Throughout my legal studies my focus has been European law, human rights and international law. I find the interactions of the different legal sources and legal systems very interesting. When my supervisor, Maria Elvira Mendez Pinedo, suggested that I should look into the balance between the fundamental rights and fundamental freedoms in EU law I was intrigued right away. As my research progressed I became more and more interested in the subject as it involves so many different and fundamental questions. I decided to focus on the right to take collective action, because I find that it has great relevance today. There has been a lot of development in this field in the past few years, within European law and on behalf of the European Court of Human Rights. The matter is highly political, and even though my focus is legal I have always found legal studies that are involved in the society around them very challenging and interesting. The development in this field that started a few years ago has not come to an end when these words are written, and I look forward to following it in the coming months, years or even longer. The present time seems to be of a huge importance for the European co-operation and I hope my contribution will shed some light on some of the issues at hand.

Many people have contributed to this thesis. I would first like to thank my supervisor, Maria Elvira Mendez Pinedo, for suggesting the topic and helping me define it. Furthermore I would like to thank her for the cooperation, helpful and constructive comments and great supervision. My family and friends have been very supportive throughout this whole process and I could not have done this without their help. I would especially like to thank my parents and my sister Edda, my grandparents and my boyfriend.

Reykjavík, 5 May

Dagný Ósk Aradóttir Pind
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1 Introduction

The tension between social policy and the market aim of the European integration has been a constant theme since the formation of the European Union (EU) in the 1950s. This tension has become even more apparent with the Eastern enlargement of the EU in 2004 and 2007 and in some respects it can also be said that there is an emerging tension between new and old Member States of EU. Those interested in EU law are well aware that this tension was recently brought to light with the case law of the European Court of Justice (ECJ) in the so called Laval quartet.

The topic of this research is to look at the right to engage in collective action, especially the right to strike, as a fundamental right in EU law. This recent case law of the ECJ has generated concerns amongst many people and organizations and has given a rise to a lively debate, at the political and academic level. The majority of the commentators have been very critical and worried where to the EU is heading with the progress of this case law. In their view, these cases of the ECJ underline that economic freedoms prevail over fundamental rights in the EU legal order. A few commentators object and believe there is no reason to worry.

This study will examine the case law of the European Court of Justice with regard to the right to strike vs. the fundamental freedoms in EU law. The primary cases are the so-called Laval quartet, the Laval\(^1\), Viking\(^2\), Rüffert\(^3\) and Commission vs. Luxembourg\(^4\) cases. They all revolve around more or less the same questions. The facts of the cases will be examined, the judgments of the ECJ and the responses, both from academic commentators and various stakeholders. The political debate will also be looked at, both in individual Member States, as well as in Europe. The cases generated strong responses, as already mentioned.

The topic is highly political and touches upon not only legal issues. The study is of legal nature but during times it is inevitable to look at the bigger picture and involve political, economic and societal factors. The Laval quartet has implications both for the labour market as well as for the political sphere. The political implications could concern the support for the European integration project.\(^5\)

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\(^1\) C-341/05, Laval [2007] ECR-I-11767.
\(^2\) C-438/05, Viking [2007] ECR-I-000.
\(^3\) C-346/06, Rüffert [2008] ECR-I-1989
Classification of human rights will be discussed in order to better underlie the issues in question. Questions such as whether labour rights are indeed human rights and how the European Union treats labour rights will furthermore be addressed.

Recent case law of the European Court of Human Rights (EChHR) on the right of association and the right to collective action will be examined. The different methodologies of the two courts (the ECJ and the EChHR) will be looked at in order to see what implications the different methodologies can have for the European legal order. With the Lisbon Treaty the road for the EU to accede to the European Convention on Human Rights (ECHR) was opened a brief discussion on what EU accession could mean for the protection of fundamental social rights will be given.

The different roles of the EU institutions will be explored, especially the ECJ. The Court has been a key actor in the ongoing development in the EU and this thesis will reflect on whether it should be that way. Should the Court be able to alter the balance between established national social models and the rules of the market freedoms?

This research is highly relevant at the moment as the subject matter involves some fundamental questions that address the whole legal order of the EU. There are more than one ways to solve this dilemma that the EU is facing and therefore it is of importance to look thoroughly into the matter before any decisions are made. There have been some proposals towards how to solve these issues and they will be examined.

The methodology of the research is to look at the case law of the two courts and look at the academic responses to analyze the doctrine. Responses of various other actors, such as the social partners and individual Member States, will also be examined. The legal context, in primary and secondary law, will only be touched upon briefly.

The contribution of this thesis to legal science is to gather all the above mentioned sources and analyzing the bibliography. This is a highly sensitive issue and in the era of globalization it cannot be overlooked. This subject matter is also of relevance in Iceland as Iceland is party to the EEA agreement. This field has received little attention in Iceland and this thesis aims at providing Icelandic society an insight into the ongoing debate.

The first chapter will give a brief overview of the history of the European integration and look at developments in the fields that EU is competent to address. The different categories of human rights will be explored and labour rights will receive special attention. In the second chapter the main legal principles of EU law in the field of labour law and social policy will be examined. The Charter of Fundamental Rights will be looked at, followed by a brief examination of how internal market legislation is created. Chapter three focuses on the case
law of the ECJ in this field, the Laval quartet. The cases will be explored and subsequently
the most important responses from various actors. Chapter four will examine how the ECHR
has treated cases regarding the same fundamental rights and reflect on what EU accession to
the ECHR could possibly entail. Chapter five will look at how the Laval quartet has been
analyzed and try to locate the main themes in academic debate. Chapter six covers the recent
development in this field, a recent proposal from the Commission and what implications that
might have. Chapter seven looks at the changes in the EU that have taken place since the
judgments were delivered and explores a few documents that have come up with ideas for
how to address the issues at hand. Finally, chapter eight summarizes the main points of the
thesis.

2 History of the European integration and development of human and
labour rights

The following chapter gives an overview of the history of the European integration and the
evolution of the European Union (EU) in the past decades. The different categories of human
rights will furthermore be introduced with a specific focus on the development of worldwide
and European labour rights, under the auspices of the Council of Europe and the EU.

2.1 The beginning of the European integration

The European integration project was launched by six countries after the devastation of the
Second World War. The War left the European economies in bad shape. In the countries of
Europe, social rights were instituted as a part of a wider effort to regulate the labour market
and to re-forg the links between family life and the economy after the war. During that time
the so-called European welfare state began its development along with associated social
rights. European states have ever since developed their own models of social justice. These
models were and are divergent and influenced by different cultures and traditions in
individual Member States. However, the common feature of all of these models is that the law
is used as a means to protect the weaker party against the stronger party, such as the employee
against the employer, the tenant against the landlord or the consumer against the supplier.
Redistribution of wealth from the wealthier to the poorer part of the society is the core idea of

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a welfare state. Social rights address the inherent contradiction in liberal democracies between the promise of equality and the harsh inequalities generated amongst other factors by capitalist markets.

In the 1950’s, most of the European states had adopted constitutions that recognized the existence of fundamental social rights and contained commitments to maintain strong welfare states. These strong welfare systems have been understood to be fundamental elements of the constitutional regimes of the European Member States. The original six Member States were fairly similar in this regard, with little difference between regimes and wages for example.

During the same time the European integration was launched. The European project was among other things supposed to secure for lasting peace in the continent. The integration started out as purely economic, which made sense at the time. The Coal and Steel Community was founded in 1951, regulating the sales of coal and steel in Europe, and the European Economic Community (later the European Community and then the European Union) was founded a few years later, in 1957.

The European policy was therefore twofold; economic rules were at supranational level while the social policies were the responsibility of the Member States, at best through intergovernmental bargaining processes, which provided minimum harmonization. As stated earlier, the Member States had developed their national social law long before the EU turned into a political, economic and social actor. Economic provisions of the Treaty have prevailed over others as a consequence of the continuous consolidation of the economic and monetary union. There was next to no social policy in the Treaty in the beginning. Social policy took some time to develop within the EU context and the emergence of social rights was also a slow process. The Union was primarily created for the promotion of economic freedoms. Some would therefore have expected a focus on social and economic rights at an early stage compared to other regional or international organizations, where political and civil rights were targeted at first, and sometimes only.

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10 S. Deakin. “Regulatory Competition after Laval”, page 737.
Report on the General Common Market), issued in June 1956, rejected ideas for a European-wide labour code. Instead it was believed that better social conditions and wages would follow naturally with the integration of the internal market, a so-called ‘race to the top’. The Spaak report was used as basis for the Treaty drafting that followed. The European Coal and Steel Community also established a committee of experts to look into whether the functioning of the common market necessitated intervention in the social sphere and whether the different labour standards in the Member States would be a problem for the harmonization of markets. The conclusion of the committee was that it was not necessary to intervene in the social policy law of the Member States to make sure the common market functioned properly. There was no need for a European wide labour code. Only minimum harmonization of social policy was proposed, in matters such as equal pay for men and women, working time and some other matters. The Committee stressed that this harmonization should be minimum. The ILO commissioned the Ohlin report at the same time. The same conclusion was reached there, i.e. that a European labour code was unnecessary in matters other than those of minimum importance. The Ohlin report did, however, state that economic progress was dependent not only on “the more efficient international division of labour” that would follow with the common market, but also on “the strength of the trade union movement in European countries” and furthermore on “the sympathy of European governments for social aspirations.” All of these values were highly respected in the original Member States and therefore there was perhaps no reason to worry that this would be any different within the Union.

Drafters of the Treaty of Rome in 1957 adopted a minimalistic approach to social law regardless of the vague pro-labour protection quote from the Ohlin report. The goal of the Treaty was to create a common market and a customs union, what is evident in the text of the Treaty. The Rome Treaty treated labour above all as a resource of production, a commodity and thereby directly contradicting the philosophy of the ILO.

It was not until the 1990’s that the EU started deeper integration in social matters, as demonstrated later in the thesis. The harmonization was mostly through soft law.

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17 S. Deakin. “Regulatory Competition after Laval”, 737-738.
21 ILO. “Social Aspects of European Economic Cooperation”, page 112.
22 Catherine Barnard and Simon Deakin. “European labour law after laval”, page 255.
2.2 Development of the EU – deeper integration into different policy fields

The Union has undertaken a huge development since the beginning, with deeper integration in various fields. With the Single European Act (SEA) the internal market was completed in 1992. The internal market is “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured”. The SEA added new areas to the competences of the Community, such as co-operation in an economic and monetary union, social policy and economic and social cohesion. The Maastricht and Amsterdam Treaties further expanded the European co-operation and introduced several institutional changes.

As stated earlier, the original EU treaties contained no provisions regarding the protection of human rights, and for decades they largely focused on economic matters. The inclusion of human rights into EU law has been gradual and has happened both on behalf of the political institutions of the EU and the ECJ. In spite of that development, the focus of the EU remains economic. After this step in the integration process where the EU became involved in more policy fields it can still be said that Europe was governed by an economic constitution, rather than by political rule.

In 1994 the Commission published its White Paper on Social Policy that included proposals for which the directions social policy within the EU should be headed. It contained a new mix of social and economic policy with the main argument that competitiveness and social progress could flourish together. The main goal was a well-educated and motivated workforce able to adapt to different conditions and the authors believed that this goal could only be reached together with a comprehensive social policy. The economic and social dimensions should therefore be treated as mutually reinforcing, rather than conflicting objectives.

The debate about the role of the EU concerning human rights has been and remains a lively one. After the landmark cases that made the principles of direct effect and supremacy

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30 C. Joerges and F. Rödl. “Informal Politics, Formalised Law and the ‘Social Deficit’ of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*” page 5.
of EU law (Van Gend en Loos (1963)\textsuperscript{34} and Costa vs. ENEL (1964)\textsuperscript{35}) which confirmed the doctrines of primacy and direct effect of EU law, some concerns were raised that there could be conflicts between EU law declared supreme, and human rights provisions in different national constitutions, as EU law was ‘human rights free’ at that time.\textsuperscript{36} These concerns made way for the beginning of the human rights development in the EU, which began for real around the 1970’s.

