**Doctoral School of**

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# THE LAYERS OF THE RESTRICTION OF COLLECTIVE BARGAINING AND ACTIONS

## The case-law of the European Union in the light of regional and international standards

**Doctoral thesis**

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**Introduction**

The aim of the foundation of the long-ago european integration was purely economical, furthermore its direction of evolution was defined in the light of this objective for many decades. Nor 'social policy', neither fundamental rights protection existed. This approach was derived from the neo-liberal views of the founding fathers that the social aims are not a precondition but a desirable consequence of the economical integration.[1] However for legislative bodies and those applying the law had to address new challenges on the one hand, because of the accession of new member states with different levels of protection, and on the other, the so called spillover mechanism that were reasonable unnoticed by the draftsmen of the Treaty of Rome.

These challenges stem from the fundamental rights protection originated from the consitutional law of the member states and international law, furthermore from those conflicts existing beetween the founding and new member states because of the differences regarding their social protection levels.

The legislation and the interpretation of law has been gradually affected by the expectations of the member states regarding the promotion of fundamental human rights. This affection has showed a slow but a stable development in the field of fundamental rights including the progressive adoption of the the constitutional traditions and international obligations of the member states, furthermore the European Convention on Human Rights (ECHR) as a point of reference. This development has reached its peak firstly with the adoption of The Charter of Fundamental Rights of the European Union (Charter) as a soft law document later with the Treaty of Lisbon however as legally binding.

Accordingly, the aim of the Internal Market was to ensure an area without internal frontiers or regulatory obstacles in which the free movement of goods, persons, services and capital is ensured in accordance with the articles of the Treaties.[2] These four freedoms are known

[1] This approach caused that the labour was considered to be only a commodity and a factor of production. This logic was confirmed by the Spaak Report. Paul-Henri Spaak, Intergovernmental Comm. on Eur. Integration, Rapport des Chefs de Délégations aux Ministres des Affaires Etrangères (Apr. 21, 1956).

[2] The term "fundamental freedoms" captures the EU internal market freedoms enshrined in the provisions on free movement of goods, free movement of persons, services, and capital in Title II and IV of Part Three ("Union Policies and Internal Actions") of the Treaty on the Functioning of the European Union.

collectively as ’fundamental freedoms’ which are basically economical in nature that are applied in case of crossborder economic activities.

Thanks to the globalization and the crossborder (international) nature of providing services, new kinds of conflicts have arisen regarding the fundamental labour rights such as the right to collective bargaining and the right to strike. Ensuring the level playing field between service providers and the social rights of employees caused an interfering and restrictive affect to the member states applying ’weaker’ labour regulation and social environment.

Inevitably question arises how shall the legislation and the competent authoritative bodies manage the situations where a fundamental freedom clashes with a human labour rights. The problem to be solved is to struck a fair balance between these two interests and to avoide a hierarchical relationship.

**Hypothesis and purpose of the thesis**

My hypothesis is that there is a strong hierarchical relationship beetween the protection of fundamental freedoms and human labour rights. As long as this relationship will exist, there will be an irreconcilable conflict between the European Union and the Member States due to the international obligations of the latter.

The purpose of the thesis is to present the long path of the European Union until nowadays regarding its attitude to the protection of social values and core human rights. Furthermore the purpose is to explain the case law of the three legal order regarding the basic human labour rights, namely the legal order of the European Union, the case law of the European Court of Human Rights and the International Labour Organization.

**The tools and structure of the thesis**

From my point of view, the best way to present the above-mentioned purposes is to separately explain the case law of the three legal order through the groundbreaking decisions of the competent supervisory bodies and courts.

In order to do this, I divide the thesis into four parts in which I explain in details the legal practice of the competent forums, including the intrinsically contradictory case law of the European Union. An introduction to the legal and economical basis for the whole topic and a conclusion with the possible one and only solution to the collision makes a framework for the thesis.

I place strong emphasis on the presentation of the decisions and other legal documents in details as this is the best way to highlight the attitude of the competent organs towards the issues at hand. Of course I collect and cite the prominent bibliographical references and authors ensuring that the thesis does not lead to a collection of the bare legal and judicial texts.

The main point of the whole collision centres round the balancing between the competing interests. Accordingly, each part presenting the legal reasoning focuses on how the competent organ tries (or does not to) strike a fair balance between protecting the fundamental economic freedoms and labour rights.

Besides, to solve this collision it is worth to identify how such collision may arise. To explain this, I give great attention to present the so called ’social dumping’, the practice, undertaken by self-interested market participants/employers, of undermining or evading existing social regulations with the aim of gaining competitive advantage. However this advantage does not lie on the efficiency of the employers, but thanks to the chosen law in bad faith. It is not unusual that the employer establishes a ’letter-box’ company to circumvent the applying law, a practice which the stakeholders of employee and organizations does not leave without a word.

