 (decision of 16 June 2011), § 13

<sup>59</sup> The inquiry must be completed by 1 September 2012. See Swedish Parliament Press Release of 7 June 2011 (*Labour Committee to change the lex Laval*)

<sup>60</sup>The Labour Committee's central premises were that the social partners' autonomy and contracts in the labor market must be always fully respected and that all forms of social and wage dumping must be always deterred and punished. See Labour Committee Report 2010/11:AU10

<sup>61</sup> It is, in fact, specified "that the solutions proposed by the Inquiry must meet the requirements of EU law", and should be compatible with conventions to which Sweden is bound. The amended legislation should also be "stable" in the sense that upcoming legal changes may not be at significant risk of being contested by the Commission or in the complaint to the ECJ. *Ibid.*

<sup>62</sup> According to the Labour Committee's Report, the starting point of the new legislation should be that Swedish collective agreements will apply to everyone working in Sweden, including posted workers, in order to ensure that every worker in Sweden is subject to the same conditions (including insurance coverage, considered as part of the protection to be ensured for safety, health and hygiene in the workplace in accordance with Article 3.1, first paragraph e PWD), regardless of origin. Furthermore, on the basis of a motion by the Social Democrats, the inquiry should also investigate the possibilities for modification or removal of the aforementioned "evidence rule"; an employer claiming that the wages and conditions are acceptable and should verify their implementation through an agreement with the trade union. Otherwise, a set of qualitative requirements for the equivalence of the foreign contract should be put in place: however, individual employment agreements or unilateral commitments made by employers will not suffice in determining the equivalence. *Ibid.*

<sup>63</sup> Not ratified by Sweden at the time of its issuing, and object during the 90s of an ILO inquiry.

legislation in the specific branch in which the work is carried out<sup>64</sup>.

While not directly touched by the ECJ's ruling in *Laval*, Denmark's industrial relation context and legal framework in transposing the PWD shared several points in common with the Swedish one<sup>65</sup>; in this case, however, the efforts directed to the protection of the autonomy of the collective bargaining system were shared by the social partners, which found common ground in responding to the challenges posed by the judgments in question to the national industrial relations system<sup>66</sup>.

This has translated in a swift<sup>67</sup> reaching of consensus for the necessary amendments to be implemented into the national legal framework in order to comply with the new case law<sup>68</sup>. The Danish *Lex Laval*, amending the transposition law of

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<sup>64</sup> The ratification of ILC 94, highlighted in several motions from the Social Democrats, Green Party and Left Party, was deemed by the Committee as instrumental in the fight against social combat social dumping (depriving companies that compete on poor employment standards of the benefits deriving from such practices in a public tender setting) and facilitating the maintenance of good wages and working conditions in Sweden. See Labour Committee Report 2010/11:AU10

<sup>65</sup> Sweden and Denmark share a similar model of autonomous collective agreements, entrusting to trade unions, in absence of general applicable collective agreements and of a minimum wage set by law, to uphold a general level on wages and employment conditions and protect the workers from social dumping.

With more specific reference to strike rules, while the right to collective action is protected by the constitution and to its exercised are exclusively entitled the representative organizations, is possible to identify a more active role of the social partners (the *Landsorganisationen* trade union and the employers' association *Dansk Arbejdsgiverforening*) in its regulation and in the definition of the conditions that need to be fulfilled for a conflict to be considered lawful. The most important differences refer to the procedures prior to the initiation of the action (ballot in the executive body of the organization in question, a double issuing of the strike notice and the possibility postponement of the strike to a maximum of two weeks per notice); furthermore, if one of the parties asserts that the conflict is unlawful, the action is not carried out but instead it is customary practice to await the ruling of the Labour Court. More importantly, the Danish legal framework presents a proportionality requirement for the collective action (which must have a "reasonable union aim", meaning that it has to be relevant to the working conditions and that there must be a reasonable relationship between goal and means), and to certain restrictions put on solidarity actions (lawfulness of the main dispute, community of interest between employees in the main and secondary conflicts).

<sup>66</sup> The difference between the Danish and Swedish *Laval* solutions mirrors the level of trust between the social partners in the two countries. In Sweden, there was no joint position adopted or any joint analysis of the judgment conducted by the social partners, while the Danish social partners cooperated in the joint defence of the IR model. See Bruun-Jonsson in Bückner-Warneck 2010, p. 23

<sup>67</sup> The entire process took less than a year, with the setting up of a tripartite commission (the so-called *Laval Commission*) in spring 2008; its findings were fully supported by both the trade unions and employers' organizations, and were not challenged by the Government or Parliament. The first legislative proposal was issued in June 2008, and was later enacted by the Parliament as Law No L 36 of 18 December 2008 on implementing the recommendation of the working group on the consequences of the *Laval* decision and on the extension of the deadline for revision of the Law.

<sup>68</sup> See Malmberg 2010b, p.7

the PWD<sup>69</sup> by the insertion of a single provision, entered into force on the 1st of January 2009.<sup>70</sup>

Collective action against foreign service providers may be undertaken only in relation to pay<sup>71</sup>, and its lawfulness is subject to four main criteria: firstly, there must be correspondence of the wage claims with wages paid for similar works by Danish employers. In second place, pay levels must be regulated only by a collective agreement signed by representative social partners and applied throughout the national territory.

Furthermore, a duty of information to the service provider with reference to the provisions of the collective agreement was included, as well as a requirement for clarity in the provisions of the agreement regulating the wages<sup>72</sup>.

For the case of disagreements arise about the interpretation and application of this article in posting situation,, the Danish Labour Court has jurisdiction to decide on the application of Law to the actual situation, and in particular on the respect of fulfillment of the conditions of Sect. 6a(2).

### 3.1.2 – Germany

In order to properly assess the consequences of the rulings of the Laval quartet and their potential impact in the German framework, two main aspect need to be focused on; in a perspective more closely linked with the ECJ's ruling involving the *Land Niedersachsen*, it is necessary to analyze the legislative modifications in the public procurement laws induced by the ECJ. With more direct reference to the

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<sup>69</sup> Lov om udstationering af lønmodtagere, Law nr. 964 of 2. november 2001 (LUL, Posting of Workers Act).

<sup>70</sup> See Lind 2010, p. 14

<sup>71</sup> “With a view to ensuring for posted workers rates of pay corresponding to those which Danish employers are obliged to pay for the performance of equivalent work”. LUL, §6a(1). However, it has been noted that the concept of minimum rates of pay was interpreted quite extensively by the Danish *Lex Laval*, in accordance with the practice in Denmark.

<sup>72</sup> “It is a condition for initiating the collective action referred to in paragraph 1 that the foreign service provider should previously have been referred to the provisions in the collective agreements between the most representative parties on the labour market in Denmark applying to the whole of the territory of Denmark. These collective agreements shall state, with sufficient clarity, what rates of pay must be used under the collective agreements.” LUL, §6a(2). According to the preparatory documentation, the requirement for referral to existing terms means that, it should be clear which provisions are referred to, which collective agreement is referred to, who the parties to the collective agreement are, and how long the collective agreement in question has been in force. See Lind 2010, p. 15

right to strike, the interactions between key concepts of the German framework on collective action such as proportionality and *ultima ratio*<sup>73</sup> with the indications stemming from the ECJ judicial course.

For what it refers to national legislative modification induced by the ECJ, the German situation appears substantially twofold; on one hand, at Federal level no obligation to pay employees the wages set in collective agreements is provided by the recently amended Act Against Restraints of Competition<sup>74</sup>, in accordance with the provisions deriving from *Rüffert*<sup>75</sup>.

On the other hand, in particular for what it refers to public procurement<sup>76</sup>, several *Länder* have introduced norms attaching to public contracts the condition for tenderers that collectively agreed wage structures should be adhered<sup>77</sup> - which represented the trigger for the ECJ decision - referring to the full pay scale of (non-extended) collective agreements and extending the scope of the social clauses, initially linked only with the construction and public transport sectors, up to the

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<sup>73</sup> See *supra*, par. 1.1.1

<sup>74</sup> *Gesetz gegen Wettbewerbsbeschränkungen* (also Antitrust Act) 703-5 of 27 July 1957, amended by the Law on the Modernization of the Public Procurement Law of 20 April 2009 which, according to its draft document “serves to implement other provisions of the EC procurement directives 2004/17/EC and 2004/18/EC” (as well as lines of the Remedies Directive 2007/66/EC), and had no impact in the situation currently analyzed, since they only codified the previous legal situation.. See *Entwurf eines Gesetz zur Modernisierung des Vergaberechts* of 13 August 2008, (BT-Drs.16/10117), p. 1 and Bückner in Bückner and Warneck 2010, p. 37

<sup>75</sup> Similarly, the legal framework transposing the PWD has also been amended in 2009 independently from the Laval ruling through the *Arbeitnehmer-Entsendegesetz* (AEntG) of 20 April 2009, replacing the previous AEntG of 26 February 1996 (BGBl I, p. 227), setting minimum standards for working conditions (specifically minimum wage, annual leave, H&S and the conditions for the provision) for posted workers, in particular in the construction sector. See Bückner, Hauer and Walter in Bückner and Warneck 2011, p. 55

<sup>76</sup> For which individual *Bundesländer*, according to art. 74.1.1 of the German Constitution has competing legislative competence (*i.e.*, if the Federal Government does not provide a regulation for the matter), and can issue legislation for the case of internal procurement, when the object to be procured are for its own use. the legitimacy of social clauses in public procurement with regards to the fundamental right of freedom of association (Art. 9 §3 GG) and of occupational freedom (Art. 12 §1 GG) was sanctioned by a judgement of the German Constitutional Court of 11 July 2006 (1 BvL 4/00, published 3/11/2006), which derived from a submission of the Antitrust Division of the Federal Court concerning the unconstitutionality of a provision in the Berlin Public Procurement Act. See also Rödl in Vimercati 2009, p. 135-136, Walters in Bückner and Warneck 2010, p. 44

<sup>77</sup> Also defined as *Tariftrueuerklärungen* (pay clauses), collective agreement declarations or, more generally, “social clauses”, such provision represent a “softer generally binding declaration”, and a relevant element of the German legal and industrial relation systems. See Zimmer 2011, p. 225, See Bückner, Hauer and Walters in Bückner and Warneck 2011, p. 74

removal of the limitations referring to the branch of activity<sup>78</sup>.

As a direct consequence of the ECJ ruling in *Rüffert*, in the early 2008 Lower Saxony (the Federal State directly involved in the case) removed the obligation for tenderers to commit to the remuneration specified by local collective agreements that have not been declared generally applicable, and all the *Länder* whose public procurement acts contained identical or similarly worded obligations to comply with collective agreements suspended the application of their social clauses, either by completely removing them<sup>79</sup>, or by rendering its application voluntary rather than mandatory<sup>80</sup>; at the same time several Regional Governments gradually started a revision process with a view of amending their public procurement legal frameworks<sup>81</sup> in order to still limit unfair competition.

It should be noted that the ECJ declared the constitutive collective agreement declaration<sup>82</sup> of the Lower Saxony Public Procurement Act incompatible with the PWD and the freedom to provide services; social clauses requiring compliance with pay rates should therefore considered to be allowed if linked to a public declaration of general application to all employees as a minimum wage<sup>83</sup>.

The application of the ECJ jurisprudence by various German Courts and public procurement bodies has also produced varying effects: on one hand, *Rüffert*

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<sup>78</sup> At the time of *Rüffert* *Bundesländer* presenting “social clauses” in their procurement legislation were Bavaria, Berlin (the first *Länder* to introduce it in 1999), Bremen, Hamburg, Hessen, Niedersachsen (the cited Lower Saxony), the Saarland and Schleswig-Holstein. Saxony-Anhalt and NRW, which had introduced pay clauses, abolished them respectively in 2002 and 2006 (the latter in particular was evaluated after a Government change and found as not reaching its objective)

<sup>79</sup> As for the case of Berlin, the Saar, which also gave the opportunity to undertaking participating in the awarding of public contracts to submit a modified bid taking the changed circumstances into account.

<sup>80</sup> As for the cases of Bremen and Hamburg

<sup>81</sup> With reference to the Federal States having no social clauses at the time of *Rüffert*, it must be noted that the recent draft legislation on the matter of Thuringia (of 21.09.2010) and Mecklenburg-West-Pomerania (of 02.03.2011) ultimately incorporated the main amendments (see *infra*) occurred in the other *Länder* frameworks.

<sup>82</sup> *Konstitutiven Tariftreueerklärung*, imposing also on tenderers which were not parties in collective bargaining procedures the payment to its workers and by its subcontractors of wages deriving from collective agreements (in particular could not be considered universally applicable since of sole regional relevance, and covering only contracts in the public sector). See *supra* par 2.2.3

<sup>83</sup> *Deklaratorischen Tariftreueerklärung* (declaratory pay clause), in which the already existing obligation deriving from the normative effect of the collective agreement is flanked by contract and public procurement law sanctions, such as penalties and barring orders for the non-compliant employer.



was “naturally applied”<sup>84</sup> and social clauses in public contracts were struck down as being in conflict with EU legislation<sup>85</sup>.

In other cases, the validity of the obligation concerning collective agreements declarations was linked to the internal relevance of the procurement situation; according to a decision by the Bavarian Constitutional Court, in fact, the regional public procurement law, while similar to the Lower Saxony one, was not to be considered unlawful<sup>86</sup>, but “merely” that it would be inapplicable in those situations in which the relevant EU law can claim primacy<sup>87</sup>, the contrast not invalidating the standards set by the public procurement law, and therefore not requiring the removal of the normative item in question.

Furthermore, in the proceedings before the OLG Celle regarding the tendering of S-Bahn services, the Court indicated that it would overturn the ruling by VK Lüneberg<sup>88</sup> on the basis of the special regime determined by EU for the transports, which explicitly excludes urban, suburban and regional transport from the scope of the PWD<sup>89</sup>, consequently preventing the application of the *Rüffert* jurisprudence to the transport sector.

Notwithstanding the relevance of its first impact with the regional legislation and the jurisprudence, *Rüffert* has not led to a complete abolishment of social

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<sup>84</sup> Bücken in Bücken and Waneck 2010, p. 37

<sup>85</sup> In particular, the decision taken on 8 December 2008 (VII-Verg 55/08) the Procurement Division of the Düsseldorf Higher Regional Court made direct reference to the constitutionality of pay clauses but also the implication deriving from *Rüffert* that compliance may be required only for universally applicable collective agreement (par. 35), and by the Arnsberg District Court (VK 16/08) stating that companies not bound by collective agreement may forced apply certain wages in tender procedures (on penalty of exclusion from the tender) only by law.

<sup>86</sup> On the contrary, the social clause was in accordance with the Bavarian Constitution, in particular since economic and social policy measures need to counteract a threat to the public interest such as the one deriving from competition on wage levels.

<sup>87</sup> See *Bayerischer Verfassungsgerichtshof*, Vf. 14-VII-00 (decision of 20 June 2008), par. V.3.b

<sup>88</sup> VgK-12/2008, in which the Court, referring to *Rüffert*, had rescinded the award decision noting that the need for a collective agreement declaration by the subcontractors violated Art. 49. See Denzin, Siderer and v. Bechtolsheim 2008, p. 34, and Bücken in Bücken and Warneck 2010, p.38

<sup>89</sup> See also recital 8 of Reg. 12/98, stating that “Whereas the provisions of 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 [...] apply in cases where, for the provision of special regular services, carriers, post workers, who have an employment relationship with those carriers, from the Member State where they ordinarily work”.

clauses throughout Germany<sup>90</sup>; instead, similarly to what has happened in the Nordic system concerning *Laval*, many of the collective agreement declaration frameworks involved by the ruling have been carefully changed and adapted to the ECJ jurisprudence, in order to defend at least partially the original idea underlying the provision of social clauses while avoiding the risk of further private litigation and possible infringement actions by the Commission.

The political responses and legal solutions to *Rüffert* present a high degree of variance, which can be explained, on one hand, on the basis of the ideological features of the governing parties in the various *Länder* concerned<sup>91</sup>, and on the other of the different use of the regional regulatory autonomy in determining the new legislative framework; currently three main types of pay clauses can be identified in the German context<sup>92</sup>.

Firstly, recently amended public procurement legal frameworks provide for pay clauses making to reference to generally binding collective agreements or collectively agreed minimum wages which are extended on the basis of the German Posted Workers Act<sup>93</sup>, as for the case of Lower Saxony<sup>94</sup> and Hamburg<sup>95</sup>, Saarland and Rhineland-Palatinate.

In other cases, such as the new Berlin public procurement law adopted in

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<sup>90</sup> It should be noted that Bremen has in fact proceeded to the abolition of its social clauses in 2009, and that Schleswig-Holstein has amended its public procurement law in 2008 (which should have been in force since 2003 to 2010), removing the obligation for collective agreement declaration for contractors and subcontractors; furthermore, in May 2009 a recommendation was issued, stating that written commitments were only to be demanded with respect to collective agreements declared universally applicable, and that this applied beyond the construction sector to the public rail transport and waste collection sectors.

<sup>91</sup> In particular, while through the instrument of social clauses it had been possible to consolidate political majorities with regards the protection of wage and social standard for workers, for *Länder* governed by centre-right coalitions (CDU/CSU, FDP) the ECJ judgment largely represented an occasion to abolish or disapply the contested provisions, while the picture becomes diverse for the case of governing coalitions which cannot be clearly classified as centre-right or centre-left. On the other hand, all governments led by the social-democrats (SPD) reformed or are still reforming their public procurement legislation so as to include social criteria in public tenders, comprising the requirement of collective agreement declarations. See Rödl in Vimercati 2009, p. 141, Blauberger 2011, p. 18

<sup>92</sup> Schulten, WSI Report of October 2011

<sup>93</sup> *i.e.*, declaratory pay clauses, therefore in line with art. 3.1 PWD. From the extension of the Posted Workers Act derives a wage floor for public procurement contracts with EU-dimension for the 10 branches of activity provided.

<sup>94</sup> NdsGVBl. of 22. December 2008, 411, which refers to generally binding collective agreements of the construction sector. However, collective agreements still have to be complied with for contracts worth 30.000 € or more.

<sup>95</sup> HbgGVBl. of 23. December 2008, 436.

June 2010<sup>96</sup>, a requirement of the application of a minimum hourly wage is present, which also apply to subcontractors.

Furthermore, constitutive pay clauses with reference to collective agreements in public transport on road or rail have been introduced<sup>97</sup> on the basis of the special regime for the transport sector defined by the EU legal framework, in particular art. 51 limiting the freedom of services with regards to transport<sup>98</sup> and the Regulation on Public Transport No. 1370/2007<sup>99</sup>, that render the *Rüffert* jurisprudence not applicable to the transport sector<sup>100</sup>; in these cases pay clauses make reference to the full pay scale of (non extended) collective agreements<sup>101</sup>.

It should be noted that further social clauses not regarding pay have also been included in the revised procurement legislation: social and ecological criteria, such as the promotion of women employment and gender equality, the hiring of disabled employees or the provision of vocational training may therefore translate in preferential placing for companies participating in public tenders.

Therefore, while the “*Rüffert-shock*” of 2008 did not apparently leave any space for the survival of social clauses in the German legal context, the issue of social clauses is not disappeared from the German political arena, and as an intermediate result of the aforementioned revision and amendment process, nine Federal States currently present *Tariftreueerklärungen* in their regional public

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<sup>96</sup> Along with Bremen, Brandenburg and Rhineland-Palatinate laws, revised or introduced between 2009 and 2011. Minimum wage clauses have also been planned by further two Federal States: Baden-Wuerttemberg and North Rhine-Westphalia. It should be also noted that the Berlin *Länd* had already extended the applicability of the Procurement Act to all sectors (beyond the public one) and introduced a minimum wage for workers employed in public contracts (in the amount of 7.50 €) in March 2008, but at the end of April the clause was rescinded. (VBl. Bln of 29 March 2008, 80; Berichtigung in GVBl. Bln of 15. May 2008, 112)

<sup>97</sup> In Rhineland-Palatinate, Saarland, Berlin and Bremen *Länder*.

<sup>98</sup> As well as art. 70-80 of the EU Treaty, defining the separate title for “Transport”, to which art. 51 explicitly refers.

<sup>99</sup> And specifically its recital 17 stating that “competent authorities are free to establish social and qualitative criteria in order to maintain and raise quality standards for public service obligations, for instance with regard to minimal working conditions, [...] collective agreement obligations and other rules and agreements concerning workplaces and social protection at the place where the service is provided. In order to ensure transparent and comparable terms of competition between operators and to avert the risk of social dumping, competent authorities should be free to impose specific social and service quality standards”

<sup>100</sup> In a way similar to the solution proposed by the OLG Celle, see *supra*

<sup>101</sup> See also Bücken in Bücken and Warneck 2010 p. 38 and the Schulten WSI Report

procurement legislation, and three more have announced the introduction of such clauses.

However, while these developments highlight a general tension towards the protection of the main features of the national systems of labour relations and wage setting through collective agreements, several differences remain both in the regulatory detail of the regional public procurements acts<sup>102</sup> and in the various solutions elaborated by the jurisprudence, in particular by the Regional Constitutional Courts<sup>103</sup>.

Although at the present moment such differences do not appear to particularly reflect on wage levels<sup>104</sup>, some aspects still need to be considered; firstly, it is without doubt that *Rüffert* has increased of the possibilities for competition based on wage levels in Germany, with the consequent risk of social dumping at trans-national level, and potential negative consequences for the market presence of German companies because of the pressure by foreign bidders. In this sense the strategy to establish a minimum wage in the procurement acts of the states is only the second best solution because, while public procurement norms provide the possibility for further measures with particular reference to monitoring and sanctions, the confirmation of the already prescribed minimum wage lacks the binding force of the entire pay scale<sup>105</sup>.

Furthermore, while regional solutions appear to be based on the same aim of implementing social clauses which are compatible with the EU law, the effective compatibility of provision introducing social criteria into public procurement legislation (in particular for the case of going beyond minimum wages) with the frameworks on the posting of workers and the provision of services is still to be

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<sup>102</sup> Ranging from frameworks which have determined the abolition or non-application of social clauses (the mentioned Bavaria and Schleswing-Holstein), to the extremely progressive Länd Berlin procurement law, which provides for the setting of a minimum wage, the separated discipline for the transport sector, and the further social criteria in public tenders.

<sup>103</sup> See also Bücken, Hauer and Walters in Bücken and Warneck 2011, pp.85-86

<sup>104</sup> Specifically, the minimum wages range from 7,50 and 8,62 € p/hour with reference to regional minimum wage clauses and from 6.75/7.80 to of 9.75/13,00 € p/hour (depending on the sector of the employment in one of the nine sectors of activity and its geographical setting) for what it refers to the extension of collectively agreed minimum wages which are extended on the basis of the German Posted Workers Act.

<sup>105</sup> Like the one deriving from a collective agreement declaration. See Zimmer 2011, p. 227

considered uncertain, in particular with reference to its stability in the light of future scrutiny by the ECJ<sup>106</sup>.

The proportionality and *ultima ratio* principles elaborated and applied by the ECJ in *Viking* and *Laval* are concepts at first glance very much compatible with the German framework on collective action, in which they have been present for a relatively long period of time and appear strictly connected in determining the lawfulness of a collective action<sup>107</sup>.

As noted, the German legislature has not implemented a legal framework that ensures the respect of meaning and purpose of interrelated rights and freedom with reference to collective action<sup>108</sup>; the Courts therefore have gradually derived the substantive regulatory framework for industrial disputes from the general principles governing the legal relationship in question<sup>109</sup>.

In the design of industrial action law, the courts have had above to ensure that an existing balance of power between the parties to collective bargaining is not disturbed or imbalance is amplified, and central standard of review is the principle of proportionality<sup>110</sup>; according to the judicial elaboration carried out in particular by the Federal Labour Court (BAG)<sup>111</sup>, a collective action should be initiated only in order to achieve legitimate objectives and is legitimate insofar the measures undertaken are appropriate and necessary to the achievement of the particular aim pursued. In addition to the respect of this general principle, the industrial action must not be disproportionate in a narrow sense, that is it must not interfere excessively with the

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<sup>106</sup> With the possible exception, for the mentioned reasons, of the frameworks elaborated for the transport sector.

<sup>107</sup> Along with the capability of representing collective interest of the involved parties, the aims which need to be achievable through collective bargaining, and the respect of the peace obligations and duties.

<sup>108</sup> In particular art. 9 §3 GG protecting the freedom of association and Art. 12 § 1 GG defining the professional freedom (for workers and employers). It should be noted that also intervention and interference by State regulation can be considered as allowed only insofar it sets a level playing field necessary for the parties to bargain on an equal footing. See Schlachter in Blanplain and Światkowski 2009, p. 69

<sup>109</sup> BAG 19 June 2007 - 1 AZR 396/06, par. 16

<sup>110</sup> *Grundsatz der Verhältnismäßigkeit*. See BAG GS, 21/4/1971 (Fn. 33) Teil III A 1 and also BAG 19 June 2007 - 1 AZR 396/06, par. 17

<sup>111</sup> And in particular the groundbreaking ruling of the 21 April 1971, BAG Grand Senate, 21/4/1971 (par. 33), confirmed by the Federal Constitutional Court (1BvR BVerfGE 418/71) on 19 February 1975.

rights of others and do not go beyond what is absolutely necessary to achieve the purpose<sup>112</sup>.

The principle of proportionality was initially designed as an external limit to the recourse to collective action industrial disputes; while industrial action must indeed be deemed as feasible option in the German system of collective bargaining, it has also to be kept into consideration that the consequences of industrial actions such as strikes and lock-outs can possibly involve non-striking workers and other third parties as well as the common good, especially for the case of long-lasting disputes<sup>113</sup>.

The application of the principle in question in case-law tends to prevent the abuse of collective action, and is particularly referred to the reciprocal interference between fundamental rights and freedoms, enjoyed by both sides of the labour market, and deriving from their exercise<sup>114</sup>; collective action, therefore, is seen as the exercise of the fundamental right to organize and as an interference with the freedom of exercising a profession of the single employer or with the corresponding right to organize of another party.

In the balancing of the rights of both parties, it has emerged that violations of the social partners' right are, from a theoretical point of view, inconceivable, while

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<sup>112</sup> *Proportionalität*, BAG Decision of 10 June 1980 (1 AZR 822/79)

<sup>113</sup> As noted, one of the major implications deriving from such reasoning (given in particular the fact that the self-assessment by the union of the necessity of particular measures in case of industrial conflict was bound to overcome the efficacy of proportionality as a guidance and control rule for collective action) is the requirement of "fairness" of the strike, which cannot be directed towards the destruction of the undertaking involved, but must pursue the aim of the establishment of a negotiated equilibrium in collective bargaining. While the BAG has indicated that requirements of a fair strike may also be infringed if the strike reaches a certain level of intensity, the strike patterns carried out in Germany generally seem to meet the requirement of a fair strike, and the Federal Labour Court therefore has never determined for a strike to be disproportionate on this basis. See Weiss and Schmidt 2008

<sup>114</sup> In the recently issued "Flash-Mob" Decision (BAG 22/09/2009 - 1 AZR 972/08), the Labour Court had to rule on a trade union action which called participants to purchase low value goods or proceed to filling and then abandoning shopping trolleys in a retail store in order to disrupt business processes in order to enforce collective bargaining goals. The BAG re-stated that the choice of "industrial weaponry" (not limited therefore to the coordinated work stoppage) is inherent in the freedom of association protected by art. 9 §3 GG, but that the admissibility of an industrial action depends not only by the intended achievement of a collective bargaining goal (See par. 10 and 38, which also make reference to the "ongoing labour struggle" and the "failure of conciliation processes", therefore implying the respect of the *ultima ratio* principle), but also by its appropriateness, which must be defined through the principle of proportionality (See par. 10), and in particular with reference to means of defense available to the employer. For the case at hand the "flash mob" actions of the type described were considered not generally inappropriate, since the employer could have enforced its authority or responded through a temporary shutdown (See par. 33)

the exercise of the fundamental right to organize legally justifies interferences with the others' freedom to exercise a profession<sup>115</sup>. This does not appear to be the case for the ECJ jurisprudence, which did not recognize that as the right to collective action obviously restricts the exercise of economic freedoms, the exercise by the employer of its economic prerogatives infringes the right of individual workers and their union to bargain for the protection or improvement of working conditions; as noted, the Luxembourg Court did not grant equal footing to the right to collective action and to the fundamental economic freedoms, and ultimately gave precedence to the fundamental economic freedoms determining the compatibility of the collective action with the EU framework.

When considering furthermore the permissible aims for the collective action, the ECJ, on the other hands, limits the goals to be pursued to the protection of individual workers' employment security and working conditions. According to the German domestic perspective, all the relevant interests of the parties should be taken into account<sup>116</sup>; furthermore, the objective of the collective action remains in principle an autonomous decision of labour market parties, and neither the specific type of terms and conditions of employment nor the level of employment bargained for can be curbed by a court as inappropriate.

Furthermore, with regards to the means by which collective action is carried out, another striking discrepancy can be highlighted between the supervision by the ECJ on collective action on the basis of the test of adequacy and necessity and the recently reasserted general principle of freedom of choice of instruments of collective action<sup>117</sup>.

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<sup>115</sup> Although infringement of other rights (such as the one to property, violated in the case of plant occupation, see BAG, Decision of 14 December 1978) cannot be justified. See Deinert in Ales and Novitz 2010, pp. 72-73

<sup>116</sup> For instance, collective interests of workers and unions' procedural rights which are not considered lawful aims by the ECJ in *Viking* (par. 81). See Schlachter in Blanplain and Światkowski 2009, p. 69

<sup>117</sup> In particular, it should be noted that the duration of a strike cannot be used in determining its unlawfulness (BAG, Decision of 26 October 1971 - 1 AZR 113/68). See also *supra* with reference to the "Flash Mob" decision, and Deinert in Ales and Novitz 2010, p. 74.

Similar considerations can be drawn with reference to the principle of *ultima ratio*<sup>118</sup> which represented, until recently, one of the most important limitations to the right to collective action in the German framework.

Collective action is to be considered the last possible means of achieving the goals pursued, and can only come into question when the alternative means<sup>119</sup> have been exhausted or have been refused by the other side<sup>120</sup>: more importantly, a party would be in violation of such principle if it would refuse any negotiation and immediately resort to collective action.

The principle of *ultima ratio*, however, has been the object of a progressive erosion in German case-law, in particular in relation to the legitimacy of “warning strikes”: in 1976 the BAG admitted such instrument<sup>121</sup>, having recognized their often positive effect on the reaching of a quicker compromise between the parties. It further specified that this mild pressure on the employer might be exerted before means of negotiation are exhausted; the *ultima ratio* principle was therefore to be applied only to strike of long or indefinite duration<sup>122</sup>.

Subsequently the BAG, while determining that both “normal” and “warning” strikes fall under this principle, significantly lowered the conditions to be fulfilled in order to meet the requirements of *ultima ratio*<sup>123</sup>; a formal declaration of failure of negotiations cannot be considered anymore as a prerequisite for the initiation of an industrial action, which by itself reflects the fact that the party concerned has considered the possibilities of reaching an agreement without making recourse to such means of pressure to be exhausted<sup>124</sup>. More in general, according to the Federal Labour Court, it is possible to identify a “uniform point” as from which a

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<sup>118</sup> *Ultima-ratio Prinzip*, originally derived from the “Social adequacy” doctrine. See BAG GS, Decision of 28 January 1955, I, 289

<sup>119</sup> Including mediation procedures provided by statute or collective agreement. See BAG GS, Decision of 21 April 1971 - GS 1/68

<sup>120</sup> See Kraus 2011.

<sup>121</sup> Previously considered unlawful, because spontaneously called by the workers (and only afterwards backed by the unions), therefore violating the need for a ballot, and because they did not constitute a means of last resort, being called during collective bargaining procedures (although for periods of time not exceeding three hours).

<sup>122</sup> See BAG, Decision of 17 December 1976 – 1 AZR 605/75

<sup>123</sup> See BAG, Decision of 21 June 1988 – 1 AZR 651/86

<sup>124</sup> Therefore, it is up to the trade union to declare that negotiations have failed whenever it seems that further negotiations would be useless and that the seriousness and execution of negotiations are not subject to judicial control. See Weiss and Schmidt 2008 p. 162



warning strike, like any other form of industrial action, is not excluded, “even though collective bargaining continues”, therefore explicitly admitting the recourse to collective action during the course of ongoing negotiations.

Therefore, while the principle of last resort is still formally present in the German legal framework, the strict judicial control on the existence and exhaustion of less restrictive means to conclude the negotiations indicated by the ECJ as necessary in order to ascertain the suitability and necessity of the collective action<sup>125</sup> significantly diverges from the free and non-verifiable decision of the collective party in the introduction of collective action in the industrial disputes.

