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Reconciliation between fundamental social rights and economic freedoms

In the context of the EU internal market, the relationship between economic freedoms and social rights originally had deemed to deserve not much attention. Member States emphasized on the economic side of the new Union by providing citizens and undertakings with the four fundamental economic freedoms. Social aspects then were understood as being automatically furthered by the application of such freedoms. They deemed an almost inevitable consequence of a prospering economy to be achieved through the success of free, flexible enterprises. Over the years, that perspective changed. The very construction of the EU was seen as having a "social deficit" which needs to be counterbalanced through social integration.

With the entry into force of the European Charter of Fundamental Rights, all the rights guaranteed including several social entitlement rights were given the status of "fundamental" rights, too, placing them theoretically on an equal footing with the original four freedoms. The underlying problem of an unequal distribution of competencies to protect rights and freedoms remained, though. While the Union itself is clearly bound by this Charter, it's means for actually furthering social integration are very limited. The Union cannot guarantee the precondition for exercising social rights because this competency remains with the Member States. States, on the other hand, developed rather diverging models of social policies that are hardly in the position of representing a countervailing power of social integration. Still the economic freedoms as guaranteed by the Union itself represent the framework of reference against which Member States' respective preferences are to be balanced.

The balance between both types of rights will change according to their respective relative weight. The Lisbon Treaty makes it very clear that the EU wishes to realize a "Social Europe" and for this purpose refers to International Instruments, especially the Council of Europe's Convention on Human Rights and the European Charter of Social Rights. The interpretation of the EU's Charter of Fundamental Rights explicitly shall not fall short of the entitlements guaranteed by the Human Rights Convention wherever the relevant rights are identical. Therefore the Union is bound to take into consideration how the Human Rights Convention construes social rights whenever secondary Union law is created or applied. The European Court of Human Rights as the judicial body responsible to interpret the Convention frequently interprets the Convention's social and labor rights in accordance with the European Social Charter. Thereby not only the Convention but both of the Council of Europe Instruments gain some influence on the interpretation of EU law. EU fundamental rights are not wholly autonomous or independent, but influenced by international instruments pursuing a specific social policy approach. But where does this leave the attempt to actually "reconcile" the different types of fundamental rights and freedoms? Giving more weight to social rights can - and indeed: should- change the approach of dealing with conflicts between rights and freedoms.

The first detailed acknowledgement thereof is found in the Opinion of Advocate General Trstenjak in the "Commission v Germany" case (C-271/08 of 15 July 2010), which highlights the need to adopt a *symmetrical* approach to such reconciliation. As a consequence of the additional importance attached to social rights by the Lisbon Treaty, in case of a conflict between a social right and an economic freedom both legal positions must be presumed to have equal status. The Opinion does not stop by stating this but explicitly demands consequences thereof when applying EU legislation: as fundamental freedoms may justify a restriction on a fundamental right, conversely it must be equally

possible that a fundamental right causes the limitation of the scope of a fundamental freedom , including limitations to the scope of the secondary law based thereupon. In my view, this approach indeed opens up a road how this reconciliation could be achieved, if all players participating in setting and applying the law could agree on following this line of reasoning. This would include the Courts when interpreting and applying EU law, but also law makers when creating secondary law.

Regarding the judiciary, it comes quite naturally for any supervisory body to take the rights they are responsible to protect as a starting point for deliberations and judge any infringements thereof for their potential justifiability. Along this line, the ECJ used to be tough on any restriction of economic freedoms which are at the heart of the functioning of the internal market, closely supervising any potentially harmful effect of acts pursuing social rights such as the right to strike or to bargain collectively. Conversely, from a human rights enforcement body's perspective, the line of reasoning would fly the other way round: any act potentially harmful to the enjoyment of human rights needs to pass a strict justification test in order for it to comply with, say: the European Social Charter, even if such act expresses an economic freedom. Whereas the one body would set the social right as a given and question the justifiability of any infringement thereof, the other would invoke the economic freedom and question any restriction thereof. With high probability the outcome of a similar case put before the different bodies might vary considerably according to that body's respective approach. This holds true even though all players in principle agree on the necessity of balancing social and economic rights and freedoms.

To make the underlying problem more visible, I would like to go back to the popular conflict between the rights to strike or bargain collectively on the one hand and the economic freedoms of establishment or to provide services on the other. As the high profile cases in this area, ECJ's Viking Line/ Laval/ Rüffert/ Luxemburg decisions, are sufficiently well known, I do not undertake to analyze their line of reasoning in any detail but address such basic approach that fundamentally differs from the European Social Charter's focus on protecting social rights:

The right to collective action as guaranteed by Art.6§4 of the ESC is fundamental in the sense that, without providing for an absolute guarantee, it allows only narrow restrictions. Pursuant to the Appendix to the Charter, this right may be regulated only once several preconditions have been met. Any restriction needs to be prescribed by law, pursue a legitimate purpose and must be necessary in a democratic society. Our supervisory body has only very reluctantly accepted that economic considerations might ever justify an infringement. Much rather the Committee demands grounds like health, safety and public order. The Viking/ Laval cases also had agreed to characterize the right to collective action as a fundamental right, even before the entry into force of the European Charter of Fundamental Rights. Nevertheless, by qualifying it as an infringement of economic freedoms of enterprises, the right, despite being fundamental, can only be enjoyed once the relevant action is properly justified. It must pursue legitimate objectives and must not go beyond what is necessary to achieve such objectives.

