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the land of the Lesser Depression

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Comments and discussions welcome.

Trade unions, collective bargaining and collective action beyond the EU and its Court of Justice

A tale of shrinking immunities and sparkling new competences
from the land of the Lesser Depression

Eftychia Achtsioglou^{}, Marco Rocca[†]*

1. Introduction

A long time ago, in a continent far, far away, a Federal State was facing its direst economic crisis. Gross domestic product was shrinking, by almost 50% in a few years, while unemployment sky-rocketed well above 20%. Evidently, it was not high time for social rights, or for trade union action. True enough, almost a decade before such an economic disaster, the Supreme Court of this distant land had recognized that the right to strike enjoyed constitutional protection. However, in spite of this recognition, such a right was in practice severely constrained by the omnipresent (and very credible) threat of liability in tort, as well as by the possibility for employers to fire strikers for breach of contract.

That being said, at the pinnacle of this dire situation, a series of legislative measures were enacted at the federal level, directly aimed at overcoming the economic crisis. Here we will not even try to assess the importance and the impact of those measures, such a task lying outside the scope of our paper. More modestly, we will focus on a specific measure of this package of legislation. Indeed, it was in the occasion of this legislative intervention that the right to strike found its guarantee at federal level.

The year was 1935 and the statute was the National Labor Relations Act (NLRA, also known as Wagner Act by the name of its sponsor, Senator Robert F.

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Wagner)¹. The country was, though quite obvious by now, the United States of America. More specifically, the US Supreme Court had stated that the right to strike was protected under the “due process clause” in the case of *Charles Wolff Packing Co. v. Court of Industrial Relations*², in 1923. As recalled before, this protection was in practice curtailed by the persistent interpretation delivered by the US Supreme Court about the application of antitrust law³ to trade unions’ activities -thus considered as an unlawful combination. Also the Supreme Court gave precedence over trade unions rights to the liberty to engage in business⁴ as well as to the freedom to enter into private contracts without any government restriction⁵. In sum, one can easily see as during the period pre-dating the NLRA economic freedoms were considered as prevailing on (though constitutionally protected) collective social rights⁶, the Supreme Court enforcing a *laissez-faire* economic approach to the relationship between management and labour.

It was on this stage that the NLRA was enacted. In order to achieve its goal to promote “the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees”⁷ it stated that “employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”⁸. Although the NLRA only applied to inter-state commerce, in the years following its enactment many states followed the federal example adopting similar pieces of legislation.

Needless to say, the Wagner Act has been subsequently amended a number of times, always in the direction of restricting the protection and room for maneuver for

¹ Pub. L. 74-198, 49 Stat. 449, codified as amended at 29 U.S.C. § 151–169.

² 262 US 522 (1923).

³ The so called Sherman Act, 26 Stat. 209, currently codified at 15 U.S.C. §§ 1–7.

⁴ *Loewe v. Lawlor*, 208 US 274 (1908).

⁵ The most (in)famous case being *Lochner v. New York*, 198 US 45 (1905).

⁶ ELIASOPH I. H., *A “Switch in Time” for the European Community? Lochner Discourse and the Recalibration of Economic and Social Rights in Europe*, *Columbia Journal of European Law*, 14, 2008 , p. 471.

⁷ 29 U.S.C. § 151.

⁸ 29 U.S.C. § 157.

trade unions' action⁹. However, we will now leave the protection of the right to strike in the US at its highest peak and fast forward to the present times, while leaping over the Atlantic, in order to come back to Europe and to the stage of this paper.

Before proceeding, a side note is in order. This (superficial) glance to the US legal history is not intended as a part of a comparative analysis¹⁰. In fact, as it will soon be clear, our paper deals exclusively with the legal order of the European Union. Still, our story telling has not been presented out of nostalgia for some tale from a distant past. Indeed, a number of thought-provoking inspirations arise from this history, as we keep it in mind while looking at the present situation of the EU.

Thus, back to Europe and to present times, back to another dire economic crisis. The Lesser Depression, as it has been called¹¹, is indeed putting an incredible strain upon social rights. Our analysis is focused on the collective side of these rights and, mirroring our American tale, on the quasi-federal level: the EU. Hence our paper tries to assess the evolving impact of the EU legal order upon two fundamental rights: the right to collective bargaining and the right to take collective action. Ironically, our “Supreme Court”, *i.e.* the Court of Justice of the EU (CJEU), delivered its over-debated decisions¹² about collective action just a few months before the sudden bankruptcy of Lehman Brothers, making the time span of our analysis coincide almost perfectly with the present economic crisis. As it is well known, both in *Viking* and *Laval* the CJEU had to decide upon a clash between (collective) social rights and economic freedoms, with the latter emerging “victorious” while the former had to undergo a strict proportionality test. More recently the Court applied the same logic to the right to collective bargaining, with a very similar outcome¹³. Though keeping in mind the huge differences between the two situations, the EU is currently living through its “Lochner Era”¹⁴, as we saw before for the US. Hence, we’re witnessing the “*Laval&Viking* Era”. Following our parallel through the looking glass, in the US that Era ended, grossly speaking, with the

⁹ GETMAN J., MARSHALL R., *The Continuing Assault on the Right to Strike*, Texas Law Review, 79, 2001, p. 703 et seq., 704. .

¹⁰ For an analysis in a comparative constitutional perspective see FABBRINI F., *Europe in Need of a New Deal: On Federalism, Free Market and the Right to Strike*, Georgetown Journal of International Law, 43, 2012, pp. 1-73.

¹¹ KRUGMAN P., *The Lesser Depression*, The New York Times, July 21, 2011.

¹² Case C-438/05, *Viking Line ABP v. The International Transport Workers' Federation and the Finnish Seaman's Union* [2008]; and Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet* [2008].

¹³ Case C-271/08 *Commission v. Germany* [2010].

¹⁴ See *supra* notes 5 and 6.

enactment of the NLRA. What about the EU? The legislative reaction to *Laval* and *Viking* is supposed to be embodied by the Commission proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services¹⁵ (so called “Monti II proposal”¹⁶). The proposal *per se* is a ground-breaking legal event, as for the first time the EU tries to directly intervene on the right to collective action. In our paper we will analyze this proposal in order to assess its (potential) impact on the situation.

Concluding this somewhat tortuous introduction, our paper will be organized as follows. Section 2, 3 and 4 provide for the story before the story, by elaborating on the balance struck by the Court to solve the clash between economic freedoms and fundamental trade union rights. At this stage our focus will be on specific aspects of the issue which we consider to be determinant of the final jurisprudential stance, such as the scope of application of economic freedoms with regard to trade union rights (Section 2), the “image” of trade unions emerging from the CJEU jurisprudence (Section 3) as well as at the more general theoretical approach granted by the Court to fundamental collective labour rights (Section 4). In the following sections 5 and 6 we will build upon this theoretical foundation and deal with its effects and its evolution in the field of the right to collective bargaining and the right to take collective action. In this regard our analysis first (Section 5) deals with the decision recently delivered by the CJEU in *Commission v. Germany* case¹⁷, second we turn to the “BALPA dispute”, and then we proceed to analyse the (now withdrawn) so called “Monti II” proposal”, in Section 6. We conclude by reflecting on these developments in the broader strategic framework drawn by the EU to deal with the current crisis, trying to evaluate the possible impact of the (eventual) accession of the EU to the European Convention for Human Rights.

¹⁵ COM(2012) 130, 21 March 2012.

¹⁶ The origin of this name is twofold. On the one hand, its comes from the document *A New Strategy for the Single Market At the Service of Europe's Economy and Society*, Report to the European Commission, 9 May 2010, prepared by (at that time just) professor Mario Monti. On the other, the regulation is (or should be) inspired by the Regulation on the functioning of the internal market in relation to the free movement of goods among Member States, 7 December 1998, OJ L337/8, 12 December 1998, this called “Monti I” by the name of the (back then) Commissioner Mario Monti. We will come back to this later in this paper.

¹⁷ Case C-271/08, *Commission v. Germany* [2010].

2. EU economic freedoms and trade union rights: is the scope clear?

It is by now well known that the balancing of national social policies and rights with the process of market integration which is to be achieved primarily through the elimination of barriers to free movement, has not been securely resolved by the political institutions of the EU. What is certain is that the goal of total harmonization of social policies –let alone labour law regimes- has been abandoned at least since the 1990s¹⁸. In the meantime, several collisions between national social rights and policies on the one hand and free movement provisions on the other have been brought before the CJEU, which found itself in the position of addressing an issue of political obligation. In a form of negative harmonization the Court began to strike down national social policy measures on the grounds of their incompatibility with the principles of free movement within the internal market¹⁹.

With regard to the collisions of trade union rights with the fundamental freedoms of market integration, the issue that has primarily to be addressed is whether collective labour rights should be considered to fall within the scope of application of the free movement provisions of the EU Treaty. Allied to this issue, is whether the Court chooses to involve itself in the process of weighing the conflicting fundamental social rights on the one hand and economic freedoms on the other, - as it would be the case with a national constitutional court-, or it chooses to refrain from it²⁰. The answers to the above questions should not be considered to be obvious, despite CJEU infamous jurisprudence in *Viking* and *Laval* cases, where the Court was without hesitation involved in the clash of the rights and freedoms in question, following its statement that trade union rights do fall under the scope of the EU economic freedoms.

The approach granted by the Court to the above key issues is not uncontested for at least three important reasons: a) Because according to article 153 (5) of the Treaty on

¹⁸ SYRPIS P. and NOVITZ T., *Economic and social rights in conflict: Political and judicial approaches to their reconciliation*, European Law Review, 3, 2008, pp. 411-426, 411-412.

¹⁹ DEAKIN S., *Labour Law as Market Regulation: the Economic Foundations of European Social Policy*, in P. DAVIES, A. LYON-CAEN, S. SCIARRA and S. SIMITIS (eds.), *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn*, Oxford University Press, 1996, pp. 63-93; MADURO M. P., *Striking the Elusive Balance Between Economic Freedoms and Social Rights in the EU*, in P. ALSTON (ed.), *The EU and Human Rights*, Oxford University Press, 1999, pp. 449-472, 451; BARNARD C. and DEAKIN S., *In search of coherence: social policy, the single market and fundamental rights*, Industrial Relations Journal, 31:4, 2000, pp. 331- 345, 333.

²⁰ SYRPIS P. and NOVITZ T., *op. cit.*, p.419.

the Functioning of the European Union (TFEU) (ex Art. 137 (5) TEC) the Union has no competence to regulate the right to strike²¹. Thus, it could be reasonably argued –and it has been so- that a TU’s right to take collective action in the context of negotiations with an employer is not covered by the free movement provisions²²; b) Because in *Albany*²³ the CJEU ruled that CAs “by virtue of their nature and purpose” when pursuing to serve objectives of social policy fall outside the scope of competition provisions of the Treaty²⁴. Drawing by analogy to *Albany*, it could be argued that collective autonomy is to be granted immunity from the free movement provisions of the Treaty. c) Most importantly, because the fundamental logic underlying the project of the European integration is characterized by the division of the social policy sphere from the economic one within the internal market. This balance of constitutional potency cannot be upset by fully subjecting national social policies and rights to economic freedoms²⁵.

