HUNGARIAN LABOUR LAW
E - J O U R N A L

The right to strike and collective bargaining versus fundamental freedoms

A clash between human rights in the legal order of the European Union?

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Abstract

Thanks to globalization and the crossborder nature of providing services within the Member States of the European Union, new kinds of conflicts have arisen regarding the basic values of competing legal orders.

It was experienced at an early stage of the European integration that market freedoms may cause a serious conflict with the claim of Members States regarding the effective enforcement of human rights including labour rights.

It is worth to examine in details the nature and legal grounds of the competing interests in question to the extent that whether there is an a priori hierarchy between those. Finally, we present a legal tool that is (was) considered to be an effective aid to strike a fair balance.

Keywords: human rights, fundamental freedoms, collective labour rights, collision of legal orders, principle of practical concordance

1. Introduction

The aim of the foundation of the European integration was purely economical, furthermore its direction of evolution was defined in the light of this objective for many decades. Nor ’social policy’, neither fundamental rights protection existed. This approach was derived from the neo-liberal views of the founding fathers that the social aims are not a precondition but a desirable consequence of the

economical integration.[1] However legislative bodies and those applying the law had to address new challenges because of, on the one hand, the accession of new Member States with different levels of protection, and on the other, the so called spillover mechanism that was reasonable unnoticed by the draftsmen of the Treaty of Rome.

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

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

Accordingly, the aim of the Internal Market was to ensure an area without internal frontiers or regulatory obstacles in which the free movement of goods, persons, services and capital is ensured in accordance with the articles of the Treaties.[2] These four freedoms are known collectively as ’fundamental freedoms’ which are basically economical in nature that are applied in case of crossborder economic activities.

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

The inevitably question arises: how shall the legislation and the competent authoritative bodies manage the situations where a fundamental freedom clashes with a human labour right? The problem to be solved is to struck a fair balance between these two interests and to avoid a hierarchical relationship. To solve this collision we shall identify the elements of the collision itself, firstly that whether fundamental freedoms can be either considered as human rights.

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

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

2. Are fundamental freedoms human rights?

In case we look through the catalogue of rights and freedoms laid down in the Charter, we find the freedom of free movement and providing services,[3] but not the free movement of goods and capital. Cecco – citing Raz – commits himself in his study that a right is *fundamental* if the right-holder's interest is considered to be „of ultimate value" that is, an interest that „does not derive from some other interest of the right-holder or of other persons".[4] Furthermore, the values protected by fundamental rights are those that „need not be explained or be justified by (their contribution to) other values".

Accordingly, we shall separate those interests that are protected for their intrinsic value from those that are protected for their instrumental role. The implication of this view is that rights that are protected because of their instrumental role in advancing a common purpose or collective good, such as the internal market, should not be regarded as fundamental.

According to the author, a perfect example is the Lili Schröder case[5] in which the Court stated that the initial approach in the case law to Article 157 of the Treaty on the Functioning of the European Union (TFEU) was aimed at avoiding distortions of competition between undertakings. However, the case law subsequently recognized the right not to be discriminated against on grounds of sex as a fundamental human right. Consequently, the economical aim pursued by Article 157 shall be considered as secondary regarding anti-discrimination measures, which, instead, was the expression of a fundamental human right. In conclusion, a fundamental human right cannot have as its primary justification the pursuit of an economic aim which is external to the right-holder's interest.[6]

In the light of the above, the Charter follows a dichotomy as those free movement provisions that cannot be linked to a person, are not considered to be human rights.[7] To resolve such dichotomy, Cecco reviews two arguments. Let us consider these two approaches with which we may reconcile the conflicting interests.[8]

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3 According to Article 45 par. 1: *„Every citizen of the Union has the right to move and reside freely within the territory of the Member States."* According to Article 15 par 1–2: *„Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State."*

4 Francesco de Cecco: Fundamental Freedoms, Fundamental Rights, and the Scope of Free Movement Law. *German Law Journal*, Vol. 15, Iss. 3. (2014) 385.