In the Stauder case from 1969\textsuperscript{37} the ECJ responded positively to an argument based on the fundamental right to human dignity. This represented a change of approach by the court; fundamental rights were treated as general principles of EU law.\textsuperscript{38} Other cases of similar nature followed. In the Defrenne\textsuperscript{39} case the ECJ stated that the Community was “not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples.”\textsuperscript{40} The ECJ didn’t take human rights as formal sources of law, but as general principles of Community law that had effect on the interpretation an application of the court.\textsuperscript{41}

In the Nold\textsuperscript{42} case the Court indicated that there were two primary sources of inspiration for the general principles, the common national constitutional traditions and international human rights agreements:\textsuperscript{43}

As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures.

In safeguarding these rights the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures that are incompatible with fundamental rights recognized and protected by the Constitutions of those States.

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines that should be followed within the framework of Community law.\textsuperscript{44}

\textsuperscript{34} C-26/62, Van Gend en Loos [1963] ECR 13.
\textsuperscript{35} C-6/64, Costa vs. ENEL [1964] ECR 585.
\textsuperscript{36} Allan Rosas. “The European Union and Fundamental Rights/Human Rights”, page 446.
\textsuperscript{37} C-29/69, Stauder [1969] ECR 419.
\textsuperscript{38} Paul Craig and Gráinne de Búrca. \textit{EU Law: Texts, Cases and Materials}, pages 381-382.
\textsuperscript{39} C-43/75, Defrenne [1976] ECR-455.
\textsuperscript{40} C-43/75, Defrenne [1976] ECR-455, para 10.
\textsuperscript{42} C-4/73, Nold [1974] ECR 491.
\textsuperscript{43} Paul Craig and Gráinne de Búrca. \textit{EU Law: Texts, Cases and Materials}, page 383.
\textsuperscript{44} C-4/73, Nold [1974] ECR 491, para 13.
These important cases set the trend for other cases that would follow and changed the way EU law worked with respect to human rights. The ECJ has numerous times been a driving force in changing the way EU law is interpreted and applied.

Amongst the international treaties the Court referred to in the Nold case, the European Convention of Human Rights (ECHR) has been a special source of inspiration for the Court, but it has also cited many other international agreements, such as the European Social Charter (ESC) and various conventions of the International Labour Organization (ILO). It should also be mentioned that in the preamble to the Single European Act of 1986 there was a referral to both the ECHR and the European Social Charter. Further discussion on how these international instruments have influenced the case law of the EU will be provided later in this thesis, along with discussions on whether they had any impact in the Laval quartet.

Currently it is widely accepted that fundamental rights are binding on EU institutions and Member States when they are acting within the scope of EU law. In the cases Schmidberger and Omega Spielhallen the Court confirmed that the protection of human rights constitutes a legitimate interest that justifies restriction of the free movement rules. The case Schmidberger concerned a temporary closure of roads between Austria and Italy while an environmental demonstration was taking place. With reference to freedom of expression and assembly, guaranteed by human rights instruments such as the ECHR the blockade was considered in line with EU law. The Court presented the case as a conflict between two legal interests of equal weights, free movement rules and fundamental human rights. The case Omega concerned the selling of laser games that simulated the killing of people. With reference to provisions regarding the protection of human dignity in the German constitution Germany was allowed to prohibit the sale of those games.

It is clear that the EU has changed a lot from the origin of the co-operation. The number of Member States has increased and so has the diversity in living conditions and labour rules amongst other things. The introduction of the Euro also played an important role as the economies of the different nations in Europe are more connected now than ever with the use of a common currency. Through the intensification of the integration process and the Eastern

46 Allan Rosas. “60 Years of the Universal Declaration of Human Rights in Europe”, page 419.
enlargement of the Union, European law has become ever more complex.\textsuperscript{52} Today the EU deals with a variety of subjects, from the more traditional emphasis on economic freedoms and the internal market, to fields such as the environment, social affairs, immigration, judicial cooperation and even issues of penal law and defense policy.\textsuperscript{53} In the beginning of the European integration fundamental rights played a marginal role in the EU. That has also changed and now sometimes those rights seem to be high on the agenda of the EU. If the EU would be considered a fundamental rights free zone, that situation surely would endanger collisions with national constitutions and fundamental rights regimes of Member States because of the supremacy and direct effect of EU law.\textsuperscript{54} But the fundamental rights scheme of the EU is not perfect, as will be examined further in connection with the Laval quartet.

Together with this development of the EU it can be stated that the national systems of the Member States have been weakened and have not been replaced with a common social constitution and a common set of principles of labour and employment law. The original wishful idea was and has always been that social progress would follow the economic growth automatically.\textsuperscript{55} The internal market would create more and better jobs, more people would be employed, the wage level would rise and general living conditions follow. But this surely has been a rocky road. After the the EU took up interest in gaining competence in social matters the Member States soon wanted to protect their interests which were vested in the social systems they have developed through the years.\textsuperscript{56} Balancing these interests is a difficult challenge.

The European social model is a concept that is used to describe the social aquis of the EU. The model is the result of a complex interplay between the Treaties, interaction between EU law and the law of Member States and the current construction of fundamental social rights in the EU. The Commission and the ECJ have been central in the development of the social model.\textsuperscript{57}

2.3 Different categories of human rights

There has always been a distinction between different categories of human rights. Sometimes these categories are referred to as different generations of rights. The first generation consists

\textsuperscript{52} C. Joerges. “A Renaissance of the European Economic Constitution”, page 40.
\textsuperscript{53} Allan Rosas. “60 Years of the Universal Declaration of Human Rights in Europe”, page 415.
\textsuperscript{54} Allan Rosas. “60 Years of the Universal Declaration of Human Rights in Europe”, page 416.
\textsuperscript{55} Jon Erik Dølvik and Jelle Visser. “Free movement, equal treatment and workers’ rights: can the European Union solve its trilemma of fundamental principles?, page 494.
of civil and political rights, the second generation of economic, social and cultural rights and the third generation consists of collective, or group rights. Social rights have a much more ambiguous legal status than civil and political rights. Social rights are rarely justiciable and courts have tended to be suspicious about them. The way provisions on the different categories of rights are worded is also quite different. Civil and political rights are usually worded as distinct rights that individuals can base court cases on whereas social rights are worded in a more soft manner, as policy goals or something for governments to strive for. This is apparent in the 1948 Universal Declaration on Human Rights, that contains both categories of rights, but appears like two distinct documents that have been merged. The 1966 two main UN Covenants on human rights make this distinction even more apparent. These are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both the way in which the provisions are worded and the enforcement mechanisms of these covenants are very divergent. In general civil rights are regarded as fundamental, universal, individual, absolute and negative, meaning that they are directed against the state and do not require much action or resources from the state. They apply equally to everyone and are enforceable in courts. Social rights, on the other hand, are looked upon as imposing different types of obligations on states, more often than not positive obligations, that require resources from the states. They can either be individual or collective and may require that people are treated differently.

In the Council of Europe (CoE) context the same distinction applies to a large extent. Two important conventions, the European Convention of Human Rights (ECHR) and the European Social Charter (ESC) are under the auspices of the Council of Europe. These two conventions contain more or less different sets of rights and very different enforcement mechanisms. Freedom of association and the right to join and act as a member of a trade union are recognized in both of these instruments. The ESC has largely been overshadowed by the ECHR. The main reasons for this are that civil and political rights are mainly recognized in the ECHR, and those rights are generally more widely accepted than the social and economic rights such as those in the ESC. The role of the European Court of Human Rights (ECtHR) is also very important. All Member States to the ECHR are also members of the Court and

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individuals can bring cases where they claim their rights have been violated before the Court. The Member States then have a duty to fulfill the judgments of the Court, pay damages and correct previous wrongdoings and amend legislation if necessary. The Court therefore guarantees that all Member States have to uphold and fulfill all the rights contained in the ECHR. There is no comparable enforcement mechanism connected to the ESC and breaches of the rights contained therein do not have the same consequences for member states of the CoE.

When the ECHR was being drafted freedom of association was viewed as civil and political right and was therefore included in the Convention. This right is guaranteed in article 11(1) of the ECHR: “everyone has the right to freedom of assembly and to freedom of association with others, including the right to form and join trade unions for protection of his interests.” Because of the way the provision is worded it seems possible to read that the scope of freedom of association has a specific application to workers’ organizations and their activities. The right to strike is established in article 6 of the ESC.

In national constitutions civil and political rights usually are more apparent, and if there are any social rights they normally enjoy weaker legal enforcement.63

In his influential essay, Citizenship and Social Class, TH Marshall comprised a theory of citizenship containing three elements: 1) civil elements composed of the rights necessary for individual freedom, such as liberty, freedom of speech and the right to property; 2) a political element referring to the right to participate in the exercise of political power; 3) and a social element such as the right to welfare and security and a right to live a civilized life according to society’s standards. According to Marshall it was not until the 20th century that social rights attained equal status with the other two elements of citizenship.64

Today there is a widespread understanding all over the world that social rights are just as important as the civil and political ones and social rights often act as a necessary precondition to the fulfillment of civil and political rights. The Declaration adopted by the second World Congress on Human Rights in 1993 in Vienna referred to the two covenants as “universal, indivisible, and interdependent and interrelated”.65 Even though social rights now enjoy wide

65 Vienna Declaration and Programme of Action, para 5.
recognition this has not embraced the end of the controversy over social rights, especially those who relate to issues of resource allocation.66

2.4 International and European development of labour rights

Labour rights were first recognized and discussed at international level after the foundation of the International Labour Organization (ILO) in 1919. Labour rights were seen as workers’ rights and the role of these rights was to provide minimum standards for workers and promote social justice to protect against the increased competition that resulted amongst others from the expansion of international trade. After the Second World War, where forced labour was a big part of the prison camps, the core labour rights were reviewed and came to be viewed as human rights, stemming from recognition of human dignity. The International Labour Organization is the oldest of the specialized agencies of the United Nations system. The ILO has had a role as the premier labour and social legislation standard setter in the world for decades. In the preamble to the ILO Constitution there are three basic reasons stated for the creation of the organization. It says: “lasting universal peace can be established only if it is based upon social justice; it was urgent to improve the working conditions of large numbers of people, as injustices, hardship and privation produced such unrest that the peace and harmony of the world were imperiled; and the failure by any nation to adopt humane conditions of labour was an obstacle in the way of other nations which desired to improve conditions in their own countries”67. These three basic reasons, or constitutional objectives, can be summarized into social justice, fair competition and freedom of association.68

There is no clear guarantee of the right to strike in the ILO Constitution or Conventions. The protection of the right to strike has been developed by the ILO supervisory bodies such as the Fact Finding and Conciliation Commission on Freedom of Association and the Committee on Freedom of Association. Freedom of association is protected in ILO Conventions no. 87 and 98. In Art. 10 of Convention no. 87 the basis of a right to strike is stated. According to the ILO bodies, the right to strike is a vital element of the freedom of association even though it can be subject to some restrictions, such as reasons of economic and social interests.

The ILO constitution was revised in 1944 with the Declaration of Philadelphia and freedom of association and collective bargaining were recognized as fundamental rights.69 In

67 ILO. Declaration of Philadelphia. 1944.
the 1970s and 1980s the political and economic basis for social rights began to be undermined by neo-liberalism, emphasizing individual civil rights as the route to human freedom and economic prosperity, gaining momentum. This tendency spread to international institutions such as the International Monetary Fund (IMF), the World Bank and the Organization for Economic Cooperation and Development (OECD). These institutions advocated free trade, deregulation, especially of labour markets, and privatization. They also encouraged governments to switch from passive labour market policies, such as unemployment insurance, to policies that were more active at involving workfare. This development led to subordination of social rights versus civil and political rights and their traditional institutional supports, trade unions and the welfare state, were weakened.

