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THE COURT OF JUSTICE AND THE SOCIAL MARKET ECONOMY: THE EMERGENCE OF AN IDEAL AND THE CONDITIONS FOR ITS REALIZATION

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1. Introduction

The *Viking* and *Laval* cases are certainly complex cases.[1] *Viking* – decided by the Court of Justice on 11 December 2007 – concerns a collective action relating to the reflagging of a vessel from Finland to Estonia; in *Laval*, decided by the Court of Justice on 18 December 2007, a Swedish trade union had tried, by means of collective action, to force a Latvian provider of services to sign a collective agreement with it when performing services in Sweden. The complexity of these cases results from the string of events leading up to the disputes, and the particular characteristics of the systems of social bargaining in Sweden and Finland. However what makes these cases interesting is not their complexity, but the uncertainty involved. That uncertainty concerns a problem which is fairly simple: can the exercise of the social rights to negotiate and of collective action protected by the national constitutions of some Member States preclude the exercise of an individual economic freedom guaranteed by the EC Treaty? Strictly speaking, such a problem is insoluble: two contradic-

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1. Case C-438/05, *International Transport Worker's Federation, Finnish Seamen's Union* v. *Viking Line ABP, OÜ Viking Line Esti*, judgment of 11 Dec. 2007, nyr; Case C-341/05, *Laval un Partneri Ltd* v. *Svenska Byggnadsarbetareförbundet and others*, judgment of 18 Dec. 2007, nyr. The facts are quite well known, but are also summarized in Malmberg and Sigeman, "Industrial actions and EU economic freedoms: The autonomous collective bargaining model curtailed by the European Court of Justice", 45 CML Rev. (2008), 1079–1114. There is already an abundant literature commenting on these cases, which follow different lines of analysis. See e.g., taking one line, Bercusson, "The Trade Union Movement and the European Union: Judgement Day", 13 ELJ (2007), 279–308; Barnard, "*Viking* and *Laval:* An Introduction", (2008) CYELS, (forthcoming); taking a different line: Reich, "Free Movement v. Social Rights in an Enlarged Union – the *Laval* and *Viking* cases before the ECJ", (2008) *German Law Journal* (www.germanlaw-journal.com/), Teyssié, "Esquisse du droit communautaire des conflits collectives", *Semaine Juridique Social*, 5 Feb. 2008, 1075.

tory types of requirement confront one another, which are fundamentally equal.

The Court of Justice has had to deal with such conflicts of norms and interests in the past. But the novelty of these cases is that the Court decided to treat these conflicts as problematic cases, as conflicts of a "constitutional nature" – which should be dealt with by finding the right balance between the norms. For a long time the Court took pains to ensure the prevalence of the Treaty provisions concerning the economic freedoms over any contradictory requirements, whatever their origins or status. Now, it seems that the reference framework of its judgments has been extended – the Court admits that the fundamental provisions of the Treaty must be reconciled with conflicting demands, in particular social demands, flowing from the Community legal order or from the parallel constitutional orders.

Such a search for a balance has its *raison d'être* in the political and constitutional theory guiding the interpretation of the Court. This theory is based on the complementarity of the economic constitution of the Community and its social dimension: "The Community has … not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, *inter alia*, improved living and working conditions, so as to make possible their harmonization while improvement is being maintained, proper social protection and dialogue between management and labour."[2] This passage recalls the famous wording used by the Court in *Defrenne*, according to which the Community "is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples".[3] But, in *Defrenne*, this duality led to the assertion of the direct effect of Article 141 of the Treaty, on equal pay for male and female workers, whereas in *Viking* and *Laval* it means balancing diverging – even opposing – requirements enshrined in the Treaty. This change of context is significant: it corresponds to an evolution in the Community legal order, oriented towards a new type of "constitutionalization". The classic type of constitutionalization consisted in establishing the primacy of Community rules in all situations threatening the aims of the Community.[4] It has been hierarchical in nature. Now, the Court uses constitutional techniques based on the idea of antinomy, of conflict between principles of a similar nature, and on the need to find co-

2. *Viking*, para 79; *Laval*, para 105.
3. Case 43/75, *Defrenne* v. *Sabena* [1976] ECR 455, para 10.
4. Weiler, *The Constitution of Europe*, Cambridge, Cambridge University Press, 1999.

herence between these principles. In this way, we move from a hierarchical way of resolving conflicts to a form of legal pluralism.[5]

The Court develops this conception in a context which is apparently suited to it: that of the wish to bestow on the Union – founded on economic growth – a stronger social component. Evidence of this is, particularly, the introduction into the Treaty establishing a Constitution for Europe and, identically, in the Treaty of Lisbon, of a reference to the "*social market economy"*. This concept – in its German ordo-liberal inspiration not without strong liberal elements – in the new treaty clearly corresponds to the desire to create a social counterbalance to market considerations. It contains the idea that European integration should not be pursued to the detriment of the integrity of the social systems of the Member States. Economic benefits should not be obtained by sacrificing social benefits.[6] The inclusion of the concept of a social market economy in the new Treaty confirms the desire to find a new equilibrium, and to combat the "*social deficit*" of the Union.[7] This is also what inspires the Commission idea of a new social agenda, presented in May 2008.[8]

It is quite clear that this conception is based on a contradiction. The means for developing a social Europe are in fact limited. The "new" Union – just like the Community – has not been granted a competence in matters of social harmonization. It only has instruments of coordination in relation to the social policies and social law of the Member States, which in their turn are based on very divergent economic and social models.[9] In the situation following the accession of twelve new Member States, there is a risk of competition between these models, which is potentially destructive for the Union. As Barnard recalls, "for the Accession States, one of principal reasons for surrendering at least part of their recently acquired sovereignty was to gain access to the markets of the EU-15 in order to exploit their comparative advantage of cheaper labour, thereby improving the prosperity of the new Member States". This

5. Edward, "What kind of law does Europe need?", (1999) CJEL, 1; Mortelmans, "The Relationship Between the Treaty Rules and Community Measures for the Establishment and Functioning of the Internal Market – Towards a Concordance Rule", 39 CML Rev. (2002), 1341 et seq.