5 Deutsche Telekom AG v. Lilli Schröder, CJEU Case C-50/96. ECLI:EU:C:2000:72.

6 Equally important argument is that – according to de Vries – rights that are implicit in the economic freedoms, such as the right to equal treatment, the right to move and reside in another Member State, transcend beyond the economic dimension of the free movement rules. Sybe A. de Vries: Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice. *Utrecht Law Review,* Vol. 9, no. 1. (2013) 176.

7 With other words, certain free movement provisions (goods and capital) cannot be viewed as fundamental rights, because they are instrumental as they are intented to ensure the internal market.

8 Cecco op. cit. 392–397.

2.1. Do the conflicting interests rest on a common ground?

One possible position is that the fundamental freedoms in nature shall be considered as fundamental rights because those freedoms derive from universally applicable values and that they are based on other fundamental rights. To clarify this position, Cecco citates Petersmann who writes that free movement provisions are manifested – through the freedom of trade – in the right to liberty.[9]

For example Article 16 of the Charter states that „*The freedom to conduct a business in accordance with Union law and national laws and practices is recognised*." as a fundamental right clearly proves that the whole *Community acquis* and the free movement provisions are rooted in shared values.

Advocate General Staxl in the Omega case[10] refers also to the common basis of the two interests as the fundamental freedoms are the expression of the general principle of non-discrimination. He stated:

> „[F]undamental freedoms themselves can also perfectly well be materially categorised as fundamental rights – at least in certain respects: in so far as they lay down prohibitions on discrimination, for example, they are to be considered a specific means of expression of the general principle of equality before the law. In this respect, a conflict between fundamental freedoms enshrined in the Treaty and fundamental and human rights can also, at least in many cases, represent a conflict between fundamental rights."[11]

Furthermore Trstenjak and Beysen give a similar understanding of the connection of the conflicting interests as they argue that Article 17 of the Charter[12] can be viewed as „the foundation on which free movement of goods" is based.[13] The overlap is clear: the goods belong to one or more natural or legal person, and if the owners are deprived from their right to property, the free movement provisions cannot prevail as well.[14]

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9 Ernst-Ulrich Petersmann: International Trade Law, Human Rights and Theories of Justice. In: Steve Charnovitz – Debra P. Steger – Peter Van den Bossche (eds.): *Law in the Service of Human Dignity.* Cambridge University Press, 2005. 49.

10 Omega Spielhallen- und Automatenaufstellungs-GmbH kontra Oberbürgermeisterin der Bundesstadt Bonn, CJEU Case C-36/02. ECLI:EU:C:2004:614.

11 Ibid. para 50.

12 "*Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions.*"

13 Verica Trstenjak – Erwin Beysen: The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU. *European Law Review,* Vol. 35. (2013) 310.

14 Trstenjak – Beysen op. cit. 309–310. Of course, TFEU 34 protects the *flow* of the goods and not the legal relationship between them and the natural and legal persons, however we believe that goods and other materials shall not be in itself the subject of any legal regulation, but only the conducts, rights and obligations of natural and legal persons. Accordingly, the restriction of free movement always interferes with the rights of others.

2.2. The convergence between the fundamental freedoms

The other position represents a view that there is a convergence between the four freedoms. According to this view, the whole free movement is concentrated around the EU citizenship. Tryfonidou[15] argues that the EU citizenship is the keystone for the four freedoms. It means that the free movement provisions of the TFEU shall be read in conjunction with Article 20 and 21 TFEU[16] as the aim of the movement of citizens is sale and purchase goods.

In this regard the A-Punkt case[17] is a good example. According to Tryfonidou, the determining factor was not the free movement of goods (that were in a wholly internal situation by the way), but the trader who has moved between Member States.[18] To sum up, citizens of the Member States shall be deemed as the bearers of instrumental rights as well in order to raise the protection of the two interests to the same level.

3. Are the right to strike and collective bargaining genunine human rights in the legal order of the EU?

The other explainable issue regarding the collision to be discussed is that whether the right to strike and collective bargaining are recognised as human rights. The case law shows a disappointing issue in this question, despite the existence of a stable legislative environment.

When we see only the statute primary law of the European legal order, it would be easily misleading regarding the scope of the legal protection of workers and trade unions. Apparently, each of the basic documents provides a sufficient protection even against the pure economical goals of the Internal Market.

