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THE PRINCIPLE OF PROPORTIONALITY IN THE *VIKING* AND *LAVAL* CASES:
AN APPROPRIATE STANDARD OF JUDICIAL REVIEW?

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Abstract

The article analyses the application of the proportionality principle in the *Viking* and *Laval* judgments. It argues that one of the main reasons why the outcome of these two eminent cases became so controversial was because of the way in which the Court applied the proportionality principle. The paper will first give an overview about the application and elements of the proportionality test in EC internal market law; it will then raise two related issues, namely to what extent the so-called 'Prinzip der praktischen Konkordanz' is relevant in the existing case law and whether there is a need for a differentiated approach under the proportionality test in horizontal situations. The article urges the ECJ to develop a different standard of judicial review for trade union action. The paper will draw on some selective national examples to show that where a proportionality principle is applied in industrial action cases, both the elements and the substance of the test are different from those applied by the Court of Justice in these two cases. The last part of the paper will highlight the differences between the proportionality review in the two cases, including the importance of the reference to the minimum harmonisation clause of the Posted Workers Directive in the *Laval* judgement. Finally, the article invites the reader to pay attention to the broader constitutional implications of judgement in the field of social policy, i.e. to what extent the cases generated coordination between the Member States at the intergovernmental level.

Keywords

Free movement, fundamental/human rights, judicial review, proportionality, industrial action, Europeanization

The Principle of Proportionality in the Viking and Laval Cases: An Appropriate Standard of Judicial Review?

Nikolett Hős¹

1. Introduction

The place that social policy considerations have gained in the recent constitutional and legal reforms of the European Union is a strong signal of the fact that it will be very difficult in the future for the Union to gain legitimacy or support for major economic and legal reforms without stronger guarantees for the protection of its social values. To underline this point, it is sufficient to think of the rejection of Constitutional Treaty² by the Dutch and French voters or the very recent negative referendum on the Lisbon Treaty³ in Ireland. The amendments of the original Services Directive⁴ taken in order to reconcile the effects of further market liberalisation with the diverse models of European labour and employment laws⁵ can be mentioned here as well. Arguably, the appropriate settlement of issues on the social dimension of the European Union became a source of legitimacy for the future of the integration project.⁶ Nevertheless, the implications of the appraisal of 'Social Europe' in the political rhetoric are less straightforward from a legal perspective. Indeed, both the refuted Constitutional Treaty and the 'prospected' new framework Treaty of the EU, the Treaty of Lisbon, envisioned a new economic model for the Union by referring to the 'innovative' concept of a '*highly competitive social market economy*'.⁷

While the political process seems to struggle hard with the question of how to find, in fact, a better balance between the social and economic rationales of the integration project, in the recent *Viking*⁸ and *Laval*⁹ judgements it was left to the European Court of Justice (further on: Court or ECJ) to establish an indirect basis for a legal compromise and to facilitate coordination between the Member States at the intergovernmental level. The Court apparently took a decision with important 'constitutional' significance for Europe's social dimension. It ruled in both cases that the activities of the Community are to include not only an 'internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital, but also a policy in the

¹ PhD candidate, European University Institute; I am grateful to Prof. Marie-Ange Moreau and to Prof. Marise Cremona for their support and comments on an earlier version of this paper. I would also like to say thank you to Prof. Norbert Reich for his thoughtful comments on the paper. The responsibility for any faults or omissions lies exclusively with the author.

² Treaty establishing a Constitution for Europe OJ C 2004 310/01

³ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 2008 115/ 01

⁴ Directive 2006/123/EC on Services in the Internal Market, OJ 2006 L 376/36 (referred to as 'Services Directive')

⁵ EDITORIAL COMMENTS, 'The services directive proposal: Striking a balance between the promotion of the internal market and preserving the European social model?', (2006) 43 Common Market Law Review, ; For an up-to-date overview concerninf the impact of the Services Directive on national employment laws see CATHERINE BARNARD, *Employment Rights, Free Movement under the EC Treaty and the Services Directive* Mitchell Working Papers Series

⁶ CHRISTIAN JOERGES & FLORIAN RÖDL, *On De-formalisation in European Politics and Formalism in European Jurisprudence in Response to the "Social Deficit" of the European Integration Project, Reflections after the Judgments of the ECJ in Viking and Laval* EUI Working Paper

⁷ See *Article I-3(3)* of the Draft Treaty Establishing a Constitution for Europe and *Article 3(3)* of the Treaty on European Union, For a critical analysis of this concept in the Constitutional Treaty see CHRISTIAN JOERGES, "Social Market Economy" as Europe's Social Model? (European University Institute 2004).

⁸ Case C-438/05 *Viking* [2007] ECR I-10779

⁹ Case C-341/05 *Laval un Partneri* [2007] ECR-I 11767

social sphere'.¹⁰ Referring to Article 2 EC the Court also stated that 'the Community is to have as its tasks, inter alia, the promotion of 'a harmonious, balanced and sustainable development of economic activities and a high level of employment and social protection'.¹¹

Such statements, trying to re-align the social dimension of the Community with its economic rationale, are not without precedent in the case law of the Court of Justice.¹² Having regard to the very controversial and uncertain implications of the Viking and Laval cases, especially for the Swedish autonomous collective bargaining model,¹³ the question arises of what significance should be assigned especially to the reference to the protection of fundamental rights and the social policy objectives of the European Community in these two eminent cases? The reference to the equal status of the economic and the social policy goals of the Community in the internal market review could be perceived as confirmation by the Court of the policy discourse that has been attempting to reconceptualise the internal market project in more "holistic terms", i.e. to include long term and essentially distributive policy objectives such as consumer safety, social rights, labour and environmental policy into the single market project since the early 1990s.¹⁴

However, due to historical reasons, Europe's economic constitution is 'embedded' into the diversity of national welfare state regimes.¹⁵ Therefore, furthering market integration via *political goals* requires that first a new (different) institutional balance between the social and economic rationales of the Union be established. On the basis of a political and historical compromise between the founding Member States of the European Economic Community, an agreement regarding shared theoretical concepts on which grounds economic integration should take place in Europe was reached.¹⁶ The 'predominant version of philosophy' underlying the single market project is well documented elsewhere. According to this ideal, the single market program was designed to remove barriers to free movement of factors of production mainly on formal equality grounds and to remove barriers to distortions of competition as a means to maximize utility and achieve allocative efficiency in Europe.¹⁷ In this constitutional setting it is expected that social progress will automatically follow from economic development at the national level. Arguably, in light of these two judgments, some elements of this original constitutional compromise on what the social dimension of the Community was built became questionable.¹⁸

¹⁰ Case C-438/05 *Viking* [2007] ECR I-10779 para. 78 and Case C-341/05 *Laval un Partneri* [2007] ECR-I 11767 para 104

¹¹ Case C-438/05 *Viking* [2007] ECR I-10779 para. 79 and Case C-341/05 *Laval un Partneri* [2007] ECR-I 11767 para. 105

¹² Case C-43/75 *Defrenne* ECR [1976] 455 , paras. 8-10 ; Case C-50/96 *Deutsche Telekom AG v Lilli Schröder* [2000] ECR I-00743 para. 57; Case C-67/96 *Albany* [1999] ECR I-05751 , paras. 56-60 , see also ERIKA SZYSZCZAK, 'The New Paradigm of Social policy: a Virtuous Circle? ', (2001) 38 Common Market Law Review,

¹³ JONAS MALMBERG & TORE SIEGMAN, 'Industrial Actions and the EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice ', (2008) 45 Common Market Law Review,

¹⁴ PAUL CRAIG, 'The Evolution of the Single Market', in Catherine Barnard & Joanne Scott (eds), *The Law of the Single European Market* (Hart Publishing, 2002), p. 36-40.

¹⁵ STEFANO GIUBBONI, *Social Rights and Market Forces* (Cambridge University Press 2006), SIMON DEAKIN, 'Labour Law as Market Regulation: the Economic Foundations of European Social Policy', in Lyon-Caen Davies P., A., Sciarra S. and Simitis S. (ed), *European Community Labour Law: Principles and Perspectives* (Clarendon Press, 1996).

¹⁶ According to Joerges and Rödl, the European integration project developed in a theoretical frame influenced by German *ordo-liberalism* and by the theory of "orthodox" supranationalism in its foundational period JOERGES & RÖDL, *On De-formalisation in European Politics and Formalism in European Jurisprudence in Response to the "Social Deficit" of the European Integration Project, Reflections after the Judgments of the ECJ in Viking and Laval* p. 4-6.

¹⁷ J.H.H. WEILER, 'The Transformation of Europe', (1991) 100 *The Yale Law Journal*, , p. 2477

¹⁸ See further on this point SIMON DEAKIN, 'Regulatory Competition After *Laval*', in Catherine Barnard (ed), *The Cambridge Yearbook of European Legal Studies* (Hart Publishing, 2008).

The means to further market integration have also been *functionally* developed according to this theoretical framework. As long as Europe was searching for legitimacy for the integration project by relying only on its 'orthodox' economic rationale framework, these means were appropriate and consensual. However, despite some remarkable attempts to find a new and autonomous rationale for European social policy and employment law,¹⁹ there is much more controversy about a possible future shared concept, whether this be economic, legal or political; on what consensual basis the economic integration project could be legitimized on social grounds. In fact, Europe's 'social self'²⁰ seems to be based on an '*invisible*' rather than a strong social constitution. Moreover, the recent Viking and Laval judgements have also highlighted that the traditional means used to further market integration might not always be appropriate to *resolve conflicts* that can arise in the "holistic frame" of the internal market project. After the Court ruled that the Community has not only an economic but also a social objective, it pointed out that the objectives pursued by the economic freedoms must be balanced against the objectives pursued by the social policy objectives of the Treaty. The legal technique used for this balancing exercise was the proportionality principle. Although the recognition of the right to take collective action, including the right to strike as a fundamental right within the Community legal order, was an ambitious first step forward by the Court, it soon became apparent that something went wrong with the balancing exercise in these two cases. It will be argued that one of the main reasons why the outcome of these two cases became so controversial was because of the way how the Court used the principle of proportionality. It might be because the Court was applying a "collage of general principles"²¹ developed in the law of the internal market for reviewing national measures restricting the economic freedoms to essentially novel situations,²² or due to 'the poor understanding of the industrial relations context',²³ but the Court consciously or unconsciously opened up a 'Pandora's box' with its proportionality analysis in Viking and Laval. The Court seemed to 'amalgamate' different types of proportionality tests in the Viking and Laval cases and these led to a very controversial end-result.

The present paper will give an overview about the application of the proportionality test in EC internal market law and it will raise two related issues, namely to what extent the so-called 'Prinzip der praktischen Konkordanz' is relevant in internal market case law and whether there is a need for a differentiated approach under the proportionality test in horizontal situations. The proportionality principle has been developed for reviewing essentially state measures. In light of the Viking and Laval judgements there seems to be a need to develop a different standard of judicial review to trade unions action. The paper will draw on some selective national examples to show that where a proportionality principle is applied in industrial action cases, both the elements and the substance of the proportionality test is different from those applied by the Court of Justice in these two cases. It is important to keep in mind, however, that the application of the proportionality principle was applied in a very different context in the Viking and Laval cases. In Laval, the application of the proportionality principle was influenced by the combined interpretation of the relevant 'minimum harmonisation'

¹⁹ ALAN SUPIOT, *Beyond Employment, Changes in Work and the Future of Labour Law in Europe* (Oxford University Press 2001). and CATHERINE BARNARD, DEAKIN, SIMON AND HOBBS, RICHARD, 'Capabilities and rights: An Emerging Agenda for Social Policy?', (2001) 32 *Industrial Relations Journal*, ;JUDE BROWNE, et al., 'Capabilities, Social Rights and European Market Integration', in Robert Salais & Robert Villeneuve (eds), *Europe and the Politics of Capabilities* (Cambridge University Press, 2004).

²⁰ MIGUEL POIARES MADURO, 'Europe's Social Self: "The Sickness Unto Death"', in Jo Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart Publishing, 2000).

²¹ LOIC AZOULAI, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Relaisation', (2008) *Common Market Law Review*,

²² CATHERINE BARNARD, 'Viking and Laval: An Introduction', in Catherine Barnard (ed), *Cambridge Yearbook of European Legal Studies* (Hart Publishing, 2007-2008), p. 492

²³ A.C.L. DAVIES, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ', (2008) 37 *Industrial Law Journal*, p. 144

directive, i.e. the Posting of Workers Directive (PWD)²⁴ and Article 49 EC. In spite of these differences, the final part of the paper will analyse and compare the application of the proportionality principle in the two judgments. It will be shown, that different types of proportionality principles were applied in the two cases and that the inconsistent use of this principle led to an undesirable legal uncertainty.

2. Where do we stand with the Principle of Proportionality in Internal Market Law?

The principle of proportionality is both a written and an unwritten constitutional principle of Community law. Together with the principle of subsidiarity it is the main governing principle of the exercise of Community competences therefore, in principle it is applied by the Community legislator. It is also used by the Community courts as a general principle of Community law to review both Community measures as well as national measures affecting any of the fundamental freedoms.²⁵ Article 52 (1) of the EU Charter of Fundamental Rights²⁶ establishes the principle of proportionality also as part of the criterion for assessing limitations on fundamental rights and freedoms in the Community legal order.²⁷ Historically, as a principle originating in public law, it protected the individual interests from the unnecessary and arbitrary intrusions of the state into the private sphere and it was the ultimate source of legality of any administrative and legislative action. Depending on the area, where it is applied the principle serves different functions. As *Tridimas* has pointed out, in internal market case law when it is invoked as a ground for the review of Member State measures affecting one of the fundamental freedoms, the proportionality principle has a ‘double function’. First, within the economic constitution conception of the internal market project it has a public law objective: individuals can invoke the free movement provisions against national measures that are unnecessarily restricting the exercise of the four freedoms. Its main rationale lies, however, in its second function, i.e. to further market integration. In this latter case the principle of proportionality is essentially a means of negative integration and requires the Court to balance the Community interest against a legitimate national interest.²⁸ *Danwitz* has pointed out two further functions of the proportionality principle in EC law which also has relevance in internal market law. In the mainly decentralized system of EC law enforcement the principle of proportionality serves as a guideline of interpretation (“*Auslegungsdirektive*”) in the application of Community law at the national level and it also ensures the “optimization of administrative action” so that this principle provides an ‘executive model’ (“*Prüfaster*”) for the legislator and the executive defining a framework within which to apply Community law at the national level.²⁹ Given the lack of a comprehensive system of EC administrative law, it is especially as a result of the application of the proportionality principle that Community law has had a major impact on the development of some national administrative laws and practices.³⁰ A further interesting phenomenon is the so-called “collateral review on grounds of proportionality”.