With regard to the first two of the above arguments, the CJEU has already taken a position, which is however neither fully justified, nor uncontested. Concerning argument (a), the CJEU has rejected both in *Viking* and *Laval* judgments the position that the right to take collective action falls outside the scope of the economic freedoms in question, due to the EU lack of competence on the right to strike. In particular, the Court rejected this view in both cases maintaining that although Member states are in principle free to regulate the respective rights in the areas that fall outside the Community’s competence, they still have to exercise their competence in compliance with EU law²⁶. Consequently, the right to take collective action is not as such excluded from the application of the provisions of both the freedom to provide services and the freedom of establishment²⁷. As far as *Albany* judgment and the issue of CAs immunity

²¹ For a more detailed analysis of the EU’s competence in the field of collective labour rights see DAVIES A.C.L., *Should the EU have the power to set minimum standards for collective labour rights in the Member States?*, in ALSTON P. (eds.), *op. cit.*, pp.177-213, 192-199.

²² MALMBERG J. and SIGEMAN T., *Industrial actions and EU economic freedoms: the autonomous collective bargaining model curtailed by the European Court of Justice*, *Common Market Law Review*, 45, 2008, pp. 1115-1146, 1126.

²³ Case C-67/96 *Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999].

²⁴ *Albany*, paras 59-60.

²⁵ JOERGES C. and RÖDL F., *Informal politics, Formalised Law and the ‘Social Deficit’ of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval*, *European Law Journal* 15:1, 2009, pp. 1-19, 12.

²⁶ *Viking*, para 40; *Laval*, para 87.

²⁷ MALMBERG J. and SIGEMAN T., *op. cit.*, p. 1126.

from competition law are concerned, it is necessary to make the following remarks: In *Albany*, the Court adopted the view that the social policy objectives pursued by CAs would be seriously undermined if management and labour were subject to competition law rules when seeking to improve jointly the terms and conditions of employment²⁸. Based on this thought, the Court ruled that such CAs by virtue of their nature and purpose should be considered to fall outside the scope of the competition law provisions²⁹. Therefore in *Albany* the Court chose to immunize certain CAs from the competition law provisions of the Treaty. Note that we refer to “certain” CAs and not to all of them, because a closer look to the judicial reasoning reveals that the immunity founded by the Court concerned only those CAs the purpose of which is to serve social policy objectives. At this point, it becomes evident that the Court has set a standard of judicial review, which is no other than the review of the purpose of a CA, in order for it to be insulated from the competition law provisions. Consequently, it is doubtful whether CAs which do not serve a social policy goal will be exempted from scrutiny under the competition provisions of the Treaty³⁰. Leaving aside the implications for collective autonomy entailed by the standard of review set by the Court, it is undoubtful that in *Albany* judgment the Court has made a significant step on the road towards the recognition of a more pivotal position for social rights within the European legal order than the one occupied before³¹. What is even more significant in this labour law decision of the Court is that the emphasis was put on the social policy objectives found in Art 2 and 3 of the EC Treaty, which are to be given at least equal weight to competition policy objectives³². Consequently, *Albany* judgment not only offered a very useful clarification of the limits of competition policy with respect to collective autonomy, but it also brought to the fore the important standing issue of social policy within the European legal order. On the supplement ground offered by this jurisprudent, social policy is to be conceived as an independent goal of the Community which “cannot be emptied of content by the dictates of competition law”³³.

²⁸ SYRPIS P. and NOVITZ T., *op. cit.*, p. 419.

²⁹ *Albany*, paras 59-60.

³⁰ RYAN B., *The Charter and Collective Labour Law*, in T. HERVEY & J. KENNER (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights*, Oxford: Hart Publishing, 2003, pp.67-90, 82-84.

³¹ BARNARD C. and DEAKIN S., *In search of coherence*, *op. cit.*, p. 331.

³² BERCUSSON B., *European Labour Law*, 2nd ed., Cambridge, 2009, p. 293.

³³ BARNARD C. and DEAKIN S., *In search of coherence*, *op. cit.*, p. 337.

Nevertheless, a few years later the Court has come to negate the step forward taken by its decision in *Albany*, which has resulted in safeguarding vital space both for collective autonomy and social policy within European legal order. In *Viking* case the Court has limited the extent of *Albany* judgment maintaining that the approach adopted in the latter applied only to competition law provisions and was not applicable to the free movement provisions of the Treaty³⁴. The Court forwarded the direct application of economic freedoms over trade union rights on the basis of two individual arguments: i) that “it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that (those) fundamental freedoms will be prejudiced to a certain degree”³⁵; ii) that the terms of a collective agreement (CA) seeking to be reached by way of collective action (initiated by a trade union against an undertaking) are liable to deter the undertaking from exercising freedom of establishment³⁶.

Many scholars have contested the reasonableness of the first of the above arguments of the Court, claiming the exact opposite to be the truth; namely that the right to take collective action is intended to raise barriers to the economic sphere of the employer³⁷, to restrict, in other words, the exercise of his/her economic freedoms. It has therefore repeatedly and rightly been argued that it is impossible to exercise the right to collective action without restricting the employer’s economic freedom to a certain degree³⁸, unless the action is completely ineffective. However, our analysis wishes to shed some light on another aspect of the judicial reasoning. In terms of the methodology followed, the Court appears to take a rather strange path. It rules that trade union rights fall under the scope of economic freedoms by assuring that the exercise of the former is possible to set barriers to the latter –though the freedom’s impediment is not considered inherent in the exercise of the right. In other words, instead of first answering the

³⁴ *Viking*, para 53.

³⁵ *Viking* para 52.

³⁶ *Viking* para 55.

³⁷ DAVIES A., *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, *Industrial Law Journal*, 37, 2008, pp. 126-148, 140; NOVITZ T., *National reports: United Kingdom*, in R. BLANPAIN and A. ŚWIĄTKOWSKI (ed.), *The Laval and Viking Cases. Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area and Russia*. *Bulletin of Comparative Labour Relations* - 69. 2009, Kluwer Law International, pp.177-185, 183.

³⁸ FLOUR J. and AUBERT J.L. *Droit Civil. Les Obligations*, Vol. II, Sources: Le fait juridique, Armand Colin, 1981, p. 134; RIVERO J., *Les libertés publiques. Le régime des principales libertés*. 3e éd., PUF, 1983, p. 394; SINAY E. & JAVILLIER J.C., *La grève. Traité de droit du travail*, Vol VI, 2e éd, Dalloz, 1984, p. 367.

question whether the free movement provisions apply to trade union rights and then consider the possible limitations of both rights and freedoms at hand, the Court adopts the reverse logic. As a result, the conclusion drawn -namely that trade union rights fall within the scope of application of free movement provisions- not only lacks sufficient justification, but it also prejudices the standing of social rights at hand in the clash with economic freedoms.

Following such a problematic reasoning, the Court proceeds to interlink the freedoms of the European economic constitution with the fundamental labour rights of the national constitutions, undermining thus a constitutional design famously characterized by Fritz Scharpf as the decoupling of the social and the economic sphere in the European project³⁹. This jurisprudential move was meant to have an even greater impact on national autonomy over social policy given that it did not only subject national labour legislations to the free movement provisions, but also the fundamental labour rights and directly the trade unions as actors entitled by these rights⁴⁰.

3. Extending direct horizontal effect: A not so trivial misunderstanding of TUs' role

With the judgments in *Viking* and *Laval* cases being determinative of a line of decisions testing the limits of resistance of both the national labour law systems and the fundamental trade union rights, the Court chooses not only to establish the application of free movement rules to collective labour rights, but it makes another step by providing this application with direct horizontal effect. It is appropriate to clarify that 'horizontal effect' refers to a different and more complex issue of the binding nature of a provision, than the scope of application. It deals with the private actors (whether individuals or in a group) who are abide by a rule – in this case by the economic freedoms' rules- when exercising their autonomy⁴¹.

³⁹ SCHARPF F.W., *The European social model: coping with the challenges of diversity*, Journal of Common Market Studies, 40:4, 2002, pp. 645-670; JOERGES C. & RÖDL F., *op. cit.*, p. 3.

⁴⁰ JOERGES C. and RÖDL F., *op. cit.*, p. 13.

⁴¹ ORLANDINI G., *Right to Strike, Transnational Collective Action and European Law: Time to Move On?*, European Legal Integration: the new Italian scholarship, Jean Monnet Working paper 8/07, p. 7.

Let us now approach in more detail this core issue of direct horizontal effect. The vertical direct effect of the fundamental economic freedoms is established; all freedoms are applicable against the state. On the contrary, it is in principle excluded that the free movement provisions apply in horizontal relations. Contractual provisions cannot be regarded as barriers to economic freedoms since they are agreed between individuals and they are not imposed by a Member State⁴². This principle does, nonetheless, have exceptions⁴³. In particular, in its first judgment regarding direct horizontal effect in 1974, the Court held that the obligations from economic freedoms should apply directly to non-state actors who regulate in a collective manner gainful employment and the provision of services⁴⁴. The Court obviously wanted to prevent Member states from evading their obligations by delegating aspects of their regulatory functions to private parties, namely by providing the latter with the legal autonomy to regulate unilaterally market issues, just as the state did before⁴⁵.

However, collective action undertaken by trade unions totally differs from regulations on market affairs enacted by other legal entities when exercising their legal autonomy. The exercise of the right to take collective action does not result in regulating the market unilaterally; quite the contrary, collective action attempts at counterbalancing the lack of such a regulatory autonomy⁴⁶. The exercise (or even the threat of exercising) of the right to collective action enables trade unions to overcome to a certain extent the inherent inequality that characterizes the relation between workers and employers and which reflects in collective bargaining procedure, but it does not provide trade unions with the power to regulate the market unilaterally.

⁴² AZOULAI L., *The Court of Justice and the social market economy: the emergence of an ideal and the conditions for its realization*, Common Market Law Review, 45, 2008, pp. 1335-1356, 1343.

⁴³ On this point KILPATRICK argues that while the free movement of goods was found not to be horizontally directly effective, the opposite conclusion was reached by the Court in relation to the free movement of workers, in the *Angonese* case (C-281/98). Therefore, KILPATRICK maintains that the extent to which the fundamental economic freedoms apply to private parties varies according to the freedom. See KILPATRICK C., *British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law*, LSE Law, Society and Economy Working Papers 16/2009, p. 24. Quite different is the approach of AZOULAI who suggests that whether an economic freedom is horizontally effective depends, according to the Court, on the private party's activity which may attribute to it the characteristics of a quasi-public body. See AZOULAI L. *op. cit.*, p. 1344.

