

Implementing EU Law on Services: National Diversity and the Human Rights Dilemma*

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1 Introduction

This paper emanates from the FORMULA project, which is devoted to studying the development and interplay at the European and national levels of the regulation of labour relations in the context of cross-border provision of services. In part, the object is to introduce the FORMULA project and where it stands at an intermediate stage of the project as a whole. Beyond this, the aim of this paper is to address some of the essential points that have emerged in the course of the first two and a half years of the project's research period, in particular how EU law by virtue of the case law of the European Court of Justice has evolved to a point of conflict with human rights standards considered fundamental in the field of labour law.

Part of the background for and platform of the FORMULA project was the increasing focus on cross-border service mobility in the wake of the EU enlargements in 2004 and 2007, epitomized by the strife over the «Bolkestein proposal» and a Services Directive, and the highly controversial cases – then pending – before the European Court of Justice in *Viking Line* and *Laval*. The ECJ's decisions in those two cases¹ were handed down right at the start of the FORMULA project

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* This is a revised and enlarged version of a paper given at the conference «Tradition and Law in a Changing Europe», organized by the Research Council of Norway on 4 November 2010, the 2010 edition of the annual 'Meeting Place' of the RCN sponsored program «Europe in Transition», which in addition to the FORMULA project includes two other projects, Legal

period, whereas the Services Directive was adopted in 2006 to be implemented by late 2009.² The Directive, the ECJ decisions, and the subsequent developments have obviously influenced FORMULA project issues and research efforts. And not only that. It is not too much to say that the research based literature on topics such as are at the centre of the FORMULA project has virtually exploded after the ECJ's decisions in *Viking Line* and *Laval* and the corollaries to the latter, the Court's 2008 decisions in *Rüffert* and *Luxembourg*.³ Thus the FORMULA project is set squarely at the centre of an on-going debate at European level and among EU/EEA Member States, in academic research as well as among social partners and EU institutions.

2 The Project, Aims and Methods

FORMULA – short for 'Free movement, labour market regulation and multilevel governance in the enlarged EU/EEA – a Nordic and comparative perspective' – is an international and interdisciplinary project. In general terms, FORMULA is focused on legal regulation, legislative developments and industrial relations structures and actors, and the interplay between them in a national, supra-national and multilevel governance context, in the field of cross-border provisions

Cultures in Transition – The Impact of European Integration, and The Transformation and Sustainability of European Political Order – EuroTrans. An earlier, essentially identical version of this paper was published on SSRN as University of Oslo Faculty of Law Research Paper No. 1/2011, available at <http://ssrn.com/abstract=1736561>.

¹ Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779, and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767.

² Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, (2006) OJ L 376, 36–68, to be transposed into national laws by 28 December 2009 (Article 44).

³ Case C-346/06 *Rechtsanwalt Dr Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989, and Case C-319/06 *Commission of the EC v Luxembourg* [2008] ECR I-4323.

of services involving cross-border movement of workers. This entails that the aims and methods are not just those of legal science. They encompass also social sciences perspectives and research, and the interplay between perspectives and methodological approaches is a key element in the project, generally and with regard to the comparative analyses that is also a central part of the project.

In more specific terms, the aim of the comparative analyses is to develop new, applicable knowledge about:

- 1) How the interplay between extension of the EU/EEA market, growth in cross-border services, supra-national regulations, and national responses, influence the evolving multilayered regime of labour market regulation, industrial relations and interest intermediation in the EU/EEA; this includes national reactions to and influence on EU legislative initiatives and different forms of adaptation in transposition.
- 2) The impact of these processes, and of the application of the Posted Workers Directive and the Services Directive in particular, on the national regimes of labour market regulation in the Nordic countries, Germany, Poland, and the UK; and
- 3) the aims, strategies, and institutional channels through which the political authorities and the social actors in these countries try to influence EU policies and regulations in this field.

Through (1)-(3) the overriding ambition is to

- 4) deepen the understanding of how interacting political, legal, socio-institutional and economic logics are influencing the interplay between the different institutions and organized actors shaping supra-national decision-making and national adjustments in the emerging multilayered European polity, with particular regard to the formation, adaptation, and application of legal regimes in the labour market.

Also, FORMULA is a problem driven project; it rests on a ‘grounded’ approach to the research issues. Thus the problem does not set out to employ or test a certain theory but is rather concerned with facts and their impact. Theory driven approaches are not fruitful to the issues and objectives with which the FORMULA project is concerned. Whereas one may conceive of various actor or interest perspectives that might be employed in analyzing the different issues and conflicts with which FORMULA is concerned, the foundational perspective of the project is that of labour law and industrial relations. Regulating transnational labour is a process and the project is concerned with how this emerges in a multifaceted environment. The protection of labour

rights in international human rights is another foundational element. The FORMULA project is not aimed at revising or rewriting human rights conventions or case law pertaining to them. Part of the project's object is rather to confront and assess EU legal developments within the project's remit with international human rights norms. A brief sample is given later in this paper.