²⁴ Directive 96/71/EC concerning the posting of workers in the framework of the provision of services', in.

²⁵ For an overview on the application of the proportionality principle in Community law see TAKIS TRIDIMAS, *The General Principles of EU Law* (Oxford University Press 2006) and PAUL CRAIG, *EU Administrative Law* (Oxford University Press 2006)

²⁶ Charter of Fundamental Rights of the Union OJ C 2007 303/01 and Explanations relating to the Charter of Fundamental Rights OJ C 2007 303/02

²⁷ To what extent the general limitation clause of the Charter differs from the general proportionality test applied by the ECJ in fundamental rights cases or from the test applied by the European Court of Human Rights see CRAIG, p. 512-517.

²⁸ TRIDIMAS, p. 193

²⁹ THOMAS VON DANWITZ, 'Der Grundsatz der Verhältnismässigkeit im Gemeinschaftsrecht', (2003) *Europäisches Wirtschafts und Steuerrecht*, p. 394

³⁰ For a useful discussion of this point see EVELYN ELLIS, *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999).

According to *Tridimas*, this covers cases where the protection of fundamental rights is invoked within the framework of justifications. In these cases beyond the internal market imperative, the original public law function of the principle becomes more important.³¹ A good example for this ‘collateral use’ of the proportionality principle is the *Schmidberger* case.³²

It is important to emphasize that there is an *autonomous* concept of proportionality in European Community law. Community law does not seem to formally follow any particular model on the application of the proportionality test. Nevertheless, according to legal doctrine, the influence of some national models such as the German ‘*Verhältnismäßigkeitsprinzip*’ has been more influential than others on the development of the EC model.³³ Even though the elements of the test might be sometimes fairly similar to a particular national law test, on a detailed assessment it turns out that there are major gaps and differences concerning the precise content of the respected elements at the national level and as applied by the European Court of Justice.³⁴

There is a direct link between the test defining the scope of application of the four freedoms (discrimination based or ‘market access’ test) and the application of the proportionality test in internal market cases. According to *Tridimas*, proportionality became the main ground for review of national measures especially following the early 1980s. This was attributable to the increase in litigation before the ECJ and to the changes in the nature of the test, triggering the application of Article 28 EC and later also of the provisions on the free movement of persons and services. Since restrictions resulting from national measures can fall more easily under the scope of the four freedoms in a *market access* test than in a discrimination test, the focus has shifted to the application of the proportionality principle in order to define which state measures are lawful under Community law and which ones are not.³⁵ Arguably, a market access test, especially if it is interpreted in a very broad sense, subjects in principle all market regulation to judicial scrutiny under the four freedoms, since – as *Maduro* claimed – ‘all such measures by their very nature have an impact on trade’.³⁶ Especially under the free movement of person’s case law where there is in principle no ‘Keck-type’ filtering mechanism, this can lead to an overreliance on the proportionality principle to define the scope of the economic freedoms.³⁷

The test of proportionality is a context-specific standard of judicial review and the ECJ seems to apply it in a fairly *functional* way. Depending on the context where it is applied (or on the outcome that the Court would like to reach), the elements and the substance of the test can be very different. As *De Burca* observed, the formulation of the proportionality principle ranges, on the one hand, from an evaluation of the impact of a measure on a civil liberty or human right from minimal, normal to strict scrutiny and, on the other hand, from an economic cost/benefit analysis to the ‘not manifestly appropriate’ test, or the ‘no less restrictive means’ test.³⁸

³¹ TRIDIMAS, p.194. and 209.

³² Case C-112/00 *Schmidberger* [2003] ECR I-05659 , see later under point 2.3.

³³ JÜRGEN SCHWARZE, *European Administrative Law* (Sweet and Maxwell 2006). Schwarze provides a comparative analysis of some national models on the proportionality principle, see also in this regard WALTER VAN GERVEN, ‘The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe’, in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Oxford University Press, 1999).

³⁴ For a critical assessment of the Community test as compared to its alternative applied in German constitutional and administrative law see DANWITZ,

³⁵ TRIDIMAS., p. 142 and 196

³⁶ MIGUEL POIRES MADURO, ‘Reforming the Market or the State? Article 30 and the European Economic Constitution: Economic Freedom and Political Process’, (1997) 3 *European Law Journal*, p. 57

³⁷ TRIDIMAS.

³⁸ GRÁINNE DE BÚRCA, ‘The Principle of Proportionality and its Application in EC Law’, (1993) 13 *Yearbook of European Law*, p. 113

As opposed to the mild ‘manifestly inappropriate’ test used, for example, as a ground for review of Community measures, the assessment of a least restrictive alternative under the test of necessity is claimed to be an example for the strict application of the proportionality test. Above all, this alleged difference in the intensity of review can be explained by the fact that in internal market litigation proportionality is used as an instrument of supranational integration, *i.e.* to further market integration and to reconcile a Community interest with national interests.

The application of the proportionality test is problematic in internal market case law also because there is a close connection between the manner in which the Court applies the proportionality principle and the allocation of competences between the EU and the Member States. In particular, the application of the test of necessity and proportionality *stricto sensu* can in certain cases result in a situation where the ECJ imposes a certain level of protection on the Member States. Occasionally, the Court suggests even a better regulatory alternative or more appropriate forms of legal remedy in the framework of the necessity test.³⁹

The intensity of the test depends on various factors: on the nature of interests and the degree of impediment that the national measures causes for intra-community trade, on the field where it is applied and also on the existence or non-existence of positive harmonisation. As *Jans* has pointed out, in principle the Court gives more latitude for the Member States to determine what is necessary in order to achieve the respected objective if the interests at stake reflect a policy area where the competences fall primarily within the jurisdiction of the Member States. This means that the nature of interests can sometimes determine the way in which the Court applies the proportionality principle.⁴⁰ On the basis of some selected cases, *De Burca* also pointed out that the Court has only engaged in a deferential proportionality inquiry when, for instance, the aim of the state measure related to a complex political objective which required specialized knowledge, experience, the appreciation of diverse national and individual interests and varied national requirements (e.g. national security, social policy). Second, if the aim of the state was related to an area in which there were as yet no harmonized European-wide or international standards of protection for certain interests.⁴¹

The use of the principle of proportionality in EC law is subject to criticism for several reasons: It is by its nature open textured therefore it undermines legal certainty and transparency; it implies value judgments and institutional choices especially in politically sensitive areas of national competence; it leads to judicial empowerment therefore raises questions on judicial legitimacy; it is not politically neutral and its application directly concerns the division of competence between the Community and the Member States;⁴² and, finally, it makes the application of the four freedoms somewhat ‘hazardous’.⁴³

Despite these highly relevant concerns regarding the proportionality principle, it is important to keep in mind that the fairly functional use of the proportionality principle - especially in internal market case law - might simply reflect a practical compromise in the everyday work of a regional court, whose 27 members have very different practical experience on the appropriate standard of judicial review and are coming from different legal traditions. Some of them are public lawyers and are used to applying the proportionality principle in a national context whereas others have worked in the field of

³⁹ See for instance Joined Cases C-338/04, C-359/04 and C-360/04 *Criminal proceedings against Massimiliano Placanica (C-338/04), Christian Palazzese (C-359/04) and Angelo Sorricchio (C-360/04)* ECR [2007] I-01891, para 62-63, or in a posted workers context Case Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and others* ECR [2001] 07831 para. 51-52.

⁴⁰ JAN H. JANS, 'Proportionality Revisited', (2000) 27 Legal Issues of Economic Integration, , p. 246.

⁴¹ DE BÚRCA, , p. 147

⁴² For the critics of the proportionality principle see especially TRIDIMAS and VAN GERVEN.

⁴³ CATHERINE BARNARD & SIMON DEAKIN, 'Market Access and Regulatory Competition', in Catherine Barnard & Joanne Scott (eds), *The law of the Single Market* (Hart Publishing, 2002).

international law or any other legal discipline. Arguably, they are used to different standards of judicial scrutiny that might have an effect on their final judicial deliberations as well.

2.1. The Methodology of Justification in EC Internal Market Law

It is established case law that derogations from one of the fundamental freedoms by national measures are subject to a proportionality assessment before the Community courts. A restriction on one of the fundamental freedoms is warranted only if it pursues a *legitimate objective* compatible with the Treaty and/or is justified by overriding reasons of public interest being also in compliance with the objectives of the Community. Even if this is the case, it must be *suitable* for securing the attainment of the objective which it pursues and not go beyond what is *necessary* in order to attain it. As *Barnard* has pointed out, whereas Member States are interested in extending the range of objectives as possible justifications, the principle of proportionality is applied in order to limit their right to discretion to rely on one of the derogations and to justify their action.⁴⁴ The substance of each element of the tests depends on the question of which of the four freedoms is under consideration. For instance, a proportionality assessment under Article 49 on the freedom to provide services includes the evaluation of equivalent protection in the home and the host states. If the same public interest is safeguarded by the rules to which the service provider is subject in the Member State where he is established (home state), the national measure cannot be saved since it constitutes a double burden for the foreign service provider.⁴⁵ In the case law of the ECJ on the posting of workers under the scope of Article 49, the proportionality test often also includes an assessment whether the application of the host states' rules on, for instance, minimum wage laws or laws on contributions to social security funds - typically in the construction sector - confer on posted workers an advantage capable of providing them with real additional protection. If the posted workers enjoy the 'same or essentially similar protection' under the legislation of the home state, the proportionality scrutiny takes a stricter form.⁴⁶ As the Court observed in *Finalarte*, the national court in these cases has to carry out essentially a cost and benefit analysis, i.e. it has to 'balance the administrative and economic burdens that the rules impose on providers of services against the increased protection that they confer on workers' compared with the guarantees by the law of the home state.⁴⁷ The Court provides guidance for the national authorities via the proportionality principle on the question: which national labour law and employment law rules can be extended to foreign service providers so that host state control will not undermine the effective enforcement of the freedom to provide services.

Member States or private actors can invoke the *protection of fundamental rights* as a legitimate objective within internal market case law in different ways. Within the framework of expressed Treaty- based derogations, such as public policy, public security or public health, the individual can invoke the protection of fundamental rights in order to limit the margin of appreciation of the national authorities to justify a restriction on a fundamental freedom (ERT type situation).⁴⁸ This could be

⁴⁴ See further on the substance of the derogations CATHERINE BARNARD, *The Substantive Law of the EU* (Oxford University Press 2007).

⁴⁵ For further details see *Id.* at p. 378-379.

⁴⁶ Case Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and others* ECR [2001] 07831 ;Case Case C-272/94 *Guiot* ECR [1996] I-01905 ;Case Joined cases C-369/96 and C-376/96 *Arblade and Leloup* ECR [1999] I-08453

⁴⁷ Case Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and others* ECR [2001] 07831 , para. 50

⁴⁸ Case C 260/89 *ERT* [1991] ECR I 2925 , In *ERT* the Greek government wanted to save a derogation (exclusive broadcasting rights granted to one national radio station, ERT) from Article 49 EC on the grounds of public policy. The respondents of the main proceedings counter argued that public policy could not be invoked in the case since the national measure violated the protection of fundamental rights, as protected in the European Convention of Fundamental Rights (Article 10 on freedom of expression of the ECHR). The ECJ ruled in para. 43 of the judgment, that the expressed Treaty based derogations must be interpreted in light of the general principles of the law and in particular of fundamental rights.

called the limiting function of fundamental rights. The *Omega* case⁴⁹ is a good illustration of the fact that Member States can invoke the necessity to respect fundamental rights as protected in their constitutions, in certain cases to broaden their margin of appreciation under an express Treaty-based derogation, such as public policy. The *Schmidberger* case⁵⁰ is an example of the case when Member States can invoke the protection of fundamental rights as an independent ground of justification. The *Viking* and *Laval* cases seem to establish a fourth category, under which private actors can invoke the protection of fundamental rights if it serves a legitimate private/public interest objective that is in compliance with the objectives of the Community. This distinction is important because, as we will see, depending in which framework the relevant actors are invoking the protection of fundamental rights can change the way in which the principle of proportionality is used by the Court of Justice.

2.2. 'Breaking Down' the Elements of the Proportionality Test

Academic writings usually distinguish between three elements of the Community test: suitability, necessity and proportionality in a narrow sense (the so-called proportionality *stricto sensu*).⁵¹ There is some uncertainty concerning the question whether this third element is an independent element of the Community test, especially in internal market case law, or whether it is rather part of the second test. AG *Maduro* argued in the *Leppik* case that, depending on the degree of the impediment that the national measure causes to the free movement of goods, the Court applies one or more of the above-mentioned sub-tests. But he also noted that the Court's case law in the context of the free movement of goods concentrates on the first two steps of the test – suitability and necessity – and that typically, the national measure fails at the second step.⁵² In general, one could argue that the more structured the test the higher is the standard of proof under the proportionality analysis. *Maduro* highlighted a fourth element of judicial review under Article 30, the examination of whether the measure constitutes a means of arbitrary discrimination, which in turn entails the assessment of the discriminatory impact of the measure.⁵³

The first element of the test (i.e. *the test of suitability*) entails a usually abstract assessment of the relationship between the objective of the national measure and whether the means that this national measure has chosen to further that objective is appropriate, likely to achieve its ends.

The second element of the test (*test of necessity*) requires the courts to assess whether there were less restrictive alternative measures available to achieve the same result or objective. Under the *test of necessity*, the courts have to consider whether an alternative measure is realistically available that would protect the Member State's legitimate interests just as effectively, but would be less restrictive of the free movement of goods. However, if the adoption of the alternative measure had detrimental effects on other legitimate interests, for instance on fundamental rights, this would have to be taken into account.⁵⁴ In other words, the relative effectiveness of the alternative measure to furthering the original objective has to be taken into account also in internal market cases. Second, the mere fact that

(Contd.) _____

Therefore national measures under these exceptions can be saved only if they comply with the protection of fundamental rights as well.