⁴⁴ Case C-36/74, *Bruno Nils Olaf Walrave and Longinus Johannes Norbert Koch v. Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielren Unie and Federacion Española Ciclismo* [1974].

⁴⁵ SYRPIS P. & NOVITZ T., *op. cit.*, p. 421; JOERGES C. and RÖDL F., *op. cit.*, p. 13.

⁴⁶ JOERGES C. and RÖDL F., *idem*.

Contrary to the above remarks -quite obvious in legal scholarship-, the Court both in *Viking* and *Laval* held that Art. 56 and 49 TFEU (ex 49 and 43 TEC), guaranteeing respectively the free provision of services and the freedom of establishment, have a direct horizontal effect, namely they apply directly to trade unions, and consequently they can be invoked against the latter⁴⁷. In order for the Court to justify this ruling it cited that “the abolition, as between Member States, of obstacles to freedom to provide services would be compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law”⁴⁸. As noted by many scholars, the Court thus extended the application of the free movement provisions of the Treaty, which in principle address to public authorities, to trade unions as well⁴⁹, attributing to the latter characteristics of quasi-public bodies or bodies with regulatory power⁵⁰.

Not unexpectedly, the Court rejected the claim that its interpretation applied only to quasi-public organizations or to associations exercising a regulatory task and having quasi-legislative powers⁵¹. Nevertheless, the Court’s position at this point is further contested, because in order to reinforce its view on the direct horizontal effect, the Court referred to cases concerning restrictions on free movement provisions imposed by private bodies with a regulatory power, that is, mainly by professional associations, such as the Union of European Football Association (UEFA) in *Bosman* case⁵². Note that within the context of this particular case the ECJ had held that free movement provisions “apply also to rules laid down by sporting associations, such as URBSFA, FIFA or UEFA, which determine the terms on which professional sportsmen can engage in gainful employment”⁵³. There is though a major difference between professional associations and trade unions, since, as already noted above, professional

⁴⁷ VAN PEIJPE T., *Collective Labour Law after Viking, Laval, Rüffert, and Commission v. Luxembourg*, International Journal of Comparative Labour Law and Industrial Relations, 25:2, 2009, pp. 81-107, 97.

⁴⁸ *Laval* para 98, *Viking* para 57.

⁴⁹ Note that in *Viking* case, the Court imposed the obligations from market freedoms not only to Finnish trade unions which undertook industrial action against Viking, but also to the ITF, a global federation of transport unions, which did nothing more than to send a circular to its affiliates reminding them of their commitments under ITF’s statutes. If even such an action is considered a barrier to economic freedoms, then we stand before a limitless extension of the horizontal effect of market freedoms which is to seriously undermine -if not to curtail- TUs’ autonomy, JOERGES C. and RÖDL F., *op. cit.*, p.14.

⁵⁰ AZOULAI L., *op. cit.*, p. 1344; DAVIES A.C.L., *One Step Forward*, *op. cit.*, pp. 136-137.

⁵¹ *Viking* para 64.

⁵² Case C- 415/93, *Union royale belge des sociétés de Football association ASBL v Jean-Marc Bosman* [1995].

⁵³ *Bosman* para 87.

associations can impose rules on those who wish to participate in an economic activity, while trade unions do not have this power. Trade unions are far from being bodies able to regulate the access to labour market. They can only negotiate with an employer on the terms of employment and even undertake collective action in order to put pressure towards the fulfillment of their demands, but they need the consent of the other party – namely the employer- for reaching a collective agreement⁵⁴. It is of course true that even in the case of professional associations consent on the part of workers is needed in order to realize an economic activity. The major difference though lies at the fact that professional associations have the power to set the rules, which employees are in principle free to accept, but in case they don't, it is them –namely the workers- who will not gain access to the market. In this regard, professional associations regulate access to the labour market. On the contrary, trade unions enjoy only negotiating power which can be more or less effective depending on the unions' dynamics, but they don't have the power to impose terms. Consequently, as Schlachter noted⁵⁵, trade unions can participate in setting rules for a labour market, thereby influencing fundamental freedoms of service providers, but they cannot regulate totally, on their own, the labour market. We believe that at this very misunderstanding of the role of TUs lies the key to clarify the problematic approach granted to both collective bargaining and collective action by the CJEU.



4. Trade union rights before the CJEU

4.1. From the 'non-discrimination' to the 'market access approach': Is it only national regulatory autonomy to be hurt?

Another pivotal issue that has to be addressed when attempting to approach CJEU judgments on trade union rights is the test used by the Court to review the compatibility of national social provisions with the free movement provisions. We argue at this point that despite the Court's subsuming trade union rights to economic freedoms, collective labour rights could still have preserved their effectiveness, unless

⁵⁴ AZOULAI L., *op. cit.*, p. 1346; SCHLACHTER M., *National reports: Germany*, in R. BLANPAIN and A. ŚWIĄTKOWSKI (ed.), *op.cit.*, pp. 63-72, 68.

⁵⁵ SCHLACHTER M., *idem*.

the Court had chosen to move from the ‘non-discrimination’ approach to the ‘market access’ approach so as to assess potential violations to market freedoms. In particular, in a first period following the Treaty of Rome, the Court assessed the conflicts between national social policy provisions and the free movement provisions of the Treaty through the use of the “non-discrimination test”⁵⁶, as it is by now well known. In terms of labour law, the application of this test implied that national rules were not considered obstacles to free movement once it was assured that they were equally addressed to domestic and foreign undertakings. From the workers viewpoint, national labour law rules were, according to this test, compatible with EU law, once they allowed in each state equal access to employment to the nationals of other Member states and assured that the latter would be treated equally to the nationals of the host state. In line with this test, if the Court was to find that national labour rules discriminated -either directly⁵⁷ or indirectly⁵⁸- on the grounds of nationality, the discriminatory element had to be removed, but the substance of the national rule at hand remained intact⁵⁹. The ‘non-discrimination’ approach ensured not only the equal access and treatment of other Member states’ nationals, but also the terms and conditions of employment of the host states’ nationals, who were thus protected from social dumping. Furthermore, the ‘non-discrimination’ approach immunized national labour law systems from challenges raised by the application of EU law, since it merely required that national labour rules were equally applied to both national and migrant workers⁶⁰.

However, from the beginning of the 1990s the Court of Justice began to implement a different approach to the review of compatibility of national measures with the free movement rules, widely known as the ‘market access’ approach⁶¹, or the *Säger* formula from the so-called case-law, in which the new approach was first detected⁶². In

⁵⁶ BARNARD C. & DEAKIN S., *European labour law after Laval*, in M.-A. MOREAU (ed.), *Before and after the Economic crisis: What implication for the ‘European Social Model’?*, Edward Elgar Publishing, 2011, pp. 252-269, 254-255.

⁵⁷ *Bosman*, *op. cit.*

⁵⁸ Case C-419/92, *Scholz v. Opera Universitaria di Cagliari and Cinzia Porcedda* [1994] ECR I-505.

⁵⁹ BARNARD C., *Employment Rights, Free Movement Under the EC Treaty and the Services Directive*, in M. RÖNNMAR (ed.), *EU Industrial Relations v. National Industrial Relations*, Wolters Kluwer 2008, pp. 138-168, 141.

⁶⁰ BARNARD C., *idem*.

⁶¹ BARNARD C., *idem*; LO FARO A., *Toward a de-fundamentalisation of collective labour rights in European social law?*, in M.A. MOREAU (ed.), *op. cit.*, pp. 203-216, 209; BARNARD C. and DEAKIN S., *op. cit.*, p. 256.

⁶² Case C-76/90, *Manfred Säger v. Dennemeyer & Co. Ltd* [1991].

the field of labour law, the implementation of this test entails that even non-discriminatory national rules may become liable to challenge as a restriction to free movement. An initial statement on this approach is detected in para. 12 of *Säger* judgment. It was cited that: “It should first be pointed out that Article 59 of the Treaty” -now Art. 56 TFEU- “requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services”.

The interpretation of the Treaty provisions given by the Court in *Säger* has proven determinative of the Member states’ regulatory autonomy in the social policy field. In the years to come, the Court of justice has extended the application of the ‘market access’ test to other economic freedoms⁶³, reinforcing thus its power to scrutinize national provisions. Consequently, the adoption of the market access approach upset the balance between national labour law systems and EU rules on free movement. The test sets the question whether a national measure restricts or in any way impedes the ability of an economic actor to exercise an economic freedom. Focusing, thus, exclusively on the effect of the rule on the exercise of the economic freedom, it is more damaging to regulatory autonomy, than the ‘non-discrimination’ approach⁶⁴. It further becomes obvious how the implementation of the ‘market access’ approach automatically results in national labour law rules being regarded as restrictions or obstacles to free movement and being reviewed as such.

4.2. From national social policy provisions to fundamental labour rights: The leitmotiv of ‘rule-exception’ continues

In *Viking* and *Laval* cases, the Court strictly implemented the ‘market access’ test. At this point it is useful to remind that the Court has ruled in both cases that

⁶³ For example in *Commission v. Denmark* (company vehicles) the Court ruled that ex Art. 39 TEC (now Art. 45 TFEU) requires not only the elimination of all discrimination on grounds of nationality, but also the abolition of any national rule which, even if it applies irrespective of nationality, hinders or restricts freedom of movement, Case C-464/02 [2005], para 45.

⁶⁴ BARNARD C., *op. cit.*, p. 142.

economic freedoms have been infringed by the unions' collective actions⁶⁵, since these actions made "it less attractive or more difficult" for the undertakings to exercise their rights to freedom to provide services (*Laval*) and freedom of establishment (*Viking*)⁶⁶. It was thus maintained that an infringement of the fundamental freedoms is conducted when their exercise is rendered "less attractive or more difficult". At this point a clear application of the 'market access' test is detected, which nevertheless does not address to national legislations, but to a fundamental labour right, such as the right to collective action. In other words, through the reasoning adopted by the Court in *Viking* and *Laval* judgments, the burden of compliance with the 'market access' test was transposed from national provisions to fundamental rights. Therefore, in the same way that national labour law provisions are subjected to routine scrutiny under the free movement provisions of the Treaty, so are the fundamental collective labour rights. It is on this questionable ground that trade union rights are regarded as obstacles or restrictions to economic freedoms⁶⁷.