6. See Azoulai, *Article I-3. Les objectifs de l'Union*, in Burgorgue-Larsen, Levade, Picod (Eds.), *Traité établissant une Constitution pour l'Europe. Commentaire article par article*, vol. 2 (Bruylant, Bruxelles, 2007).

7. See Joerges and Rödl, "Social Market Economy" as Europe's Social Model ?, *EUI Working Paper*, 2004/8.

8. Speech by the President of the European Commission J.M. Barroso, "Shaping a modern social agenda for Europe", Brussels, 6 May 2008.

9. Art. 136 EC: "the Community and the Member States shall implement measures which take account of the *diverse forms of national practices*, in particular in the field of contractual relations…".

generates a risk of relocation of employers (*Viking*) and social dumping for workers (*Laval*) of other Member States.[10]

In order to overcome the contradiction just indicated, the Union has been given a catalogue of social rights, intended to guarantee all citizens of the Union access to collective fundamental goods. One such right is the right – recognized for workers and their organizations – to negotiate and to have recourse to collective actions, guaranteed by Article 28 of the EU Charter of Fundamental Rights. Nevertheless, the regime and the material conditions for protecting this right, like that for all the social rights protected by the Charter, are within the competence of the Member States. [11]

In these two cases, the Court clearly recognizes the right of collective action as "a fundamental right which forms an integral part of the general principles of Community Law". This is part of the ideal the Court claims to promote – the ideal of a Community which has at the same time an economic and a social purpose. Now, the practical problem which it has to solve is that of the technical methods for realizing this ideal. It has to explain clearly what separates the law of a Community based on the market – "a market Community" – from the law of a "social market economy". This presupposes a double operation: the first step is to enlarge the scheme of integration, that is to affirm the authority of the general rules of the Treaty in the area of collective labour conflicts; the second consists of altering the substance of integration, that is ensuring a balanced reconciliation between the rules of the market and the requirements of social action. There the two critical points of this jurisprudence are also to be found.

Formally, the Court bases its decisions essentially on the Treaty provisions on freedom to provide services and freedom of establishment. Looking for a solution in the interpretation – in anticipation – of the new Directive on services in the internal market was tempting but impossible, since that Directive was carefully drafted in its final version so as to exclude from its field of application any sensitive issue of a social nature.[12] Thus, questions concerning posted workers – at issue in *Laval* – still have to be dealt with by Directive 96/71 on the posting of workers in the framework of the provision of ser-

10. Barnard, op. cit. *supra* note 1.

11. Art. 28 of the EU Charter of fundamental Rights provides: Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

12. Cf. Barnard, "Unravelling the Services Directive", 45 CML Rev. (2008), 323.

vices.[13] This Directive establishes a "hard nucleus" of mandatory rules of social protection which the host Member State must impose on undertakings which post workers on its territory in the framework of the transnational provision of services. In *Laval*, the Court recalls that "Directive 96/71 did not harmonize the material content of those mandatory rules for minimum protection."[14] The Court draws two conclusions from this: on the one hand, it is up to the Member States to define this material content; on the other hand, the measures freely adopted by the Member States on the basis of this Directive, which coordinates the social legislation applied to posted workers, remain subject to the fundamental provisions of the Treaty, in particular the market freedoms which are ensured by the Court. As Syrpis and Novitz explain, "the compromise solution reflected in the Services Directive was not to attempt to spell out the legitimate scope of collective action in the event of conflict with the free movement provisions of the EC treaty, but rather to delegate that decision to the Court".[15]

Reading them as a whole, these two judgments give a strange impression: everything takes place as if the solutions found were the result of a complex kind of "collage" of judicial formulas. Thus, the reasoning behind these two decisions can easily be reconstructed on the basis of a number of well-known cases, which each relate to a seminal step in the Court's case law: the judgments can be seen as a resumption of the solution adopted in *Bosman* (on the applicability of market freedoms outside the field of the Community competence), a reversal of the socially protective assumptions underlying *Defrenne* (on the direct horizontal effect of Treaty provisions), a rejection of the suggested analogy with the solution adopted in *Albany* (which lays down the exemption of collective agreements from the framework of the economic freedoms – there, the competition rules), a confirmation of the analysis adopted in *Säger* (on the notion of restriction) and an extension of the model set out in *Schmidberger* (for reconciling conflicting demands). This collage effect is typical for Community case law – to such an extent that in some cases it may seem as if it is the formulas which are speaking, instead of the Court and the preferences of its members. It is certain that, in difficult cases, these formulas, which were forged as part of the reasoning of some of the "grands arrêts" help the judges to reach a decision. They form the conceptual and ideological framework of the Court's reasoning. They act as elements offering security

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

14. *Laval*, para 60.

15. Syrpis and Novitz, "Economic and social rights in conflict: Political and judicial approaches to their reconciliation", 33 EL Rev. (2008), 411.

and permanence in the judicial work. Nevertheless, they do not dictate the outcome. Finding the actual solution remains a product of imagination.