In 1951 the Council of Europe and the ILO agreed to cooperate, meaning that all the member states of the CoE had to meet the standards of the ILO.

### 2.5 The European Model of Justice

The EU is not a human rights organization like the Council of Europe and the EU courts are not human rights courts like the ECtHR. The situation of the EU can better be compared to that of individual states, as human rights protection is a part of the tasks of the EU, but it is not a main object or focus, like it is for the CoE. The matter also becomes more complicated because the Member States and the EU share competences in human and fundamental rights issues. There is no jurisdiction within EU that can be based purely on breach of human rights obligations, but questions concerning human rights can be raised in the context of the normal procedures before the courts.

According to Hans Micklitz, the European legal order has over the last fifty years yielded a genuine model of justice that he terms access justice, which is different from the national concept of social justice. In his comprehension access justice means justice through access, not access to justice, and it is for the European Union to grant access justice to those who are excluded from the market or to those who can’t use the market freedoms properly. The object of the law is to ensure that the weaker party that needs protection has access to the market.

In EU context this makes sense. The focus of the EU is to keep markets open, what is evident in the cases at hand here. When looking at the development of labour law in Europe it is

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pretty clear that the EU has been most concerned with opening up markets for workers and fighting against discrimination in access requirements, thereby leaving the social welfare and care to the responsible Member States.\textsuperscript{75} According to EU legislation the typical worker is the one that resembles the circumspect and responsible consumer.\textsuperscript{76}

Access justice differs from national justice, as it does not aim at social protection or redistribution of resources. The addressees are meant to be the dynamic, open-minded, flexible, well informed and self-standing mobile workers that seek the best job opportunities and make full use of the internal market. The ideal worker is essential for the EU to reach its goal of Europe being the most competitive and most dynamic knowledge based economy in the world, as stated in the Lisbon Agenda.\textsuperscript{77} Europe is market driven and the law is substantially tainted by that fact, far away from the social laws of the Member States as they stood a few decades ago.\textsuperscript{78}

It is interesting to compare the development of labour law inside the EU with the development of EU consumer law. When the European integration began there was no settled consumer law in the Member States, a situation that paved the way for the EU to take a leading role, avoiding the difficult tensions between Member States and the EU that have been a permanent problem in the field of labour law. The field of anti-discrimination law is also interesting, as the EU has almost from the beginning taken a leading role in equality matters of all sorts, such as gender equality and equal pay, and thereby steadily intruding over wider realms of labour law and now also other fields of private law.\textsuperscript{79}

\textbf{2.6 Changes in the EU: Eastern enlargement – more diversity among Member States}

The background of the Laval quartet was the Eastern enlargements of the EU in 2004 and 2007. Practically overnight, a large pool of migrant labour emerged, ready to work for a much lower salary than the customary workforce in the old member states.\textsuperscript{80}

\textsuperscript{80} Catherine Barnard. “Solidarity and the Commission’s Renewed Social Agenda”, page 78.
In recent years various events have crystallized the various tensions the EU is facing in this field. The ‘Polish Plumber’ incident, the referendums on the Constitutional Treaty in France and the Netherlands and several harsh workers disputes in UK have ignited a general conflict over workers’ rights and equality in the context of cross-border mobility. This conflict represents the tension between the fundamental principles the EU rests on, free movement of services and workers, non-discrimination and the right of association and industrial action.81

These issues first became apparent after the Southern enlargement of the EU in the 80’s, but they were dealt with more promptly at that time. The Rush Portuguesa case82 arose after the Southern enlargement, when Spain and Portugal joined the EU, and in that case the ECJ faced the same problem it had to deal with later in the Laval quartet. At this time there were vast differences between wages and living standards between Spain and Portugal on the one hand and the old Member States on the other. There was a transition period set up regarding free movement of workers but there was no such mechanism in place for free movement of services. A Portuguese construction company tried to benefit from this and offered its services in France using cheap Portuguese labour. In a way it is hard to read into the judgment of the ECJ in this case. On the one hand the ECJ took a rather defensive position with regard to safeguarding the internal market and ruled that the Portuguese company had to perform services in France under the same condition France applied to French firms. On the other hand the Court made a revolutionary statement saying that Community Law does not preclude Member States from extending their labour legislation and collective agreements to any person who is employed, even temporarily, within their territory. Doing that the Court permitted the imposing of national labour regulations on foreign service providers using workers that would never be counted as national workers.83

The Posting of Workers Directive from 199684 (PWD) was heavily influenced by the ECJ’s decision in the 1990 Rush Portuguesa case.85 The PWD was supposed to create a supranational coordinated set of non-exhaustive minimum rules for host states and service providers. The minimum rules were supposed to provide a floor of protection, a nucleus of

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84 Directive 96/71/EC.
mandatory rules for minimum protection for matters including minimum pay, rest and holidays.  

Parallel with the Eastern enlargement after 2000 there were great concerns amongst the workers of ‘old Europe’. At that time there was no political deal on how to compensate increased heterogeneity with more regional and social cohesion. The political climate called for opening of markets and deregulation, those were the key drivers of the Lisbon Strategy, which aimed to make Europe the most competitive, knowledge based economy in the world.  

In 2004 eight Central and Eastern European countries with 70 million inhabitants and nominal wage levels between one-tenth and one-seventh of the “old” 15 Member States acceded to the EU. This was a fairly bold step because the welfare gap between those countries and the EU was huge and now there was to be free movement of goods, capital and citizens between them and the Union. In 2007 Bulgaria and Romania also joined the EU. The impact of these changes on national labour settlements has been among the most controversial areas of EU law in academic scholarship. Some progressive scholars have directly addressed this as a neo-liberal development constituting a high-level danger to national labour settlements and the workers. In the same sense, the process of working towards a solution for this problem is among the most important challenges facing the EU in the new millennium.  

Before the Eastern enlargement there were various concerns about the effects this change could possibly have on the old Member States. Some of those concerns were based on reality but others were based on fear of changes or factors that had no place in reality. For example the wage level in the new Member States was not so different from that of Portugal and Greece, who were already members at that time. Other factors also played some part. Migrating workers tend to choose a neighboring country, because of linguistic, cultural and transport cost considerations, so not all of the member states did have cause for concern, and these factors also prevent a major flood of migration. Studies also show, contrary to widespread beliefs, that European migrants tend to be young, well educated and single.  

Studies furthermore show that increased supply of labour may induce new investments, which is something all states are always looking for. 92 Taking indicators like these into considerations, even today it is hard to judge the effects of the enlargement because these changes are so recent in time and transitional periods have just run out. 93

In spite of all these various circumstances, most of the old Member States opted for restricting the free movement of workers from the new member states for the transitional period. Only Sweden, Ireland and the United Kingdom opened their markets up in the 2004 enlargement and in the 2007 enlargement only Sweden and Finland opened their markets right away, which made Viking and Laval pioneer cases in this field. 94 The strict cautions of most Member States also explain why so many of them submitted their observations before the Court in the Laval case, even the EEA states Iceland and Norway did so as discussed later. 95

These fears of enlargement and the consequences it would bring probably played some role in the failed referendum on the European Constitutional Treaty in 2005. In the same year there was a Commission proposal, called the Bolkestein Directive, with the purpose of liberalizing the service sector. The proposed country of origin principle raised particular concerns, because in practice for example these rules would allow a Polish plumber to set up shop in any EU member state while being subject to Polish laws and regulations. The same would go for service providers from other Member States. There were mass demonstration against this proposal in several European cities and in 2006 the European Parliament passed a significantly changed version of the directive where some of its most controversial elements had been withdrawn and national labour and social provisions were safeguarded. 96 There was obviously a considerable fear of increased number of letter box companies in the new member states which could allow employers to take advantage of lower wages and weaker regulations. 97

93 Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 6.
96 Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 2.
97 Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 7.
In the opinion of some commentators the Eastern enlargement of the EU created a unique moment for the ECJ to look into the status of social rights within the EU order, especially the relationship between social rights and the internal market. The essence of this will be discussed later.

3 EU Treaties and principles

The following chapter focuses on the legal context of labour rights in Europe, in the EU Treaties and the Charter of Fundamental Rights. It also discusses briefly how secondary EU legislation that concerns the internal market is made and introduces the main actors that take part in that process.

The Lisbon Treaty, which was adopted in 2009, introduced some changes to the EU. The Treaty steps up the EU’s social objectives and with the Treaty’s entry into force the Charter of Fundamental Rights was given the legal value of the EU Treaties. The Lisbon Treaty introduces a new Art. 2 that lays down a set of values common to the EU and the Member States:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

This article has to be read as a general principle, rather than something that is fully established in the legal order of the EU. Read together with various articles of the EU Treaties this provision allows for the founding of a European concept of justice on weighing social rights against other rights, for example those of the internal market.

The European Union is committed to achieving a “highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment”, as is stated in article 3(3) TEU:

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

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100 Art. 2 TEU.
market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States. 102

Throughout the Treaties various references to this social dimension are visible. Even though the Lisbon Treaty introduces some changes in this regard the main competence in social matters still remains with the Member States. 103 This reference to the social market economy was not in the Treaty until the Lisbon Treaty.

The main provision on social policies of the EU is found in Article 151 TFEU. The article describes the goals that the Union and the Member States are entitled to work towards in the field of social policy. The EU and the Member States share competences in this field, with the member states leading the way. Union competence is only for support and to complement the actions of the Member States:

The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy.

They believe that such a development will ensue not only from the functioning of the internal market, which will favor the harmonization of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action.

Until now, no comprehensive labour code has emerged at EU level and whole areas of labour law that are intensively regulated at Member State level are still formally excluded from the legislative competences of the EU institutions. Article 153 of TFEU states that the EU shall support and complement the legislation of Member States in various fields of social

102 Art. 3(3) TEU.
law, to reach the goals set out in article 151, such as working conditions, social security, combating of social exclusion and other fields. The EU may adopt measures to reach these goals. According to paragraph 5 of article 153 this does not apply to pay, the right of association, the right to strike or the right to impose lock-downs, which are at the sole competence of the Member States. The role of the social partners is recognized in art. 152.

3.1 The European Charter of Fundamental Rights

The European Charter of Fundamental Rights covers a wide range of civil, political, economic, social and cultural rights and principles. Most of the provisions are the same as in other human rights documents, e.g. the ECHR, the European Social Charter or the various UN covenants, such as the two main ones from 1966. But some provisions go beyond those previously internationally recognized human rights. The Charter was proclaimed in Nice in 2000 after the Cologne European Council meeting in 2000. The Charter first became legally binding with the adoption of the Lisbon Treaty in December 2009 so it was not legally binding when the Laval quartet was decided. Before the Charter became binding the ECJ had referred to it in several of its judgments, thereby giving it some legal value. The Charter’s Preamble refers to a future based on common values, common European spiritual and moral heritage and affirms the EU’s foundation in the indivisible, universal values of human dignity, freedom, equality and solidarity. The Preamble also tries to capture the diversity of the peoples of Europe, cultures, national identities of the Member States and the organization of their public authorities at national, regional and local levels.

The Charter was not supposed to alter in substance the existing EU law on fundamental rights. The European Council’s decision to draft the Charter was aimed primarily at making the fundamental rights of EU law more visible and consolidate and codify the existing norms, rather than create new ones.

Before the establishment of the Charter of Fundamental Rights in the EU was agreed, there was a lively discussion whether social rights should be included. In the end it was accepted that social rights should be included in the Charter. There are not many international instruments existing that contain both social rights and political and civil rights so the

inclusion of social rights in the Charter could therefore be seen as an important step for the recognition of social rights in Europe.109

The Charter contains several rights that relate to labour law issues. They can all be found either in national constitutions or international instruments, such as the European Social Charter.110 Article 28 refers to the right to collective bargaining and action:

> Workers and employers, or their respective organizations, 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.

This article is in chapter IV, titled Solidarity, but the different labour law provisions are in different chapters of the Charter. Among other rights covered are the freedom of assembly and association (art. 12), fair and just working conditions (art. 31) and reconciliation of family and professional life (art. 33(2)).111

Collective bargaining and trade union rights have been outside the scope of EU law for most of the EU lifespan. Collective bargaining is mentioned and encouraged as a method to regulate labour law in article 156 of the TFEU.