For the project as a whole, we are not yet at a stage to draw firm conclusions. The first phase of the project, concluded in 2009, was devoted to developments at EU level. The second phase, concluded this September, was devoted to the evolvement at national level in the states covered by the project – Denmark, Finland, Norway and Sweden, and Germany, the Netherlands, Poland and the UK.⁴ Summarizing the latter developments is a too far-reaching task to be undertaken here.⁵ I must limit this presentation to some key issues, one of them being the 'human rights dilemma', just indicated, that has emerged in the wake of the legislative measures and case law at EU level which are central to the theme of the FORMULA project.

3 Points of Departure – Private International Law and National Autonomy

In the field of cross-border provision of services and conjunct movement of workers a fundamental part of the background is that of private international law. In spite of its appellation, private international law at the outset is national law, regulating conflicts of law and matters of jurisdiction in transnational contexts. Within the EU a certain harmonization was achieved with the 1980 Rome Convention (now superseded by the Rome I Regulation

⁴ All countries are represented in the FORMULA group of researchers; its members are presented at the project web-site, at www.jus.uio.no/ifp/english/research/projects/freemov/members/.

⁵ Working Papers from phase 1 and phase 2 of the project are available at the FORMULA web-site, www.jus.uio.no/ifp/english/research/projects/freemov/index.html, under Publications.

593/2008/EC).⁶ Quite simplified, parties to employment contracts are free to choose the applicable law, i.e. which law shall govern the contract. If no law is chosen, the contract is governed by the law of the country where work is ‘*habitually*’ carried out. For workers moving from one country to another, individually or, more importantly, as employees of a service provider to temporarily perform work in another country, this implies that it is the law of the home state, not that of the host state, that would apply. The host state can however apply mandatory rules of law, i.e. rules that cannot be derogated from by contract (now termed ‘overriding mandatory provisions’ meaning ‘provisions the respect for which is regarded as crucial by a country for safeguarding its public interests’; Rome I art. 9(1)).

Within this general setting, national regimes differed quite significantly. Simplifying once more, in one category we can place states with a ‘globalist’ approach whereby all labour and employment law rules apply also to workers from abroad on a temporary assignment in the host country, the UK and Poland being primary examples.

It has long been a rule of British law that, provided the individual falls within the personal scope of the relevant provision and has worked the relevant period of service, UK employment rights will apply, irrespective of the individual’s nationality and the duration of his or her employment in the UK.⁷

In another category we have states drawing a distinction between mandatory rules, often considered as rules of public law, and private law rules pertaining to the employment contract. Within this category considerable differences maintained, however. The notion of ‘*ordre public*’ and the role accorded to norms of that kind in labour market regulation are widely different. This is aptly illustrated by Belgium and France on the one side, where the larger part of public and private

⁶ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I, (2008) OJ L 177, 6–16.

⁷ See C. Barnard, ‘The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law: Case C-319/06 *Commission v Luxembourg*, Judgment 19 June 2008’ (2009) 37 *Industrial Law Journal* 122-132 (122).

labour law is considered *ordre public*,⁸ and on the other side Denmark, where contract regulation and contractual freedom is predominating.

This was furthered by the fact that the Rome Convention did not define the term 'mandatory rule' clearly. The margin for a national appreciation of what should be deemed a mandatory rule was used by the states to continue their different traditions in this field. In particular with regard to the extent to which and the reason why the applicable employment law is set aside by overriding mandatory rules and rules of public policy.⁹

Also, immigration law was employed to curtail labour immigration, including cross-border provision of services, and to protect the domestic labour market by imposing an obligation to pay wages in line with those prevailing, pursuant to collective agreements or otherwise, upon domestic and foreign employers alike. Here, Norway presents a very straightforward example.

It is easily appreciated that in such varied legal settings uncertainty would be a factor, for service providers as well as for their employees. In the project, we have been able to demonstrate how legislative efforts to harmonize Member States' law on this ground were initiated by the EC long before the emergence of plans for a single (internal) market. Those specific initiatives did not result, however; they dwindled into nothing and were shelved after the adoption of the Rome Convention in 1980. But we have also shown how those initiatives were brought back into the legislative process and how main features were retained in the drafting of the Posting of

⁸ On French law see, in particular, N. Meyer, *L'ordre public en droit du travail : Contribution à l'étude de l'ordre public en droit privé*. Paris: LGDJ, 2006; for Belgium e.g. Joined Cases C-369/96 and C-376/96 *Jean-Claude Arblade, Arblade & Fils SARL, as the party civilly liable, and Bernard Leloup, Serge Leloup, Sofrage SARL, as the party civilly liable* [1999] ECR I-8453. The situation in Luxembourg is similar, as illustrated by the *Luxembourg* case (fn. 3, *supra*).

⁹ Cf. M. Houwerzijl, *The Dutch understanding of posting of workers in the context of free services provision and enlargement: A neutral approach?* FORMULA Working Paper No. 23 (2010), at 5.