What is striking in these two judgments is a contrast between, on the one hand, well-known judicial formulas, and on the other the particularity and novelty of the situations to which these formulas are applied. An examination of the Court's decisions is doubly instructive. On the one hand, it reveals the adaptive capacity of judicial formulas. But, on the other, it demonstrates the limits of this way of proceeding. When they are applied to novel problems, the Court's formulas seem very abstract: their initial intention is lacking. Then they can have unexpected consequences.

2. Authority of EC Law

What the authors of the Treaty had in mind when drawing up the conditions for the construction of the common market was an economic integration, that is to say a "partial integration".[16] In these conditions, the pre-eminence of the Treaty rules whose aim was to break open the national markets (free movement) was self-evident. The precedence of those rules was all the more accepted as their scope seemed to be limited to the economic and commercial sphere. It is no longer quite the same when one moves to a regime of "total integration", which is the present situation. Because the scope of application of Community law has constantly widened, there is virtually no area of economic and social life which escapes, in principle, the effect of the Treaty rules. This extension produces a legitimacy problem, and also, in practice, a *problem of boundaries*.

Legally, this problem comes into play at two stages: at the stage of the establishment of the Community competence with regard to the area in question; and at the stage of applicability of the Treaty rules to the disputed situation and to the organizations concerned. In fact, in these cases, the Court had to meet two major objections: the objection of the lack of Community competence with regard to collective action, and the objection that the free movement provisions cannot be relied on against the trade unions concerned.

16. Pescatore, "La Cour en tant que juridiction fédérale et constitutionnelle", in *Dix ans de jurisprudence de la Cour de justice des Communautés européennes* (Cologne, Carl Heymans Verlag, 1965).

2.1. *The Community competence*

According to the first argument, collective actions do not fall within the scheme of Community economic integration: they should be excluded from the scope of application of the market freedoms. The reason is that the Community is not competent under Article 137(5) EC to regulate the right to strike. Consequently, the Community does not have the right to impose the application of the freedoms provided for elsewhere in the Treaty. In support of this argument, the provisions of the Services Directive[17] can also be cited. This Directive, based on Articles 47 and 55 EC, excludes from its scope the legal provisions on labour law, the regulation of relations between employers and workers, and the exercise of the right to strike and that of collective bargaining. Above all, the Directive refers in these areas to Member State legislation.

Such arguments have been forcefully rejected by the case law of the Court of Justice in many cases concerning direct taxation, social security, health and education.[18] The penetration of Community law in all the areas of competence of the Member States is perhaps the most important phenomenon in Community case law in the last ten years. True, Community law has for a very long time been able to forbid public law or criminal law rules if these aimed directly to obstruct intra-Community trade. But, in the form fixed for example in *Bosman*, this case law goes further: it means that no types of rules or regulations, whatever the field or the underlying intention, are a priori excluded from the field of the EC Law's empire.[19]

This extension of the influence of the Community framework is based on a simple and recurring formula which, in these cases, is worded as follows: "even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law".[20] Here is a significant redundancy ("the fact *remains* that ... the Member State must *nevertheless*..."). The reasoning means in practice that the field of competence of the Community, which may be limited, must be dissociated from the scope of application of Community law, which is much less limited. To understand this, it must be assumed that in conferring on the Community the competence to implement the objectives of

17. Directive 2006/123/EC on services in the internal market, O.J. 2006, L 376/26.
18. See, e.g. the recent judgment of 11 Sept. 2007, Joined Cases C-76/05 & C-318/05, *Schwarz,* nyr.
19. Case C-415/93, *Bosman,* [1995] ECR I-4921.
20. *Viking,* para 40.

integration, by the privileged means of the market freedoms, the Member States also agreed that the exercise of this Community competence should result in constraints on the pursuit of all national policies. It must be assumed moreover that the Court has legitimacy to identify such constraints. Although the Court of Justice does not enjoy the "*Kompetenz-Kompetenz*", it is master of the limits of the scope of Community rules. While it cannot determine the fields which fall within the competence of the Community, it can decide, on its own, which situations fall within the Community framework and what is the content of this framework.

What do these constraints actually consist of? In *Watts*, while recognizing that the Community's competence in the area of hospital care is limited, pursuant to Article 152(5) EC, the Court added: "that provision does not, however, exclude the possibility that the Member States may be required under other Treaty provisions, such as Article 49 EC, to make adjustments to their national systems of social security."[21] These adjustments flow from the need to "balance the objective of the free movement of patients against overriding national objectives relating to management of the available hospital capacity, control of health expenditure and financial balance of social security systems."[22] It follows from a long line of cases that the constraints resulting from the free movement provisions consist in imposing on the national authorities the adjustment of their national legislation, taking into account the specificity of individual cross-border situations.[23]

In the areas of competences which are reserved to the Member States, the application of the market freedoms is not equivalent to a centralized action by the Community. It does not lead to a Community competence taking the place of national competences. Instead, the market freedoms offer the Member States criteria which allow them to evaluate all policies pursued in a wider context, the trans-national context. They have first of all a "review" function: they help the Member States to "recontextualize" the decision-making process at national level to force them to take account of interests coming from or situated in other Member States, which are not only interests of firms but also of citizens, workers or students.[24] They also have a "*re-programming*" function to the extent that they should lead the national authorities to adapt their policies to the objectives of integration. The application of free movement provisions is based on an engagement on the part of the Member States to

21. Case C-372/02, *Watts,* [2006] ECR I-4323, para 147.

22. *Watts*, ibid., para 145.

23. See e.g. Case C-322/01, *Deutscher Apothekerverband,* [2003] ECR I-4887, paras. 73–74.

24. See, in particular, Case C-157/99, *Smits and Peerbooms,* [2001] ECR I-5473; Case C-446/03, *Marks & Spencer,* [2005] I-10837; Case C-209/03, *Bidar,* [2005] ECR I-2119.