The very same rights which are in the first place formally recognized by the Court as "fundamental rights which form an integral part of the general principles of Community law"⁶⁸, they are then classified as restrictions and they are assessed as such. Once this classification is made, the binary logic of "rule-exception/restriction" prevails in the judgment, where the rule is identified with the fundamental economic freedom which can be only exceptionally restricted. From this point on the structure of the judicial reasoning is by now well known. A legitimate ground for justification should be provided in order for the restriction to be accepted, while further requirements related to the restrictions' extension should also be met: The basic requirement is that the restriction cannot extend to the point of rendering the rule inapplicable and it should also be in accordance with the proportionality principle; that is, the restriction should be suitable for the objective it seeks to achieve, should be necessary for its achievement and should be fair on a cost-benefit analysis, namely the cost which invokes should not override the pursued benefit.

⁶⁵ BARNARD C., *Social dumping or dumping socialism?*, The Cambridge Law Journal, 67, 2008, pp. 262--264.

⁶⁶ *Laval* para 99, *Viking* para 72.

⁶⁷ LO FARO A., *op. cit.*, p.209.

⁶⁸ *Laval* para 91, *Viking* para 44.

With regard to the legitimate grounds upon which a restriction to free movement may be justified, the CJEU appears rather loose. This is the case, because the Court is interested not so much in confronting the collision of fundamental social rights with market freedoms, but in drawing the borderlines of the restrictions to economic freedoms. In other words, the Court is mainly concerned with dealing with the extent of the so-called “exception/restriction” to economic freedoms and not with balancing equally ranked rights and freedoms. Whether an interest will be characterized as “fundamental right” or not, is not a principal concern of the Court, as long as it can justify an exception to economic freedoms. Therefore, the classification of reasons which can provide a justification for limiting free movement appears of rather minimum importance to the Court, although some of them constitute rights of alleged European and fundamental nature. In this regard, a fundamental right is sometimes classified by the Court as an imperative reason of public interest, sometimes as a reason among those expressly provided for in the Treaties, sometimes as a *sui generis* motif of derogation, with the distinction not being always clear⁶⁹.



However, to approach the fundamental rights as restrictions or exceptions undermines their nature as the fundamental value-choices of a society and contravenes to their constitutional entrenchment as set of values given normative force⁷⁰. But even to regard fundamental rights as a separate ground of justification of the obstacles of free movement provisions is not compatible with the rights’ substance, resulting, as well, in their being assessed on the basis of the restrictions’ extension that they entail to economic freedoms.

As regards particularly the restriction to economic freedoms caused by the exercise of the right to take collective action, this is in principle addressed by the Court in the same way as any other “imperative reason of public interest”⁷¹. There is, nevertheless, a point of difference: the Court does not classify the right itself to the category of reasons of public interest which can in principle justify restrictions to economic freedoms, but the purpose that this right serves, namely workers’ protection,



⁶⁹ A. BAILLEUX, *Les interactions entre libre circulation et droits fondamentaux dans la jurisprudence communautaire. Essai sur le juge traducteur*. Bruxelles: Facultés universitaires Saint-Louis, 2009, pp. 274-278.

⁷⁰ WEILER J.H.H., *Fundamental Rights and Fundamental Boundaries: On standards and Values in the Protection of Human Rights*, in N.A. NEUWAHL and A. ROSAS (eds), *The European Union and Human Rights*, Kluwer Law International, 1995, pp. 51-76, 52.

⁷¹ LO FARO A., *op. cit.*, p. 212.

the actual pursue of which is also to be assessed by the Court. It is reminded at this point that both in *Viking* and *Laval* the Court asked if the collective action could be justified as a means for the protection of workers⁷². What is more, the Court assessed whether the exercise of the right at hand actually pursued this objective, giving as it is well known, a positive answer in *Laval* and a negative one in *Viking*. In particular, in *Laval* the collective action undertaken in order to ensure the terms and conditions of employment of the posted workers was considered to fall within the legitimate objective of protecting workers⁷³, while in *Viking* the Court cast doubt on the actual pursue of this objective⁷⁴. However, what appears to be the problematic issue here is not related to the judgments' outcome (namely whether the Court finds that the right to strike does serve workers' protection or not), but to the very object of the judicial review. The Court appears to examine whether the current exercise of a right – which noteworthy has been characterized as fundamental- actually pursues a legitimate goal, as if the right itself does not embody a self-existent value, but as if it equals to a means for the attainment of a different objective. Such an approach ultimately reveals that the judicial recognition of the right to strike as a fundamental right has been just in name and not in substance.

All in all, it seems apparent that the Court frames the conflict of economic freedoms with trade union rights not as a case confronting two opposed rights, but rather as an issue where an economic freedom is restricted by a (legitimate/) interest⁷⁵. Indeed, the Court never denied the adoption of such an approach; quite the contrary. The CJEU appears to abide by its position on the issue, by invoking reasons of jurisdiction. In particular, it is argued that the Court's approach to the conflicts between economic freedoms and fundamental rights is totally justified by the fact that the Court's jurisdiction is limited to the review of the market freedoms' application. In line with this argument, CJEU president stated that "the Court has jurisdiction only when fundamental freedoms come to play", therefore in the conflicts with fundamental rights, "fundamental freedoms are to be examined first"⁷⁶. With regard to the above argument, it should be first clarified that the approach to fundamental rights adopted by the Court,

⁷² MALMBERG J. and SIGEMAN T., *op. cit.*, p. 1130.

⁷³ *Laval* para 107.

⁷⁴ *Viking* paras 81-82.

⁷⁵ ALIPRANTIS, N. and KATROUGALOS, G., *National reports: Greece*, in R. BLANPAIN and A. SWIĄTKOWSKI (eds.), *op. cit.*, pp. 73-81, 76.

⁷⁶ SKOURIS V., *Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance*, EBLR, 2006, pp.225-239, 237.

according to this study analysis, is not founded on the order by which the Court reviews the conflicting interests, but on the type of the judicial reasoning, namely its structure on the premise of “rule-exception/restriction”. Apart from this, it is true that the subject matter of the Court’s jurisdiction is limited to economic freedoms. Therefore, while the qualification of strike as a fundamental right would require that the Court evaluated whether it could be limited by other rights or interests⁷⁷, the CJEU has never performed such a judicial review; For the Court rightly considers itself to be only competent to assess the application of economic freedoms and not to evaluate the observance of fundamental rights.

However, we argue that in order to maintain consistency with the above cited argument on limited jurisdiction, the Court should in the first place choose not to interfere with the weighing of colliding rights and freedoms; For in such collisions, the *ad hoc* balancing of conflicting values is required, an oeuvre which can only be realized by a competent constitutional court. All the same, the CJEU chooses, as noted, to involve itself in the process of weighing the conflicting economic freedoms with TU rights, despite its explicit recognition of latter as fundamental. It is, nevertheless, deeply contradictory to refuse competence in the observance of fundamental rights, while involving in a dispute of constitutional nature between fundamental rights and freedoms only to treat the former as restrictions to the latter. What is more, such a contradictory approach is bound to lead to the automatic subordination of TU rights to economic freedoms, even before the judicial review commences.

5. Collective Bargaining in the *Laval&Viking* Era

As already argued above, the feeling of (relative) safety inspired by the *Albany* decision, was to be shattered during the *Viking&Laval* Era. It took little less than 2 years to the CJEU to apply the doctrine developed in the two decisions to the right of collective bargaining. The occasion was provided by an infraction procedure brought against Germany⁷⁸.

⁷⁷ LO FARO A., *op. cit.*, p. 212.

⁷⁸ Case C-271/08, *Commission v. Germany* [2010]. See SYRPIS P., *Reconciling Economic Freedoms and Social Rights – The Potential of Commission v Germany (Case C-271/08, Judgment of 15 July 2010)*,

This infraction procedure was directed against the direct awarding (by local authorities and local authority undertakings having more than 1218 employees⁷⁹) of service contracts for the management of occupational old-age pensions, without call for tenders at European level. Those contracts were awarded to bodies which were directly identified by collective agreements. Such agreements were concluded between the Federation of Local Authority Employer Associations and ver.di (United Service Sector Union). This practice was considered by the Commission as being in breach of Council Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts⁸⁰, in conjunction with Articles 23 to 55, of Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts⁸¹.

Following our previous analysis, we will focus on the relationship of this decision with *Albany*. However, it is interesting to spend a few words about the reaffirmation of the cited *Viking&Laval* doctrine in the present case. In fact it is by explicitly referring to these judgments the Court considers itself competent to solve the clash between economic freedoms and fundamental rights⁸². *In casu*, the freedom to provide services, since the two directives at stake are considered as an *implementation* of this freedom⁸³, and the right to collective bargaining, protected under Art. 28 of the EU Charter of Fundamental Rights. Article 28 plays indeed an important role, since it is through it that the Court affirmed that also the constitutional protection enjoyed by the right to collective bargaining⁸⁴ had to bend the knee in front of EU law: “While it is true that the right to bargain collectively enjoys in Germany the constitutional protection conferred, generally, by Article 9(3) of the German Basic Law upon the right to form associations to safeguard and promote working and economic conditions, the fact remains that, as provided in Article 28 of the Charter, that right must be exercised in

Industrial Law Journal, 40:2, 2011, pp. 222-229; ROCCA M., *Case C-271/08 Commission v. Germany*, European Labour Law Journal, 2:1, 2011, pp. 76-79.

⁷⁹ It must be noted that the Commission in its reply redefined the subject-matter of its action “by requesting the Court to find a failure to fulfill those obligations because local authorities and local authority undertakings which had more than 2 044 employees, in 2004 and 2005, more than 1 827 employees, in 2006 and 2007, and more than 1 783 employees, in the period from 2008, awarded such contracts directly, without a call for tenders at European Union level”.

⁸⁰ 18 June 1992, OJ 1992 L 209, p. 1.

⁸¹ 31 March 2004, OJ 2004 L 134, p. 114.

⁸² *Commission v. Germany*, para 42.

⁸³ *Ibidem*, para 44.

⁸⁴ Article 9(3) of the German Basic Law.

accordance with European Union law”⁸⁵. Obviously this comes as no surprise, as the preeminence of EU law has long been affirmed by the Court⁸⁶. The actual application of this principle however is, in this case, more problematic. It was so that, after having confirmed its competence, the Court applied the proportionality test developed in *Viking* and *Laval*. Unsurprisingly the Republic of Germany was found in breach of the Directive (and hence of the freedom to provide services).

On its path to this solution, the Court had to circumvent the argument based on the “*Albany* immunity”⁸⁷, put forward by the Republic of Germany. Indeed the German State, in order to “exclude” the results of collective bargaining from the application of EU economic freedoms, proposed the application of the reasoning delivered by the Court in *Albany*. The cornerstone of such a defense was the analogy between competition law (where the *Albany* doctrine was elaborated) and fundamental freedoms (at stake in the present case). The Court did not accept this reasoning, denying, plain and simply, the possibility of such an analogy, as it had already done in *Viking*⁸⁸. Indeed the Court, in its distinguishing of the two sets of rules (competition and fundamental freedoms), carries the narrowing of the “*Albany* doctrine” to its furthest end. This may be puzzling as in *Albany* the Court was already aware of the possible restriction of cross-frontier business and service⁸⁹, nonetheless granting the immunity to collective agreements.