### 3.1.3 – Italy

The Italian framework on the right to strike was not directly involved by the ECJ jurisprudence in the matter; however, it is not possible to *a priori* exclude a certain degree of influence for this and the other Member States which find themselves in a similar situation; it is necessary therefore, to address the possible interferences of the principles inferred in particular by *Viking* and *Laval* with several elements both referring to the detailed regulatory framework, developed in particular by the courts, and to the Constitutional basis for the collective action<sup>126</sup>; a system such as the Italian one may very well be affected by the consequences of the *Viking-Laval* judicial course, in particular when is considered that the lawfulness of the action according to national legislation does not guarantee compatibility with EU law *per se*.

The first element to be considered in this context is the relevance granted by the ECJ to the economic freedom; *in primis*, it came to represent a right that can be

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<sup>125</sup> C-438/05 *Viking Line Abp*, Par. 87

<sup>126</sup> See *supra* par. 1.1.1

enforced in private disputes<sup>127</sup>, unlike in particular those listed in the Charter of Nice<sup>128</sup>.

Secondly, its content, which is to be balanced against the right to collective action, refers to the protection of the company's business and its freedom to operate and move on the market<sup>129</sup>; this implies that even the normal activity of the undertaking would be protected from the exercise of the collective action, while currently in the Italian framework, a disruption of the economic activity which can justify the liability of strikers in the case of a legal collective action is only one posing unjustified obstacles to the "fundamental economic freedom" of the employer<sup>130</sup>.

With regards to the permissible aims of the collective action, it should be noted that the ECJ, in particular in *Viking*<sup>131</sup>, refers to very specific kind of strike action that can be undertaken when internal market issues are concerned; trade union, in fact, can only rely on the objective of the "protection of workers"<sup>132</sup>, and in particular when "jobs or conditions of employment at issue" are "jeopardised or under serious threat"<sup>133</sup>; such a reconstruction may reflect in the Italian context from a double point of view.

According to the ECJ, in fact, any action not aimed towards the objective of

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<sup>127</sup> It should be noted that the Italian constitutional order recognizes the right to "private economic enterprise" (art. 41) through a relatively wide formulation which at the same time imposes the limits of common good and safety, and in particular liberty and human dignity, and the possibility for the law for the orientation of economic activity towards social purposes. The horizontal direct effect of EU legislation granting economic freedoms, however, greatly reinforces the contraposition between the predominance social interests - and in particular labour rights - as fundamental principles in the Italian Constitution versus the prevalence of economic freedoms in the EU framework as crucial elements for the realization of the internal market. See also Orlandini in Ales and Novitz 2010, p. 99

<sup>128</sup> See *supra* par. 1.2.3 and also Serrano in Vimercati 2009, pp. 173-175. See *infra* parr. 3.3.2 and 4.1.2 for the possible implications on the matter deriving from the adoption of the Lisbon Treaty

<sup>129</sup> Ales and Orlandini in Bucker and Warneck 2010.

<sup>130</sup> The constraints to the right of strike present in the Italian framework with reference to the freedom of undertaking derive from the principle that the exercise of the right to strike must not infringe other constitutionally protected rights, and is therefore aimed at protecting the very survival of the company and its ability to remain on the market once an industrial dispute is over (so called *business productivity*). See also *supra*, par. 1.1.1

<sup>131</sup> Often seen as "less restrictive" in respect to *Laval*, but in fact setting up a framework of principles which, notwithstanding their uncertainty, may translate into severe constraints on the right to take industrial action. See Pallini 2008, pp. 2, Orlandini in Blanplain and Światkowski 2009, p. 105 and also *infra* parr. 3.2.1-3.2.1 with reference to the British experience.

<sup>132</sup> *Viking*, par. 77

<sup>133</sup> *Viking*, Par. 81. See also *supra* par. 2.3.1

the protection of workers is to be considered incompatible with the EU framework, or at least questionable by the other party; the theoretical application of such a principle in the Italian system would therefore constitute a complete overturn of the current discipline, in which no limitations can be set to the aims of the collective action<sup>134</sup>; reasons outside the framework of collective bargaining<sup>135</sup> represent legitimate expressions of industrial dispute from a civil and criminal point of view, and its participant continue to be protected by the provisions of the Workers' Statute from disciplinary actions dismissal by the Workers' Statute.

The *Viking-Laval* doctrine also casts serious doubts on the lawfulness of any collective action whose aim is to prevent the exercise of market freedoms of national operators, as for the case of delocalization, outsourcing and off-shoring, on the basis of the "indirect" negative consequences of such operations, or to impose on foreign undertaking the signature of the collective agreements or the respect of social clauses provided by the latter<sup>136</sup>.

A further element in need of analysis is represented by the reconstruction of the right to collective action as *ultima ratio* in the event of industrial dispute, whose exercise, as noted before, may only be justified when the other means and options provided to the parties in order to settle the dispute have been exhausted<sup>137</sup>; it is to be underlined that in the Italian legal framework presents no obligation determining the recourse to collective action as an instrument of last resort in the private sector, nor it provides for mandatory procedural restrictions on collective action.

Such restrictions, generally not in line with the Italian experience, are set by law for the "essential public services"; while the kind of balance sought by the Italian regulation is aimed at making possible the exercise to the right of strike and the

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<sup>134</sup> In particular see Court of Cassation decision no. 5053/1979, which dismissed the possibility of judicial control in assessing whether the reasons at the basis of the protest were well grounded.

<sup>135</sup> e.g., the political strike, which has been the object of several pronouncements by lower courts but also by the Constitutional Court (no. 290/1974) and by the Court of Cassation (nr. 5053/1979, 16515/2004) or a sympathy action.

<sup>136</sup> With particular reference to the interaction between tendering procedures, collective action and employer's liability, see Cass. 10139/2006

<sup>137</sup> *Viking*, Par. 87

enjoyment of other personal rights of Constitutional value<sup>138</sup>, the application of the ECJ doctrine to the sector would mean that workers involved in collective action undertaken without the respect of the conciliation procedures would face the imposition of the sanctions provided by law, but also a possible tortious liability for damages<sup>139</sup> suffered by the undertaking.

Similar conclusions must be drawn for the case of the voluntary provision of conciliatory procedures in collective agreements for the private sector; the workers belonging to the trade unions which have signed agreements containing such clauses are to be considered bound to their respect, and their infringement would render a collective action unlawful from a Community law perspective.

However, the contractual source in question cannot be seen as extending its binding force to the organisations which have not signed an agreement, to their members, or to non-unionized workers, notwithstanding the fact that its partial coverage may affect the very function of such clauses in reducing and proceduralising the recourse to collective action<sup>140</sup>, nor it can be taken into account the fact that conciliatory instrument are theoretically available within the undertaking.

It should be lastly noted that the Italian transposition of the PWD provides<sup>141</sup> the extension to posted workers of the collective agreements signed by the most representative employers' and labour organizations<sup>142</sup>, therefore imposing by law duties on foreign service providers in order to prevent social dumping; the Italian frameworks, however, makes reference to "the same working conditions" deriving from law and from collective agreements, which are applied to workers performing a comparable work in the area of posting.<sup>143</sup>

Therefore, in accordance to the *Laval* and *Rüffert* jurisprudence, such norms should be interpreted as imposing on foreign service providers the respect of the

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<sup>138</sup> The Law 146/90 provides indications on the "quantity" of services to be supplied to the public, a ten day's notice, and a series of procedures in need of compliance before the beginning of the strike action.

<sup>139</sup> See also *infra* par. 3.2.4 with reference to workers and trade union liability, remedies and sanctions.

<sup>140</sup> See also, with reference to the contractual peace obligations, Pallini in Sacchi 2011, p. 6

<sup>141</sup> Art. 3, c. 1, D.lgs. 72/2000

<sup>142</sup> In accordance with art. 3.8 PWD

<sup>143</sup> It should be further considered that social clauses in tender procedures referring to the respect of collective agreements are present Italian experience. See in particular D.lgs. 163/2006, art. 96

minimum standards set by law for the matters listed in art. 3.1 PWD and, with reference to wage levels, with the minimum rates of pay deriving from the partial extension of the enforceability of the collective agreements<sup>144</sup>; only in this case an industrial action against a foreign service providers and in defence of posted workers should be considered compatible with the EU-framework.

Furthermore, the recent decentralization of the bargaining system, allowing plant-level agreements to derogate from the result of national-level bargaining processes accentuates the risks of social dumping, in particular because it prevents a clear identification of minimum standards “applied throughout national territory”<sup>145</sup>, and further reduces the space for collective action, which could not force the foreign employer to enter in case-by-case negotiations on the place of work, in a context characterised by lack of transparency and predictability with regards to the conditions to be applied<sup>146</sup>.

## **3.2 - Reflections on national disputes and rulings**

### *3.2.1 - The Swedish Labour Court judgment in Laval: claim for damages and trade union liability*

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<sup>144</sup> According to consistent Italian case-law (dating back to the '50s), art. 36 of the Constitution (“workers have the right to a remuneration commensurate to the quantity and quality of their work and in any case such as to ensure them and their families a free and dignified existence”) has mandatory nature. The constitutional norm has to be applied by the courts in conjunction with the provision of the civil code referring to remuneration in work contracts (art. 2099.2 civil code), which in turn implies that the judges have to define the “sufficient” wage level by specifically referring to the minimum pay provided for in industry-wide collective agreements (collective agreements therefore work as “interposed parameter” in the determination of the wage level to be applied). It should be noted, however, that the jurisprudence on the matter has identified different clauses to determine the minimum wage, and for what specifically refers to foreign workers, have taken into account the differences in the cost of living in the country of origin (Cass. 26.11.2004 n. 22332, MGL, 2005, 457). See Orlandini 2011, pp. 409-410

<sup>145</sup> For instance with reference to the working time (D.lgs. 66/2003)

<sup>146</sup> See *Laval*, parr. 71 and 110

In one of the two “flag-cases” for the judicial course in object, *Laval*, the ECJ left no “margin of appreciation” to the national courts with regards as to the compatibility of the industrial action carried out by the Swedish trade union with art. 49 EC and the PWD; however, since the issue had not been referred to it, did not provide directly an answer to the consequent question on whether the renewed context regulating the collective action allowed for claims for damages by employers against trade unions<sup>147</sup>.

In December 2009 the the Swedish Labour Court<sup>148</sup> issued its judgment on the *Laval* case, following the preliminary ruling by the ECJ; a split decision<sup>149</sup> determined the Swedish Building Workers’ Union and the Swedish Electricians’ Union could be made responsible for the violations of EU law as a result of the industrial action carried out at the Vaxholm site, and therefore liable to *Laval* for damages: the Labour Court, in consequence, awarded the company compensation for three trade unions’ breach of EU law and sentenced the union to pay 55.000 € in damages, as well as the majority of the litigation costs<sup>150</sup>.

The case is particularly interesting since the Labour Court as late as in December 2004 – when deciding on the *interim* injunction<sup>151</sup> – found that the collective actions were lawful; it should also be considered the fact that the Swedish trade unions had relied on the unequivocal right to collective action according to the

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<sup>147</sup> This question has easily revealed its fundamental importance; as noted, at the core of the outcome of the BALPA litigation (see *supra*) was the argument made by British Airways that the cap for damages usually applied to trade union liability could not find application in the case of industrial action breaching EU law, on the basis in particular of the consideration that a cap on damages was incompatible with the principle of effective remedies under EU law. In this sense the ruling by the Labour Court of Stockholm, which recognized the absence of national provisions on the matter and derived it solely from EC law, represent a decisive innovation both in the Swedish national setting and at EU-level.

<sup>148</sup> *Arbetsdomstolen* (Labour Court) judgment AD 2009:89. The text utilized is an unofficial translation by Jur. Dr Laura Carlson

<sup>149</sup> Three of the seven judges had a dissenting opinion and two of them (in particular the vice-president - one of the professional judges - and one of the members representing the labour side) wanted to reject *Laval*’s claims altogether.

<sup>150</sup> Amounting to roughly 200.000 €.

<sup>151</sup> Labour Court decision AD 2004:11, see also *supra* par. 2.2.2

Swedish Constitution and legal framework<sup>152</sup> as well as on consolidated praxes in conducting the dispute, and that ECJ had never ruled on such a matter at the time of the dispute<sup>153</sup>. On the other hand, *Laval* had made claims both for financial damages and punitive damages<sup>154</sup> for the breach of EU law<sup>155</sup>.

Firstly, it should be underlined that the Court<sup>156</sup>, while admitting that it had not included questions on liability for damages in its 2005<sup>157</sup> reference, stated that the preliminary ruling in *Laval*, together with the principle of effective enforcement of EU law developed in ECJ case law, provided sufficient guidance for deciding the issues of liability for damages in the case at hand<sup>158</sup>.

Therefore, in order to determine the legal basis for damage liability for violations of EU law, the Labour Court copiously referred to the the fundamental principles of loyalty and solidarity<sup>159</sup>, as well as considering the criteria for Member State liability established, among others, in *Francovich*<sup>160</sup>; it further determined that,

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<sup>152</sup> While agreeing that the labour dispute should be considered unlawful, trade unions had denied any liability, arguing that they had applied explicit Swedish law on the matter. It has been noted that the fact that the Swedish trade union acted in full compliance with national law should exclude its liability, which should be imposed on the Member State. See Zahn and DeWitte 2011, p. 440

<sup>153</sup> See Kruse 2009

<sup>154</sup> Around 140,000 and 135,000 € plus interest; in Sweden, punitive damages are generally paid for breaches of labour law legislation and collective agreements. See Rönmar 2010, p. 281

<sup>155</sup> It should be also noted that both parties requested that, if the Labour Court did not approve their claims, the case should be referred to the ECJ for another preliminary ruling on the question of liability for the breach of EU law. *Ibid.*

<sup>156</sup> Which can be considered a court of last resort, see *infra*

<sup>157</sup> AD 2009:89, p. 18. see also *supra* in this paragraph and also par 2.2.2

<sup>158</sup> “There was therefore no need to refer the case for yet another preliminary ruling by the ECJ”. AD 2009:89, p. 40. It should be noted, however, that the decision of the Labour Court not to submit the case to the ECJ for a preliminary ruling on the issue of trade union liability and damages does not seem appropriate. The Labour Court of Stockholm, is a court of last resort in labour law disputes under the meaning of Article 234 EC (now Article 267 TFEU) and relevant ECJ case-law, and matter of individual rights to damages for breach of EC law had, in fact, never been reviewed before the ECJ. When the *acte clair* doctrine and *CILFIT* (Case C-283/81) criteria are taken into account, it does not seem the case that the correct application of EU law was “so obvious as to leave no scope for any reasonable doubt as to the manner in which the question [...] is to be resolved” (*CILFIT*, par. 16), given in particular the content of the dissenting opinions expressed by three of the members of the judging panel in the “clearly not unanimous” decision. While its unwillingness to submit once more the case to ECJ is “understandable” (in particular because of the length of such procedure), it is to be considered that the Court had failed in including questions about the compensation for damages in its first reference. The *Arbetsdomstolen*, therefore, had the duty rather than the option to submit the case to the ECJ in order to clarify the matter and receive the necessary guidance. See Kruse 2009, Rönmar 2010, p. 284.

<sup>159</sup> AD 2009:89, p. 13

<sup>160</sup> Joined Cases C-6/90 and C-9/90

since no applicable regulation on the matter could be derived from the Treaty, national measures were to be applied in the case.

It then proceeded to consider that in order for the general legal principle of EU law<sup>161</sup> of liability between private parties for damages deriving from violation of Treaty provisions to be applied, the specific EU rule that has been violated must have horizontal direct effect<sup>162</sup>; the Court determined that the application of this principle to violations against other Treaty provisions beyond the area of competition law<sup>163</sup> could be derived in particular from the ECJ case-law in *Raccanelli*, which refers to the free movement of workers<sup>164</sup>. Lastly, it referred to *Brasserie du Pêcheur* and *Factortame*<sup>165</sup>, but only in order to generally affirm that a legal rule recognized by the ECJ should be considered as retroactively applicable to legal relationships<sup>166</sup>.

With specific reference to the trade union's liability in the case, the assessment by the *Arbetsdomstolen* proceeded in two main directions, that is to ascertain the violation and trade union liability for what it refers to the EU framework on the freedom of movement and, on the other hand, in the light of the provision of the MBL; the Labour Court determined that article 49 EC had direct horizontal effect<sup>167</sup>, allowing therefore a private undertaking to invoke its rights against a labour union taking industrial action<sup>168</sup>.

For what it refers to the appropriateness of the damages as remedy for the violation of the Treaty, the Labour Court underlined, *in primis*, how there was “no explicit support” in the ECJ case-law for the proposition that an individual is to pay

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<sup>161</sup> “It may [...] be considered established that there is a general legal principle within EC law that damages are [...] to be awarded between private parties upon a violation of a Treaty provision that has horizontal direct effect.”

<sup>162</sup> That is, the EU provision in question must have direct effect on the national level, create rights for the individual that the national courts have to protect, and the direct effect needs to be applicable in the relationship between the private parties. See also Rönmar 2010, p. 281

<sup>163</sup> Established in particular by *Courage* (C-453/99) and *Manfredi* (Joined Cases C- 295/04 to C-298/04)

<sup>164</sup> Case C-94/07

<sup>165</sup> Joined cases C-46/93 and C-48/93

<sup>166</sup> See *amplius*, with particular reference to the Italian Constitutional framework, Saccà 2010, pp. 14-16

<sup>167</sup> In order to reach this conclusion, the Labour Court interpreted some different language versions of the ECJ's answer to the first question in *Laval*. See Rönmar 2010, p. 282

<sup>168</sup> In particular referred to *Viking* (parr. 33 and 35) and *Laval* (par. 98)



damages on an EU law basis to another individual upon a violation of Article 49 EC<sup>169</sup>.

However, without “taking a stance” on the possible applications of the damage liability criteria of *Brasserie du Pêcheur* and *Factortame*, nor contemplating the possibility of liability for the Swedish State, the Labour Court determined that the trade unions’ actions, being in conflict with art. 49 EC, constituted a serious violation of the Treaty, and was directly linked to the damage suffered by the employer; notwithstanding the recognition of a fundamental right to collective action in the EU, the actual actions undertaken by the unions were not proportionate, and could not be considered acceptable despite their objective of protecting workers. Thus, the Labour Court also concluded in the sense of the existence of a sufficiently clear violation of EU law, and determined that the rules on damages for unlawful industrial action contained in §§ 54 and 55 of the MBL should be applied by analogy<sup>170</sup>, on the basis of national procedural autonomy, equivalence, effectiveness and proportionality<sup>171</sup>.

With reference to the national framework, the Court found that, because of the provisions of the MBL, the fact that Laval was already bound by a collective agreement did not mean that the collective actions were unlawful under Swedish law. However, on the basis of the ECJ’s decisions determining that such provisions were discriminatory and in violation of the Treaty, the rule should, in accordance with EU law<sup>172</sup>, not be applied; as a result of this, the Court decided that also in this perspective<sup>173</sup> the collective actions were to be considered unlawful and the trade unions were to be held liable for damages under the provisions of the MBL.

Several aspects emerging from this approach need to be analyzed, and in particular it must be considered whether the eager references made by the Labour

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<sup>169</sup> AD 2009:89 p. 22

<sup>170</sup> AD 2009:89 p. 28

<sup>171</sup> With particular reference to the principle of equivalence, the Labour Court held that since the Swedish legislator provides the imposition of punitive damages as a sanction in industrial disputes it should also be imposed for the breach of EU law deriving from unlawful collective action.

<sup>172</sup> In particular, cases C-106/77 *Simmenthal*, C-81/05 *Alonso* and, with specific reference to the incompatibility of national legislation weakening the effect of EU law, C-213/89, *Factortame*. The Labour Court therefore considered that the effect of EU law would be jeopardized if it was not possible to oblige the trade unions to pay damages.

<sup>173</sup> And specifically, from the application of the “Britannia rule” (AD 1989/120)

Court to EU fundamental principles and case-law<sup>174</sup> represent an accurate interpretation of the EU framework<sup>175</sup>.

As noted, Art. 49 EC was to be viewed by the Labour Court as having horizontal direct effect, notwithstanding the absence of explicit support in the ECJ case-law for the proposition that an individual is to pay damages to another individual upon such violation specifically<sup>176</sup>; most of ECJ's jurisprudence cited with reference on the established liability for damages for private parties for violations of EU law, however, concerns individuals' rights to compensation for a Member State's breach of EC law in very specific situations involving competition law<sup>177</sup> and, in particular for the case of *Raccanelli*<sup>178</sup>, the hypotheses concerning a breach of the non-discrimination rule in which a horizontal effect on the freedom of movements is affirmed in order to strike down the application of overtly discriminatory measures<sup>179</sup> which prevented the enjoyment by citizens of other Member State of rights "reserved" to nationals<sup>180</sup>.

In the cases referred to by the Labour Court the ECJ, while referring to the principles of equivalence and effectiveness did not apply the principles of Member State liability by analogy<sup>181</sup>; a broad interpretative reconstruction of the principles of EU law would certainly serve in filling the gaps of EU law, but because of the consistent presence of the right in question in national frameworks, and in particular consideration of its mention in art. 28 CFREU (where, among other things, it is specified that the right in question can be exercised "in the event of a conflict of interest") it is not possible to identify such gaps with reference to collective action<sup>182</sup>.

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<sup>174</sup> Whithout a compelling reason for it. Sciarra 2011, p. 366

<sup>175</sup> See *Comments by LO and TCO to the CEACR on Sweden's application of C. 87 and 98*, par. 43

<sup>176</sup> See Orlandini 2008c, p. 3

<sup>177</sup> Where Treaty provisions are clearly directed towards companies and private parties

<sup>178</sup> On which the Labour Court relies heavily, see Kruse 2009

<sup>179</sup> "in the event that the applicant in the main proceedings is justified in relying on damage caused by the discrimination to which he has been subject, it is for the referring court to assess [...] the nature of the compensation which he would be entitled to claim" (*Raccanelli*, par. 52)

<sup>180</sup> While in the case at hand the collective action represents the exercise of an autonomous right by national citizens and does not interfere with the exercise of that right by foreign nationals; furthermore, it has been noted how the autonomy of a research institute such as the one involved in *Raccanelli*, presents very different features from that of a union, with regards to its relationship to State law as well to the functions effectively carried out. See Lo Faro 2008, p. 80

<sup>181</sup> See Rönmar 2010, p. 283

<sup>182</sup> See Sciarra 2011, p. 367

Another fundamental aspect, in fact, regards the the private nature of trade unions, which nonetheless are subjected to the direct effect of the rules of fundamental economic freedoms and consequently held liable for the exercise of the right to collective action. On one hand the Labour Courts proceeded to apply art. 49 EC to the trade unions by virtue of the private nature of such organizations, on the other it did not carry out the necessary distinction and adaptations in consequence of the specific role<sup>183</sup> of the various subjects involved; as noted, the Labour Court made only a formal reference to the criteria set by *Brasserie du Pêcheur* and *Factortame*, without actually deciding whether they could be completely applied in the situation at hand, in particular when the autonomous collective bargaining model characterizing the Swedish system is taken into account.

Similarly the Court did not address the question on the basis of the principles set in competition law which, while suggesting a rule of strict liability for repairing damages represents an appropriate remedial standard, also refer to the fault requirement as a necessary condition for damages claims, on the basis in particular of the “excusable error” which allows infringers to exceptionally escape liability in such matters<sup>184</sup>.

Since this judgment lacks therefore a clear analysis and consequent identification of the various elements determining trade union liability, the possible consequences stemming from the different role of the trade unions in the various contexts remain unpredictable. For what it concerns the Nordic model, it has to be noted that the interaction between public and private regulation, legislation and collective agreements is already in general rather complex; the pictures becomes even more complex when the analysis moves from the organisation-related nature of the right to collective action typical of the Swedish and Finnish systems to the exercise of such a right in legal frameworks entitling every individual to such a right<sup>185</sup> or for situations in which single individuals conduct such a protest; in the first case, the complexities may stem from the consideration that unions’ liability

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<sup>183</sup> In particular it has been argued that the trade unions’ sui generis nature of quasi-public regulatory bodies, See Apps 2009

<sup>184</sup> Cf. in particular *Manfredi* and *White Paper on Damages actions for breach of the EC antitrust rules*, COM(2008) 165, par. 2.4. See Saccà 2010, p. 11 and Van Bael 2011, p. 406

<sup>185</sup> Such as the Italian one, see in particular Ales, Orlandini in Bückler, Warneck 2010

may be incremental to or replace that of the individual worker<sup>186</sup>; in the latter case<sup>187</sup> the collective action could even fall outside of the scope of *Viking* and *Laval*, as these only contemplate liability for trade unions and not for private individuals<sup>188</sup> deriving from an industrial action incompatible with EU law.

With reference to the damages awarded by the *Arbetsdomstolen* it should be noted that on the basis of the provisions of the MBL employers, employees and organisations who violate the Act or a collective agreement must compensate all the damages incurred by the other party<sup>189</sup>; furthermore, according to § 55, in determining the extent of the damage, the Court must also take into account the interests of the injured party with respect to rules deriving from laws and collective agreements, as well as the other circumstances of other than purely economic importance (so-called “punitive” or “non financial” damages).

The Labour Court concluded its assessment in the sense of the existence of a right to compensation for the Laval company for punitive damages<sup>190</sup> but not for the economic loss suffered by the company, since it had not succeeded in providing sufficient evidence of it<sup>191</sup>; the Labour court disregarded the trade union claims which had adduced that a prerequisite for liability to pay damages is negligence by considering that when applying the MBL provisions on damages it is sufficient that the action constitutes a breach of the Act, and the same should apply to breaches of EU law.

Furthermore, the Court did not utilize the statutory possibility to reduce or waive damages when it is reasonable under the circumstances<sup>192</sup>; in particular, the

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<sup>186</sup> See Orlandini 2011, p. 414

<sup>187</sup> See *infra* par. 3.2.2 with regards to the “wildcat” strikes during the course of the *Lindsey* dispute.

<sup>188</sup> See also Novitz in Bucker, Warneck 2010

<sup>189</sup> MBL, § 54. The assumption underlying such provision is that the compensation should cover the entire amount of the loss suffered; the burden of proof on the amount of damages generally lies on the employer, except for the possibility for the judge to order compensation on an equitable basis when proof on the exact amount of damages results particularly difficult. See Bruun 2011, p. 399

<sup>190</sup> Of the total of the damages 20,000€ were imposed on the Swedish Building Workers' Union, 20,000€ on its local branch and 15,000 € on the Swedish Electrician's Trade Union.

<sup>191</sup> Malmberg 2010a, p. 16

<sup>192</sup> MBL, § 60. If it is reasonable damages may be reduced or waived entirely. When assessing the workers' liability for participation in unlawful industrial action the circumstances that have emerged from consultation that must be undertaken with a view of terminating the industrial action (§ 43 MBL) must be taken into account.

Labour Court held that the trade unions should have taken into account the possibility that their action could be incompatible with EU law, in particular on the basis of the objections raised by *Laval* and of the retroactive effect of ECJ jurisprudence<sup>193</sup>.

Therefore, the liability ultimately recognized by the Swedish Labour Court according to § 55 MBL significantly differs from an economic compensation and appears more similar to penalty or fine for breach of EU law: as noted, the Swedish legislative frameworks provides both the functions of guaranteeing compensation for the economic losses and providing a deterrent tool against further violations, even if the former remedy was not applied because of the dismissal the financial claim.

Notwithstanding the aforementioned problems in the determination of the effective elements of the trade union liability, and the factual occurrences at the basis of the dissenting opinions, the extension of the national framework set by the MBL to the cases of breach of EU law represents at first glance a reasonable result of the national *Laval* judgment and a seemingly fair application of EU law on damages<sup>194</sup>, in particular for what it refers to the principles of equivalence and effectiveness<sup>195</sup>; however it should be noted that the “effective remedies” to protect an individual’s rights under EU law should rather aim at restoration of the offended party rather than to the punishment of the side in violation of EU law, and that, more than anything, the national *Laval* case has strongly highlighted the need to

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<sup>193</sup> On the “negligence” of the trade union on the matter see also Saccà 2010, p. 30

<sup>194</sup> See Kruse 2009. See also *infra* par. 3.2.2 with reference to the British framework on damages, and in particular, the limits set by §22 TULRCA

<sup>195</sup> In particular, see *Unibet* (C-432/05) which represents one of the most comprehensive modern summaries of the basic position on the principle of effective judicial protection, reaffirmed in Article 47 of the CFREU (right to an effective remedy and a fair trial) and *Impact* (C-268/06). It should be noted that under *Lex Laval* a conduct similar to the one in the *Vaxholm* dispute would be unlawful under sect. 5a LUA and sanctioned according to sect. 54 and 55 MBL, whose extension to disputes in breach of EU law has been institutionalized by the 2010 amendments to the Swedish statutory provisions on collective action in the context of the posting of workers.

determine guidelines<sup>196</sup> and criteria on the delicate and matters of trade union liability<sup>197</sup>.

Furthermore, while the *Laval* judgment is clearly a domestic decision, a theoretical application of this principle in a system such as the Italian one would presents several complexities: it is without doubt, in fact, that an action similar to the one undertaken in the *Laval* dispute does not involve constitutional rights of parties third to the dispute<sup>198</sup>. The “equivalent” national remedies for unlawful actions in such cases, in practice do not include compensation for damages<sup>199</sup>, and could therefore fall short in providing effective judicial protection to an individual’s rights.

Beside the exceptional possibility of the creation of a “new remedy” determined by the ECJ in *Unibet*<sup>200</sup>, it should therefore be considered whether the application of the compensatory remedies provided in the framework on essential public services could be extended also to the collective action in violation of EU law.

In particular, the damages awarded by the Swedish Labour Court in the national *Laval* case appear similar to the sanctions issued by the competent Commission<sup>201</sup> to the trade unions or their legal representatives<sup>202</sup> in the event of proclamation or participation to an unlawful strike; the similarities refer to the sanctionatory nature of the remedies at hand, to the degree of discretionary power

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<sup>196</sup> Bruun 2011, p. 402

<sup>197</sup> It should be noted, that the possibility of a future amendment of *Lex Laval* does not allow to consider the analyzed extension as a stable innovation in the Swedish system. Another element of uncertainty in the present situation refers to the fact that, as noted, trade unions were condemned because of their compliance of the national norms and regulation; there is therefore the possibility of a further claim by trade unions for State compensation for the damages suffered in accordance with the principles of MS liability. At the basis of such a claim would be application of the principle of legitimate expectations with respect to the incorrect implementation of EU law by Sweden, or more specifically the fact that the Swedish Labour Court unilaterally concluded in the matter without recurring to the available instruments. See also Bruun 2010

<sup>198</sup> And would not therefore be covered by the discipline on the collective action in the “essential public services” (l. 146/90)

<sup>199</sup> It should be considered, however, that this possibility is not excluded *de jure*. Lo Faro 2011, p. 422

<sup>200</sup> According to which Union law does not create new remedies in the national courts unless it was “apparent [...] that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual’s rights under [Union] law.” (*Unibet*, par. 41)

<sup>201</sup> See *supra* par. 1.1.1

<sup>202</sup> l. 146/90, articles 4.4-bis and 4.4-ter.

by the adjudicating body in issuing the sanction<sup>203</sup>, and to the economic consistence of the latter<sup>204</sup>.

However, it must be noted that the discipline set by l. 146/90 refers only to the safeguard of human rights protected by the Constitution, and therefore its extension would not meet the principle of equivalence, since those remedies are provided in domestic law with respect to different situations from those at issue in the hypothetical case in question; for “normal” collective actions, therefore, sanctionary economic measures should not be applied in the Italian context<sup>205</sup>.

Furthermore, the specific aims of the sanctions should be taken into account when considering the possibility of utilizing such parameter in guiding the discretionary power of the judge in determining the compensation; the Swedish system, in fact, provides both a sanctionary and restorative remedy, which would have been activated had the company provided proof of the damages suffered.

On the other hand, the exclusively sanctionary nature of the Italian remedy would not fulfill the essentially restorative function that should characterize an effective remedy for an undertaking which had suffered a damage deriving from the violation of its economic freedoms<sup>206</sup>, nor it could be applied as an insurmountable threshold once determined that the compensation, in order to be effective, should cover the entire extent of the damages suffered<sup>207</sup>.

Lastly, it should be underlined that on 6 May 2010 an extraordinary appeal was been lodged by Byggnads, Byggettan and Elektrikerna before the Supreme

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<sup>203</sup> In the Italian discipline, linked to the size of the organization, the severity of the violation, the eventual repeated infringement, as well as the severity of the effects of the collective action on the public service, there is not a precise economic quantification nor to (unlimited) claims by the employer.

<sup>204</sup> A maximum of 51.645,69 €.

<sup>205</sup> Furthermore, widely applied solutions like the *interim* injunction (ex art. 700) would also imply that beside the economic compensation provided by the Swedish Labour Court, other effective remedies could already be provided by national legislations and case-laws.