The Charter is more closely tied to the ECHR and the language and jurisprudence of the ECtHR than the previous fundamental rights law of the EU.112 This fact could create an interesting dialogue between the two courts and related mechanisms, as will be explored in the context of labour law and collective action later on. The Lisbon Treaty opens up for accession of the EU to the ECHR and that will make this field of law even more interesting. It is hard to predict when the EU would presumably accede, but some work is being done to prepare for that accession and the ECHR has been amended to open up for the possible accession of the EU.

In the recent past the EU has been mainly focused on market integration, deregulation and economic issues. The adoption of the Charter might be a sign of the Union changing the focus. Whether the Charter will soften the edges of the internal market law and make it more focused on human rights remains however to be seen.113

3.2 Creation of Internal Market Legislation: Main actors

A number of actors participate when internal market legislation is created. The method used is co-decision, which became the ordinary legislative procedure with the entry into force of the Lisbon Treaty, where the Commission, the Council and the European Parliament all have their distinct roles and all play important parts. The European Parliament usually plays a key pro-labour protection role in the creation of internal market legislation. Different parts of the Commission have a voice at the preparation stage when it comes to the interface between labour rights and internal market legislation. Strongly divergent views sometimes come from the employment and social affairs and the internal market directorates of the Commission on how or whether to accommodate labour rights within the internal market legislation. The positions of individual states in the Council can also be very divergent, for example their opinions are usually based on whether they are primarily importers or exporters of posted workers when it comes to issues related to posting of workers. Finally the ECJ provides an important input on how internal market legislation is interpreted. In the past the ECJ has given many verdicts that have gone against previously established precedents. It is therefore not always foreseeable how the different rules and regulations of the internal market will be viewed by the ECJ individual cases.

The institutions of the EU play a key role in negotiating the demands of economic and social interests. As the EU has taken on more and more policy fields and roles since the launch of the Single European Act, this role has become more important. In spite of all these new roles of the EU, the driving force behind the European integration seems to remain deregulatory and market oriented. In practice, most hard legislation proposed by the Commission is for furthering the single market while social goals remain in the soft-law category, usually subject to voluntary cooperation and presented in the forms of policies and best practices.

A third group of relevant actors in the creation of legislation that balances economic and social interest within the EU institutions and the Member States, are the social partners. The

116 Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?” page 4.
social partners represent associations of labour and capital, labour and workers unions and employer’s unions.  

The relationship between internal market provisions, in the Treaty and in secondary legislation, and labour rights is often controversial and that is highly relevant when discussing these cases as they can be viewed from different perspectives. Internal market purists are of the opinion that labour rules should not normally affect the operation of the market freedoms and domestic purists think that national labour settlements should be free from influence from internal market legislation. Both of those arguments are powerful and have advocates within and outside the EU institutions. This tension becomes apparent when legislation is made. This can also imply difficulties in predicting how the Court will accommodate labour rights within the Treaty freedoms. The individual cases can also become more high profile because of this uncertainty, which certainly sometimes has characterized this line of cases. They have been the source of much controversy in Member States, among trade unions and even the general public of Europe.

In the European Union, freedom of services dates back to 1957. After more than fifty years one might think that it would function to perfection. But that is surely not the case. A number of directives, regulations, communications and other documents tell us that a lot of monitoring and regulations are needed in order to manage the four freedoms. Employers and employees at European level, as well as national social partners want to keep markets and jobs for themselves. This became obvious when the Eastern enlargement of the EU was underway and many of the old Member States and trade unions insisted on limitations for the access of the new European workers.

4 The Laval quartet: Do economic rights prevail over fundamental rights?

The “Laval quartet” refers to a line of four important cases dealt with by the ECJ; the Laval case, the Viking case, the Rüffert case and the Commission vs. Luxembourg case.

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117 Nicole Lindstrom, “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 4.
120 C-341/05, Laval [2007] ECR-I-11767.
The cases are different in many respects but they all address labour rights within a market providing free movement of labour and the conflicts between the fundamental freedoms and the fundamental right to take collective action.

Prior to the Laval quartet the ECJ passed judgments on a few cases that are similar to the Laval quartet in many ways. In the cases Albany, Omega and Schmidberger, the ECJ had emphasized the importance of the social sphere and ruled in favor of such arguments. The Omega and Schmidberger cases are covered in chapter 2.2. In the Albany case the Court referred to the right to join and form trade unions as a general principle of EU law. It did, however, not take into consideration the freedom to bargain collectively. The Advocate General Jacobs stated that there wasn’t enough convergence in national legal orders and international legal instruments to conclude that there could be a specific right to bargain collectively in EU law. Concerning the questions of posted workers, like in the Laval case, the ECJ had only considered or applied the PWD in three cases prior to the Laval case. In all these cases the Court concluded that the exercise of fundamental rights fell within the scope of the Treaty provisions on free movement and used a proportionality test to find a balance between the fundamental freedoms and fundamental rights. These cases illustrate the territorial struggle that has been in progress concerning where labour law ends an economic rules in the shadow of the internal market take over.

The Viking and Laval cases were the first two cases in this line of important cases dealt with by the ECJ and therefore they have generated the most responses and debate. The judgments in the Viking and Laval cases were delivered with one-week interval and while the proceedings were going on they stirred much debate and there were numerous actors waiting for the ECJ’s verdicts. The judgments undoubtedly came as a shock to the system of European labour law and the repercussions are still on the agenda of various actors. Shortly afterwards, the judgments in the Rüffert and Commission vs. Luxembourg cases were
delivered. The following chapter provides an overview of these four cases and examines their effect, through academic debate and the responses of stakeholders, such as labour and employer’s organisations.

4.2 The Laval case

The Laval case deals with the posting of workers. Posting of workers occurs when an employer in one Member State (the home state) sends (posts) its workers to another Member State (the host state) to deliver services in the host state. The workers who move cross border with their employers to carry out specific projects are called posted workers, their base remains in the home state and they are only temporarily located in the host state. This raises a question about which employment standards should be applied to those posted workers, those of the home state, those of the host state or some kind of combination of the two. In the Laval case a Latvian company, Laval, posted Latvian workers to Sweden to work on building sites for a subsidiary of Laval. The project was a school construction in the town of Vaxholm. The Laval subsidiary and the Swedish construction workers’ union entered into negotiations on the wages of the workers but had no success in reaching an agreement. Shortly thereafter Laval and the Latvian construction workers’ union signed collective agreements on the basis of the Latvian wage level. Around 65% of the Latvian workers were members of the Latvian union. The wage they agreed upon was nearly double the average pay for construction workers in Latvia but only nearly half of the wages for Swedish construction workers. The Swedish trade union started collective action, blockading the construction site. The goal was to achieve the Swedish wage levels for the Latvian workers. Other Swedish unions entered into sympathy action and in the end the Latvian workers returned to Latvia. The town of Vaxholm furthermore withdrew from the contract with the Laval subsidiary and the subsidiary declared bankruptcy. Laval, the mother company, brought proceedings against the Swedish trade unions before the courts in Sweden.

This typical industrial dispute quickly turned into a larger diplomatic dispute. Before the blockade of the construction site even started, the Latvian Deputy Prime Minister met with the Swedish Ambassador in Riga to request that the Swedish government intervened to prevent discrimination on grounds of nationality and ensure freedom of services within the union. The wage they agreed upon was nearly double the average pay for construction workers in Latvia but only nearly half of the wages for Swedish construction workers. The Swedish trade union started collective action, blockading the construction site. The goal was to achieve the Swedish wage levels for the Latvian workers. Other Swedish unions entered into sympathy action and in the end the Latvian workers returned to Latvia. The town of Vaxholm furthermore withdrew from the contract with the Laval subsidiary and the subsidiary declared bankruptcy. Laval, the mother company, brought proceedings against the Swedish trade unions before the courts in Sweden.

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133 C-341/05, Laval [2007] ECR-I-11767.
135 Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 9.
EU. Other ministers also intervened. The Latvian Foreign Minister Artis Pabriks claimed that the action undermined the main reasons for why Latvia joined the EU and the Swedish Prime Minister Göran Persson claimed that the Swedish unions had the right to take retaliatory measures in order to ensure the survival of collective agreements.

Employer’s associations both in Sweden and Latvia condemned the industrial action. The Latvian Construction Contractors Association threatened to boycott Swedish construction companies operating in Latvia. Svensk Näringsliv, the Confederation of Swedish Enterprises that represents 54,000 Swedish companies, also supported Laval’s position and ended up contributing large sums for Laval’s legal costs before the Swedish court.

The fact that Swedish employers and some other actors in Sweden aligned with Laval can probably be explained by the fact that they had been demanding a more flexible labour environment in Sweden for a long time with the aim of increasing the rights of the companies and decreasing the rights of the unions. The Laval case therefore presented an unexpected opportunity to challenge existing national systems.

The Latvian worker’s union was silent throughout the dispute but the Swedish union tried its best to answer claims about Swedish unions discriminating against Latvian workers (and other foreign workers for that matter) and declared that their action was designed to protect the rights of all workers. They even published advertisements in Latvian newspapers to stress that opinion.

The Swedish Labour Court requested a preliminary ruling from the ECJ in April 2005. The ECJ was prompted for a ruling on three matters. First, whether the right to collective action falls within the scope of Community law, including the provisions on free movement of services. Secondly, whether Swedish law, which leaves it to the social partners to define the terms and conditions of employment, constituted an adequate implementation of the 1996 PWD, providing enough protection for posted workers. And thirdly, whether trade unions are

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136 Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 10.
137 Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, pages 10-11.
138 Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 11.
139 Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 11.
140 Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 11.
allowed to use industrial action that is legal under national law to compel a service provider from another country to provide comparable terms and conditions of employment.\(^{141}\)

\[4.2.1\] More political debate across Europe

The political debate continued outside the courtroom during the time the case was under ECJ consideration. In December 2005 the EU Commissioner for the Internal Market and Services, Charles McCreevy, stated that the Swedish unions’ action against Laval was against free movement of services and he therefore opposed the position of the Swedish government and unions. That statement provoked outrage among trade unions in Europe.\(^{142}\) The conflict also had an impact in Denmark, where the labour relations model is quite similar to the Swedish one. Former Danish Prime Minister, Poul Nyrup Rasmussen, suggested that McCreevy’s comment could have serious consequences for Danish and Swedish support for the EU.\(^{143}\) When asked about these comments, European Commission President, Jose Manuel Barroso, stated however that the EU was in no way going against or criticizing the Swedish social model.\(^{144}\)

It is not common that ECJ cases have such an impact outside the courtrooms. The European Commission and 14 member states, two EEA states Iceland and Norway, and the EFTA Surveillance Authority submitted observations on the case. The member states split up in to two groups, more or less, the new Member States and UK and Ireland on the one hand, and the other old Member States on the other. There were some minor differences in the states opinions but the New Member States supported free movement of services and believed that the Swedish union was in breach of that freedom. The old Member States argued that free movement of services could not infringe on the right to collective action. The European Commission was of the opinion that both principles must be upheld but it was up to national courts and the ECJ to decide which principle should prevail on a case-by-case basis.\(^{145}\)

\[4.2.2\] Opinion of the Advocate General: Trade unions should be able to use industrial action

\(^{141}\) Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, pages 11-12.
\(^{142}\) Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 12.
\(^{143}\) Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 12.
\(^{144}\) Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 12.
\(^{145}\) Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 13.
Advocate General Paolo Mengozzi argued in his opinion that collective action does fall within the scope of freedom of movement of services. It should be possible for trade unions to use industrial action to press service providers from other Member States to deliver equal terms and conditions of employment. The only condition being that collective action would have to be motivated by public interest objectives. In Mengozzi’s opinion the action of the Swedish union met these conditions, as the industrial action was designed to contribute to the protection of the Latvian workers.  