Firstly, Article 28 of the Charter states that

> „Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective

15 Alyna Tryfonidou: Further Steps on the Road to Convergence among the Market Freedoms. *European Law Review,* Vol. 35, Iss. 1. (2010) 36.

16 Provisions regarding non-discrimination and citizenship of the union. Especially „Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

17 A-Punkt Schmuckhandels GmbH v. Claudia Schmidt, CJEU Case C-441/04. The case involved an individual who runs an undertaking with headquarters in Germany. She carries out itinerant selling of jewellery in the countries of the European Union, canvassing individuals in private homes. There, she offers silver jewellery for sale and takes orders for such jewellery. The other party A-Punkt, which has a competing business, brought proceedings against him before the Klagenfurt Regional Court (Austria) seeking to stop her business on the ground that it is prohibited by the national legislation. Ms Schmidt disputes the claims of the applicant in the main proceedings, contending that it is contrary to the free movement of goods as laid down in Article 34 TFEU.

18 Tryfonidou op. cit. 43.

> agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."

Secondly, the Preamble of the Charter constitutes that

> „This Charter reaffirms […] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights."

Looking at the content of the above-mentioned documents, Article 11 of the ECHR starts by guaranteeing the freedom of association in a generic way, however it is mutant about the right to strike and collective bargaining.[19] Despite the lack of explicit formulation, the European Court of Human Rights in a groundbreaking decision[20] has recognised the right to collective bargaining as an essential element of the right to form and join trade unions. The more timid recognition of the right to strike as a corollary right which cannot be dissociated from the freedom of association dates back to another milestone decision.[21]

The ECHR in these cases made a detailed reference to the universal instruments – without aiming to give an exhaustive list – such as Article 4 of ILO Convention No. 98 concerning the Application of the Principles of the Right to Organise and to Bargain that read as follows:

> „Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

Furthermore Article 3 of ILO Convention No. 87. concerning the Freedom of Association and Protection of the Right to Organise states that

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19 For the exhaustive analysis of Article 11, see F. Dorssemont: The Right to Form and to Join Trade Unions for the Protection of His Interests under Article 11 ECHR: An Attempt "to Digest" the Case Law (1975–2009) of the European Court on Human Rights. *European Labour Law Journal,* Vol. 1, Iss. 2. (2010) 185–235.

20 European Court of Human Rights, 12 November 2008, Demir and Baykara v. Turkey, no. 34503/97. A trade union active in the civil service was given access to the bargaining table and had effectively concluded a collective agreement with the Municipality of Gaziantep. The municipality did apply the collective agreement to its civil servants. Since there was no explicit recognition of the freedom of association in the civil service and no legal framework for collective bargaining, the Turkish judges considered the agreement to be null and void.

21 European Court on Human Rights, 21 April 2009, Enerji Yapi-Yol Sen, no. 68959/01. The Court had to rule on the legitimacy of a circular which recapitulated the prohibition for civil servants to have recourse to any kind of collective action.

> „Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes."

That provision is mutant about the right to strike as well, however the supervisory bodies of the ILO give the argument that the wording of the Convention („to organise their […] activities and to formulate their programmes") implicitly includes that right.[22]

Article 6 of the European Social Charter explicitly recognises these rights as it states that Contracting Parties undertake

> „2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
>
> 4. and recognise the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."

Besides, the forum – in general – cannot disregard the domestic law standards as a common ground accepted by the vast majority of the European states. It is worth mentioning that for example the ILO has counted 93 countries in which the right to strike is consitutionally guaranted.[23]

Notwithstanding the above, the case law of the CJEU is not willing to put labour rights to the same level as market freedoms. In recent years the CJEU has excessively given priority to market freedoms over labour rights especially in the case of Viking[24] and Laval.[25] Accordingly, the problem is not that

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22 See for example the Report of the Committe of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), ILC 102nd session. Geneva, ILO, 2013. paras 31, 102.; Report III (Part 1A), ILC 103rd session. ILO, Geneva, 2014. para 25.