⁴⁹ Case C-36/02 *Omega* [2004] ECR I-09609

⁵⁰ Case C-112/00 *Schmidberger* [2003] ECR I-05659

⁵¹ For an overview on the principle of proportionality see especially VAN GERVEN, in.

⁵² Case C-434/04 Opinion of Mr Advocate General Pólares Maduro, Criminal proceedings against Jan-Erik Anders Ahokainen and Mati Leppik [2006] ECR I-09171

⁵³ Id. at para 27-31

⁵⁴ Case C-434/04 Opinion of Mr Advocate General Pólares Maduro, Criminal proceedings against Jan-Erik Anders Ahokainen and Mati Leppik [2006] ECR I-09171, para. 25.

other Member States employ less restrictive measures will not necessarily lead to the conclusion that a more restrictive measure in another Member State is disproportionate.⁵⁵

According to *Tridimas*, it is questionable to what extent the Court distinguishes in its case law between the second and the third elements of the test, namely between the test of necessity and the test of 'proportionality *stricto sensu*'. He argues that the structure of the principle is less important. In all of the cases the main issue is that the Court has to find a balance between two competing interests and it has to assess the adverse effects of the Community or national measure on the interests worthy of legal protection, i.e. on an individual freedom or on a Community or state interest.⁵⁶ On the contrary, *Craig* argues that the existence of this third element is an important issue from the perspective of judicial review, because it can change the nature of the test itself. This third element guarantees that the Court has to assess the negative consequences that the measure has on the interests of the individual. He argues that to the extent that the applicants present arguments directed specifically to such an assessment, 'proportionality *stricto sensu*' is part of the Community test as well.⁵⁷

Even though many authors acknowledge the existence of this third element in Community law, there seems to be some uncertainty concerning its precise content in the different areas where it has been applied. According to *De Burca*, under the third part of the proportionality inquiry the Court has to establish whether even in the absence of less restrictive means, the measure does not have any excessive or disproportionate effect on the applicants' interests.⁵⁸ As *Danwitz* explains, in German constitutional law the third element of the test serves three purposes. First, its function is to protect the interests of the individual. Second, after analyzing the suitability and necessity of the measure it serves as a 'counter assessment' and guarantees that the review for proportionality will not be confined to an efficiency assessment. Thirdly, it requires the identification of the relevant legal interests protected by the measure (*Rechtsgüter*) under scrutiny and the degree of the restriction, and, finally, the establishment of a fair balance between them.⁵⁹

Both *Van Gerven*⁶⁰ and *Jan*⁶¹ identified cases where the Court's analysis seemed to contain elements that resembled this third test while reviewing national measures. However, they also pointed out that the application of proportionality in the narrow sense has implications for determining the level of market regulation and touches directly upon the question of the allocation of competences between the Member States and the EU. In fact *Jan* discussed several cases where the Court exercised self-restraint in applying a high degree of scrutiny under this element of the test in sensitive policy areas. In his opinion, the application of proportionality in the narrow sense entails a balance between the various interests at stake. A balancing of interests in the context of proportionality implies that the courts first have to comment on the degree of protection in the Community and then to balance this against the interests of market integration. If the nature of the policy area in the public interest objective constitutes an area where the competences fall at the national level, the Court has to respect that there are different ways of realizing that objective and that each Member State might prefer to establish a different balance between the respected interests at stake. On the other hand, refraining from balancing the different interests in the framework of proportionality can also alter the nature of the test of necessity, as *Jan* rightly pointed out. In these cases, the mere fact that there are less restrictive alternatives available is not relevant if they are not sufficient to achieve the same level of protection.⁶²

⁵⁵ JANS, p. 247.

⁵⁶ TRIDIMAS, , p. 192-196.

⁵⁷ CRAIG, EU Administrative Law., p. 657

⁵⁸ DE BÚRCA, , p.113

⁵⁹ DANWITZ, p. 399-400

⁶⁰ VAN GERVEN, in., p. 40-41.

⁶¹ JANS, , p. 249-252

⁶² Id. at , p. 250

Maduro has also highlighted the problems with the application of the third test in internal market litigation. Under this test a Member State has to show that the *level of protection* it decides to afford to its legitimate interests is commensurate with the degree of interference this causes in intra-community trade. The sensitivity of the third element of the test arises from the fact that ‘a Member State may be required to adopt a measure that is less restrictive of intra-Community trade, even if this would lead to a lower level of protection of its legitimate interests’. Hence, if this third element is interpreted strictly by the courts, a Member State can be required to lower the level of protection as a matter of Community law. Therefore the Court, depending on the field of area, allows a wide margin of appreciation for the Member States and it recognizes that different Member States may grant different levels of protection to the same public interest. It is only in areas where Community law already identifies a common level of protection of the legitimate interest under consideration - such as, for example, in consumer law - that the Court applies the test more strictly.⁶³ *Jan* very briefly considered the issue of the effect of minimum harmonisation on the manner in which the proportionality principle is applied by the Court. He argued that in general the existence of a directive gave more impetus for the Court to carry out a more rigorous scrutiny of the necessity of the measure. However, the Court accepts the need for stricter standards if the Member State provides good arguments for the fact that the least restrictive alternatives are not realistic alternatives. He also points out that the proportionality test in these cases is only applied if the stricter standards do establish a barrier to free movement.⁶⁴

2.3. *The Principle of ‘Practical Concordance’: An Appropriate Standard of Judicial Review for the ECJ?*

The principle of ‘practical concordance’ (*Das Prinzip praktischer Konkordanz*) is a principle of constitutional interpretation and it has been developed in order to resolve conflicts between two apparently opposing constitutional rights in German constitutional jurisprudence. In these cases not the standard test of proportionality is applied by the Court. In order to preserve the ‘unity of the Constitution’ (*Einheit der Verfassung*) the task of the judge is to *optimize* the protection and the effectiveness of the two rights. As *Schwarze* explains, when conflicts arise, they must not be solved by giving one right precedence over the other either by means of ill-considered “weighing up of interests” or even through an abstract “weighing up of values”. Instead, the principle of the unity of the constitution requires that an optimal solution be found: *both* rights must be restricted to certain limits in order to optimise their effectiveness. Consequently, the way in which these limits are drawn must be proportionate in each individual case; they may not be drawn any further than is necessary to reconcile both rights. In this context proportionality means a relationship between two variable entities, i.e. a relationship which provides the best way of optimising both rights, rather than a relationship between a constant “objective” and one or more variable “means of achievement”.⁶⁵ As *Blanke* explains, if the conflict between ‘competing fundamental rights is balanced by the requirement to establish ‘practical concordance’, this ‘means that neither of the two guarantees may be enforced at the cost of the other; rather, each legal principle must be established in the light of the other in such a way that both competing principles operate as effectively as possible’.⁶⁶ Therefore for instance when the Court analyzes the question of less restrictive measures, it has to take into account the relative effectiveness of the alternative measures for the protection of the respected interests.

⁶³ Case C-434/04 Opinion of Mr Advocate General Poirares Maduro, Criminal proceedings against Jan-Erik Anders Ahokainen and Mati Leppik [2006] ECR I-09171, para. 26

⁶⁴ JANS, p. 253-255.

⁶⁵ SCHWARZE, p. 690.

⁶⁶ THOMAS BLANKE, 'Observations on the Opinions of Advocate General Maduro and Mengozzi Delivered on 23 May 2007 in the Viking and Laval Cases', (2007) Transfer,

Some authors have advocated using this principle for reconciling conflicting Treaty objectives and interests.⁶⁷ The potential use of a concordance principle seems the most attractive for resolving conflicts between the fundamental freedoms and fundamental rights. As the *Schmidberger* case indicated, arguably the concept of ‘praktischer Konkordanz’ has already attained some relevance in the Community law context. In this case the ECJ declined establishing a *formal* hierarchy between the four freedoms and fundamental rights as protected in the national constitutions and in the Community legal order. The test of proportionality did not only function as a means of market integration but also – as the Court put it in *Schmidberger* – as a means to ‘reconcile the requirements and the respected scope of protection of fundamental rights in the Community with those arising from Community freedoms enshrined in the Treaty’.⁶⁸ In the latter case, the respected scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the European Convention of Human Rights, and the free movement of goods, guaranteed by Article 28 of the Treaty, had to be reconciled. However, the Court also pointed to the fact that this balancing exercise must take place in a special community law context, namely where fundamental rights as guaranteed in the European legal order are relied upon as a justification for the restriction of a fundamental freedom that constitutes one of the fundamental principles in the scheme of the Treaty. Therefore, in these cases, the starting point of the assessment is not the protection of fundamental rights as such but a Community freedom. Fundamental rights can be relied upon in a ‘defensive’ way,⁶⁹ as a justification for a restriction of one of these Community freedoms. This distinction is important because in the latter case with the inappropriate use of the proportionality principle the Court risks creating a *de facto* hierarchy between the fundamental freedoms and fundamental rights within the EC legal order.

It is worth taking a look therefore at the application of the proportionality test in the *Schmidberger* case. The case concerned an essentially vertical situation. Article 28 was invoked by an international transport undertaking against the decision of the Austrian authorities that allowed a demonstration resulting in the closure of the Brenner motorway for almost 30 hours. The Austrian authorities relied on the protection of fundamental rights in order to justify the restriction of the free movement of goods. The Court argued that, especially if the protection of fundamental right is invoked as an independent ground for justification by Member States, the main question comes under the proportionality test i.e. that ‘the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests’.⁷⁰ The Court gave a wide margin of appreciation for the national authorities under the test of *suitability* by listing only some considerations that might be taken into account when the national authorities are assessing the appropriateness of the national measure for the protection of fundamental rights.⁷¹ The way in which the Court took into account the relative efficiency of the alternative measures that would have had a less restrictive effect on free movement of goods under the *necessity* test in the *Schmidberger* case was notable. The Court ruled that an outright ban could have clearly constituted an unacceptable interference with the fundamental rights at issue. However, even the

⁶⁷ ROLF-OLIVER SCHWEMER, *Die Bindung des Gemeinschaftsgesetzgebers an die Grundfreiheiten* (Peter-Lang 1995), and also VAN GERVEN, in.,

⁶⁸ Case C-112/00 *Schmidberger* [2003] ECR I-05659, para.77

⁶⁹ OLIVIER DE SCHUTTER, ‘The Implementation of Fundamental Rights through the Open-Method of Coordination’, in Olivier De Schutter & Simon Deakin (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies The Future of Social Europe?* (Bruylant, 2005).

⁷⁰ Case C-112/00 *Schmidberger* [2003] ECR I-05659, para. 81.

⁷¹ These considerations included the fact that the demonstrators have requested an authorization from the competent authorities that decided not to ban it; the impermanent nature of the demonstration as well as the geographic scale and the seriousness of the disruption caused by the demonstration. The motivation of the demonstrators, that was not national protectionism but by exercising their fundamental rights the manifestation in the public an opinion which they considered to be of important to society, was also taken into account. The Court referred also to the fact that the national authorities had taken various forms of preventive measures in order to limit as far as possible the disruption to road traffic [para. 82-88].

imposition of less restrictive conditions, such as conditions concerning the site and the duration of the demonstration on the Brenner motorway, “could have been perceived as an excessive restriction, depriving the action of a substantial part of its scope”.⁷² Thus, the adoption of alternative and less restrictive measures on the free movement of goods would have been detrimental to another legitimate interest, namely to the protection of the fundamental rights of the demonstrators. The Court also accepted the argument of the Austrian government that all the alternative solutions could have resulted in more serious disruptions with the free movement of goods.⁷³ Finally, the Court seemed to analyze questions that could be part of the third element of the test, i.e. proportionality *stricto sensu*. It stated explicitly that the exercise of fundamental rights can in certain cases entail inconvenience for third parties; in particular, it can entail a restrictive effect on one of the fundamental freedoms. However, there can be more important interests, such as the public and lawful demonstration of an opinion, that make it necessary to tolerate the inconvenience that such actions can entail for third parties.⁷⁴ Having regard to all of these considerations, the Grand Chamber found that the decision of the national authorities not to ban the demonstration on the Brenner motorway constituted a proportionate restriction on the free movement of goods.

What is the function of fundamental rights within this context? As the *Schmidberger* case indicated, fundamental rights served within this context essentially as normative and objective criteria for judicial balancing of the identified conflicting aims and interests by delimiting the protected sphere of the two conflicting rights. This interpretation can be traced back above all to the fact that in German constitutional theory, fundamental rights have a ‘double character’. They are not only subjective rights that can be relied on by individuals but they also have an objective function. They are basic elements of “the objective system of values” (*objektive Werteordnung*), and they therefore serve as a yardstick for the legislator and also for the courts to identify what should be the objective standard of protection of individual interests in a democratic society.⁷⁵ Arguably, Articles 2 and 3 of the existing EC Treaty lay down an “objective system of values” on which the Community is based. As the Court pointed out in *Viking* and *Laval*, the Community’s economic goals stand at an equal footing with its social objectives.

Although at first sight, the principle of “*praktischer Konkordanz*” seems to be a ‘magic formula’ for striking a fair balance between conflicting interests especially within the ‘pluralistic constitutional polity’ of the Community, it can be the source of controversies in the ECJ’s case law. According to *Blanke*, the application of the *Konkordanz* rule means that the Court will have to draw the boundaries of guarantees of collective freedoms on a case-by-case basis. In other words, the respected scope of protection of the fundamental right used to justify a restriction on one of the fundamental freedoms becomes a matter of pure interpretation. If the Court does not apply a proportionality test, but decides each case freshly on a persistent factual basis - as AG Maduro suggested in his opinion - this creates a great uncertainty for trade union actions and the lack of specialized knowledge how the delicate system of collective bargaining works, risks undermining the collective bargaining autonomy of the parties.⁷⁶ Borrowing this constitutional principle from German law can be problematic for a further reason. It gives the Court and also the national authorities, which eventually have to carry out the balancing exercise on the basis of the Court’s orientations, a constitutional role, that of taking value judgments in the name of a constitutional ideal, such as, for instance, the objective of the ‘social

⁷² Case C-112/00 *Schmidberger* [2003] ECR I-05659, para. 89-90.