4.2.3 The judgment of the ECJ

In its judgment, the ECJ recognized that the right of trade unions to take collective action is a fundamental right under EU law and that protection of workers against social dumping might constitute an overriding reason of public interest. The ECJ however departed from Mengozzi’s opinion and ruled that the Swedish unions’ action violated the principle of free movement of services under article 49 of the Treaty since the unions’ demands exceeded minimal protections under national labour law.

In the Laval case the Court introduced a new approach to posted workers. The ECJ dramatically restricted which host state labour standards can be applied to posted workers. It interpreted the PWD as providing maximum standards, instead of the minimum standards approach it had always been thought to contain. The Swedish authorities had implemented the PWD in the way that there was no fixed national minimum wage, all wages were meant to be set by collective agreements, as has been customary in Sweden for decades.

In its approach, the Court seems to look at both economic and social arguments and the outcome appears to be a question of balancing, in the words of the Court at least. The Court emphasizes that the European integration is not exclusively about providing the efficiency of the economic freedoms but due regard should also be paid to social rights. This all sounds satisfactory in the words of the Court, but there is still an unanswered question remaining on

146 Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 13.
to what extent the decision was really informed by social factors and a broader social context of the community legal order.149

The fact is that in the Laval case the Court only devoted a few lines to discuss the nature of the restriction on the freedom to provide services. The conclusion was that any action that was “liable to make it less attractive, or more difficult”150 to carry out construction work in Sweden constituted a restriction on the freedom to provide services under art. 49 EC. There was not much reasoning behind this conclusion.151 But what is the actual meaning of this statement of the Court? More difficult or less attractive than what? This has been looked at by various commentators and it seems there are a few possibilities to choose between when interpreting the words of the Court; 1) More difficult than if laws allowing the industrial action had not existed, 2) more difficult than for Swedish firms or 3) more difficult than the situation if Latvian law had prevailed? In general it should be obvious that labour law and strikes, if successful, inevitably always make it more costly for employers that are affected by them to do business.152

After the ECJ delivered its judgment the Swedish Labour Court in its final judgment held the trade unions liable to pay punitive damages.153

4.3 The Viking case154

The Viking case deals with a conflict between a Finnish ferry operator, Viking Line, the Finnish Seamen’s Union (FSU) and the International Transport Workers’ Federation (ITF). Viking Line was operating a ferry, the Rosella, that sailed between Tallin and Helsinki. The ship was sailing under a Finnish flag but in October 2003 Viking Line informed FSU that the ship was about to be reflagged and registered in Estonia, in order to employ an Estonian crew. The wages in Estonia were not as high as in Finland and that was the reason for the reflagging. The FSU notified the ITF, which sent a circular letter to all its members, asking them not to negotiate with Viking Line. The ITF strongly opposes using flags of convenience, that is, reflagging vessels in order to circumvent strict labour laws in certain countries. This

150 Laval case, para 99.
153 The impact of the ECJ judgements on Viking, Laval, Rüffert and Luxembourg on the practice of collective bargaining and the effectiveness of social action, page 5.
resulted in a strike. Viking Line brought an action to court in the United Kingdom, where ITF is based, claiming that the action taken by FSU and ITF was contrary to article 49 TFEU (ex art. 43 EC) on freedom of establishment. The British Court brought the case before the ECJ. The ECJ was asked to answer two questions: 1) whether collective action falls outside the scope of article 43 and 2) whether art. 43 has a horizontal direct effect. In essence it is a question of how to strike a balance between the right to take collective action and the fundamental freedom to provide services.155

4.3.1 ECJ hearing – Many actors involved

Fifteen states and the European Commission submitted observations in the case. The ITF General Secretary David Cockroft noted that the number of submissions shows how many states have recognized just how deep the impact of this case could be. He stated:

What’s at issue here could hardly be more fundamental. The right to defend your job against the right of a business to do what it takes to up its profits; a Europe for the powerful or a Europe for its citizens. This is not about new entrants, or labour costs. It is about the rights and basic beliefs that most of us have always believed underpinned the European Union.156

The observations of the states that took part in the proceedings were more or less similar to their positions in the Laval case. The UK stated that there was no legally binding fundamental social right to take collective action in Community law. The European Commission argued that article 43 on freedom of establishment does not have horizontal direct effect; so private companies cannot resort to EU law to prevent unions from taking collective action against them.157

4.3.2 Opinion of the Advocate General: Compromise between fundamental rights and fundamental freedoms

The Advocate General Miguel Poiares Maduro delivered his opinion in May 2007. On the point whether collective action falls outside the scope of article 43 Maduro took a compromising position stating that EU provisions on freedom of establishment and services are not irreconcilable with the protection of fundamental rights or the Community’s social

155 Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 17.
156 “European Court of Justice hearing ‘a welcome step’ says ITF.” http://www.itfglobal.org/.
157 Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, pages 17-18.
policies. He also stated that trade unions could take collective action to try to prevent a company from relocating within the EU, as long as it did not do so with discrimination or prevent a relocated company from providing services in another Member State. In his opinion article 43 had a horizontal direct effect so the employer could pursue a claim against a trade union for violations of EU law. Regarding the particular collective action in the case Maduro stated it should be left to national courts to decide on the legality of such action on a case-by-case basis provided there was no difference in treatment of national and foreign companies.\textsuperscript{158}

4.3.3 ECJ ruling

In December 2007, the ECJ passed its long awaited judgment. The ECJ stated that collective action may be legitimate if the aim is to protect jobs or working conditions and if all other ways of resolving the conflict are exhausted, thereby agreeing with Advocate General Maduro.

On the issue of horizontal direct effect, the Court stated that private companies could appeal to article 43 in seeking relief from industrial action.\textsuperscript{159} The ECJ ruled that the collective action was likely to make it “less attractive, or even pointless”\textsuperscript{160} for Viking to exercise its right to freedom of establishment. The Court also stated that the right to take collective action must be accepted as a fundamental right and an integral part of the general principles of Community law.\textsuperscript{161} But in fact the Court seems to give a very small margin for that right to be exercised, it has to be suitable for the objective pursued and must not go beyond what is necessary in order to attain it. The ECJ ruled that it was for the national court to ascertain whether the restriction in question could be justified. The case ended up being settled out of court in the UK.\textsuperscript{162}

The judgment gave rise to a lively debate. At first the response was positive, because of the right to collective action being recognized as a fundamental right.\textsuperscript{163} However, the extensive application of the fundamental freedoms was criticized. Section 4.6 focuses on the different responses of parties that participated in the debate.

\textsuperscript{158} Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 18.

\textsuperscript{159} Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 18.

\textsuperscript{160} Viking case, para 72.

\textsuperscript{161} Viking case, para 44.

\textsuperscript{162} The impact of the ECJ judgements on Viking, Laval, Rüffert and Luxembourg on the practice of collective bargaining and the effectiveness of social action, page 5.

\textsuperscript{163} ETUC Press release. ECJ judgment on Viking case recognizes fundamental right to collective action as integral part of EU Community law.
4.4 The Rüffert case

The Rüffert case deals with the application of public procurement rules in Germany, posting of workers and the freedom of establishment. A German company won a tender with the German state of Lower Saxony to build a prison. According to the rules on public procurement in the state the contractor must pay at least the salary prescribed in the collective agreement in force where the services are performed. The German company subcontracted work to a Polish contractor that employed Polish workers. The Polish workers were paid less than half of the minimum wage prescribed in the collective agreement and because of that Lower Saxony annulled the contract and imposed penalties on the company. The dispute was brought to the ECJ. The German referring court pushed for the view that the law as it was in Lower Saxony should not be allowed to stand, arguing that would result in an unequal treatment and preventing workers from other Member States than Germany to work there because their employer would lose its competitive advantage.

The case was long running and revolved among other things around the legality of social considerations in public procurement as well as the legality of applying host state standards to posted workers. The ECJ confirmed the new approach to posted workers, originating in the Laval case. The Court found that the claim to pay wages according to the collective agreement did not comply with the PWD, interpreted in the light of art. 56 TFEU. One of the reasons formulated was that the collective agreement was not generally applicable (according to art. 3.1 of the PWD). In Germany states, like Lower Saxony, do not have the power to make collective agreements universally applicable. The Court found that where a Member State had the power to make collective agreements universally applicable, like the case is in Germany, no collective standards other than those universally applicable collective agreements could be applied. The Court also went further and came to the conclusion that because the collective agreement in question applied only to public contracts within a defined geographical scope (the state of Lower Saxony), it should also be ruled out as a lawful

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method to set standards for posted workers.\textsuperscript{168} The Court almost totally overlooked the consideration of the public procurement social aquis, looking only to the posted workers dimension of the case. The implications of the Rüffert case for the public procurement cases of the future remain to be seen.\textsuperscript{169} The Commission issued a response after the Rüffert case:

[A]lthough this judgment was rendered in the context of a public procurement contract, it has no implications for the possibilities offered by the Procurement Directives to take account of social considerations in public procurement. It only clarifies that social considerations (in public procurement) regarding posted workers must also comply with EU law, in particular with the Directive on the posting of workers.\textsuperscript{170}

\subsection*{4.5 Commission vs. Luxembourg\textsuperscript{171}}

In Commission vs. Luxembourg the Commission brought proceedings against Luxembourg claiming that Luxembourg had failed, in several respects, to implement the PWD correctly. The Commission stated that it was an obstacle to foreign service providers wanting to operate in Luxembourg. The ECJ interpreted art. 3.10 of the PWD, concerning that Member States are allowed extend conditions of employment on matters beside the core if they concern public policy provisions, to be a derogation from the fundamental principle of freedom to provide services and therefore it was to be interpreted strictly. Strictly meant that “public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society”. It is difficult to imagine what kind of host state labour rules would fall under such a definition.\textsuperscript{172}

\subsection*{4.6 Responses after the Laval quartet}

The judgments in these four cases discussed above have raised many key questions regarding the relationship between fundamental freedoms and fundamental rights and where the development of the EU is heading. On the surface it seems as the relationship between EU level norms and national labour law has been fundamentally altered by the ECJ, as the ECJ has taken on the role to review national labour legislation.\textsuperscript{173} The Laval and Viking cases, as

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{168} Claire Kilpatrick, “Internal Market Architecture and the Accomodation of Labour Rights: As Good as it Gets?”, pages 14-15.
\item\textsuperscript{169} Claire Kilpatrick, “Internal Market Architecture and the Accomodation of Labour Rights: As Good as it Gets?”, page 15.
\item\textsuperscript{170} Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement, page 46.
\item\textsuperscript{171} C-319/06, Commission v Luxembourg [2008] ECR I-4323.
\item\textsuperscript{172} Claire Kilpatrick. “Internal Market Architecture and the Accomodation of Labour Rights: As Good as it Gets?”, page 12.
\item\textsuperscript{173} Catherine Barnard and Simon Deakin. “European labour law after Laval”, page 253.
\end{enumerate}
\end{footnotesize}
being the first two in this line of cases, have generated the most discussions. Various trade
unions, academics and other actors have commented on them, as well as on the other two
cases.