Workers Directive (PWD), 1996.¹⁰ The latter legislative process was set in the framework of the single market, implemented in 1992, and was triggered in particular by a key ECJ decision (*Rush*, 1990).¹¹ The Court's broad *dictum* in that case, seemingly granting Member States virtually unlimited discretion to decide to apply domestic labour law rules to foreign workers employed by a foreign service provider was obviously problematic to reconcile with the tenets of a single market and the Treaty based freedom to provide services¹² in that context.

As I have noted already, the private international law dimension is essential to the issues with which the FORMULA project is concerned. In short, key issues in the project are (i) what wages and working conditions are to be applied to workers who are moving to work (temporarily) in the territory of another Member State, (ii) should the employment relationship of these workers be governed by the law of the host state or the home state, or (iii) should terms and conditions of employment partly be regulated by both of the national laws?

4 Restricting National Autonomy – ‘Positive’ and ‘Negative’ Integration

Here is where the Posting of Workers Directive and ECJ case law pertaining to it have fundamentally altered the terrain, retreating territoriality in favour of supra-national EU law. Put differently, the economic has taken precedence over the social – the intended ‘social dimension’ of the single market has had to yield to market freedoms as construed on the basis of Treaty law. This is common ground by now; here I shall just briefly recall the essential features.

The Posting of Workers Directive does not regulate private international law issues comprehensively but lays down a ‘catalogue’

¹⁰ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, (1997) OJ L 18, 1–6.

¹¹ Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* [1990] ECR I-1417.

¹² Then Articles 59 and 60 EEC, subsequently Articles 49 and 50 EC, now Articles 56 and 57 TFEU.

(or 'list') of types of provisions in a host state's national law that are to apply, coupled with requirements as to their adoption, 'whatever the law applicable to the employment relationship' (Article 3(1)). The rules thus designated hence are mandatory rules, taking precedence over the worker's home state law or a choice of applicable law made in the employment contract – save for *more favourable* terms and conditions applying by way of *home* state (or the chosen) law, pursuant to Article 3(7).

The Directive was perceived by many at the outset as a *minimum* directive that allowed a host state to impose other types of term and conditions than those specified in the Directive and also to fix higher standards than such as are otherwise obtaining in the labour market (subject to not being discriminatory on grounds of nationality).

The ECJ, however, considering the PWD in the light of Treaty provisions, has emphatically construed EU (Community) law to the effect that Article 3(1) (and 10) of the Directive lays down a *maximum* regulation. By the *Laval*, *Rüffert* and *Luxembourg* sequel of decisions the Court has laid down that a foreign service provider cannot be compelled to abide by host state provisions beyond the scope of Article 3(1) and within this scope, higher standards than those applying as mandatory minima in the national labour market, or the relevant part of it, cannot be imposed. Consequently, for the rest, home state law or the employment contract parties' choice of law will prevail.

Moreover, and more important in the present context, the Court in *Laval* and the conjoint *Viking Line* decision (on free establishment, Article 43 EC) to lay down supra-national norms on a point where the EU does not have legislative authority, i.e. on issues concerning industrial action (strike, lockout, etc.); cf. Article 136(5) EC (now Article 153(5) TFEU). It is a common denominator of the two decisions that the possible recourse by a trade union to industrial action for the purpose of pressing for the acceptance of a demand relating to employment and terms and conditions is considered a 'restriction' under Articles 43, 49 EC. Just the *prospect* of being met with industrial action in the host state as a means for a trade union to impose demands on an employer amounts to a restriction on freedom of movement, at any rate if demands go beyond the permitted scope

under Article 3(1) PWD or if industrial action is a means linked in with demands for collective bargaining if the outcome is not clearly prescribed in advance or if bargaining may be long-lasting.¹³ The Court effectively held to suffice that a transnational service provider *may* be met by collective action as a means to be forced to sign a collective agreement or to be forced to enter into collective bargaining of ‘unspecified duration’ with a host country trade union. It can hardly be said more emphatically that the *state of domestic law* as such is a restriction in Community law; a threat to undertake industrial action or the actual implementation of such action is not a prerequisite.

Also in both decisions, the Court paid homage to the right to strike as ‘a fundamental right which forms an integral part of the general principles of Community law’. But this was immediately subjected to the reservation that such a right still must be within the bounds of general principles of Community law, namely those pertaining to the safeguarding of freedom of movement. The exercise of a fundamental right such as the right to take collective action, said the Court, ‘must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality ...’, and from that follows, in the Court’s view, ‘that the fundamental nature of the right to take collective action is not such as to render Community law inapplicable to such action’.¹⁴ Thus, having been placed squarely within the reach of Community law the right to take industrial action is immediately subjected to the general principles of ‘justification’ for restrictions on free movement to be permissible. This, in short, is a two-pronged issue. First, the question is for what purposes may collective action be used, or, in the standard language of free movement law, which objectives may constitute ‘an overriding reason of public interest’. The second question is how the *proportionality* test is to be conducted.

