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*

Political answers to judicial problems? Europe after Viking, Laval and Rüffert

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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.

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The Viking (2007), Laval (2007) and Rüffert (2008) rulings are further steps in a long history of judicially imposed European liberalization. From a German perspective, besides the effective liberalization of public services, the liquidation of the monopoly of the former Federal Employment Office and restrictions on both public banking and public broadcasting are noteworthy examples (for detailed discussions, see the writings of Fritz Scharpf). In its company law rulings on Centros (1999), Überseering (2002) and Inspire Art (2003), the ECJ forbid Member States to apply the so-called seat-of-administration rule (which implied that the company law of the state in which a firm was domiciled, rather than the law of the nation in which it was incorporated, had to be imposed on firms) – with as yet unforeseeable consequences for German supervisory board codetermination. In October 2007, the ECJ ruled that the *Volkswagengesetz* that protected the automobile manufacturer against hostile takeovers constituted an unlawful restriction on the free flow of capital.

In this contribution to the discussion, I would like to emphasize two points. First, I argue that it is important to consider the general implications of the ECJ's competence imperialism; and, second, I suggest that we are facing a situation in which a *juridical problem* requires *political*, rather than juridical, *answers*.

I start with some remarks on the generality of the problem. In the cases at hand, the ECJ insists on its right to subordinate national labour law and social regulation to European law in order to remove restrictions on European-wide markets (promoting free movement of products, services, capital and personnel). The European "four freedoms" are, in essence, the freedom of capitalist action. Labour and social law aim at limiting, transcending and controlling capitalist freedoms, thereby making free market action socially acceptable. Therefore, the problem with ECJ imperialism is not just the uncontrolled transfer of competences to the European level. Rather, the problem is the subordination of "positive" regulations to the freedom of capitalist action.

In principle, many "positive" market-restricting regulations could be juristically removed once the ECJ's right to adjust national, non-Europeanised regulations is generally accepted – except for situations in which European judges discretionally accept "overriding reasons relating to the general interest" that justify restrictions on the "four freedoms". Why – as Austrian labour law professor Robert Rebhahn asked in response to the Viking and Laval rulings – should engine drivers have the right to strike when they thereby restrict the free movement of goods? Why, to cite another example, should the German legislator be allowed to impose supervisory board codetermination although some investors claim that codetermination legislation impedes free investment? The list of regulations that could be adjusted or totally removed by subordination under the "four freedoms" is long. Surely, the current European judges do not intend to remove them all. But it is also a fact that they are moving on and on.

ECJ imperialism, this is my second point, requires political answers – answers that are yet to be found. In Germany, the Viking, Laval and Rüffert rulings have, for the first time, initiated a critical discussion on "integration through law" and its consequences for the asymmetry of economic and social integration. Most comments, however, provide critiques of the legal foundations of the rulings. I do not claim that such critiques lack qualification; I suppose, however, that judicial answers might not make the general problem vanish. As early as the 1960s, the ECJ established – and the Member States accepted – the principles of supremacy and of a European law that provides market participants with rights vis-à-vis Member States (see the ECJ rulings on Van Gend & Loos, 1963 and on Costa/ENEL, 1964). Now these principles serve as vehicles for effective economic liberalization.

However, the fact that rulings may be in line with the logic of European law does not automatically imply that their consequences are socially and politically acceptable and, therefore, legitimate. The response to the rulings, therefore, must be a political one – a *transnational* political one, which makes the situation even more complicated, given the different interests of Member States, sectors, parties, employers and employees.

Many commentators state that we face a problem of insufficient political and social integration. In general, this is right. However, more competence transfers to the European level will not solve the problem discussed here. We may suffer from a lack of integration in the social and political sphere. The Viking, Laval and Rüffert cases, however, concern situations in which integration – *judicial* integration – has gone too far. Therefore, "more integration" cannot be the adequate answer. Until now, the Member States have grudgingly accepted the juristically imposed gradual, but transformative, subordination of their legislation to European law. A substantial conflict of competences, however, will arise sooner or later. And we had better start the discussion now.

In my view, we need to discuss questions like: Do we not need legal procedures that allow Member States to return European competences to the member states if they feel that the ECJ hurts the principle of subsidiarity? What would happen if a group of “coordinated”, “organized” Member States abstained from adjusting their strike laws and collective bargaining laws in response to the Viking, Laval and Rüffert rulings? Could, for example, the trade unions of the respective countries encourage their governments transnationally to do so? Do we not need an independent “competence court” to rule whenever competences are contested between Member States and the European level?

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