"denationalize" their normative standards.[25] It demands a profound turnaround of national practices.

In *Viking* and *Laval*, the Court transposes these constraints to the situation of trade unions. The trade unions should not be able to act without taking account of the interests of the undertakings and those of workers from other Member States. Such a transposition can have a destabilizing effect. For the definition of the equilibrium between individual contractual freedom and the freedom of business, on the one hand, and the defence of professional and social interests on the other, is the product of each legal and social system.[26] In Community case law, this destabilizing effect is usually compensated by finding justifications which permit the Member States to take account of the equilibria reached in their particular situations (fiscal cohesion, balanced allocation of the power to impose taxes, maintaining the supply of health care, financial equilibrium of the social security system, national conception of respect for human dignity…).[27] The question which then arises in these two cases is to know whether, in imposing on the trade unions the burden of adjustment which is usually put on the Member States, the Court offers them adequate and particular possibilities of justification.

Before answering this question, let us consider the second objection raised against the authority of EC Law in this area.

2.2. *The horizontal direct effect of the free movement provisions*

Rights of negotiation and of collective action are horizontal rights, in the sense that they work between private parties. Private parties of a special kind, nevertheless. On the one hand, the parties are not just private individuals, but economic and social organizations. On the other, these rights occur in relations between employers and workers, the latter having a relationship of subordination *vis-à-vis* the former. This "horizontal relationship" actually contains some elements of a "vertical" nature.[28] But it remains formally horizontal.

In principle, it is excluded that the free movement provisions apply in horizontal relations. A contractual provision cannot be regarded as a barrier to trade since it is not imposed by a Member State but agreed between individu-

25. De Búrca and Gerstenberg, "The denationalization of constitutional law", 47 *Harvard International Law Journal* (2006), 242.

26. Lyon-Caen, "Droit social et droit de la concurrence. Observations sur une rencontre", in *Les orientations sociales du droit contemporain* (PUF, Paris, 1992), p. 331.

27. See e.g. *Marks & Spencer*, cited *supra* note 24; *Watts*, cited *supra* note 21; Case C-36/02, *Omega*, [2004] ECR I-9609.

28. Following the analysis of Rodière, "Article II-88. Droit de négociation", in Burgorgue-Larsen, Levade, Picod op. cit. *supra* note 6.

als.[29] Private persons engage freely in contractual relations, providing they abide by the competition rules. This principle does have exceptions, however, in three hypotheses: i) if the party is only apparently private, but is actually acting on behalf of the State, then his or her action may be imputed to the State;[30] ii) if the private party involved is an organization regulating in a collective manner employment or self-employment (*Bosman*, *Wouters*);[31] iii) if the private party involved imposes a discriminatory condition as part of an established regional practice in relation to access to employment (*Angonese*).[32]

In *Viking*, the Court has made a dialectic transformation of this case law. Formally, the Court maintains and applies its case law based on the recognition of a power to regulate in a collective manner enjoyed by the leadership of a professional organization: "it must be borne in mind that the collective action taken by Finnish Seamen's Union (FSU) and International Transport Workers' Federation (ITF) is aimed at the conclusion of an agreement which is meant to regulate the work of Viking's employees collectively, and, that those two trade unions are organizations which are not public law entities but exercise the legal autonomy conferred on them, inter alia, by national law".[33] But, in fact, the Court makes a double shift: in this case, there is a power recognized not for a professional organization of employers, but an organization of workers; moreover, this power consists not in the competence to regulate a branch of the economy, but in the power to start collective industrial action.

This judgment entails both a development of the logic of the *Bosman* case law, and a reversal of the *Defrenne* case law. The extension of the horizontal applicability of the free movement provisions to collective actions of workers reflects a more general evolution of the context in which Community law operates. The development of non-State actors occupying an important position in the market has undermined the division between "public" and "private" on which the Treaty rules were based.[34] Just as the State acts more and more often as market agent, so one finds more and more often private agents, such as professional organizations, which enjoy a large autonomy in relation to public institutions (as a result of the effect of increasing functional differentiation of society) and which enjoy real power in the market. At the same time, this

29. Case C-159/00, *Sapod Audic,* [2002], ECR I-5031, para 74.
30. Case C-325/00, *Commission* v. *Germany*, [2002] ECR I-9977
31. *Bosman*, cited *supra* note 19; Case C-309/99, *Wouters*, [2002] ECR I-1577.
32. Case C-281/98, *Angonese,* [2000] ECR I-4139.
33. Para 60, *Viking.*
34. On this point, see Poiares Maduro, "L'Etat caméléon. Formes publique et privée de l'Homo Economicus", in *Le droit à la mesure de l'homme. Mélanges en hommage à P. Léger* (Pedone, 2006).

spreading of power changes the way in which it is exercised. The distinction between the public power of regulation and the private freedom of action – which constitutes the liberal State – is becoming less apparent. In this way, action in the form of social mobilization which influences the conditions in which economic operators take decisions is, in practice, treated in the same way as normative power held by the State or corporatist organizations. In these cases, trade unions are not bound by the freedom of movement insofar as they assume a statal regulatory task but insofar as they behave as powerful social actors.