<sup>206</sup> On the basis of the same reasoning, the imposition of disciplinary sanctions should be excluded without any consideration of a possible contrast between the EU and domestic constitutional framework. See *Lo Faro* 2011, p. 426

<sup>207</sup> It should be noted that such a reconstruction, would also trample frameworks such as the UK one, which present a cap for damages that seems to derive from a balancing of the protection of the trade unions' ability to bargain collectively without the threat of unlimited damages, and the demand for an effective restoration by the employer, in particular when the variation of the size of the cap on the basis of union size is taken into account. See *infra* par. 3.2.2

Court against the judgment of the Labour Court (whose judgments cannot be normally appealed) by the Swedish trade unions, on the basis that its determination of the existence of a principle of damages between individuals in EU law without the support of any judgment of the ECJ establishing horizontal damages for breach of Art. 49 EC (Article 56 TFEU), and that the *Arbetsdomstolen* was under an obligation to make a preliminary reference to the Luxembourg Court.

The Supreme Court, however, has rejected the claim to have the judgment reverted, since it was not proven that the Labour Court's decision constituted a manifest infringement of the law and/or amounted to a serious fault in the court's procedure which affected the issue of the case<sup>208</sup>; the "very weak" ruling<sup>209</sup> by the *Arbetsdomstolen*, therefore represent the final judgment on the Vaxholm dispute, more than five years after its start<sup>210</sup>.

### 3.2.2 - A British "trio" for collective action? BALPA, Metrobus and Lindsey

As noted before, the ECJ's decision in the *Viking* judgment was only an interpretation of the EU law in order to assist the Court of Appeal, and did not represent a final judgment on the facts of the dispute<sup>211</sup>; the Court, in fact, stated that it pertains to the national court to determine the justification, necessity and proportionality of the collective actions<sup>212</sup>.

The case was referred back to the English Court of Appeal that should have issued a judgment on whether or not to maintain the original injunction granted against the FSB and ITF in the light of the judgment from the ECJ; however the parties involved<sup>213</sup>, after the *interim* decision, had reached an out-of-court settlement for the dispute before it returned to the Court of Appeal in United Kingdom<sup>214</sup>. The Finnish company accepted an undisclosed sum covering its legal

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<sup>208</sup> HD 2181/10 of 6/7/2010

<sup>209</sup> Kruse 2009

<sup>210</sup> See Ahlberg 2010d, Saccà 2010, p. 2, Malmberg 2011, p. 376

<sup>211</sup> For what it refers the ECJ's assessment of ITF's action, see *supra* par. 2.3.5

<sup>212</sup> and in particular, it has to ascertain whether, the union involved did or 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 negotiations entered and whether the trade union had made use and exhausted those means before initiating the action. See *Viking*, par. 85

<sup>213</sup> *i.e.* Viking Line and the FSU

<sup>214</sup> See Bell 2008, p. 6



costs as well as compensation for having to agree to a manning agreement in consequence of which the vessel was continuing to fly the Finnish flag but with slightly reduced wage supplements for new crew members<sup>215</sup>.

The main dispute that had originated the ruling by the ECJ remained untouched in the agreement, nor it was assessed and ruled upon by a British judge; however the ECJ jurisprudence on collective action could give rise in the United Kingdom to some of the potentially most far-reaching consequences in the various domestic settings analyzed, and some peculiar features emerging from recent industrial disputes can be attributed to the influence of the *Viking-Laval* judicial course.

In particular it should be considered whether *Viking* and *Laval* add another layer of restrictions on the ability to take industrial action<sup>216</sup> to the statutory and case law restraints already present in the British framework, by imposing the application of the EU free-movement rules on the action at least for the case of real or potential existence of an element of trans-nationality in the dispute or in the actual action undertaken<sup>217</sup>.

As collective bargaining is not the main form of implementing EU Directives in UK, the other main issues emerging from *Laval* did not, similarly, produce an immediate impact in the British framework, in particular because of the existence of

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<sup>215</sup> The agreement on the matter was reached in January 2008. Subsequently, Viking Line Viking chose to register its new fast ferry (the *Viking XPRS*, which entered service on 28 April 2008 XPRS) replacing the *MS Rosella* under Swedish rather than Estonian flag, and manning Swedish, Finnish and Estonian crew members. *Finnish Shipping Group Settles Case Over Cheap Labour*, Financial Times, 4 March 2008, and *Tallink eyes Finnish flag*, TradeWinds News 23 April 2008, available online at <http://www.tradewindsnews.com/daily/article507968.ece?service=printArticle>

<sup>216</sup> It should be considered that the British framework already provides the opportunity for a scrutiny on the aims of the collective action when it states that a lawful action can only be undertaken “in contemplation or furtherance” (which is determined by a subjective test) of “a trade dispute” (although no reference is made to the further ECJ requirement of the “serious threat for jobs and employment conditions”). It should also be noted that the competence in determining the lawfulness of the strike pertains to High Courts (which are common law bodies) instead than to the more specialized Employment Tribunals, and the English law’s approach to the regulation of industrial action seeks to avoid “politicising” the courts by preventing them from ruling on the merits of the dispute, whose determination is left to the appreciation of the party taking a certain decision. See *supra*, par 1.1.1, Davies 2008, p. 146 and Szyszczak in Blanpain and Swiatowski 2009, p. 167

<sup>217</sup> In this sense, the ECJ rulings cannot be seen as requiring the introduction of an explicit “right to strike” in UK law (as opposed to the system of immunities that continues to operate to this day), since the recognition of the right to strike is limited to EU law, both rather of a “binary system” regarding the lawfulness of industrial action in the British system: in particular, the courts should not apply the reasonings and the principles deriving from *Viking* and *Laval* for the case of trade disputes not presenting EU features or dimension. See Countouris in Vimercati 2009, p. 98

a universally applicable National Minimum Wage<sup>218</sup>. The East Lindsey “wildcat” strikes, however, did not exclusively concern the ability for individual workers to take unofficial action but also raised concerns regarding an ineffective transposition of the PWD in the domestic legal framework, as well as the EU incompatibility of solutions found in order to settle the dispute.

Furthermore, it should also be noted that *Rüffert* and *Luxembourg* could produce relevant consequences also in the UK setting; in particular the Greater London Authority (GLA) Group and Olympic Delivery Authority’s (ODA) procurement requirements impose on contractors the payment of the so-called *London Living Wage*<sup>219</sup> rates of pay instead of the lower National Minimum Wage<sup>220</sup>. As LLW agreements cannot be considered as “universally applicable”, ECJ jurisprudence on the matter would suggest that the living wage could not be imposed as a matter of local authority or Olympic Development Authority policy.

The other main area in which social clauses have been widely applied is represented by the one referring to social cohesion and integration of minorities; in particular, “supplier diversity” requirement to be observed by contractors and sub-contractors in public procurement (linked with the varied British situation), while not imposing “minority quotas” but rather the respect of good practices<sup>221</sup> in the area may still collide with the minimalist and restrictive interpretations by the ECJ jurisprudence on social clauses and public policy justification.

The first test for the potential effect of *Viking* in the UK setting, and for the willingness of the British courts in applying the ECJ jurisprudence came in early 2008.

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<sup>218</sup> Ewing 2009, p. 4

<sup>219</sup> LLW, introduced in 2005 for achieving “adequate levels” in housing, diet, social integration and avoidance of chronic stress for earners and their dependents, and currently amounting to £8.30 per hour. Greater London Authority 2011, p. 11

<sup>220</sup> As a matter of fact the same GLA states that LLW “is not the same as a minimum wage” *Ibid.*, p. 32

<sup>221</sup> See Countouris in Vimercati 2009, pp. 105-106

The decision by British Airways to set up a wholly owned subsidiary based in France<sup>222</sup>, resulted in the opposition by British Airline Pilot Association (BALPA) aiming to prevent the company undermining terms, conditions and job security by employing pilots on wages lower than those paid to UK-employed “mainline” staff<sup>223</sup>. Once all the stages of the disputes procedures were exhausted without agreement been reached <sup>224</sup>, the trade union promoted the recourse to strike action; the ballot saw 93% of the workers eligible voting, and a vast majority (86%) voting in favour of the strike.

British Airways responded by announcing that if strike dates were issued it would have gone to the High Court to seek an injunction preventing the strike underlining that, the action would be unlawful by virtue of the protection to the freedom of establishment; in particular, BA relied on *Viking*, arguing that art. 43 EC would apply because of its intention of establishing separate companies in various EU Member States in order to run its business, as well as acquiring existing operations from third parties, and that BALPA’s opposition would have the effect of making the establishment in another Member State less attractive or even pointless<sup>225</sup>.

BALPA did not accept this argument but, rather than announce strike dates, it took the unprecedented initiative of referring the matter to the High Court to seek a declaratory ruling for determining the lawfulness of the action, and in particular on whether BA's reliance on Article 43 of the Treaty of Rome had any bearing on the

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<sup>222</sup> This new business was established, with the purpose of flying Europe-US routes as a result of the liberalization intervened as a response to the ECJ ruling in cases C-466-469/98, C-475/98, C-476/98 *Commission v. United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany*. Prior to the Open Skies Treaty, there were significant regulatory obstacles to an airline based in one EU state flying passenger operations from another EU state to the USA.

<sup>223</sup> It should be noted that BALPA accepted that the subsidiary, as a start-up company, would need to operate with lower labour costs than in BA mainline. The protracted collective bargaining (started in summer 2007) concerned various various protective amendments to the long-standing substantive collective agreement, and in particular that Openskies pilots should have common seniority with BA’s pilots, and that the same clause should apply to all other subsidiaries in the EEA. See Ewing and Hendy 2010, p. 44

<sup>224</sup> Including ACAS conciliation talks (commenced on 3 March and broken down on 8 March 2008). Acas is an independent statutory body (governed by a Council consisting of the Acas Chair and employer, trade union and independent members) providing information and advice to prevent or resolve problems and improve performance. See *27th February, 2008, British Airways/BALPA - Openskies*, Government News 27 February 2008, available online at [http://www.gov-news.org/gov/uk/news/british\\_airwaysbalpa\\_openskies/38327.html](http://www.gov-news.org/gov/uk/news/british_airwaysbalpa_openskies/38327.html)

<sup>225</sup> *Viking*, par. 72

industrial dispute and whether the union may rely on the strike ballot to avoid a claim for unlimited damages<sup>226</sup>.

BA, while stating that BALPA had complied with the ballot and notice requirements provided by UK law, claimed that the Court should determine whether the action was “legitimate” and “proportionate”, and adducing several reasons for the incompatibility of the action threatened by BALPA<sup>227</sup>. Furthermore, early in the course of the proceedings the company stated that it would have claimed unlimited damages estimated at £100 million per day<sup>228</sup>, had the stoppages actually taken place<sup>229</sup>: furthermore it was made clear that, regardless of the outcome, the case would have progressed on appeal to Court of Appeal and the House of Lords, with possible future reference to the ECJ.

This threats were sufficient to make BALPA back down from the dispute<sup>230</sup>, as well as not following through with the strike, because of the prospect of mounting litigation costs of a drawn-out case and a long series of appeals<sup>231</sup>, as well as the possibility of being sued for the very consistent damages claimed by BA, leading to the possible bankruptcy of the union, in the event of a strike; therefore also in this case there was no determination of the relevance of EU law in the dispute at hand; subsequently, the trade union has launched a campaign for the review of Article 43

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<sup>226</sup> Furthermore, even if Viking applied, BALPA’s intended industrial action was considered by the union a last resort and proportionate, there being no other way of protecting its members’ interests.

<sup>227</sup> In particular, the guarantees given by the company with reference to the protection of existing terms and conditions were in line with *Viking* par. 85, while the union had not considered actions short of a strike (*Viking*, par. 75) and in particular its request of applying the clause to future merger operations was disproportionate. Szyszczak in Blanpain and Swiatowski 2009, pp. 172-173

<sup>228</sup> As the case was discontinued, the effective amount was not determined but would have been plainly substantial. It should be noted tha BA claimed damages alleged to have been sustained by it by the mere fact that BALPA had served notice to ballot for strike action.

<sup>229</sup> With specific regard to the amount of damages required in the dispute, the position by British Airways was that the cap for damages usually applied to trade union liability, could not find application in the case of industrial action breaching EU law, on the basis in particular of the consideration that a cap on damages was incompatible with the principle of effective remedies under EU law.

<sup>230</sup> With the consequent withdrawal of the counterclaim by BA, in particular on the basis of the assurances by BALPA that it would not call industrial action based on similar issues <http://business.timesonline.co.uk/tol/business/law/article3986070.ece>

<sup>231</sup> And also because the original January strike ballot (which has only four/twelwe weeks of validity) (save where extended by the court for up to a further eight weeks) would have expired and a re-ballot would have been necessary if there was to be strike action. See *Unite* 2008, Ewing and Hendy 2010 p. 45

EC<sup>232</sup> and in particular submitted an application to the International Labour Organisation in which underlined the British government's failure to meet the requirements of ILO Convention 87, protecting the right to freedom of association and the right of trade unions to organise workers<sup>233</sup>.

While it should be noted that there has been no further litigation on the issues of freedom of movement and strike action<sup>234</sup>, two main conclusions can be drawn from the BALPA litigation: *in primis*, it should be considered that the UK injunctive relief system provides the employers with a very powerful instrument in the national setting, exploiting the uncertainties linked with the possible application of the criteria and the proportionality test derived from the *Viking Laval* jurisprudence.

Given that the outcome of the test for the grant of an *interim* injunction is based whether the claimant can demonstrate the “existence of a serious question to be tried” and that the *status quo* should be maintained unless the “balance of convenience”<sup>235</sup> disfavors it<sup>236</sup>, employers<sup>237</sup> will not have to show in detail before the court that Community law actually applies or that the action proposed is unjustified or disproportionate. Rather, an employer can merely show that there is an arguable case that the proposed industrial action will infringe its rights under

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<sup>232</sup> While renouncing to its previous “BA plane - BA pilot” campaign. Details of the Article 43 campaign can be found at [http://www.balpa.org/Campaigns/Article-43-\(1\).aspx](http://www.balpa.org/Campaigns/Article-43-(1).aspx),

<sup>233</sup> See *infra* in this paragraph

<sup>234</sup> See Novitz in Ales and Novitz 2010, p. 201-202

<sup>235</sup> According to the *Cyanamid*-doctrine (*American Cyanamid Co. v Ethicon Limited* [1975] AC 396)

<sup>236</sup> The “convenience test” is not linked to issues of proportionality as defined in *Viking* and *Laval*, but it represent an assessment of which of the parties would suffer the most inconvenience should the action take or not take place. In the BA/UNITE and Network Rail/RMT disputes, for instance, the setting of the strike over the 12 days of Christmas was deemed as “fundamentally more damaging to British Airways and the wider public than a strike taking place at almost any other time of the year” (and the balance of convenience, therefore, lay firmly in favour of granting relief. See *British Airways plc v Unite the Union (No. 1)* [2009] EWHC 3541 (QB), [2010] IRLR 423, par. 83). For what it refers to the RMT row (*Network Rail Infrastructure Ltd v National Union of Rail, Maritime & Transport Workers* [2010] EWHC 1084 (QB)), the element that was deemed “disproportionate” was the potential disruption of more than 80% of the railway traffic, that would have caused a lot of damage “to the already stricken economy” by affecting, in addition to the claimant itself and train operating companies, also businesses that depend on rail services for transport and freight and the travelling public (par. 2). Nonetheless concerns have been raised on the use of “proportionality” in the UK judicial discourse with reference to injunctions, representing a troubling opening towards the use of uncomplete standards, principles and legal reasonings. See *BA Christmas strike blocked by high court*, The Guardian 18 December 2009, available online at <http://www.guardian.co.uk/business/2009/dec/17/ba-christmas-strike-blocked-court>, Novitz 2009, p. 184, Ewing and Hendy 2010, p. 44 and Wicks 2010, p. 2

<sup>237</sup> Which are undoubtedly the parties more likely to suffer economic damages deriving from a strike action.

Community law; the serious issue at hand therefore provides good prospects of obtaining an injunction<sup>238</sup>.

The British Courts have appeared very open to utilize a restrictive approach in responding to the employers' applications for injunctive relief<sup>239</sup>, and the request for *ad interim* injunction, which by itself is not a new tactic in the British industrial relation system, has clearly become the preferred remedy for employers seeking to overcome the threat of industrial action, especially in consideration of the very serious consequence that may stem from the breach of an injunction<sup>240</sup> and of the fact that it allows dilatory tactics in ongoing disputes which, while preventing the strike from taking place swiftly, may greatly reduce the effectiveness of the trade union's initiative.

The many complexities brought in by the amendments to the ballot regulations have widened the scope for technical irregularities in the balloting and employer notice procedures, increasing the threat for injunction to prevent strike action<sup>241</sup>; therefore the detailed and rigid drafting of its formality provisions of Part V of TUL(R)CA 1992, which was "ostensibly"<sup>242</sup> designed to protect the democratic rights of trade union members, can in effect be invoked by the employer to precisely the opposite effect<sup>243</sup>, notwithstanding the recent Court of Appeal decisions in *BA v*

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<sup>238</sup> See Ornstein and Smith 2009, p. 2

<sup>239</sup> See *EDF Energy Powerlink Ltd v National Union of Rail, Maritime and Transport Workers* [2009] EWHC 2852 (QB) [2010] IRLR 114. Given the relatively small workplace involved, it was determined that it would not have been "unduly onerous or unreasonable" for the union to supply to the employer a detailed breakdown of the categories of worker balloted, even if the former did not request a detailed job description (par. 18). It should be also noted that the fact that an injunction (ultimately granted for failure to comply with the notice provisions) had been sought before the ballot had been concluded was not considered premature: the prospect of an unlawful strike was sufficiently imminent to justify the grant of *quia timet* relief (par. 6). See Hayes, Novitz and Reed in Bucker and Warneck 2011, pp. 207 ff. and Stilitz 2011, p. 5

<sup>240</sup> Such as fines for trade unions and trade union officials, confiscation of union assets, and possible criminal liability for "contempt of the court". See Novitz in Bucker, Warneck 2010

<sup>241</sup> The law appears designed to frustrate trade unions on technical grounds from exercising the right to take collective action, rather than to provide a framework for assessing whether there is genuine worker support for the proposed action. See Ewing and Henty 2010, p. 21

<sup>242</sup> See Prassl 2011, p. 91

<sup>243</sup> See also the aforementioned *Network Rail Infrastructure v. RMT*, in which the inaction of the union in determining the workplace of its members (par. 50, 53 and 60), the fact that 5 out of 21/23 had not received a ballot paper (par.67) as well the methods of information on the results of the ballot (a text message making reference to the union website, see par. 71) were struck down as insufficient to comply with the balloting and notification procedures (the last point should be reviewed following the judgment in *BA v UNITE No.2*)

*Unite (No.2)*<sup>244</sup> and *RMT v Serco*<sup>245</sup> which, while holding the unions to certain basic standards of compliance, have addressed the restrictive framework balloting and notice requirements of the 1992 Act and partly solved some of the problems in the domain of information and communication<sup>246</sup>.

It should be noted that many of the previously analyzed jurisprudence may be seen as stemming<sup>247</sup> from the *Metrobus*<sup>248</sup> case, which concerned collective bargaining arrangements for London's decentralized bus drivers and once more referred to the interpretation of the statutory provision on information and notice

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<sup>244</sup> *British Airways plc v Unite the Union* [2010] EWCA Civ 669 [2010] ICR 1316. This long lasting dispute started with the 2009 "Christmas injunction", granted on the basis of the fact that 900 staff members that had accepted voluntary redundancy had been balloted, while regulations provide that only qualified staff should be balloted, and redundant workers are not. UNITE had underlined that British Airways was unhelpful and uncooperative in response to the efforts made to identify the redundant workers, and argued that ballot would still have resulted in a vote in favour of industrial action even if those members leaving the airline had not been balloted (of the 13,000 cabin crew balloted, over 9,000 voted in favour, see *British Airways cabin crew vote for Christmas strike*, BBC News 14 December 2009, available online at <http://news.bbc.co.uk/2/hi/8411214.stm>). UNITE proceeded to another ballot, and BA sought and was granted another injunction in May 2010, this time on the basis of irregularities in information similar to those in the aforementioned *Network Rail Infrastructure v. RMT*. The Court of Appeal lifted the injunction by rejecting the argument that the UNITE had not taken active steps to inform everyone entitled to vote and that Unite had not pursued all reasonable avenues to comply with the information duties. The Court was clearly influenced by the fact that BA had not raised any complaint about compliance in relation to the previous ballot, where the same methods of communication (text messages and public and internet notices) had been used. See also Prassl 2011, p. 87, Stilitz 2011, p. 9 and <http://www.bbc.co.uk/news/10130274>

<sup>245</sup> *National Union of Rail, Maritime & Transport Workers v Serco Ltd* [2011] EWCA Civ 226 [2011] IRLR 399. In this ruling the position upheld in *Network Rail Infrastructure v. RMT* with regards to the accuracy of the ballot notice was reverted, since notification requirements must refer to the information actually in the hands of the union at the time when it sought to comply with its obligations (see parr. 69-70).

<sup>246</sup> In particular, both *RMT v Serco* and *BA v Unite (No.2)* make reference to a "reasonableness requirement" in. In particular, in the latter case it was underlined how the insertion of such requirement in §231 TULR(C)A ("As soon as is reasonably practicable [...] the trade union shall take such steps as are reasonably necessary to ensure that all persons entitled to vote in the ballot are informed") was precisely aimed at diminishing the strictness of the necessity requirement and held that the correct test was to see whether the means of communications used were sufficient to inform all members of the results in accordance with the statutory requirements, as opposed to the question whether every possible means had been deployed (par. 20).

<sup>247</sup> See Countouris and Freedland 2010, p. 4

<sup>248</sup> *Metrobus v Unite The Union* [2009] EWCA Civ 829

requirements; the Court, in granting injunctive relief to Metrobus<sup>249</sup>, rejected the argument by UNITE’s counsel that, on the basis of the requirement contained in §3 (1) of the Human Rights Act 1998 that domestic statutory provisions should be construed in such a way as to be consistent with the fundamental rights protected in the ECHR. According to this view, the complex framework of requirements for the trade unions made it almost impossible to avoid errors, and that right of association provided by Article 11 ECHR, and in particular its “essential element” constituted by the right to strike, was constrained in a way to render impossible its effective exercise<sup>250</sup>.

Having considered the various provisions highlighted by UNITE, the Court underlined that<sup>251</sup> the reference to international sources did not “affect the substance of the points arising under the ECHR itself” in the decision<sup>252</sup> and that had constituted only the context for the decision by the Strasbourg Court; hence it proceeded to evaluate the reasonableness or proportionality of the various UK statutory provisions concerned by the case and found that the notice and information requirements, as well as their amendments and formalistic interpretation, did not amount to disproportionate restrictions on the right to freedom of association under art. 11 of the Convention<sup>253</sup>, given also that the legislation has

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<sup>249</sup> Ultimately, the Court’s assessment determined four main results with regards to notice to the employer the result of the ballot and to lack of explanation in the ballot notice and strike notices: *in primis*, and perhaps more importantly, that the obligation to inform the employer of the result of a ballot under exists independently of the union’s decision on the actual initiation of industrial action (par. 73), and that, under determined circumstances (the ballot involved around 800 workers) the term for the fulfillment of such information duties may be the “same day as the result of the ballot becomes known” (par. 82), since the statutory criterion must be interpreted strictly as “the earliest time by which the communication of the information is reasonably achievable” and does not provide for elasticity for the unions choices as well as an assessment of the employer’s need to know. Furthermore, it was determined that unions are entitled to elect whether to provide the lists, figures and explanation or the information (§§ 226A(2)(c) (ii) and 234A(3)(a)(ii) TULRCA) only with respect to those workers who workers have their union subscriptions deduced through authorized deduction from their wages (check-off), and that inaccuracies or errors in figures supplied by a trade union do not constitute a breach of the statutory provision for the case of their relation to figures which the trade union was not required to provide.

<sup>250</sup> In particular in the light of the decision of the ECtHR in *Demir and Baykara v Turkey* and *Enerji Yapı-Yol Sen v Turkey*, which recognized (contrary to decades of previous case law) the right to collective bargaining and to collective action, by making also reference to international labour standards developed by the ILO and ESC. See *infra* par. 4.2 for a more detailed reconstruction of these cases and their potential interactions with the ECJ jurisprudence in *Viking* and *Laval*

<sup>251</sup> See Dukes 2010, pp. 89-90

<sup>252</sup> *Metrobus*, par. 50

<sup>253</sup> *Metrobus*, par. 113



been carefully adapted over many years, in order to balance the interests of employers<sup>254</sup>, unions and members of the public<sup>255</sup>.

The swift and abstract decision by the Court of Appeal, therefore, completely disregarded an evaluation of the link between the national setting and the international and European human rights dimension of collective action, and held the British legal framework was as justified and proportionate under the margin of appreciation inherent in Article 11 ECHR<sup>256</sup>.

The consequences of *Metrobus*, which constitutes a binding precedent<sup>257</sup>, reflected on subsequent cases such *EDF Powerlink v RMT*, where the Court rejected the submission that §226A of the TULRCA should be construed, in accordance with section 3 HRA 1998, so as to give effect to the right to strike protected by art. 11 ECHR. The Court, in the case at hand, determined that the acceptance of the fact that industrial action should to be considered from a human rights perspective cannot be considered “absolute and can be defined according to national law”, which can provide for “proportionate derogations”<sup>258</sup>; in this sense, the requirements as to pre-strike notification and ballots are simply seen as “not onerous or oppressive” and as not “unduly” restricting the exercise of the right to strike<sup>259</sup>.

The other main element deriving from ECJ jurisprudence giving rise to a “chilling effect”<sup>260</sup> in UK industrial disputes is the potential absence of the cap for

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<sup>254</sup> In particular in consideration of the fact that a balance between the rights afforded to workers by Article 11 ECHR and the rights of the employer guaranteed under Article 1 of the First Protocol to the ECHR is in any event necessary

<sup>255</sup> *Metrobus*, par. 27

<sup>256</sup> In particular, the Court of Appeal disregarded the fact that the margin of appreciation afforded to Member States is as to the choice of means to provide for unions to be heard and not as to the restrictions which may be imposed and, although concluding that the restrictions were “not unduly onerous”, it failed to answer the question whether they were “necessary in a democratic society”, as required by art. 11 ECHR. See Countouris and Freedland 2010, p. 4 and Joint Committee on Human Rights 2010, p. 48

<sup>257</sup> *Metrobus*, par. 27

<sup>258</sup> *EDF Powerlink v RMT*, par. 3

<sup>259</sup> *Ibid.*, par. 4. It has been duly noted that, had the restrictions been tested against Article 11.2 ECHR, the actual output of such an assessment should have been that the two specific legislative restrictions at issue in *Metrobus* were not necessary in a democratic society for the protection of the rights and interests of others. See Ewing and Hendy 2010, p. 25

<sup>260</sup> On the “chilling”, “ripple” and “disruptive” effects of the ECJ rulings, respectively limiting the ability of the unions to take industrial action, undermining collective bargaining in particular with reference to posting situations see *amplius* Hayes, Novitz and Reed in Bückner and Warneck 2011, pp. 227 ff.

damages recoverable from a trade union according to TULRCA §22, which lays down a scale of maximum damages against trade unions for tortious liability; in particular, the very high compensation claimed by BA exposed the trade union, as noted, to the risk of bankruptcy, even if only a small part of those claims could have been proved in Court.

In particular, British Airways' position in the BALPA dispute, advocating the removal of such limitations, was that a claim for damages based on incompatibility of the action undertaken with *Viking* and *Laval* would not be deriving from tort and, alternatively, that the cap on damages provided by the British law was incompatible with the principles of EU law on effective remedies<sup>261</sup>, which require that remedies for breaches of EU law should be effective and equivalent to parallel remedies in domestic law<sup>262</sup>; trade unions held liable for a breach of EU law<sup>263</sup>, therefore, should not benefit from any limitation of damages for impeding freedom of establishment or provision of services.

However the limit for damages for trade union liability, in addition to recognizing and addressing the asymmetry in the collective bargaining relationship by protecting the trade union's ability to collectively bargain without the threat of unlimited damages<sup>264</sup>, does not simply provides an arbitrary maximum level for compensation but allows for variation in the size of the cap based on the membership size of the union<sup>265</sup> and would apply independently<sup>266</sup> from the

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<sup>261</sup> See in particular the aforementioned *Unibet* and *Impact*, par. 3.2.1

<sup>262</sup> Similarly to the case for discriminatory dismissal: generally, damages for unfair dismissal are capped at about £75,000, however, there is no statutory cap on compensation payable under the Sex, Race and Disability Discrimination legislation (see Equality Act, § 124(2) and *Marshall v Southampton and South West Hampshire AHA* (C-271/91) [1993] E.C.R. I-4367; [1993] 3 C.M.L.R. 293) or the "whistle blower" provisions (see the Public Interest Disclosure Act 1998)

<sup>263</sup> In this sense, it was underlined that In order to establish tort liability against a state in community law, it would be necessary to show a "sufficiently serious breach" under the principles summarised in by the ECJ in *Brasserie du Pecheur* and *Factortame*. See Apps 2009, p. 145, and *supra* par. 3.2.1 for the findings of the Swedish *Arbetsdomstolen* in the national *Laval* judgment.

<sup>264</sup> Firstly recognized by the notorious *Taff Vale* judgment (*Taff Vale Co v Amalgamated Society of Railway Servants* [1901] A.C. 426)

<sup>265</sup> Ranging from £10,000 (less than 5000 members) to £250,000 (for union counting 100,000 or more members). In this sense it is considered that the number of members of a union is likely to be proportional to the economic power of the union and its ability to pay damages, independently from the sanctionatory or restorative nature of the compensation awarded. See Apps 2009, p. 152 and *supra* par. 1.1.1

<sup>266</sup> The limit on damages, in fact, applies to "any proceedings in tort brought against a trade union" (TULRCA §22, and more in general on trade union liability, also TULRCA §20).

domestic or EU origin of the tortious liability, representing therefore an effective remedy in this context<sup>267</sup>.

As noted, the East Lindsey Oil Refinery disputes in the first half 2009 has represented another example of the possible influence of ECJ jurisprudence with the national setting; the background of the dispute relates to a series of sub-contractings involving foreign nationals in the construction of a new industrial facility<sup>268</sup>.

In order to complete the assigned project in the required timescale, Total's main contractor - engineering firm Jacobs - and Shaw Group UK<sup>269</sup> agreed to involve another company to carry out specific aspects work that had been taken from the main sub-contractor; IREM, the Italian company that was ultimately awarded the £200 million worth contract<sup>270</sup>, stated that it would employ its own Italian and Portuguese workers for its core activities<sup>271</sup>.

This decision sparked walk-outs in the Lindsey plant<sup>272</sup> and triggered a widespread series of solidarity protests, picketings which involved a large number of workers<sup>273</sup> and contractors in various oil refineries, power stations and nuclear

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<sup>267</sup> This point was also stressed by the UK Government in its reply to BALPA's Application to the ILO (see *infra* in this paragraph) stating that the limit provided by §22 TULRCA "has a sound basis in the protection of the freedoms of trade unions which would be taken into consideration if the limit were challenged as contrary to the European Union law". See *International Labour Conference, 99th Session, Geneva, 2010, Report of the Committee of Experts on the Application of Conventions and Recommendations*, p. 209.

<sup>268</sup> The construction of two new units for hydrodesulphurization (HDS) and hydrogen production (SDR) represented an investment of around €300 million, and was part of a larger strategic plan that involved the sale of 70% of its interest in the Milford Haven refinery allowing Total to concentrate its U.K. refining operations at the wholly-owned and upgraded Lindsey Oil Refinery. See *Total to Build Two New Units at the Lindsey Oil Refinery in the United Kingdom* Press release, available online at <http://www.total.com/en/press/press-releases/consultation-200524.html&idActu=1478> and *Total Sells Its Interest in the Milford Haven Refinery in the United Kingdom* Press release, available online at <http://www.total.com/en/press/press-releases/consultation-200524.html&idActu=1392>

<sup>269</sup> Both contractor and sub-contractors were UK-based companies, and in particular the Shaw Group had agreed to employ local personnel, in compliance with ECIA's principles.

<sup>270</sup> IREM was one of seven companies bidding for the work, all of which were European and five of which were based in the UK. IREM was awarded the contract on the basis of the safety, quality, scheduling and price of their bid. See ACAS 2009, par. 4

<sup>271</sup> Local workers would be employed only on less skilled work or where the work entailed servicing mainstream operations (cranage, riggers, NDT, painting etc) and for filling gaps in the IREM workforce. *Ibid.*

<sup>272</sup> See *Mass walkout over foreign labour*, BBC News 28 January 2009, available online at [http://news.bbc.co.uk/2/hi/uk\\_news/england/humber/7855752.stm](http://news.bbc.co.uk/2/hi/uk_news/england/humber/7855752.stm)

<sup>273</sup> Including unemployed ones.

plants across the UK; the dispute was settled with a deal<sup>274</sup>, arising from ACAS talks<sup>275</sup>, in which the contractors and unions agreed to the hiring around 100 “locally sourced” skilled and unskilled workers<sup>276</sup>, and that no foreign workers would lose their jobs as a result of the deal<sup>277</sup>.