Paradoxically in a more recent judgment⁹⁰, the Court had the occasion to confirm the *Albany* doctrine in its previous, “orthodox” version. In the *AG2R* case the Court of Justice had to decide upon the compatibility of a French sectoral agreement with the EU requirements in the field of anti-trust law. This sectoral agreement contained a provision for a mandatory health insurance, managed by *AG2R Prevoyance*.

⁸⁵ *Commission v. Germany*, para 43.

⁸⁶ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963]; Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970].

⁸⁷ It is interesting to note that the facts in *Albany* were similar to the ones of the present decision, as the Court had to assess the compatibility of competition law with a collective agreement establishing a mandatory pension fund.

⁸⁸ *Viking*, para 52, see previously Section 2.

⁸⁹ See *Albany* para. 50: “Moreover, such an agreement affects trade between Member States in so far as it concerns undertakings which engage in cross-frontier business and deprives insurers established in other Member States of the opportunity to offer a full pension scheme in the Netherlands either by virtue of cross-frontier services or through branches or subsidiaries.”

⁹⁰ Case C-437/09, *AG2R Prévoyance c. Beaudout Père et Fils SARL* [2011].

The dispute originates from the action brought by the insurer against an employer who refused to pay its contributions to the fund. Beyond the French tribunal the employer, among other arguments, claimed that the French legislation, allowing for an extension *erga omnes* of the cited agreement, was in breach of EU law. The Tribunal de Grande Instance of Périgueux then sent the case to the CJEU for a preliminary ruling on the issue.

In very brief, the Court confirmed the compatibility of this scheme with competition law (Art. 101-106 TFEU). The decision is in fact a direct application of *Albany*, if not a repetition, even though the French legislation, not allowing for exemptions to the mandatory affiliation to the insurance, is even stricter than the Dutch one⁹¹. Hence, the paradox. Both the decision and the Opinion never make reference to *Commission v. Germany*. Visually, the gate preventing the intrusion of competition law in the field of collective bargaining stays high, strong and barred, while the surrounding walls are but a ruin, crumbled under the superior strength of economic freedoms. This amounts to a grotesque mimicry of the old idea that social policy was a matter for the individual Member States to handle. The combination of *Commission v. Germany* and *AG2R* makes it clear that a national employer cannot "escape" from (as in our cases) mandatory membership to an insurance/pension fund established in a CA applicable to its sector of activity. On the contrary, a foreign employer (or an eventual infringement procedure) could challenge the very same provision as restricting the freedom of establishment or the freedom to provide services with a much higher possibility of "success". Thus the *Albany* doctrine is confined to competition law. On the one hand this approach seems very formalistic: the restriction to competition and to economic freedoms derives from the very same exercise of the same right. It is difficult to conceive a CA restricting competition while leaving untouched the (broader) economic freedoms. This brings back the paradox: those who can rely on fundamental freedoms to challenge collectively agreed standards may find themselves in a position of competitive advantage. On the other hand this situation shows once again the

⁹¹ *AG2R*, para. 39: "Article 101 TFEU, read in conjunction with Article 4(3) EU, must be interpreted as not precluding the decision by the public authorities to make compulsory, at the request of the organizations representing employers and employees within a given occupational sector, an agreement which is the result of collective bargaining and which provides for compulsory affiliation to a scheme for supplementary reimbursement of healthcare costs for all undertakings within the sector concerned, without any possibility of exemption".

preeminence of economic freedoms, in their role of quasi-constitutional foundations of the EU.

6. Collective Action in the *Laval*&*Viking* Era

It is difficult to assess the actual impact of *Viking*&*Laval* on industrial relations practices across Europe. Following the analysis proposed by Novitz, Hayes and Reed, the effects of such jurisprudence can be classified under three different categories: chilling effect, ripple effect and disruptive effect⁹².

The chilling effect refers to the hampering of the ability of trade unions to take lawful industrial action. This effect derives from the threat of claim for damages, of the very same nature that we saw in *Laval* and in the subsequent Swedish judgment. Putting this in the context of power relations, the limitation of the ability to have recourse to collective action evidently entails a reduction of “the ability to influence the decisions which are and are not taken by others”⁹³ and of “the capacity to oppose the actions of others”⁹⁴. *In casu* this actions and decisions were represented by the application of lower working conditions (*Laval*) or by the de-localization pursued by the re-flagging of a vessel (*Viking*). Indeed, as industrial action can be considered as the “sanction” of an industrial relations (legal) system, this *chill* may very well pervade the whole process of collective bargaining, since “serious negotiations involve the overt or implicit threat of collective action”⁹⁵.

One can see as a similar effect is difficult to grasp in terms of legal analysis. Indeed by its very definition it prevents the recourse to collective action, undermining legal certainty and providing for actual grounds to make credible threats of retaliation. Still, a very good example of this effect made its way to the international stage during

⁹² NOVITZ T., HAYES L. and REED H., *Applying the Laval quartet in a UK context: chilling, ripple and disruptive effects on industrial relations*, in A. Bückner and W. Warnecke (eds), *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert*, Nomos Publishers, 2011, pp. 195-244.

⁹³ HYMAN R., *Industrial relations: a Marxist introduction*, Macmillan, 1975, p. 26.

⁹⁴ EDWARDS P. et al., *Industrial relations: theory and practice*, Paul Edwards (ed.), John Wiley & Sons, 2003, p. 12.

⁹⁵ HYMAN R., *Industrial relations*, *op. cit.*, p. 189.

the *Laval&Viking* Era: we will soon turn our gaze to it. However, for the sake of completeness, we will first sketch the two remaining effects.

In a nutshell, the ripple effect is identified with the undermining of collective bargaining. Indeed, making it harder to secure the application of agreed conditions clearly represents another shift of power resources. In fact, collective agreements are the practical epiphenomena of trade union's power, intended as “the ability of an individual or group to control his (their) physical and social environment”⁹⁶ as well as the “capacity to pursue one's interests”⁹⁷.

Finally, the disruptive effect represents the outcome of the two previous effects, involving the very role of trade unions in society. With their weapons (collective action) and tools (collective bargaining) seriously undermined trade unions are deemed to lose attractiveness in front of the workers. This amounts to the disruption of established practices and pushes workers towards less institutionalized means for expressing their eventual unhappiness (e.g. wildcat strikes)⁹⁸.

For the purposes of this paper we will focus on the first effect, *i.e.* the chilling one, in order to assess how the doctrine developed by the CJEU in *Viking&Laval* was soon used as a basis for threats aimed at undermining the ability to take (lawful) industrial action.

6.1 The BALPA dispute

The dispute here at stake⁹⁹ (generally referred to as “the BALPA dispute”) arose in the context of negotiations between British Airways and the British Air Line Pilots’ Association. Following the Open Skies Treaty¹⁰⁰ (concluded in 2007 between the USA and the EU) British Airways was planning to launch a wholly owned subsidiary airline that would operate between Paris and (among others) the US. Along with this operation, the process of collective bargaining started: the thorny issue revolved around the working conditions to apply to the workers of the subsidiary. BALPA was ready to

⁹⁶ HYMAN R., *Industrial relations, op. cit.*, p. 26.

⁹⁷ EDWARDS P. et al., *Industrial relation, op. cit.*, p. 12.

⁹⁸ NOVITZ T., HAYES L. and REED H., *Applying the Laval quartet in a UK context, op. cit.*, p. 239.

⁹⁹ For a more detailed analysis see EWING K.D., HENDY J. (eds.), *The New Specter Haunting Europe*, Institute for Employment Rights, 2009, Ch. 6.

¹⁰⁰ This Treaty, for the part that is involved in our story, allowed an airline based in one EU Member State to operate flights to the USA from another EU State. Before the Treaty such a possibility faced significant obstacles.

accept the principle by which the new subsidiary would need to operate with lower labour costs; still they were concerned by the possibility that this situation would provide a basis to subsequently undercut working conditions also within the “mother” company. Thus, collective bargaining started in the summer 2007. However, the negotiations failed and no agreement was reached. BALPA then called for strike action, holding a ballot which turned out as clearly in favor of collective action. BA responded threatening to seek an injunction. It is at this point that the shadow of *Viking&Laval* appeared on the scene. Indeed, the company alleged that any strike action would be unlawful because of the doctrine developed by the CJEU in the two infamous cases¹⁰¹, since such an action would be in violation of its freedom of establishment. Because of the complexity of the test involved in the *Viking&Laval* doctrine¹⁰² it was very likely that the injunction would have been granted¹⁰³. What is more, when BALPA applied to the court in order to determine if BA claim was founded, the company counterclaimed, once again on the basis of the doctrine developed by the CJEU. The main threat behind this counterclaim revolved around a claim for *unlimited* damages, estimated by the company at £100 million *per day*. It was then clear for BALPA that even pursuing the action in court was futile: such an action would have likely required a long time to see its end, including a possible appeal and a reference to the CJEU. By that time the subsidiary would have been established. Also, the “life-threatening” amount of damages sought by the company meant that having recourse to industrial action before the end of the judicial procedure would have been far too dangerous for the union¹⁰⁴. Because of this, BALPA discontinued its legal claim and the collective action was cancelled. So far so good. Or not. However, this short *chilling* story is but the first half of the novel. There is indeed a second part, a twist in the plot. This second part is in fact directly connected with the *chilling effect* we explained before. Following the outcome we

¹⁰¹ EWING K.D., HENDY J., *The Dramatic Implications of Demir and Baykara*, Industrial Law Journal, 39:1, 2010, pp. 2-51, 43.

¹⁰² See *supra* Section 4.2.

¹⁰³ EWING K.D., HENDY J., *The Dramatic Implications*, *op.cit.*, p. 43: “Given that the test for the grant of an interim injunction is whether the claimant can demonstrate a serious issue to be tried and that the status quo should be maintained unless the balance of convenience disfavours it, it was plain that an interim injunction would be likely to be granted”.