In *Defrenne*, the Court granted direct horizontal effect to certain Treaty provisions: "in fact , since article [141 EC] is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals".[35] This precedent is explicitly cited by the Court, to support its reasoning in *Viking*.[36] But: in *Defrenne*, direct horizontal effect is conceived as a tool or resource offered to female workers in order to fight discrimination committed by employers. The power was on the side of the employers, and the right on the side of the workers. In *Viking*, it is quite a different kettle of fish: the power is on the side of the trade unions, and the right to oppose this is given to the employer. The Court's analysis in order to arrive at the application of the free movement provisions means that the right to strike and the right of collective bargaining have to be put in terms of a power: power to strike, power to negotiate.[37] Now, a power is not a right.[38] A right demands protection. Recognition of the right to strike implies, in principle, conferring on collective actions a certain judicial immunity.[39] On the contrary, power implies control. And it involves the responsibility to take account of the interests of the undertakings and those of workers from other Member States.

What power is exactly at stake in the present case? It is necessary to define this precisely, since it directs the analysis of the restriction on the market free-

35. Para 39, *Defrenne*.

36. Para 58, *Viking*.

37. See Bailleux, *Les interactions entre libre circulation et droits fondamentaux dans la jurisprudence communautaire*, PhD thesis, Facultés Universitaires Saint-Louis, Brussels, 2008, p. 748.

38. See Hohfeld, *Fundamental Legal Conceptions* (Greenwood Press, Westport, reprint, 1978).

39. See, in English law, Barnard, op. cit. *supra* note 1; in French law, Cavallini, "Une action collective licite en droit interne peut être contraire à la liberté d'établissement consacrée par le traité de Rome", *Semaine Juridique Social*, 5 février 2008, 1086 ; Pataut et Robin-Olivier, "Europe sociale ou Europe économique (à propos des affaires *Viking* et *Laval*)", (2008) *Revue du droit du travail*, p. 80.

doms. In *Viking*, three different forms of trade union power must be distinguished: First, there is the action by the ITF asking its affiliates to refrain from entering into negotiations with Viking. This power was exercised *vis-à-vis* the affiliated unions. Second, as a result of their capacity to mobilize these affiliates, ITF and FSU enjoy a power with regard to employees, both national workers and posted workers. These two forms are not in themselves capable of forming a restriction on the freedom to provide services. Only the third form is that: the power which the unions exercise on the situation of Viking. As a result of their ability to act and to negotiate, the unions are presumed to be able to prevent Viking from establishing in another Member State.[40] The same holds in the case of *Laval*: it is the power to force Laval to negotiate and to conclude a collective agreement which forms a restriction.[41]

Another analysis was possible. It was possible to consider that the "external" restrictive effects are inherent to the pursuit of the aims of mobilization and defence of the rights of employees – which are the primary objectives of trade unions. It would then have been necessary to conclude an absence of any restriction, or to find a restriction which was manifestly justified. Such a solution could have been adopted by analogy with the reasoning followed in *Wouters*.[42] If the Court implicitly rejects this analysis, it seems that it is because it refuses to consider the trade unions in the same way as the associations of lawyers (the Bars) acting as organizations outside the scope of the internal market. This choice to include the trade unions in the scope of the internal market was certainly influenced by the circumstances of both cases: a strong collective action making impossible the pursuit of an economic activity at the transnational level. But it was also a political choice. In these cases, the Court reveals a vision of the internal market as a "political" process,[43] which should make it possible to integrate market interests and non-market values, economic power and non-economic power, and reconcile them.

3. The reconciliation of economic and social requirements

The Court recognizes the right of collective action as a "fundamental right which forms an integral part of the general principles of Community law".[44] On the other hand, it usually qualifies the market freedoms as "fundamental

40. Paras. 72–73, *Viking*.
41. Paras. 99–100, Laval.
42. Case C-309/99, *Wouters,* [2002] ECR I-1577.
43. On this idea, Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Oxford, Hart Publishing, 1998).
44. Para 44, *Viking,* para 91, *Laval.*

Community provisions".[45] In a situation such as that at issue, resulting from a collective labour conflict in the framework of a company undertaking trans-border activities, these two fundamental elements of Community law meet – in fact confront one another.[46] This confrontation reveals a concrete contradiction. The Court chooses not to avoid the contradiction but to deal with it following a model of reconciliation.

3.1. *The definition of the model of reconciliation*

Faced with this concrete contradiction, the Court could have chosen to make one of the two fundamental elements prevail over the other. In fact, even though not formally admitting the superiority of one of these fundamental elements, it is possible to grant one of them priority. So, if the Court had chosen to favour freedom of establishment or freedom to provide services, it could have based its reasoning on the classic case law which only accepts restrictions on the market freedoms which are legitimate and strictly proportional. In this case, it is enough to consider strikes and blockades as disproportionate. If, on the contrary, it had chosen to favour the right to collective negotiation and action, it could have based its decision on the line of case law which only permits restrictions to fundamental rights if these do not affect the substance of the right, and provided they are strictly necessary.[47] In that case, it is enough to consider that the substance of the right of collective action was at stake.

In both cases, the Court would reintroduce a *hierarchy* in favour of one of the two fundamental elements. That is not what the Court chose to do in these cases. It decided, at least formally, to take the contradiction seriously and not to sacrifice either of the two opposing demands. Nevertheless, in theory there are two ways of giving effect to the pluralism of fundamental elements. These two ways have very pronounced theoretical and practical implications.

The first way is to consider that there is a total contradiction between the two fundamental elements. They belong to two separate spheres, which cannot meet without mutually destroying each other. These two fundamental elements

45. Case C-49/89, *Corsica Ferries France* [1989] ECR 4441, para 8.

46. This is what Joerges and Rödl call a "true conflict": "Democracy and European Integration: A Legacy of Tensions, a Re-conceptualisation and Recent True Conflicts", *EUI Working Paper*, LAW 2007/25.

