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Transnational Wages Setting as a Key Feature of a Socially Oriented European Integration: Role of and (Questionable) Limits on Collective Action

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"People who have never been on a picket line tend to think all industrial action is disproportionate if not indecent"

Lord Wedderburn, *Labour Law: 40 Years On*, ILJ, 2007

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1. 'Old' and 'new' references to a socially oriented European integration in the Treaties: strengthening social cohesion by improving living conditions.

Looking at the Treaty on European Union and at the Treaty on its functioning (hereafter, respectively, TEU and TFEU) as re-structured after Lisbon 2007, 'old' and 'new' references can be found within both which confirm that the social dimension is still present and has to play a relevant role within European integration. In fact the new text of art. 3 (par. 3) reads: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a *highly competitive social market economy*, aiming at *full employment and social progress*; (..) it shall *combat social exclusion and discrimination*, and shall *promote social justice and protection*; (..) it shall *promote economic, social and territorial cohesion*, and *solidarity among Member States*"¹ (art. 3, par. 3 TEU).

Assuming that the reference to a "social market economy" will, at least, differentiate the European economic model from the pure neoliberal one², one has to focus, above all, on social progress as main aim of the EU fighting against social exclusion and discrimination, while promoting social justice and protection, alongside the economic, social and territorial cohesion and solidarity among Member States. These are ambitious goals that, according to the more recent case law of the European Court of Justice³ (hereafter ECJ), shall be considered influential even while

¹ Emphasis always added.

² On the concept of "social market economy" and on its possible impact on European integration, see C. JOERGES, F. RÖDEL, *Social Market Economy as Europe's Social Model*, EUI Working Papers LAW n. 2004/8 available at <http://cadmus.iue.it/dspace/bitstream/1814/2823/1/law04-8.pdf>.

³ ECJ 11 December 2007, Case 438/05 *International Transport Workers Federation*; ECJ 18 December 2007, Case 341/05 *Laval un Partneri Ltd.*. Literature on both cases, their background and their consequences is already wide. See, at least, M. V. BALLESTRERO, 'Le sentenze *Viking* e *Laval*: la Corte di giustizia "bilancia" il diritto di sciopero', (2008) 2 *Lavoro e diritto*, 371; B. BERCUSSON, 'The Trade Union Movement and the European Union: Judgement day', (2007) *European Law Journal*, 279; B. CARUSO, 'I diritti sociali nello spazio sociale sovranazionale e nazionale: indifferenza, conflitto o integrazione?', WP C.S.D.L.E. "Massimo D'Antona" .INT - 61/2008; A. C. L. DAVIES, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ', (2008) 2 *Industrial Law Journal*, 126; E. EKLUND, 'The Laval Case', (2006) 2 *Industrial Law Journal*, 202; P. A. KÖHLER, "'Vaxholm" - "Gustafsson" - "Evaldsson": Das kollektive Arbeitsrecht Schwedens auf dem europarechtlichen Prüfstand', (2008) *ZESAR*, 65; A. LO FARO, 'Diritti sociali e libertà economiche del mercato interno: considerazioni minime in margine ai casi *Laval* e *Viking*', (2008) 1 *Lavoro e Diritto*, 71; T. NOVITZ, 'The Right to Strike and re-flagging in the European Union: free movement provisions and human rights', (2006) *Lloyd's Maritime and*

implementing the internal market based on competition and fundamental freedoms.

This new social awareness is confirmed by the introduction of the so called horizontal social clause, already provided within the aborted Constitutional Treaty, according to which: "In defining and implementing its policies and activities, the Union shall take into account requirements linked to *the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.*" (art. 9 TFEU).

The fact that social progress and economic, social and territorial cohesion are missed from art. 9 TFEU has not to be overestimated since something similar to the above mentioned horizontal social clause was already provided within art. 159 par. 1 TEC, now art. 175 par. 1 TFEU, which reads: "(..) the formulation and implementation of the Union's policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 174 and shall contribute to their achievement". As well known, art. 174 TFEU (once art. 158 TEC) states that: "in order to promote *its overall harmonious development*, the Union shall develop and pursue its actions leading to the *strengthening of its economic, social and territorial cohesion.*".

The strengthening of economic, social and territorial cohesion has, therefore, to be considered an added horizontal goal to be pursued by the EU and the Member States, each one within the scope of its shared competence on the topic, as provided by art. 4 par. 2 TFEU.