Those who supported Laval and the employers’ cause in the proceedings were happy with the
ECJ judgment. Svensk Näringsliv welcomed the decision and its vice president, Jan-Peter
Duker, declared that the judgment was good for the free movement of services and that there
should not be any obstacles for foreign companies to come to Sweden.\textsuperscript{174} Latvian officials
were also content. Latvian member of the EU Parliament, Valdis Dombrovskis suggested that the
EU should put up protective mechanisms to safeguard companies from the “arbitrary and
unjustified demands of trade unions.”\textsuperscript{175} The employers’ association, BusinessEurope,
representatives were a little bit more cautious saying that the EU should wait for the Member
States to draw their own conclusions on what impacts Laval and Viking would create for their
national systems before deciding on the next move on EU level.\textsuperscript{176}

4.6.1 ETUC resolutions: Call for a Social Progress Clause in the Treaties

The European Trade Union Confederation (ETUC) has raised concerns over several issues in
the cases, claiming that the cases expose the weaknesses of the current EU legal framework.
The ETUC has adopted several resolutions and documents concerning these cases and they
have all been very critical. The ETUC Executive Committee claims that the judgments in the
Viking and Laval cases are of massive importance to the European trade union world and not
just to the workers directly affected by the cases. The ETUC claims that it is deeply ironic
that the Swedish and Danish models are under particular pressure from the judgments,
because they are widely respected homes of flexicurity, a concept used to describe flexibility
and security in the labour world.\textsuperscript{177} The ETUC acknowledges the complexity of these cases
but claims that it is very clear that they represent a major challenge for the organization and
its members. How will labour standards be defended in an era of globalization? The ETUC
claims that the ECJ does not sufficiently recognize the right of trade unions to defend their

\textsuperscript{174} Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 14.
\textsuperscript{175} “European Social model Challenged by Court Rulings.” http://www.euractiv.com.
\textsuperscript{176} Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 14.
\textsuperscript{177} ETUC resolution. \textit{ETUC response to ECJ judgments Viking and Laval}, page 1.
members against social dumping and fight for equal rights of migrant and local workers and take action to improve the living and working conditions of workers in Europe in general.\textsuperscript{178}

In another resolution adopted by ETUC the Confederation claims that these cases have confirmed a hierarchy of norms, with market freedoms highest in the hierarchy, and the fundamental social rights of collective bargaining and action in second place. This is claimed to have serious consequences for Social Europe.\textsuperscript{179}

The right to strike was confirmed as a fundamental right in the Laval case but to ETUC it is clear that it is not as fundamental as the EU’s free movement provisions, even though in some member states the right to strike is a first rank constitutional right. On top of that all the Member States have ratified the relevant ILO and Council of Europe conventions, which guarantee the freedom of association and the right to collective bargaining and strike.\textsuperscript{180} These ECJ verdicts also can lead to unions having to justify their action, ultimately to the courts, when using collective action to fight for equal rights and good working conditions. That jeopardizes the autonomy of the unions, something that is very dear to some of the member states. ETUC is deeply concerned about all these aspects. In art. 152 of TFEU it is stated that the EU shall respect the autonomy of the social partners:

The Union recognizes and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.

The ETUC also suggests that the EU institutions should consider even bigger questions, who has the final decision making power in the EU? Is it the legislator or is it the judges?\textsuperscript{181} These are important questions of democratic value.

The ETUC has been urging EU institutions to take action to address these problems. They have asked for a Social Progress Clause to be added to the legal framework of the EU, clarifying the relationship between economic freedoms and fundamental social rights, and a revision of the PWD.\textsuperscript{182} The aim of the Social Progress Clause\textsuperscript{183} should be to clarify that the Treaties and secondary EU legislation are interpreted in the light of the following elements: That the single market is not an end in itself, but a means to achieve social progress for the

\textsuperscript{178} ETUC resolution. \textit{ETUC response to ECJ judgments Viking and Laval}, page 1.
\textsuperscript{179} ETUC resolution. \textit{Achieving social progress in the single market: proposals for protection of fundamental social rights and posting of workers}, page 1.
\textsuperscript{180} ETUC resolution. \textit{ETUC response to ECJ judgments Viking and Laval}, page 2.
\textsuperscript{181} ETUC resolution. \textit{ETUC response to ECJ judgments Viking and Laval}, page 3.
\textsuperscript{182} ETUC resolution. \textit{Achieving social progress in the single market: proposals for protection of fundamental social rights and posting of workers}, page 1.
\textsuperscript{183} ETUC proposal for a Social Progress Clause can be viewed at \texttt{http://etuc.org/a/5175}
people of Europe. That economic freedoms cannot have priority over fundamental social rights and if there is a conflict the social rights should prevail. Economic freedoms should not be interpreted as allowing enterprises to circumvent national social and employment laws.\textsuperscript{184}

The ETUC has also mentioned the so-called Monti clause, which was proposed by Commissioner Monti (current Prime Minister of Italy) when legislation to introduce the free movement of goods was being discussed. The clause reads:

This Directive may not be interpreted as affecting in any way the exercise of fundamental rights as recognized 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.

A similar clause can be found in the Services Directive.\textsuperscript{185} The Social Progress Clause would replace the Monti clause and be a broader, more general clause that would remove any doubt that the free movement rules may in any way affect fundamental rights. The Lisbon Treaty and the Charter of Fundamental Rights also matter in this regard, both containing provisions and principles on social progress and fundamental and social rights.\textsuperscript{186}

\textbf{4.6.2 Joint report by the European social partners}

The European social partners have also issued a joint report on the Laval quartet.\textsuperscript{187} In the report ETUC raises similar concerns that it had done before in its own reports and the social partners are far from being in agreement on these issues. In the section on shared observations of the social partners there are no concrete proposals as to how to respond to the judgments. They share views such as respecting the diversity of industrial relation systems in Europe,\textsuperscript{188} and share concerns about the rise of protectionism and xenophobia that has been observed in Europe lately.\textsuperscript{189}

In the view of the employers’ organizations the ECJ rulings have not affected the relationship between social fundamental rights and economic freedoms, making either of

\textsuperscript{184} ETUC resolution. \textit{Achieving social progress in the single market: proposals for protection of fundamental social rights and posting of workers}, page 2.
\textsuperscript{185} ETUC resolution. \textit{ETUC response to ECJ judgments Viking and Laval}, page 3.
\textsuperscript{186} ETUC resolution. \textit{ETUC response to ECJ judgments Viking and Laval}, pages 3-4.
\textsuperscript{187} Report on joint work of the European social partners on the ECJ ruling in the Viking, Laval, Rüffert and Luxembourg cases.
\textsuperscript{188} Report on joint work of the European social partners on the ECJ ruling in the Viking, Laval, Rüffert and Luxembourg cases, page 3.
\textsuperscript{189} Report on joint work of the European social partners on the ECJ ruling in the Viking, Laval, Rüffert and Luxembourg cases, page 2.
them subordinate to the other. As there are limitations on economic freedoms, there can also be limits on the exercise of fundamental rights, such as the right to take collective action. It is coherent to recognize the existence of mutual limitations that have to be used in a proportionate manner. In the view of the employers these limitations are fully compatible with international standards, as those set by the ILO. The entry into force of the Lisbon Treaty and the European Charter of Fundamental Rights ensures that these fundamental rights are protected and there is no need to add a Social Progress Clause. The employers’ organization stresses the importance of the Single Market, which is a key tool in driving economic growth in Europe. The employers’ organizations do not want any changes to the Treaties or the existing directives and they believe that individual Member States can react to the case law on their own and solve problems that might come up.

4.6.3 European Parliament: The goal is balance between freedom to provide services and worker’s rights

The European Parliament’s Employee and Social Affairs Committee held a hearing in February 2008 to exchange views on the Laval and Viking cases. ETUC General Secretary John Monks spoke to the committee and argued that the Laval case challenges the European Parliament’s position that fundamental social rights and free movement of services should be placed on equal footing. He continued:

The idea of social Europe has taken a blow. Put simply, the action of employers using free movement as a pretext for social dumping practices is resulting in unions having to justify, ultimately to the courts, the actions they take against those employers’ tactics. That is both wrong and dangerous. Wrong because workers’ rights to equal treatment in the host country should be the guiding principle. Wrong because unions must be autonomous. And dangerous because it reinforces those critics of Europe who have long said that liberal Europe would always threaten the generally excellent social, collective bargaining and welfare systems built up since the Second World War.

190 Report on joint work of the European social parnters on the ECJ ruling in the Viking, Laval, Rüffert and Luxembourg cases, page 5.
The European Parliament (EP) issued a resolution in October 2008 and voiced its concerns about the gross violation of the principle of equal treatment regardless of nationality in the judgments.\textsuperscript{196} The resolution covers a lot of matters connected to the judgments and shows clearly the concerns of the European Parliament. The EP recalls the main principles of the EU, an internal market with a social dimension with free movement of goods, persons, services and capital and the recognition of basic constitutional rights of citizens, including the right to form trade unions, the right to strike and the right to collective agreements.\textsuperscript{197} The undertone of the resolution is concern about where the case law of the Laval quartet is taking the EU and that there is strong need to prevent negative effects on the labour market models.

The resolution stresses that “in the framework of freedom to provide services or freedom of establishment, the nationality of the employer, or of employees or posted workers cannot justify inequalities concerning working conditions, pay or the exercise of fundamental rights such as the right to strike.”\textsuperscript{198} The resolutions also states that the “freedom to provide services is not superior to the fundamental rights contained in the Charter of Fundamental Rights of the European Union and in particular the right of trade unions to take industrial action, in particular since this is a constitutional right in several Member States […]”.\textsuperscript{199}

To the European Parliament it is important to keep in mind that the economic freedoms can not be interpreted as granting the right to evade national social and employment laws.\textsuperscript{200} The EP cites ILO conventions and the Charter of Fundamental Rights to support its opinion and states that it is important that the fundamental right to collective action is not put at risk.\textsuperscript{201} The Parliament also stresses that these judgments demonstrate the need to clarify that economic freedoms should be interpreted as not to infringe upon the exercise of fundamental social rights as recognized by the Member States and EU law. The autonomy of the social partners should also be respected. The Parliament also states that there are loopholes in the current legislation of the EU and that was not the intention of the legislator. The goal must be to look for a fair balance between the freedom to provide services and the protection of workers rights.\textsuperscript{202} Towards the end of the resolution the European Parliament states:

\textsuperscript{196} European Parliament resolution. \textit{On challenges to collective agreements in the EU} (2008/2085(INI)).
\textsuperscript{197} European Parliament resolution. \textit{On challenges to collective agreements in the EU} (2008/2085(INI)), paras B and C.
\textsuperscript{198} European Parliament resolution. \textit{On challenges to collective agreements in the EU} (2008/2085(INI)), paras B and C.
\textsuperscript{199} European Parliament resolution. \textit{Challenges to collective agreements in the EU}, para 8.
\textsuperscript{200} European Parliament resolution. \textit{Challenges to collective agreements in the EU}, para 5.
\textsuperscript{201} European Parliament resolution. \textit{Challenges to collective agreements in the EU}, para 17.

Alain Supiot. “Conclusion: Europe’s awakening”, page 301.
[...] fundamental social rights are not subordinate to economic rights in a hierarchy of fundamental freedoms; therefore [the Parliament] asks for a re-assertion in primary law of the balance between fundamental rights and economic freedoms in order to help avoid a race to lower social standards.203

4.6.4 Responses from the ILO: Judgments likely to restrict the exercise of the right to strike

The ILO has voiced many concerns over the development in Europe that started with the Laval and Viking cases. After its conference in 2010 the organization issued this statement in a report:

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 judgments is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention.204

The background to this statement was a dispute that was taking place in the UK around that time, where airline pilots in the British Airline Pilots’ Association were restricted from strike action.

4.6.5 The European Economic and Social Committee

The European Economic and Social Committee (EESC) has released several opinions on the implications of the Laval quartet and how to solve the dilemma that has risen from the cases. In an opinion titled ‘The Social Dimension of the Internal Market’205 the EESC states that the legal aspects of the social dimension of the internal market have been brought into question because of the judgments in the Laval quartet.

The EESC stresses that the social dimension is a core component of the internal market and that the internal market cannot function properly without a strong social dimension and support of the citizens. The EESC is concerned about the current state of affairs with the financial crisis having its impact in Europe with increased unemployment and deterioration of the social situation. Therefore matters of employment must remain at the top of the EU’s agenda.

203 European Parliament resolution. Challenges to collective agreements in the EU, para 35.
205 Opinion of the European Economic and Social Committee on ‘The Social Dimension of the Internal Market’.
Some proposals from the EESC as to how to solve these issues are among others that the PWD must be implemented more effectively. The EESC also calls for the creation of a ‘European Social Interpol’ that would assist the labour inspectorates in various Member States and monitor employment matters in Europe. The EESC welcomes the Commission initiative that came with the Monti Report and believes that might solve some of the problems. The Monti Report will be discussed in further detail in section 7.7. According to the EESC the EU should in the longer term strive to strengthen the social dimension and realize the full potential of the internal market. The Charter of Fundamental Rights and the Lisbon Treaty have not yet had their full impact on the balance between fundamental rights and economic freedoms, in the view of the EESC.

