

# European fundamental social rights and their (problematic) relationship with the economic freedoms

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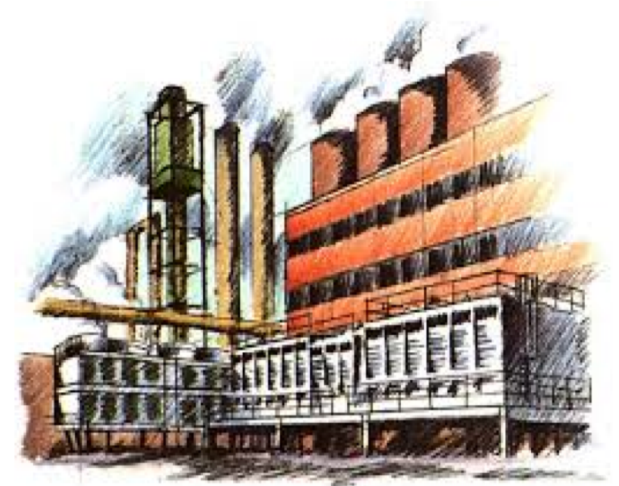
# Summary

- European Fundamental Social Rights
  - Sources
  - Enforceability
- Social Rights *vs.* Economic Freedoms
  - The legal regime of economic freedoms
  - Social rights *vs.* economic freedoms

# I. European Fundamental Social Rights

A. Sources

B. Enforceability



# A. Sources

- European Charter of Fundamental Rights
  - Content
    - Allegedly a restatement of the *acquis*
    - No formal separation between 1<sup>st</sup> generation and 2<sup>nd</sup> generation rights
    - Title IV – Solidarity
      - Worker’s right to information and consultation within the undertaking (Art. 27)
      - Right of collective bargaining and action (Art. 28)
      - Protection in the event of unjustified dismissal (Art. 30)
      - Fair and just working conditions (Art. 31)
      - Family and professional life (Art. 33)
      - Etc.

# A. Sources

- Other rights : Equal pay between men and women (art. 21), freedom to engage in work (Art. 15).
- Status
  - Legally binding since 1 December 2009
  - Same legal value as the Treaties (Art. 6(1) TEU)
- Scope
  - Binds only the EU and the Member States when they “implement EU law” (Art. 51)
    - Implement a directive or apply a regulation
    - Restrict a free movement right
    - Act in a field regulated by EU law but “requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other” (C-206/13 *Siragusa*)

# A. Sources

- Interpretation

- Consistency with ECHR (Art. 52(3)), which is a minimum floor (Art. 53)
- Consistency with constitutional traditions (Art. 52 (4))
- Due regard must be given to the Explanations (Art. 52(7))
- In the Explanations, reference to other international law documents such as the Community Charter of the Fundamental Social Rights of Workers and the European Social Charter.
- Difference between rights and principles (see below).

# A. Sources

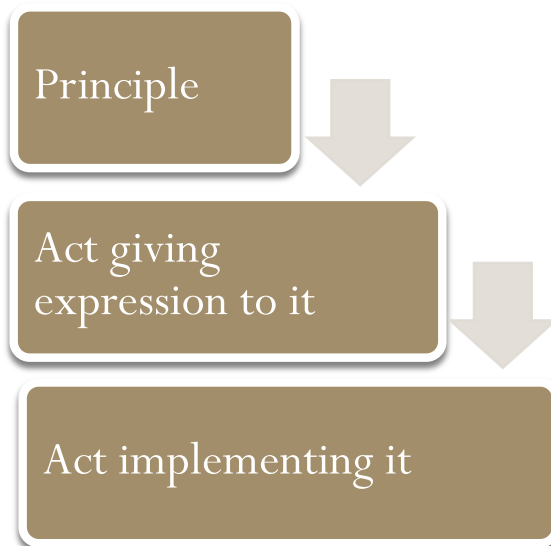
- The general principles of EU law
  - Status: « constitutional » (i.e., primary law)
  - Sources
    - Constitutional traditions common to the Member States
    - European Convention on Human Rights (and its case-law)
- Other, more specific, sources?
  - ILO Conventions, European Social Charter, Community Charter of the Fundamental Social Rights of Workers do not directly bind the EU.
  - However, can be used by ECJ in review or interpretation of secondary legislation that expressly refers to such sources (e.g. Working Time Directive and C-214/10 *Schulte*).