⁷³ *Id.* at, para. 92.

⁷⁴ *Id.* at, para. 91.

⁷⁵ Further on this point see KONRAD HESSE, *Grundzüge des Verfassungsrecht der Bundesrepublik Deutschland* (C.F. Müller Verlag 1995), p. 127-137 and EVA JULIA LOHSE, ‘Fundamental Freedoms and Private Actors - towards an ‘Indirect Horizontal Effect’’, (2007) 13 *European Public Law*, 159, p. 168-172, VAN GERVEN, in., p. 45

⁷⁶ BLANKE,

market economy', without having established a solid basis of legitimacy.⁷⁷ Therefore, as *Mortelmans* argued this principle might be useful in the Community 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 Treaty itself.⁷⁸

2.4. Proportionality Assessment in 'Horizontal Cases': A Need for a Differentiated Approach under the Proportionality Test?

The *Viking* and *Laval* cases raise the issue of whether there is a need for a differentiated approach in the application of the proportionality principle in the case law that extends the application of economic freedoms to restrictions resulting from the actions of private law bodies, especially to trade union actions. In *Viking*, the Court clearly stated that "(...) the organization of collective action by trade unions must be regarded as covered by the legal autonomy which those organizations, which are not public law entities, enjoy pursuant to the trade union rights accorded to them, inter alia, by national law."⁷⁹ Nevertheless, the Court used the standard proportionality test developed mainly for reviewing public law measures restricting the fundamental freedoms. Especially in *Viking* the Court can be criticized because it did not take into account that the application of an overtly strict necessity test in industrial action cases is problematic.

It is important to emphasize that - as *Reich* argues - there is no traditional, but rather a "functional private/public law divide" within the Community legal order⁸⁰. As we will see below, there are examples for the application of the proportionality principle in a substantive and predominantly private law context, such as in Community discrimination law. There are examples also for using the principle of proportionality as a standard of judicial review in collective labour law. On the other hand, in some countries such as in strike laws of the United Kingdom the concept of proportionality might be a "remarkably new development".⁸¹ Therefore, similar to the way in which the public law concept of proportionality had an impact on the development of some national administrative laws, starting with the *Viking* and *Laval* judgments, we might be witnessing a so-called 'Europeanization' of national industrial relations *via* negative integration case law.⁸² It will be argued, however, that it is not the origin of the principle that is important (public/private) but the fact that courts have to provide justification of why is it necessary to apply a proportionality principle in a private law context and why the substance of the test must be adapted to the essentially private law context. Arguably, EC law should only define the 'outer boundaries of strike action' in these cases and it ought to leave a broader margin of appreciation for the actions of private parties even if their conduct breaches the exercise of the fundamental freedoms.⁸³

As *Ellis* observed, in Community sex discrimination cases, the main role of the proportionality principle is "to condition and limit in terms of the principle the circumstances in which an allegation

⁷⁷ AZOULAI, , p. 1349-1350

⁷⁸ KAMIEL MORTELMANS, 'The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning of the Internal Market - Towards a Concordance Rule', (2002) 39 see id. at , p. 1341-1346, He made a specific proposal concerning the substance and also the place of such a concordance provision in the Treaty framework.

⁷⁹ Para. 35

⁸⁰ NORBERT REICH, The Public/Private Divide in EC Law [discussion paper, under publication] (2008).

⁸¹ Davies, p. 146.

⁸² Although, as the British example shows, especially in EC discrimination cases national courts can be sometimes reluctant to follow the ECJ's proportionality assessment and to apply a too strict proportionality test. See further AARON BAKER, 'Proportionality and Employment Discrimination in the UK', (2008) 37 Industrial Law Journal,

⁸³ NORBERT REICH, 'Fundamental Freedoms v. Fundamental Rights: Did *Viking* get it wrong?', (2008) 4 Europarättslig Tidskrift, at page 870

of unlawful discrimination can be refuted”.⁸⁴ Namely, if an employer wants to justify, for example, a employer’s pay practice or a Member State a legislation that is alleged by the plaintiff to be discriminatory, the Court applies a proportionality test to assess whether that employers’ practice or national legislation is suitable and necessary for the achievement of the objective pursued by it. As the rather infamous *Mangold*⁸⁵ judgment of the Court of Justice shows, the application of the proportionality principle can be very controversial in the context of equality law as well.

An important difference between the function of the proportionality principle in discrimination cases and in *Viking* and *Laval* must be highlighted, however. In *Viking* and *Laval*, the principle of proportionality was used in order to reconcile the scope of protection of a fundamental freedom with a fundamental right that was relied on as a justification for a restriction on the former. In discrimination cases the starting point is the protection of a fundamental right not to be discriminated against on the basis of sex, and the derogation (private or state action) from this right must be proportionate. In *Viking* and *Laval*, the starting point was a fundamental freedom that was invoked by an employer directly against a collective action taken by trade unions. Since in *Viking* the Court established the horizontal direct effect of Article 43, the exercise of the fundamental right to strike constituted the restriction *itself* on one of the economic freedoms and the exercise of that right had to be proportionate to a legitimate objective.⁸⁶ The manner in which the Court applies the proportionality test is significant in these cases because in the absence of substantive, transnational labour standards (positive harmonisation) the legal scope of protection of (transnational) industrial action will be determined by the interpretation of the respected free movement provision. The argument that the horizontal application of Articles 43 and 49 to collective actions taken by trade unions would be a circumvention of the explicit exclusion of ‘harmonisation’ on pay and the right of association, the right to strike and lockouts according to Article 137(5)EC was rejected by the Court in both cases.⁸⁷ The Court in both cases used the same argument. It recalled that

“in the areas that 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 the exercise of the rights in question, the fact remains that, when *exercising* that competence, the Member States must nevertheless comply with Community law” [emphasis added].

Arguably, Article 137(5) EC contains only a limitation on Community competences concerning secondary law, but this does not exclude the effects of primary law, i.e. the interpretation of the free movement provisions of the EC Treaty as general principles of Community law on industrial action.⁸⁸ Their relationship cannot be described therefore by the general principle of legal interpretation according to which ‘lex specialis’ derogates ‘legi generali’.

As pointed out earlier, the standard less restrictive alternative test can be particularly problematic in industrial relation cases. While arguing that it is difficult to apply to private parties the same ‘margin of appreciation’ test that was afforded to Member States in the *Schmidberger* case, *Bercusson* cautioned the Court against invoking *any* test of proportionality as regards the right to strike. He pointed out several possible risks that the invocation of the proportionality principle could create in practice. His comments are to be cited here at length.

⁸⁴ EVELYN ELLIS, ‘The Concept of Proportionality in European Community Sex Discrimination Law’, in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, 1999).

⁸⁵ Case C-144/04 *Werner Mangold v Rüdiger Helm*

⁸⁶ DAVIES, p. 141

⁸⁷ *Viking* para. 40-41 and *Laval* para. 87-88 See also the arguments of the governments and other interested parties as recalled by Prof. Bercusson. BRIAN BERCUSSON, ‘The Trade Union Movement and the European Union: Judgment Day’, (2007) 13 *European Law Journal*, 279, p. 289.

⁸⁸ NORBERT REICH, ‘Free Movement v Social Rights in an Enlarged Union - the *Laval* and *Viking* Cases before the ECJ - Part I’, (2008) 9 *German Law Journal*, p. 128-129

‘Workers only have negotiating power because of their ability collectively to withdraw their labour. Courts in the Member States, very sensibly, have been extremely cautious in invoking any test of proportionality as regards the right to strike. It is a right inextricably linked to the collective bargaining process and must be assessed in the context of that process. It is difficult sensibly in practice to apply any test of proportionality to the demands made by the trade unions in that process. It is in the very nature of negotiations that both parties set demands at their highest and through negotiation over time seek a compromise, if necessary, with the assistance of mediation and conciliation. At what stage of this process and against what criteria is the test of proportionality to be applied? Any test based on proportionality in assessing the legitimacy of collective action is generally avoided in the industrial relations models of the Member States for the very reason that it is essentially to maintain the impartiality of the state in economic conflicts.’⁸⁹

There are, nevertheless, examples for subjecting the assessment of the legitimate exercise of industrial action to a proportionality test in certain countries. In Germany, for instance, the *Bundesarbeitsgericht* applies a proportionality test as a general principle for assessing the legality of industrial actions since its groundbreaking decision in 1971.⁹⁰ The application of the proportionality test to private law situations is controversial because it raises the question to what extent courts are allowed to control the substance of contracts in private law or the substance of collective agreements and to set limits on private- or collective - autonomy. It appears that the identification of the appropriate level of judicial scrutiny in such cases is surrounded by considerable legal uncertainty and judicial ‘subjectivism’.

In Germany, the application of the proportionality principle in industrial action cases has been justified by the need to respect the rights and interest of third parties and also of the interest of the general public, which can be affected by a strike action. With certain divergences, the test in industrial action cases follows the public law concept of *Verhältnismässigkeit*, i.e. it consists of three elements. First, it must be analyzed whether the industrial action was *suitable* to achieve a legitimate objective, namely to enforce a collective agreement. An industrial action is suitable if it puts the employer under such pressure as to make him to comply with the collective agreement or re-open negotiations with trade unions. There are two main limitations on the application of the suitability test. The strike cannot aim at destroying or endangering the existence of the other party.⁹¹ Under the *test of necessity* it must be established whether there are any other, less restrictive means with which the same objective could have been achieved with essentially the same result. So the proper application of the least restrictive alternative test takes into account the relative efficacy of different methods of action in protecting workers’ interests.⁹²

Apparently, the most important but also the most controversial element of the proportionality test is its third element, namely the analysis of *proportionality in the narrow sense*. This requires the court to strike a balance between the two conflicting interests at stake. Whereas it is relatively easy to identify the costs that occur on the side of the employer as a result of, for instance, of a strike action, the difficulty lies in fixing the optimal level of protection of interests on the workers’ side, against which the first must be balanced. In order to respect the collective autonomy of the parties (*Tarifautonomie*), the substance of the collective agreement cannot be taken as a point of reference. In practice, the

⁸⁹ BERCUSSON, p. 304.

⁹⁰ Case BAG von 21.4.1971 - GS 1/68, BAGE 33, 140 (174) = AP Nr. 43 zu Art. 9 III GG Arbeitskampf, This case actually concerned the proportionality of a lock-out not strike action, but the application of a proportionality principle in general as regards industrial action is based on this decision. For a detailed analysis of the proportionality principle in industrial action cases see OTTO RUDOLF KISSEL, *Arbeitskampfrecht* (Beck 2002). p. 317-335, for a more recent analysis on the diverging academic views see PHILIPP S. FISCHINGER, ‘Zur Begrenzung des Streikrechts durch den Grundsatz der Verhältnismässigkeit’, (2007) *Recht der Arbeit*,

⁹¹ There are divergent views on what one has to understand under this latter element. See further KISSEL. P. 326-327

⁹² DAVIES, p. 143

relationship between the costs of the industrial action and the objectives pursued by it will be accepted as proportionate to the extent that it serves to restoring the equality of bargaining powers of the parties (*Hertstellung der Kampf- und Vertragsparität*). As Kissel points out, there are no convincing and generally applicable standards for the application of this third element: it requires an ex-post, case-by-case analysis of the facts by the courts.⁹³

However, as Davies points out for certain, countries the application of the proportionality test in industrial action cases such as, for instance, for the UK, is a remarkable new development. Respecting the competences of the legislator, British courts only apply a subjective test, i.e. they are only allowed to assess the objectives of trade unions. The objective effect, namely the harm caused to the employer cannot be considered unless the employer can show that the industrial action was unlawful.⁹⁴ As a result of the *Laval* case, there is also a proposal to introducing a general proportionality principle in industrial action in Sweden, both to transnational and to purely national situations.⁹⁵

The application of the proportionality principle can be problematic from a procedural law standpoint as well. In vertical situations, a private individual invokes one of the fundamental freedoms against a state measure, in the end against the state. After establishing that a national measure constitutes a restriction on one of the fundamental freedoms it up to the Member State to show that it can be justified and that it was proportionate. In horizontal situations, an employer can invoke the fundamental freedoms – except for the freedom of goods – against the activities of private law entities, including trade unions. Arguably, *the standard of proof* under the proportionality test varies depending on the type of test that the Court applies to define the applicability of the respected freedoms (discrimination, restriction or market access test). Under an unqualified and broad ‘restriction test’, employers must in practice comply with a lower standard of proof in order to show that there was a breach of Community law. Especially in horizontal situations, where the Court is analysing the restrictive effect of a private action - as explained above – an overtly broad test determining the scope of application of the four freedoms establishes a ‘rebuttable presumption’ of the restrictive effect of industrial action on the free movement provisions, and places higher burden of proof on trade unions to justify their action.⁹⁶

There are several further questions that need to be answered if there is a need for a differentiated approach under the application of the proportionality test in ‘horizontal cases: What exactly has to be balanced under the proportionality principle in horizontal situations? Is it the effective functioning of the internal market that must be balanced against public health or the protection of workers, or whatever national interest is at stake? Or is it rather a balance between *individual/collective interests*, e.g. the interests of the employers and workers that must be balanced against each other?