23 Giving Globalization a Human Face, Report III (Part 1B), ILC 101st Session. Geneva, ILO 2012. para 8.; 123. Hungary belongs to these countries as Article XVII para. (2) of the Fundamental Law states that „Employees, employers and their organisations shall have the right, as provided for by an Act, to negotiate with each other and conclude collective agreements, and to take collective action to defend their interests, including the *right of workers to discontinue work*."

24 Viking, a ferry operator incorporated under Finnish law, sought to reflag its vessel by registering it in Estonia. This was due to the higher wages applicable under a collective bargaining agreement, governed by Finnish law, with the Finnish Seamen's Union (hereinafter: 'the FSU'). Based on the 'Flag of Convenience' policy of the International Transport Workers' Federation (hereinafter: 'the ITF'), the FSU requested that the ITF, whose headquarters was in London, send out a circular asking its affiliates to refrain from entering into negotiations with Viking, which it duly did. Following the expiry of the applicable collective labour agreement, the FSU threatened strike action against Viking in order to deter Viking from its plans to reflag its vessel. The Court pointed out that the union has to exhaust other, less restrictive means available to resolve the dispute before intiating a strike. Furthermore, it has to be proven that there is a serous threat to jobs or conditions of employment. To sum up, the Court did not leave any leeway where exercising the right to strike would not be disproportional.

25 Having won a public tender in Sweden to renovate a school, the Latvia-based construction company Laval posted workers to Sweden. Estimates suggest that these posted workers earned around 40% less than their Swedish counterparts. Concerned that the posting of cheaper labour to Sweden would undermine the labour standards of Swedish construction workers, the trade union opened negotiations with Laval with the aim of extending the applicable collective agreement to the posted workers, allowing the union to negotiate minimum wages for them. The negotiations failed and the union, supported by the electricians' union, began a blockade of Laval's building sites. The Court found that this kind of obligation regarding negotiations lacked transparency for

the fundamental freedoms do not enjoy that status of fundamental rights, but exactly the opposite, as labour rights are not granted the protection as (for example) the freedom of providing services.[26]

4. Is there an a priori hierarchy between the fundamental freedoms and labour rights?

According to Vries, irrespective of that the market freedoms have a fundamental character, they should not be given a higher status than that awarded to other fundamental values in the European legal order.[27] Which means that although the fundamental freedoms are still the backbone of the EU, these rights and the fundamental human rights are indivisible in nature, which should be equally promoted. One is for sure: exercise of fundamental rights does not escape the scope of application of the Treaty provisions.[28] However, as we have mentioned the case law differs from the texts of the written labour standards.

The problem is the differing starting point from the one generally applied in usual human rights reasoning.[29] To clarify this, regarding freedom of association – and, according to the case law, its corollary rights – the ECHR provides that any intervention must meet the restriction grounds provided for by Article 11(2).[30] For example, to stop a trade union action the state has to prove that „this restriction is 'prescribed by law and is necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others'.

In contrast, because of the fundamental nature of the economic freedoms, the EU law system, on the other hand, only allows for a strike action that infringes these principles if the trade union's action 'pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest".[31]

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foreign firms, unduly restricting their trade prospects. Furthermore, it perceived that the content of the collective agreement sought by the union would also be an infringement of the Posting Directive, since the union was seeking negotiations on additional subjects that went beyond the minimum terms and conditions envisaged in it.

26 Which interpretation is clearly contra legem as Article 6 of the Treaty on European Union states that „Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law". It is therefore undisputable that the two interests have been provided equal levels of protection.

27 Vries op. cit. 177–178.

28 In the case of Viking, the Danish and the Swedish Governments argued, that the right to take collective action, including the right to strike, constitutes a fundamental right which, as such, falls outside the scope of provisions of the freedom of establishment. However the Court held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods, but does not fall outside the scope of the provisions of the Treaty. International Transport Workers' Federation v Viking, CJEU Case C-438/05, ECLI:EU:C:2007:772. paras 44–47.

29 Albertine Veldman: The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR. *Utrecht Law Review,* Vol. 9, Iss. 1. (2013) 113–115.