Being social among the other, the question is if cohesion may be achieved also by EU policies adopted under the scope of art. 151 TFEU (former art. 136 TEC) which reads that: "the Union and the Member States (..) shall have as their objectives (..) *improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained (..).*". This is the case, in our opinion, since, according to art. 174 TFEU the strengthening of cohesion is pursued "in order to promote the overall harmonious development" of the EU, a mission which cannot be accomplished without improving living and

Commercial Law Quarterly, 242-256; M. PALLINI, 'Law shopping e autotutela sindacale nell'Unione Europea, (2008) *Rivista Giuridica del Lavoro*, II, 3; R. REBHANN, 'Grundfreiheit vor Arbeitskampf - der Fall Viking', (2008) *ZESAR*, 109; S. SCIARRA, 'Viking e Laval: diritti collettivi e mercato nel recente dibattito europeo', (2008) 2 *Lavoro e Diritto*, 245; F. TEMMING, 'Das "schwedische Modell" auf dem Prüfstein in Luxemburg - der Fall Laval', (2008) *ZESAR*, 231; LORD WEDDERBURN, 'Labour Law 2008: 40 Years on', (2007) *Industrial Law Journal*, 397; C. WOOLFSON, J. SOMMERS, 'Labour Mobility in Construction: European Implications of the Laval un Partneri Dispute with Swedish Labour', (2006) *European Journal of Industrial Relations*, 49.

working conditions at European level by harmonising them “while the improvement is being maintained”.

2. Transnational harmonisation of wages as the main instrument of improvement of living conditions and the crucial role of collective action.

Looking at the social objectives laid down by art. 151 TFEU, one may wonder if living and working conditions cannot be considered as a whole as far as community action is concerned. Indeed, since its beginning, i.e. in the Seventies, EU commitment towards harmonisation in the social field has exclusively focused on working conditions - the new competence on “the combating of social exclusion” introduced by the Treaty of Nice of 2001 being limited to the coordination of national inclusion policies (art. 137 TEC now art. 153, par. 1, lett. j TFEU). In this view, living conditions should have improved indirectly, by consequence of the harmonisation of (at their turn, hopefully improved) working conditions. These latter, however, as well known, cannot refer to wage (“pay”) because of the lack of EU competence on the subject under the social chapter (art. 153 par. 5 TFEU⁴).

On the other hand, undoubtedly, wage increase has to be considered one of the most significant parameters in evaluating the improvement of living conditions at transnational level. Therefore, the lack of competence in this field is likely to hinder the accomplishment of the EU mission as defined by art. 151 TFEU. Neither such a lack can be compensated by the role Social Partner are suppose to play according to art. 154 TFEU⁵, since such a role is clearly limited to the competences recognised to the EU by art. 153, par. 1 TFEU.

However, this does not mean that, even “at Union level”⁶, collective action carried out by trade unions outside the scope of art. 154

⁴ Art. 153 par. 5 TFEU reads: “The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.”.

⁵ Art. 154 TFEU reads: “1. The Commission shall have the task of promoting the consultation of management and labour at Union level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties. 2. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action. (..)”.

⁶ See art. 155 TFEU which reads: “1. Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements. 2. Agreements concluded *at Union level* shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States *or, in matters covered by Article 153*, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed. (..)”.

TFEU shall not be considered as the most relevant and effective tool in order to increase wage standards and thus to improve living conditions. On the contrary, taken into account the exclusion provided by the above mentioned art. 153, par. 5, collective action has to be deemed to be the sole legitimate tool for transnational wage setting within the EU Law perspective.

3. Collective action as fundamental right at EU level: the legal background.

This can be considered one of the reasons why the reaffirmation of the right of collective bargaining and action within art. 28 of the Charter of Fundamental Rights of the EU (hereafter CFREU)⁷ has been optimistically welcomed as decisive in view of eventually providing collective action with a clear status at EU level. However one may wonder if this is really the case.

A first question that has been risen immediately after the solemn proclamation of the CFREU on December 2000 in Nice was referred to its legal value. This question has now been answered by art. 6, par. 1 TEU which recognised to the CFREU "the same legal value as the Treaties" adding that "the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties."

This leads to the second double question that, on the contrary, still remains open - to what extent "Community law" can limit "the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action"? What if "national laws and practices", also referred to in art. 28, are in conflict with "Community Law"?

To the last part of the question the answer seems to be the prevalence of "Community law" on national laws and practice, as recently confirmed by art. 1, par. 7 dir. 2006/123 which reads: "This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action *in accordance with national laws and practices which respect Community law.*"

⁷ Art. 28 CFREU reads: "Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the *right* to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."