There is a further reason why the standard proportionality test is not an appropriate framework for weighting conflicting interests in cases when employers are invoking fundamental freedoms especially against collective action taken by trade unions. As we saw above, the application of the proportionality principle requires courts to *ex post* reconstruct the real objectives of the parties and the weighing of costs arising on both sides. As Van Gerven has observed, “weighing conflicting interests (...) requires that court of law called upon to carry out this balancing test to be put in a position to hear the interested parties in order for them to discuss the comparative importance of the interests involved in the litigation.” As he points out, the preliminary rulings procedure is simply not appropriate for such a

⁹³ In general it is the geographical scope or the duration of the strike action that will be analysed under this third element., KISSEL., p. 330-332

⁹⁴ DAVIES, p. 146; The fact that the application of the proportionality principle implies the possibility of profoundly changing British strike law was pointed out also by BARNARD, 'Viking and Laval: An Introduction ', in., p. 489

⁹⁵ MIA RÖNNMAR, 'The *Laval* case from a Swedish and Nordic Perspective', in Catherine Barnard (ed), The Cambridge Yearbook of European Legal Studies (Hart Publishing, 2008), p. 521

⁹⁶ See also BARNARD, 'Viking and Laval: An Introduction ', in., p. 486

balancing exercise as it is an indirect judicial procedure and it does not give all of the interested parties the chance to present and discuss their viewpoint before the ECJ.⁹⁷

This is even more true in cases when it is not the legality of a national measures but directly the legality of a private action that is under scrutiny on grounds of proportionality. Trade unions are only parties to the legal proceedings before the national court, even though they can submit their observations in the written procedure⁹⁸ and they have limited possibility to influence the judicial deliberations in the oral hearing and to respond to the questions referred to the ECJ by the national court⁹⁹. In the Court's procedure private parties can only be represented by a lawyer, who must be authorized to practice before a court of a Member State.¹⁰⁰ Apart from the Community institutions it is only national governments that can submit written observations and/or also be represented by an agent in the oral hearing before the ECJ.¹⁰¹ The decision about whether the government will intervene and what kind of strategy it follows before the Court is a discretionary decision of the governmental agents: they can decide not to intervene at all.¹⁰² It can be an interesting question what happens if the opinion of the government and the trade unions diverge on fundamental questions concerning the legal issue. Third interested parties have no formal right to be heard before the ECJ they can only indirectly influence the written procedure. This was for example the case with the European Trade Union Confederation (ETUC) that 'intervened' in the proceedings by submitting a letter attached to the written submission of the ITF in Viking.¹⁰³

3. Justification and Proportionality in *Viking* and *Laval*

First of all, it must be emphasized that on the basis of the two judgements one can conclude that trade unions can indeed take collective action under Article 43 and under Article 49 against the possible negative consequences of company relocations (Viking) and in order to induce foreign service providers to enter into negotiations with them on wages (Laval). Nevertheless, what appears to be very problematic on the basis of these two judgements is that the possible grounds on the basis of which trade unions can lawfully pursue negotiations with employers and foreign service providers in cross-border situations were disproportionately restricted by the ECJ.

3.1. 'Reconstructing' the Facts in *Viking* and *Laval*

Viking concerned the proportionality of a collective action taken by a Finnish trade union (FSU) with the support of an international trade union organization (International Transport workers Federation, ITF) against a private undertaking incorporated under Finnish law, in order to prevent the undertaking from reflagging one of its vessels, the Rosella in Estonia. It is clear from the facts that the main intention of the employer was to cut costs by being able to apply lower Estonian labour standards to the crew, since the registration of the vessel in Estonia would have allowed the employer to conclude a new collective agreement with the Estonian trade unions. The objective of the Finnish trade unions is

⁹⁷ VAN GERVEN, in., p. 63.

⁹⁸ Article 23 II of the Statute of the Court of Justice

⁹⁹ According to Article 104 (4) of the Rules of Procedure the parties can submit an application setting out the reasons for which they wish to be heard. This is, however, only a right to submit written observations also in the oral procedure and respond to the questions of the national court.

¹⁰⁰ Article 19 of the Statute of the Court

¹⁰¹ Article 19 and 20, 23 of the Statute of the Court

¹⁰² As to an overview on the strategies for intervention followed by national governments before the European Court of Justice see F. MARIE-PIERRE GRANGER, 'When governments go to Luxembourg ... : the influence of governments on the Court of Justice ', (2004) 29 European Law Journal, 3

¹⁰³ BRIAN BERCUSSON, 'The Trade Union Movement and the European Union: Judgment Day ', (2007) 13 see id. at 279p. 280

less clear. On the facts referred to the ECJ, it seems that initially they took industrial action directly against the reflagging of the vessel. In the course of negotiations the trade unions modified their demands and tried to persuade Viking that it should employ the workers mainly under Finnish labour standards, even after the reflagging of the vessel, i.e. their principle objective was the protection of workers. Following Estonia's accession to the EU, Viking brought proceedings to the English High Court of Justice and argued that the collective action taken by the Finnish trade unions and the coordinated, transnational solidarity action of trade unions constituted a restriction under Article 43 EC. In broad terms the English courts were asked to 'assess the Finnish social model'¹⁰⁴, since on the facts it seemed that, if it was not for the impact of the internal market rules, the industrial action would have been lawful under Finnish law.¹⁰⁵ Therefore - as Davies has recalled - one of the reasons why the Court of Appeal eventually referred the case to the ECJ was to allow the Finnish government to participate in the legal proceedings.¹⁰⁶ The British judge refused to grant an interim relief to Viking before referring the case to the ECJ, because according to him the outcome of the case depended on a balancing exercise between the employer's free movement rights and the social rights of trade unions and its members. Lord Justice Waller was confident with regard to especially one question: if Article 43 or Article 49 were to be granted horizontal direct effect to trade union action, one of the main issues would be 'by what criteria is the balance between the employers' free movement rights and the social rights of the trade union and its members to be struck'.¹⁰⁷

Laval was concerned above all the compatibility of the collective action taken by Swedish trade unions against a Latvian company with Directive 96/71 on the posting of workers and with Article 49 EC (*Laval*). The collective actions were taken in order to induce that foreign-service provider and its Swedish subsidiary (Baltic) to enter into negotiations on pay and to sign a collective agreement in the construction industry. Although, the role of *Laval*'s Swedish subsidiary (Baltic) in the performance of the contract is not entirely clear¹⁰⁸, it seems that the employer was only temporarily carrying out an economic activity in the host Member State and that it was already bound by a collective agreement in the state of origin (Latvia), although not under equivalent terms and conditions. The case was particularly sensitive was because the industrial action taken by the trade unions is an essential means of the effective enforcement and it is indispensable for the proper functioning of the Swedish autonomous collective bargaining model.¹⁰⁹

The collective action consisted in the blockading of the Swedish building site by preventing the delivery of goods onto the site, placing pickets and prohibiting Latvian workers and preventing the vehicles from entering the site. Later, other trade unions announced sympathy actions, making the performance of *Laval*'s contractual obligations in Sweden impossible. The Swedish trade unions refused to recognize the applicability of the Latvian collective agreement. On the other hand, *Laval* refused to sign the Swedish collective wage agreement applicable in the construction industry, because it insisted on fixing the wage levels in the course of collective bargaining. Had the employer signed

¹⁰⁴ Id. at p. 283

¹⁰⁵ Probably this is why the proceeding before the Finnish court and the ADR proceedings were brought to an ended by Viking in Finland.

¹⁰⁶ A.C.L. DAVIES, 'The Right to Strike Versus Freedom of Establishment in EC Law: The Battle Commences', (2006) Vol. 35 *Industrial Law Journal*, p. 76

¹⁰⁷ Case Viking Line ABP and Another v International Transport Workers Federation and Others [2005] EWCA Civ 1299 , para. 23

¹⁰⁸ See on this point further DEAKIN, 'Regulatory Competition After *Laval*', in. p. 587-593, who argues that if Baltic was a Swedish subsidiary, the whole situation should have considered as a purely internal situation, and Article 49 should not have been applied at all.

¹⁰⁹ For an introduction of the Swedish autonomous collective bargaining model see MALMBERG & SIEGMAN, and ÖRJAN EDSTRÖM, 'The Free Movement of Services in Conflict with Swedish Industrial Relations Model - or Was it the Other Way Around? ', in Nils Wahl & Per Cramér (eds), *Swedish Studies in European Law* (Hart Publishing, 2006). ; RÖNNMAR, in.

that collective agreement the mandatory social truce obligation of trade unions would have been applicable. Furthermore, according to an Act from 1991 the ban on collective action under a valid collective agreement was not applicable if foreign service providers were carrying out temporary work in Sweden (Lex Britannia).¹¹⁰ Consequently, on the facts available, it seems that from the perspectives of Swedish law the collective action was in principle lawful, and it was for this reason that when the employer asked the police to intervene and ban the collective action it refused to do so. The costs and consequences of the industrial action were thus fairly burdensome for the employer and for the exercise of its freedom to provide services in Sweden. In addition, the Swedish electricians' trade union (Elektrikerna) also took secondary, sympathy actions by preventing undertakings belonging to the organization of electricians' employers from providing services to Laval. Already as a result of these collective actions Laval was unable to carry out its work in Sweden and the workers returned to Latvia. However, the collective actions taken against Laval continued and sympathy actions were extended to other Swedish sites of Laval in Sweden. Eventually, the contract was terminated and the subsidiary established for the performance of that contract went bankrupt. The national authorities did not intervene, even though as *Malmberg* and *Sigeman* have pointed out, some forms of collective actions taken by the trade unions in the Laval case might have been illegal even under Swedish law.¹¹¹ There was no question before the Court of Justice concerning the responsibility of the national authorities in Sweden, that the main issue was rather whether collective actions were proportionate means for enforcing minimum rates of pay in a country where the regulation of wages is based in principle on collective self-regulation and if the collective action taken in order to enforce this regulatory model could eventually hinder the provision of services.

3.2. The Scope of Application of Article 43 and 49

In both cases the Court applied a fairly broad and unqualified 'market access' test. It was enough if the collective actions with cross border implications and the transnational collective action make the exercise of the economic freedoms "less attractive" or "more difficult" to be caught by Article 43 and 49.¹¹² In *Viking* the main argument was that collective actions - having regard to the effect on intra-community trade (FSU) or to the objective of the policy in order to which the collective action was taken (ITF) - were capable of restricting the employers 'right to exit' under the right to freedom of establishment.¹¹³ The effect of collective action taken by the national trade union was that it made *less attractive* or even *pointless* the exercise of freedom of establishment. The objective of the collective action taken in order to implement ITF's flags of convenience policy (hereinafter FOC policy) was considered to be *at least liable* to restrict *Viking's* right of establishment. In *Laval*, two types of collective actions were taken. Collective action taken in order to induce a foreign service provider to sign a collective agreement the terms of which (a) laid down more favorable conditions than those provided for in the statutory implementation measure of the Posted Workers Directive (PWD) and (b) others that concerned matters not listed in the PWD. Second, collective actions were taken in order to induce a foreign service provider to enter into negotiations on the rates of pay at the place of the provision of services. With regard to the first type of measure, the Court ruled that the right of the trade unions to take such collective action is "liable to make it *less attractive*, or *more difficult*, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC. The same test was applicable to the second type of collective actions because "in order to ascertain the minimum wage rates to be paid

¹¹⁰ The latter was found as a directly discriminatory and unproportionate national measure under Article 49 by the ECJ. The present article does not deal with the question of the compatibility of Lex Britannia with Article 49.

¹¹¹ According to them setting up a cordon of pickets or in other ways physically blocking access to the workplace is not lawful under Swedish law either. MALMBERG & SIEGMAN, p. 1117-1118

¹¹² DEAKIN, 'Regulatory Competition After *Laval*', in.

¹¹³ Case C-438/05 *Viking* [2007] ECR I-10779, para. 72-73.

to their posted workers, those undertakings may be forced, by way of collective action, into negotiations with the trade unions of unspecified duration at the place at which the services in question are to be provided”.

Although the Court used exactly the same arguments in the *Laval* case than in *Viking*, to conclude that Article 49 is applicable to collective action of trade unions,¹¹⁴ there was a difference in the Court’s reasoning compared to the *Viking* case. In *Viking*, the Court directly assessed the restrictive effect of national and transnational collective action on the freedom of establishment¹¹⁵, while in *Laval* the restrictive effect of collective action taken by national trade unions was apparently scrutinized on the basis of the national legal context. As we saw above, the Court argued in *Laval* that *the right (!) of trade unions* - not the trade union action as such - constituted an impediment on the freedom to provide services. It is possible to argue therefore that the horizontal direct of Article 49 is - at the very - least less clear in the *Laval* case.

The Court’s unqualified market access test is problematic in these two cases for the following reasons. Having regard to the nature and the objective of strike action, which necessarily causes costs to the employer and implies a restriction on its economic freedom, it is very difficult to see when a strike action (either national or transnational) could not hinder intra-community trade.¹¹⁶ This contradicts with the Court’s argument that it cannot be upheld that certain restrictions would be *inherent* in the very exercise of trade unions rights and the right to take collective action. The application of this far-reaching market access test is problematic for a further reason. It establishes a presumption for the *restrictive effect* of national and transnational collective action on intra-community trade and it eventually shifts the burden of proof to the trade unions, to justify their action under the test of proportionality. It is also an extremely broad test for the application of the economic freedoms to essentially private law action and sets the threshold below which the diverse labour law regulations of the Member States fall under Article 43 and 49 very low.¹¹⁷ The Court could, of course, change or at least modify its jurisdiction in the future.

According to *Barnard*, there are different ways in which the Court deals with conflicts between EC internal market law and national employment laws, depending on the area where the question has been raised. Even though under the free movement of services provisions there is no formal Keck-type filtering mechanism, in some cases the Court seemed to be willing to accept a *de minimis* threshold for the application of the economic freedoms.¹¹⁸ For instance the Court has explicitly ruled in certain cases that the effect of private action on cross border activities in the internal market is too remote or that it does not create a substantial hindrance of market access.¹¹⁹ Advocate General *Maduro* in the *Viking* case also suggested applying a *de minimis rule* as regards the question of what type of private measures can restrict the exercise of the four freedoms. He argued that the free movement provisions should be directly applicable to private action only if they are capable of effectively restricting others from exercising their right to freedom of movement, namely by raising an obstacle that holders of the right of establishment cannot reasonably circumvent. The issue on applying a *de minimis* rule for the definition of the scope of the fundamental freedoms was already raised by AG Jacobs in the *Schmidberger* case. He argued that if the *effect* of the private action on the free movement of goods was ‘too uncertain and indirect as not to be regarded as capable of hindering trade’ or if they might be

¹¹⁴ Para. 86-95.

¹¹⁵ Para 72-73.

¹¹⁶ See also, TONIA NOVITZ & PHIL SYRPIS, 'Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation', (2008) 33 European Law Review, 411 , p. 419. and DAVIES, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ', p. 140.

¹¹⁷ For an in-depth analysis on the reach of Article 49 in the *Laval* case see DEAKIN, 'Regulatory Competition After *Laval*', in.