30 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

31 Case of Viking para 101.

Veldman argues that exercising a fundamental human right in itself cannot be a sufficient ground for justification, but exercising the right to strike – depending on the specific circumstances of the case – can be. Accordingly, for example, the protection of workers as an 'overriding reason of public interest' may justify a derogation regarding fundamental freedoms.[32]

Furthermore, in the legal order of the ILO there is less room to manoeuvre, in order to invoke economic freedoms to justify a restriction of basic human rights. According to the supervisory body of the ILO, the Committe of Experts states that the prohibition of strikes could only be acceptable in case of 'essential services' in the strict sense of that term, i.e. services whose interruption could endanger the life, personal safety or health of the whole, or part of the population.[33]

It follows from the above, that the private interest of an economic operator shall not be a ground of a lawful restriction. Any restriction or prohibition is acceptable in case it is based on public policy as economical causes are not even present in the legal reasoning. Furthermore, the Commite of Experts maintained that the possible long-term serious consequences for the national economy of a strike did not justify its prohibition.[34]

In conclusion, starting out from the perspective of market freedoms in the European legal order, labour rights have to withdraw into a defensive position as they may be at best a lawful ground for restriction, but not a separate value standing on its own foot. The European Economic and Social Committe has criticised that as collective action is a fundamental right in principle rather than a reality, which means that formally it is recognised, however regarding the actual and effective enforcement of this right we may find much to criticise. The Court deemed collective action to be a restriction on the exercise of those freedoms, asking whether this restriction can be justified. This means that collective action is measured with regard to the restriction that they imply for economic freedoms. Academics have pointed to the fact that the ECHR in recent cases has examined the issue from the opposite perspective, i.e. the question has been to consider what limitations are acceptable in the area of fundamental rights.[35]

Furthermore, in the famous Balpa case[36] the ILO supervisory body CEACR has pointed out „that when elaborating its position in relation to the permissible restrictions that may be placed upon the

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32 Veldman op. cit. 115. According to Nikolett Hős, we may distinguish three different situation where human rights may run into conflict with the case law of the European legal order. Firstly, 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. Secondly, States can invoke the protection of fundamental rights as an independent ground of justification. Thirdly – as in the cases at hand – 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 EU legal order. Nikolett Hős: The Principle of Proportionality in the Viking and Laval cases: An Appropriate Standard of Judicial Review? *EUI Working Papers (LAW),* 2009/06. 7–8.

33 *Freedom of Association. Compilation of decisions of the Committee on Freedom of Association*. Geneva, ILO, [6]2018. (Digest) 838.

34 Bernard Gernigon – Alberto Odero – Horacio Guido: *ILO Principles Concerning the Right to Strike*. Geneva, ILO, 2000. 21.

35 Opinion of the European Economic and Social Committee on 'The Social Dimension of the Internal Market' (own-initiative opinion) 2011/C 44/15.

36 The British Airline Pilots Association (BALPA) explains that it decided to go on strike, following a decision by its employer, British Airways (BA), to set up a subsidiary company in other EU States which would have caused a deterioration of the working conditions. While efforts were made to negotiate this matter, in particular the impact that the decision would have upon their terms

right to strike, it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services."[37]

Consequently, it is clear that the hierarchical relationship cannot be maintained as these two kinds of interests have to be treated with equal protection bearing in mind that the fundamental freedoms – in case they ensure the rights of their holders – shall be deemed human rights as well. Nonetheless, the margin of appreciation is inherently differs in the Charter from the case law of the Court. The Charter stipulates that

> „Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

As a contrast, the case law of the Court uses the legal tool of „overriding reasons of public interest" as summarised in Gebhard[38]:

> „However, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it."

However, the well-established category of 'imperative requirements' manifestly do not list human rights[39], accordingly the admissibility of restrictions is scrutinised with different principles.

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and conditions of employment, all attempts were unsuccessful and BALPA members overwhelmingly voted to go on strike. The strike action was, however, effectively hindered by BA's decision to request an injunction, based upon the argument that the action would be illegal under Viking and Laval.

37 The CEACR has only suggested that, in certain cases, the notion of a negotiated minimum service in order to avoid damages which are irreversible or out of all proportion to third parties, may be considered and if agreement is not possible the issue should be referred to an independent body.

38 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, CJEU Case C-55/94, ECLI:EU:C:1995:411. para 39.