Again, I shall not go into any detail on this. It must be noted, however, that the Court’s approach in these cases in principle is nothing new and thus the outcome arguably could not be surprising. That being said, there was a strong line of arguments made that

¹³ See in particular *Laval* (fn. 1, *supra*) paras. 91–111.

¹⁴ Cf. *Laval* paras. 94–95.

demonstrates how the Court, had it so considered, could have reached different conclusions.¹⁵ As regards fundamental rights, however, the same approach as in *Viking Line* and *Laval* is manifested in the *Schmidberger* and *Omega* decisions.¹⁶ Concerning areas where the EC/EU does not have power to legislate directly, case law demonstrates the same kind of approach to limiting the freedom to regulate by Member States, e.g. in the fields of tax law, social security law, and pay within the meaning of Article 136(5) EC.¹⁷ And, it may be added, the overall pattern of recent directives prior to the decisions was to subordinate fundamental rights to economic concerns.¹⁸ Nonetheless, as regards industrial action, with its conjunct collective bargaining, the ‘negative integration’ now imposed by the ECJ is of a far-reaching nature. What matters here is the principled approach of subjecting the lawful recourse to industrial action to market economic considerations, restricting the scope of interests to be pursued and to impose a proportionality standard.

5 The Human Rights Dilemma

As a precursor, it could be noted that the ECJ’s recognition of the right to take collective action as a fundamental right may be seen as a positive feature of *Viking Line* and *Laval*. But in real terms it does not amount to much. The immediate paradox is evident. As collective

¹⁵ See for an in-depth discussion B. Bercusson, ‘The Trade Union Movement and the European Union: Judgment Day’, (2007) *European Law Journal* 279–308.

¹⁶ Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659, and Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609. See also Case C-265/95 Commission of the European Communities, supported by the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland, v the French Republic [1997] ECR I-6959.

¹⁷ See on the latter Case C-307/05 *Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* [2007] ECR I-7109.

¹⁸ See S. Fredman, ‘Transformation or Dilution: Fundamental Rights in the EU Social Space’, (2006) *European Law Journal* 41–60 (48).

action is also qualified as a ‘restriction’, the issue consequently is turned into whether the exercise of this fundamental right in Community law may actually be lawful in Community law. Put differently, the exercise of the fundamental right needs to be justified vis-à-vis the fundamental freedom. Arguably, this is turning the issue on its head. At any rate, the situation would be manifestly different if the justification perspective were inverted. Much can be said for a change in that direction.

At the very outset, labour law emerged as a counter-measure against unbridled market liberalism. The need for special and protective labour market regulation was duly recognized a century ago, at national and international levels alike. Put bluntly, the underlying assumption and accumulated insight is that if labour law is subordinated to the law of market economics, labour law is destroyed. This is yet a vivid and valid perception. The ECJ’s stance on how to align the right to collective action with free movement law is in marked contrast to this, which is apparent in several regards.

The ‘human rights dilemma’ lies therein, that the Court’s stance on industrial action is clearly at variance with public international law standards. Just to add to this, the Court’s stance in *Rüffert* is also not consonant with ILO Convention No. 94 on labour clauses in public contracts.

It is notable that the ECJ did no more than mention ILO Conventions Nos. 87 and 98 and refrained from elaborating. Both the Court’s narrowing down of legitimate objectives, by its construction and use of the PWD and the ‘serious threat’ clause, and the application of the proportionality test and framing of an ‘*ultima ratio*’ standard (in *Viking Line*) demonstrates a fundamentally different outlook on industrial action from that prevailing under the ILO Conventions, and it places the right to strike in a far weaker position than the protection afforded by Conventions Nos. 87 and 98 and appertaining case law. In contrast to Convention No. 94 these two conventions have been ratified by *all* (EU and EEA) Member States. The inconsistency has been emphasised by many, including the ILO itself, and as regards Convention No. 87 it was confirmed by the ILO Committee of Experts on the Application of Conventions and

Recommendations in its Report to the 2010 Labour Conference in the *BALPA* case,¹⁹ where the Committee noted, i.a.

‘With respect to the matter raised by BALPA, the Committee wishes to make clear that its task is not to judge the correctness of the ECJ’s holdings in *Viking* and *Laval* as they set out an interpretation of the European Union law, based on varying and distinct rights in the Treaty of the European Community, but rather to examine whether the impact of these decisions at national level are such as to deny workers freedom of association rights under Convention No. 87. ...

The Committee observes that when elaborating its position in relation to the permissible restrictions that may be placed upon the 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. ... The Committee is of the opinion that there is no basis for revising its position in this regard.