¹⁰⁴ Though under British law (TULRCA 1992, s. 22) the amount of damages recoverable from a trade union in similar disputes is capped, the company argued that a claim based on EU law was incompatible with such a limitation, because of the principle which requires remedies for breach of EU law to be effective.

outlined in the preceding paragraphs, BALPA lodged a complaint before the ILO Committee on Freedom of Association (CFA). In this procedure the union was later joined by the International Transport Federation (ITF). The Committee delivered its conclusions in the occasion of the 2010 Report. These conclusions were defined by the ITF as groundbreaking¹⁰⁵. In its conclusions, the Committee first discarded the objection raised by the UK Government, which had pointed out that the impact of *Viking&Laval* was a consequence of EU law¹⁰⁶. Second, the Committee stressed the fact that it was not its task to “judge the correctness of the ECJ’s holdings in *Viking* and *Laval* [...] but rather to examine whether the impact of these decisions at national level are such as to deny workers’ freedom of association rights under Convention No 87”¹⁰⁷. However, after this careful disclaimer, the conclusions were a direct (as direct as it can be imagined in such a context) critique of the *Viking&Laval* doctrine. On a more “abstract” side, the Committee *explicitly* excluded the proportionality test from the catalogue of possible restrictions to the rights protected under Convention No. 87¹⁰⁸. On the “practical” side, in the conclusions we can find a direct critique to the chilling effect entailed by the ECJ doctrine. In fact the Committee denounced that “the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the *Viking* and *Laval* judgments, creates a situation where the rights under the Convention cannot be exercised”¹⁰⁹. Closing its conclusion the Committee stated that “the doctrine that is being articulated in these (*Viking* and *Laval*) ECJ judgments 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*” (emphasis added). It is then clear that the recognition by the Committee of the chilling effect has played a pivotal role in reaching such a conclusion.

Apart from the recommendation to the UK Government to improve the situation by reviewing the legislation dealing with industrial action, the actual (direct) legal effect

¹⁰⁵ ITF, Right to strike over social dumping backed by key ILO body, 4 march 2010, www.itfglobal.org/news-online/index.cfm/newsdetail/4256, (last accessed 30 July 2012).

¹⁰⁶ International Labour Conference, 99th Session, 2010, Report of the Committee of Experts on the Application of Conventions and Recommendations, pp. 208-209.

¹⁰⁷ *Ibidem*, p. 209.

¹⁰⁸ “The Committee observes that when elaborating its position in relation to the permissible restrictions that may be placed upon the right to strike, 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” (emphasis added), *ibidem*.

¹⁰⁹ *Ibidem*.

of these conclusions may be defined as nonexistent¹¹⁰. Still, it can be safely affirmed that at present the doctrine developed by the CJEU in the two infamous cases is (*likely*) in violation of ILO standards, and in particular of Convention No. 87, as interpreted by the Committee supervising the application of the Convention itself. To add to the embarrassment that this situation entails (or should entail), Convention No. 87 is included in the ILO Declaration on Fundamental Principles and Rights at Work, thus figuring between those Conventions (defined as “fundamental”) whose *respect* and *promotion* is considered as inextricably connected with the very *membership* of the ILO¹¹¹.

A final, though probably minor, legal note on this *chilling* story, regarding the relationship between the EU legal order and ILO standards: It is interesting to note that Art. 351 TFEU provides for an exceptional procedure in the specific case of a conflict between EU law and obligations stemming from international treaties signed by the Member states *before* the conclusion of the TEC¹¹². This article stipulates that: “The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude”. Incidentally, the Convention at stake in the BALPA dispute, Convention No. 87, was signed in 1949. Although the practical legal effects of this situation are far from clear, it should at least urge the Member States to act in the context of the EU in order to solve this conundrum.

¹¹⁰ A (narrow) pathway for a legal effect to manifest itself will be analysed in our conclusions, when dealing with the recent jurisprudence of the European Court of Human Rights.

¹¹¹ ILO Declaration on Fundamental Principles and Rights at Work, June 1998.

¹¹² See BÜCKER A., DORSEMONT F. and WARNECK W., *The Search for a balance: analysis and perspectives*, in BÜCKER A. and WARNECK W. (eds.), *Reconciling Fundamental Social Rights and Economic Freedoms*, *op. cit.*, p. 338.

6.2 The “Monti II” proposal (what is dead may never die)

In his most renowned book Otto Kahn-Freund affirmed that “on a number of vitally important occasions Parliament had to intervene to redress the balance which had been upset court decisions capable of exercising the most injurious influence on the relations between capital and labour”¹¹³. The German-British lawyer was in fact speaking of the British system. However, all differences considered, at the EU level we are witnessing a similar situation, as a legislative action is invoked in order to tackle the issues arising from the case law of the Court of Justice.

Provided that in the EU it is not for the Parliament to start the legislative process, it was the Commission which, on the 21st of March 2012, put forward a proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services¹¹⁴. Evidently the process of drafting this proposal has been long: indeed, it saw the light more than four years later the “Judgment Day” of *Viking* and *Laval*¹¹⁵. This long period has been punctuated by negotiations, reports and documents¹¹⁶. The intention of addressing the situation created by *Viking&Laval* was also mentioned by President Barroso in its speech (in the quality of candidate for re-election) beyond the European Parliament¹¹⁷. Here we will focus on the actual proposal, making reference to the preparing documents when they represent a source of clarification.

However, a word of warning is in order. In the context of the procedure established by Article 4 of the Subsidiarity Protocol¹¹⁸ a number of national parliaments¹¹⁹ have raised objections regarding the competence of the EU to regulate

¹¹³ KAHN-FREUND O., *Labour and the Law*, Stevens & Sons, 1977, pp. 1-2.

¹¹⁴ COM(2012) 130, 21 March 2012.

¹¹⁵ We borrow this expression from BERCUSSON B., *The trade union movement and the European Union: Judgment day*, *European Law Journal*, 13:3, 2007, pp. 279-308.

¹¹⁶ See for example *A New Strategy for the Single Market At the Service of Europe's Economy and Society*, Report to the European Commission by Mario Monti, 9 May 2010, hereinafter, ‘Monti Report’; Communication by the Commission, *A Single Market Act - Twelve levers to boost growth and strengthen confidence*, COM (2011) 206, 13 April 2011; EP resolution of 22 October 2008 on challenges to collective agreements in the EU, 2008/2085(INI); EESC Opinion, SOC/360 – EESC 970/2010.

¹¹⁷ José Manuel Durão Barroso, Speech/09/391,

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/391>, (last accessed 30 July 2012).

¹¹⁸ Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, OJ C 83 of 30.3.2010, pp. 206 et seq.

¹¹⁹ Belgium, Denmark, Finland, France, Latvia, Luxembourg, Malta, the Netherlands, Poland, Romania, Sweden, the United Kingdom.

the field (and also regarding the respect of the subsidiarity principle). Because of this, on September the 11th 2012 the Commission decided to withdraw its proposal, “taking note that the concerns expressed relate in particular to the added value of the draft Regulation, the choice of the legal basis, the EU competence to legislate on this matter, the implications of the general principle included in Article 2 of the draft Regulation and the references to the principle of proportionality in Article 3(4) and in recital 13 of the draft Regulation [...]”¹²⁰. The fate of this proposal is at present impossible to foresee. In theory the Commission could re-examine (and modify) the text, but no guidance on its intentions can be found in the letter withdrawing the proposal. Also because of this, we consider the analysis of the “Monti II” proposal as a very important exercise to complete our paper. This proposal still represents the first attempt of the EU to directly legislate in the area of collective action¹²¹.

Starting from its “nickname” it is worth remembering that the “Monti II” regulation takes such a denomination from Mario Monti, former Commissioner to the Internal Market and at present Prime Minister of Italy. This is due to two different reasons. First, Mr. Monti was the author of one of the preparatory documents, the report *A New Strategy for the Single Market at the Service of Europe's Economy and Society* of May 2010, where he addressed the issue of *Viking&Laval* in a specific section. Second, and more importantly, logic has it that to have a “Monti II” one first needs a “Monti I”. This first episode was the Regulation on the functioning of the internal market in relation to the free movement of goods among Member States¹²². More specifically, reference goes to Article 2 of this Regulation. Since “Monti I” obliged Member States to take all necessary and appropriate actions in order to avoid interruptions to the functioning of the internal market caused by private individuals, Art. 2 was included in the legal instrument to *exclude* the right (or freedom) to strike from its scope. It states: “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”. This

¹²⁰ EU Commission, letter to the House of Lords, Brussels, 12 September 2012, Ares(2012)1058907.

¹²¹ Because of this we still refer to the text as a “proposal” and we use verbs in their present form.

¹²² Regulation of 7 December 1998, OJ L337/8, 12 December 1998.

solution (known, uncreative it may be, as “Monti clause”) was proposed in the cited Report as a possible answer to the questions raised by *Viking&Laval*¹²³.

The proposal itself consists of four articles. Article 1 defines the scope and the subject matter of the Regulation; Article 2 lays down the general principles applicable to the relationship between fundamental rights and economic freedoms; Article 3 deals with dispute resolution mechanism (either already present at State level or elaborated by the European social actors) and Article 4 puts in place an alert mechanism which should grant an exchange of information between the concerned Member States and the Commission. In view of the context of our paper, we will deal exclusively with Art. 1 and 2¹²⁴.

Before turning to the actual text, we cannot avoid a first legal comment regarding the competence of the EU to legislate on the right to take collective action, as this issue has played an important role in many of the “yellow cards” raised by national parliaments. In fact, the objection comes almost instinctively: didn’t Art.153(5) TFEU¹²⁵ explicitly exclude the right to strike from EU competences in the social sphere? In the view of the drafters it seems that this obstacle can be circumvented simply by basing the proposal on a different legal basis (*in casu* Art. 352 TFEU¹²⁶). It is interesting to note that Advocate General Mengozzi, in his opinion on the *Laval* case, had warned that “If the effectiveness of Article 137(5) EC [now 153(5) TFEU] is to be

¹²³ Monti Report, p. 72: “[...] introduce a provision to guarantee the right to strike *modeled on Art. 2 of Council Regulation(EC) No 2679/98* and a mechanism for the informal solutions of labour disputes concerning the application of the directive” (emphasis added).

¹²⁴ For a more complete and detailed analysis see BÜCKER A., BRUN N., DORSSEMONT F., *Balancing fundamental social rights and economic freedoms – Can the Monti II initiative solve the EU dilemma?*, International Journal of Comparative Labour Law and Industrial Relations, 28:3, 2012, pp. 279-306; EWING K., *The Draft Monti II Regulation: An Inadequate Response to Viking and Laval*, Institute for Employment Rights, 2012, available on <http://www.lcdtu.org/the-draft-monti-ii-regulation-an-inadequate-response-to-viking-and-laval/> (last accessed 30 July 2012). For an analysis also focused on Article 1 and 2 see ROCCA M., *The Proposal for a (so-called) 'Monti II' Regulation on the Exercise of the Right to Take Collective Action within the Context of the Freedom of Establishment and the Freedom to Provide Services*, European Labour Law Journal, 1, 2012, pp. 19-34.

¹²⁵ “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”

¹²⁶ “If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament”.

upheld, the Community institutions *could not of course resort to other legal bases in the Treaty in order to adopt measures designed*¹²⁷” (emphasis added).