39 In the case of Cassis de Dijon the Court has stated – not exhaustively listed – that the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer shall be deemed as mandatory requirements. Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, CJEU Case C-120/78, ECLI:EU:C:1979:42. para 8.

5. How to reconcile the hierarchy? The principle of *practical concordance*

First of all, besides the legal aspects, we must not lose the sight of the fact that the mutual understanding between those interests shall be respected. It would be a wrong message, if only the legal dogmatic position would prevail over political coordination. According to Vries, it is not a real option for fundamental rights outside the framework of the four freedoms that constitute the core values of European integration. Instead – rejecting the methodology used in Viking and Laval – the author argues that the one possible good solution is the reasoning following in the Schmidberger case.[40] In that ruling the Court reviewed the case on the basis that the fundamental freedoms stand on an equal footing with the human rights.[41] The Court followed the princuple of 'practical concordance', a perfect legal tool that is worth to be presented in details.

The point is to avoid as far as possible that any of the interests are sacrified in favour of the other one, reaching a fair compromise between the rights in conflict. It rejects the argument that it is desiarable to set aside one claim simply because a competing claim appears. The aim is to ensure a broad scope of effectiveness for both of the interests without any of the two rights in conflict having been completely sacrificed to the other. We may transform the background conditions of the case which made the conflict possible. It has four components.[42]

5.1. Transforming the background conditions

Firstly, it is desirable to transform the background conditions of the case in order to ensure that all competing rights can be exercised without any one right having to be sacrified to the other. Accordingly, the State authorities have to provide such measure with which the conflict may vanish.[43] Besides, it

40 Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich, CJEU Case C-112/00, ECLI:EU:C:2003:333. The case involved a demonstration by environmentalists on the Brenner motorway in Austria, thereby closing the motorway from traffic for nearly 30 hours. Permission for this demonstration was (implicitly) granted by the Austrian authorities. The question was whether the Austrian authorities could be held liable for an infringement of EU law under Article 34 TFEU (the free movement of goods) in conjunction with the principle of Community loyalty as now laid down in Article 4(3) TEU, as the Austrian authorities had not completely banned the demonstration on such an important motorway.

41 Vries op. cit. 191–192.

42 Olivier De Schutter – Françoise Tulkens: Rights in Conflict: the European Court of Human Rights as a Pragmatic Institution. In: Eva Brems (ed.): *Conflicting between fundamental rights*. Antwerp–Oxford–Portland, Intersentia, 2008. 24–32.

43 For example, Austria has violated the ECHR, when the applicant was intented to commemorate the Salzburg Jews killed by the SS during the Second World War. The meeting coincided with the assembly of a group commemorating the SS soldiers killed in the Second World War which was to be held at the same time and place. While aware of that other assembly, the applicant had refused to give an undertaking that the proposed meeting inmemory of the murdered Salzburg Jews would not disturb that gathering, which he considered illegal. The reaction of the police authorities, subsequently approved by the Austrian court, had been radical: they had prohibited one assembly from taking place, in order to ensure that the other assembly could take place peacefully and that the cemetery-goers would not be disturbed by the clash between opposed group. According to the Court, instead of identifying how the conflict could be avoided – by organizing the separation of the two groups on the premises, by deploying a police force –, the police authorities simply chose to prioritize certain interests above the others, *without seeking to modify the background conditions which may create the conflict in the first place.* European Court of Human Rights, 29 June 2006, *Öllinger v. Austria,* no. 76900/01.

may be crucial to compare the situation of conflict emerging in one jurisdiction with similar situations which have occurred in other jurisdictions, and how they were solved.

5.2. Ensuring the open deliberation

In case the conflict of rights cannot be removed, the State has to ensure that the procedural dimension is transparent and the aspects of the decision-making are accessible. Similarly to the above-mentioned problem, the outright ban cannot be acceptable especially because that solution lacks any balancing between the conflictings interests.[44]

This kind of transparency ensures to find new solutions as it permanently re-evaulates the decisions-making processes to fine-tune the level of protection of conflicting interests.

