



Viking-Laval-Rüffert: Economic freedoms versus fundamental social rights – where does the balance lie?

Debate organised by Notre Europe and the European Trade Union Institute

The Court of Justice of the European Communities and the “Social Market Economy”

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How to balance the application of the European Union’s free movement rules - in particular, the right to work and provide services in another member state - with the maintenance of different national social systems?

In particular, how will these freedoms affect trade union rights such as the right to collective action and collective bargaining?

These questions are the object of much debate, following three recent rulings adopted by the European Court of Justice.

The ETUI and Notre Europe have therefore decided to launch this forum, in which users will find information on the different cases and analysis offered by a variety of experts.

The Court of Justice of the European Communities was asked one question: May a company based in the Union and wishing to exercise its freedom of movement, either to offer its employees’ services in an other Union State (the *Laval* case) or to settle in a EU State where the salaries are lower (the *Viking Line* case) contest collective action undertaken by a workforce wishing to impose on the said company the higher salary rates in force in their countries? The Court’s answer is twofold. For one thing, this question does indeed come under its jurisdiction. For another, it is wholly feasible to conciliate economic and social necessities – the freedom of movement the treaty grants enterprises on the one hand and on the other the right to arbitration and collective action, including the right to strike the national constitutions allow workers – without sacrificing either.

Must these two decisions be read as the mechanical implementation of a Treaty unilaterally committed to free trade and economic efficiency and eyeing public intervention or social policy only as an “easement”, to

be curbed or disallowed? By no means. The Court presents them as the expression of a balanced political theory, which it has arrived at on the basis of ambiguously framed Treaty provisions. This theory is hardly new; it is shared by quite a few of Europe's leaders and finest minds. Ever heard of the "Social Market Economy"? This German-grown reference introduced in the Constitutional Treaty was resumed in the Lisbon Treaty for the very purpose of counterbalancing the economic construction with a social integration formula. In both judgments, it is roughly spelt out as follows: "... *The Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.*" This political theory is grounded in the combat against the European construction's "social deficit" through the introduction of a social counterbalance to market considerations. It does however harbour some contradictions. It is the theory of a Union in which the means for social integration are actually very limited whilst Member States have developed strongly diverging social policies and models, hardly suited to harmonisation. However, in this theory, there is also a ploy. The Union seeks to make its social engagement feasible by securing for all EU citizens the right of access to a set of fundamental social and public goods (employment, health, justice, education...). To that end it has delivered itself of a catalogue of fundamental social rights such as the right of collective bargaining and action. Only it cannot guarantee the material conditions for exercising these rights since they fall entirely within the remit of the Member States who regulate their availability and application. So that there is good cause to wonder just how credible this counterbalance is. Has the EU reached a balance?

In both those rulings, the Court claims it has achieved it and, in theory, so it has. In practice this achievement remains dubious. Whatever the case may be, it is unfair to read these two rulings as a triumph of "capitalist freedom of action". It is true that the Court has for a long time striven to ensure the prevalence of Treaty provisions relating to economic freedoms over any contrary demand. But its reference framework has now been broadened: it recognises that there is a case for conciliating these demands with other contradictory demands arising from social policies and notably from the fundamental right allowed workers and organised labour to negotiate and to resort to industrial action. What, then, is one to make of such an assertion of the primacy of economic freedoms as: "*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* [meaning: rights to social bargaining and to strike] *they must nevertheless exercise that competence consistently with Community law* [meaning: economic freedoms]"? It addresses a concern for "integrating" not just in economic but also in social terms. The Court uses the freedoms of movement as the framework for shifting national actors' preferences. It is necessary for all powers in Europe to "de-nationalise" their thinking and decision-making models, so that interests coming from or vested in other Member States may be taken into account. This is the condition to a genuine integration. Yet what powers are we talking about? First, the powers of the State: taxation authorities, social authorities, immigration authorities must resist narrowly financial and national drives and promote not only the integration of enterprises but also that of the citizens, employees, students and the unemployed of other Member States. Second, the economic powers: professional organisations, sport federation, bar councils... but also – and this is novel – collective powers. What is striking in those two rulings, and may come as a surprise, is that power is aligned with workers organisations and right with the employers. Now rights must be protected and powers curbed. It follows that, to all intents and purposes, the unions must, before wielding their collective

power, take into account the possible negative impact of their action on companies or workers established in or coming from other Member States. Is it fair to impose such restrictions?

It is possible that the Court was influenced by circumstances specific to the two cases (organised collective action leading to a blockade and to bankruptcy in the *Laval* case, refusal to take into account the company's commitment not to sack its employees in the *Viking Line* case). However, its analysis teaches us something else. It shows that dignity from which the action of the richest European States' workers derives its irreducible and absolute right is by no means a singular truth in the current situation in Europe. Dignity is a right and the foundation of all rights. But dignity does not take sides. Where the French jurist holds forth on worker's protection – and along with him, many freedom, progress and democracy-loving people, others – and along with them, many freedom, progress and democracy-loving people – point to the discrimination against workers from the Union's new Member States and the need to share the continent's wealth. The “two Europes” divide resurfaces. The deepening of the Community and the enlargement of the Union have not altered thought patterns. A shared sense of commonality in the Community has yet to come. Hence this suspicion each can nurture against everyone else: the defence of the workers is nothing but a smokescreen; what is being sought is no longer social protection in an enlarged community but the consolidation of entrenched power bases (those of the national trade unions for some, and of multinational corporations for others). The defence of rights in the Union is always understood as on two sides at once.

It may be necessary to start framing things differently. If European thought is so soon dragged back into its traditional categories and assertions, it is because it refuses to ride the risks of a true “European Community”

project, with all the ambiguity apparent in a project where open solidarity and the defence of national interests, interdependent cooperation of the Member States and the competition between their fiscal and social systems co-exist. These two rulings say that the risk is worth taking and if they must be criticised it is not for having gone too far but on the contrary for not running the risk to its logical conclusion. For, if there is such a thing as collective unionised power, it should have been left to handle the contradiction between economic and social demands. The Court allows the State this option when it allows it to oppose the application of freedoms of movement to individuals in the name, say, of the social security system's financial stability, a certain conception of human dignity, sustaining its care capacity on its territory, the coherence of its fiscal system or any other justification of economic, social or moral nature. Now in these two rulings, the Court denies collective power the same possibility to act and to justify itself. It is indeed a power but a power failing to rise to the ideal of a Community both economic and social. This default of power is apparent in two respects: in the fact that the Court refuses to entrust the social partners with the business of negotiating piecemeal the wage rates in enterprises as provided for in Swedish law; and in the fact that union action is found legitimate only if it relates to the specific defence of workers seconded or relocated, not if it fights more broadly for the defence of a social model. What is at issue, in the eyes of the Court is not so much the substance of social obligations that Community Law allows each State to fix on its territory; it is the way these obligations are fixed. According to the Court, European enterprises must be able to rely on a social framework defined at legislative or governmental level by each EU Member State. The State alone is habilitated to define the social model applicable to all businesses on its territory. This condemns autonomous collective actions undertaken to the same end. Thus the Court of Justice drew back at the point of drawing all the consequences from its conciliation model. The State, the legislator

remain the frame of reference. Far from condemning public action, these two rulings reinforce State interventionism in the social sphere – in the event to the detriment of legitimate social demands.



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