The first part of the question seems to be more difficult to answer, above all if we take into account art. 52, par. 1 CFREU which reads: "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.". Limitation by law, the respect of the essence of the right and of the principles of proportionality, necessity and general interest have to be considered conditional to any kind of restriction the same definition of a fundamental right can afford.

If such a conclusion perfectly fits to the fundamental nature recognised to all the rights (and freedoms) reaffirmed by the CFREU, it fits even more to the right of collective action that, as we have tried to demonstrate in the above, can be considered, at the moment and probably also for the future, the only mean by which the harmonisation of living conditions, while the improvement has been maintained, can be achieved at EU level. The fact that, according to art. 34, par. 3 CFREU, "In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a *decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices*" has now to be confronted with the statement that "the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties." (art. 6, par. 1 TEU). Indeed, the recognition and the respect of such a right (if already existing at national level) does not mean that EU competences in the field go beyond the coordination perspective provided by the already mentioned art. 153 TFEU as far as the "the combating of social exclusion" and the "modernisation of social protection systems" are concerned.

Therefore, one may wonder if, after the coming into force of the Lisbon Treaty, particularly art. 6, par. 1, the ECJ could still reach the same conclusions recently reached in the already mentioned *ITWF* and *Laval* cases at least with regard to what we may call the 'fundamental right argument'. In fact, from the moment the Lisbon Treaty will be ratified by all Member States, the ECJ will have to test any kind of limitation to the right of collective action, whether provided by "Community law" or by "national legislations and practices", against the above mentioned conditions required by art. 52, par. 1 CFREU, i.e. limitation by law, the respect of the essence of the right and of the principles of proportionality, necessity and general interest. Thus just reversing the way of reasoning adopted till now, according to which

collective action has to be seen as a limitation to the exercise of fundamental freedoms and therefore to be warranted and allowed "only if (a) it pursues a legitimate objective compatible with the Treaty (*protection of workers*) and (b) is justified by overriding reasons of public interest (*protection of workers*); if that is the case, (c) it must be suitable for securing the attainment of the objective which it pursues (*suitability or appropriateness*) and (d) not go beyond what is necessary in order to attain it (*proportionality*)"⁸.

However, since, at the time of writing, the Treaty of Lisbon has not yet come into force – and we do not know if it will, taking into account the Irish decision to ratify it by a referendum – it is worth to propose some reasoning about the (highly questionable) way by which the ECJ has approached the subject of the right of collective action, i.e. the only mean by which harmonisation of living conditions, while the improvement is maintained, can be achieved at EU level.

4. Fundamental freedoms as limits and conditions for collective action in transnational wage setting at EU level: *ITWF, Laval* and *Rúffert*.

As well known, the ECJ has been called to pronounce three times in less than six months on the legitimate exercise of collective action which was *de facto* conditioning and allegedly limiting the freedom of establishment and, above all, the freedom to provide transnational services by posting workers of an enterprise. In all the three cases, *ITWF*, *Laval* and *Rúffert*⁹, at stake was the request of (maintaining) working conditions which differ from those ones afforded by the employer to the workers. Nevertheless, only in *ITWF* such a claim was directly supported by the Union representing the workers concerned against an employer (Viking) who wanted to reflag one of its ships just to be able to apply Estonian working conditions instead of Finnish ones, thus reducing the existing wage standards. In *Laval* and *Rúffert*, indeed, the anti-dumping concern had led, in the first, the Swedish legislature to let the Swedish unions free to try to impose a bargaining on wages as far as (Latvian) posted workers were concerned, and, in the second, the German (regional) legislature to ask for the application of local collective agreements as a condition to be fulfilled by enterprises that wanted to compete for a public procurement procedure.

⁸ ECJ *ITWF*, n. 75; *Laval* n. 101. On the questionable relevance of the principle of balancing see below par. 4.1.

⁹ ECJ 3 April 2008 Case 346/06 *Rúffert*.

If in *ITWF* the solidarity strike called by the International Transport Workers Federation was asked by the Finnish trade union in order to support its collective action directly brought against the Finnish ship-owner Viking, in *Laval*, solidarity collective action was the sole mean by which the Swedish unions might try to convince Laval un Partneri to get involved in a negotiation its workers cannot ask for due to the existence of an *ad hoc* collective agreement quickly signed in Latvia.

However, it is apparent that in all the three cases the ultimate goal of trade unions and legislatures was to avoid that the exercise of a fundamental freedom by the relevant employer will have as a direct or indirect side effect the worsening of wage standards and, consequently, of living conditions, thus contradicting the principle of 'harmonisation in the improvement' laid down in art. 151, par. 1 TFEU.