The Committee observes with serious concern the practical limitations on the effective exercise of the right to strike of the BALPA workers in this case. The Committee takes the view that the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the *Viking* and *Laval* judgements, creates a situation where the rights under the Convention cannot be exercised. ... Finally, the Committee notes the Government’s statement that the impact of the ECJ judgements is limited as it would only concern cases where freedom of establishment and free movement of services between Member States are at issue, whereas the vast majority of trade disputes in the United Kingdom are purely domestic and do not raise any cross-border issues. The Committee would observe in this regard that, in the current context of globalization, such cases are likely to be ever more common, particularly with respect to certain sectors of employment, like the airline sector, and thus the impact upon the possibility of the workers in these sectors of being able to meaningfully negotiate with their employers on matters affecting the terms and conditions of employment may indeed be devastating. The Committee thus considers that the doctrine that is being articulated in these ECJ judgements is likely to have a significant

¹⁹ Application by the British Air Line Pilots Association to the International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations against the United Kingdom for breach of ILO Convention No.87. London, 5th October 2009.

restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention.’²⁰

This demonstrates clearly how the state of EU law as laid down by the ECJ runs counter to human rights standards under ILO Conventions – and, it must be noted, thereby to the obligations of EU/EEA Member States under two of the ILO Conventions, Nos. 87 and 98, that form part of the ‘Fundamental Principles and Rights at Work’ embodied in the ILO Declaration of 1998.²¹

The same is true for the Council of Europe treaty on social and economic human rights, the European Social Charter (1961), to which, as the Court duly noted, express reference is made in Article 136 EC. The right to collective action, including the right to strike, is specifically protected in Article 6(4) of the Charter, and identically in Article 6(4) of the European Social Charter (revised) (1996). By the stance adopted in *Viking Line* and *Laval* the ECJ has framed a fundamentally different conception of the right to collective action than that maintaining pursuant to the European Social Charter. The ESC recognizes that the right to collective action may be *restricted*,

²⁰ *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A) International Labour Conference 99th Session 2010 (Geneva, International Labour Office, 2010), 208–209. Cf. Document No. (ilolex): 062010GBR087, CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) United Kingdom (ratification: 1949). Submitted: 2010.

²¹ ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010), available at www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm. This Declaration has subsequently been reinforced by the ILO Declaration on Social Justice for a Fair Globalization, 2008, which, ‘institutionalizes the Decent Work Agenda as the key policy and operational concept to attain the ILO’s constitutional objectives and service efficiently and effectively its constituents’; this Declaration is available at www.ilo.org/public/english/bureau/dgo/download/dg_announce_en.pdf.

but solely on narrow grounds.²² Pursuant to Article 6(4) it is however deemed unacceptable to subject the exercise of this human right to a proportionality standard or otherwise construe the right as relative in domestic law.

The dilemma is amplified by the subsequent case law of the European Court of Human Rights. In its groundbreaking decisions in *Demir and Baykara*²³ and the sequel *Yapi-Yol Sen*²⁴ the ECtHR has granted the right to strike protection under Article 11 of the European Convention of Human Rights – the civil and political rights treaty of the Council of Europe – taking into account the protection of the right otherwise prevailing in international law.

The ECtHR judgments are posterior to the *Viking Line* and *Laval* decision but the ECJ's failure to take further account of the other international law instruments pointed to here is notable. For one, it leaves EU law clearly at variance with human rights standards and public international law obligations incumbent on all or the great majority of Member States. Moreover, it is also in sharp contrast to EU policy commitments and statements on international and EU (Community) law. The Commission, the Council, and the European Parliament have often enough subscribed to ILO's 'core conventions', in particular during the past ten years in conjunction with the Decent Work Agenda. Member States have been called upon to accept all up-to-date ILO Conventions – of which Convention No. 94 is one. And Conventions Nos. 87 and 98 have been pointed to specifically as belonging to the core labour standards that should be applied in Community law.²⁵ A measure of discrepancy thus appears not merely

²² See European Social Charter 1961 Article 31, and Article G of the 1996 revised Charter; the exception clauses are similar to that of Article 11 para. 2 of the European Convention of Human Rights.

²³ ECtHR judgment 12 November 2008 (appl. no. 34503/97), *Demir and Baykara v. Turkey*.

²⁴ ECtHR judgment 21 April 2009 (appl. no 68959/01), *Enerji Yapi-Yol Sen v Turkey*.

²⁵ See, e.g., the EP Resolution on transnational trade union rights in the European Union, (1998) OJ C 226, 64 (64, 65), the EP Resolution on the Commission communication COM(2001) 416, (2003) OJ C 271 E, 598 (598-600), and the Commission communication 'Promoting decent work for all :

in relation to international law standards. It is also evident internally, within the wider context of EU law as such.

Also, the discrepancy is added to by the conspicuous absence of any mention of the Services Directive²⁶ in the Court's reasoning on the right to collective action. This omission is also remarkable. By disregarding the Services Directive the Court conveys the impression that it really disowns the explicit clause in Article 1(7) of the Directive and the history behind it.