5.3. Avoiding the unalterable formal procedural steps

Significant defect of the decision-making procedure is that it is neccessarily abstract beyond the individual case and not contextualized. Furthermore, it should be noted that the formalistic procedure is only the means of the decision-making but not the ends. In other words, the substantive content of a right may be seriously damaged if the decision maker applying the law respects only the formalistic procedural steps.[45] Accordingly, if needed, the procedural solutions have to be revised and replaced.

5.4. Personal autonomy and the notion of democratic society

Finally, we may mention two guiding principles which are abstract in nature, however those help to understand the core values which guide the decision-makers.

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[44] For example, seven judges gave dissenting opinion in a case where the applicant was denied to have access to information about her origins as the domestic law accepted that the mother's decision constituted an absolute defence to any requests for information by the applicant, irrespective of the reasons for or legitimacy of that decision. Therefore, it is not a multilateral system that ensures any balance between the competing rights. European Court of Human Rights, 13 February 2003, *Odièvre v. France,* no. 42326/98. joint dissenting opinion of Judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää.

[45] For example, in the *Denbigh High School* case in the United Kingdom, a Muslim girl, who was 14 years old at the material time, was excluded from the Denbigh High School in Luton after she insisted on wearing a long coat-like garment known as a jilbab, in violation of the dress codes imposed by the school. She felt that this was in violation of her freedom of religion, as recognized under Article 9 ECHR, and that it violated her right not to be denied education under Article 2 of the First Additional Protocol to the Convention. Although her contentions were upheld at the second instance, however, was based on the consideration that the decision-making procedure by the direction of the school had been inadequate. Since the premiss of the decision by the school should be that freedom of religion and the right to education should allow Shabina Begum access to the school, the school authorities should have explained why the exclusion was justified in the light of those principles. It is a retreat of the courts from substance to procedure and an abandonment of the kind of scrutiny required by the principle of proportionality prescribed under the ECHR. R (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School (Appellants), [2006] UKHL 15 (judgment of 22 March 2006).

One of them is the personal autonomy invoked, typically, where the two conflicting rights are both rights of the same individual, one granting him a freedom to choose, and the other a right to protection.[46]

The other one is the protection of democratic society which principle will be invoked where the rights of different individuals are in conflict, requiring that their coexistence is organized. Democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.

6. Conclusion and *de lege ferenda* or *de lege (non) lata*?

In this article we explained that the case law of the CJEU regarding labour rights is disappointing as the Court gives a far-reaching priority to fundamental market freedoms over basic human labour rights. It does so despite the fact that the neccessary legal basis are available both in the European legal order and in the international obligations.

It can be concluded that the only equitable solution for the resolving conflicts between rights and freedoms is the so called practical concordance. According to the German constitutional lawyer, Konrad Hesse, this technique implies that constitutional rights must be harmonized with each other when they are in conflict in such a way that one value does not lose ground against the other. Hesse pleads for finding a balance by way of optimizing the relevant values against each other and thus allowing both values to be exercised to the same time.[47] Mortelmans argues that this legal tool might be useful *de lege ferenda* in the European legal context in order to reconcile possible conflicts between the fundamental freedoms and non-economic interests only if the substance of the principle is codified in the TFEU itself.[48]

However, there is (was) sufficient evidence in the European legal order that a fair solution exists in order to satisfy the interest of both sides.[49] Finally, we present this legal basis that was named after professor Mario Monti.[50]

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46 One of the most famous cases was the case of Diane Pretty, where the applicant argued that she should be allowed to be aided to commit suicide without being encumbered by the obstacle created by the criminal law which she considered paternalistic and premised on the idea that she might not be capable of entirely exercising her right to self-determination. In that case, the reference to the principle of autonomy allowed the Court to consider Article 8 ECHR applicable to the situation of the applicant, whose request to be aided in ending her life could be treated as an expression of her right to 'autonomy' or to 'self-determination. European Court of Human Rights, 29 April 2002, Pretty v. the United Kingdom, no. 2346/02.

47 Kenan Ertunc: *The Legal Implications of the Social Market Economy on the European Economic Constitution*. Dissertation. Università Degli Studi di Milano, 2014. 51.