Workers protested that, at a time of deep recession in the UK and increasingly high unemployment, a contractor with a public commitment to corporate social responsibility was refusing to hire local workers<sup>278</sup>; the unions were also extremely concerned about about the lack of wage transparency and the employment status of the foreign workers, which potentially allowed the company to undercut labour costs in particular by not paying breaks and travel fees and allowances and not including the preparation time in the shift calculation,

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<sup>274</sup> It has been noted that nor Total nor the companies affected by solidarity strikes sought *interim* injunctions against the unofficial actions; this conduct, rather than based on a strict legal reasoning, seems to be deriving from the fact that it would not lead to “harmonious” or “productive” industrial relations for the case of highly unionized (and activist) workforce. See Novitz in Bücken and Warneck 2010, p.103

<sup>275</sup> Since the industrial action was unofficial, ACAS could engage only in facilitation, not formal conciliation, of the dispute itself, although in practical terms the differences between facilitation and conciliation are somewhat slim. See Barnard 2009b, p. 248

<sup>276</sup> The unions had rejected a previous offer of hiring 60 (out of 195 disputed). ACAS underlined how “locally sourced” only made reference to the advertisement through the public employment service and highlighted that such an expression would not entail direct discrimination on the grounds of nationality

<sup>277</sup> See Foreign labour row 'deal reached', BBC News 4 February 2009, available online at [http://news.bbc.co.uk/2/hi/uk\\_news/7868777.stm](http://news.bbc.co.uk/2/hi/uk_news/7868777.stm). It should be noted that in June, a dismissal and hiring of workers carrying out essentially the same job by two of the Total sub-contractors involved in the January/February dispute gave origin to another wave of protests involving “wildcat” strikes and walk-outs ([http://news.bbc.co.uk/2/hi/uk\\_news/england/humber/8095182.stm](http://news.bbc.co.uk/2/hi/uk_news/england/humber/8095182.stm)). The unions lamented that the cross redundancies and hirings were in breach of the February agreement and represented a victimisation of the workers involved in unofficial action, while Total maintained that no such agreement existed; nevertheless another round of ACAS talks (this time made more difficult by the decision by Total to order to contractors to dismiss the staff taking unofficial industrial action, see [http://news.bbc.co.uk/2/hi/uk\\_news/england/humber/8108434.stm](http://news.bbc.co.uk/2/hi/uk_news/england/humber/8108434.stm)) ultimately led to the reinstatement of the dismissed workers, and the exclusion of redundancy for original 51 workers employed by Shaw.

<sup>278</sup> It was underlined how the IREM workforce was not complete and that the Portuguese workers had been supplied or hired through an agency instead of recurring to local labour which had had the relevant skills and experience. The Lindsey protest, however, were also characterized by the slogan “British jobs for British workers” and were not seldom presented as part of a “new protectionism” with nationalistic and xenophobic overtones, as the far-right British National Party (BNP) supported and encouraged the action. See ACAS 2009, par. 9, Barnard 2009b, p. 252, Novitz 2010, p. 26 and <http://libcom.org/history/2009-strike-lindsey-refinery-struggle-entangled-nationalism>

notwithstanding the assurances by IREM that rates and allowances determined by the NAECI agreement<sup>279</sup> would be paid.

It should be noted that while IREM is nominally bound by the “blue book” agreement when carrying out work in the UK, such agreement does not comply with the conditions set out by articles 3.1 and 3.8 PWD<sup>280</sup> and cannot, therefore, serve as a source of mandatory rules<sup>281</sup>; English law, in fact, does not contain a mechanism for declaring collective agreements or arbitration awards to be universally applicable nor the UK has not decided to rely on the NAECI agreement as a source of regulation.

However while the Italian company, according to the renewed EU context deriving from *Viking*, *Laval* and *Rüffert*, could not have been forced to apply the terms and conditions deriving from the agreement in question but only to respect the minimum wage levels set by statutory provisions<sup>282</sup>, it should be also noted that it was a tender requirement that the awarded company would respect the content of the NAECI agreement and IREM accepted that it would comply with this obligation<sup>283</sup>.

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<sup>279</sup> National Agreement for the Engineering Construction Industry, so-called “blue book” agreement, determines the pay and conditions for workers at all major engineering construction sites in the UK and requires that all member firms of the Engineering Construction Industry Association (including Jacobs and IREM) abide by the terms of the agreement where projects are put within its scope. It should be also noted that, while not obliged to agree, Total chose to conduct its project under the terms of the NAECI agreement, and that therefore IREM, in submitting a tender, was implicitly accepting that all of their workers on site would be employed on the terms of the blue book agreement independently from its affiliation to ECIA. See ACAS 2009, par. 4-7

<sup>280</sup> Notably stating that standard terms and conditions of employment may be imposed by collective agreements or arbitration awards which have been declared universally applicable (in particular in the construction sector) or collective agreements concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory

<sup>281</sup> Except for those cases in which the agreement may reflect obligations imposed in any event by law or administrative provision. See ACAS 2009, par. 22

<sup>282</sup> In particular the National Minimum Wage Act of 1998. See also Orlandini 2009

<sup>283</sup> There is no evidence that IREM ever objected to being subject to the more onerous requirements of the blue book agreement, going beyond the the *minima* laid down by the PWD. The focus of the dispute at hand, therefore, was the actual compliance by IREM with the terms and conditions (the ACAS inquiry was not able to determine such compliance, nor IREM was able to provide evidence of it) and, on more general terms, the “weakness” of the UK’s implementation of the PWD, which fails to guarantee UK agreements, leaving space for the employers to (further) undermine existing standard. It has been further noted that the agreement putting an end to the first dispute the provided that the contractors would hire 102 “locally sourced” workers; this solution also raises questions as to its compatibility with EU rules, given its contrariness to Articles 39 and 49. See ACAS 2009, par. 11, Barnard 2009b, p. 256 and 262 and *amplius* Novitz in Bückner and Warneck 2010, p. 114-118

The other main element emerging from the dispute regards once again the potential liability of unions for breaches of fundamental market freedoms under EU law; the strikes and protests in the Lindsey dispute represented a classic example of “wildcat” strikes, undertaken without the authorization or endorsement of the union, and of secondary action in sympathy with the workers involved in the original dispute<sup>284</sup>. While UK law makes unions responsible for a wide range of strike activity even when the strike has not been initiated by the union such collective actions appear to lie beyond the scope of *Viking* and *Laval*<sup>285</sup>, which referred trade union liability to actions challenging EU free movement rules thoroughly organized by such organisation.

Furthermore, it should be considered that individual workers cannot perform the same function of “quasi-regulatory bodies” carried out by the trade unions, and therefore cannot be considered liable relying on the *Viking* and *Laval* jurisprudence<sup>286</sup>.

In the aforementioned Lindsey dispute it was the suitability and appropriateness of the balance being struck between business and workers by the national framework to be questioned, as well as between the social and economic dimensions of the EU project.

Similarly, in the wake of the OpenSkies dispute, BALPA submitted an application to the Committee of Experts of the ILO against the United Kingdom for breach of the Convention No. 87<sup>287</sup>, underlining the failure of the Government to effectively protect the social rights jeopardized by economic processes through a

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<sup>284</sup> Authorization for the industrial action had been repudiated by the relevant unions (GMB and Unite) under § 21 TULRCA.

<sup>285</sup> See Kilpatrick 2009, p.21

<sup>286</sup> It is therefore arguable that, if the unions were to be involved in the Lindsey dispute, they could have been considered liable. The UK disputes clearly raise the question whether unions will be held responsible under Article 49 for spontaneous industrial action not organized by the union in protest against the actions of foreign service-providers. See Syrpis and Novitz 2008, 420, Apps 2009, 147, Kilpatrick 2009a, p.21 and Novitz in Bucker and Warneck 2010, p.102

<sup>287</sup> *Application by the British Air Line Pilots Association to the International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations against the United Kingdom for breach of ILO Convention No.87* (hereby *BALPA Application*), available online at <http://213.146.190.47/Document-Library/Industrial-Issues/BALPA-ILO-Application-2009-01-26.aspx>. Soon after, UNITE also submitted in support of BALPA's application, which also was secured the support of the International Transport Federation (ITF), the TUC, IFALPA and ECA. See, among others, <http://213.146.190.47/Document-Library/Industrial-Issues/BALPA--UNITE-ILO-Submission-2009-03-11.aspx>

detailed reconstruction of the facts of the dispute and of the UK restrictive framework and judicial attitude on collective action<sup>288</sup>; furthermore, the union brought forward the view that the restrictions on collective action deriving from *Viking* and *Laval*<sup>289</sup> as well as, at national level, the threat for unlimited damages<sup>290</sup> and the uncertainties on the matter of the application of the proportionality test and on the absence of protection from dismissal for the workers represented severe inhibitions on trade union action and therefore could not be consistent with the respect for ILC 87, in particular when it was considered that the action undertaken in the OpenSkies dispute was legal according to the extensive UK regulation.

The succinct reply from the UK Government underlined that the trade union's application was "misdirected and misconceived", since the negative impact of *Viking* and *Laval* would be the consequence of the application of EU law, rather than of action by UK itself; furthermore, the actual impact on trade union freedoms remained uncertain, because the judgments would only apply when the economic freedoms are concerned, and were bound to produce different results on the basis of different facts of case concerned<sup>291</sup>.

Notwithstanding the CEACR stressed that its task is not to judge the correctness of the case law of the ECJ, the *Viking* and *Laval* doctrine was assessed by the Committee with reference to its potential impact at national level on workers freedom of association rights protected under ILC 87.

Taking in due consideration both BALPA's application and the Government's reply, the Committee considered that the ECJ judgements are likely to have a "significant restrictive effect on the exercise of the right to strike" in practice in a manner contrary to the Convention; in particular, among the permitted restriction on

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<sup>288</sup> See *BALPA Application*, parr. 14-30 (for the facts pertaining to the dispute), 36-61 (for the analysis of the UK statutory and case-law framework on industrial action) and 185, stating "the Courts themselves have recognized a lack of sympathy with trade unionism which has required considerable judicial restraint to avoid"

<sup>289</sup> "on the ground simply that the exercise of it interferes with an employer's freedom to conduct one of his enterprises in another country" (par. 77) as well as applying in a "wholly arbitrary way" depending on the effect on parent company and subsidiary and on the country of establishment of the companies involved (in EU or non-EU States, par. 160-161)

<sup>290</sup> *Ibid.*, par. 31-33

<sup>291</sup> There have been no subsequent analogous cases at the ECJ level, nor have there been any decisions by the UK domestic courts as to whether and to what extent the new principles might represent an additional restriction on the freedom of trade unions to organize industrial action in the United Kingdom. *Report of the Committee of Experts on the Application of Conventions and Recommendations*, p. 209

the right to strike, the CEACR had never included the “need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services”<sup>292</sup>.

With regards to the BALPA dispute, it was underlined that the practical limitations to the right of strike, in particular the threat of an action for damages and the loss of relevance and meaning of the strike deriving from the lengthy legal process linked with the *interim* injunctions, created a situation where the rights under the Convention could not be exercised. Furthermore, the Committee argued that cases involving cross-border elements are, in the current context of globalization, likely to be ever more common, in particular with reference to specific sectors of employment, like the airline sector. For the workers in these sectors, restrictions on the right to strike following from the economic freedoms may seriously jeopardize to their ability to negotiate meaningfully with their employers<sup>293</sup>.

In conclusion, the Committee requested that the Government of the UK should review its national legislation and consider appropriate measures for the protection of workers and their organizations to engage in industrial action, especially in the light of the previous observation in which the Committee had already asked the UK Government to amend the TURLCA with regards to the qualification of strike as a breach of contract and the exclusion of secondary and solidarity actions from the notion of “trade dispute”, in order to broaden the scope of protection available to workers who stage official and lawfully organized industrial action.

While it has been suggested that even small changes to the 1992 Act would provide responses to the problems highlighted by *Viking*<sup>294</sup>, and *Laval* and could be

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<sup>292</sup> While it had suggested that a notion of minimum services to avoid an irreversible or disproportionate damages to third parties “may be considered”. *Ibid*.

<sup>293</sup> “The impact [...] may indeed be devastating”. See *Report of the Committee of Experts on the Application of Conventions and Recommendations*, p. 209 and also Malmberg 2010b, p. 11

<sup>294</sup> In particular, clarification on the existence of the cap for damages also for breach of EU law and a review of the rules of *interim* injunction providing that an injunction should not be granted unless the applicant is in all the circumstances substantially more likely to succeed than to fail at the trial of the action (as already proposed in the in accordance with the proposals in the TUC’s Trade Union Rights and Freedoms Bill 2007). See *amplius* Ewing and Hendy 2009, pp. 17-18



addressed by allowing for the registration and extension of national agreements<sup>295</sup>, there has been no legislative UK response on the matter, and the current lack of interest expressed in this issue by any of the major UK political parties<sup>296</sup>, compounded by the Court's reluctance to take into account the international protection of fundamental right testified by *Metrobus*, highlight the uncertainty and potential procedural and financial burdens that have undermined the trade unions' ability to provide democratic representation of workers' interests in the aftermath of the ECJ judgments in question<sup>297</sup>.

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<sup>295</sup> To be achieved on the basis of three main options, and specifically a) the "legalization" of defined collective agreements b) the extension of the agreement to employers who were not parties (a regime similar to the repealed Employment Protection Act 1975) and c) the imposition of a duty on posting employers to comply with defined collective agreements, with the exception for the case where the terms of the agreement were not being applied with the same obligations or effects by national undertakings "in a similar position". Ewing and Hendy 2009, 19-21

<sup>296</sup> Novitz 2010, p. 31

<sup>297</sup> In particular when the British inactivity in adapting to the decisions is compared with the analyzed situation of other MS, which have taken elaborate steps in changing their national framework with a view of protecting their industrial relations and welfare systems from the more relevant consequences of the "Laval quartet"

## **4- IN SEARCH OF A REGULATION OF THE EUROPEAN RIGHT TO COLLECTIVE ACTION CAPABLE OF RESTORING THE POWER BALANCE IN EUROPE: POLITICAL APPROACHES AND JUDICIAL PATHWAYS**

### **4.1 - Early Responses and the adoption of the Lisbon Treaty**

In *Viking* and *Laval* the ECJ has interpreted provisions of the Treaty, the legislative framework instrument as the PWD, but has also assessed trade unions' rights of collective bargaining and the right to strike; diverging from previous case law the Luxembourg Court assessed the relationship between the economic freedoms and the collective labour rights by following an approach based on the principles of market economy<sup>1</sup>, disregarding the meaning of the rights involved as fundamental rights of the workers, and their function as main tools for rebalancing the asymmetries in the labour market recognised in most national Constitutional, legal and conventional frameworks and tipping the balance decisively in favour of the economic dimension of the EU<sup>2</sup>.

The seemingly broad recognition of the fundamental trade union right to undertake collective actions<sup>3</sup> entailed an examination by the ECJ in the light of Articles 43 and 49 of the EC Treaty<sup>4</sup>, whose outcome determined that the limitation

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<sup>1</sup> Landa Zapirain 2010, p. 94

<sup>2</sup> Eklund 2008, p. 570

<sup>3</sup> *Viking*, par. 42-44 and *Laval*, par. 89-91. Is it noteworthy to further underline that the “organic” reconstruction by the ECJ of the role of trade unions in collective action should not be underestimated, in particular with reference to those national systems in which also individual workers are entitled to strike, without the need for any trade union coverage.

<sup>4</sup> See Novitz in Ales and Novitz 2010, p. 254

on free movement can be justified so far as the collective action is necessary and proportionate; the perspective adopted by the ECJ only recognizes collective labour right as a hinderance to the functioning of the single market<sup>5</sup>, rather than as a resource promoting its correct development.

The main concepts and elements surrounding the actions involved in the disputes, namely the “protection of workers”<sup>6</sup>, the restrictions to the economic freedoms<sup>7</sup> and the clarity, precision and accessibility of the provision regarding minimum rates of pay<sup>8</sup>, were also construed and interpreted in a restrictive way, thus determining a situation in which the trade unions may potentially create barriers to free movement in a very wide variety of situations, and be therefore held accountable for breach of Treaty provisions, when exercising their “regulatory functions” through collective bargaining and action<sup>9</sup>; in order to justify their activity the trade unions therefore need to demonstrate that their actions serve a wider public order goal, while on the one hand, an employer can act freely in pursuit of its company interest and to invoke the “heavy argument” related to the promotion of the fundamental freedoms of the Treaty<sup>10</sup>.

Indeed, the ECJ reaffirmed that the European project emerging from the Treaty of European Community and the Treaty on European Union maintains as its main purpose the economic integration of its Member States, and that social policy is to be considered nothing more than an accompanying policy, always subordinate to the realization the internal market, which represents the priority.

On one hand the ECJ approach on social dumping and on the rebalancing of social rights and economic freedoms appears particularly consistent with the measures adopted at national and European level in response to the crisis, based on the idea that competitiveness and growth require more flexibility, less room to collective bargaining and cuts to social expenditures; furthermore, the judicial course

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<sup>5</sup> Almost in a “restraint of trade” perspective, See Rodríguez-Piñero y Bravo-Ferrer 2009, p. 538.

<sup>6</sup> Determined in a perspective closely linked with the workers’ immediate economic interests and job security. *Viking*, par. 90. See also *amplius* Pallini 2009, with particular reference to the public policy justification.

<sup>7</sup> *Viking*, parr. 72-73 and *Laval*, par. 99

<sup>8</sup> *Laval*, par. 110

<sup>9</sup> *Viking*, par. 62 and 65 and *Laval*, par. 98.

<sup>10</sup> See Zahn, De Witte 2001, p. 444

in object seems to favour progressively greater integration and a more unified framework with reference to the right to collective bargaining and action. When hindering the fundamental economic freedoms the national regulatory frameworks need therefore additional justification in the light of general criteria defined by the Court through an apparently arbitrary selection of various elements derived from different jurisdictions, reducing or even removing the policy options that can be used in order to respond to the pressures in particular deriving from the European enlargement in the process<sup>11</sup>.

On the other, as noted above, the domestic responses to the ECJ rulings in the Laval quartet present a high degree of variance, both in terms of intervening actors and of the actual features of the measures considered, which not seldom raise further doubts of compatibility with the EU framework; the criteria and principles elaborated by the Luxembourg Court, while evidently proceeding towards a restrictive reconstruction of collective labour rights deriving from clear political and regulatory options<sup>12</sup>, lack a certain degree of technical detail and do not appear to be based on sound legal reasoning, not offering therefore sufficient guidance both for national political institutions and juridical bodies<sup>13</sup>.

The uncertainties linked with the current situation can foster unfair competition, social dumping, and highlight existing tension between older and newer MS, while also threatening TU solidarity; it appears evident that the ongoing enlargement processes as well as the consolidation of the internal market should

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<sup>11</sup> It has been noted that with the rulings in *Viking* and *Laval*, the Court did not seem to avoid anymore to make significant policy judgments about national laws, having abandoned the restraint showed in the early goods (especially food)-related cases where in the assessment of the justifications put forward by the MS (in particular, consumer protection and public health) and their proportionality was guided by the principle of majoritarianism in the EU. See Barnard 2009a.

<sup>12</sup> In particular the noted proportionality and *ultima ratio* principles for collective action, the rigid criteria used to define collective agreements under the PWD (also for the case of public procurement), and the case-by-case assessment of public policy notions, on the basis of a strict proportionality test often run counter the industrial relations traditions of a significant number of EU Member States; in particular the latter appears to significantly reduce the MS' prerogatives in determining which aspects of their labour law are so essential to the public interest that they must be respected by all undertakings operating on their territory because of their being limited in accordance with the "EU public order": by doing so instead of evaluating the compatibility of the single national provision on the basis of the same criteria (the common concept of public interest), the same minimum requirements are imposed for the protection of the different social and economical orders realized in the single national context. Such an interference collides with the aims and the competences assigned by the Treaty not only to the ECJ, but to the EU as a whole. See Pallini in Vimercati 2009, p. 208, Novitz in Ales and Novitz 2010, p. 269

<sup>13</sup> See *infra* in this paragraph.

not be left to often unsatisfactory case law and market operators' initiative<sup>14</sup> but should be articulated, in principle, from the legal instruments of EU law, without failing to take into account the social goals and dimension of the Union.

#### *4.1.1 - ETUC and European Parliament Proposals*

The need to respond legislatively to the serious challenges posed by that ECJ legal doctrine in order to avoid the consolidation of an unbalanced and precarious framework is also justified by the urgency of containing the progressive disaffection of large sectors of the society growing more and more disenchanted with the liberal economic approach undertaken in the development of the European project<sup>15</sup> and with the interferences of the ECJ decisions with highly politically salient norms, institutions and policy choices on the basis of the extension the reach of Treaty freedoms into policy areas were nonetheless explicitly excluded from the domain of

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<sup>14</sup> It should be noted that that there was no written reaction from BusinessEurope on the matters involved by the Viking quartet. The organization, however, has given in several occasions oral statements making it clear that ECJ rulings are limited to a balance between rights and interests and that the right to strike has not been denied by the Court, but simply limited in its more disruptive effects in accordance with the established principle of proportionality, in order to prevent that its exercise may adversely affect the functioning of the internal market, by hindering in particular the free provision of services. BusinessEurope therefore has opposed any proposal for reform of primary and secondary law that excludes the exercise of trade union from the scope of market freedoms, and that no significant legislative revision (in particular of the PWD) is needed. See also Warneck in Bücken and Warneck 2010, p. 126

<sup>15</sup> Landa Zapirain 2010, p. 88, underlining in particular the "serious episodes" occurred in the EU-15 national setting in the various EU *referenda* conducted so far

delegated powers such as pay, collective bargaining, strikes and lockouts<sup>16</sup>, education<sup>17</sup>, vocational training<sup>18</sup>, culture<sup>19</sup> and health care<sup>20</sup>.

A coordinated set of responses to the negative consequences to be taken at EU level was early proposed by ETUC, in particular demanding the addition of a legally binding Social Progress Protocol<sup>21</sup> to the Treaties with the objective of defining the aims and principles of the European social model<sup>22</sup> and clarifying the

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<sup>16</sup> Art. 137.5 EC

<sup>17</sup> Art. 149.4 EC

<sup>18</sup> Art. 150.4 EC

<sup>19</sup> Art. 151.5 EC

<sup>20</sup> Art. 152.5 EC. See Scharpf 2010, p. 231. In this context stands out the “negative solution” proposed by the same Scharpf, *i.e.* a refuse by the Member States to comply with ECJ rulings, on the basis of the fact that “there is quite a lot of clandestine non-compliance” among the MS, especially in consideration of the fact that any dissatisfaction of the voters is reflected on the national government rather than on the EU representatives or institutions. At the same time, however, no MS has publicly refused to comply with ECJ rulings and none will, since such a decision could likely throw the entire EU into a crisis. In order to maintain the support for European integration while defending from excessively restrictive judicial interpretation of Treaty clauses, if a government intends to react to an ECJ ruling, it should declare that it considers that judgement to represent a case of judicial legislation overstepping the limits of European powers: compliance would be assured if judgment were to be approved by a majority vote in the Council of Ministers; this “appeal” to a EU political authority would ensure that the decision taken by the ECJ does in fact reflect the current political consensus.

The proposed procedure is certainly appealing, while presenting some legal complexities, but as also the author underlined, there not seem to be any country ready to publicly contesting an ECJ ruling, and on the other hand, the concept of “compliance to EU law” is often used by national governments as a justification for domestic and unpopular legislation. The presence of such an instrument would deprive national governments of such justification in the public eye or, at least, would make them accountable by voters also for their excessive “zeal” or “passivity” in complying to directions coming from the EU institutions deemed as undesirable or unnecessary. Such a solution is also bound to increase the political frictions between “sending” and “receiving” countries, since for the matter ay hand it is easy to imagine the clashing demands and expectations brought forward by these two categories of MS, especially when it is considered that at the present moment MS with well developed IR and welfare systems (*i.e.* the older members) do not find much support from the EU, and that in the ECJ cases it has been possible to identify a clear split between the choices of the EU-15 and NMS-12 (and in particular CEE) Member States; this heightened sense of contraposition could also very well reflect negatively at trade union level (where the political boundary between “old” and “new” Member States finds a very similar corresponding split) radicalizing the differences and further undermining trade union solidarity at European level, a concept already severely challenged by the current situation. See Scharpf 2008

<sup>21</sup> SPP. the proposal is available online at <http://www.etuc.org/a/5175>

<sup>22</sup> Characterized in particular by “the indissoluble link between economic performance and social progress”, in a perspective in which a highly competitive social market economy “is not considered an end in itself, but should be used to serve the welfare of all”. See SPP, art. 1

relationship between fundamental social rights<sup>23</sup> and economic market freedoms<sup>24</sup> with the explicit aim of influencing future decisions by the ECJ, as well as an extensive revision in order “to better achieve its aims” of ensuring fair competition and respecting workers’ rights, whose specific features were defined by an Expert Group composed by trade unionists and academics<sup>25</sup>.

The main aspects of the PWD, such as the legal base, the definitions of posted worker and trans-national service, should be reviewed, and other important matters should be covered, with particular attention to the respect of the bargaining role of the trade unions and the possibility for MS to include workers’ protection into the notion of “public policy” and provide for social clauses in the case of public procurement procedures<sup>26</sup>, in order to restore the “minimum” character of the PWD<sup>27</sup>; specifically, while not containing a a positive regulation of the right to strike, the ETUC intends to protect the fundamental right to collective action through the

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<sup>23</sup> “in particular the right to negotiate, conclude and enforce collective agreements and to take collective action, [...] for the protection of existing standards as well as for the improvement of the living and working conditions of workers in the Union also beyond existing (minimum) standards, in particular to fight unfair competition on wages and working conditions, and to demand equal treatment of workers regardless of nationality or any other ground” SPP, art. 2

<sup>24</sup> In particular, economic freedoms and competition rules shall not have priority over fundamental social rights and social progress, and in case of conflict fundamental social rights shall take precedence. Economic freedoms “cannot be interpreted as granting undertakings the right to exercise them for the purpose or with the effect of evading or circumventing national social and employment laws and practices or for social dumping” and must be interpreted as not infringing upon “the exercise of fundamental social rights” (including collective bargaining and action) and “the autonomy of social partners when exercising these fundamental rights in pursuit of social interests and the protection of workers.” *Ibid.*, art. 3

<sup>25</sup> Furthermore, as a practical reaction to the ECJ decisions ETUC established an “early warning system” network of lawyers in the national federations in order to be able to be proactive in upcoming cases of concern to trade unions in Europe.

<sup>26</sup> Also addressed by ETUC Expert Group, infact, is the relation between PWD as is currently interpreted and ILO Convention 94, which has been ratified by 10 MS and whose ratification and implementation process continues. ILC 94, in fact, states that conditions under public procurement contracts should not be less favorable than those established for the same work in the same area by collective agreement or similar instrument, apparently in direct contrast with the solution found by the ECJ in *Rüffert*. See *supra* parr. 2.2.3 and 2.3.5

<sup>27</sup> Therefore reverting its current configuration as a “maximum” directive with regard to the matters that can be regulated, the degree of protection that can be required, and the methods that can be used to ensure the employment condition are observed by all undertakings in the same region or sector. See ETUC Expert Group on Posting 2010, p. 18

introduction of a “Monti-style” clause in the principles of the PWD<sup>28</sup>, as well as several references to the legitimacy exercise of the right to strike, both with regards to the host country workers<sup>29</sup> and to the posted workers<sup>30</sup>.

For what it refers to the EU institutions, in April 2008 a Commission statement emphasized that the freedom to provide services did not contradict and was not superior to the right to strike, organise and join a trade union or negotiate collective bargaining agreements, that the ECJ decisions did not jeopardize national systems of industrial relations and that the the Commission would “continue to fight against any form of social dumping or disrespect of workers’ rights”.

The urgency of the need to mobilize the Community institutions for the defense of fundamental rights of European citizens is also testified by a European Parliament Resolution of October 2008<sup>31</sup>, adopted as a direct reaction to the ECJ rulings of the “Laval quartet” and stressing the need of restoring the balance between respect for the fundamental economic freedoms<sup>32</sup>, the guarantee of the fundamental rights and social objectives set out in the Treaties, and in particular the exercise of trade union action, recognised by the Charter of Fundamental Rights of

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<sup>28</sup> By-passing the preclusion of art. 153.5, the amended article 1 would provide that the PWD “may not be interpreted as affecting in any way the exercise of fundamental rights as recognized in Member States and in international treaties , including the right or freedom to strike and the right to collective bargaining These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States.” See ETUC Expert Group on Posting 2010, p. 22

<sup>29</sup>With particular reference to the fact that the current interpretation of art. 3.7 PWD, allowing the “application of terms and conditions of employment which are more favourable to workers”, only refers to a situation where employers sign on their own accord a collective agreement in the host MS, prohibiting trade unions to use their usual means of pressure in order to encourage the employer to conclude collective agreement in the host Member State, therefore depriving the article of a lot of its practical effect. *Ibid.*, p. 19

<sup>30</sup> However, as it was noted by the same Expert Group, a revision of the text of the PWD does not imply a change in the ECJ’s approach to Article 56 TFEU (49 EC). This issue, as well as the limits on the right to strike, can only be addressed at Treaty level, possibly “taking into account the now binding Charter of Fundamental Rights as well as the relevance of ILO and Council of Europe standards”. See also the similar conclusions reached in the draft resolution at the 7-8 December ETUC Executive Committee (*Achieving social progress in the single market: proposals for protection of fundamental social rights and posting of workers*, EC196/EN/8), <http://www.etuc.org/IMG/pdf/08-EN-Achieving-social-progress-in-the-single-market.pdf>

<sup>31</sup> *European Parliament resolution of 22 October 2008 on challenges to collective agreements in the EU 2008/2085 INI* (Own-initiative procedure, hereby also *Challenges Resolution*), adopted by 474 votes in favour, 106 against and 93 abstentions

<sup>32</sup> Defined as “one of the cornerstones of the European project”. See *Challenges Resolution*, par. 1



the European Union<sup>33</sup> and protected by the constitutional practice of most Member States, and the right to ensure non-discrimination, equal treatment, and the improvement of living and working conditions.

The analysis of the relation between the economic freedoms and the right to collective action is particularly focused on the concept of proportionality; the rebalancing must take into account on one hand that cross border activities of undertakings which may jeopardize terms and conditions of employment in the host country must be proportionate and cannot automatically be justified by the EC Treaty provisions on economic freedoms, and on the other that the requisite of proportionality introduced by the ECJ should not be applied to collective actions against undertakings deliberately undercutting terms and conditions of employment<sup>34</sup>.

With specific reference to the PWD the main points highlighted refer to the possibility for public authorities and social partners to lay down more favorable terms and conditions of employment, in accordance with the different traditions in the Member States, the provision of recital 22 which states that such instrument does not prejudice the national frameworks on collective action and that any interpretations which may invite unfair competition between undertakings is incompatible with the Directive<sup>35</sup>; the European Parliament, demonstrating a far superior social sensitivity than the ECJ, called on the Commission to prepare the necessary legislative proposals which would assist in preventing any future conflicting interpretation deriving from “loopholes and inconsistencies” present in the current framework.

Furthermore, it also underlined the possibility of partial reviews of the PWD should not be excluded, aimed at clarifying its relationship to ILO Convention 94, laying down clear rules to combat abuses, in particular “letterbox companies”, in its

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<sup>33</sup> Several references were made to the adoption of the Lisbon Treaty and the fact that the Charter of Fundamental Rights of the European Union is to be made legally binding, and that the ECJ did not recognize that, under the ILO conventions 87 and 98, restrictions on the right to industrial action and fundamental rights can only be justified on grounds of health, public order and other similar factors

<sup>34</sup> *Challenges Resolution*, par. 16

<sup>35</sup> *Ibid.*, parr. 6, 7 and 12

code of conduct for companies under the Services Directive<sup>36</sup> and putting forward the Communication on transnational collective bargaining<sup>37</sup>.

Notwithstanding the fact that the European Parliament had put forward the question of potential amendments at European level for the Treaty and the PWD the Commission, while agreeing that “correct and uniform application and enforcement of the provisions of the PWD are essential in terms of protecting posted workers rights”, did not see any need for such legislative action, maintaining the view that “the current PWD provides a sufficient and appropriate framework within which the issues raised can be appropriately addressed” and focusing instead on the improvement of the implementation with particular reference to the administrative cooperation of national monitoring and enforcement bodies<sup>38</sup>.