In *ITWF* the effect would have been direct, since lower Estonian wage conditions would have applied to Finnish workers. In *Laval* and *Rüffert* it would have been indirect, by pushing Swedish and German employers to question collectively bargained (national or regional) wage standards in order to be able to compete with enterprises coming from (new) Member States with lower living conditions. On the other hand, opting for the prevalence of the interest of the posting enterprise not to modify its wage conditions will mean to provide it with a competitive advantage which can be challenged under the just recalled principle of 'harmonisation in the improvement'. The same will happen by allowing a Finnish ship-owner to reflag a ship only because of the convenience it may have in terms of wage lower conditions.

In this view, also the establishment of the principle of "minimum rates of pay" by art. 3, par. 1 of EC directive 96/71 on posted workers¹⁰, which has to be guaranteed by the employer whatever the country of origin of the worker, does not seem to be effective in order to avoid that instead of producing the 'harmonisation in the improvement' European integration will reduce itself to a race to the bottom for working and thus living conditions. On this point we will come back later, dealing with some reform scenarios. Now it is time to focus on how the ECJ has approached the issue of the clash between the fundamental right of collective action and market freedoms.

First of all we have to highlight that, as recently and brilliantly reminded by Antonio Lo Faro¹¹, both *ITWF* and *Laval* are fruits of the

¹⁰ On that point see G. ORLANDINI, 'I diritti dei lavoratori migranti nell'ambito del mercato dei servizi', in S. GIUBBONI and G. ORLANDINI (eds.), *La libera circolazione dei lavoratori nell'Unione europea*, (Bologna: Il Mulino, 2007), 85.

¹¹ See A. LO FARO, 'Diritti sociali e libertà economiche del mercato interno', 71.

poisoned tree of *Rush Portuguesa*¹² in which the ECJ, due to the fact that, at that time, art. 39 TEC (now art. 45 TFEU) on free movement for workers was not applicable to Portugal, consequently referred to art. 49 TEC (now art. 56 TFEU) in order to avoid that a Portuguese firm would be obliged to hire French workers as a condition to operate in France. Workers protection against discrimination based on nationality was the aim, not social dumping. This was recognised by the same ECJ when affirming that: "Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means."¹³.

Unfortunately, the positive intent of protecting workers which moved the ECJ to look beyond art. 39 in order to find another reliable juridical basis for its anti-discriminatory discourse, opened the way to a total (and unintended?) overlapping of art. 39 by art. 49 which became the one and only provision of the Treaty to refer to in order to define the legal and contractual treatment applicable to (temporary) transnational provision of work.

This was even more regrettable since only one year later in *S ger*¹⁴ the ECJ affirmed that art. 49: "requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.". Not surprisingly, since the same reasoning had been proposed by the ECJ three years before in *Daily Mail and General Trust* referring to art. 43 TEC (now art. 49 TFEU)¹⁵.

Therefore, in the understanding of the ECJ, both provisions cannot be seen anymore as antidiscrimination rules in the sense that they secure the same treatment for national and non national enterprises moving abroad. On the contrary, by claiming for the "abolition of any restriction", they allow the discrimination of enterprises from the host Country which are committed to national collective agreements and the discrimination of

¹² ECJ 27 March 1990 Case 113/89, *Rush Portuguesa*, ECR 1990, I-01417.

¹³ ECJ *Rush Portuguesa*, n. 18.

¹⁴ ECJ 25 July 1991 Case 76/90, *Manfred S ger*, ECR 1991, I-04221, n. 12.

¹⁵ ECJ 27 September 1988, C-81/87, *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.*, ECR 1988, 05483.

workers from the Country of origin who cannot benefit from the highest wage standards in case paid to workers from the host Country.

In such a perspective, the already mentioned art. 3, par. 1, directive n. 96/71, obliging Member States to guarantee, within the "nucleus of mandatory rules for minimum protection"¹⁶, "minimum rates of pay", is likely to produce at least three negative effects: firstly, by excluding posted workers from the enjoyment of the equal treatment principle provided for by art. 39 to migrant workers, simply because they are not employed by an enterprise based in the host Country; secondly, by obliging trade unions to bargain a *minimum* rate of pay at national level in order to avoid the legislature to intervene on wages, thus interfering in a field traditionally ruled by collective bargaining; thirdly, by call into question the same legitimacy of collective action aimed at obtaining higher wages for posted workers and to avoid the above mentioned race to the bottom.