The EESC is also concerned about the conflict between the ECJ judgments and the judgments of the ECtHR in recent cases as well as a conflict with international labour standards that are articulated in ILO conventions. The case law of the ECtHR will be discussed further in chapter 5. The EESC urges the Commission to address these conflicts.

4.6.6 Disputes in Member States

The Laval quartet has raised a lot of media attention and the general public of Europe was well aware of what was happening. It is rare that cases before the ECJ attract such attention. Trade unions across Europe became involved, and in the UK for example, the cases were the target of a major campaigning petition by the UK’s largest union, UNITE, that aimed to reverse the effect of the cases. The cases also started a wave of widespread strike action that got responses from EU institutions, something that does not happen frequently in Member States. The Laval quartet has influenced disputes in Member States for several reasons. The way the Court handled the issue of posted workers has generated dramatic changes leading to unstable conditions among workers in the UK among others.

Two big disputes arose in the UK after the ECJ gave judgments on Laval and the other cases. The Total dispute and the Alstom dispute. Both disputes concerned posted workers as contractors from other member states (Italy and Spain) were awarded the contracts in question. These disputes were the subject of extensive media attention, both in the UK and

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across the EU. The action of the workers on strike had xenophobic undertones and slogans such as “British jobs for British workers” were common in the strike actions.\textsuperscript{209} The British unions, supported by the European Parliament, argued that the action was not protectionist and xenophobic, it was just a question of a wrong balance between business and workers and between the social and economic dimensions of the EU project.\textsuperscript{210} In any case it is undisputed that what sparked the disputes was that the use of foreign labour leads to an erosion of wages and conditions for all workers concerned because posted workers can be paid less than UK workers.\textsuperscript{211}

\textbf{4.6.7 Other responses}

The issues before the ECJ in the Laval case were social dumping by a cheaper labour force coming from Eastern Europe and equal treatment concerning wages and working conditions, the untouchability of the right to strike, something states have the right to govern themselves, and the right for Sweden (or any other member state for that matter) to impose its own industrial relations system.\textsuperscript{212} This raises some questions. Why would Latvian workers not be entitled to similar wages and conditions as the Swedish workers in the same industry? And why would Swedish trade unions not be allowed to engage in the same industrial action regarding employers, regardless of the nationality of the firm or the employers? Why set up a double labour system in one country? Why are these questions a special concern for the EU, especially since the EU Treaty clearly indicates that the EU has no competence to regulate wage matters, freedom of association, strikes and industrial action?\textsuperscript{213} In view of some commentators the ECJ was on the right track in the Laval quartet and these factors mentioned above are wrong for legal reasons and reasons of social justice. What the ECJ should focus on is the big picture.\textsuperscript{214} The internal market provides for the right of EU citizens and employers to move freely around the continent to work, start a business and provide services in other member states. The aim of the internal market was to bring the people of Europe freedom, peace, well being and welfare. The freedom to provide services has economic and social advantages. It creates jobs. The service industry has grown massively in the last decades and

\begin{footnotes}
\item[214] Roger Blanpain. “Genera Comments. Laval and Viking: Who Pays the Price?”.
\end{footnotes}
now some 70% of all jobs are service jobs. Therefore the internal market should be safeguarded.

Brian Bercusson, a renowned academic that spent his life supporting labour rights, was very critical towards the judgments in the Laval quartet. Shortly before the judgments in the Viking and Laval cases were delivered he wrote an article, The Trade Union Movement and the European Union: Judgment Day. In that article he looked into possible solutions of the issues at hand and to him it was clear that there were other possibilities for the ECJ. He has stated that the judgments were old-fashioned and reflected doctrines long superseded in national legal discourse. He believed that the fact that the EU Charter of Fundamental Rights contained a lot of fundamental workers’ rights would contribute to the better protection of workers in the EU and the ECJ would use that momentum to adopt interpretations consistent with international labour standards where national labour law may fall short. Brian suggested that the Lisbon Treaty would be amended to allow for socio-economic governance.

4.7 Some concluding remarks on the Laval quartet

The previous chapter has covered the case law of the ECJ in the Laval quartet in a descriptive manner. The chapter also covered the various responses of different stakeholders and some academics and how the cases have been received in the different Member States. Most of them were critical of the judgments but especially the employers’ union wanted to wait and see how things played out at Member State level before the EU starts interfering. The unions in the new Member States were also content with the judgments. The next chapter covers the case law of the European Court of Human Rights in cases that concern the right to collective action. In chapter 6 the Laval quartet will be further analyzed with regards to the various implications on European law and the law of the Member States they might have.

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5 Developments in international and European law: The ECtHR approach

The complex questions on how to balance fundamental rights and fundamental freedoms have not only been addressed by the EU. The European Court of Human Rights (ECtHR) has recently delivered a series of cases developing how trade unions are protected under the freedom of association (art. 11 ECHR). In the following chapter the case law of the ECHR regarding the right to take collective action and the right to strike will be examined.

In earlier case law of the Court the right to collective action or collective bargaining was not considered indispensable for the effective enjoyment of trade union freedom. Art. 11 safeguarded the freedom to protect the interest of trade union members by the union’s collective action but the Member States were left with a free choice of the means to be used to this end.

5.1 Earlier case law of the European Court of Human Rights

Generally, the ECHR has not been used much with regards to collective rights. Individuals have been the driving actors in most of the cases before the ECtHR and not many cases deal with collective rights.

Until recently the Court interpreted article 11 restrictively, which resulted in relatively few trade union freedoms being protected. The Court still found some connection between protection of freedom of association and the right to engage in collective bargaining. This was for instance the case in the Swedish Engine Drivers’ Union case. In that case the Swedish government refused to enter into collective agreements with the applicant union. The government wanted to reach an agreement with a larger union that represented more number of workers, and that agreement was supposed to cover the members of the Swedish Engine Drivers’ Union (SEDU) as well. The Court came to the conclusion that the government was not bound to enter into agreements with SEDU and left open the question whether there could be a positive right to collective bargaining. In subsequent cases the court cited this case as justification for Article 11 not containing a right to collective bargaining or to enter into

Demir and Baykara vs Turkey, (34503/97), ECHR 2008-12-11, Enerji Yapi-Yolsen vs Turkey, (68959/01) ECHR 2009-21-04 and Danilenkov m.fl. vs Russia, (67336/01) ECHR 2009-30-06.

The impact of the ECJ judgements on Viking, Laval, Rüffert and Luxembourg on the practice of collective bargaining and the effectiveness of social action, page 10.

Filip Dorsssemont. “How the European Court of Human Rights gave us Enerji to cope with Laval and Viking, page 221

Swedish Engine Drivers’ Union vs. Sweden, (5614/72) ECHR 1976-02-06.
collective agreements. This was not convergent with the opinion of the ILO Conventions and the supervisory mechanisms of the ILO.

Case law in the same direction followed, the Court observed that the right to strike was not expressly protected under art. 11 and could be subjected to limitations by national law. In addition, in UNISON vs. UK, the court argued that the right to strike, and thereby freedom of association, was unjustifiably limited by virtue of the narrowly explained immunities for industrial action provided under the UK statute.

By this earlier case law of the ECtHR it is clear that the court had a limited understanding of the dynamics of industrial relations and ILO standards. However, maybe as a response to the ECJ cases, the ECtHR decided to go in a new direction.

5.2 Changes in the case law of the ECtHR: Response to ECJ cases?

This consistent interpretation of the ECtHR of article 11 changed with the Demir and Baykara case in 2008. Two other cases of the same nature followed, i.e. the Enerji Yapi-Yol Sen vs. Turkey case and the Danilenkov case. These cases declare that article 11 of the ECHR includes a right to collectively bargain and prohibits an absolute ban on the right to strike. Following subsections discuss each case in detail.

5.2.1 Demir and Baykara: The right to bargain collectively an essential element of art. 11

In the Demir and Baykara case the court stresses that elements of international law other than the ECHR must be taken into account, and looks to ILO conventions among others, and the practice of Member States. With regard to these developments the Court argued that the right to bargain collectively has become one of the essential elements of the right to form and join trade unions for the protection of one’s interests’ set forth in art. 11. Demir and Baykara were representing a trade union and its members and claimed before the Court that the right to collective bargaining was linked with the right in article 11(1). The ECtHR noted that the declaration of the right in art. 11(1) had to be strictly interpreted and therefore civil servants could not be treated as members of the administration of the state. The Court continued to say that the right to bargain collectively in principle had become one of the essential elements of

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224 Tonia Novitz, International and European Protection of the right to strike, pages 228-229.
225 UNISON vs. UK, (53574/99) ECHR 2002-02-10.
the right to form and join trade unions, guaranteed under article 11.\textsuperscript{226} The Court was also clear on the interplay between different sources of law:

The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialized international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.\textsuperscript{227}

It is interesting to note the methodology of the ECtHR and compare it with the one of the ECJ in the Laval quartet discussed in chapter 4. The ECtHR perspective is looking at the fundamental right (in this case art. 11) and asking whether any interference with that right can be justified. The ECJ on the other hand looks at the fundamental freedoms and asks whether derogations from them can be justified on the grounds of fundamental rights. This is a totally opposite way of asking these fundamental questions.\textsuperscript{228}

The way international treaties and principles of member states’ law are treated is also very different as the ECtHR clearly takes inspiration from other international instruments and the practice of European States that reflect common-European values.

5.2.2 \textit{Enerji Yapı-Yol Sen}: Restrictions on the right to strike interpreted strictly

The case \textit{Enerji Yapı-Yol Sen} vs. Turkey revolved around questions of the right to strike and the ECHR. In that case the government of Turkey had interfered in a demonstration and strike planned by civil servants with a circular ban of such activities and had consequently sanctioned members of the boards of the trade unions involved in the collective action.

The ECtHR asked two fundamental questions: 1) what is the right to strike of civil servants and 2) what are the conditions for restricting a strike?\textsuperscript{229} The Court argued that the terms of the Convention require the law to allow trade unions to act in defense of their members’ interests. The Court referred to ILO Convention 87 and the European Social Charter in this context.\textsuperscript{230} The Court followed the regular procedure when assessing whether limitations on rights prescribed in the Convention are justified. Restrictions have to be prescribed by law, aimed at one or more of the legitimate ends listed in paragraph 2 of article

\textsuperscript{226} Demir and Baykara, para. 154.
\textsuperscript{227} Demir and Baykara, para 85.
\textsuperscript{228} The impact of the ECJ judgements on Viking, Laval, Rüffert and Luxembourg on the practice of collective bargaining and the effectiveness of social action, page 11.
\textsuperscript{229} Matti Mikkola. \textit{Social Human Rights of Europe}, page 281.
\textsuperscript{230} Matti Mikkola. \textit{Social Human Rights of Europe}, page 281.
11 and last but not least necessary in a democratic society for the achievement of these ends. The Court examined these criteria and then spent some time elaborating on the right to strike. It concluded that the right to strike was not absolute and could be subject to certain conditions and restrictions. Some civil servants could be prohibited to strike on the basis of their role as authority on behalf of the state. However, banning all public servants from striking was clearly going too far. The restrictions on the right to strike should be defined as clearly and narrowly as possible and the categories of civil servants concerned should also not be interpreted broadly. The circular issued by the Turkish government was too general. Finally the Court concluded that the circular did not answer a pressing social need and the interference with the trade union’s rights was disproportionate. Because of all of the above there was a violation of article 11.\textsuperscript{231}

5.2.3 Danilenkov: Authorities must provide judicial protection against discrimination on grounds of trade union membership

The Danilenkov case concerned the discriminatory treatment of members of the Kaliningrad branch of the Dockers’ Union of Russia by their employer, a private company. The company had attempted to get the employees in question to leave the union. The union complained to the Court, claiming that there had been a breach of articles 11 and 14, because the Russian government had not looked into the case at all or tried to end the discriminatory behavior on behalf of the company.