47. See e.g. Case 265/87, *Schräder* [1989] ECR 2237, para 15. Identically, Art. 52(1) of the Charter of fundamental rights of the European Union provides that "[a]ny limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the *essence* of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others".

are each exclusive. This is the route the Court chose to follow in *Albany*. In that case, an undertaking refused to pay its premiums to the sectoral pension fund for the textile industry, on the ground that such an obligation of affiliation is contrary to the competition rules prohibiting certain agreements. The Court began by recalling that "the activities of the Community are to include not only a 'system ensuring that competition in the internal market is not distorted' but also 'a policy in the social sphere'."[48] Taking this broader framework of Treaty objectives, and not just the framework of the competition rules, the Court recognized that "certain restrictions of competition are inherent in collective agreements between organizations representing employers and workers".[49] It is thus on the basis of "an interpretation of the provisions of the Treaty as a whole which is both effective and consistent"[50] that the Court concluded that collective agreements in the field of employment, bearing in mind their nature and their object, must be put *outside* the field of application of the Community competition rules.[51] This route was suggested to the Court by the trade unions concerned in *Viking*. They proposed that, just as collective labour agreements are by their nature restrictive of competition, restrictions on freedom of establishment and freedom to provide services are inherent in collective action. The application of the free movement rules to labour conflicts would amount to systematically undermining the legitimacy and legality of collective action. Therefore labour conflicts must be put outside the field of application of the market freedoms.

The Court rejected this solution. In its view, the contradiction is not total, but partial. Certainly, the exercise of rights of collective action and negotiation is likely to involve restrictive effects on market freedoms. But these rights can also be exercised without such effects. As a result, it is possible to find a "reconciliation according to circumstances" for these two fundamental elements.[52] The collision of principles is not destructive. It should, on the contrary, lead to a "mutual optimization" of the social and economic objectives of the Treaty. [53] This "consensualist" conception contrasts fundamentally with the previous "conflictual" conception. That conception saw the different Treaty objectives

48. Case C-67/96, *Albany*, [1999] ECR I-5751, para 54.

49. Para 59.

50. Para 60.

51. See also Case C-222/98, *van der Woude,* [2000] ECR I-7111.

52. See, on legal theory, Champeil-Desplats, "Raisonnement juridique et pluralité des valeurs: les conflits axio-téléologiques de normes", (2001) *Analisi e diritto*.

53. Blanke, "Observations on the Opinions of Advocates General Maduro and Mengozzi delivered on 23 May 2007 in the *Viking* and *Laval* cases", ETUI-REHS, *Transfer 3/07*. "Mutual optimization" refers to the concept of "praktische Konkordanz" as developed in German constitutional law.

in autonomous and exclusive normative spheres. This consensualist conception envisages, on the contrary, demands which can be balanced, interests which may concur, voices in concert.[54] This is the conception supported by Advocate General Poiares Maduro: participation and collective action by workers are not excluded from the scheme of economic integration; on the contrary, they contribute to increasing the efficiency and proper functioning of the integrated market.[55] Choosing this route, the Court affirms the productive ambiguity of the Community project. But then it tends to put on the same level parties and interests which are in a situation of imbalance of power, as are workers and employers in transnational contexts.[56]

The practical method for the Court's reconciliation was set out in *Schmidberger*. The conflict is formulated within the classic framework according to which free movement is the principle and the right of social action the exception. This framework is dictated by the rules on the jurisdiction of the Court – it can only be seized of a dispute concerning a possible violation of one of the market freedoms. But, instead of confining the exception within a strict application of the proportionality principle, the Court acknowledges that, in defining the right protected in the internal order and in the balance of this right with the Treaty's economic freedoms, "the competent authorities enjoy a wide margin of discretion".[57] In fact, the Court restricts itself to submitting this assessment to a review of whether it is "reasonable".[58]

The construction of this model has a twofold consequence at the institutional level. First, it gives the Court a truly constitutional role: that of defining the plurality of values which must be recognized or accepted by the Community legal order and establishing the relationships between these different values. Secondly, this model gives the national authorities a constitutional task, that of bringing fundamental national values into accordance with fundamental Community provisions, taking account of the particular characteristics of the situation. The application of this model to *Viking* and *Laval* raises two questions: Is the Court legitimated to assume such a constitutional role?[59] Can

54. Poiares Maduro, "Striking the Elusive Balance Between Economic Freedom and Social Rights in the European Union", in Alston, Cassese, Lalumière, Leuprecht (Eds.), *An EU Human Rights Agenda for the New Millennium* (Oxford, Hart Publishing, 1999), p. 449.

55. Opinion in *Viking*, paras. 59–60.

56. On this point, see Bercusson, op. cit. *supra* note 1, who states that "the freedom of enterprises to move throughout the single European market has shifted the balance of economic power towards employers" (at 307). Also Moreau, *Normes sociales, droit du travail et mondialisation* (Dalloz, Paris, 2006).

57. *Schmidberger*, para 82.