4.1 Limitations in purposes and contents for collective action after ITWF and Laval.

As confirmed by *Laval*, the combination of the controversial interpretation of art. 49 with the "minimum rates of pay" principle is likely to deeply affect the very essence of the right of collective action i.e. the free definition, by trade unions, of the purposes and of the contents of the bargaining process and, thus, when needed, of industrial action. Which is totally against "national legislations and practices" of all Member States, even those providing the more restrictive regulations on strike¹⁷. As a matter of fact, none of them is prohibiting collective bargaining and action if these are aimed at the conclusion of a collective agreement¹⁸, this being the case both in *ITWF* and *Laval*.

Therefore, it is worth explaining how it has been possible for the ECJ to reach this socially unacceptable conclusion by briefly analysing the reasoning followed in *ITWF* and, above all, in *Laval*.

First, by summarily affirming the existence of a horizontal direct effect¹⁹ of art. 49 TEC, thus applicable also to trade unions as

¹⁶ ECJ *Laval*, n. 108.

¹⁷ As it would happen in Italy, for instance. On this point see G. ORLANDINI, 'Considerazioni sulla disciplina del distacco dei lavoratori stranieri in Italia', (2008) *Rivista Italiana di Diritto del Lavoro*, I, 73-74.

¹⁸ This seems to be the case now also for solidarity action as witnessed by a recent decision from the German *Bundesarbeitsgericht* (19.6.2007, 1 AZR 396/06) according to which also this form of action falls within the scope of application of art. 9 par. 3 *Grundgesetz* (the German Constitution) and, within the usual limit of *Verh Itnism Bigkeit*, is therefore legitimate.

¹⁹ ECJ *Laval*, n. 98; as for the horizontal direct effect of art. 43 TEC see ECJ *ITWF*, n. 66.

"associations or organisations not governed by public law". They are then, on the one hand, equalise to "bodies governed by public law", but, on the other seen as "bodies *not* governed by public law" when it comes "to avail themselves of that provision (*art. 3, par. 10 dir. n. 96/71*) by citing grounds of public policy in order to maintain that collective action such as that at issue in the main proceedings complies with Community law" (*Laval n. 84*). So that, trade unions has to comply with art. 49 as, in relation to it, they are assimilated to "bodies governed by public law", but they cannot avail themselves of the provision laid down by art. 3, par. 10 - according to which Member States, *for grounds of public policy*, may apply terms and conditions of employment on matter other than those referred to in art. 3, par. 1 of the directive - as, in relation to it, they are *not* considered "bodies governed by public law". Which sounds at least paradoxical²⁰.

Second, collective action falls within the scope of application of art. 49²¹, no exemption being allowed under: (a) the lack of competence argument; (b) the fundamental right argument, (c) the *Albany* argument. Let us analyse them separately, using the same wording of the ECJ.

(a) "In this regard, it suffices to point out that, even though, in the areas in which the Community does not have competence, the Member States remain, in principle, free to lay down the conditions for the existence and exercise of the rights at issue, they must nevertheless exercise that competence consistently with Community law (..). Therefore, the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the domain of freedom to provide services.". Which seems to be convincingly consistent with the wording of art. 137, par. 5 that reads: "The provisions of *this* Article does not apply to (..)."²².

(b) "(..) the exercise of the fundamental rights (..) does not fall outside the scope of the provisions of the Treaty. Such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality (..). It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Community law inapplicable

²⁰ For an opposite view, see S. Sciarra, '*Viking e Laval*', 262 - 263. Our view is shared by M. V. Ballestrero, '*Le sentenze Viking e Laval*', 388.

²¹ ECJ *Laval*, nn. 87 - 88 and 95; and under the scope of application of art. 43: see ECJ *ITWF*, n. 55.

²² ECJ *ITWF*, n. 41; *Laval* n. 88. According to S. SCIARRA, '*Viking e Laval*', 258-259, the problem is the lack of a Community legislation, compatible with the internal market, regulating social dumping.

to such action, taken against an undertaking established in another Member State which posts workers in the framework of the transnational provision of services."²³ A vision that can be shared only if the limitations on the exercise of the right to take collective action are provided for *by law* and respect the *essence* of those rights and freedoms and, subject to the principle of proportionality, these limitations 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 for art. 52 CFREU).

(c) "(..) It cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced to a certain degree."²⁴ A summary and unmotivated statement clearly contradicted by all Member States' legislations and practices, according to which a certain limitation of market freedoms must be considered inherent to the very essence of the right to take collective action.