## B. Enforceability

- In general – The strange category of “principles”
  - Art. 52(5) Charter: “The provisions of this Charter which contain principles **may** be implemented by legislative and executive acts taken by (...) the Union, and by acts of Member States (...). They shall be judicially cognisable **only** in the interpretation of **such acts** and in the ruling on their legality”.
  - Legal regime
    - The return of the 1<sup>st</sup> generation – 2<sup>nd</sup> generation divide.
    - No positive obligation

## B. Enforceability

- C-356/12 *Glatzel*: only enforceable once they have been “given specific expression in EU law or national law”



## B. Enforceability

- Enforceability toward individuals
  - Rule: none (see wording of Article 51).
  - Exceptions:
    - Full enforceability (rights directly imposed on individuals or, at least, private organisations)
      - Free movement rights (Art. 15 Charter)
      - Equal pay between men and women (C-43/75 *Defrenne*)
    - Exclusionary enforceability (national law is set aside in private trial): General principle of non-discrimination based on age (C-144/04 *Mangold*; C-555/07 *Küküçdeveci*; C-441/14 *DI*) but neither right to annual leave (C-282/10 *Dominquez*) nor right to information and consultation of workers (C-176/12 *Association de Médiation sociale*)
    - When conflicting with economic freedoms (*Laval* and *Viking* - see below)

## II. Social rights vs. economic freedoms

A. The legal regime of economic freedoms

B. Social rights vs. economic freedoms



# A. The legal regime of economic freedoms

- Free movement of
  - goods (Art. 34-35 TFEU)
  - workers (Art. 45 TFEU)
  - companies and self-employed workers (Art. 49 TFEU)
  - services (Art. 56 TFEU)
  - capital (Art. 63 TFEU)
- Apply to Member States in all fields of activity
  - comp. Charter
  - Unless the field has been exhaustively harmonised by secondary legislation.
- Can apply to individuals, at least when they hold some power, e.g.
  - trade unions (C-341/05 *Laval*, C-438/05 *Viking*)
  - sport federations (C-415/93 *Bosman*)
  - certification bodies (C-171/11 *Fra.bo*)
  - employers (C-281/98 *Angonese*, C-43/75 *Defrenne*)
- Etc.

# A. The legal regime of economic freedoms

- 3 questions
  - Does the Member State restrict (i.e., prohibits, dissuades, makes less attractive) the exercise of a free movement right?
    - No: no breach
    - Yes: is such a restriction justified by an overriding requirement of general interest (or a by an express derogation ground if the restriction is discriminatory)?
      - No: breach
      - Yes: is it proportionate, i.e. suitable and necessary, to the attainment of the objective sought?
        - No: breach
        - Yes: no breach

## B. Social rights vs. economic freedoms

- Case 1 – *Viking*
  - Facts : Registering of Finnish ship under Estonian flag. Strikes initiated by trade unions. Freedom of establishment vs fundamental right to take collective action.
  - Reasoning of the Court
    - Does Article 43 EC apply to trade unions, even when they exercise their fundamental right to strike? Yes.
    - Do the collective actions entail a restriction on the freedom of establishment? Yes.
    - Is such a restriction justified by an overriding requirement of general interest?
      - As regards ITF: probably not, but for national court to decide.
      - As regards FSU: in principle, yes (protection of workers), if conditions of employment are jeopardised or under serious threat – to be assessed by domestic court.
        - Is it proportionate (for FSU)? Probably suitable; for the domestic court to assess necessity.