#### 4.1.2 - *The Treaty of Lisbon and the European “social market economy”*

In December 2009, however, a long and difficult process of reform<sup>39</sup>, marked in particular by the failure of the draft of the European Constitution, was concluded

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<sup>36</sup> *Challenges Resolution*, par. 34

<sup>37</sup> The Member States were asked to enforce the PWD in a proper manner; particular reference was made to the fact that labour market legislation and rules concerning negotiations and collective agreements are the competence of Member States and social partners and that it is the task of the Member States to improve and to make full use of prevention, monitoring and enforcement measures, in conformity with the subsidiarity principle. See *Challenges Resolution*, par. 25 and Warneck in Bücken and Warneck 2010, p. 124

<sup>38</sup> SP(2008)7292/4, 12 January 2009. This attitude would subsequently change, see *infra* in this paragraph

<sup>39</sup> Started at the Laeken summit in 2001 with a declaration (the Convention on the future of Europe) to investigate the simplification and reorganization of the EU Treaties and institutions, and underlining how the potential outcome could have been a Constitution. Such text was signed in Rome in 2004, and subsequently rejected by French and Danish *referenda* in 2005. An agreement on the main points of a replacement treaty was reached (under the German EU presidency) and the final draft was ultimately agreed on by the leaders of the MS in October 2007 at the meeting of the European Council (the signing of the Treaty took place in Lisbon on 13 December 2007). Instead of a representing a new text the Reform Treaty, while implementing many of the reforms included in the European Constitution, was proposed as an amendment of the existing Treaties which was intended to come into force on the 1st of January 2009.

when the Treaty of Lisbon<sup>40</sup> was ratified by all Member States<sup>41</sup> and entered into force, amending the EU Treaty and the Treaty establishing the European Community, which was renamed Treaty on the Functioning of the European Union<sup>42</sup>; the most relevant development with regards to the fundamental rights is represented by the attribution to the Charter of Fundamental Rights of the "same legal value as the Treaties"<sup>43</sup>, which recognizes a comprehensive list of social and labour rights at the highest level of the European legal sources.

The social rights recognized in the Charter, while not incorporated in the hard letter<sup>44</sup>, are echoed in the opening articles of the new EU Treaty: the Union poses as its basis the values of dignity, equality, solidarity and equality between men and women<sup>45</sup> and between the objectives it is called to pursue it is set the creation of a "highly competitive social market economy, aiming at full employment and social progress"<sup>46</sup>.

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<sup>40</sup> *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, 2007/C 306/01*

<sup>41</sup> During the course of 2008 most MS ratified the Treaty through parliamentary processes (see *infra* for the German Federal Constitutional Court ruling of 2009); however, an Irish referendum in 2008 rejected the Treaty, and was reverted (by a second referendum) the October of following year. Furthermore, Czech Republic had subjected the ratification to the extension of the UK-Poland protocol (see *infra* in this paragraph) and to a positive ruling on the compatibility of the Treaty by the national Constitutional Court, and the instrument of ratification was ultimately lodged only in November 2009.

<sup>42</sup> *Treaty of Lisbon, art. 2(b)*

<sup>43</sup> See art. 6.1 TEU. As previously noted (see *supra* parr. 1.2.2 and 1.2.3) the Charter, adopted in Nice in 2000 as a "political manifesto", and while assuming judicial relevance in particular in a "confirmatory role" it was not granted with binding nature. The Charter was intended to be at the core of the European constitutionalization process, acquiring full legal force in EU law, with the rejection of the Constitution the Charter was at risk of being dropped, but this danger was ultimately averted with the reference in the new version of the Treaty, which avoided the problematic incorporation of the Charter in the Treaty (notwithstanding the proposal for instance by ETUC, the text of the Charter, revised in 2007, has not been reproduced in the text of the Treaties, and it does not appear in the Protocols), but still should be read as requiring institutions to respect the rights it contained in the exercise of their prerogatives. See Orlandini 2010

<sup>44</sup> It was noted that the choice of a separated Bill of Rights was probably connected to the opt-out decisions of United Kingdom, Poland and Czech Republic (in the latter case still to be implemented, see *infra*), in particular to avoid partial ratification of a single reform text; furthermore, art. 6.3 TEU clarifies that the CFREU does not represent an exhaustive list of the rights protected in the union, since the ECHR (independently from the accession indicated by art. 6.2 TEU) and the constitutional traditions common to the MS (which are evidently not incorporated in the text of the Treaties) are also to be considered sources to identify and protect the European heritage of fundamental rights. Gianfrancesco 2008 p.8 and *infra* for the possible interaction of the ECtHR rulings with the ECJ jurisprudence with regards to collective action

<sup>45</sup> Art. 2 TEU

<sup>46</sup> Art. 3.3 TEU.

However, while the reference to the CFREU undoubtedly represents a positive development, it must be considered whether the “constitutionalization” of the Charter on the basis of the approval of the Lisbon Treaty entails that the exercise of fundamental rights, including therefore the right to strike forms a non-derogable content of the *acquis communautaire*<sup>47</sup>, entailing therefore that no amendments would necessary be in the fundamental EU legal framework to “reorient” the aims of the EU towards the reconciliation of the social and economic dimensions of the Union, given in particular the references to the promotion of the “social market economy” of art. 3.3 TEU<sup>48</sup> and the protection of the “essence” of the rights and freedoms recognised by the Charter set by art. 52 CFREU<sup>49</sup>, in order to ensure changes in the dynamics of European integration towards the development and the protection of workers' rights<sup>50</sup>.

It should be underlined how article 6.1, while formally recognizing the Charter, also recalls that the rights, freedoms and principles of the Charter shall be interpreted in accordance with the provisions of Title VII of the Charter itself<sup>51</sup>, as

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<sup>47</sup> See Landa Zapirain 2010, p. 99, underlining also that such a solution would resolve the almost permanent conflict between the domestic and EU dimensions raised in *Solange I and II* (29/5/74 and 22/10/86, respectively), where the German Federal Constitutional Court (*Bundesverfassungsgericht*, BVerG) stated its jurisdiction over those actions or provisions adopted at Community level that were not consistent with respect for fundamental rights enshrined in German constitutional law.

<sup>48</sup> See Scharpf 2010, p. 212

<sup>49</sup> See Ales 2008, pp.15-16

<sup>50</sup> See Orlandini 2010. In particular it must be noted that the reference to the internal market is no longer accompanied by the requirement for “free and undistorted” competition formerly embedded in the fundamental provisions of the EC Treaty (art. 3.1(g)EC) which was also used by the ECJ as interpretative guidance to support an expansive reading of the competition rules as fundamental provisions essential for the accomplishment of the Treaty objectives (see *Cases 6/72 Europemballage and Continental Can v Commission* and *C-453/99 Courage v Crehan*, in which the ECJ held that violations of Article 81.1 could lead to a right to damages before national courts); therefore the current catalogue of aims only provides for the establishment of an internal market. The principle of undistorted competition appears in the Protocol (No 27) on Internal Market and Competition stating “the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted”, and providing that the Union “if necessary” may “take action under the provisions of the Treaties”, including art. 352 TFEU; it may also be considered that art. 3.1(b)TFEU, stating the exclusive competence for the Union in the matter, refers to “the establishing of the competition rules necessary for the functioning of the internal market” and art. 119, underlines that the activities of the EU and of the MS in the economic and monetary policy shall be carried out “in accordance with the principle of an open market economy with free competition”. As art. 51 TEU gives equal weight to the Treaty and Protocols, the excision of art. 3.1(g)EC from the letter of the Treaties cannot be considered as necessarily implying a change in *core* policy aspects of the Union. See also Van Rompuy 2011

<sup>51</sup> The provisions governing the application of the Charter, so-called “horizontal clauses”, artt. 51-54 CFREU

well as explanations of the Presidium<sup>52</sup>, and that it unambiguously reiterates, in particular in combined reading with art. 51 CFREU<sup>53</sup>, the impossibility of extending

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<sup>52</sup> In particular, for what it refers to collective action, it is stated that art. 28 CFREU is based on Art. 6 of the ESC and on the CCFSRW (points 12 to 14). Reference is also made to the recognition by the ECtHR of the right to collective action as “one of the elements of trade union rights laid down by Article 11 of the ECHR” (see *infra* for the evolution of the ECtHR on the matter); the modalities and limits for the exercise of collective action, including strike action, come under national laws and practices, including the question of whether it may be carried out in parallel in several Member States. With regards to the binding force of the explanations, it is stated that they lack as such a status of law, but they represent “a valuable tool of interpretation intended to clarify the provisions of the Charter” and must be given “due regard by the courts of the Union and of the Member States”, a formula which evidently dilutes the original intention of a mandatory application and an extensive evolution of the rights protected under CFREU, in particular when the inadequacy of the updating process (as well as the quality of the explanations themselves) is taken into consideration; their relevance is therefore substantially non-existent, and that its content appears directly linked to the interpretive approach already established by ECJ doctrine. See *Explanations relating to the Charter of Fundamental Rights* (2007/C 303/02) and for an early analysis, Bercusson in Alston and De Schutter 2005, pp. 204-205

<sup>53</sup> Underlining how the CFREU’s provisions “cannot be used to extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union.”

the powers and competences as defined in the Treaties, significantly limiting its scope<sup>54</sup>.

While the rights recognised in the Charter and the relevance given to the social dimension of the Union should inspire the action and policy initiatives of the EU institutions such activities apparently continues to be limited by the provisions of the TFEU for what it concerns their specific competences, by the political balances between the institution themselves and, notwithstanding the recent occurrences, by the absence of supranational institutions capable to adopt economic, financial and

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<sup>54</sup> It must also be given note of the “opt-outs” contained in the *British, Czech and Polish Protocol (Protocol 30 on the application of Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom OJ 306, 17/12/2007, p. 156-157)*, and in particular with reference to the fact the the British opposition derives mainly from concerns relative to fact the the Charter could have been used to alter British labour law, especially the collective action framework (on the other hand, the Polish Government voiced “moral” concerns regarding equality of rights and benefits for homosexual couples and abortion, while the Czech Government, whose opt-out will be ratified in the next Treaty, feared that the implementation of the Charter could enable claims from WWII expellees). The “opt-outs”, aiming to “clarify the application of the Charter” (8th preamble) where realized through the inclusion of two articles stating that the scope of the ECJ in particular is not extended to the point of that laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the Charter (art. 1.1) and that, “for the avoidance of doubts”, the latter shall only apply to the extent that the rights or principles that it contains are recognized in the national law or practices (1.2). It has however been noted that while apparently the recently confirmed binding force of the Charter (in particular see the decision in Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG* underlining the potential relevance of the Charter as the benchmarking tool for national and EU legislation) cannot be considered as generalized, in particular because of the fact that within the EU the European courts cannot rule on fundamental rights issues related to the Charter if they emerging in or from determined legislations, it must also be considered that the Protocol implies that the Charter finds application to the national frameworks considered within the limits of the rights already recognized (the analysis for the UK framework therefore reverts to the legal definition to be given to collective action, protected as a right in the Charter but subject to severe limitations in the national framework). See also Pernice in Griller and Ziller 2008, p. 247.

Lastly, it must be taken into account that the Charter applies to Member States only when they are implementing EU law (art. 51.2); Notwithstanding the attempts to limit the concept of “wholly internal rule” (see AG’s opinion in Case C-212/06 *Government of the French Community and Walloon Government v. Flemish Government*) and the conclusion reached in Case C-48/07 *État belge – Service public fédéral Finances v Les Vergers du Vieux Tauves SA*, in which the ECJ stated that its jurisdiction extends to “questions concerning Community provisions in situations where the facts of the main proceedings are outside the scope of Community law but where those provisions have been rendered applicable by domestic law”, and that the reference for preliminary ruling (implying that the national court has established, a connection between the national and EU law) leads to the conclusion that that ECJ judgment will nonetheless bind the national court, the Court recently (Case C-339/10 *Estov v. Ministerski savet na Republika Bulgaria*, Order of 12 Nov. 2010) reaffirmed that purely national issues escape EU jurisdiction and therefore should not be affected by the application of the Charter. See Barnard 2011, pp. 4 and 10

fiscal measures and policies common between the Member States<sup>55</sup>; it should also be noted that the rules promoting the economic freedoms and governing the single market remained untouched by the reform process<sup>56</sup>, and still require that any right and in particular those of workers, should be exercised so as not to jeopardize the functioning of internal market.

In particular, social policy “for the aspects defined” in this Treaty represents one area of shared competences between the Union and the Member States under art. 4 TFEU, and one in which the Union may take initiatives to ensure the coordination between the Member States<sup>57</sup>; however also in this case the detailed rules governing governing the field in question were not substantively changed, aside from some technical adjustments. Therefore the the references to harmonization in art. 151 TFEU<sup>58</sup> are diluted by the distinction between the areas in which unanimity<sup>59</sup> within the Council prevails and those where decisions can be

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<sup>55</sup> In this sense it must be taken into account the intergovernmental agreement to guide the intervention in the sovereign debt crisis in the EU and for the safeguard of the common currency, as well as the new Regulations aimed at further strengthening the surveillance mechanisms in the euro area, as well as a Green Paper on presenting options for euro Stability Bonds. The current understanding reached by the Eurogroup is that the agreement involving 26 Euro countries and 9 more MS will focus on the union budget, by strengthening the coordination of economic policies, in particular through the adoption of more stringent rules to ensure compliance with the balanced budget providing a structural maximum overshoot of 0.5% of GDP (while leaving open the exceptiona possibility of deficit “adjustments”); for what it regards the instruments the debate is still open on the possibility of using the so-called “eurobonds”, recurring to ECB-managed funds, which should enter into force even earlier than planned, and the granting of loans on a bilateral basis to the IMF. At the time of writing, such intervention appears only in its initial stages; however, while providing more stringent rules it cannot be compared to a fiscal union, and the refusal by the UK also highlights the economic and political tensions and difficulties in reaching the unanimity necessary for substantial modifications of the EU legal framework. See Uni-Europa Legislative Report September-November 2011, [http://www.fabi.it/public/documenti/relazioni-internazionali/2011\\_12\\_06\\_uni\\_legislativereport.pdf](http://www.fabi.it/public/documenti/relazioni-internazionali/2011_12_06_uni_legislativereport.pdf), and also [http://ec.europa.eu/commission\\_2010-2014/president/news/documents/pdf/regulation\\_2\\_en.pdf](http://ec.europa.eu/commission_2010-2014/president/news/documents/pdf/regulation_2_en.pdf) and [http://ec.europa.eu/commission\\_2010-2014/president/news/documents/pdf/green\\_en.pdf](http://ec.europa.eu/commission_2010-2014/president/news/documents/pdf/green_en.pdf)

<sup>56</sup> In particular see the competition law provisions (now artt. 101 and 102 TFEU)

<sup>57</sup> Art. 5.3 TFEU

<sup>58</sup> Which in any case only makes reference to the ESC and the CCFSRW as instruments that have to be considered by the Union and the Member States in the promotion and harmonization in employment and living and working conditions, while explicitly recognizing (along with art. 152 TFEU) the “diverse forms of national practices” and the “diversity of national systems” (id est of industrial relations); a similar diversity is also suggested by art. 155.2 TFEU. See Dorssemont 2011b, p. 5

<sup>59</sup> And in particular the issue of representation and collective defense of the interests of workers and employers, including co-determination

made by qualified majority vote<sup>60</sup> and the exclusion of harmonization in the field of Member State cooperation<sup>61</sup>.

Similarly, the exclusions of competences set by art. 153.5<sup>62</sup> relating to pay, the right of association, the right to strike or the right to impose lock-outs, which the proclamation of the fundamental right to collective action in the Charter<sup>63</sup> inevitably needs to be confronted with; the contradiction between recognition of the right to collective action and absence of legislative competences in the field emerged with the approval of the Charter, is possibly even more visible after the Lisbon Treaty<sup>64</sup>.

The need to accommodate the political and economic tensions with regards to the right to strike and more in general to social policies should therefore rely on the Member States but, regardless of diverging political orientation of national Governments<sup>65</sup>, it appears extremely difficult for the EU-27 to find the necessary consensus to adopt social policies achieving the harmonization while maintaining the improvement living and working conditions still expected in the text of the art. 151 TFEU; such potential stalemate in the promotion of the social dimension of the EU evidently entails the risk that even the widest and progressive recognition of workers' rights, and especially the right to collective action, would not cause significant changes in the current EU framework, in particular if those rights are not

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<sup>60</sup> Now "ordinary legislative procedure". See 153 TFEU

<sup>61</sup> Art. 153.2 (a) TFEU

<sup>62</sup> Formerly 137.5 EC, which was not amended by the Treaty of Lisbon

<sup>63</sup> The proposed dichotomy between "implementable rights" and "recognisable principles" in the Charter escape the focus of the current analysis; it must be considered however, that, even if it is possible to draw such a distinction, that the Charter does not specify does not identify which provisions contain rights and which principles, and that the revised explanations, while giving examples of principles (art. 25 on the rights of elderly people and 37 on environmental protection), also state that some provisions may contain elements of rights and principles, such as the case of man-woman equality (art.23) and of social security and social assistance (art. 34). Lastly, with direct reference to the matter at hand, art. 28 on collective agreements and action as well as art. 30 on protection from unfair dismissal appear to be drafted in terms of (justiciable) rights.

<sup>64</sup> The Charter neither empowers the Community nor requires Member States to create a right to strike. Fudge 2011, p. 252

<sup>65</sup> It must be underlined that there can be identified a certain resistance against the acceptance of cooperative and unitary logics: alongside the absence of political consensus in the EU institutions about strategies to be pursued, at a national level against employers tend to exploit the situation to their advantage, especially where it is supported by the Government (as demonstrated by the Swedish case), while the new MS (in this supported by the UK) oppose the potential amendments of the relevant EU frameworks. Furthermore, the aforementioned national legislative responses to the ECJ judicial course are not inspired by the research and implementation of common solutions in the sectors involved, but rather appear directed towards the impact reduction and the "ECJ-proofing" of the domestic frameworks (also this sense it must be explained the Swedish opposition to the revision of the PWD). See also Blauberger 2011



given content through a systematic, effective and appropriate review of policies undertaken by the Union institutions.

## **4.2 - Institutional Developments: towards a rebalancing of the economic and social dimension of the Union?**

### *4.2.1 - The Monti Report and the Single Market Act*

In the wake of European elections of 2009 Commission President Barroso, in a speech to the European Parliament<sup>66</sup>, stated his “attachment to the respect of fundamental social rights and to the principle of free movement of workers”<sup>67</sup>, and highlighted that “the interpretation and the implementation of the posted workers Directive falls short in both respects”. In order to solve the problems arisen and with a view of fighting social dumping he proposed, instead of a revision of the PWD, a Regulation to be issued “alongside” the Directive; in particular, it was underlined how such an instrument would provide more legal certainty and a quicker application than a revision of a directive, which “would still leave too much room for diverging transposition, and take longer to produce real effects on the ground”<sup>68</sup>.

Furthermore, President Barroso, in his political guidelines for the new Commission, identified the further evaluation of the single market, at the same time the core of the European integration but still an incomplete process, as a key

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<sup>66</sup> *Passion and responsibility: Strengthening Europe in a Time of Change*, 15 September 2009. See <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/391>

<sup>67</sup> President Barroso also agreed on the need of a social impact assessments for all future proposals, stating that the first test case for such a social impact assessment would be the revision of the working time Directive, and that the new review would be based on a two-stage consultation of the social partners at EU level as well as on a detailed impact assessment paying attention to both social and economic aspect come with a comprehensive legislative proposal. Along with an assessment study (*Study to support an Impact Assessment on further action at European level regarding Directive 2003/88/EC and the evolution of working time organisation, so-called Deloitte study*), one-year-long consultation were launched on 25 March 2010, with the result that the social partners jointly decided to launch talks unde art. 155 TFEU and have nine months to reach agreement. See the aforementioned *Passion and responsibility* and *Review of the Working Time Directive - Press Release* by the Commission, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/789&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>68</sup> The speech also contained a passage indicating that a revision of the PWD was not *a priori* excluded: “If we discover during the preparation of the Regulation that there are areas where we need to revisit the Directive itself: I will not hesitate to do so.”

strategic objective for Europe, and entrusting former Commissioner Prof. Mario Monti<sup>69</sup> with the mission of preparing a report containing options and recommendations for a relaunch of the single market; the so-called “Monti Report”<sup>70</sup> highlighted three main challenges for the single market.

In particular, the two reinforcing trends of “integration fatigue” and “market fatigue” erode the political and social support for market integration in Europe both in the wake of the crisis and in the longer term<sup>71</sup>; furthermore, uneven policy attention given to the development of the “various components of an effective and sustainable single market”, especially for what it refers to the connection between the internal and European market and the inability to expand to new sectors<sup>72</sup> and to ensure that the single market represents a common space of freedom and opportunity working for all<sup>73</sup>.

Lastly, it is stated that the third challenge derives the tendency to believe that the single market is an achieved result for the Union; however, while with the institutional reforms deriving from Lisbon Treaty all the three major recent priorities of the EU have been achieved, the “correct functioning of the monetary union and of enlargement” need a strengthening of the role of the single market, and the building of consensus around it<sup>74</sup>, in a context characterised by global changes and specific European transformations<sup>75</sup>.

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<sup>69</sup> Commissioner for the Internal market, Financial services and Tax policy (from 1995 to 1999) and for Competition (1999-2004)

<sup>70</sup> *A new Strategy for the Single Market at the Service of Europe's Economy and Society - Report to the President of the European Commission José Manuel Barroso*, 9 May 2010 (hereby *Monti Report*) available at [http://ec.europa.eu/internal\\_market/strategy/docs/monti\\_report\\_final\\_10\\_05\\_2010\\_en.pdf](http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf)

<sup>71</sup> According to the “political incorrect” distinction carried out, three different groups may be identified; the “radical critics”, the “conditional supporters” (the vast majority of the MS, political groups and stakeholders), and the “unwavering supporters”. See *Monti Report*, p. 20

<sup>72</sup> For instance to support “green growth” and “Europe's transition to a low-carbon, resource efficient economy”. *Ibid.*, p. 8

<sup>73</sup> “citizens, consumers and SMEs”. *Ibid.*, p. 6

<sup>74</sup> The comprehensive approach, laid down by the report highlights the need for initiatives to “build” and “deliver” a stronger single market and to “build consensus” around it. *Ibid.*, p. 32

<sup>75</sup> Among those are listed the collapse of the Soviet bloc, the consequences of the enlargement (size of the union, economic and cultural diversity, increased migration), the introduction of the Euro and, in particular, the adoption the Lisbon Treaty and of the concepts of “sustainable development” and (highly competitive) “social market economy” as well as the critical national responses to the European integration (the referenda rejecting the European Constitution and the Lisbon Treaty as well as the ruling of the German Federal Constitutional Court on the limits of integration). *Ibid.*, p. 16

The Report acknowledges the tensions between market integration and social objectives in particular after the formal introduction of the objective of a "highly competitive social market economy", the need for their reconciliation as a consequence of the "Laval quartet" rulings, and the awareness that a clarification on the issues of the adequacy of the protective framework set by the PWD and of the reach of EU law to collective labour disputes should not be left to future occasional litigation before the ECJ or national courts<sup>76</sup>.

It proceeds therefore to identify two main balancing strategies: *in primis*, the provision of more clarity in the implementation of the PWD, the facilitation of the access to information, the strengthening of cooperation between national authorities, as well as a better sanctioning of abuses<sup>77</sup>.

Secondly, having discarded the ETUC Social Progress Clause as a non-realistic option<sup>78</sup> and the EU regulation of the right to strike as explicitly prohibited, the Report suggests "a targeted intervention" to be implemented for the case of the adoption of measures to clarify the interpretation and application of the PWD.

Such intervention would aim at protecting the right to strike in the context of freedom of movement of workers and building confidence in the social partners; it should be based on the introduction of a provision modelled on art. 2 of Regulation (EC) No 2679/98<sup>79</sup>, ensuring that the posting of worker in the context of the provision of services does not affect the right to strike as protected by the CFREU

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<sup>76</sup> The proposed solutions on the matter are included in the "consensus" chapter (Chap. 3) of the Report

<sup>77</sup> Particular reference is made to the fight against "letter box companies" and to the effectiveness of national remedies. See *Monti Report*, p. 70

<sup>78</sup> "seeking Treaty changes does not seem a realistic option in the short term". *Ibid.*

<sup>79</sup> The so-called "Monti Clause" (see *supra* par. 1.2.1), as well as the mentioned "labour law safeguard" contained in the Services Directive (see rec. 14 and art. 1.6), which states that the DSIM "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". It should be noted that the prohibition of actions that "cause grave disruption to the proper functioning of the internal market and inflict serious losses on the individuals affected" whilst recognizing that the right to strike is unaffected by that prohibition provided by the Monti-clause, appears significantly different from the DSIM "exclusion".

and in accordance with national laws and practices which respect EU law<sup>80</sup>, and on a mechanism for the informal solutions of labour disputes concerning the application of the PWD and involving the national social partners, the Member States and the Commission<sup>81</sup>.

The key objective of the reaffirmation of the concept of a “highly competitive social market economy” and the relaunch of the single market, deriving from the *Monti Report*, was included in a Communication by the Commission in November 2010<sup>82</sup>, with which the governing body of the EU put forward its own “package” of proposals for the adoption of the Single Market Act, promoting “strong, suitable and equitable growth for business”, especially in the context of the EU 2020 strategy; while reaffirming that the free movement of goods and services represent two of the fundamental freedoms enshrined in the Treaties, the Communication also stated that the single market “is not an end in itself”, but it represents “a tool for implementing other policies”, which are more likely to succeed if the single market is functioning properly<sup>83</sup>.

Among the fifty proposals, with a view of increasing solidarity in the single market<sup>84</sup>, the Commission recognised the need to reconcile “economic freedoms and freedoms of collective action” (sic.), as well as the revitalization of the social

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<sup>80</sup> The reference to the “respect of Community law” of the EU national legal or conventional framework on collective action raises doubts to its suitability as a reference for an EU “immunity” for collective action, in particular given the findings of the ECJ on the combined provisions of the Swedish *Lex Britannia* and Posting of Workers Act in the *Laval* case; independently from the recourse to collective action (which in a specific dispute may or may not be undertaken by workers or the union), the main focus would be on the aims pursued through collective bargaining and their compatibility with the provisions of the PWD, as well as the restrictive interpretation of the concept of “workers’ interest” carried out by the ECJ.

<sup>81</sup> It is also proposed that if the parties refuse the solution proposed, they would be free to defend their rights in court.

<sup>82</sup> *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Towards a Single Market Act - For a highly competitive social market economy - 50 proposals for improving our work, business and exchanges with one another* COM(2010) 608 final/2. It should be noted that the EP Resolution of 20 May 2010 on “delivering a single market to consumers and citizens” (2010/2011(INI) which “encourages the Commission to present the ‘Act’ by May 2011” (par. 77), while having regard of the CFREU and emphasizing the need for the single market legislation to protect and preserve “specific fundamental rights of citizens, such as security and privacy”, did not refer explicitly to the right to collective action nor the PWD. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0608:REV1:EN:PDF#page=2> and <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0186+0+DOC+XML+V0//EN>

<sup>83</sup> *Towards a Single Market Act*, p. 4

<sup>84</sup> Within the larger aim of “restoring confidence by putting Europeans at the heart of the single market”, which echoes the objective of “building consensus” of the Monti Report.

dialogue<sup>85</sup>; the two proposals on the matter regarded on the one hand, within the strategy for the implementation of the Charter of Fundamental Rights, the assessment the social impact that any legislative proposal on single market may have, to ensure that it is taking into account respect for fundamental rights, including the trade union action<sup>86</sup>; on the other , it announced the adoption of a proposal for reform of Directive 96/71 intended at improving its implementation<sup>87</sup>, which would “likely” include or be supplemented by a clarification on the exercise of fundamental social rights in the context of economic freedom<sup>88</sup>.

This first Communication was followed by a wide debate at European, national and local level, and by the endorsement of the relaunch of the single market by the Council<sup>89</sup>; the latter in particular considered that proper implementation and enforcement of the PWD can contribute to a better protection of posted workers’ rights and ensure more clarity regarding the rights and obligations of service providers and national authorities, helping therefore to prevent the circumvention of

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<sup>85</sup> It also referred to the activities and surveillance of pension funds, as well as to the launch of a consultation with the social partners in order to create a European framework for the advance planning of industrial restructuring. It must be noted that the three proposals directly linked to the single market based on a “highly competitive social market economy” regard the development of socially innovative corporate projects (social ratings, ethical and environmental labeling, revised rules on public procurement, and by introducing a new investment fund regime and tapping into dormant saving), the (foundations, cooperatives, mutual associations, etc., proposal 36), the improvement of quality of legal structures such as foundations, cooperatives, mutual associations, in order to optimize their functioning and facilitate their development within the single market (proposal 37), and the launch of a consultation on corporate governance and on the improvement of the transparency of social and environmental information (proposal 38).

<sup>86</sup> Proposal No. 29

<sup>87</sup> And therefore, more closely linked with the first strategy highlighted in the Monti Report proposals with regards to effective monitoring and cooperation by national authorities, as well as to the continuing difficulties in the posting of workers (in particular underlined are the complex national administrative procedures as well as double-taxation problems) which make it more difficult to exercise the freedom to provide services.

<sup>88</sup> Proposal No. 30

<sup>89</sup> *Conclusions on the Single Market Act 3057th Competitiveness (Internal Market, Industry, Research and Space) Council meeting Brussels, 10 December 2010*, [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/intm/118409.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/118409.pdf). It should be given note also of the EP resolutions of 6 April 2011 (P7\_TA-PROV(2011)0144-145-146), in which the EP called the Commission in the framework of the re-launch of a more competitive single market creating sustainable growth with more and better jobs, to ensure that all social rights are respected and that, where relevant, due account should be taken in single market legislation of artt. 8 and 9 TFEU and the entry into force of the CFREU which provides a whole range of civil, political, economic and social rights to Europeans, as well as the right to negotiate, conclude and enforce collective agreements in accordance with national law and practices and with due respect for EU law. See “Single Market for Europeans” EP Resolution, par. 48. <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0145&language=EN>

the applicable rules, and that a clarification of the exercise of the economic freedoms alongside fundamental social rights is necessary.

In April 2011, the Commission issued another Communication<sup>90</sup>, identifying “twelve levers”, and proposing that the EU should adopt key action for each one of them by the end of 2012; with regards to the “inclusive growth” in the framework of the EU 2020 strategy, the Single Market Act highlights the Commission will continue to improve its coverage of the social dimension of the impact assessments which accompany legislative proposals concerning the internal market, ensuring that such proposals include a appropriate references to social policies and social rights, taking into account articles 8 and 9 of the TFUE as well as the Charter of Fundamental Rights, in particular its art. 28.

With specific reference to the “social cohesion” lever<sup>91</sup>, the Single Market Acts underlines that employers should be able to provide their services more easily throughout the EU, while at the same time guaranteeing “high quality jobs and a high level of protection for workers and their social rights”.

Therefore, the need for improvements and reinforcement of the transposition, implementation and enforcement of the PWD is highlighted; action is to be taken with reference to the prevention and sanctioning of abuses and circumvention of the applicable rules, especially to facilitate the flow of information between businesses and Member State authorities, to enable more stringent checks to be carried out and to combat abuse, with particular regard to workers' rights.

Furthermore, the Commission should propose legislation applicable to all sectors clarifying the exercise of freedom of establishment and the freedom to provide services alongside fundamental social rights, including the right to take collective action, in accordance with national law and practices and in compliance with EU law, for which the solutions found in Regulation (EC) No 2679/98<sup>92</sup> would be the starting point.

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<sup>90</sup> *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Single Market Act - Twelve levers to boost growth and strengthen confidence "Working together to create new growth" (COM/2011/0206 final) (Single Market Act)*

<sup>91</sup> *Single Market Act*, par. 2.10

<sup>92</sup> And in particular, a “Monti-style” clause (“This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognized in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States”)

#### 4.2.2 - The Monti II Regulation

According to the DG Employment Roadmap<sup>93</sup>, there were several legislative options available in order to tackle the issues raised by the ECJ rulings<sup>94</sup>; firstly, a “broad, wide ranging review” of the PWD, modifying the core provision on minimum terms and conditions and on standard setting instruments<sup>95</sup>, potentially going as far as establishing equality of treatment between posted and domestic workers<sup>96</sup>, therefore reverting the ECJ rulings and significantly shifting the balance of the PWD from the fundamental freedom to provide services and the need to guarantee an appropriate level of protection of the rights of posted workers<sup>97</sup>.

Another possibility open was a legislative initiative<sup>98</sup> on enforcement of the PWD, setting more detailed provisions in particular with reference to administrative cooperation, the exchange of information and possibilities granted to the workers to better defend their rights; such a proposal could contain recitals stressing the respect of collective rights of workers and the role of social partners in the implementation of the act in question.