58. Para 93.

59. Expressing doubts on the role assumed by the Court in these cases, Joerges and Rödl, "On De-formalisation in European Politics in Response to the 'Social Deficit' of the European Integration Project", www.europeanrights.eu, 30 May 2008.

trade unions be treated like "constitutional bodies", able to rise above their position of pure defence of social objectives, enjoying social rights, and take on obligations of balancing social and economic objectives?[60]

3.2. *The application of the conciliation model*

In the application of the model, the Court's analysis reveals a paradox and an incoherence. The paradox concerns the systems of social relations in Sweden and Finland. Collective action is recognized by the Court as a fundamental right. Autonomous collective bargaining is strongly encouraged in Community law. Now, on the contrary, the result of these two cases seems to be to imprison the system of social relations in a framework of representation (legislative, universally applicable collective agreement) and under the supervision of courts (the ECJ, national courts). In *Viking*, the Court submits the actions by the ITF and the FSU to a strict review as to their objectives and proportionality.[61] Moreover, the Court makes the legality of action subordinate to the necessity to verify the nature of the engagement undertaken by the employer and the exact nature of the demands of the employees. In *Laval*, the Court rejected pay negotiations on a case-by-case basis, at the workplace, which are not based on a system of social and pay obligations, which is regulated by law or universally applicable collective agreement and which is clear and accessible.[62] It refuses a system such as the Swedish system which did not make use of the possibility offered by the Directive to impose the universal application of a collective agreement, even if in fact it is applicable to a branch of industry.

It seems that the Court transposes to trade unions the limits which it imposes on Member States as far as the market freedoms are concerned (proportionality, judicial review) but without offering these organizations the counterpart recognized for the State: a broad margin of discretion in defining the social objectives to be protected and in the means of ensuring this protection. In other words, it refuses to consider the system of social relations as a "constitutional order" enjoying the capacity of self-determination. This sys-

60. On the idea of societal constitutional bodies, see Dorf and Sabel, "A Constitution of Democratic Experimentalism", 98 *Columbia Law Review*, (1998), 267 et seq.; Gerstenberg and Sabel, "Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?", in Joerges and Dehousse (Eds.), *Good Governance in Europe's Integrated Market* (Oxford, OUP, 2002), p. 289.

61. Paras. 81, 87, 89.

62. Paras. 71, 110.

tem is put under the supervision of the legislature and the courts.[63] This analysis amounts, in fact, to denying the choice of social organization based on freedom of negotiation between both sides of industry.[64]

This denial of choice of social organization is evident from the refusal to consider that Sweden has a minimum wage. Sweden has no minimum wage rate as long as it chooses not to transpose this part of the Directive and to leave it to the social partners to negotiate this rate on a case-by-case basis.[65] This reappears in the way the problem of "matters not covered by the directive" is treated.[66] The question arose whether it was possible to extend the application of provisions of the collective agreement in the building sector, which went further than the nucleus of mandatory rules listed in Directive 96/71. This extension could be contested on the ground that it imposed on Laval obligations which were not "necessary" for the protection of posted workers. But that is not the reasoning adopted by the Court. Sticking to a strict and literal interpretation of the Directive, the Court recalled that supplementary obligations of a public policy nature can only be imposed by the public authorities of the host State and not by means of negotiation between the social partners – the latter "not being bodies governed by public law, … cannot avail themselves of that provision by citing grounds of public policy …".[67] Nevertheless, elsewhere the Court agrees to assimilate the trade unions to public bodies for the purposes of application of Article 49 EC.[68] This contradiction shows that, though the Court does not hesitate to impose on the social organizations the constraints linked to the respect of the free movement rules, it hesitates to entrust them with the task of determining the nature of the public social order. Paradoxically, the State seems to be the only reference for the Court. In fact, the Court's analysis leads to a more regulatory approach in Sweden.

There is also an incoherence in the Court's line of reasoning in *Laval*. In the domain of posting of workers, the Court usually tries to reconcile the necessity of facilitating freedom to provide services in the Community and the necessity to protect posted workers. The application of the law of the host State is only legitimate if it means a real and significant benefit for the posted work-

63. French academic literature is particularly aware of this intrusive judicial review: Cavallini, op. cit. *supra* note 39; Vigneau, "Encadrement par la Cour de l'action collective au regard du Traité de Rome", *Semaine Juridique Ed. Générale*, 26 mars 2008, II-10060 ; Pataut and Robin-Olivier, op. cit. *supra* note 39. From an Italian point of view, Veneziani, "La Corte di giustizia ed il trauma del cavallo di Troia", (2008) *Rivista giuridica del lavoro*.

64. Cf. Opinion A.G. Mengozzi in *Laval*, para 260.

65. Para 71.

66. Paras 73 to 84.

67. Para 84.

68. Para 98.

ers. That implies a comparison of benefits and constraints resulting from the application of the law of the host State and that of the State of origin, respectively. The Court habitually requires host States to make that comparison before imposing the application of their own social legislation. Basing himself on this case law, which relates to Article 49 EC, Advocate General Mengozzi suggested the adoption of a similar solution.[69] In that context, the basis for the comparison is the gross amounts of wages.[70] In case there is no rate of pay applicable to all persons in the sector involved in the State territory, as appears to be the case in Sweden, account must be taken of the average rate of pay applied by companies of the sector in the region concerned.[71] In case of failure of negotiations on the average rate of pay, the reference for the national court to justify a collective action should be the minimum rate stipulated in the collective agreement applied in the region to which the workers of the undertaking involved were posted.[72]

The Court followed a different path. It based its interpretation entirely on that of Directive 96/71. However, the Directive does not require any comparison between the social systems, it simply requires respect for a nucleus of mandatory rules (Art. 3(1)). This nucleus does not relate to average wages but only to minimum wages.[73] Because the Directive requires above all transparency in the system, these minimum wages should be laid down by law, regulation or administrative provision, and/or by collective agreements or arbitration awards which have been declared universally applicable. Therefore, minimum rates as provided in a collective agreement which has not been declared universally applicable are not supposed to be taken into consideration.