¹¹⁸ BARNARD, *Employment Rights, Free Movement under the EC Treaty and the Services Directive* , p. 8-14.

¹¹⁹ Case C-190/98 Graf v Filzmozer Maschinenbau GmbH [2000] ECR I-493

so ‘slight and so ephemeral as to fall into the same category’, private action should not trigger the application of Article 28 even in a vertical situation.¹²⁰

Novitz and Syrpis also suggested applying a differentiated approach with regard to the horizontal direct effect of Article 43 on the activities of trade unions. According to them, employers should be able first to invoke Article 43 directly against collective action taken, in order to enforce collective agreements that have regulatory implications. However, the Court should take into account that the delegation of certain regulatory powers to trade unions is sometimes necessary in employment law. Trade unions pursue objectives in the workplace that the state cannot perform that effectively with either national or sector level regulation. Employers should therefore be able to invoke Article 43 only against the state and the Court should focus its assessment on the legality of the national framework instead of the lawfulness of strike action. The trade unions should be parties to the dispute to the extent in order to show that their conduct complied with the substantive and formal requirements of the national legislation.¹²¹ In fact, their approach highlights an important difference in legal interpretation and judicial approach under the direct or the so-called ‘indirect’ horizontal effect of the free movement provisions.¹²² This is why they rejected AG Maduro’s argument, that there was no difference with regard to the substantive legal question - i.e. to the reconciliation of the economic right of employers with a right of trade unions to take collective action – depending on the framework of interpretation (direct v indirect horizontal effect). While, it might be true, of course, that formally the substantive question for the courts to decide remains the same¹²³, the method for deciding, in particular the test of judicial review and the relevant interests that must be balanced, are not necessarily the same. In the case of horizontal direct effect, the test of proportionality should be accommodated to the fact that the litigation takes place between two private law entities and that the Court assesses directly the regulatory effect of trade union activities against the free movement provisions. Trade unions are in principle acting in the interest of their members. Therefore it is not the interest of the state that must be balanced against the Community interest, but the individual/collective private interests at stake, which must be weighted and their protection optimized.

3.3. *Legitimate Objectives of Strike Action under Community Law*

In Viking “(...) the right to take collective action for the protection of workers” was accepted as a legitimate objective capable of justifying a restriction on the fundamental freedoms. It must be noted that the Court did not confine in its reasoning to the freedom of establishment. The Court established two limitations on this. The collective action taken by the trade unions could fall under the protection of workers only if “the jobs and conditions of employment at issue were not jeopardized or under a serious threat”¹²⁴ and the legally binding force of the undertaking taken by the employer in the course of negotiations must also be assessed from this latter perspective.¹²⁵ Hence, national trade unions can take collective action against the potential negative consequences of relocations within the internal market if they can show the *actual* benefits of that action to the workers. That is to say the positive, long term effects of that collective action is not sufficient. The test of proportionality has to be ultimately carried out again by the national court, which has the sole jurisdiction to assess the facts and

¹²⁰ Case C-112/00 Opinion of Advocate General Jacobs in *Schmidberger* [2003] ECR I-05659, para. 65-67.

¹²¹ NOVITZ & SYRPIS, p. 421-422.

¹²² The differentiation between direct and indirect horizontal effect originates from German constitutional law. See further on this point LOHSE,

¹²³ Maduro argued that there might be a difference *in form* in the case of direct or indirect horizontal effect but the *substantive question* for the courts to decide remains the same, i.e. to reconcile the economic right of the employers with a right of trade unions to take collective action. Case C-438/05 Opinion of Advocate General Maduro, in *Viking* [2007] ECR I-10779, para. 40.

¹²⁴ para. 81

¹²⁵ para.82-83

to interpret the national legislation, in order to determine whether and to what extent such a collective action meets those requirements. However, as we will see the ECJ gave fairly detailed guidance to the English judge in order to allow that court to give a judgment on this particular case. The Court also referred back to the *Schmidberger* case and its case law on the posting of workers in the provision of services¹²⁶. However, there were a number of differences in the Court's reasoning.

In *Laval*, “the right to take collective action for the protection of the *workers of the host State* against possible social dumping” [*emphasis added*] was accepted by the Court as a legitimate objective of strike action in Community law. This means that trade unions in the host Member State can take collective action in order to avoid the negative consequences of unfair competition in the labour market generated by undertakings employing posted workers on their territory who originate from Member States with lower labour standards. This serves essentially the interests of the host state's workers. The improvement of the terms and conditions of employment of the posted workers (thus workers of the home state) cannot be a direct objective, but it seems only a (possible) *consequence* of strike actions taken within the scope of application of both the PWD and of Article 49. The Court also pointed out that in principle, “blockading action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers”¹²⁷.

3.4. *Proportionality in the Viking Case*

Although the Court referred the final analysis concerning proportionality on several points back to the national court, it applied a structured and fairly strict proportionality test in *Viking*. In particular, the first two elements of standard proportionality test, namely suitability and necessity, were applied.

In his opinion the Advocate General followed a different line of reasoning. *Maduro* suggested applying essentially a discrimination test, based on the criteria of market segregation. As we saw earlier, AG *Maduro* argued that the free movement provisions should be directly applicable to private action only if they are capable of effectively restricting others from exercising their right to freedom of movement, namely by raising an obstacle that holders of the right of establishment cannot reasonably circumvent.¹²⁸ He gave three examples where this could be the case. First, if otherwise private entities could partition off national markets and thereby restrict trade between Member States; if private law bodies had commanding influence over the organization of a certain cross-border activity; and, finally, if the action of private law bodies was capable of effectively hindering access to competition in the

¹²⁶ As a source for accepting the protection of workers as legitimate objective justifying freedom of establishment the Court referred back to its case law on posting of workers in the provision of services. For instance Case Joined cases C-369/96 and C-376/96 *Arblade and Leloup* ECR [1999] I-08453 or Case Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and others* ECR [2001] 07831 Neither of these cases concerned collective labour law.

¹²⁷ Para. 107

¹²⁸ See also *Cruz*, who argued that that the private or public nature of the relevant actors should not be decisive by drawing the scope of the free movement rules, since there is not one single and constant divide for the public and private sphere for all the Member States. He suggested that the Court should focus on the *nature of the action* by determining the application of the four freedoms. Private associations that have a ‘monopolistic power’ over others should be caught by the free movement rules only if they abuse this power with a protectionist intent or effect. Only in these cases are trade unions for instance capable of effectively hindering intra-community trade. He highlighted that not only collective rules but also collective action taken by trade unions could be covered by the economic freedoms. However, he also pointed out that *the substantive content* of the free movement rules, namely the test applied to trigger the application of the four freedoms and also the grounds for justification should be the same. He even argued that the proportionality test applied to private actors should be stricter. JULIO BAQUERO CRUZ, *Between Competition and Free Movement, The Economic Constitutional Law of the European Community* (Hart Publishing 2002), p. 121-125.

Community.¹²⁹ Although the Court did not expressly refer to his opinion in its final judgment, as we will see it further down the functional approach of the Advocate General did have some impact on the substance of proportionality test that was finally applied with regard to transnational collective action.

According to *Maduro*, this differentiation in the application of the fundamental freedoms to private action is justified by the fact that the horizontal direct effect of the free movement provisions must be reconciled with respect to private autonomy. He also suggested that “different levels of scrutiny, depending on the source and the seriousness of the impediment to the exercise of the right to freedom of movement, and on the force and validity of competing claims of private autonomy” ought to be applied by the Court.¹³⁰ Concerning the latter aspect – as opposed to AG Jacobs in the *Schmidberger* case – he suggested applying an objective and not an effect-based test. First of all, if the collective action was taken in the interests of the jobs and working conditions of the *current crew*, the legality of that action should be assessed eventually by the national judge in the framework of applicable domestic rules having regard to the principle of equal treatment. However, he highlighted that collective action that blocked or was threatening to block an undertaking from lawfully providing its services (*sic*) in another Member State amounted to a trade barrier and it would not fall within the first category. The second form of collective action was the coordinated collective action taken in order to *improve* the terms of employment of seafarers throughout the Community. This coordinated action by the trade unions should only be in compliance with the four freedoms if it did not amount to an abuse of the collective bargaining power of the trade unions leading to the ‘segregation’ of national labour markets.¹³¹

The Court applied the standard proportionality test developed for reviewing state measures to assess the proportionality of strike actions. As regards *suitability* of strike action, the Court referred to the case law of the European Court of Human Rights (ECtHR) and ascertained that it is common ground that collective action, like collective negotiations and collective agreements, may in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members.¹³² As regards *necessity* and the availability of less restrictive measures, the Court highlighted that

“it is for the national court to examine whether under national rules and collective agreements applicable to that action, the FSU did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with Viking and on the other hand whether that trade union had exhausted those means before initiating such action”.¹³³

The Court seemed to follow to a certain extent the opinion of the AG when it differentiated between the action of the national trade unions and the confederation of trade unions (ITF) under the proportionality analysis. It referred the question back to the national court to analyze whether the

¹²⁹ Case C-438/05 Opinion of Advocate General Maduro, in *Viking* [2007] ECR I-10779, p. 41-48. See also Deakin’s comments concerning the AG’s opinion, who argued on the basis of US experience, that although a more functional approach would seemingly fit the Community law context, it would make the application of the fundamental freedoms very complicated DEAKIN, ‘Regulatory Competition After *Laval*’, in p. 742-743. See also the criticisms expressed by Reich concerning this market segregation argument: NORBERT REICH, ‘Gemeinschaftliche Verkehrsfreiheiten versus Nationales Arbeitskämpfrecht’, (2007) *Europäische Zeitschrift für Wirtschaftsrecht*, at p. 395 and REICH, ‘Fundamental Freedoms v. Fundamental Rights: Did *Viking* get it wrong?’, (2008) 4 *Europarättslig Tidskrift*, at page 866.

¹³⁰ Case C-438/05 Opinion of Advocate General Maduro, in *Viking* [2007] ECR I-10779, para. 49.

¹³¹ *Id.* at, para. 63-72.

¹³² Case C-438/05 *Viking* [2007] ECR I-10779, para. 86.

¹³³ *Id.* at Para. 87.

objectives pursued by the FSU and the ITF by means of collective action fall under the category of the protection of workers.¹³⁴

The ECJ followed a different approach concerning the coordinated solidarity action taken in order to implement the ITF's FOC policy. Even though the Court ascertained that the objective of that policy was to protect and improve the conditions of seafarers' terms and conditions of employment, "the restrictions on freedom of establishment resulting from such action could not be objectively justified"¹³⁵, because it has effectively prevented the employer from exercising freedom of establishment. Both the Court and the Advocate General seemed to be critical concerning the automatism in the application of the FOC policy that implied the possibility of 'abusing their powers' under their collective trade union autonomy. It is clear from the facts that the application of the ITF's policy was directly discriminatory. In order to ascertain which trade union has a right to conclude a collective agreement concerning the vessel, it was not the flag of the vessel that was determinative but the nationality of the beneficial owner. Only the latter had a right to conclude a collective agreement. The main purpose of this policy is to prevent the ship owners from evading the rules of the Member States with higher labour standards. Therefore the main objective of the policy is to protect and to enhance the protection of seafarers on ships flying under a "flag of convenience"(FOC).

In principle, the Advocate General argued that coordinated collective action can be an effective means to counterbalance the economic power of employers in the case of relocations. However, the obligatory nature of the ITF's policy enabled

"any national union to summon the assistance of other unions in order to make relocation to another Member State conditional on the application of its own preferred standards of worker protection, even after relocation has taken place. In effect, therefore, such a policy would be liable to protect the collective bargaining power of some national unions at the expense of the interests of others, and to partition off the labour market in breach of the rules on freedom of movement."¹³⁶

The Court found that that policy is 'at least liable to restrict Viking's exercise of its right of establishment'¹³⁷, to the extent that the result of that policy is that "it prevents ship-owners from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals".¹³⁸ The Court ascertained that the FOC policy was applicable irrespective of the fact "whether or not that owner's exercise of its right of freedom of establishment is liable to have a harmful effect on the work or conditions of employment of its employees". In principle, therefore,

"the policy of reserving the right of collective negotiations to trade unions of the State of which the beneficial owner of a vessel is a national is also applicable where the vessel is registered in a State which guarantees workers a higher level of social protection than they would enjoy in the first State"¹³⁹

The analysis of the Court and the AG comes close to the argument of *Cruz*, who suggested that to identify what type of 'collective private measures' should be covered by the free movement provisions, the Court should focus on the question whether the private associations that adopted those measure have a controlling power over other individuals, and whether that power is used with a protectionist intent or effect. Is this a new type of proportionality test that the Court and the Advocate General have invented? If this is the case, it can be criticized on the same grounds on which Reich

¹³⁴ Id. at , para. 80

¹³⁵ Para. 88

¹³⁶ Case C-438/05 Opinion of Advocate General Maduro, in *Viking* [2007] ECR I-10779, para. 71

¹³⁷ Case C-438/05 *Viking* [2007] ECR I-10779, para. 73

¹³⁸ Para. 73

¹³⁹ Para. 89

criticized the market segregation criteria advocated by Maduro.¹⁴⁰ It subjects the legitimacy of strike action taken in the name of social policy objectives to a case-by-case analysis. Who will therefore draw the boundaries between strike action with a discriminatory effect on free movement and between the situations when it is simply an unavoidable consequence, that must be tolerated in the interest of a democratic society or due to their long term positive effects on the terms and conditions of workers? In we have seen in the presentation of the facts of the case, no one can answer the question of the real objective of the strike action in Viking and Laval with absolute certainty and as pointed out earlier, the Article 234 procedure is not appropriate to reconstruct the 'real' facts of the case.

3.5. Proportionality in the Laval Case

In contrast to Viking, the Court seemed to be more sensitive to the national and the community legal context in *Laval* and it applied a less structured proportionality test. The difference in its analysis in Laval was due to the fact that it had to respect the relationship between Article 49 and a very specific secondary Community measure, namely Directive 96/71/EC on the posting of workers (PWD). In the end it is not entirely clear whether the Court was giving a special reading to the directive in the light of Article 49 or whether it was rather interpreting Article 49 with regard to the directive.¹⁴¹ The last part of this section will underline the importance of the reference to the PWD within the proportionality test.