Third, "the right of trade unions of a Member State to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement for the building sector – certain terms of which depart from the legislative provisions and establish more favourable terms and conditions of employment as regards the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 and others relate to matters not referred to in that provision – *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."²⁵ Here we can really grasp how deep the combination of the *S ger* formula with the "minimum rates of pay" principle is affecting the very essence of the right of collective action.

Being *this kind of* collective action considered as a restriction on the freedom to provide services (and of establishment, in the *ITWF* case), this can be warranted "only if (a) it pursues a legitimate objective compatible with the Treaty and (b) is justified by overriding reasons of public interest; if that is the case, (c) it must be suitable for securing the attainment of the objective which it pursues (*suitability or*

²³ ECJ *ITWF*, n. 47; *Laval*, n. 95.

²⁴ ECJ *ITWF*, n. 51–54. On the relationship between competition and solidarity at EU level from an Italian perspective, see S. SCIARRA (ed.), *Solidarietà, mercato e concorrenza nel welfare italiano. Profili di diritto interno e comunitario*, (Bologna: Il Mulino, 2007); M. CORTI, *Contrattazione collettiva, libera circolazione e concorrenza in Europa*, (2007) *Rivista Giuridica del Lavoro*, I, 773.

²⁵ ECJ *Laval*, n. 99.

appropriateness) and (d) not go beyond what is necessary in order to attain it (*proportionality*)”²⁶.

Furthermore, “since the Community has thus²⁷ not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital (e) must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of art. 136 EC, *inter alia*, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour (*balancing*).”²⁸.

(a-b) Fortunately, protection of workers is considered by the ECJ as a legitimate objective/overriding reason of public interest and “*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.”²⁹. But ... “(..) with regard to workers posted in the framework of a transnational provision of services, their employer is required, as a result of the coordination achieved by Directive 96/71, to observe a nucleus of mandatory rules for minimum protection in the host Member State.”³⁰. Therefore collective action by a trade union of the host Member State will be justified in the light of the public interest objective (*protection of workers*) only if it is aimed at obliging an undertaking established in another Member State to comply as regards minimum pay³¹. In fact, as already highlighted in the above, “not being (*trade unions*) bodies governed by public law, they cannot avail themselves of that provision (*art. 3, par. 10 dir. n. 96/71*) by citing grounds of public policy in order to maintain that collective action such as that at issue in the main proceedings complies with Community law.”³².

(c) Fortunately again “(..) it should be borne in mind 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.”³³. Thus, at least collective negotiations and collective

²⁶ ECJ *ITWF*, n. 75; *Laval* n. 101.

²⁷ Reference has to be made to former art. 3, par. 1 TEC repealed and replaced, in substance, by art. 3 to 6 on competences – see also art. 3, par. 3 TEU.

²⁸ ECJ *ITWF*, n. 79, *Laval* n. 105.

²⁹ ECJ *Laval*, n. 107.

³⁰ ECJ *Laval*, n. 108.

³¹ ECJ *Laval*, n. 109 and 110.

³² ECJ *Laval*, n. 84.

³³ ECJ *ITWF*, n. 86.

agreements, seem to be inherently suitable and appropriate as restrictions to the exercise of fundamental freedoms which are aimed at protecting workers' interests. Something very close to the *Albany* argument.

(d) When it eventually comes to the proportionality test, its relevance has to be accurately evaluated. According to the ECJ "(..) it is for the national court to examine, in particular, on the one hand, whether, *under the national rules and collective agreement law applicable to that action*" the trade union involved "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 the relevant employer, "and, on the other, whether that trade union had exhausted those means before initiating such action."³⁴. Only apparently the ECJ is relying on national rules, where existing, in order to decide whether collective action does not go beyond what is necessary in order to attain the objective it pursues. Indeed, by asking the national judge to verify if the trade union involved "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" and "whether that trade union had exhausted those means before initiating such action", the ECJ is *de facto* introducing a *last resort principle* against which every transnational collective action has to be tested³⁵ - before it takes place, if that trade union want to escape any damage liability.

(e) Within such a conditional framework, one may ask whether the principle of balancing, finally affirmed by the ECJ, will be somehow beneficial to trade unions who want to engage in a legitimate transnational collective negotiations or action³⁶. To be honest, it does not seem it could be anyhow influential in passing the justification test all the restrictions to the exercise of fundamental freedom shall be submitted to. Balancing the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital against the objectives pursued by social policy will thus remain meaningless until when it will be possible to test - the other way round - the socially irresponsible exercise of fundamental freedom against the principles laid down by art. 52 CFREU

³⁴ ECJ *ITWF*, n. 87.