The paradox persists. In 2009, the Council adopted a directive implementing an agreement of the sectoral social partners which in turn is based on ILO's Maritime Labour Convention, 2006 (MLC).²⁷ The MLC is expressly based on the ILO core conventions set out in the 1998 Declaration, including Conventions Nos. 87 and 98 (Article III and second recital of the Preamble). The Directive is similarly recognizing these Conventions by reference in the second recital of its Preamble and, even more expressly, in the first recital of the Preamble to the underlying agreement. It would amount to a gross degradation of the fundamental rights at work thus referred to should those rights be deemed to be subsidiary to market economic and free movement considerations.

With the entry into force of the Lisbon Treaty, on 1 December 2009, the EU Charter of Fundamental Rights²⁸ became binding on the EU's institutions and on Member States when they are implementing EU law. The Charter includes protection of the right to collective

The EU contribution to the implementation of the decent work agenda in the world', COM(2006) 249 final, in which it is stated, i.a., that 'The standards and measures of the ILO also complement the *acquis* in areas which are not covered or only partly covered by legislation and Community policies, such as labour administration and inspection, *trade union freedom, collective bargaining ...*' (p. 4, emphasis added).

²⁶ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, (2006) OJ L 376, 36–68.

²⁷ Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC, (2009) OJ L 124, 30–50.

²⁸ (2007) OJ C 303, 1–16.

bargaining and collective action, including the right to strike.²⁹ This is however coupled with limiting provisions, Article 52 in particular, and overall it may well be asserted that there is little in the Charter to assuage the distrust of labour lawyers.³⁰ Still, the EU institutions now have a duty to address and take account of rights protected under the Charter, however uncertain its reach may be. Both facets are visible in the Commission's recent communication on a strategy to implement the Charter. There the Commission puts forward as a clear objective that the EU 'must set an example to ensure that the fundamental rights provided for in the Charter become reality. It is however a question what kind of reality that is envisaged. The strategy document presupposes that 'fundamental rights' may be restricted along precisely such lines as apply under the justification test pertaining to the Treaty freedoms of movement.³¹ Other than that, it is non-committal on the issue of the relation between EU law and international human rights standards.

Here, the link with the PWD again is apparent. At the 'Forum on Workers' Rights and Economic Freedoms' organized by the European Commission in Brussels on 9 October 2008, the PWD was a main issue but the human rights dimension, and the inconsistency with ILO norms, was also centrally focused.³² The European Trade Union

²⁹ Article 28: 'Workers and employers, or their respective organisations, have, in accordance with Union 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.'

³⁰ See J. Kenner, 'Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility', in: T.K. Hervey and J. Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Oxford/Portland OR: Hart, 2003, 1–25 (24).

³¹ See COM(2010) 573 final, 19.10.2010, Communication from the Commission. Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, at 13 and 5. This can be seen also as mirroring Article 52(1) of the Charter.

³² Cf. S. Evju, 'Norway', in *The Laval and Viking Cases : Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area and Russia*. Bulletin of Comparative Labour Relations, 69. (Guest. Ed. Swiatkowski, Andrzej M.; Gen. Ed. Blanpain, Roger). Austin/Boston/Chicago/the

Confederation (ETUC) subsequently called for a ‘social protocol’ to lay down ‘that fundamental social rights have priority’ over single market considerations,³³ and later, invoking the ECtHR decisions in *Demir and Baykara* and *Yapi-Yol Sen*, underlined that the right to strike is a human right and called for a change in ECJ case law.³⁴ Further, following the *Viking Line* and *Laval* decisions the European Parliament launched a review on ‘Challenges to collective agreements in the EU’ focusing on the principled consequences of the decisions and adopting a Resolution calling for, i.a. a review of the PWD and stating

‘that the exercise of fundamental rights as recognised by Member States, in ILO Conventions and in the Charter of Fundamental Rights of the European Union, including the right to negotiate, conclude and enforce collective agreements and the right to industrial action should not be put at risk’.³⁵

In a re-election effort the President of the Commission, José Barroso, in a speech to the European Parliament stated his attachment to the respect of fundamental social rights and held that the PWD falls short in this regard, and committed ‘to propose as soon as possible a Regulation to resolve the problems that have arisen’.³⁶ This has not materialized, however. After his re-election Barroso in October 2009 mandated former Commissioner Mario Monti to draft a report and submit recommendations for a ‘relaunch’ of the Single Market. Taking a cue from Barroso’s speech and ETUC’s stance, most recently emphasized in the bi-partite report on the PWD-related ECJ

Netherlands: Wolters Kluwer/Kluwer Law International. 2009, 123-138, at note 43.

³³ ETUC, A social progress protocol to the EU treaties to guarantee workers’ rights. Press release, 14 October 2008, at www.etuc.org/a/5402.

³⁴ ETUC, The right to strike is a human right – ECJ must change its case law. Press release, 14 May 2009, at www.etuc.org/a/6174.

³⁵ European Parliament resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI)), item 31 cf. item 30.