Coming to the text, we start from Art. 1. This article first presents the subject matter of the Regulation which then “lays down the general principles and rules applicable at Union level with respect to the exercise of the fundamental right to take collective action within the context of the freedom of establishment and the freedom to provide services”. So far so good. The picture already gets complicated with the second part of Art. 1. Here we find the “Monti clause”: “This Regulation” we are told “shall not affect in any way the exercise of fundamental rights as recognized in the Member States, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States in accordance with national law and practices [...]”. It is clear that such a clause was directly inspired by the one (that we recalled before) included in the “Monti I” Regulation. However, the different context makes it impossible to simply transplant the clause. While the Regulation on the free movement of goods (*i.e.* “Monti I”) was aimed at regulating *other* areas of EU law and *could* be used in order to impose limitations on the right to strike (hence the clause was included to avoid this possibility), the purpose of the present proposal, from its very title, is to regulate precisely *the exercise of the right to take collective action* (within the context of the freedom of establishment and the freedom to provide services). This is, at least, puzzling. Indeed it is difficult to see how regulating the exercise of the right to take collective action without *affecting*, in any way, such an exercise would even be possible. A second critique to this Article regards once again the wording of the (displaced) “Monti clause”. By “immunising” the exercise of the right (or freedom) to take collective action from “*this* Regulation” we find ourselves in the same situation as before. The restrictions to this right came before this Regulation, and came directly from the interpretations given by the CJEU to Articles present in the Treaty itself. In sum, it is difficult to find an *effet utile* for this new “Monti clause”, at least in the present state of the proposal.

Art. 2 lays down the general principle which should govern the relationship between fundamental rights and economic freedoms, hence striking at the very heart of the matter we analyzed in Section 4. It is worth quoting its text in full: “The exercise of

¹²⁷ Opinion of AG Mengozzi, in *Laval*, §57.

the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms”. This Article should then restate the equal footing of fundamental rights and economic freedoms. However, since conflicts between the two may arise, Recitals 11-13 introduce the instrument to solve these conflicts, the principle of proportionality¹²⁸. Thus, this can be understood as completing the proportionality test applied by the CJEU in *Viking&Laval* with a second step, where the proportionality of the restrictions imposed on fundamental rights should also be assessed. From a theoretical point of view, this is evidently a step forward towards a more balanced approach. However, it is difficult to see how this will work in practice. Problem is that the “recourse” to economic freedoms never needs to be justified: *e.g.*, in *Viking*, the shipping company didn’t need to justify its decision to re-flag the *Rossella*, nor it will need to justify it under the new Regulation. On the contrary, it is the very *recourse* to the right to take collective action (in the context of the freedom of establishment or the freedom to provide services) that will require justification¹²⁹. As suggested by Catherine Barnard, this *cross-proportionality test* should be completed by another test, considering whether the application of proportionality could result in undermining the *essence* of the right being protected¹³⁰. This suggestion echoes Art. 52(1) of the EU Charter of Fundamental Rights¹³¹, which, dealing with the permissible limitations to the rights recognised by the Charter, states that the limitations must respect the *essence* of these rights. In light of this, one should also notice that the content of this Article is repeated almost verbatim in

¹²⁸ Recital 13: “A fair balance between fundamental rights and fundamental freedoms will in the case of conflict only be ensured when a restriction imposed by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, a restriction imposed on a fundamental right by a fundamental freedom cannot go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom”. As a side note, it is interesting to stress the fact that the principle of proportionality, which is evidently one of the most important point of the whole problem, is absent from the legal text of the Proposal.

¹²⁹ BÜCKER A., BRUN N., DORSSEMONT F., *Balancing fundamental social rights and economic freedoms*, op. cit., p. 290.

¹³⁰ BARNARD C., *A Proportionate Response to Proportionality in the Field of Collective Action*, *European Law Review*, 37:2, 2012, pp.117-135.

¹³¹ “Any limitation on the exercise of the rights and freedoms recognised 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 recognised by the Union or the need to protect the rights and freedoms of others”

Recital 12 of the proposal. Keeping in mind that the legal value of Recitals is by no means clear, the inclusion of this “test” in the approach of the Court could provide for a more solid foundation for a balancing of fundamental rights and economic freedoms. This however not without a word of warning: in the end following this route could amount at protecting *only* the essence, a minimal hard nucleus, of those fundamental rights facing economic freedoms.

Evidently the "Monti II" Regulation raises a number of legal (and not only legal) questions, so that it would be impossible to analyse them all in the limited context of this paper. Here we will conclude with just two observations. The first doubt is related to a question of hierarchy. It is evident that when fundamental rights have been analysed by the CJEU in their clash with other parts of EU law, excluding fundamental freedoms, the outcome has been quite different from the one of *Viking&Laval*¹³². The thorny issue comes from the interpretation delivered by the CJEU in a matter of *primary* law, as the so-called fundamental (*i.e.* economic) freedoms are enshrined in the Treaties. Thus, it is not clear how, and to what extent, an instrument of *secondary* legislation will be able to influence a balancing exercise that deals first and foremost with primary sources, *id est* with fundamental freedoms and the right to collective action protected under Article 28 of the Charter, which now has the same legal value as the Treaties. The Court will at best interpret this Regulation in conformity with the Treaties. There, while economic freedoms enjoy a true constitutional status, the right to take collective action *exists* only inasmuch its exercise does not conflict “with Community law and national law and practices”. An instrument of secondary legislation may not be sufficient to redress the balance upset by the Court in its jurisprudence.

Second, even if our first doubt proves itself unfounded, the Regulation does not seem able to stop the *chilling effect* which we outlined before. Every collective action potentially conflicting with the economic freedoms¹³³ recognized in the Treaties will still be exposed to the threat of a proportionality test and subsequently of potentially unlimited damages. It is true that this Regulation may have tempered the proportionality

¹³² See *supra*, in the cases of *Albany* and *AG2R*.

¹³³ The number of these conflicts is likely to increase, as noted also by the ILO Committee in the conclusions about *BALPA*: “The Committee would observe in this regard that, in the current context of globalization, such cases are likely to be ever more common, particularly with respect to certain sectors of employment, like the airline sector, and thus the impact upon the possibility of the workers in these sectors of being able to meaningfully negotiate with their employers on matters affecting the terms and conditions of employment may indeed be devastating”

test, through the inclusion of the “reverse” test, but the outcome of this procedure remains extremely uncertain. If possible it is now even more uncertain, placing an almost unconstrained power of appreciation in the hands of (first) the Court of Justice and eventually of the national judge. Nothing has been done, for example, to limit the damages recoverable from trade unions. One might wonder whether the *BALPA* dispute would have ended differently under the new Regulation. Unfortunately the answer seems negative. In the end it is difficult to consider this Regulation as a step forward. It is true that, at least in theory, Article 2 deviates from the doctrine developed by the CJEU, establishing a *cross proportionality test*, as we saw before. That being said, this Regulation would set in stone, *i.e.* in a piece of legislation, the submission of the exercise of the right (or freedom) to take collective action to a test of proportionality, more balanced it may be. As we saw before in the context of the *BALPA* dispute, this restriction to the right to take collective action has been considered in violation of ILO standards, and specifically of Convention No. 87. Hence a proposed piece of legislation of the EU did probably violate such standards. For the good or the bad, the opposition of the national parliament did at least avoid such an outcome.

7. Conclusions

Looking backward from the end of our tale one can easily see how the legal scope for trade union action is indeed shrinking under the pressure of EU economic freedoms, given the interpretation of the relationship between these freedoms and fundamental (social) rights delivered by the Court of Justice.

As we explained before, this interpretation rests, first, on several fundamental misunderstandings of the very nature and role of trade unions. The parallel drawn between trade union and football association¹³⁴ is in this sense revelatory. Trade unions do not enjoy regulatory powers. On the contrary, they *may* be able to put in place an economic or social power through collective action (or the threat of the same action), if the power relationship with the employer(s) allows them to¹³⁵. The Court seems

¹³⁴ See *supra* Section 3.

¹³⁵ See DAVIES A., *The right to strike versus freedom of establishment in EC Law: the battle commences*, *Industrial Law Journal*, 35:1, 2006, pp. 75-86, 77.

oblivious of this difference: in fact, the very idea present in *Viking* that “trade unions are organisations which are not public law entities but exercise the legal autonomy conferred on them, inter alia, by national law”¹³⁶ (emphasis added) entails a vision of trade unions as exerting powers *delegated* by the State which fits difficultly with a modern vision of trade unions (and human rights)¹³⁷, seeming more apt to describe some authoritarian regime of the past.

Unfortunately the European legislator does not seem to be immune from those misunderstandings. On the shortcomings of the Monti II proposal we have already written *supra*. Here we will only add some last critical point, regarding what is *not* present in Monti II. Indeed, the proposal fails to acknowledge the link between collective action and collective bargaining, a connection which is made evident by Article 6 of the European Social Charter -ironically, a text cited by the drafter of the proposal¹³⁸. By reading *Viking* and *Laval* one can easily see how, even if the judgments deal with collective action, the legal evaluation of *collective bargaining* plays a fundamental role in the Court’s reasoning. The proportionality of the action is assessed on the basis of the objectives of the action itself. These objectives are the ones embodied in a process of collective negotiations with the employer. Hence, also the very process of collective bargaining is directly put under pressure by the Court. This adding up to the restriction of the right to collective bargaining itself provided by the application of the *Laval&Viking* doctrine in *Commission v. Germany*. However, as we said before, the Monti II proposal contents itself of addressing collective action. This is once more puzzling, since, as we saw before¹³⁹ the Court has, both in *Viking* and *Laval*, assessed the lawfulness of collective action on the basis of the legitimacy of the *aims* pursued through the action itself¹⁴⁰.

On this legal background, the *BALPA* dispute analysed before should ring a bell. As the ILO Committee pointed out, the constant threat provided by the *Viking&Laval* doctrine could entail a deadly restriction to the exercise of fundamental social rights (at

¹³⁶ *Viking*, para. 60.

¹³⁷ See DORSSEMENT F., *The right to take collective action versus fundamental economic freedoms in the aftermath of Laval and Viking. Foes are Forever*, in DE VOS M. (ed.), *European Union Internal Market and Labour Law: Friends or Foes?*, Intersentia, 2009, pp. 45-104, 75.

¹³⁸ See Recital No. 1. Furthermore, in the same Recital it is stated that “The right to take collective action, which is the corollary of the right to collective bargaining [...]”.

¹³⁹ See *supra*, Section 4.2.

¹⁴⁰ *Viking*, paras. 81-82, *Laval* para 107.

the very least, in the context of disputes possibly touching fundamental freedoms). For the reasons we tried to summarize *supra*, the Monti II proposal, was not an instrument able to change such a situation.