³⁵ See on it M. V. BALLESTRERO, 'Le sentenze *Viking e Laval*, 379 and 383.

³⁶ The same question, followed by a negative answer, is addressed by M. V. BALLESTRERO, 'Europa dei mercati e promozione dei diritti', WP C.S.D.L.E. "Massimo D'Antona".INT - 55/2007, 20 ff.

as a restriction to the exercise of collective action as a fundamental right³⁷.

5. Collective action and wages: negative effects of the EU hidden competence under the fundamental freedom chapter.

What seems to follow from the foregoing, is the existence of a hidden competence on collective action and on wages under the fundamental freedom chapter, deriving, on the one hand, from the already recalled combination of the controversial interpretation of art. 49 as a discriminatory provision³⁸ with the "minimum rates of pay" principle laid down by art. 3 par. 1 directive 96/71, and, on the other, from the paradoxical consequences produced by the summarily affirmed horizontal direct effect of art. 43 and 49 TCE, not accompanied, at least in the case of posting, by the recognition to trade unions of the right to cite grounds of public policy (*protection of workers*) in order to widen the scope of collective action otherwise restricted to a "nucleus of mandatory rules for minimum protection"³⁹ by the above mentioned directive.

Furthermore, as a restriction on the exercise of fundamental freedoms, collective action has to be – beforehand – evaluated according to the last resort principle in order to pass the proportionality test.

From a socially oriented perspective of the European integration at least two criticisms has to be moved to the legitimate exercise of such a hidden competence. The first falls under the 'essence of fundamental right' argument. Restricted in its scope and legitimacy as described in the above, the right to collective action can hardly be considered secured in its very essence as required by art. 52 CFREU. The second falls under the 'harmonisation in the improvement' argument. Indeed the benefit the "minimum rates of pay" principle is likely to bring to posted workers is not comparable to the damages the same principle is likely to cause to the free exercise of collective action in terms of obliging trade unions of the host Member State to bargain, nationally, on a minimum level basis. This, as clearly shown by *Rúffert*, calls into question the very existence of wage standards which exceed that level, also for national workers of the sector of industry involved.

To the just drawn picture we have to add the lack of EU competence under the social policy chapter on wage ("pay") and collective action. Reality shows that it has been short-sighted of European

³⁷ See on it B. CARUSO, 'I diritti sociali', 35.

³⁸ See above par. 4.

³⁹ ECJ *Laval*, n. 108.

trade unions to stand for the exclusion of those subjects from the EU social competences. In fact this has not meant the exclusion of EU intervention under the market freedom chapter. It has only made now impossible for a hypothetical political will to oppose to the ECJ dealing with social issues as mere restrictions on the exercise of fundamental freedoms, thus to be submitted to the justification test.

6. “Minimum rates of pay” or equal treatment for posted workers? Weighing up pros and cons in a transnational bargaining perspective.

It is clear that the “minimum rates of pay” principle does not fit to the vision of a socially oriented European integration we have advocated in the above⁴⁰. The same principles which support that vision in the Treaties will rather suggest the equal treatment principle for substitute to it as far as the definition of working conditions of posted workers is concerned. Indeed, the ‘harmonisation in the improvement’ of living condition and the strengthening of economic and social cohesion at EU level which will follow it, would be more effectively achieved by securing to posted workers the same wage conditions national workers usually enjoy. Moreover, equal treatment will also led to the “abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment”, inherent to the freedom of movement for workers within the EU (art. 45, par. 1 and 2)⁴¹.

Therefore, if EU wishes to move towards a more socially oriented integration, a substantive modification of art. 3 par. 1 directive 96/71 seems to be crucial. Otherwise it will be recommendable for trade unions and for those member States who have already adopted that principle, Italy for instance, to lodge a claim in front of the ECJ in order to ask for the withdrawal of art. 3, par. 1 because its conflict with art. 45, par. 1 and 2, art. 151, par. 1 and art. 174 TFEU.

On the other hand, it is clear that the competitive advantage of undertakings based in Member States with a lower wage standards will vanish as a result of the introduction of the equal treatment principle between national and posted workers. In the opinion of many, this has to be considered unacceptable because of its negative consequences on the employment opportunities of workers coming from the new Member

⁴⁰ See above, par. 1.

⁴¹ On this point see also art. 18, par. 1 TFEU which reads: “Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”.

States. However, by accepting such a criticism one assumes companies can compete only on labour cost, which is obviously neither true nor recommendable.