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<sup>93</sup> New legislative initiative for Posting of Workers, CWP DG EMPL, 25 October 2010, [http://ec.europa.eu/governance/impact/planned\\_ia/docs/2011\\_empl\\_001\\_posting\\_of\\_workers\\_en.pdf](http://ec.europa.eu/governance/impact/planned_ia/docs/2011_empl_001_posting_of_workers_en.pdf). The Commission had indicated that a legislative initiative on the Posting of Workers was due on 20 December 2011, however the publication of proposals has been postponed until end January/beginning of February 2012. See <http://www.emf-fem.org/Press/Labour-related-news/Social-Europe-Delay-regarding-the-Posting-of-Workers-and-Monti-II>

<sup>94</sup> Identified as the extent to which trade unions can recur to industrial action in order to protect workers' interests without undermining economic freedoms (concerning the balance between fundamental principles of Community law established in the Treaty) and the possibility for MS or national social partners to determine more favorable conditions for posted workers going beyond the minimum conditions laid out in the Directive (without creating obstacles to cross border provision); this issue concerns the interpretation of the provisions of the PWD. It was also determined that the *status quo* could not be considered a viable option and “soft law” instruments seemed insufficient to appropriately tackle the problems laid down.

<sup>95</sup> Artt. 3.1-7-8-10 PWD. See on the matter also Ales 2008, p. 17

<sup>96</sup> On the basis of art. 154 TFEU

<sup>97</sup> It was also noted that such wide review would also give the opportunity to clarify specific implementation problems. (e.g. exclusion of seagoing personnel of merchant navy undertakings, the treatment of certain activities in the transport sector or the link with the recent Directive on interim agency work (Directive 2008/104). However, it was noted that a wide ranging review would have few chances of being adopted in Council and would raise severe controversy in the Parliament.

<sup>98</sup> Which, according to the legal basis of such a proposal, should have been a Directive.

Lastly, a Council Regulation (which would have to be adopted by unanimity by the Council and approved by the Parliament) based on the “Monti-clause”, defining a framework for dealing with obstacles to the free provision of services and recognizing the exercise of fundamental rights, such as the right or freedom to strike.

The options ultimately chosen, according to the Commissioner for employment<sup>99</sup>, social affairs and inclusion, were the implementation of an enforcement Directive on posting, which should clarify the existing PWD without amending it, accompanied by a new Regulation on fundamental social rights, dubbed Monti II, to clarify the extent to which trade unions can use the right to strike in the case of trans-national activities, without reverting ECJ case-law<sup>100</sup>; should such a solution prove not acceptable, the Commission would have to review the Posting of Workers Directive itself.

The challenging objective of the proposal is represented by the facilitation of economic integration and, at the same time, the fostering of social protection; with reference to the clarification of the PWD, such objective translates in the continuing promotion of worker mobility alongside the protection from abuses of economic freedoms or ambiguities in the national implementation or enforcement of the EU provisions, resulting in a downgrade of working condition.

The enforcement Directive, respecting the different social models and the national traditions of social dialogue and industrial relations, would entail a series of provisions improving the access to information and enhancing administrative

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<sup>99</sup> The following considerations and analysis are derived from the speech given by Mr. László Andor, EU Commissioner responsible for Employment, Social Affairs and Inclusion, at the Conference on Fundamental Social Rights and the Posting of Workers in the framework of the Single Market "Balancing economic integration and social protection" held in Brussels, 27 June 2011. SPEECH/11/478 <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/478&type=HTML>

<sup>100</sup> See *Directive to be supplemented - not revised - by end 2011*, EUROPOLITICS 27 June 2011 <http://www.europolitics.info/social/directive-to-be-supplemented-not-revised-by-end-2011-art308225-25.html>



cooperation<sup>101</sup>, increasing the effectiveness of controls and sanctions and posted workers' possibilities to better defend their rights, in order to prevent abuses<sup>102</sup>, circumvention or disrespect of law such as in the case of “letterbox companies” or subcontractors failing in their obligations<sup>103</sup>.

The still embryonic Monti II Regulation, on the other hand, should explicitly recognise that there is no inherent conflict between exercise of the right to strike and freedom of establishment and of provision of services, or primacy of one over the other, while recognizing the key role of the social partners in taking action to protect workers' rights, including through strikes.

Furthermore, the future proposal could stress the role of national courts in applying the proportionality test on a case-by-case basis, while reconciling the exercise of fundamental social rights and economic freedoms, and it should also confirm the role and contribution of alternative dispute settlement mechanisms at national level, including in cases of disputes in transnational situations; lastly, the

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<sup>101</sup> Including the development an electronic information exchange system between MS and clarification on what type of checks and controls should authorities carry out without creating undue obstacles to the free provision of services. According to article 4.2 of the PWD, the national authorities (set up “for the purpose of implementing this Directive” and represented by *ad hoc* bodies or existing structures such as the Labour Inspectorates) should mutually cooperate to provide to each other information “on the transnational hiring-out of workers”, including possible abuses, and cooperate alongside the Commission in order to examine potential difficulties in the application of art. 3.10 (public policy provisions); in order to promote the cooperation, each MS has to notify the others and the Commission the competent bodies, and the various informative activities must be carried out free of charge.

The importance of the cooperation as a fundamental tool for implementing the PWD was recognized by the ECJ already in *Arblade*, in which the Court underlined how the effective protection of workers may require the accessibility of documents in the host MS for control by the competent authorities as the only appropriate means of control, in the absence of an organized system for cooperation or exchanges of information between Member States as provided for in Article 4 of PWD. The effective development of such a system should render superfluous the retention of the documents in the host MS after the employer has ceased to employ workers there; it should be also noted that the Commission has recently (March 2011) greenlighted the use of IMI system for the purposes of the PWD implementation, to improve and reinforce (electronic) information exchange between the various national authorities, allowing for a secure and fast data exchange enabling Member States to work together despite language, administrative and structural barriers, with the aim to provide each liaison office/monitoring authority with a quick reference tool on the legislation of the MS of the establishment of the service providers.

<sup>102</sup> An important question in the field is whether duration of posting can and should be a decisive criterion for the appreciation of its temporary nature, and in which circumstances such criteria should be addressed

<sup>103</sup> Furthermore, the enforcement Directive should also include specific provisions for sectors where the application of posting rules poses problems (such as international transport)

regulation could contain a clause establishing an information and notification obligation (an alert mechanism) for situations causing major disruptions<sup>104</sup>.

While measures aimed at preventing and sanctioning abuses, or reinforcing the information flow between Member States are possibly bound to reduce conflictuality in the posting sector and promoting a climate of fair competition preserving the rights of workers, all but the most radical changes in the language or the legal basis of the PWD<sup>105</sup>, would not guarantee an automatic reversal of the ECJ's judicial course in the case of conflicts or disputes, and could also provoke its further strengthening through their setting in relatively stable EU secondary legislation rather than in potentially reversible jurisprudence.

With specific reference to the expected provisions of the current "Monti II" proposal, while the recognition of the union's key role in protecting workers, nothing is said with reference to the possibility for the host member state unions of inducing

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<sup>104</sup> With reference to the responses to the mentioned proposal, it should be noted that already on 28th June, MEPs Pervenche Berès (S&D, France) and Edit Bauer (EPP, Slovakia) warned that simple clarification of the PWD will not be enough, rejecting the proposals outlined the day before by Commissioner Andor; in particular Berès expressed the opinion that the interpreting regulation will not be enough to "clear up grey areas and to combat abuse in posting of workers". On the other hand, Bauer argued that the only action necessary is better application of the existing directive, which should be achieved through an agreement between the social partners (on the lines of the one on parental leave), inviting the Commission not to act and the social partners to take the lead in order in particular to avoid a political battle in the EP. At social partner level, Bernadette Ségol (general-secretary of ETUC, which continues to attach a very high priority to the introduction of a social progress protocol in the Treaties) stated that Andor's stance was not encouraging since fundamental social rights have a priority over freedom to provide services (and not be balanced as in the ECJ rulings). In November 2011, BusinessEurope expressed a severe concern about the EU initiative, stressing that there is no need to revise the PWD, and EU action is needed to better implement and enforce the existing PWD to ensure compliance (favoring in particular better information of companies and workers through improved administrative cooperation between MS); the Monti II should therefore facilitate cross-border provision of services and should not create new administrative burdens. BusinessEurope has stressed that "in order to be acceptable", the Monti II regulation should "stick as close as possible to the Monti I regulation, in particular with respect to the short notification deadlines" and "limit obstacles to the freedom to provide service, including those deriving from an excessive use of the right to take collective action, and avoid any justification of obstacles deriving from <<social unrest>>". See *Two MEPs challenge Andor's plans*, EUROPOLITICS 29 June 2011, <http://preprod.europolitics.abccom.cyberscope.fr/social/two-meps-challenge-andor-s-plans-art308447-25.html> and *Andor: law on posting of workers will be 'clarified'*, European Voice 20 July 2011 <http://www.europeanvoice.com/article/imported/andor-law-on-posting-of-workers-will-be-clarified-71698.aspx> and BusinessEurope Policy Briefing 2 November 2011, Posting of Workers, <http://www.businesseurope.eu/content/default.asp?PageID=568&DocID=29411> and [http://www.feani.org/site/index.php?eID=tx\\_nawsecuredl&u=0&file=fileadmin/PDF\\_Documents/F E A N I \\_ N e w s / S i n g l e \\_ M a r k e t \\_ F o r u m \\_ - \\_ K r a k o w \\_ D e c l a r a t i o n . p d f & t = 1 3 2 3 6 5 7 7 2 9 & h a s h = 7 2 e 7 9 9 f 5 2 3 a b 2 e 9 5 e 1 4 d d 4 b 6 f 6 f f b 4 5 1 7 7 a 7 9 2 d 5](http://www.feani.org/site/index.php?eID=tx_nawsecuredl&u=0&file=fileadmin/PDF_Documents/F E A N I _ N e w s / S i n g l e _ M a r k e t _ F o r u m _ - _ K r a k o w _ D e c l a r a t i o n . p d f & t = 1 3 2 3 6 5 7 7 2 9 & h a s h = 7 2 e 7 9 9 f 5 2 3 a b 2 e 9 5 e 1 4 d d 4 b 6 f 6 f f b 4 5 1 7 7 a 7 9 2 d 5)

<sup>105</sup> See Ales 2008, p. 17, also recommending trade unions and MS, to lodge a claim in front of the ECJ in order to ask for the withdrawal of art. 3, par. 1 because its conflict with art. 45, par. 1 and 2, art. 151, par. 1 and art. 174 TFEU.

adherence to collective agreements providing more favorable conditions than the minimum standards set by the PWD<sup>106</sup> supporting a posted workers' action pursuing similar claims<sup>107</sup>; an enforcing role of the unions against unscrupulous or uncomplying posting employers and undertakings<sup>108</sup> should already be considered as legitimate in the current EU framework, even if an explicit confirmation should be considered as a progress in the field, in a similar way to the provision of the “alert mechanism” for serious disruptions of the economic freedoms.

However, it must be considered that, while drawing inspiration from the Monti-clause of Reg. 2679/98<sup>109</sup>, the “Monti II” Regulation would present significant differences to its antecedent; *in primis*, rather than providing that the exercise of economic freedoms “does not affect” fundamental rights, it should simply state that economic freedoms and fundamental social rights are equally important, therefore not avoiding the possibility of a balancing by the ECJ, possibly reproducing therefore the assessment and interpretation problems highlighted with reference to the rulings of the “Laval quartet”.

Furthermore, the balancing the economic and social aspects in posting-relating disputes should be carried out by national courts through a case-by-case proportionality test, replicating the ECJ’s main assumptions in *Viking*; in this sense it should be considered that the proportionality test represents a severe interference with the fundamental right to take collective action<sup>110</sup>, in particular when is taken into account the current absence of EU criteria in order to determine it, other than

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<sup>106</sup> It has been noted that a rephrasing of the requirements of art. 3.8 PWD, replacing the current emphasis on *erga omnes* applicability/application by clear requirements of non-discrimination and transparency would effectively recognize and enforce the role of the unions in the area. See van Hoek and Houwerzjl 2011, p. 179 (Recommendation 4)

<sup>107</sup> A legislative intervention should, in order to effectively protect fundamental rights, confirm the right of posted workers to initiate or take part in industrial actions in the host country. For similar conclusions, see also previous footnote

<sup>108</sup> See art. 5 PWD

<sup>109</sup> For the sake of repetition, stating that “This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognized in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States”

<sup>110</sup> See *supra* for the ILO Committee of experts Report of the Committee of Experts on the Application of Conventions and Recommendations in response to the BALPA Application for violation of ILC 87.

the very restrictive framework determined by the ECJ<sup>111</sup>. Furthermore, the suitability of non-specialized national courts to rule on transnational labour matters can be questioned, both with reference to the significant differences in the way in which the assessment of the proportionality and legitimacy of the action is carried out<sup>112</sup> and to the possible problems related to the technical capacity or institutional strength of the national bodies involved; the setting up of alternative dispute settlement mechanism for transnational situations, while in general terms an improvement promoting a correct application of the PWD, cannot be considered as sufficiently addressing this problem<sup>113</sup>.

Lastly, at the current stage there are no provisions regarding the specific indication of the elements of the possible trade union liability, nor a determination of the damages to be awarded by the national courts for the case of breach of EU-law<sup>114</sup>, which represent fundamental critical features of the ECJ jurisprudence in *Viking* and *Laval*; as noted before, also in this sector the simple reliance on national provisions and frameworks do not seem an appropriate solution, given in particular the uncertainties emerging from systems such as the British and Italian ones with

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<sup>111</sup> For a similar position, see the aforementioned ETUC's *Achieving social progress in the single market*, p. 4. See also *supra* par. 2.3.2 for a detailed analysis of the principle of proportionality linked to the ECJ jurisprudence in *Viking* and *Laval*

<sup>112</sup> See Novitz in Ales and Novitz 2010, pp. 266-268 and *supra* cap. 3 for the possible implications for the German and Italian framework, as well as for the findings of the Labour Court of Stockholm in the national *Laval* case.

<sup>113</sup> Furthermore, the specific features of the ADR system defined by the Monti II Regulation must be analyzed; in accordance to the principle of "last resort" of collective action deriving from the ECJ jurisprudence its exhaustion by the parties should be considered mandatory, as well as to be carried out on the basis of a duty of cooperation with a view to settlement (a general duty to "negotiate with a view to reach an agreement" is also provided by several national legislation as well as by international standards such as ILC 98 with regards to collective bargaining as well as by art. 6.1 EWC Directive (Recast), with reference to the SNB and the management negotiations on the on the form and operation of the EWC themselves) and enforceable in court procedures (in analogy with art. 6 of the Mediation Directive 2008/52/EC). However, it should be noted that nothing is currently said with regards to its supplementing the already existing ADR procedures or substituting them in reason of its specialty and particular scope of application; in the former case, furthermore, it must be considered whether the recourse to such instrument should occur before the exhaustion of national settlement procedures or only after such negotiation have not brought satisfactory result, in a "quasi-ultima ratio" perspective defining this remedy as a direct alternative to industrial action in a transnational setting.

<sup>114</sup> The *Monti Regulation* refers to obstacles occurring in the MS, and provides the obligation for (or the request to) the Member State to "take all necessary and proportionate measures to remove the said obstacle" (artt. 4.1(a) and 5.1 Reg. 2679/98). The concept and principles of liability to what it refers (and the only that could emerge in an application by analogy) would be therefore those articulated by the ECJ on the basis of *Francovich* and *Brasserie du Pêcheur* with regards Member States.

reference, respectively, to the potential absence of a cap for damages<sup>115</sup>, and to the effectiveness of the mainly non-restorative sanctions and remedies issued<sup>116</sup>, and a solution possibly combining measures at both EU and national level, in analogy to the antitrust damages actions<sup>117</sup>, would be needed to correctly address the issue.

The debate around the PWD revision and the analysis of the provisions of the current “Monti II” proposal highlights once more the invasiveness of the ECJ’s judicial legislation in the matter at hand, deriving from the extreme difficulty of a political reversal; at national level, in fact, judicial interpretations of a legal framework may be relatively easily corrected by parliamentary majorities<sup>118</sup>. On the other hand, ECJ decisions based on primary European law could only be reversed by Treaty amendments, which need to be ratified by all Member States, and interpretation of secondary EU law cannot not be corrected without an initiative of the Commission that needs the support of at least a qualified majority in the Council, and usually an absolute majority in the European Parliament<sup>119</sup>; alongside the ever-increasing diversity of national interests and preferences<sup>120</sup>, which make political corrections to ECJ interpretation in practice nearly impossible, it is to be considered that the interaction between a evolutionary or deregulatory effect on the freedoms of the

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<sup>115</sup> See par. 3.2.2

<sup>116</sup> See par. 3.2.1

<sup>117</sup> See the aforementioned (par. 3.2.1) *White Paper on Damages actions for breach of the EC antitrust rules* (COM(2008) 165 final), p. 2 (par. 1.1)

<sup>118</sup> Courts and Constitutional Courts may be involved in this process, and the majorities involved may consequently change in accordance with the specific national provisions.

<sup>119</sup> Scharpf 2010, p. 217

<sup>120</sup> The Declaration elaborated at Single Market Forum in Krakow (3-4 October 2011, gathering market participants as businesses, social partners, non-governmental organisations and public authorities and examining the state of the Single Market, the transposition and application of directives, and the exchange of best practices, as well as contributing to policy evaluations and monitoring the implementation of the SMA) contains, among its operational conclusions (pag. 3), a general statement regarding the possibility to reconcile the transnational provision of services with the guarantee of an “appropriate level of protection” for posted workers; the starting point, however, is represented by the fact that “cross border provision of services and mobility of posted workers are essential elements of the internal market”. No reference at all is made to the reconciliation of the exercise of collective action or to the potential role of the unions in the protection of workers and the regulation of the market demands apparently continues to prevail on the promotion of social rights. Furthermore, as noted above (par. 3.2.1), in national labour law other methods than (full) economic reparation are often used to counteract unlawful collective actions; these national experiences should be taken into account when deciding on remedies for unlawful collective actions.

See [http://www.feani.org/site/index.php?eID=tx\\_nawsecuredl&u=0&file=fileadmin/PDF\\_Documents/F\\_E\\_A\\_N\\_I\\_N\\_e\\_w\\_s/\\_S\\_i\\_n\\_g\\_l\\_e\\_M\\_a\\_r\\_k\\_e\\_t\\_F\\_o\\_r\\_u\\_m\\_-\\_K\\_r\\_a\\_k\\_o\\_w\\_Declaration.pdf&t=1323657729&hash=72e799f523ab2e95e14dd4b6f6ffb45177a792d5](http://www.feani.org/site/index.php?eID=tx_nawsecuredl&u=0&file=fileadmin/PDF_Documents/F_E_A_N_I_N_e_w_s/_S_i_n_g_l_e_M_a_r_k_e_t_F_o_r_u_m_-_K_r_a_k_o_w_Declaration.pdf&t=1323657729&hash=72e799f523ab2e95e14dd4b6f6ffb45177a792d5)

internal market, as interpreted by the Court, and the competence to address or re-regulate it by the European legislator does not exist in the case of the right to take collective action: therefore, while the ECJ was able to determine the incompatibility with EU law of national legal or conventional frameworks on collective action, the European legislator could not re-address the issue by setting a European standard through general harmonization measures seeking to protect public policy goals without (by definition) cause restrictions to the operation of the internal market<sup>121</sup>, because of the ban imposed by art. 153.5 TFEU<sup>122</sup> which, as noted, has not undergone any modification under the renewed Lisbon framework; the workers, therefore, still are not entitled to effective instruments to defend and enforce their rights at the same supranational level in which European employers and undertakings thoroughly enjoy and exercise their market freedoms.

#### **4.2 - The difficult “resurgence” of social rights in the ECJ jurisprudence and the EU relevance of ECtHR standards: judicial dialogue the solution for an effective protection of the right to strike in Europe?**

The ECJ’s organization<sup>123</sup> and jurisdiction were significantly amended by the Lisbon Treaty; in particular the disappearance of the so-called “pillar structure”, deriving from the Maastricht Treaty, and repeal by the Treaty of Lisbon of Articles 35 EU and 68 EC, imposing restrictions on the jurisdiction of the ECJ, entail that the jurisdiction of the Court of Justice of the European Union will extend to the law of the European Union, unless the Treaties provide otherwise<sup>124</sup>.

The most significant extension related to the area of freedom, security and justice, in which the ECJ had previously experienced a limited and asymmetric competence; under the provisions of the Treaty of Lisbon, therefore, police and

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<sup>121</sup> See Zahn and De Witte 2011, p. 442-443

<sup>122</sup> In this particular constitutional situation, it was frequently suggested the ECJ should have acted with greater caution and possibly should have avoided interfering with the national laws relating to collective action altogether. See Bercusson 2007, Carabelli 2008, p. 7

<sup>123</sup> In common with the institutions to be renamed, the whole court system of the European Union will be known as the Court of Justice of the European Union, comprising three courts: the Court of Justice, the General Court and the Civil Service Tribunal.

<sup>124</sup> Declaration No 38 on art. 252 TFEU, regarding the number of AGs in the Court of Justice

criminal justice, along with visas, asylum, immigration and other policies related to free movement of person <sup>125</sup> have become part of the general law, and any court or tribunal will be able to request a preliminary ruling<sup>126</sup>, and the Court will have jurisdiction to rule on measures taken on grounds of public policy in connection with cross-border controls.

The Common foreign and security policy (CFSP)<sup>127</sup>, has remained subject to special rules and specific procedures<sup>128</sup>, and the jurisdiction of the Court is generally excluded in the area; there are however two exceptions to the main rule, regarding the monitoring of compliance with art. 40 TEU, delimiting the CFSP with respect to the Union competences<sup>129</sup>, and the possibility<sup>130</sup> for the Court to rule on proceedings reviewing the legality of decisions providing for restrictive measures

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<sup>125</sup> And in particular, judicial cooperation in civil matters, recognition and enforcement of judgments

<sup>126</sup> Transitional provisions (art. 10 of Protocol No 36 on transitional provisions) provide that that full jurisdiction in criminal matters will not apply until five years after the entry into force of the Treaty, during which “the powers of the Court of Justice are to remain the same with respect to acts in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon”.

<sup>127</sup> Title V TEU, artt. 21 ff.

<sup>128</sup> art. 24 TEU

<sup>129</sup> “The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter”

<sup>130</sup> art. 275 TFEU

against natural or legal persons adopted by the Council on the basis of the specific provision of the CFSP<sup>131</sup>.

As noted above, the Charter of Fundamental Rights of the European Union is now regarded as having the same legal value as the Treaties, forming part of the set of constitutional rules and principles by reference to which the Court of Justice can directly adjudicate; furthermore, articles 6.2 and 6.3 TEU provide that the EU “shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms” and that, independently from the planned accession to the ECHR<sup>132</sup>, the fundamental rights therein guaranteed, along with those resulting from the constitutional traditions common to the Member States, “shall constitute general principles of the Union’s law”.

It is of the outmost evidence, therefore, that the framework from which the ECJ can and must derive its reasonings has been significantly expanded and enhanced in particular for what it refers to fundamental social rights, especially in consideration of the jurisprudential practice of the ECtHR and specifically of its dynamic interpretations of positive obligations and newly bred human rights<sup>133</sup>,

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<sup>131</sup> Chapter 2 of Title V TEU. The CJEU; in its Press Release *The Treaty of Lisbon and the Court of Justice of the European Union* (No 104/09, 30 November 2009) specifically refers to the freezing of assets in connection with the fight against terrorism as an example for the competence of the Court in the area. See in particular Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, in which the Court already in 2008 annulled a Council Regulation (No 881/2002) imposing restrictive measures directed against certain persons and and repealed another Regulation (No 467/2001) which prohibited the export of certain goods and services to Afghanistan, strengthened the flight ban and extended the freeze of funds and other financial resources in respect of the Taliban of Afghanistan with respect to Mr. Kadi and the Al Barakaat Foundation; in particular it should be noted that the ECJ, in adjudicating the compatibility of the regulation with human rights, held the regulation (which did not provide any procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in the “black list”), violated the right to be heard and the right to an effective remedy, which constitute fundamental principles of the international legal order that not even the Security Council can just ignore, showing a confident approach confident approach with the protection of fundamental rights even in “delicate” matters such as those regarding counter-terrorism. See Pernice in Griller and Ziller 2008, p. 250 Fabbrini 2011, p. 19

<sup>132</sup> Art. 6.2 TEU specifies that “such accession shall not affect the Union’s competences as defined in the Treaties”; furthermore, Protocol No 8 states that the accession agreement is to specify, in particular, “the specific arrangements for the Union’s possible participation in the control bodies of the European Convention [and] the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate”. See *infra* in this paragraph

<sup>133</sup> Azarov 2008. See *infra*



which could encourage the ECJ to reassess the nature of the relationship between the economic and the social dimension of the EU<sup>134</sup>.

#### 4.3.1 - A “social” jurisprudence by the ECJ?

The potential significance of the renewed context with regards to the reconciliation of the tensions between social and economic aspects in transnational situations was highlighted in particular in two cases regarding transnational provision of services and public procurement directives and proceeding apparently in diverging directions.

In *Commission v Germany*<sup>135</sup>, stemming from a infringement procedure<sup>136</sup>, the ECJ condemned Germany for breach of its obligations deriving from Directives 2004/18 and 92/50 over the practice of local authority employers to award contracts for pension services directly on the basis of a preliminary selection laid down in the terms of collective bargaining agreements; Germany had questioned the possible applicability of the relevant directives, arguing in particular with regards to an “Albany immunity” from art. 101.1 TFEU for collective agreements and, more specifically that the public procurement directives could not be applied since the awarded contracts derived from collective action.

Following on the basis of the *Viking* and *Laval*<sup>137</sup> case law, the ECJ reaffirmed that the right to bargain collectively, whilst being a fundamental right, is not absolute, and “must be exercised in accordance with European Union law”<sup>138</sup>; therefore the collective agreement source does not entails an exclusion of the contract awards from the scope of the obligations in the directives<sup>139</sup>, in particular

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<sup>134</sup> Syrpis 2008, p. 235

<sup>135</sup> Case C-271/08 *Commission v Germany*

<sup>136</sup> The European Commission, in particular, considered that the award of contracts for pension services by public authority employers should be conducted with the tendering procedures required by EU public procurement law.

<sup>137</sup> And of the rejection of the “Albany venue”

<sup>138</sup> *Commission v Germany*, par. 43

<sup>139</sup> *Ibid.*, par. 50. The Court had also determined that unlike the objective of enhancing the pension levels, the designation of bodies and undertakings in the collective agreement at issue “does not affect the essence of the right to bargain collectively” (par. 49). It must be noted that the AG had also had preliminarily determined that the “Albany exclusion” should be narrowly construed and does not imply a general exception from the competition rules under primary law for collective agreements. See *Commission v Germany*, AG’s Opinion, par. 62

because it is possible to accommodate the various social objectives of the national scheme with the EU frameworks<sup>140</sup>.

The ECJ concluded that, above the relevant thresholds, the social partners in the public sector cannot on directly service contracts for occupational old age pensions and, in accordance with the public procurement directives, a call for tender must be advertised at EU level; it should be however noted that the Court, in its reasonings, explicitly referred to the need to reconcile the right to bargain collectively and the social objectives pursued by the parties with the Treaty freedoms and the requirements of the public procurement directives<sup>141</sup>; it also underlined that such reconciliation should be carried out in accordance with the principle of proportionality, also entailing the verification on whether “a fair balance was struck in the account taken of the respective interests involved”<sup>142</sup>.

References to the “fair balance” between rights and freedoms and the proportionality test as the appropriate instrument to carry it out were included in AG Trstenjak’s Opinion, whose most interesting elements refers to the conclusion that the right to bargain collectively and the “inherent” autonomy of the parties in the process must be recognised in the EU legal order as fundamental rights which form an integral part of the general principles of Community law<sup>143</sup>, and must be presumed to have “equal status” with the economic freedoms in the case of conflicts<sup>144</sup>.

In consequence of this unequivocal recognition it must be complementary investigated not simply if the exercise of fundamental rights demand that the scope

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<sup>140</sup> See Syrpis 2011, p. 224

<sup>141</sup> *Commission v Germany*, parr. 44 and 51. See also Lo Faro 2011a, p. 203

<sup>142</sup> and, namely, “enhancement of the level of the retirement pensions of the workers concerned, on the one hand, and attainment of the freedom of establishment and the freedom to provide services, and opening-up to competition at European Union level, on the other”. *Ibid.*, par. 52

<sup>143</sup> The AG referred to “settled case-law” and to the recognition by instruments such as the ESC, the CCSRW and the CFREU (*Commission v Germany*, AG’s *Opinion* parr. 76-77). Furthermore, the AG stated “by the Treaty of Lisbon – not relevant, *ratione temporis*, in the present case – the primary law enshrinement of the right to bargain collectively was strengthened” by art. 6 TEU declaring the binding force of the CFREU, which expressly incorporates the right in question into primary law (par. 79).

<sup>144</sup> The AG questioned the approach adopted in *Viking* and *Laval*, highlighting in particular that the necessary (written or unwritten) ground of justification for a restriction on a fundamental freedom “sits uncomfortably alongside the principle of equal ranking for fundamental rights and fundamental freedoms”, and suggests “the existence of a hierarchical relationship between fundamental freedoms and fundamental rights in which fundamental rights are subordinated to fundamental freedoms”. *Commission v Germany*, AG’s *Opinion*, parr. 81, 183-184

of the fundamental freedoms “and the secondary law based thereupon” must be limited, but also whether the fundamental freedoms may justify a restriction on the fundamental right to collective bargaining<sup>145</sup>; in order to determine the “exact boundary between fundamental freedoms and fundamental rights”<sup>146</sup> the principle of proportionality should be applied to symmetrically review the appropriateness, necessity and reasonableness for the attainment of interests protected of the restrictive measures in question<sup>147</sup>.

However the AG did not proceed in the examination of the justification and proportionality of the public procurement directives in particular because the “German Government advanced, above all, arguments seeking to justify a restriction” on economic freedoms and the assessment of whether fundamental rights are justified and proportionate represents the option which better allows “a thorough evaluation of the arguments advanced by the German Government”<sup>148</sup>; therefore the AG’s “promising” approach<sup>149</sup>, in concrete, did not significantly deviate from the restrictive case-law of *Viking* and *Laval*, predictably resulting in an adverse ruling on the German pension scheme<sup>150</sup>; also the Court, as noted, avoided to question the status of fundamental economic freedoms while subjecting the exercise of social rights to a proportionality test, ultimately determining that the national measures were disproportionate<sup>151</sup>.

An apparently different approach may be found in the almost contemporary *Palhota*<sup>152</sup>, in which the Court, while stating that no registration and notification procedure for posting should be set up by the hosting Member States’

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<sup>145</sup> *Ibid.*, par. 84

<sup>146</sup> *Ibid.*, par. 189

<sup>147</sup> *Commission v Germany, AG’s Opinion*, parr. 190, 192 and 199. The AG also concluded that such an approach would not constitute a “fundamental reorientation in the case-law” but rather a return to the values of *Schmidberger* (par. 195), and would be in line with the qualification of the *Viking* and *Laval* approach undertaken by the ECJ in *Rüffert*, where the Court “considered, at least, implicitly, the possibility that the fundamental social right to freedom of association, in itself, could justify a restriction on fundamental freedoms” (par. 198). See also Vecchio 2010, p. 11

<sup>148</sup> *Ibid.*, parr. 203-204

<sup>149</sup> Syrpis 2011, p. 226

<sup>150</sup> *Commission v Germany, AG’s Opinion*, parr. 232-234

<sup>151</sup> *Commission v Germany*, par. 105

<sup>152</sup> *Judgment in criminal proceedings against Vítor Manuel dos Santos Palhota, Mário de Moura Gonçalves, Fernando Luis das Neves Palhota, Termiso Limitada* (C-515/08), judgment of 7 October 2010

authorities<sup>153</sup>, implicitly reaffirmed the right of “fair and just working conditions”<sup>154</sup> when determining the compatibility with the EU framework of the requirement to present copies of certain documents<sup>155</sup> from the country of origin and to send copies to the authorities of the host-Member State at the end of the posting period.

It must be noted that the AG called for interpretative changes of the derogations of the economic freedoms deriving from the intervened modifications of the EU constitutional framework, *i.e.* the entry into force of the Lisbon Treaty, in order to address the “inherent tension between the construction of the internal market and the protection of social values”<sup>156</sup>.

In particular, the Court’s assessment should investigate the EU compatibility of national the national supervision and monitoring provisions with articles 56 and 57 TFEU<sup>157</sup>, rather than the provisions of the PWD, because the substantive rules on posting of workers<sup>158</sup> “coexist with an additional but essential set of rules in order to give them effect” and in particular to ensure the respect of the posted workers’ rights<sup>159</sup>, whose enforcement is entrusted to the Member States<sup>160</sup>.