³⁶ José Manuel Durão Barroso, Passion and responsibility: Strengthening Europe in a Time of Change. European Parliament Plenary, Speech/09/391, 15 September 2009; at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/391>.

decisions,³⁷ and pointing also to the labour law exclusion provisions in the Services Directive,³⁸ Monti conditionally recommended that if measures to clarify the PWD be adopted, a provision to guarantee the right to strike should be introduced, modelled on Article 2 of the ‘Monti Regulation’,³⁹ which reads

‘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.’

Such a clause would, Monti opined, “immunise” the right of strike, as recognised at national level, from the impact of single market rules’.⁴⁰

It is arguably doubtful if a provision as suggested would carry sufficient clout to impress the ECJ and attain what would amount to a fundamental change in the Court’s outlook on the relation between Treaty freedoms and secondary legislation and national laws. As the matter currently stands, however, the initiatives to enact a ‘social progress clause’ have dwindled and fostered renewed controversy.

Building in part on the Monti Report the Commission in late October, 2010, tabled a Communication, ‘Towards a Single Market Act’, setting out altogether 50 proposals for a relaunch and more

³⁷ ETUC, BUSINESSEUROPE, CEEP, and UEAPME, Report on joint work of the European social partners on the ECJ ruling in the Viking, Laval, Rüffert and Luxembourg cases. [Brussels] 19 March 2010.

³⁸ Article 1(6) and (7).

³⁹ 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, (1998) OJ L 337, 8–9. Conjointly, the Council adopted a *resolution*, also 7 December 1998, (1998) OJ L 337, 10–11. See also Recital 4 of the Preamble to the Regulation, ‘Whereas such measures must not affect the exercise of fundamental rights, including the right or freedom to strike’.

⁴⁰ Mario Monti, A New Strategy for the Single Market : At the Service of Europe’s Economy and Society. Report to the President of the European Commission José Manuel Barroso. [Brussels] 9 May 2010 (the Monti Report).

ambitious single market policies.⁴¹ Two proposals pertain to the PWD and industrial action. Referring to views propounded by Monti and the Strategy for the effective implementation of the EU Charter of Fundamental Rights presented just a week before,⁴² the two proposals tabled in the Communication on a Single Market Act read as follows.

‘Proposal No 29: Pursuant to its new strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, the Commission will ensure that the rights guaranteed in the Charter, including the right to take collective action, are taken into account. The Commission will first of all conduct an in-depth analysis of the social impact of all proposed legislation concerning the single market. [Footnote omitted.]

Proposal No 30: In 2011, the Commission will adopt a legislative proposal aimed at improving the implementation of the Posting of Workers Directive, which is likely to include or be supplemented by a clarification of the exercise of the fundamental social rights within the context of the economic freedoms of the single market.’

On the face of it, these proposals may seem to indicate a positive approach to providing a stronger protection in EU law for the right to take industrial action. The wording of the proposals is guarded, however. Moreover, the drafting history of the proposals is tale telling. The draft Communication submitted for discussion by the Commissioners’ representatives⁴³ on 25 October spoke of ‘including the right of workers to take collective action to defend their interests’ to be taken into account, and that the Commission ‘will insert a social clause inspired by’ Article 2 of the Monti Regulation into relevant single market legislation, recalling that this legislation ‘should be applied respecting fundamental rights, which include the rights to take collective action and to strike’. This was toned down somewhat as a result of the discussion, but the wording of Proposal No. 29 put before

⁴¹ COM(2010) 608 final, 27.10.2010, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions. Towards a Single Market Act : For a highly competitive social market economy. 50 proposals for improving our work, business and exchanges with each other.

⁴² See fn. 31, *supra*.

⁴³ The *chefs du cabinet*.

the Commissioners for discussion on 27 October still included references to a 'social clause'. The explicit references to the Monti Regulation and a right to strike were however deleted, the draft proposal reading as follows.

'Pursuant to its new strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, the Commission will ensure that the rights guaranteed in the Charter, including the right to take collective action, are taken into account. The Commission will propose to insert a social clause into the relevant single market legislation, recalling that this legislation does not affect the exercise of fundamental rights that are recognized by the Member States and the Union, and also does not affect to bargain, to conclude and apply collective agreements and to take trade union action in conformity with national law and practice respecting Union law.'⁴⁴

The text adopted by the Commission on 27 October amounted to a further watering down of the original proposals and evidently came as a surprise, particularly in view of the compromise that was struck by the *chefs du cabinet* two days earlier. The wording of Proposal No. 29 was changed as a result of an apparently contentious discussion in the Commission. This 'last minute change' drew sharp reactions from, among others, the ETUC.⁴⁵ Both the adopted text and the reactions to it are well suited to illustrate how the gap between free market conceptions and workers' rights and the human rights paradox still remain topical issues.