Also the anti-protectionist argument has to be rejected, given that, defending a higher level of workers protection by demanding other Member States and enterprises to increase their protective standards will serve the cause of achieving the 'harmonisation in the improvement' of living condition and the strengthening of economic and social cohesion at EU level which will follow it.

Problems linked to the overall financial sustainability of a straight introduction of the equal treatment principle for posted workers could be taken into the due consideration and faced in a less drastic way by stimulating social partners at national and European level to develop forms of transnational collective bargaining aimed at first reducing and then gradually filling the existing wage gap⁴².

Such objectives have been developed by the European Commission within the Social Agenda 2005 - 2010⁴³ according to which: "In the EU, there is still considerable potential for facilitating improvements in quality and productivity through more intensive cooperation between economic players. Providing an optional framework for transnational collective bargaining at either enterprise level or sectoral level: (a) could support companies and sectors to handle challenges dealing with issues such as work organisation, employment, working conditions, training. (b) It will give the social partners a basis for increasing their capacity to act at transnational level. It will provide an innovative tool to adapt to changing circumstances, and provide cost-effective transnational responses. Such an approach is firmly anchored in the partnership for change priority advocated by the Lisbon strategy. The Commission plans to adopt a proposal designed to make it possible for the social partners to formalise the nature and results of transnational collective bargaining. The existence of this resource is essential but its use will remain optional and will depend entirely on the will of the social partners."

⁴² For a sceptical position on this point see W. STREECK, 'The Internationalisation of Industrial Relations in Europe: Prospects and Problems', (1998) *Politics & Society*, 429, who was pleading for a growing convergence between national bargaining systems in order to cope with their diminishing capacity to "override and correct market forces" (452). The solution proposed in the text is supported by B. CARUSO, 'I diritti sociali', 40 and by R. PESSI, 'Diritto del lavoro: bilancio di un anno tra bipolarismo e concertazione', Dipartimento di Scienze Giuridiche, Collana Studi, n. 5, (Padova: CEDAM, 2008), 88.

⁴³ COM(2005) 33 final.

At the time of writing the Commission has not yet adopted its proposal and it is very unlikely it will do it in a near future, any reference to transnational collective bargaining being absent from the *Renewed Social Agenda*⁴⁴. Nevertheless, in 2004, the Commission selected a group of independent experts asking them to deliver a juridical study on an optional European framework for transnational collective bargaining⁴⁵. The study has been presented on May 2005 to social partners and still represents a useful contribution for an open debate⁴⁶.

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⁴⁴ COM(2008) 412 final.

⁴⁵ As a matter of fact, as the ECJ (13 September 2007, Case 307/05, *Del Cerro Alonso*), recently stated: "39. (...) as Article 137(5) EC derogates from paragraphs 1 to 4 of that article, the matters reserved by that paragraph must be interpreted strictly so as not to unduly affect the scope of paragraphs 1 to 4, nor to call into question the aims pursued by Article 136 EC. 40. More particularly, the exception relating to 'pay' set out in Article 137(5) EC is explained by the fact that fixing the level of wages falls within the contractual freedom of the social partners at a national level and within the relevant competence of Member States. In those circumstances, in the present state of Community law, it was considered appropriate to exclude determination of the level of wages from harmonisation under Article 136 EC et seq. 41. The 'pay' exception cannot, however, be extended to any question involving any sort of link with pay; otherwise some of the areas referred to in Article 137(1) EC would be deprived of much of their substance.". These principles have been confirmed and further developed by ECJ 15 April 2008, Case 268/06, *Impact*, n. 120-126. I owe these references to Massimiliano Delfino.

⁴⁶ E. ALES (co-ordinator), S. ENGBLOM, T. JASPERS, S. LAULOM, S. SCIARRA, A. SOBCZAK, and F. VALDÉS DAL-RÉ, *Transnational collective bargaining: Past, present and future*, available at: http://ec.europa.eu/employment_social/labour_law/docs/transnational_agreements_ales_study_en.pdf. An illustrative survey on its contents may be found in European Industrial Relations Review, September 2006, p. 27 ff. On the report see A. LO FARO, 'La contrattazione collettiva transnazionale: prove di ripresa del dialogo sociale in Europa?', (2007) *Giornale di diritto del lavoro e delle relazioni industriali*, 2007, 568. On the report and more generally on the topic, see E. ALES, 'Establishing an Optional Legal Framework for a European Union Transnational Bargaining System: Possible Grounds, Instruments and Contents for a Suitable Legislative Action', forthcoming, ILO, Geneva.

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