The PWD is a very specific social policy harmonization measure¹⁴² because, as the Court has ascertained, it was not intended to harmonize either the *material content* of the nucleus of mandatory rules for minimum protection listed in Article 3(1) of the Directive or the *system* for establishing those terms and conditions of employment in the Member States.¹⁴³ In principle, Member States remain free to define the content of those provisions or to choose a system for their regulation that is not expressly mentioned in the Directive. Nevertheless, they must respect the rules of the Treaty and the general principles of Community law. As regards the appropriate national systems for determining minimum rates pay, the Court observed that it must not hinder the provision of services between the Member States.¹⁴⁴ Eventually, the Court concluded that Sweden did not properly implement the directive because the Swedish autonomous collective bargaining model was not adapted to the requirements of the directive. In particular, the Court ruled that the Swedish

“authorities have entrusted management and labour with negotiating and setting the wage level in the construction industry on a case-by-case basis, having regard to the qualifications and tasks of employees so that the employers may ascertain the wages they are to pay their posted workers in the course of these negotiations is not an appropriate means for enforcing minimum wage laws under the Directive 96/71”.¹⁴⁵

¹⁴⁰ REICH, 'Fundamental Freedoms v. Fundamental Rights: Did *Viking* get it wrong?' (2008) 4 *Europarättslig Tidskrift*, pp. 866-67

¹⁴¹ See further on this point DEAKIN, 'Regulatory Competition After *Laval*', in.

¹⁴² Although it is not entirely clear what is the main objective of the Directive to facilitate the free provision of services or the protection of workers. It has several apparently irreconcilable objectives, such as facilitation of freedom to provide services, prevention of social dumping and protection of workers. For an excellent overview on the adoption and the debates before the adoption of the directive see EEVA KOLEHMAINEN, *The Posted Workers Directive: European Reinforcement of National Labour Protection* (2002) (PhD Thesis, European University Institute). Having regard to the legal basis (Article 47(2) and 55 EC) of the Directive and the way it was drafted, *Kolehmainen* concluded that the main rationale of the Directive is the facilitation of the provision of services and the other two objectives, i.e. prevention of social dumping and the protection of workers is just ancillary to former, id. p.13.

¹⁴³ Case C-341/05 *Laval un Partneri* [2007] ECR-I 11767 , para 60

¹⁴⁴ Id. at , para. 68

¹⁴⁵ Para. 60 and Para. 68-71.

Apart from the directive, Article 49 EC was also applicable to the case. The Court had to analyze an essential element of the autonomous collective bargaining system on the basis of a complex set of questions. The first question was: Is it compatible with Article 49 the organization of collective action by the trade unions in order to ‘force’ a foreign service provider to accept the extension of an existing sector level collective agreement the terms of which (1) went beyond the minimum rules of the directive and (2) others that concerned matters that were not listed in the directive and, eventually, to ‘force’ a foreign service provider to enter into negotiations with them on the wages to be paid to the posted workers in the host state? Finally, does it make a difference in the interpretation of the Directive that in Sweden the minimum (average) rates of pay are laid down by negotiation between management or labour on a case-by-case basis?

Since, as we saw earlier, this type of collective action eventually fell under the scope of Article 49, the second question was what significance should be given to the existing secondary measure within the proportionality test. The Court applied an ‘innovative’ approach. As opposed to its former case law on the interpretation of the minimum harmonization clause of the PWD,¹⁴⁶ it ruled that the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited in principle to the ‘minimum protection’ provided by the directive.¹⁴⁷ Secondly, the Court used this interpretation within the proportionality principle in order to limit the legitimate grounds on which trade unions can take collective action against foreign service providers.

As mentioned above due to the fact that the procedural framework of assessment was to a certain extent different from the Viking case, the Court did not refer the analysis on the proportionality principle back to the national court. It ruled, that in principle, collective action taken by the host Member States’ trade unions in order to induce an employer to sign a collective agreement and fix the terms and conditions of employment of the posted workers at a certain level falls under the protection of workers.¹⁴⁸ The question whether the objectives pursued by the trade unions in the *Viking* case fall under the mandatory requirement with certain instructions was instead referred back to the national court.¹⁴⁹ However, as regards the specific obligations, linked to the signature of the collective agreement for the building sector, which the trade unions were seeking to impose on the foreign-service provider, the Court ruled that it was not proportionate. The *obstacle* which that kind of collective action formed could not be justified with regard to the protection of workers of the host state against a possible social dumping. The Court’s reasoning on this point is not entirely clear but it highlighted two main reasons in support of this. *First*, the collective agreement, the signature of which the collective action served, went beyond the minimum level of protection provided by the positive harmonization measure in the respected field Community law, without any more favorable treatment in the state of origin. *Second*, because the collective agreement contained terms that related to matters not provided in the directive and it created an obligation for undertakings established in other Member States that went beyond the nucleus of mandatory provisions for minimum protection where the coordination of national laws was required by the Directive.¹⁵⁰ The reference to the posted workers directive was relevant in the proportionality principle to the extent that it limits the possible demands of the trade unions in collective action cases with cross border implications to the principle of

¹⁴⁶ Case Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and others* ECR [2001] 07831 , para. 55-59 and Case Joined cases C-369/96 and C-376/96 *Arblade and Leloup* ECR [1999] I-08453 , para. 68-69 in both cases the Court respected the autonomy of the Member States to regulate terms and conditions of employment beyond the minimum level.

¹⁴⁷ Para. 81

¹⁴⁸ Case C-341/05 *Laval un Partneri* [2007] ECR-I 11767 , para 107

¹⁴⁹ Case C-438/05 *Viking* [2007] ECR I-10779 , para. 80

¹⁵⁰ Case C-341/05 *Laval un Partneri* [2007] ECR-I 11767 , para. 107-108.

minimum protection, thus more favorable terms and conditions of employment seem to be only applicable to situations of reverse discrimination.¹⁵¹

As regards collective action taken in order to induce the foreign service provider to enter into negotiations on pay, the Court seemed to confront itself with the Swedish system of collective labour relations as such. The Court observed that “Community law certainly does not prohibit Member States from requiring such undertakings to comply with their rules on minimum pay by *appropriate means*” [*emphasis added*]¹⁵².

“However, collective action such as that at issue in the main proceedings could not be justified (...) in the light of the public interest objective (...) where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterized by a lack of provisions, of any kind, which are *sufficiently precise and accessible* that they do not render it *impossible or excessively difficult* in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay”. [*emphasis added*]¹⁵³

AG Mengozzi took a somewhat different approach under the proportionality test, which was much more sensitive to the existing level of diversity concerning the national systems of wage regulation. He found that the collective action taken to impose the rate of pay determined in accordance with the sector level collective agreement was suitable and necessary. An alternative could have been the automatic subjection of the foreign-service provider to a similar rate of pay, for instance, by national legislation. However, the Advocate General argued that the Swedish system provided more flexibility for the employer and it was less restrictive, since it enabled the service provider to negotiate on the rate of pay and to take into account its own costs without allowing it to apply a rate of pay lower than determined in the fall-back provision. As he maintained, there is arguably some legal uncertainty inherent in this system. Nevertheless, it is a characteristic in a system of collective employment relations which is based on and favors negotiations between both sides of industry and therefore, contractual freedom, rather than intervention by the national legislation. He argued that at the present stage of development, Community law cannot encroach upon this approach to employment relationships through the application of one of the fundamental freedoms provided for in the Treaty.¹⁵⁴ The Court did not follow the AG’s opinion to require the national courts or authorities to examine in detail those elements of the rate of pay that went beyond the minimum level, and especially to assess whether they involved a real advantage for the workers or whether they simply duplicated the obligations of the foreign-service provider. AG Mengozzi suggested comparing the gross amount of wages to identify whether the employer was subject to an equivalent or essentially similar obligation in the home Member State as well. This assessment was to be carried out by the national court and if it was found that the gross wage paid by Laval on the basis of the Latvian collective agreement was not essentially similar the collective action taken to enforce the Swedish wage level was to be considered proportionate.¹⁵⁵ The Advocate General’s approach has been criticized by *Blanke* on the grounds that it

¹⁵¹ Following Michael Dougan’s interpretation of *Laval* case, who argued that the Court’s approach in *Laval* was indirectly influenced by the *Tobacco Advertising Judgements*. One possible interpretation of this line of case law is that Community directives adopted under an internal market legal base have a stronger pre-emptive effect on national competences than minimum harmonisation measures adopted for example under the Social Policy Chapter of the EC Treaty. See further MICHAEL DOUGAN, ‘Minimum Harmonization after *Tobacco Advertising* and *Laval un Partneri*’, in: Bulterman, M. et. al. (eds.), *Views of European Law from the Mountain*, Liber Amicorum Piet Jan Slot (Kluwer Law International, 2009), pp. 3-19.

¹⁵² Para. 109

¹⁵³ Para. 110

¹⁵⁴ Case C-341/05 Opinion of Advocate General Mengozzi, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, [2007] ECR I-11767

¹⁵⁵ Id. at , para. 254-273.

comes close to ‘censorship’ of the collective agreement and interferes with the collective bargaining autonomy of the parties.¹⁵⁶ A similar argument can be made against the Court’s approach, because it took the substance of the collective agreement as a reference point for its assessment.

4. Where and why did the Proportionality Principle go wrong in *Viking* and *Laval*?

In both cases, the Court’s analysis on the restrictive effect of industrial action on the free movement of companies seemed to converge around a fairly broad market access test.¹⁵⁷ According to the Court’s approach, strike action does not have to be fully effective to fall under the application of Article 43 or 49. It is enough if it makes the free movement of companies or the provision of services *less attractive* or *more difficult* in the internal market. The application of an unqualified and far-reaching market access test triggering the application of the four freedoms furthers the market integration that is the objective of these Treaty provisions. The horizontal direct effect of the free movement provisions may guarantee more effective (private) enforcement by making the application of Article 43 and 49 functional before national courts. Nevertheless, when private law bodies for whom in this way the free movement provisions create obligations, invoke the protection of fundamental rights as a justification, the appropriate application of the proportionality principle requires the ECJ to respect the *essence of both rights*. Hence, the Court has to counterbalance the effective protection and enforcement of fundamental freedoms with the effective protection and enforcement of fundamental rights. In particular, it cannot undermine the essence and effectiveness of the right that is invoked as a justification for a restriction on the former.¹⁵⁸

Reich argued that collective action or the solidarity action of a group of trade unions may make relocations more costly for employers but it does not *automatically* prevent them from exercising their economic freedoms. As long as trade unions do not take solidarity action directly against freedom of movement, they cannot be accused of national protectionism. Provided that they are pursuing a legitimate social policy objective, i.e. to prevent the negative short or long term consequences of an employment practice or an economic decision of the employer, collective action should be lawful even in light of the economic freedoms.¹⁵⁹ *Bücker*, while reflecting on *Viking* and on the role of transnational collective action in restoring the balance of economic power within the internal market, argued in a similar vein. In his view, freedom of establishment enables undertakings to neutralize the demands of trade unions in national collective bargaining by relocating their activities to another Member State with lower labour standards. As a result, transnational coordination of trade union action can be essential in order to guarantee the effectiveness of freedom of association in the Member State of *origin* (Finland). He contended that coordinated solidarity action taken by a group of trade unions would undermine the essence of freedom of establishment. It would certainly restrict the exercise thereof, but should have been found proportionate because it was necessary for the effective protection of the right to strike and of freedom of assembly. Despite transnational collective action, the employer could exercise its freedom of establishment but the exercise thereof would not automatically lead to the application of the host state employment rules, although the rates of pay and certain terms and conditions would be worked out in the course of negotiations with the trade unions.¹⁶⁰

¹⁵⁶ BLANKE,

¹⁵⁷ BARNARD & DEAKIN, 'Market Access and Regulatory Competition', in.

¹⁵⁸ See similarly REICH, 'Free Movement v Social Rights in an Enlarged Union - the Laval and Viking Cases before the ECJ - Part I', p. 149-150

¹⁵⁹ NORBERT REICH, 'Free Movement v. Social Rights in an Enlarged Union: The Laval and Viking Cases before the European Court of Justice - Part II', (2008) 9 German Law Journal, p. 4 and 9

¹⁶⁰ ANDREAS BÜCKER, 'Die Rosella-Entscheidung des EuGH zu gewerkschaftlichen Maßnahmen gegen Standortverlagerungen: Der Vorhang zu und viele Fragen offen', (2008) Neue Zeitschrift Für Arbeitsrecht, p. 215-216

Davies criticized the Court's approach in *Viking* because when it analyzed the availability of alternative and less restrictive measures it did not take into account the relative efficacy of different methods of action in the bargaining process and in protecting workers' interests. For example, a leafleting campaign might be less restrictive from the perspectives of the four freedoms but it is a less effective means for the protection of workers than collective action.¹⁶¹ *Davies* also highlighted that the application of a proportionality principle in industrial action cases requires specialized labour courts with a good understanding of the industrial relations context. Therefore it is more appropriate to refer the analysis on proportionality back to the national courts.¹⁶²

Reich criticized the way in which the Court used the principle of proportionality and especially the standard of proof that is required by the trade unions to justify their transnational collective action for a further reason. The Court's decision

“implies that the labour unions and their head associations can take collective action only for the concrete purpose of protecting workers (the protection of the interests of workers at the date of relocation), not to support policies which in a long run may improve the social well being of their members, or avoid a ‘social dumping’ by indirect means of action by undertakings, in particular via outsourcing” or relocation”.¹⁶³

This point that was also partially raised by AG Maduro in his opinion, when he differentiated between collective action taken in the interests of the *existing crew* and collective action taken in order to *improve* the terms and conditions of the workers.¹⁶⁴ Once it is accepted that ‘market access and regulatory competition are two sides of the same coin’¹⁶⁵, it is to be hoped that the Court will take a more ‘dynamic approach’ towards the role of competition between the national legal orders in Europe¹⁶⁶.