The Court sets about the reconciliation of economic and social objectives in what seem to be classic terms. It starts with the principle of freedom to provide services, and adjusts its application with a justification drawn from the objective of protection of workers. Nevertheless, it does not use the proportionality principle as developed in the context of the application of free movement provisions for this.[74] It subordinates the objective of protection of workers to the mere respect of the hard nucleus of mandatory rules for minimum protection

69. Opinion, para 272.
70. Opinion, para. 265.
71. Opinion, para 268.
72. Opinion, para 273.
73. As recalled by the Court, para 70.
74. On the structure of reasoning of the Court in such context, see Bengoetxea, MacCormick, Moral Soriano, "Integration and Integrity in the Legal Reasoning of the European Court of Justice", in de Búrca and Weiler, *The European Court of Justice* (Oxford, OUP, 2001), p. 67.

provided for by Directive 96/71.[75] However, as minimum wages are not part of this hard nucleus of mandatory rules which can be imposed in Sweden, social action in order to impose a minimum wage cannot be a legitimate ground for restriction of the freedom to provide services. In its judgment, the Court indicates that the provisions of the Directive must be interpreted in the light of Article 49 EC.[76] But, at the end of the day, it does exactly the opposite: it sticks to a strict interpretation of the Directive and brings the interpretation of Article 49 EC back to this interpretation of the Directive.

The Court has a legitimate concern: it should not take the place of the Community legislature, which had limited itself to adopting a Directive of coordination, or that of the national legislature, which had omitted to take a stand on certain social obligations. But, by making this referral back to the legislature, it obscures the specific nature of the Swedish social constitution, which is based on negotiation case-by-case and the existence of de facto applicable collective agreements. In this case, the Court corrects the economic constitution of the Community (free movement) in a "social sense", but does so on the basis of a partial and derived cohesion (minimal rules of coordination fixed in Directive 96/71 which is based itself on the economic freedom to provide services, not on social policy). Thus, it seems that the technique of reconciliation used does not match up to the ideal which is announced.

4. Conclusion

It is quite evident that the Court does not have the power to impose an equalization of social costs or to harmonize employment conditions in the Community. In specific cases, it must ensure the freedom of trade and preserve the competitive advantage of undertakings in the integrated market. On the other hand, it must assume the protection of employment and of workers and take account of the preservation of national social models.
Therefore, only a solution based on conciliation seems feasible.

Adopting a "conflictual" solution, thus excluding labour conflicts from the scope of application of Community law, would have had the advantage of protecting the integrity of the national social systems. But it would have created the risk of appropriating forms of social action in order to avoid the application of the Treaty rules in transnational situations.[77] Moreover, it would

75. Para 108.
76. Para 61.
77. On the specificity of transnational conflicts, see Pataut, "Régulation des rapports de travail en Europe et conflits de lois", in Audit, Muir Watt, Pataut (Eds.), *Conflits de lois et régulation économique* (Paris, LGDJ, 2008), p. 134.

have endangered the sense of solidarity and of equal treatment that national social systems owe to workers of new Member States – the sense of European integration.[78] For the Court, the bold choice was to opt for a "consensual" solution, including the transnational labour conflict within the scope of Community law and putting the trade unions under its supervision. It is submitted that this is the only way to achieve the goal of a real economic and social integration. What the Court fails to do, however, is to take into account the existence of a weaker party (workers) in the economic transnational activity. As Advocate General Poiares Maduro recalls, "one must not ignore, in that regard, the fact that workers have a lower degree of mobility than capital or undertakings".[79] It follows that, contrary to employers, workers have not the same opportunity to choose the most attractive system of regulation. Such an imbalance of power must find a solution in an enhanced cooperation between workers organizations at the transnational level. Advocate General Poiares Maduro calls for a new form of "workers coalition" in Europe.[80] This is certainly welcome. But is it feasible and realistic, given the persistent divergence of social models in Europe?

These decisions pose, more fundamentally, the delicate problem of the justification for national collective actions in transnational contexts. Should the point of reference be only the interests of undertakings and posted or outsourced workers to move to another Member State? Or the defence of the national social models and the interests of workers to be offered the best possible social protection? The Court seems to have chosen the first branch of the alternative. Assuming the second branch of the alternative would mean that a collective action is justified if it aims to establish a regime which is really more beneficial for workers concerned by a posting or a relocation. This solution would oblige the national trade unions to take account of the protection offered to workers in their State of origin or of destination. If workers already enjoy equivalent guarantees, or if the action is not really beneficial to workers, but aims to protect guarantees which are only beneficial to national workers, the action may not be justified. This would imply also that the Court accepts negotiation on a case-by-case basis, in the same way as it imposes a case-by-case form of reasoning on Member States which have to deal with transnational situations in social or educational matters.[81] Such solutions would be – of necessity – complex. But, in the absence of social harmonization, this is the

78. A conditional duty of solidarity towards citizens of other Member States is clearly asserted by the Court in its case law on citizenship: see Case C-184/99, *Grzelczyk*, [2001] ECR I-6193, para 44.

79. Opinion *Viking*, para 70.

80. Ibid.

81. See, in particular, *Bidar* cited *supra* note 24; *Watts*, cited *supra* note 21.

only way to maintain an equilibrium between the divergent requirements of the national social models and the uniform requirements of the internal market.

These cases are typical of the problems the Court will have to deal with in the context of an expanded economic and social integration. In these decisions, the Court carries out one of the two operations which define its new constitutional role. It manages to make the *connection* between the different national and sectoral elements of the situations.[82] But it still has to make the necessary *correction* in view of the distortions of power that are at stake in such contexts.

82. Cf. Cassese, "La fonction constitutionnelle des juges non nationaux. De l'espace juridique global à l'ordre juridique global", conference at the Cour de Cassation, Paris, 11 June 2007.