As for the objectives pursued, Art.6§4 ESC has been applied to all types of conflict of interests, with the notable exception of political strikes. Apart from this exception it is in principle for the parties to the conflict to decide which aim

to pursue. That under such preconditions it would be acceptable to limit collective actions to objectives like certain interests of the individual workers is more than doubtful. Much rather any problem of "common interest", including all sorts of collective interests of the parties to the conflict would deem viable.

The Viking case on the other hand accepted preserving jobs and employment conditions as legitimate objectives but only insofar as they were under serious threat. That seems to acknowledge defensive actions without including actions for improving existing terms and conditions of work. Such restriction according to which trade unions could not take action to attain more favorable terms seems to run counter the very essence of collective action in the meaning of the ESC. The Laval case initially seemed to broaden that scope of objectives by accepting as legitimate also the "protection of workers" in general terms. But when linking this protection to the terms and conditions listed in § 3(1) of the Posting of Workers Directive, such scope immediately was narrowed down. As this Directive is bound to the setting of minimum standards for certain employment conditions only, the act of reading this list into the permitted protection of workers effectively rules out many traditional subjects of collective bargaining. Moreover, it excludes from industrial conflicts all objectives beyond minimum levels of employment conditions.

The precondition of actions to be "suitable and necessary" for achieving the intended purpose is seen comparably different following the two approaches. The ESC is giving only limited scope to the application of a proportionality test to collective actions. The reason for such reluctance is the fear of a proportionality criteria leading to the judicial review of a strike's appropriateness in a given situation. Instead of leaving the margin of discretion to the parties concerned it would then be for the court to decide if and when

collective action is best to be taken or to be omitted. To avoid this, the ESC restricts the application of a proportionality test more or less to procedural requirements such as a reasonable cooling-off period or a mediation requirement, and to interventions pursuing health, safety or public order. The ECJ's case law applies the proportionality test differently, in that they also include all sorts of economic considerations. This allows the court to decide whether there would have been any other form of action that might have been less costly, and therefore less restrictive to economic freedoms. The content of the underlying bargaining demand as well as its appropriateness in a given situation will then be assessed by the judge instead of the respective parties.

Taken together the examples provided show that even those elements of control that appear to be similar if not identical gain rather different weight depending on the approach the relevant supervisory body follows. As EU law is ready to acknowledge that both legal positions have equal status, at least in principle both lines of reasoning must be pursued. But if this were to work in practice, details can not be left altogether to the courts to decide.

Many elements of an operation of a genuinely symmetrical approach that gives equal weight to both types of rights remain unclear. Therefore it is for the legislator at EU level to see to it that their measures do not restrict social rights in a manner neither necessary nor proportionate to protect an economic freedom. Parallel to the hitherto commonly applied assessment whether the social objectives of a Member State's policy scheme may be accommodated within the framework of EU Directives and their underlying economic freedoms, such assessment will have to be applied also in the other direction: can the objective of a Directive protecting economic freedoms be accommodated in an way better suited to protect social rights? When agreeing

on an instrument like the Posting of Workers Directive it is for the law makers to realize that such a directive has the potential to endanger the right to collective bargaining and therefore needs to be justified against the standard of the Charter of Fundamental Rights. As this standard may not be less protective than the guarantees in the Human Rights Convention, any possibility to interpret such Directive as forbidding to bargain - or strike – for improvement of existing conditions must be excluded. Still, it would not suffice to simply not interfere with the collective bargaining process. Strengthening of social rights would also include acknowledging and furthering the role of social partners through legislative instruments at EU level.

If the EU legislative process guarantees protection of social rights in Directives or Regulations, it can be left to the courts to balance the economic freedoms enshrined in the Treaty against such social rights. If, however, such legislative act fails to satisfy the protective standards set by the EU Charter and the relevant Council of Europe Instruments, the judicial review will have to become more complex. Then it would be for the litigants to challenge the legal instrument itself by claiming that their social rights are, due to the lack of adequate protection, restricted in a manner that is neither justified nor proportionate. As this is not only difficult to obtain and potentially rather time consuming, there might even be a need for introducing some collective dispute resolution mechanism like, for example, the collective complaint procedure well known at the ESC level.