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<sup>153</sup>National legislation requiring a prior declaration of posting and allowing the posting only after the authorities receive confirmation of the declaration and a registration number is given, is precluded under articles 56-57 TFEU, in particular because of the length of the procedure, which may impede the the planned posting and, consequently, the provision of services by the employer of the workers who are to be posted, in particular where the services to be provided necessitate a certain speed of action. It should be also noted that the formalities provided by the Belgian declaratory procedure have, in the meantime, been replaced by the so-called LIMOSA declaration, which appears to stand the test of the Court. The mandatory LIMOSA-declaration must be kept during the stay: the ID of the employee, the employer and the Belgian client or principal, the starting and termination dates, the type of service or the economic sector, the location of the activities, the weekly working hours and the time schedule of the employee have to be included in the declaration. See *Palhota*, par. 36, 44 and 52, and *Skouris* in CJEU 2011, p. 21

<sup>154</sup> Art. 31 CFREU

<sup>155</sup> Equivalent to the social or labour documents required under the law of the ... MS and enabling the authorities to monitor compliance with the terms and conditions of employment of posted workers set by art. 3.1 PWD and therefore, to ensure their protection. See *Palhota*, par. 61

<sup>156</sup> *Palhota*, AG’s *Opinion*, par. 38

<sup>157</sup> In line, therefore, with the criteria found by the ECJ in *Arblade*. *Palhota*, AG’s *Opinion*, par. 46

<sup>158</sup> Specific reference is made to 3.1, 3.7 and 3.10 PWD

<sup>159</sup> Art. 5 PWD

<sup>160</sup> While this “constitutional” perspective apparently diverges from the “broad interpretation of the substantive provisions of Directive 96/71” (in particular art. 3) adopted in particular in *Laval* and *Rüffert*, the AG also underlined that in *Commission v Luxembourg* the ECJ “analysed substantive national measures in the light of Article 3 of Directive 96/71, leaving the supervision and monitoring measures to be reviewed pursuant to the Treaties”. *Palhota*, AG’s *Opinion*, par. 45

The AG recognized that the recent ECJ judicial course, using a broad definition of restriction in relation to freedom to provide services and strictly interpreting the public interest justification through the proportionality review “was clearly inclined in favour of freedom to provide services”<sup>161</sup>; however, since the adoption of the Lisbon Treaty, it should be necessary to take into account in the interpretation of the posting of workers of primary social law provision which “affect the framework of the fundamental freedoms”<sup>162</sup> such as art. 9 TFEU, art. 3.3 TEU as well as art. 31 CFREU, which were deemed as defining and clarifying the “social obligations” of the Union<sup>163</sup>.

Therefore, in the renewed institutional context, in the case that “working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services”, they should not be interpreted strictly, since the mandatory high level of social protection provided by the EU primary law authorized the Member State to restrict a freedoms “without European Union law’s regarding it as something exceptional” <sup>164</sup>.

This approach has been regarded as giving the same standing and importance as fundamental freedoms and undoubtedly implies that certain restrictions on free movement of services, *in casu* social protection of workers, can be given the same importance as the fundamental freedoms involved<sup>165</sup>; however it must be noted how the practical application of this perspective was represented by the principle of proportionality, and that the ECJ, in ruling on the matter, did not address the issues relating to the the potential changes introduced by the Lisbon Treaty, but applied a straightforward approach based on the existence of a

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<sup>161</sup> *Palhota, AG’s Opinion*, par. 44

<sup>162</sup> *Ibid.* par. 51

<sup>163</sup> As noted, art. 9 TFEU obliges the EU institutions “to take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health”, art. 3.3 TEU refers to “a highly competitive social market economy, aiming at full employment and social progress”, and art. 31 CFREU provides that every worker “has the right to working conditions which respect his or her health, safety and dignity”.

<sup>164</sup> *Palhota, AG’s Opinion*, par. 53

<sup>165</sup> See also Dagilyte 2010

restriction of the freedom to provide services, and on the assessment of justification and proportionality of the national measures<sup>166</sup>.

Notwithstanding the larger scope and renewed importance granted to fundamental social rights, especially in the AGs' legal reasonings, implying a potentially more extensive compatibility of social provisions with the EU framework on economic freedoms it must be concluded that the Court, even under the renewed Lisbon Treaty context<sup>167</sup>, has not been able to revert or escape the major criticism moved towards it in the wake of the *Viking* and *Laval* judgments, *id est* the inability to provide the right to take social right with sufficient status compared with the status accorded to the freedom of establishment by imposing, in particular, the "general interest" and "proportionality" test to the trade unions exercise of the right to collective in a way that restricts economic freedom protected by the TFEU; in particular it must be considered that the apparently more detailed balancing operated by the ECJ in *Commission v Germany* and *Palhota* derived from established adjudicating mechanisms and interpretative approaches which produced the criticized result in object and, while deriving from situations comparable to those in *Rüffert* and *Luxembourg* and making explicit references to the case law in *Viking* and *Laval*, the cases at hand did not address or involve the

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<sup>166</sup> Furthermore, while the AG had concluded determining its incompatibility with artt. 56 and 57 TFEU (Palhota, AG's Opinion par. 93), the Court did not deliver a judgment on the fact that the exemption from drawing up and saving the social documents provided by Belgian law only applies for a limited period of six months, stating that such assessment was not relevant as the posting lasted less than six months (*Palhota* par. 32)

<sup>167</sup> With regards to political tension inherent in the EU social policy between its "collective order" (solidarity) and "individual" (non-discrimination) elements see the judgment of the Court in *Rosenbladt* (C-45/09) with regards to discrimination on the grounds of age, in which the ECJ upheld the role of collective agreements providing clause for automatic termination on reaching retirement age, on the basis of the fact that it pursues a legitimate aim (striking a balance between political, economic, social, demographic and/or budgetary considerations and the choice to be made between prolonging people's working lives or, conversely, providing for early retirement, parr. 44-45 and 67) in an appropriate and necessary manner; in particular the ECJ considers that the mechanisms for automatic termination derive from an agreement, which implies that the employer must obtain or confirm the consent of the workers on such clauses (consequently, the collective negotiation of standard and clauses may be legitimately implement EU law, see parr. 49-51) . On the other hand in *Hennigs and Mai* (Joined Cases C-297/10 and C-298/10) the ECJ stated that a collective agreement (*BundesAngestellentarifvertrag* or BAT) determining the salary of public sector employees according to age categories caused a difference in treatment which, while pursuing a legitimate aim, went beyond what was necessary and appropriate, therefore infringing art. 21 CFREU. The Court also added (referring once more to *Viking* and *Laval*) that the fact that EU law precludes a measure appearing in a collective agreement does not interfere with art. 28 CFREU, since the right to negotiate and conclude collective agreements, where covered by EU law provisions (*in casu* Directive 2000/78) must, within the scope of that law, be exercised in compliance with that legal framework (parr. 67-68)

substantial issue of the role of collective action as a workers' protection and standard-setting instrument in trans-national situations.

The difficult “resurgence” of social rights in the European setting, which makes it difficult to identify clear corrective patterns for the Viking and Laval judicial course, is also testified by another recent ECJ judgment<sup>168</sup> in which the Court gave precedence to the economic freedoms notwithstanding the specific “immunities” deriving from the Temporary Agency Work Directive<sup>169</sup> to the sovereignty of Member States<sup>170</sup> in defining national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporary work agencies and with the exclusion of from the application of the Services Directive<sup>171</sup>; in particular the ECJ upheld the claim by the Commission that the requirement for a temporary work agency to have a specific legal form<sup>172</sup> represented a significant restriction on foreign undertakings' freedom to provide services and that the reasons of general interest that could justify such a restriction were difficult to envisage<sup>173</sup>.

#### 4.3.2 - *The right to collective action between Strasbourg and Luxembourg*

As it was noted, one of the most relevant innovations contained in the Treaty of Lisbon is represented by the inclusion of a provision imposing a constitutional duty on the European Union to accede to the European Convention of Human

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<sup>168</sup> C-397/10 *Commission v. Belgium*, 30 June 2011

<sup>169</sup> Directive 2008/104/EC, art. 4.4

<sup>170</sup> See Dorsemont 2011b, p. 2

<sup>171</sup> Directive 2006/123/EC rec. 14 and art. 2.2(e)

<sup>172</sup> According to the relevant provisions an agency must be established as a limited liability company (specifically, as *société anonyme* or *société de personnes à responsabilité limitée*) with the exclusion of excluding a single-member company, or in an equivalent form under foreign law for the case of foreign undertakings.

<sup>173</sup> *Commission v. Belgium*, par. 21

Rights<sup>174</sup>, although the letter of the paragraph warns that this accession does not modify the competences of the EU as are defined in the Treaties<sup>175</sup>.

The accession of the EU to the ECHR will undoubtedly produce significant effects upon the EU's institutional and judicial system as a whole, but also raises complex coordination issues<sup>176</sup> and, while explicitly planned, will represent the outcome of an extremely difficult legal and political negotiating process which needs, alongside the agreement with the forty-seven signatories to the Convention, an unanimous decision of the Council as well as the individual consent of all the Member States on the basis of their constitutional provisions.

With reference to the possible consequences of the accession, it must be underlined that once the EU has become part of the ECHR framework, it will be able for applicants to bring complaints before the ECtHR directly against the EU and its institutions for alleged violations<sup>177</sup> of Convention rights, closing an important gap in

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<sup>174</sup> Art. 6.2 TEU. See also art. 218.8 TFEU, Protocol (no 8) and Declaration 2 attached to the Lisbon Treaty. It should be noted that, while all MS have ratified the Convention (and most have also signed and ratified the additional protocols), with the entry into force of the Lisbon Treaty the EU attained a single legal personality and is therefore able to join international agreements (outside the scope of the former European Community). On the Council of Europe side, protocol 14 (Ets 194), providing that art. 59 ECHR shall be amended in order to include the wording "The European Union may accede to this Convention" (art. 17), entered into force in June 2010. It should be noted, however, that this amendment, while providing a legal basis for EU accession, is not sufficient in itself to allow accession because its modalities remain to be negotiated by the EU and all Council of Europe Member States.

<sup>175</sup> It has been noted that in 6.2 TEU and in its explanatory article 2 of Protocol (no 8) the wording "shall not affect" is used: a possible accession may affect both the relations of the Union with its member states under the ECHR law and those of the Union with the Convention itself, and the term in question should be interpreted in the sense of neither restricting, nor extending EU competences. See Margaritis 2011, p. 35

<sup>176</sup> In particular, according to Protocol (no 8), the accession agreement will contain specific provision for preserving the specific characteristics of the Union and of EU law and specifically the legal and practical relations with the ECtHR (a "possible participation" is provided), in particular to achieve coherence between the CFREU and Article 52(3) of the ECHR with reference to corresponding rights, and to preserve the monopoly of the ECJ for the interpretation of the EU Treaties, and the criteria to differentiate between law suits against the EU and those that would go against a MS (art. 1(a) and (b)), which could be difficult to determine for instance for the case of national execution of EU law (a case that should be addressed by the so called co-respondent mechanism, See Lock 2011, pp. 17 ff.). Art. 2 of Protocol 8, furthermore, stipulates that the accession agreement "shall not affect the competences of the Union or the powers of its institutions" and that it shall ensure that nothing affects "the situation of the Member States" in relation to the ECHR, its Protocols, and any derogations or reservations they have made. See UK Parliament European Scrutiny Committee 26 January 2011 <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428-xiv/42808.htm>

<sup>177</sup> Such violations can potentially be found in primary law, in secondary law, in executive actions or omissions and in decisions of the Union's courts. See Lock 2011, p. 13



the external control exercised by the Strasbourg Court<sup>178</sup>. For what it refers to the cases in which the ECJ deviates from the case law of the ECtHR, an applicant would have the opportunity to challenge this incompatibility<sup>179</sup>; furthermore, individuals who argue unsuccessfully in the ECJ that the EU has breached their Convention rights will be able to make the same arguments before the Strasbourg Court, whose decision will be binding on the EU and will ensure a consistent application of the Convention<sup>180</sup>.

An extensive and detailed assessment of the ongoing negotiating process and of the legal interdependencies between the two different supranational regimes, which do not exclude the possibility for the ECtHR to review even EU primary law and acts in domains of exclusive competence<sup>181</sup>, while related to the broader field of human rights, escapes the focus of the current analysis; it should however be noted that the accession to the Convention should imply that this framework, dedicated to the protection of human rights, shall substantially occupy a hierarchically superior position with respect to the EU constitutional frameworks, which currently provides for a juxtaposition of the Treaty freedoms and the integrated Charter rights, and will probably be able to address and reorient the position of the EU and the interpretation of the ECJ with respect to conflicts between fundamental rights and economic freedoms<sup>182</sup>.

Furthermore, under art. 6.3 TEU, the Court of Justice and the national courts already have to recognize the fundamental principles guaranteed by the ECHR as

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<sup>178</sup> In particular, see *Connolly v 15 Member States of the European Union*, no 73274/01

<sup>179</sup> In particular see the position expressed by the Vice-chairperson of the Committee of Legal Affairs and Human Rights of the Council of Europe's Parliamentary Assembly which stated that, while not referring to an issue of subordination or primacy of courts but of guarantee of "minimum common standards", after the EU accession the ECJ will be treated as just a "domestic court" over which the Court of Human Rights will exercise "external restraint". See *Hearing on the institutional aspects of the European Union's accession to the European Convention on Human Rights*, 18 March 2010

<sup>180</sup> In 2010, the ECJ concluded that in order to observe the principle of subsidiarity which is inherent in the ECHR and at the same time to ensure the proper functioning of the judicial system of the European Union, a mechanism must be available which is capable of ensuring that the question of the validity of a EU act can be brought effectively before the ECJ before the ECtHR rules on the compatibility of that act with the ECHR. See *Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ([http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention\\_en\\_2010-05-21\\_12-10-16\\_272.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf)) and Skouris in CJEU 2011, p. 9

<sup>181</sup> Lock 2011, p. 17

<sup>182</sup> See also Bucker, Dorssemont and Warneck in Bucker and Warneck 2011, pp. 349-351

general principles of European law, alongside those deriving from the common traditions of the Member States and art. 52. 3 of the Charter of Fundamental Rights provides that for the case of correspondence of rights protected by the CFREU and guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention<sup>183</sup>; the explanations to the Charter specify that the reference to the ECHR covers both the Convention and its Protocols, and that the meaning and scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the ECtHR and ECJ<sup>184</sup>. The last sentence of the paragraph allows the Union to guarantee more extensive protection, but also defines that ECHR constitutes the substantive minimum standard also for fundamental rights of the Union which will be interpreted through recourse to the ECHR and to the case law of the ECtHR.

In the field of collective labour rights the judicial options undertaken by the ECJ in *Viking* and *Laval* must be therefore assessed in the light of the the main judicial developments in the area of European recognition of the right to collective bargaining and action, which are represented by *Demir and Baykara* and *Enerji*<sup>185</sup>, two rulings issued between 2008 and 2009 by the European Court of Human Rights (ECtHR) in the field of collective representation of interests; the *Enerji* judgment, in particular, represent the first time in which the right to strike was elevated to the status of right protected by the European human rights law, and is set in the same judicial course of *Demir and Baykara*, in which the ECtHR reviewed its out-dated view on the content of Article 11 of the European Convention of Human Rights, granting protection to the right to collective bargaining<sup>186</sup>.

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<sup>183</sup> The Explanations offer a list of rights which may be regarded as corresponding to rights in the ECHR, and do not preclude its modification due to developments in the law, legislation and the Treaties. See *Explanations to the Charter of Fundamental Rights* (2007/C 303/02), p. 33

<sup>184</sup> This rule of interpretation appears evidently based on the wording of Article 6.3 TEU with regards to common constitutional traditions; therefore, rather than following a rigid approach of “a lowest common denominator”, the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for EU law and in harmony with the common constitutional traditions. *Explanations*, p. 34

<sup>185</sup> *Demir and Baykara v. Turkey*, no. 34503/97 ECtHR 2008-11-12 (hereby also *Demir*), *Enerji Yapı-Yol Sen v. Turkey*, no. 68959/01) ECtHR 2009

<sup>186</sup> Marguénaud and Mouly 2009, p. 499

In earlier case law the ECtHR had determined that art. 11 “presents trade union freedom as one form or a special aspect of freedom of association”<sup>187</sup>, safeguarding “freedom to protect the occupational interests of trade-union members by trade union action”<sup>188</sup> within the protection of the freedom of association, treated as a civil and political right; the Court, however, had also and restrictively interpreted Art. 11<sup>189</sup> with reference to trade union rights, finding in various occasions against trade unions which had claimed the right to consultation, the right to collective bargaining<sup>190</sup> and the right to strike, limiting therefore the number of trade union rights and freedoms that needed to be protected at national level by providing a wide margin of appreciation to the States<sup>191</sup>.

In particular, while both the Commission and the Court have long since referred to ILO Conventions and to decisions by ILO supervisory bodies<sup>192</sup>, neither of the two had been inclined to recognize the essential link between freedom of association and right to strike and to promote collective rights within the scope of

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<sup>187</sup> *Schmidt and Dahlström v. Sweden* (Application no. 5589/72, ECtHR A 021 1976), par. 34

<sup>188</sup> *National Union of Belgian Police v Belgium* (Application no. 4464/70, ECtHR A 019 1975), par. 39

<sup>189</sup> Article 11 (1) ECHR guarantees the freedom of association, subject to limitations spelt out in par. 2.

<sup>190</sup> Article 11 (art. 11) does not secure any particular treatment of the trade unions, or their members, by the State. See *Swedish Engine Drivers' Union v. Sweden* (Application no. 5614/72 ECHR 2 1976), par. 36

<sup>191</sup> *Schmidt and Dahlström v. Sweden*, par. 36: “Article 11 [...] leaves each State a free choice of the means to be used” in order to make trade union action possible

<sup>192</sup> See for instance *X v Ireland* (Application no. 4125/69, Yearbook of the European Convention of Human Rights 1971), in which the HCoHR stated that in interpreting the meaning and scope of Art. 11 it should be given regard “to the meaning given to this term in the International Labour Organisation Convention of 1948 (no. 87) concerning Freedom of Association and the Right to Organise” (parr. 220-222), and the Commission’s report in the case *National Union of Belgian Police*, stressing that ILO Conventions represent “widely accepted labour standards”, in particular because of their ratification by almost all the ECHR Members. See also Novitz 2003, pp. 224-255

art. 11 ECHR<sup>193</sup>; the right to strike was only partially recognised as an aspect of the freedom of association, but was not considered indispensable for the effective enjoyment of trade-union freedom<sup>194</sup>.

Insofar as it was just considered to be an important means, the ECtHR was satisfied to detect the existence of other means to protect workers' interests and, if the latter existed, the restrictions on the right to strike did not need to be scrutinized by the Court<sup>195</sup>; the ECtHR took however a different stance with respect to national regulatory framework regarding trade union rights in the *Unison*<sup>196</sup> case, by

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<sup>193</sup> On the other hand, the ECtHR appeared keen in protecting the negative dimension of the freedom of association, (*i.e.* the individual right not to associate) and on finding a “proper balance” between the two aspects; in particular, when deciding on “closed shop” clauses, while determining that art. 11 “may not guarantee the negative aspect of freedom on the same footing as the positive aspect”, and that such clauses may produce useful outcomes, the Court left little space to the State margin of appreciation, and in particular interpreted strictly the concept of “necessary in a democratic society”. *Young, James & Webster v. United Kingdom*, 44 ECtHR 1981, par. 55 and 63. This case-law was recently confirmed and tightened by *Sørensen and Rasmussen v. Denmark*, where it was clearly stated that the fact that the applicants had been compelled to join a certain trade union violated art. 11 ECHR, as such a requirement struck at the very substance of the freedom of association. The State must avoid measures violating the ‘negative right of association’, and while it enjoys a certain margin of appreciation, the Court noted that “there is little support [...] for the maintenance of closed-shop agreements”, in particular because several European instruments “clearly indicate that their use in the labour market is not an indispensable tool for the effective enjoyment of trade union freedoms”. See *Sørensen and Rasmussen v. Denmark*, nos. 52656 and 52620/99 ECtHR 2007, par. 58 and 75)

<sup>194</sup> Within the margin of discretion left to each State “the grant of a right to strike represents without any doubt one of the most important” means that can be utilized in order to enable trade unions to strive for the protection of their members’ interests, “but there are others”. See *Schmidt and Dahlström v. Sweden*, par. 36. Similarly, in *Wilson*, the Court considered that even if collective bargaining was not indispensable for the effective enjoyment of trade-union freedom, it might be one of the ways by which trade unions could be enabled to protect their members’ interests and that a union has “to be free, in one way or another, to seek to persuade the employer to listen to what it had to say on behalf of its members” (See *Wilson and the National Union of Journalists, Palmer, Wyeth and the National Union of Rail Maritime and Transport Workers and Doolan and others v. United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, ECHR 2002 par. 44 and 46)

<sup>195</sup> See also, with specific reference to industrial action *Gustafsson v. Sweden*, (no. 15573/89 ECtHR 67 1998-V), concerning industrial action (boycott and blockade of a restaurant) against an entrepreneur who had refused to join a collective bargaining agreement (for the catering sector). The Court recognized once more that freedom of association also presents a negative side (namely, the right of an employer not to be forced into a collective bargaining agreement if he does not belong to the relevant trade association) but also that while the State had to take “reasonable and appropriate measures to secure the effective enjoyment of the negative right to freedom of association” (par. 45), the restriction imposed on the applicant had not interfered significantly with the exercise of his right to freedom of association (and therefore art. 11 ECHR had not been violated, see par. 52)

<sup>196</sup> *Unison v United Kingdom*, no. 53574/99, ECtHR 2002

scrutinizing the restrictions in the light of art. 11.2 ECHR<sup>197</sup>, an approach that was confirmed in the more “progressive” *Dilek* judgement<sup>198</sup>, in which the Court concluded that restrictions on the right to collective action<sup>199</sup> need to be compatible with the Convention.

With its decisions in *Demir and Enerji*, however, the ECtHR further developed this approach by declaring that art. 11 ECHR includes a right to collectively bargain and prohibits an absolute ban on the right to strike; by making reference to a wide variety of “integrated” sources<sup>200</sup>, the Court explicitly affirmed that collective bargaining represents an “essential element” of the exercise of the right to form and join trade unions<sup>201</sup>, and that the right to take collective action is an “indissociable

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<sup>197</sup> The ECtHR, in particular, determined that injunctions can be viewed as an interference with art. 11, and that need to be subject to a proportionality review (*Unison*, par. 37). It should be noted that, ultimately, the Court held that the specific injunction in question (a prohibition for strikes after transfer of employment business provided by UK law) was justified as necessary in a democratic society for the protection of the economic interests of the transferor (par. 42), and that the union was however granted the right to take collective action against the transferee at a later date (par. 41). It has been noted that in the light of ILO and ESC Committees decisions and of the ECtHR’s recent jurisprudence, it seems unlikely that the ECtHR would reach the same conclusion, since the logic underlying the *Unison* decision would in effect allow any kind of restriction, since the strike invariably interferes with the economic freedom of the employer, See *supra* with reference to the ECJ judicial course and also Ewing and Hendy 2010, p. 12

<sup>198</sup> in *Dilek and others v. Turkey* (formerly known as *Satilmis*) nos. 74611/01, 26876/06 and 27628/02 ECtHR 2007, the ECHR in particular noted that the Turkish Government had not indicated the existence of other means for public servants to defend their rights (parr. 13); furthermore, the civil liability of the participants to the collective action did not appear proportionate to the legitimate aim pursued, in particular given the prominent place of the freedom of peaceful assembly, and was therefore not “necessary in a democratic society” (parr. 72-73)

<sup>199</sup> In particular, the objections submitted by the Turkish government that the strike, in this case the refusal of some civil servants to report to work as toll-booth cashiers, could not qualify as a strike was not accepted by the Court that held that art. 11 ECHR safeguards a more comprehensive right to take industrial action. In particular, “without speculating” as to what extent art. 11 ECHR granted the right to strike and what is the definition of this right as part of this article, the Court found that the slowdown in job applicants for a three hours could be considered as a collective action to be safeguarded in the general context of trade union rights. See *Dilek*, par. 57, and *Dorssemont and Van Hoek in Ales and Novitz* 2010, p. 231

<sup>200</sup> See *Fudge in Campbell, Ewing and Tomkins* 2011, p. 260

<sup>201</sup> *Demir and Baykara*, par. 154. It has been noted that *Demir* mirrors the Supreme Court of Canada decision in the *Health Services v. B.C.* case (*Health Services and Support-Facilities Subsector Bargaining Association v British Columbia* 2007 SCC 27, [2007] 2 SCR 391), in which the Supreme Court reviewed its case-law and found that collective bargaining was protected under the Canadian Charter of Rights; such decision, seen as showing an “international convergence” in relation to the rights included in freedom of association (although not referred to by the ECtHR), recognised that collective bargaining reflected the values of human dignity, equality, respect for personal autonomy and enhancement of democracy, and relied on the relevant international treaty material. See *Marguénaud and Mouly* 2009, p. 499, *Ewing and Hendy* 2010, p. 6

corollary” of the former; these fundamental rights have to be protected in an effective and dynamic way and can only be restricted for imperative reasons of general interest without affecting their *core* meaning.

In the Grand Chamber ruling in *Demir*, the ECtHR stressed the need to take into account, when interpreting and applying the Convention, the developments on the protection of human rights that can be derived for sources other than the Convention itself<sup>202</sup>; in particular it must consider and give prominence to the labour standards and rights as defined by the international instruments such as the ILO Conventions or the European Social Charter, their interpretation by competent supervisory bodies, as well as elements deriving from the practice of European States and reflecting their common values<sup>203</sup>; with respect to collective bargaining, the Court found that its previous case-law “should be reconsidered, so as to take account of the perceptible evolution in such matters”<sup>204</sup>.

The ECtHR determined that the position of the public employees involved, which were deemed as not being part of the “administration of the State”, and therefore capable of enjoying the right to collective bargaining<sup>205</sup>; with reference to the annulment of the collective agreement that the trade union had entered into following collective bargaining, the Court determined that, while prescribed by law<sup>206</sup> and pursuing a legitimate interest<sup>207</sup>, it was not “necessary in a democratic society”

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<sup>202</sup> In order to “render its rights practical and effective”. See *Demir and Baykara*, par. 66

<sup>203</sup> Along with the “practice of European States” to recognize the right of public employees to bargain collectively, the instruments referred to were ILC 98 and 151, Art. 8 of the International Covenant on Civil and Political Rights, Artt. 5 and 6 of the ESC and artt. 12.1 and 28 CFREU. *Ibid.*, parr. 67-68 and 147-151. See also Malmberg 2010b, pp. 10-11 and Joint Committee on Human Rights 2010, pp. 46-47

<sup>204</sup> The ECtHR stated that, while it should not depart, without good reason, from precedents established in previous cases (in particular *Swedish Engine Drivers’ Union* and *Schmidt and Dahlström*, see *supra*), it also affirmed that “a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement”. *Ibid.*, par. 154

<sup>205</sup> *Ibid.*, parr. 108 and 154

<sup>206</sup> As interpreted by the civil division of the Court of Cassation, the highest judicial body to have ruled on the case: the Court had also observed that the absence of the necessary legislation to give effect to the provisions of the international labour conventions ratified by Turkey, and the Court of Cassation judgment based on that absence, “with the resulting *de facto* annulment *ex tunc* of the collective agreement in question”, were the components of the interference with the applicants’ trade-union freedom. *Ibid.*, parr. 157 and 160

<sup>207</sup> *i.e.* the prevention of disorder. *Ibid.*, par. 161

and therefore in violation of art. 11 ECHR<sup>208</sup> in respect of both the applicants' trade union and the applicants themselves<sup>209</sup>.

With the explicit and resolute *revirement* operated through *Demir and Baykara* with regards to collective bargaining, deemed as “inherent” in the trade union freedom<sup>210</sup>, the ECtHR introduced a body of reasoning that would apply to other forms of trade union activity, notably the right to take collective action<sup>211</sup>, and therefore paved the way for the inclusion of the right to strike under the protection of trade union rights by the Convention beyond the position outlined in the aforementioned *Unison* case<sup>212</sup>.

For what it refers to the *Enerji* case, three trade union officials had been struck by disciplinary sanctions for their participation in a national one day strike<sup>213</sup> in defiance of a circular by the Prime Minister's Public-Service Staff Directorate prohibiting public sector employees from taking part to such protests<sup>214</sup>. The trade union, once it had exhausted the domestic remedies seeking an annulment of the

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<sup>208</sup> In particular, the Court (referring to considerations expressed by the Chamber) could not accept that the argument based on an omission in the law was sufficient to make the annulment of a collective agreement “satisfy the conditions for any restriction of the freedom of association”; furthermore it considered that the Turkish Government had “failed to adduce evidence of any specific circumstances that could have justified the exclusion of the applicants” from the enjoyment of their trade union freedoms. *Ibid.*, par. 166-168

<sup>209</sup> In par. 110 and 116 of *Demir* (referred to in *Enerji*), the Court highlighted that although the essential object of art. 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected (imposing therefore a negative obligation on the Contracting State), there may also be in addition positive obligations on the State to secure the effective enjoyment of such rights. For the case at hand, the responsibility of Turkey would be engaged if the facts complained resulted from a failure to secure under domestic law the rights set forth in art. 11 ECHR. The Grand Chamber further considered that the case could be analysed either as an interference with art. 11 or as a failure by the State; given the “mixture of action and inaction” both approaches were deemed as possible, and the Court, while proceeding from the “interference” standpoint also took into account the State's positive obligations in so doing.

<sup>210</sup> *Demir and Baykara*, par. 168

<sup>211</sup> See Ewing and Hendy 2010, p. 4

<sup>212</sup> See Ewing and Hendy 2009, p. 41

<sup>213</sup> Organized by the Federation of Public Sector Trade Unions “to secure the right to a collective bargaining agreement” See ECtHR Press Release 330, 21/04/2009

<sup>214</sup> The circular no. 1996/21 of 13 April 1996 was based upon the same statutory provisions that had been scrutinized in *Dilek*, and were linked in particular with the fulfillment of the requirement for continuity of the public service.

circular<sup>215</sup>, brought the case before the ECtHR, alleging that the ban on strikes by Turkish authorities interfered with their right to form and join trade unions guaranteed by the Convention.

The Court, by making direct reference to the interpretative path undertaken in *Demir* unanimously found a violation of Article 11; it determined once more that strike action, enabling a trade union to make its voice heard, constitutes “an important aspect in the protection of trade union members’ interests” and, by relying on the ILO and ESC, it established that it represented the “indissociable corollary” of the right of trade union association in order to effective exercise of the right to collective bargaining<sup>216</sup>.

Such indirect reconstruction was nonetheless sufficient to conclude that the Turkish ban on collective action for public employees interfered with the union’s right to strike, clearly reattached to art. 11 ECHR<sup>217</sup>; in determining that the adoption and application of the circular did not respond to “pressing social needs” and had disproportionately infringed the enjoyment of the union rights in question<sup>218</sup>, the ECtHR has undoubtedly sanctioned a violation of the right to strike.

Despite its inability to qualify the right to collective action as an essential means to protect workers’ interests<sup>219</sup>, the departure from the previous case law such as *Schmidt and Dahlström* and *Dilek* appears evident; it was not necessary for the ECtHR to consider whether the other means by which the union might be heard on behalf of its members were sufficient: breach of the right to strike alone was a breach of Article 11. Furthermore, in determining the justification of the interference, it doubted on the existence of a legitimate aim; however, it considered unnecessary to decide the issue in view of the conclusion reached with reference to the necessity of the restrictive measure<sup>220</sup>.

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<sup>215</sup> Appeals lodged by Enerji Yapı-Yol Sen were dismissed, the Turkish courts considering in particular that the aim of the impugned circular was to remind public servants of the legislative provisions governing the conduct expected of them. See ECtHR Press Release 330

<sup>216</sup> right to strike is referred to as “le corollaire indissociable du droit d'association syndicale” (ILO) and “un moyen d'assurer l'exercice effectif du droit de négociation collective” (ESC). See *Enerji*, par. 24

<sup>217</sup> *Ibid.*, par. 20

<sup>218</sup> *Ibid.*, par. 33

<sup>219</sup> See Dorssemont 2011a

<sup>220</sup> *Enerji*, par. 28



The Court, therefore, assessed the prohibition by stating that legal restriction on the right to strike affecting certain categories should define as clearly and narrowly as possible the categories involved and not extend to civil servants in general: the Ministerial circular had been drafted in general terms, without a balancing of the aims listed in art. 11.2 ECHR; furthermore, the demonstration at issue had not been prohibited, and therefore by joining it the members of the union had merely exercised their freedom of peaceful assembly<sup>221</sup>.