Granting horizontal direct effect to the economic freedoms can be problematic in the sphere of employment and labour law. It is an old regulatory principle of labour law that the state has to intervene sometimes either by procedural mechanism or by substantive legal rules in contractual freedom of the parties in order to protect the interests of the weaker party, i.e. the employees. In the sphere of private law where the regulation is based on private autonomy, freedom of contract arguments on the horizontal direct effect of fundamental rights could be justified with the need to protect the interest of the ‘weaker party’. Consequently, the horizontal direct effect of fundamental rights can be used to restrict freedom of contract. An example could be the need to protect the consumer. However, in an area of law such as the regulation of employment relations where freedom *to* contract and also freedom *of* contract is genuinely limited, the horizontal direct effect of fundamental freedoms may lead to the opposite result. The inappropriate application of the proportionality principle can lead to litigation where employers may invoke the fundamental freedoms directly against trade unions or employees in order to challenge labour law provisions, thereby trying to restore (complete) freedom of contract in the sphere of labour law. Fundamentally, in such cases courts will need to answer the question of when the restriction of the economic freedom of the

¹⁶¹ DAVIES, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ', p. 143

¹⁶² Id. at p. 146, 148

¹⁶³ REICH, 'Free Movement v. Social Rights in an Enlarged Union: The Laval and Viking Cases before the European Court of Justice - Part II', See also NOVITZ & SYRPIS, who refer to ILO supervisory jurisprudence that accepts that trade unions can take strike action in support of major social and economic policy trends having a direct impact on the interests of their members. p. 424-425

¹⁶⁴ Case C-438/05 Opinion of Advocate General Maduro, in *Viking* [2007] ECR I-10779

¹⁶⁵ BARNARD & DEAKIN, 'Market Access and Regulatory Competition', in. p.198

¹⁶⁶ SIMON DEAKIN, 'Two Types of Regulatory Competition: Competitive Federalism Versus Reflexive Harmonisation. A Law and Economics Perspective on Centros ', in Alan Dashwood & Angela Ward (eds), *The Cambridge Yearbook of European Legal Studies* (Hart Publishing, 2000). P. 241-48

employers is necessary and appropriate in order to promote certain legitimate public policy objectives or long term private interests. It goes without saying that the answer to the question when is there a need to restore freedom of contract in the regulation of employment relations, having regard also to the fact, that the right balance can vary from one Member States to the other, requires a very complex assessment. It is arguable that courts are not in a position and do not have appropriate mechanisms, such as, for example, the use of impact assessments in order to measure the long-term consequences of their decisions in the labour market.

5. Conclusion

According to *Fritz Scharpf's* often cited thesis, the systematic ‘decoupling’ of social issues from the economic integration project has led to a *constitutional asymmetry* between the social and economic spheres of the European integration project.¹⁶⁷ This alleged constitutional asymmetry of the integrated European market space makes the resolution of *any* conflicts between the economic and non-economic values and objectives of the EC Treaty very controversial. Some commentators argued that the gradual inclusion of labour law reforms in the supranational macro-economic policies, especially via the soft law based Open Methods of Coordination (OMC), have generated a new discourse on social and labour rights in order to avoid the gradual disappearance of this discipline from the core of European law¹⁶⁸, and, on the other hand, to maintain its main rationale, i.e. the protection of workers¹⁶⁹. Social fundamental rights or fundamental labour rights can serve as a yardstick to define the core of Europe’s ‘social constitution’ and to solve conflicts that can emerge in the ‘new’ holistic frame of the internal market project. It has been argued that ‘the historical role of social rights is to reconcile the traditional mechanisms of social policy with the mechanisms of a market order’¹⁷⁰.

This human rights approach also fits very well into a relatively new pluralistic approach concerning the relationship between EU law and national laws. In particular, the new pluralistic movement of legal scholarship would deny that in the case of conflicts between EC law and national law, there would be a hierarchical relationship between the two legal orders.¹⁷¹ Rather, the contours of this relationship have to be worked out on a case - by - case basis and in a direct or indirect dialogue between the national courts and the European Court of Justice. A more pluralistic approach concerning the primacy of Community law over national law was also a consequence of the fact that the conditions of political bargaining have changed since the adoption of the Maastricht Treaty in the 1990s. Public support for the Union has diminished, and deeper divisions have emerged between national governments about which direction to take.¹⁷² As *Weiler* predicted this new polarized environment after Maastricht often also placed the ECJ in a “no win” situation.¹⁷³ National courts started to make constitutional reservations, to the principle of primacy of EC law, starting with the groundbreaking judgment of the German Federal Constitutional Court on the ratification of the

¹⁶⁷ FRITZ W. SCHARPF, 'The European Social Model: Coping with the Challenges of Diversity', (2002) 40 *Journal of Common Market Studies*, p. 646-47

¹⁶⁸ SCIARRA, in.

¹⁶⁹ JUDY FUDGE, 'The new discourse of labour rights: from social to fundamental rights?', (2007) 29 *Comparative Labour Law and Policy Journal*

¹⁷⁰ SIMON DEAKIN, AND JUDE BROWNE, 'Social Rights and Market Order: Adapting the Capability Approach', in Tamara Hervey, and Jeff Kenner(ed), *Economic and Social Rights under the EU Charter of Fundamental Rights - a Legal Perspective* (Hart Publishing, 2003). p. 28

¹⁷¹ On the critiques of this pluralistic movement in the interpretation of EC law see JULIO BAQUERO CRUZ, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement', (2008) 14 *European Law Journal*, p.412-418

¹⁷² DAMIAN CHALMERS & ADAM TOMKINS, *European Union Public Law* (Cambridge University Press 2007).

¹⁷³ JOSEPH WEILER, *The Constitution of Europe: do the new clothes have an emperor? and other essays on European integration* (Cambridge University Press 1999). , p. 207-212.

Maastricht Treaty.¹⁷⁴ Arguably, one important legacy of the Maastricht Urteil¹⁷⁵ is that it has contributed to the emergence of a pluralistic method of legal interpretation of the relationship between EC law and the national law.¹⁷⁶

These debates might have had some influence on the approach of the judges in Luxembourg in the *Viking* and *Laval* cases. Nevertheless, one has to be aware of the fact that this relatively new approach might lead to several pitfalls. Starting with the fact that the legal and constitutional basis of this new approach seems to be rather weak: even after more than fifty years of constant evolution and stimulating academic discussions on the distinctive social dimension of this regional economic integration project, in constitutional terms the best seems to be to describe it as based on an '*invisible*' rather than a strong *social constitution*. The EU Charter of Fundamental Rights, based on the idea of the 'indivisibility' of fundamental rights, could be the main source of social and labour rights delimiting, the core of the Community's social dimension. However, the destiny of the Charter is troubled by many of controversies. The constant attempts to bestow the Charter with a prime and legally binding force seems to have opened up a legal and political 'Pandora's box' ever since it was solemnly proclaimed in 2000. It is enough if think to the very recent saga of the British and Polish protocols attached to the Lisbon Reform Treaty on the interpretation of the Charter.¹⁷⁷ The 'red lights' have been switched on again, because without integrating the text of the Charter into the Treaty according to Article 6(1) of the new Treaty on the European Union, the Charter would gain the status of primary law. The Lisbon Treaty was signed by the Member States on 13 December 2007, and in an ideal case it would have entered into force on 1 January 2009. Although 23 of the 27 Member States have already completed the ratification procedures for the Treaty, especially because of the negative Irish referendum on 12 June 2009 and due to the constitutional reservations made in some Member States to the ratification of the Treaty, the future of the 'new' European framework Treaty seems to be very uncertain again.¹⁷⁸

The Court of Justice delivered its eagerly awaited judgments in *Viking* and *Laval* on 11 and 18 December 2007. In light of the legal and political context described above, the reference to a fundamental labour right in order to strike a balance and to find a 'practical concordance' between the economic and social rationales of the integration project by the Grand Chamber seemed to be a very ambitious step forward. It was a remarkable novelty, because before similar conflicts had to be resolved by restoring to innovative "judicial escamotage".¹⁷⁹ However, this ambitious first step appeared to be also a very controversial step forward. For some, it might create the basis for an argument that the Court is more favorable towards redistributive and political interests within the internal market frame, for others, the cases represent at the most a step forward and two steps backwards.¹⁸⁰ As *Davies* argues the poor understanding of the industrial relations context and the

¹⁷⁴ CRUZ, 'Brunner v European Union Law', 37 Common Market Law Review,

¹⁷⁵ Brunner v The European Union Treaty [1994] 1 CMLR 57

¹⁷⁶ CRUZ, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement',

¹⁷⁷ MICHAEL DOUGAN, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts', (2008) 45 Common Market Law Review, p. 667-671

¹⁷⁸ Although on 26 November the Czech Constitutional Court gave green light to the ratification of the Lisbon Treaty (<http://www.euractiv.com/en/future-eu/lisbon-treaty-given-green-light-czech-court/article-177515>) it is questionable whether the president, Vaclav Klaus, who has several times openly expressed his opposition to the ratification of the Treaty, will finally make use of his constitutional veto (<http://www.euractiv.com/en/future-eu/czech-pm-wins-leadership-contest-clears-path-lisbon-ratification/article-177853>). The German Federal Constitutional Court (BVerfG) has to deliver a decision also on the constitutionality of the Lisbon Treaty with the German Grundgesetz, but the Treaty has been already formally ratified, which will be completed after the decision of the Constitutional Court.

¹⁷⁹ SILVANA SCIARRA, 'Market Freedom and Fundamental Social Rights', in Bob Hepple (ed), *Social and Labour Rights in a Global Context, International and Comparative Perspectives* (Cambridge University Press, 2002).

¹⁸⁰ DAVIES, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ',

inappropriate application of the proportionality principle substantially undermined the significance of the recognition of the right to strike as a fundamental right.

Having regard to the diversity concerning the level of protection that is afforded to the different rights and fundamental values in the EU27, identifying the optimal level of protection that can be granted to each fundamental social and labour right in the multi-level polity of the Union will not be an easy task for the Court. Therefore the judges must be aware of the fact that for some countries the level so identified will be too low while for others it might create a basis for lifting limitations on the right to strike. In its previous case law, where the Court followed a similar path of interpretation, the Court seemed to be aware of this fact. In *Omega*, the Court demonstrated that in certain situations it is sensitive to national values and “recognizes the possibility – or even perhaps the merit – of value diversity”,¹⁸¹ although one has to keep in mind that *Omega* was a very specific case. Human dignity has a very important constitutional place and significance in the German constitutional order, where it has the status of a fundamental right.¹⁸² The *Schmidberger* case seems instead to be still a useful comparator. There the Court seemed to be ready to adapt the principle of proportionality to its new approach on the relationship between market freedoms and fundamental rights. This paper argues that it is not entirely clear whether the Court followed this line of case law in the *Viking* and *Laval* judgments and it has also highlighted some of the pitfalls and controversies of this new human rights approach for the evolution of EC labour law. Especially the argument has been made that there seems to be great uncertainty around the application of the proportionality principle and that its application provides a too rigid framework for finding an optimal balance between the conflicting interests at stake, which is problematic due to the possible policy implications of these decisions both at national and European level.

Having regard to the considerable attention that these two remarkable ECJ judgments have already generated in academic circles, among law makers and in the media, several questions remain to be answered: will the Member States eventually accept the consequences of this further ‘constitutionalization’ of the economic freedoms? Will national courts, especially the lower courts - without whose contribution the ‘constitutional revolution’ would probably not have taken place in Europe - make use of the powers that the Luxembourg court has vested in them? Going back to the initial question of this article, will the decisions of the Court provide the basis for a legal compromise and political co-ordination in the intergovernmental process? As *Weiler* argued Member States have accepted the far-reaching principles of direct effect and supremacy developed by the ECJ in the foundational period because of a delicate political equilibrium in the decision-making process mainly due to unanimity voting in the Council and the Luxembourg Agreement. This provided sufficient guarantees for them to influence the political process, consequently the threat of the so-called “Selective Exit” was reduced.¹⁸³ The question is whether under the current rules of the game the Member States can still take control over the decision-making process and minimize the effect of such ECJ rulings on their national social orders. Or whether “selective exit”, i.e. the selective application of the *acquis communautaire* will be a much more common temptation for the Member States in order to minimize the effects of judicial ‘constititutionalization’.

Finally, despite of a very critical reading of the Court’s judgments in *Viking* and *Laval*, this paper invited the reader at the beginning to look at these judgments from the perspectives of wider constitutional implications and eventually their impact on the negotiations between the Member States at the political level. From this perspective it is important to see whether the delicate political

¹⁸¹ FRANCIS GEOFFREY JACOBS, *The sovereignty of law : the European way* (Cambridge University Press 2007). , p. 108.

¹⁸² For a comparative analysis on the expression of human dignity in the different legal orders of the Member States see the Opinion of the Advocate General Case C-36/02 Opinion of Advocate General Stix-Hackl, *Omega Spielhallen- und Automatenaufstellungen-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-09609 para. 81-93

¹⁸³ WEILER, *The Constitution of Europe: do the new clothes have an emperor? and other essays on European integration.*, p. 30-39

compromise reached by the Court in these two cases will facilitate the maintenance of co-operative relations between the Member States or even generate coordination between them on matters where there have been serious deadlocks in the decision-making process for many years. As has been demonstrated by *Bercusson*, there was a fairly clear division between the views of the relatively new members of the EU and the old Member States on certain questions during the judicial proceedings.¹⁸⁴ However, in a broader perspective one might reach the conclusion that the Court's decisions in *Viking* and *Laval* generated coordination between the Member States at the intergovernmental level. Around six months after the decisions were published and after some serious deadlocks and repeatedly failed efforts, the Employment, Social Policy and Consumer Affairs Council reached a political agreement by qualified majority on two controversial directives on 10 June 2008. In particular, the Council reached agreement on the adoption of the much needed amendments of the Working Time Directive, clarifying the case law of the Court of Justice on on-call time and a political agreement has also been reached on the adoption of a new directive on temporary agency workers.¹⁸⁵ It remains to be seen, however, how attractive 'selective exit' in the form of opt-outs or selective application of the EC law in the Member States will become in the future as a response to these two judgments.

¹⁸⁴ BERCUSSON,

¹⁸⁵ <http://www.eurofound.europa.eu/eiro/2008/07/articles/EU08070491.htm>

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