⁴⁴ This is based on COM(2010) 608/3, Communication de la Commission au Parlement Européen, au Conseil, au Comité Économique et Social Européen et au Comité des Régions. Vers un pacte pour le marché unique. Pour l'économie sociale de marché. Bruxelles [not dated], with corrections. Translations from the French by SE.

⁴⁵ See ETUC, Single Market Act: "The Battle goes on" says ETUC. Press release 28.10.2010, www.etuc.org/a/7792; and Förslag om stärkt strejkrätt togs bort, www.europaportalen.se/2010/10/forslag-om-starkt-stejkrett-togs-bort, 27.10.2010, quoting Wanja Lundby-Wedin, President of the ETUC and of the Swedish Trade Union Confederation (LO).

6 The Multilevel Repercussions

Returning more to the FORMULA project more specifically, the research presented at this year's conference⁴⁶ vividly demonstrates how implementation of the PWD and the case law developments of the ECJ have drawn varied reactions from EU/EEA Member States. As Member States are obligated to ensure that national law is consonant with EU law, obligations in public international law is seen to take a back seat at the outset as far as reactions by States are concerned. Norway's efforts to reconcile her obligations under ILO Convention No. 94 with EEA law can be seen as an attempt to strike a middle ground, not complying in full with the standpoint of the ESA.⁴⁷

The immediate problems faced by national jurisdictions in consequence of the '*Laval Quartet*' rulings evidently will differ, in form and degree, with the state of domestic law. On the Nordic scene, Finland and Norway each have different forms of statute law-based extension of collective agreements or public law regulation, and therefore have not been immediately affected. The same is true for Germany and, on somewhat different grounds, for the Netherlands and Poland. In the UK, the normative thrust of the ECJ decisions is liable to operate to add an exclusion to the already narrow scope of the lawful recourse to industrial action. Calls for legislative reform have been made, however not by the main labour market actors, and are unlikely to succeed. Denmark and Sweden likewise have stayed with collective bargaining, in particular as regards wages, and have been

⁴⁶ Free Movement of Services – EU Law and Member States Responses: Convergence or Conflict? The Second FORMULA Conference, Oslo, 2 and 3 September 2010. For access to papers presented at the Conference, see fn. 5, *supra*.

⁴⁷ The EFTA Surveillance Authority (ESA) sent an own initiative 'opening letter', Letter of formal notice to Norway for failure to ensure compliance with Article 36 EEA and Directive 96/71/EC, 15 July 2009 (Case no. 64849), in which it held the Norwegian regulations on labour clauses in public works contracts to be at variance with EEA law, relying heavily on the ECJ's decision in *Rüffert*. In a consultation paper on amendments to the regulations, Høring – endringer i forskrift om lønns- og arbeidsvilkår i offentlige kontrakter, 30 June 2010, the Government proposes to amend on one point in line with the ESA's objections but contest on the other point of controversy. A final decision is pending.

compelled to undertake legislative change. However, their approaches differ significantly. Denmark has maintained a strong collective bargaining-based approach. On the basis of a *tri-partite committee* report tabled in June 2008, a new provision was inserted into the Act on Posting of Workers to render possible the use of collective bargaining measures underpinned by collective action. Sweden, on the other hand, commissioned an Expert Report, which was tabled in December 2008 and proposed inserting an explicit reference to collective agreements in the Act on Posted Workers, coupled with provisions *restricting* the right of trade unions to have recourse to collective action, in order to comply with EU law. Highly controversial, the legislative amendment was passed only in March 2010.⁴⁸

The way the Member States concerned have adapted to the European level developments, first the adoption of the Posting of Workers Directive and second the emerging ECJ case law, does not conform to a single or simple pattern. It is evident, however, as just suggested, that the normative framework – the legal regulation in existence – is a key factor. In countries like Germany and Norway, where forms of minimum regulations within the scope of Article 3(1) PWD are or can be put into effect, the impact of ECJ case law on restricting collective bargaining and the use of industrial action is largely subdued. For example, for the sectors most exposed to competition from foreign service providers, minimum terms and conditions, including pay, within the scope of Article 3(1) PWD are fixed in regulations adopted by an administrative law board. In domestic law it would still be permissible for domestic trade unions to press for a collective agreement with a foreign service provider, and to take recourse to industrial action as a means to that end. However, so far this and the barriers ensuing from EU/EEA law in the national context has not been tested. If, on the other hand, fixing terms and conditions, in particular wages, is left to bargaining, as in Denmark and Sweden, the effects are far more comprehensive and radical. The

⁴⁸ On the Danish and Swedish legislative changes, see S. Evju, 'Revisiting the Posted Workers Directive: Conflict of Laws and Laws in Contrast', 12 *Cambridge Yearbook of European Legal Studies* 151 (2010).

strength and role of social partners is another factor, albeit one with many facets. Union density and collective agreement coverage rates are merely two factors, relations between social partners and between social partners and government are others. This is an avenue to proceed on in the coming phase of the FORMULA project, along with theme specific comparative analyses of the issues involved, both those touched upon in this paper and several others.