The ECtHR concluded that the sanctions issued were likely discourage union members and all others wishing to participate legitimately to strike actions aiming at defending the interests of their members to do so, and that the Government has not demonstrated the necessity in a democratic society of such generic prohibition affecting the entire public sector<sup>222</sup>.

The departure from previous case law undertaken by the ECtHR in *Demir* and confirmed in *Enerji*, as well as the reliance on international instruments and common principles has been maintained consistently in the following cases with specific reference to the protection of individual workers; in *Danilenkov*<sup>223</sup> the Court reinforced the statement that complex of the measures taken by the State concerned in order to secure trade-union freedom, subject to its margin of appreciation is taken into account, and that such measures should include protection against discrimination on the ground of trade union membership, allowing workers to challenge discriminatory treatments through claim for damages and other relief<sup>224</sup>; specifically, 32 members of the Dockers' Union of Russia that had taken

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<sup>221</sup> See also *infra* with reference to *Karaçay and Urcan*

<sup>222</sup> *Ibid.*, par. 32

<sup>223</sup> *Danilenkov and others v. Russia*, no. 733/01 ECtHR 2009

<sup>224</sup> Which “constitutes one of the most serious violations of freedom of association capable to jeopardize the very existence of a trade union”. For the case at hand, while it did not speculate on the deterrent potential of effective protection for the applicants against future unfavourable actions by their employer, the ECtHR noted that the lack of such protection could discourage (for fear of discrimination) other persons from joining the trade union, which may lead to its disappearance. *Ibid.*, parr. 123 and 135

industrial action<sup>225</sup> were discriminated against by being assigned less work, receiving reduced income and being subject to discriminatory selection for redundancy<sup>226</sup>. The Court concluded that since the State had failed to fulfill its positive obligations to adopt “effective and clear judicial protection” against trade union discrimination<sup>227</sup>, art. 14 ECHR in conjunction with art. 11 had been violated<sup>228</sup>.

Similarly, with reference to State-issued sanctions deriving from participation to collective action, the ECtHR held in three more cases the requirement to protect the right to strike<sup>229</sup>, and deemed that the imposition of the criminal sanctions and penalties<sup>230</sup> or the subjection to disciplinary action and issuing of warnings<sup>231</sup> based on the statutory prohibition for civil servants to have recourse to collective action constituted breaches of Article 11, on the basis of their being disproportionate and not necessary in a democratic society<sup>232</sup>.

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<sup>225</sup> A two-week strike calling for salary increases and better working conditions and health and life insurance. The ECtHR noted that the Kaliningrad seaport company used “various techniques” in order to encourage employees to relinquish their union membership, including their re-assignment to special work teams with limited opportunities, dismissals (subsequently found unlawful by the courts), decrease of earnings, disciplinary sanctions, refusal to reinstate following the court’s judgment etc. *Danilenkov*, par. 130

<sup>226</sup> See *Ewing and Hendy* 2010, p. 16

<sup>227</sup> While the Russian legal framework contained several provision prohibiting discrimination on the ground of trade union membership, these remedies had remained ineffective in the case at hand. In particular the domestic judicial authorities, in two sets of proceedings, had held that the existence of discrimination could only be established in criminal proceedings (and in that case only through proof “beyond reasonable doubts” of direct intent on the part of one of the company’s key managers to discriminate against the trade-union members) and therefore that the applicants’ claims could not be determined via a civil action (such decisions were subsequently overruled by the Baltiyskiy District Court). *Ibid.*, par. 132-134

<sup>228</sup> The Court had highlighted that the wording of art. 11 refers to the right of “everybody”, and that this provision “obviously” includes a right not to be discriminated against for choosing to avail oneself of the right to be protected by trade union, also given that Article 14 forms an integral part of each of the Articles laying down rights and freedoms whatever their nature. See *Ibid.*, par. 123

<sup>229</sup> See also *infra* for some critical considerations on the reasoning of the ECtHR in these cases

<sup>230</sup> *Urcan v Turkey*, no. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04, 23676/04, ECtHR 2008 and *Özcan v Turkey*, no. 22943/04, ECtHR 2009

<sup>231</sup> *Kaya and Seyhan v Turkey*, no 30946/04, ECtHR 2009, par. 12

<sup>232</sup> *Urcan*, par. 36, *Özcan*, par. 24 and *Kaya and Seyhan*, par. 31. In particular, in *Kaya and Seyhan*, the Court held that also the lesser sanction constituted an attenuation of the right of freedom of association (par. 24)

The evolution of the jurisprudence of the Strasbourg Court, therefore, appears in stark contrast with that of the Luxembourg one<sup>233</sup>; in particular, it is possible to identify a clear contraposition with the ECJ's judicial course, both with reference to the reconstructive methods of the rights in question and to the protection that has to be ensured to the latter.

*In primis* it should be noted that, while both courts refer to human rights instrument, their treatment of international law appears very different; the ECtHR explored international law and principles, and in particular the ILO supervisory body jurisprudence, in in the process of creating a *core* of inviolable individual and collective rights, extracting from these legal reasonings the elements most helpful in defining the features of the right of collective bargaining<sup>234</sup>, while the ECJ simply invoked the ILO Conventions and the ESC at the level of general principles when recognizing the fundamental nature of the right to strike as a part of EU law<sup>235</sup>.

Furthermore, the Courts proceeded from opposite premises when determining the legitimacy of the trade union collective action<sup>236</sup>; the ECtHR analysis started from the assumption that collective bargaining and action are protected, and the State has therefore to justify the measures in terms of restriction necessary to protection of a "imperative reasons of general interest"<sup>237</sup>. The ECJ, on the other hand, limited the fundamental right to strike in the case of conflict with the economic freedoms of companies circulating in the internal market, imposing the "general interest" and "proportionality" tests to the trade unions when they exercise this right

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<sup>233</sup> Bronzini 2009, p. 983, Marguenaud and Mouly 2009, p. 504, as well as ETUC's press release *The right to strike is a human right – ECJ must change its case law*, <http://www.etuc.org/a/6174>

<sup>234</sup> In particular, it should be noted that Turkey's argument that since ESC (artt. 5 and 6) and ILC 87 (since 2001) not been ratified, and should not therefore be used as an interpretative aid in proceedings brought against it was rejected; the Court held that, in order to render the rights practical and effective (*Demir*, par. 66) it was not necessary for a respondent state to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned but that the relevant instruments show a common ground in modern societies (par. 86). See Bronzini 2009, p. 978

<sup>235</sup> Fudge 2011, p. 263

<sup>236</sup> Which entail a significant difference in the application of the proportionality, to which both courts refer.

<sup>237</sup> In particular, *Demir and Baykara* was concerned precisely with the annulment of a collective agreement by law, a situation apparently analogous to the denial of the application of the collective agreements in *Rüffert* and *Luxembourg*. It appears difficult to envision that the ECtHR would not come to the same conclusion, if those ECJ decisions were subjected to its scrutiny, in particular because the justification in the ECJ would not appear to be necessary in a democratic society. See Ewing and Hendy 2010, p. 40

in a way that interferes with the economic freedom protected by the TFEU<sup>238</sup>; in the light of the Strasbourg Court jurisprudence, this approach does not seem more appropriate, in particular consideration of the fact that the unequivocal inclusion of the right to collective bargaining in the scope of art. 11 ECHR entails a far more rigorous protection of the rights and prerogatives of a social nature than of the economic needs and demands, making it possible to foresee the question whether the ECJ jurisprudence grants in effect “manifestly insufficient” protection to the rights enshrined by the ECHR.<sup>239</sup>

As noted, *Demir* and *Enerji* represent undoubtedly ground-breaking cases, in particular for the reconstruction by the ECtHR of a “meta-regulated” right of collective bargaining at European and international level; this method of interpretation introduced in *Demir*, however not developed in following rulings<sup>240</sup>, seems to provide in particular useful tools in the European Union context, where ECJ cannot be considered *sic et simpliciter* the judge of last resort for fundamental rights, especially for areas, such as the one relating to the right to collective action, that are still excluded from the EU<sup>241</sup>.

In particular, it has been suggested<sup>242</sup> that, on the basis of the theory of the plurality of legal systems, a more progressive attitude by the ECJ on the reconciliation of economic freedoms and collective labour rights could derive from a cooperative approach entailing the recourse to a non-hierarchical network of sources at national, European and international level recognizing trade union action, as well as the jurisprudence of supervisory bodies such as the ILO Committee of

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<sup>238</sup> It has been noted that, rather than a *limitable* right (as from ECtHR’s viewpoint), the strike has appeared to the ECJ as a *limiting* right, a perspective derived from 19 TEU which refers to the “application of the Treaties” implying that only 49EC could have been the main object of the hermeneutical activity could have been, since within the Treaties there were no such thing as the right to strike. It should also be considered that in the ECJ rulings the unions are asserting fundamental rights against claims brought against them by the employers, while in the ECtHR framework, the counterpart is represented by the State implementing restrictive actions against trade union. See Lo Faro 2011a, 212 and *infra* in this paragraph

<sup>239</sup> Therefore overcoming the presumption of equivalent protection defined by the ECtHR in *Bosphorus*; Marguenaud and Mouly 2009, p. 504. See *infra* in this paragraph with reference to the possible “accountability” of the ECJ before international courts and bodies

<sup>240</sup> See *infra* in this paragraph for the *Trofimchuk v. Ukraine* judgment

<sup>241</sup> Carabelli 2008, pp. 155-56

<sup>242</sup> Dorssemont 2011b, pp. 4 and ff.

Experts<sup>243244</sup> and the European Committee of Social Rights: in both cases the ECJ jurisprudence appears to fall short with respect to the standards upheld by such bodies.

In particular, the CEACR stressed that the need to assess the proportionality with regards to economic freedoms has never been included among the permissible restriction on the right to strike<sup>245</sup>, and a similar conclusion was reached by the ECSR, which has maintained that using the proportionality principle with a view to determine the strike's appropriateness represents a restriction of the right to strike going beyond those accepted under the relevant provisions of the Charter<sup>246</sup>.

As noted, the Court of Justice, in interpreting the existing Treaties and *acquis*, could take into account the renewed fundamental right context and depart from its decisions in the *Viking* and *Laval* rulings<sup>247</sup>; in particular, it should be noted that the multi-source reconstruction of the right to collective action, while an important feature of the Court of Human Rights ruling would not completely represent a novelty in the field of social rights in the European setting: already in *Bosman* and *Schmidberger* the ECJ had resorted to the analysis of the relation between articles of the ECHR<sup>248</sup> on one hand, and the provisions of the Treaty protecting the economic freedoms on the other. Furthermore, the citation in 2006 of the EU Charter by the ECJ while deciding a dispute among EU institutions<sup>249</sup>, underlined the nature of the EU Charter as a source of fundamental rights, but also asserted that its rules bound Member States in the application of Community rules, applying this kind of regulation "as far as possible" in accordance with the provisions of the Charter.

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<sup>243</sup> As noted, while not set out explicitly by ILC 87, the right of strike, has been recognized as one of the principal means by which workers and their associations may legitimately promote and defend their economic and social interests; furthermore the Committee on Freedom of association has gone further in defining all the main features of a legitimate strike, the subjects entitled to the right in question and the protection granted to them, the legitimate objectives of the collective action, the essential services deserving a special treatment. See *supra* 1.1.2

<sup>244</sup> As noted, the ILO's Committee of experts has considered that "it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services". The Committee considered that the "doctrine that is being articulated in these ECJ judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention"

<sup>245</sup> See *supra* par. 3.2.2 with reference to the BALPA application to ILO

<sup>246</sup> In particular art. 31 ESC. See Dorssemont in De Vos 2009, p. 57 and also *supra* 2.3.2

<sup>247</sup> Syrpis 2008, p. 235

<sup>248</sup> *i.e.*, artt. 10 and 11, see *supra* parr. 1.2.1 and 1.2.4

<sup>249</sup> Case C-540/03 *European Parliament v. Council*

Therefore, while art. 28 recognizes already in its language the right to take collective action<sup>250</sup>, something that both ILC 87 and the ECHR fail to do, the reference to the various sources mentioned could lower the degree of uncertainty linked to the current judicial course of the ECJ, especially on the workers and trade unions' side, would help in the proposing of alternative solutions to the Court or, at least, provide a more strict legal basis<sup>251</sup> for addressing or questioning the outcomes of the ECJ reasonings on the matter; it appears however difficult to envision a drastic transformation in the current judicial course set by the ECJ directly linked with the *Demir* and *Enerji* judicial course.

It should be considered, in fact, that the right to strike recognised by the ECtHR is not an absolute right<sup>252</sup>; it has been noted how the peculiar features and the collective force of the right to collective action could potentially be regarded as an undesirable discontinuity in an instrument designed primarily to protect individual civil and political rights<sup>253</sup>, preventing the solemn recognition and direct link of the right to strike to art. 11 ECHR; while, as noted above, the Strasbourg Court established the need for a dynamic protection of the right in question<sup>254</sup> it however appeared extremely reluctant to further address the issue of the right to strike and to assess whether the recognition of such a right was an essential element of the right to form and join trade unions.

In particular, in the aforementioned Turkish judgements<sup>255</sup> the ECtHR stated that the national legal framework constituted a violation of the freedom of association, but it addressed the issue of the legitimacy of such a restriction on the

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<sup>250</sup> References to the limitations of the rights included in the Charter are provided by art. 52.1 CFRUE, stipulating that “any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others”

<sup>251</sup> It should not be discarded, in fact, the hypothesis that the unbalance at ECJ level between the right to take collective action and the economic freedoms has derived from a certain vagueness of art. 28, in comparison with the high level of detail that could be derived from the long-standing interpretations of the economic freedoms

<sup>252</sup> See *Enerji*, par. 32

<sup>253</sup> Marguénaud and Mouly 2009, p. 501

<sup>254</sup> With particular reference to the protection of individual workers.

<sup>255</sup> *Urcan, Özcan and Kaya and Seyhan*. See *supra* in this paragraph

basis the freedom of peaceful assembly<sup>256</sup>, without examining any international law instrument related to the right to strike.

Furthermore, the formal recognition of the right to take collective action as a general principle of EU Law does not shed sufficient light on the possible relation between such a general principle and conflicting fundamental economic freedoms; in *Demir and Enerji* the Court assessed provision depriving civil servants the right to undertake collective action on the basis of the ECHR and on the other international instruments protecting workers' right, affirming the existence of a right to strike and the prohibition of a generalized ban.

However it must be considered that the ECJ had to take into account the existence of the rights contained in the EU treaties, such as the freedom of establishment and the freedom to provide services which, given their "constitutional" legal status and fundamental character as necessary instruments for the development of the internal market<sup>257</sup>, could be included in the allowed limitations to freedom of association aimed to ensure "the rights and freedoms of others", in accordance with art. 11.2 ECHR, therefore possibly leading to recognition of the need to limit the strike to allow the exercise of economic freedoms of the EU, as stated by the ECJ.

Furthermore, the reattachment to *Demir* as support for reliance on the ILO and the ESC to establish strike action as a corollary to the essential right to collective bargaining protected by Article 11 operated by the ECtHR in *Enerji*

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<sup>256</sup> Notwithstanding the fact that all the applicants explicitly referred to their right to form and join a trade union. See *Urcan* par. 33-34 and *Kaya and Seyhan* par. 29, in which the Court found that "by joining the event, the applicants have used their freedom of peaceful assembly", and *Özcan*, par. 22: "[The Court] examined the criminal conviction at issue in the light of all the facts to determine in particular if it was necessary in a democratic society, given the prominent place of freedom of peaceful assembly". It should be noted that the "Karaçay formula" ("the sanctions at issue are likely to discourage union members and others wishing to participate legitimately in a strike or in action to defend the interests of their members, see *Karaçay v Turkey*, no 6615/03, ECHR 2007 par. 37) was used in all the three judgments at hand. Therefore, in the field of industrial relations, it seems that has legal basis of the assessment of the ECJ and ECtHR might actually diverge since, while in the Convention the right to strike was connected to the right of association and peaceful assembly, such right is protected by the CFREU in art. 12, while collective bargaining and action are granted more specific protection in art. 28 CFREU. See Dorssemont 2011a

<sup>257</sup> Also, deviating from a strictly legal perspective, the peculiar role of the ECJ in the current context must be analyzed: The Court, in fact, while entrusted with the promotion of the social aspects of the EU, also has to protect the unfolding of the economic freedoms, which constitute, if not the *raison d'être*, at least the one of the paramount aims of the EU, in particular consideration of the intervened enlargement processes. At ECJ-level, therefore, the promotion of the economic dimension could be deemed as fundamental for the continuing existence of the Union

strongly suggests that the Court was accepting the right to strike insofar as it is exercised in furtherance of collective bargaining<sup>258</sup>, not leaving apparently any space for unofficial action; a confirmation of such approach can be found in the *Trofimchuk v. Ukraine*<sup>259</sup>, relating to a dismissal of a worker for a participation into a “spontaneous” strike, in which the ECtHR did not rely on multi-source reconstruction but simply on previous case law<sup>260</sup>, and ultimately found that the prohibition of anti-union discrimination<sup>261</sup> could not apply to the case at hand, concluding that disciplinary measure taken was not disproportionate<sup>262</sup>.

Moreover, the “indisputable” recognition of the right to strike by the Strasbourg Court only refers to trade unions; the individual workers, as noted, were protected on the basis of their freedom of peaceful assembly and, in particular, from retaliatory measures from the employer: the ECtHR jurisprudence, therefore, arguably shows a tendency towards an “organic” reconstruction of the right to strike, replicating the uncertainties and the criticism raised with regards to the art. 28 CFREU, and leading to the conclusion that, while heavily relying on ILO Convention 87 and on the ESC, also this judicial course may result more restrictive than the principles elaborated by the Committee of experts and the European Committee for Social Rights, in particular for what it refers to the permissible aims of the right to collective action, from which in the jurisprudence of both supervisory bodies only “purely political” strikes tend to be excluded and to the exclusive trade union entitlement<sup>263</sup>.

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<sup>258</sup> Ewing and Hendy 2010, p. 53

<sup>259</sup> *Trofimchuk v. Ukraine*, no. 4241/03, ECtHR 2010

<sup>260</sup> See Dorssemont 2011, p. 18

<sup>261</sup> *Ibid.*, par. 39. It should be noted, however, the the ECtHR stipulates that the participation to the picket falls within the scope of Article 11 of the Convention, and that since such action was directed against the management and concerned work-related issues, “divorcing the applicant’s participation in the picket from its consequences, namely her two-hour absence from work, would be too formalistic and contrary to the principle of practical and effective application of the Convention”. The Court therefore held that there was an interference with the applicant’s right to freedom of peaceful assembly and that it must be determined whether the interference was justified

<sup>262</sup> *Ibid.* par. 46-47. The circumstances that led the ECtHR to this conclusion were, in particular, that the notice given to the local authorities in anticipation of the collective action did not contain an indication of the planned duration of the picket, nor did it suggest that an absence from work because of her participation in the picket. Due to the nature of the applicant’s work responsibilities, the two-hour absence from work and the failure to provide to the direct supervisors advance notice of the absence resulted in serious disruption to workplace processes

<sup>263</sup> See *supra*, par. 1.1.2



#### 4.3.2 - By way of a conclusion: ECJ accountability and dialogue between Courts as a temporary response to the Viking and Laval judicial course

It appears evident that complaints to the supranational bodies mentioned can constitute effective modules of to determine the accountability of the ECJ with respect to its judicial options in the area of fundamental social rights, in particular when it is considered that the results of these judicial course, while not producing binding results, are reciprocally utilized and applied, giving rise to a cross-referencing *corpus* defining a set of principles potentially able to readdress the ECJ jurisprudence in a way to bring it closer to the perspective expressed by the ECtHR in *Demir*, effectively taking into account the “developments in labour law, both international and national, and to the practice of Contracting States in such matters”<sup>264</sup>.

With reference to the ECtHR, it has been underlined how, irrespective of the accession of the EU to the Convention of Human Rights, the ECtHR would represents a competent forum to challenge national legislation which has been influenced by the ECJ case-law in *Viking* and *Laval*<sup>265</sup>. However, along with the highlighted doubts with reference to the Strasbourg Court’s interpretation of the right to strike, it must be given account of the ECtHR’s restraint in holding the Member States responsible for violations of the Convention deriving from the application of EU law<sup>266</sup> and in particular the principle of “equivalent protection” defined in *Bosphorus*<sup>267</sup>; it appears therefore improbable to expect a ruling assessing the manifest insufficiency of final judgments of referring judges and national legislative items adopted in consequence of the ECJ’s judicial course.

Within the Council of Europe, another possible opportunity by way of a legal response to the ECJ decisions, notwithstanding the lack of enforceable remedies deriving from such instrument, would be under the Council of Europe’s

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<sup>264</sup> See *Demir*, parr. 153-154 and Novitz in Ales and Novitz, p. 272

<sup>265</sup> Under art. 34 ECHR. See also rule 47 of the Rules of Court which sets out the information and documents that must be provided and Dorssemont 2011a

<sup>266</sup> See, in particular *Matthews v United Kingdom [GC]*, no 24833/94, ECHR 1999-I and *Bosphorus v Ireland [GC]*, no 45036/98, ECHR 2005-VI

<sup>267</sup> *Bosphorus*, parr. 155 and 156

procedures<sup>268</sup>, raising questions about the obligations of States under the European Social Charter of 1961 and the Revised Social Charter of 1996; also for this case, as noted, it is difficult to envision a compatibility of the ECJ economic restrictions to collective action deriving from *Viking* and *Laval* with the comprehensive protection of the right to association and strike derived from Articles 5 and 6 ESC.

As it was previously underlined, an ILO complaint was the solution adopted by trade unions in the wake of the BALPA litigation and at the outcome of the Swedish Labour Court judgment and legislative process adapting the internal frameworks to the indications deriving from the Court of Justice<sup>269</sup>. While the scrutiny of the Swedish situation is still undergoing, it may be underlined the twofold position of the Committee of Expert with regards to the BALPA Application<sup>270</sup>; in particular, the CEACR rejected the British Government defence disclaiming any responsibility for the attitude adopted by the judiciary, since the negative impact of *Viking* and *Laval* would be the consequence of the application of EU law “to which the United Kingdom is obliged to give effect”. Furthermore, while explicitly affirming that it is in no position to assess other courts’ reasonings, it examined the potential impact of the ECJ jurisprudence, finding that the latter was likely to have a significant restrictive effect on the exercise of the right to strike.

National adjudicating bodies should also be considered actors of a multi-level cooperative structure for judicial dialogue, on the basis in particular of the EU principle of subsidiarity<sup>271</sup>; the Courts most involved in this process should be the bodies of last resort and, where they exist, the Constitutional Courts; in particular, in absence of the possibility of a political debate on the right to strike, national judges

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<sup>268</sup> It should be also noted that the system of collective complaints established by a Protocol to the ESC (Additional Protocol to the European Social Charter Providing for a System of Collective Complaints CETS No.: 158) provide the European Committee on Social Rights (ECSR) with the competence to examine complaints by social partner organizations and non-governmental organisations See, in particular Ewing and Hendy 2009, pp. 30 and ff.

<sup>269</sup> See parr. 3.1.1, 3.2.1 and 3.2.2

<sup>270</sup> *Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference 99th Session 2010*, 209.

<sup>271</sup> Various institutional actor can be identified as being involved in a network of frameworks for industrial relation within the EU, and in particular national civil and constitutional courts, the CJEU, the ECtHR, the ILO supervisory bodies and the social partners at relevant levels autonomously defining and enforcing such standards. See Bücken, Dorssemont and Warneck in Bücken and Warneck 2011, pp. 335 ff.

should not refrain from applying to the ECJ to induce it to provide a better explanation of the still uncertain elements deriving from its rulings<sup>272</sup>, or to take into due consideration the aforementioned developments in the ECtHR as well as in the jurisprudence of the supervisory bodies on which it nonetheless relies<sup>273</sup>.

However it must be underlined that in the national cases analyzed, this asserted dialogue has yet to occur with reference to the right to collective action and its recognition in European and international instruments: in the Swedish judgment on *Laval* the Court of Labour of Stockholm proceeded autonomously in the reconstruction of the elements of trade union liability and in determining whether the national provisions on damages could be applied to the dispute in object: such unusual “imitative” attitude<sup>274</sup>, not only produced questionable results, but represented a paradigmatic instance in which a new reference to the Luxembourg Court would have been the most appropriate response. On the other hand, in the *Metrobus* case the Court of Appeal swiftly dispatched the possibility of applying in the national setting the international standards, in particular those deriving from the *Enerji* ruling, stating that the restrictions to the right of strike provided by the British framework on collective action were to be considered compatible with ECHR<sup>275</sup>.

It should be also considered that, while the UK and Swedish situation particularly highlighted the need for effective involvement of the national judicial authorities, in order to allow for a correct development of the fundamental rights, and in particular of the right to strike, with a view of ensuring that it may be sufficiently guaranteed with regards to the national standards while remaining compatible with the EU framework still giving precedence to the economic

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<sup>272</sup> As it was noted, in particular those relating to the issue of direct horizontal effect and trade union liability.

<sup>273</sup> See Zahn and De Witte 2011, pp. 444-445

<sup>274</sup> See Sciarra 2011, pp. 366 and ff.

<sup>275</sup> In more general terms it must be noted that the ECtHR rulings do not require from the Member State any conformation effort towards a particular model, but simply prohibit to the States to be neutral or regressive with reference to existing collective bargaining and collective action rights. On the other hand, in the Nordic member states the growing influence of supranational sources in the internal systems is also producing positive effects. In Finland, for example, with a ruling issued on 22 December 2010 the KKO (Finnish Supreme Court) has struck as illegitimate because discriminating, the loss of a part of the salary (in particular, performance-based incentives) as an individual accessory sanction for the case of illegitimate strike (for violation of the peace obligation), on the basis of art. 11 ECHR and of the ECtHR jurisprudence in *Demir* and *Enerji*. See KKO:2010:93 (for the reference to ECHR parr. 15-17) and also *Stora Enso's strikers entitled to performance bonuses*, in Ammattiliitto Pro 30/12/2010, available online at <http://www.proliitto.fi/en/media/news/stora-ensos-strikers-entitled-to-performance-bonuses.html>

freedoms, it must be noted that the national courts may find themselves in the difficult situation of having to issue extremely significant decisions about legitimacy and proportionality of national policy choices, while at the same time lacking the institutional strength needed or the necessary specific technical capacity to gather the relevant information, as long as the criteria set out by the ECJ do not offer any concrete guidance<sup>276</sup>.

Lastly, for what it refers the possible involvement of Constitutional Courts, it must be given note of the German Federal Constitutional Court judgment which decided on the constitutionality of the Act approving the Treaty of Lisbon<sup>277</sup>; the BVerfG did not consider the approval to be at odds with the Constitution, but it also stated its jurisdiction<sup>278</sup> to review future EU Treaty changes and transfer of powers to the EU on the basis of an *ultra vires* and an identity review<sup>279</sup>, justifying its claim on the basis of the “democratic deficit” of the Union, in which the Member States remain the decisive holders of public authority, from which the Union derives its own power under the principle of conferral, which cannot allow the possibility the possibility for the European Union of taking possession of *Kompetenz-Kompetenz*<sup>280</sup> or to violate the domestic “constitutional identity”, which is not open to integration.

In the face of increasing competences and further independence of the EU institutions, therefore, national autonomy should prevail in areas where policy choices are specifically shaped by pre-existing cultural, historical and linguistic understandings<sup>281</sup>; furthermore the BVerfG also defined “constitutional identity” to require sufficient space for national policy choices shaping the economic and social

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<sup>276</sup> In this sense, it must be underlined once more how the Swedish *Arbetsdomstolen* represents a specialized body as well as a court of last resort: it is a tripartite body that comprises judges with legal background as well as members representing both sides of the labour market and, beside the assessment of the national ruling and of the criticism that has drawn, it must be noted how the national *Laval* ruling highlighted a very high degree of autonomous decision-making by the Supreme Court.

<sup>277</sup> BVerfG, 2 BvE 2/08, 30.6.2009

<sup>278</sup> Deriving from the “primary responsibility for integration” assigned to the national constitutional bodies which act on behalf of the peoples

<sup>279</sup> According to the *ultra vires* review, the BVerfG shall assess whether legal instruments of the European institutions and bodies, adhering to the principle of subsidiarity (art.5.2 EC and artt. 5.1 and 5.3 TEU), respect the boundaries of the powers accorded to them. The “identity review”, on the other hand, investigates whether the inviolable core content of the constitutional identity of the Grundgesetz is respected. BVerfG, 2 BvE 2/08, 240

<sup>280</sup> *i.e.*, the competence to decide on matters regarding competence. *Ibid.*, par. 233

<sup>281</sup> *Ibid.*, par. 249. Among these “socio-cultural” matter, the Court included issues of language, religion, education or family law.

conditions affecting the lives of citizens, including fiscal and social-policy choices; in contrast to the former sphere, therefore, it appears difficult to argue for a general presumption of national autonomy in the socio-economic sphere, which is deeply affected by the European integration<sup>282</sup>. The Lisbon ruling, however, while defining the EU substantially as a secondary political area<sup>283</sup>, does not provide a solution to the social and democratic problems emerging from such process<sup>284</sup>, and may therefore be considered as representing a substantially defensive reaction which, moreover, does not address the *status quo* when it affirms that no manifest problems of competences can be identified<sup>285</sup>.

The pressure on the ECJ to produce more detailed and balanced rulings, taking in due consideration the equality between the economic freedoms and social rights could not be sufficient, by itself, to solve the problems and the tensions underlying the ECJ jurisprudence and consequent to the rulings in the “Laval quartet”, in particular because of the occasional nature of the judicial interventions; in order to be able to produce consistent results this approach should be therefore accompanied, notwithstanding the shortcomings of the instruments provided by the current EU legal framework, by a strengthening of social policies and initiatives aiming to restore a better balance between market rules and labour rights, and in particular those of the collective dimension.

Long term and “structural” solutions to address the negative consequences of the rulings and the reconciliation of the social and economic dimension should proceed towards further amendments of the EU Treaties, and in particular the introduction of legal prerequisites for a common economic governance; for what it refers to the protection of fundamental rights it must be noted that, even in the

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<sup>282</sup> See Scharpf 2010, p. 233

<sup>283</sup> See Steinbach 2010, p. 415

<sup>284</sup> Relying in particular on reciprocal cooperation duties.

<sup>285</sup> See Höpner 2010, p. 25. It should also be noted that, the Italian Constitutional Court had developed a similarly cautious and conciliatory solution through the so called “counter-limits doctrine” set by its judgment 183/73, in which the Court stated that the ratification of the EC Treaty could not undermine the fundamental principles set by the Italian Constitution, while considering it inconceivable that the Community would adopt instruments “in a civil, ethico-social and political” ambit which were at odds with the fundamental principles at hand, among which are undoubtedly comprised social and labour rights (in particular see §20 German GG and Article 1 of the Italian Constitution and ). See Bückner, Dorssemont and Warneck in Bückner and Warneck 2011, pp. 348-349 and *supra* par. 1.1.1

perspective of possibly significant outcomes of the EU accession to the ECHR and its consequences in the EU institutional and judicial framework, the continuing exclusion from the competences of collective action is not bound to be touched upon by such an agreement which will not modify the competences of the Union.

Art. 153.5 TFUE therefore needs to be amended, and in particular it must be recognised in the EU setting the directly political relevance of the right to strike, linked with the effective development of a democratic society, rather than a reconstruction providing a more limited economic role of a rebalancing and enforcement instrument in collective bargaining and standard setting, which must be nonetheless ensured <sup>286</sup>.

Pending completion of the lengthy process towards ECHR accession and lacking political impetus, it is not currently possible to identify a definite and shared line of intervention in order to the practicable solutions with reference to the absence of clearly defined supranational standards on trade union action, fitting interpretative tools and a defined set of principles regulating the coordination and the dialogue between the various courts that should be involved in the dialogue at European level; the current situation of contrast will not be easily resolved, and for the short term the ECJ will probably be able to retain its interpretative primacy in the matters at hand, in consideration in particular of the cross-border aspects and the balancing issues between economic and social dimension emerging from such cases, that represent complexities which the ECtHR is not familiar with, but which represents aspects of fundamental importance in the enlarged European setting, as well as of its preminent institutional positioning and the far greater enforceability of its rulings.

Despite the asserted ongoing “constitutionalization” process of the European Union, therefore, the law governing such a Union and the policies pursued by the various institutional actors remain apparently dominated by the economic perspective of the establishment and consolidation of the common market, in particular in the current phase of EU interventions linked with the consequences of the economic and financial crisis, rather than by responses to the needs and demands regarding the promotion, protection and enforcement of fundamental social rights.

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<sup>286</sup> See Zoppoli in Andreoni and Veneziani 2009, pp. 228-229

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