48 Kamiel Mortelmanns: The Relationship between the Treaty Rules and Community Measures for the Establishement and Functioning of the Internal Market – Towards a Concordance Rule. *Common Market Law Review*, Vol. 39, No. 6. (2002) 1303–1346.

49 Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services [doc. 8042/12 SOC 226 MI 194 COMPET 169 – COM(2012) 130 final].

50 Former member of the European Commission.

The proposal was not unprecedented as in 1997, the EU Commissioner for the Internal Market, Mario Monti, proposed a regulation which sought to put pressure on Member States to take measures to remove obstacles to the free movement of goods.[51] A year later the so called Monti I Regulation[52] was adopted. The Regulation states that Member States should provide for existing alternative dispute resolution mechanisms to cover cross-border situations.[53]

However, the Laval and Viking cases raised again the concerns that the economic freedoms were being given priority over fundamental social rights such as the right to strike. This raised questions about the relationship between market freedoms and fundamental social rights again. Therefore, in March 2012, the European Commission issued a proposal which become known as the Monti II Regulation which was aimed to ensure the free movement of goods in the EU, while acknowledging the right and freedom to take strike action.

The explanatory memorandum of the proposal citates an illustrative good example stated in the Report 'A new strategy for the single market' that the Viking and Laval cases *'revived an old split that had never been healed: the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level*'. The aim of the proposal was to clarify the interaction between the exercise of social rights and the exercise of the freedom of establishment and to provide services enshrined in the TFEU within the EU in line with one of the key objectives, a 'highly competitive social market economy', without however reversing the case law of the Court.[54] But in what sense would have been the proposal a pioneer?

The proposal confirms that there is no inherent conflict and dispute between the right to take collective action and the freedom of establishment and providing services stipulated in TFEU, accordingly none of them can be enforceable against the other one and there is no primacy of one over the other. However, there are situations where their exercise may have to be reconciled in cases of conflict, in accordance with the principle of proportionality in line with standard practice by courts and EU case law.

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

> „The exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right

[51] Obstructions to free movement caused by protesting farmers had earlier led to a complaint by the Commission against France for failing to take appropriate measures to guarantee the free movement of goods blocked by protesting farmers. https://www.eurofound.europa.eu/en/european-industrial-relations-dictionary/monti-regulation

[52] Council Regulation (EC) No. 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States.

[53] Article 2 states that 'This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States'.

[54] Proposal 3.1.

> or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms."

The proposal triggered the first yellow card procedure in the which allows one third of the national parliaments to ask the Commission to review a draft legislative act, if they consider that it does not comply with the principle of subsidiarity. The European Commission claimed that the Monti II proposal did not breach the subsidiarity principle but that it withdrew the draft European legislative act because of a lack of political support.[55]

The proposal tried to make a fair balance between the competing interest as it stated that there is no primacy of one over the other. However, it is worth to mention that the above-mentioned clause does not specify that how the balance between the two competing interests shall be strucked as the proposal is much more an abstract balance of interests than a practical guide. This proposal was similar to some of the ILO reccommendations that are programmatic in nature and as such it was highly symbolic. Furthermore, it is very telling that proposal stated that the alternative non-judicial dispute mechanisms shall be without prejudice to the role of national courts in labour disputes in particular to determine whether and to what extent collective action, under the national legislation and collective agreement law applicable to that action, does not go beyond what is necessary to attain the objective(s) pursued, without prejudice to the role and competences of the Court of Justice.[56]

To sum up, according to the proposal, the case-law was not expected to change as the fundamental freedoms would have continued to prevail over social and labour rights.

Lastly, it shall be noted that the Monti clause[57] has been integrated into numerous legislation matter[58], however this 'non-affecting principle' could not be used alone to solve the present collision. Accordingly, it has not led to any major changes in the legal framework and the case law.[59]

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

56 See point 4 of Article Monti II Regulation.

57 See Article 2 of Monti II Regulation.

58 For example point b) subsection (1) Article 1 of Directive (EU) 2018/957; subsection (3) Article 1 of Regulation (EU) 2019/1149.

59 Kártyás, Gábor: *Kiküldött munkavállalók az uniós és a magyar jogban.* (Jogtudományi Monográfiák 15.) Budapest, Pázmány Press, 2020. 113–116.