## B. Social rights vs. economic freedoms

- Case 2 – *Laval*
  - Facts : Posting of Latvian workers for construction of a school in Sweden. Refusal to enter into collective agreement. Collective action (blockading and sympathy actions).
  - Reasoning of the Court
    - Case-by-case negotiations of minimum rates of pay is not covered by Directive 96/71.
    - Does Article 49 EC apply to trade unions, even when they exercise their fundamental rights? Yes.
    - Do the collective actions entail a restriction on the free provision of services? Yes.
    - Is such a restriction justified by an overriding requirement of general interest? In principle, yes (the protection of the workers of the host State against possible social dumping) but not in this case, as the collective agreement goes beyond the requirements covered by Article 3 of Directive 96/71 EC.

## B. Social rights vs. economic freedoms

- Case 3 – C-549/13 *Bundesdruckerei*
  - Facts: obligation contained in tendering specifications relating to a public service contract of Stadt Dortmund to guarantee payment of a minimum wage to the employees of subcontractors of tenderers, provided for by legislation of the Land to which the public contracting authority belongs, even when the subcontractor is established in another MS (here Poland) and all the services are carried out in that other Member State.
  - Reasoning of the Court
    - Directive 96/71 does not apply because workers are not posted.
    - Is there a restriction of free provision of services (Art. 56 TFEU)? Yes.
    - In principle, may be justified by protection of workers but here
      - does not appear to be necessary (comp. employees in private sector)
      - and is certainly not proportionate (minimum wage does not match standard of living in Poland + takes away competitive advantage of subcontractors established in Poland .

## B. Social rights vs. economic freedoms

- Case 4 – *The German minimum wage legislation (MiLoG) and the international carriage of goods by road.*
  - Facts :
    - MiLoG entered into force on 1 January 2015 and applies to international carriage services (transit; loading or unloading; cabotage).
    - Infringement proceedings started against Germany regarding transit and loading or unloading services.
    - MiLoG currently suspended regarding transit.
  - Legal assessment
    - Cabotage – Recital 17 to Regulation 1072/2009: Directive 96/71 applies.

## B. Social rights vs. economic freedoms

- International carriage services (transit and loading or unloading):
  - Directive 96/71 does not apply:
    - Interpretation *a contrario* of Recital 17
    - Not “posted workers”
  - Contrary to Article 56 TFEU:
    - Restriction? Yes
    - Justified? No.
      - Protection of German industry: no because purely economic purpose (protectionism).
      - Social security concerns: yes but not suitable.
      - Protection of foreign workers: Yes but not genuine or suitable.

## B. Social rights vs. economic freedoms

- Conclusion: priority of free movement rights over social rights?
  - In theory, no: “Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.” (*Laval* and *Viking*).
  - In practice, problem of allocation of powers:
    - To the ECJ: Review of compliance with FM rights larger than with fundamental (social) rights;
    - To the EU legislature: limited competence in the field of social rights.

## B. Social rights vs. economic freedoms

- Result:
  - “The Committee considers that neither the current status of social rights in the EU legal order nor the substance of EU legislation and the process by which it is generated would justify a general presumption of conformity of legal acts and rules of the EU with the European Social Charter. Furthermore the Committee notes that the EU has not taken steps to accede to the European Social Charter at the same time as the ECHR. Therefore, the Committee confirms that it will carefully follow developments resulting from the gradual implementation of the reform of the functioning of the EU following the entry into force of the Treaty of Lisbon, including the Charter of Fundamental Rights. It will review its assessment on a possible presumption of conformity when it considers that the existence of the factors which the ECtHR identified as warranting the existence of such a presumption in respect of the Convention, which are currently missing insofar as the European Social Charter is concerned, have materialised. In the meantime, whenever it has to assess situations where States take into account or are bound by legal rules or acts of the EU, the Committee will examine on a case-by-case basis whether respect for the rights guaranteed by the Charter is ensured in domestic law” (European Committee of Social Rights, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees v. Sweden*, 3 July 2013).
  - Danish Labour Court judgment of 1 July 2015, *Danish Confederation of Trade Unions v. Ryanair*.

Thank you!