From a legal point of view, a much more strong intervention by the legislator would be necessary to assure a change in the doctrine developed by the CJEU. This intervention should directly address the Treaties, since the Court builds its interpretation on primary EU law. This does not mean that such an intervention should necessary follow the request put forward by the ETUC for a Social Protocol to be attached to the Treaties¹⁴¹. A different compromise could be found. What is important is to acknowledge the fact that the current situation is not balanced (and the simple, though brief, *existence* Monti II proposal seems at least a step in this direction) and that an intervention through secondary law is unlikely to redress this unbalance. Unfortunately, already in the Monti Report we were told that “seeking Treaty changes does not seem a realistic option in the short term”¹⁴². This is probably still true, from a political point of view.

As we are then stuck in the *Viking&Laval* Era, some scholars have tried to look for another way to change (or overcome) the CJEU doctrine. This brings us to Strasbourg.

7.1 A clash of Courts

Lacking the political will (or possibility) to solve the imbalance, a different way has been proposed¹⁴³. This reasoning aims at changing the CJEU interpretation through the impact of the European Convention for the Human Rights (ECHR). Here we will only sketch the main points of this argument.

Following the coming into force of the Lisbon Treaty, the EU itself *should* accede to the ECHR. Before analysing the recent jurisprudence of the Court of Strasbourg, a jurisprudence which raised much hope for the issues presented in this

¹⁴¹ See the ETUC proposal for a Social Protocol, <http://www.etuc.org/a/5175> (last accessed 30/07/2012)

¹⁴² Monti Report, p. 70.

¹⁴³ DORSSEMONT F., *How the European Court of Human Rights gave us Enerji to cope with Viking and Laval*, in MOREAU M-A. (ed.), *op. cit.*, pp. 217-235; EWING K. and HENDY J., *The Dramatic Implications*, *op.cit.*,

paper, a word of warning is in order. It must be kept in mind that the process of accession of the EU to the ECHR is by no means approaching its end. A draft agreement was reached¹⁴⁴, but then the afterthoughts of some European governments brought about a slowing down (if not a stalling) of the whole process.

Back to the hope, two recent cases sparked with a renewed interest for the role of the European Court for the Human Rights (ECtHR) in protecting collective labour rights. Not much time after the decisions by the CJEU in *Viking* and *Laval*, the ECtHR delivered *Demir* (2008)¹⁴⁵ and *Enerji* (2009)¹⁴⁶. Briefly, in *Demir* the Court had to decide upon the decision of the Turkish Court of Cassation annulling a CA (reached between the trade union Tüm Bel Sen and the municipality of Gaziantep) because of the lack of “authority to enter into collective agreement as the law stood”¹⁴⁷. In upholding the claim of Mr. Demir and Mr. Baykara (respectively, a member and the president of Tüm Bel Sen), the Court affirmed that “the right to bargain collectively with the employer has, in principle, become *one of the essential elements* of the ‘right to form and to join trade unions for the protection of [one's] interests’ set forth in Article 11 of the Convention”¹⁴⁸ (emphasis added). In *Enerji* (which, as *Demir*, was brought against Turkey) the Court had to examine a state ban on public sector trade unions from taking industrial action. Members of the trade union Enerji Yapi-Yol Sen ignored the ban and underwent disciplinary sanctions because of this. In analysing this case the Court found the ban to be in violation of Article 11. In particular the Court stated that the right to strike was to be considered as an “indissociable corollary” of the right to form and join trade unions¹⁴⁹. Both cases represent an evolution (if not a revolution) from the previous case law of the Court of Strasbourg. What is more, from a methodological point of view, the importance of *Demir* goes beyond the recognition of the right to collective bargaining as an essential element of the right of association protected under Article 11.

¹⁴⁴ Final version of the draft legal instruments on the accession of the European Union to the European Convention on Human Rights, available at www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/cddh-ue_documents_EN.asp.

¹⁴⁵ European Court of Human Rights, 12 November 2008, *Demir and Baykara v. Turkey*, no. 34503/97.

¹⁴⁶ European Court on Human Rights, 21 April 2009, *Enerji Yapi-Yol Sen*, no. 68959/01.

¹⁴⁷ *Demir*, para. 18.

¹⁴⁸ *Demir*, para. 154.

¹⁴⁹ *Enerji*, para. 24: “La Cour note également que le droit de grève est reconnu par les organes de contrôle de l' Organisation internationale du travail (OIT) comme le corollaire indissociable du droit d'association syndicale protégé par la Convention C87 de l'OIT sur la liberté syndicale et la protection du droit syndical”.

In this decision the Court, recognised the pivotal role of taking into account “elements of international law other than the Convention”, as well as “the interpretation of such elements by competent organs”¹⁵⁰ while interpreting the Convention itself. Such an approach could allow for further developments through dialogue with more specialised bodies, such as the European Committee on Social Rights and the Freedom of Association Committee¹⁵¹. This novelty also shed a new light on the possible importance of the *BALPA* case we analysed before. Since the ECtHR has acknowledged the importance of taking into account the decisions of the supervisory bodies in interpreting other international sources, the conclusions of the ILO Committee on *BALPA* may inspire the Court of Strasbourg in its (eventual) future decisions regarding the right to strike.

Looking at the right to take collective action/right to strike, even though the facts in *Enerji* were extremely different from the ones in *Viking* or *Laval*, as the restriction imposed by the Turkish government upon collective action was absolute and extended to all civil servants¹⁵², the difference between the two approaches is evident¹⁵³: The court of Strasbourg considers the right to take collective action as the starting point, assessing the limitation to this right on the basis of Article 11(2) ECHR¹⁵⁴. On the contrary, the CJEU interprets the (fundamental) right to strike as a limitation of the fundamental freedoms, so that the exercise of this right should be considered as legitimate, only inasmuch as it is carried out in a proportionate way¹⁵⁵.

That being said, the hopes for a revenge of collective social rights upon the fundamental freedoms through a clash of Courts should be cautiously considered. Even though the decision in *Enerji* is likely at odds with the doctrine developed by the CJEU in *Viking&Laval*, the ECtHR has, in the past, taken in to account economic interests to

¹⁵⁰ *Demir*, para. 85.

¹⁵¹ See DORSSEMONT F., *The Right to Form and to Join Trade Unions for the Protection of his Interests Under Article 11 ECHR*, *European Labour Law Journal*, 2:2, 2010, pp. 185-235, 233-234.

¹⁵² *Enerji*, para. 21. See DORSSEMONT, *How the Court of Human Rights gave us Enerji*, *op. cit.*, pp. 225-226.

¹⁵³ *Ibid.*, pp. 220-221.

¹⁵⁴ “No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State”

¹⁵⁵ *Viking*, para. 74; *Laval*, para. 96.

assess the compatibility with Article 11 of a restriction of the right to take collective action¹⁵⁶. The necessity of taking into account the interpretation of the CJEU, could also exert an influence upon the judges of Strasbourg, paving the way for an interpretation of the “protection of [...] rights and freedoms of others” to include the fundamental freedoms of the EU legal order.

However, the main critical point of this approach, aimed at overcoming *Viking&Laval* through the interplay between different legal orders¹⁵⁷ (as the ones of the EU and of the Council of Europe), remains the uncertainty (at least, in terms of time) of the accession of the EU to the ECHR.

7.2 Another brick in the wall

Through the pages of this paper we have tried to identify the main critical points of a legal construction which sees collective social rights as obstacles to economic freedoms. The very exercise of these rights in the context of the so-called fundamental freedoms, “constitutionalised” in the EU Treaties, is considered as a restriction and hence needs to justify itself. This is very far from the idea of equal footing of the social and the economic aims of the EU¹⁵⁸.

Unfortunately all the signs seem to say that this situation is there to stay. On the one hand the Court of Justice has confirmed this approach in *Commission v. Germany*, notwithstanding the opinion of the Advocate General, explicitly critical about the *Viking&Laval* doctrine. On the other hand, the “Monti II” proposal revealed that the space for a political compromise which could allow for a legislative intervention in this

¹⁵⁶ See European Court of Human Rights, 10 January 2002, *UNISON v. UK*, no. 53574/99, p. 11. See also European Court of Human Rights, 27 June 2002, *Federation of Offshore Workers’ Trade Unions and Others v. Norway*, no. 38190/97; European Court of Human Rights, 28 October 2011, *Trofimchuk v. Ukraine*, no. 4241/03.

¹⁵⁷ See BÜCKER A., DORSSEMONT F. and WARNECK W., *The Search for a balance: analysis and perspectives*, in BÜCKER A. and WARNECK W. (eds.), *Reconciling Fundamental Social Rights and Economic Freedoms*, op. cit., pp. 315-360.

¹⁵⁸ See the Opinion of AG Trstenjak in *Commission v. Germany*, para. 183: “The approach adopted in *Viking Line* and *Laval un Partneri*, according to which Community fundamental social rights as such may not justify –having due regard to the principle of proportionality – a restriction on a fundamental freedom but that a written or unwritten ground of justification incorporated within that fundamental right must, in addition, always be found, *sits uncomfortably alongside the principle of equal ranking for fundamental rights and fundamental freedoms*” (emphasis added).

field is extremely narrow. Too narrow, it could be argued, to have an actual impact on the judges of Luxembourg.

For a glimmer of hope, as we approach the end of this tale without many fairies, one could wonder if the recent decisions of the ECtHR in *Demir* and *Enerji* could exert some pressure upon the CJEU, even before the formal accession of the EU to the ECHR. Even more evident, though maybe less direct in terms of legal effects, the conclusions of the ILO Committee in the *BALPA* dispute do show the potential for an unprecedented contrast between ILO standards and EU law, as applied by the CJEU; a situation which is, at best, embarrassing.

However, after the peak of debate following *Viking* and *Laval*, the whole issue is slowly disappearing from the political arena, while social rights (both individual and collective) are threatened by the much more direct threats of the economic crisis and of its poisoned fruits, shaped as Memoranda. In fact, we were told, the European social model has already gone¹⁵⁹. Still, also our piece here seems to fit into the puzzle. The interpretation delivered by the CJEU of the relationship between fundamental freedoms and fundamental social rights evidently amounts to a limitation of the ability of trade unions to carry out the de-commodification¹⁶⁰ of labour in the context of EU law. Hence the increased pressure upon wages and working conditions fits nicely in the whole strategy of wage moderation/internal devaluation supposed to help the EU to overcome the crisis¹⁶¹. At the end of the day, and without any implication of political influence on the CJEU, the *Viking&Laval* doctrine does constitute another brick (though maybe a small one) in the wall. Problem is that, from the observation point of this gloomy autumn 2012, the wall is collapsing, with the risk of bringing down the whole house.

¹⁵⁹ Wall Street Journal, Q&A: ECB President Mario Draghi, 23 February 2012, <http://blogs.wsj.com/eurocrisis/2012/02/23/qa-ecb-president-mario-draghi/> (last accessed 30 July 2012)

¹⁶⁰ A term we borrow from ESPING-ANDERSEN G., *The Three Worlds of Welfare Capitalism*, Polity, 1990.

¹⁶¹ For a recent example, see the ECB monthly bulletin of July 2012.