**Conclusions of the thesis**

With the methodology mentioned above the thesis clearly states and presents that the collision unavoidably exists and causes a permanent conflict between the Member States and the institutions of the European Union. The origin of the conflict is the different starting point of the legal reasoning regarding the balance of competing interests. While the European Union extremely prioritises the protection of the fundamental freedoms, the Member States shall not set aside their international obligations such as the protection of human rights.

**A possible solution of the thesis**

First of all, besides the legal aspects, we must not lose the sight of the fact that the mutual understanding between those interests must be respected. It would be a wrong message, if only the legal dogmatic position would prevail over political coordination. According to Vries, it is not a real option to fundamental rights outside the framework of the four freedoms as constitute the core values of European integration. Instead – rejecting the methodology used in Viking and Laval – the author argues that the one possible good solution is the reasoning according to the case of Schmidberger.[3] In that ruling the Court reviewed the case taking into consideration that the fundamental freedoms stand on an equal footing with the human rights.[4] The Court followed the principle of 'practical concordance', a perfect legal tool that is worth to be presented in details.

The point is to avoid as far as possible that any of the interests got sacrified in favour of the other one reaching a fair compromise between the rights in conflict. It rejects the argument that it is desiarable to set aside one claim simply because a competing claim appears. The aim is to ensure a broad scope of effectiveness for both of the interests without any of the two rights in conflict having been completely sacrificed to the other.

***De lege ferenda* or *de lege (non) lata*?**

In my thesis I explain that the case law of the CJEU regarding the labour rights is disappointing as the court gives a far-reaching priority to fundamental market freedoms over basic human labour rights. It does so despite the fact that the neccessary legal basis is available both in the European legal order and in the international obligations.

[3] Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich, CJEU Case C-112/00. The case involved a demonstration by environmentalists on the Brenner motorway in Austria, thereby closing the motorway to traffic for nearly 30 hours. Permission for this demonstration was (implicitly) granted by the Austrian authorities. The question was whether the Austrian authorities could be held liable for an infringement of EU law under Article 34 TFEU (the free movement of goods) in conjunction with the principle of Community loyalty as now laid down in Article 4(3) TEU, as the Austrian authorities had not completely banned the demonstration on such an important motorway.

[4] Vries op. cit. 191–192.

It can be concluded that the only equitable solution for the resolving conflicts between rights and freedoms is the so calles practical concordance. According to the German constitutional lawyer, Konrad Hesse, this technique implies that constitutional rights must be harmonized with each other when they are in conflict in such a way that one value does not lose ground against the other. Hesse pleads for finding a balance by way of optimizing the relevant values against each other and thus allowing both values to be exercised to the same time.[5] Mortelmans argues that this legal tool might be useful *de lege ferenda* in the European legal context in order to reconcile possible conflicts between the fundamental freedoms and non-economic interests only if the substance of the principle is codified in the TFEU itself.[6]

However, there is (was) a sufficient evidence in the European legal order that a fair solution exists in order to satisfy the interest of both sides.[7] Finally, we present this legal basis that was named after professor Mario Monti.[8]

The explanatory memorandum of the proposal citates an illustrative good example stated in the Report 'A new strategy for the single market' that the Viking and Laval cases *'revived an old split that had never been healed: the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level*'. The aim of the proposal was to clarify the interaction between the exercise of social rights and the exercise of the freedom of establishment and to provide services enshrined in the TFEU within the EU in line with one of the key objectives, a 'highly competitive social market economy', without however reversing the case law of the Court.[9] But in what sense would have been the proposal a pioneer?

The proposal confirms that there is no inherent conflict and dispute between the right to take collective action and the freedom of establishment and providing services stipulated in TFEU, accordingly none of them can be enforceable against the other one and there is no primacy of

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[5] Kenan ERTUNC: The Legal Implications of the Social Market Economy on the European Economic Constitution, Dissertation 2014, 51.
[6] Kamiel MORTELMANNS: The Relationship between the Treaty Rules and Community Measures for the Establishement and Functioning of the Internal Market - Towards a Concordance Rule. *Common Market Law Review*, (2002) 1303–1346.
[7] 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 services [doc. 8042/12 SOC 226 MI 194 COMPET 169 - COM(2012) 130 final]
[8] Former member of the European Commission.
[9] Proposal 3.1.

one over the other. However, there are situations where their exercise may have to be reconciled in cases of conflict, in accordance with the principle of proportionality in line with standard practice by courts and EU case law.

Article 2 of the proposal would have struck a fair balance in the following way:

> „The exercise of 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."

The proposal triggered the first yellow card procedure in the which allows one third of the national parliaments to ask the Commission to review a draft legislative act, if they consider that it does not comply with the principle of subsidiarity. The European Commission claimed that the Monti II proposal did not breach the subsidiarity principle but that it withdrew the draft European legislative act because of a lack of political support.[10]

[10] Which reasoning is contradictory as the CJEU has clearly stated that although Article 153 of TFEU does not apply to the right to strike, it does not mean that it excludes collective action from the scope of EU law especially the freedom of establishment and providing services. As these cases include a cross-border disputes, it is required to action at European Union level and cannot be achieved by the Member States alone.