The Court concluded unanimously that there had been a violation of article 14 in connection to article 11 on the account that the Russian authorities failed to provide effective and clear judicial protection against discrimination on the grounds of trade union membership. The Court particularly stressed that any worker should be free to join or not to join a trade union without being sanctioned. Authorities also have to make sure those who feel discriminated against are able to challenge it and have real and effective relief.

5.3 EU’s potential accession to the ECHR

The accession of the EU to the ECHR has been discussed for a very long time.\textsuperscript{232} It is only recently that the possibility of achieving EU accession has become a reality. After the Lisbon

\textsuperscript{231} Matti Mikkola. \textit{Social Human Rights of Europe}, page 282.

Treaty entered into force the EU can now formally accede to the ECHR. That will not happen right away though, all the member states of the Council of Europe will first have to accept the EU as a member. Protocol 14 of the ECHR makes way for the accession and a process is under way so in the coming years the EU might become a member.

The EU’s potential accession to the ECHR is the culmination of a long development. The relationship between the two courts, Strasbourg and Luxembourg has developed gradually through the years. The Commission made a formal proposal to the Council in 1990 recommending EU accession to the ECHR. The European Parliament had also recommended accession. The ECJ commented on this matter in an opinion and argued that the Community had no competence in the field of fundamental rights and there would arise a need for a revision of the Treaties if the EU were to accede to the ECHR. In its first judgments concerning fundamental rights the ECJ did not refer expressly to the ECHR. The next step was the ECJ citing the ECHR as a document having special significance and more recently the ECJ has referred to individual judgments of the ECtHR. Currently this happens on a routinely basis.

Now there is legal basis for the accession of the EU to the ECHR in art. 6(2) of the TEU. It is even stated that the Union shall accede. Such a decision has to be taken unanimously by the Council, according to art. 218(8) of the TFEU.

5.3.1 What would accession mean to the EU legal order?

EU law and ECHR law are quite different and the accession of the EU to the ECHR could bring on some alterations to the EU system. The difference lies first and foremost in the different tasks of the courts, which lead to different perspectives used when solving their cases. The task of the EU is to create an internal market and the measures taken by the EU institutions are assessed by the ECJ in view of this task. Therefore, the fundamental rights are viewed in connection with the fundamental freedoms. The ECHR system is very different. Its only object is to guarantee individuals the protection of their fundamental rights that are

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234 European Parliament resolution. adopting the Declaration of fundamental rights and freedoms.
235 Opinion 2/94, [1996], ECR 1-1759
236 Allan Rosas. “The European Union and Fundamental Rights/Human Rights”, page 457. See for example, C-368/95, Familiapress, [1997], ECR 1-3689, para 26; C-185/95 P, Baustahlgewebe, [1998], ECR 1-8417, para 29; C-105/03, Pupino, [2005], ECR 1-5285, para 60; C-465/07, Elgafaji, [2009], ECR 1-1921, para 44.
contained in the Convention. In a nutshell the paradigm for the ECJ is the internal market, while for the ECHR it is human rights.\textsuperscript{237}

Because of these differences it is possible be that EU accession to the ECHR would alter the economic and political program of the Union. The ECJ would need to examine the execution of the measures taken by EU institutions in the light of protection of human rights, instead of viewing the respect of fundamental rights through the prism of the internal market, as it has done until now. It can be argued that this shift is already required to a certain extent, since the Charter of Fundamental Rights has been given the same legal value as the Treaties. In a way it can be said that even though the Charter of Fundamental Rights should have the same legal value as the Treaties, the provisions in it are treated more like general principles of EU law. Of course the Charter became a binding instrument only a few years ago so this approach of the ECJ could still change. Nevertheless, accession to ECHR will accentuate this human rights focus of the Union even further.\textsuperscript{238} The ECHR would become an integral part of the EU legal order.\textsuperscript{239} The ECJ would have to follow the case law of the ECtHR and there would be some added external control on the protection of fundamental rights within the EU.\textsuperscript{240} The ECtHR does not ask whether human rights can restrict fundamental economic freedoms, like the ECJ, instead it asks whether and to what extent these fundamental economic freedoms can restrict fundamental human rights. The ECHR will therefore force the EU institutions to justify restrictions to rights of Europeans instead of forcing Europeans to justify their exercise of human rights.\textsuperscript{241} The ECJ has referred to the ECHR in many cases but in doing so the power of interpretation lies with the Luxembourg court. Even though divergences in the way the provisions of the ECHR are interpreted are rare, it remains a possibility until the EU has acceded to the ECHR.\textsuperscript{242}

It has been considered what would happen if the Court of Justice went in one direction and the ECtHR in another and how such a conflict could be solved. This is what has happened


\textsuperscript{241} Filip Dorssemont, “How the European Court of Human Rights gave us Enerji to cope with Laval and Viking”, page 231.

with regards to collective action and the right to strike. The EU, however, is still not a member of the ECHR, so the issue is not as serious as it would be in that case. One idea that has emerged about how to solve an issue like that is that a special chamber consisting of an equal number of judges from each court would solve such disputes. Nothing has been decided in this regard.243

5.3.2 What could accession mean to the Member States?

This twofold system of human rights protection in Europe could also create some problems for the Member States. All the EU Member States are parties to the CoE and therefore have to respect the two mechanisms. If the two courts interpret some specific rights in a different way and no mechanism to fix such a situation has been set up, it would create an uncertainty as to how individual states should treat the same rights.244 That is what has happened with regards to the fundamental right of collective action. If the EU will accede to the ECHR the Union can become a defendant before the ECtHR and therefore any situations of this nature could be cleared up.

Even if the EU will not accede to the ECHR soon, or ever, there could be an interesting development lead by the Member States of the EU. If the national governments start to take precedence from the EU court to change national legislation and reduce trade union rights, cases that would arise because of such changes could end up before the ECtHR.

5.4 Some concluding remarks on the ECtHR

Looking at this chapter, it is clear that the ECJ way of interpreting the fundamental right to collective action is not the only possible way. This divergence in the case law of the two courts, the ECJ and the ECtHR, could create an interesting dialogue between the courts in the near future. Both the ETUC and the EESC have addressed the different approaches by the two courts, saying that this incompatibility must be urgently addressed, especially in the light of the forthcoming accession of the EU to the ECHR.245


6 Fundamental rights vs. fundamental freedoms – analyzing the Laval quartet

There have been countless comments on the Laval quartet and the cases in question have been analyzed from many different perspectives. The following chapter provides an overview of this debate with the objective of locating its main themes along with the numerous implications the case law has had, for European as well as national law.

These four ECJ cases, the Laval quartet, shed a light on the relationship between fundamental rights and fundamental freedoms within the EU. These issues are both of a legal and highly political nature, especially after the Eastern enlargement of the EU. The decision in the Laval case, as well as the other three cases, is taken in the specific post-enlargement context, where the Court is amongst other factors expected to shed light on the status of the internal market for the biggest EU citizenship ever. The Court does not make any reference to the enlargement and thereby manages to elude this highly political issue.

Various tensions exist between economic freedoms and national labour law within Europe. The tensions are similar to the tensions that arise whenever there is a problem in fields where competences are partly with the European institutions and partly with the Member States. The ECJ claims to be striking a balance between economic and social rights, but it seems as if the reasoning of the Court inevitably prioritizes the economic rights over the social rights. In these cases it therefore seems as if the conclusion of the ECJ is to use the doctrine of supremacy, letting EU law prevail over national law. That leads to the fact that economic liberties prevail over social rights. The current chapter examines how the case law of the ECJ can be viewed in the light of these tensions. To understand it properly, it is also necessary to look at the doctrine on fundamental rights in the EU, especially in relation to labour rights.

The ECJ has usually been appreciated for its creative functions, and in the past the Court has certainly pushed the EU in a more human rights oriented direction, as explained earlier in chapter 2. It therefore came as a shock to some commentators that the Court would now use the principle of proportionality in such a restrictive manner, weighing fundamental rights.

247 For example in Laval, para 105.
against the market freedoms, and hence change the balance between social and economic rights.\textsuperscript{250} The action of the ECJ can be questioned both in terms of democratic legitimacy and the Court’s role in the EU legal order. This will be elaborated on later in chapter 7.3.

These are highly political issues of global importance and the ECJ is not moving in the same direction as other international bodies, such as the ILO or the ECtHR. That indeed is a cause for concern. From a legal point of view these issues are also highly relevant, especially with regard to the interaction between the fundamental rights and the fundamental freedoms and the interplay between the different sources of law, in the Member States, the EU and other international sources.

\textbf{6.1 Fundamental rights in the EU}

The status of fundamental rights in the EU has been fairly uncertain for a long time. The concept of fundamental rights was first recognized by the Court in the Stauder case\textsuperscript{251} and developed further in subsequent cases.\textsuperscript{252} Amongst the EU Member States there are more than one systems of human rights observance with different dispute resolution mechanisms, i.e. national courts, national constitutional courts and the European Court of Human Rights. On top of that there exists a wide range of NGOs dealing with different fields of human rights along with UN bodies and mechanisms. All this leaves small room for EU maneuvers in this field.\textsuperscript{253} When the internal market started evolving the need for a human rights aquis in EU became very clear and there has been a lot of development in this field, as explored earlier in chapter 2.

\textbf{6.2 Legal grounds for fundamental rights in the EU}

There are at least eight platforms that could be defined as legal grounds for fundamental rights in the EU legal order:

\begin{itemize}
  \item Article 6 TEU with a reference to fundamental rights as guaranteed by the ECHR and constitutional traditions common to the member states, as general principles of EU law.
\end{itemize}

\textsuperscript{250} Marie-Ange Moreau. “Introduction”, page 12.
\textsuperscript{251} C-29/69, Stauder [1969] ECR 419.
\textsuperscript{252} See chapter 2.2.
• Articles 18 and 19 TFEU on non-discrimination.
• The case law of the ECJ.
• Human rights as part of constitutional law and traditions of member states.
• Judicial dialogue between the ECJ and the ECtHR.
• General acceptance of International Human Rights Law.
• The mechanism of human rights clauses in external relations of the EU.
• The Charter of Fundamental Rights.\textsuperscript{254}

The social rights aquis of EU has been much more created and influenced by the ECJ than the other EU institutions. Particular Member States have been reluctant to broaden the powers of the EU to harmonize labour and social law. This is a sensitive area since there are many different systems in the European Member States and further harmonization could lead to a financial burden for many of them.\textsuperscript{255} The EU institutions have rather opted for soft law mechanisms and policy making. There are also some limitations for harmonization in this field. Art. 153(4) TFEU sets limitations for uniform labour standards stating that standards “shall not affect the right of Member States to define fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof.” The Union also lacks competence in issues related to the right of association, the right to strike and other collective action, according to art. 153(5) TFEU.

6.3 Collective action as a fundamental right

The discussion whether the right to strike should be recognized as a fundamental right within the EU has been established and progressed for many years. It was not until the Charter of Fundamental Rights was adopted in 2000 that the right to collective action was explicitly stated as a fundamental right. The development has been slow. The right was stated in the Community Charter of Fundamental Social Rights of Workers in 1989, but that Charter never had much impact.

One of the novelties in these cases is that the right to strike has assumed a new cross-border dimension.\textsuperscript{256} For the first time the ECJ has stated that the right to collective action is a

\textsuperscript{254} Uladzislau Belavusau. “The Case of Laval in the Context of the Post-Enlargement EC Law Development”, page 2299.
fundamental right. It appears as the ECJ in the Laval quartet reconfigures the balance between economic and social rights in a delicate manner, with regard to the right to collective action. In the Viking case the Court states that the right to take collective action, including the right to strike, is a fundamental right that forms an integral part of the general principles of Community law. Then the Court delicately states that when these rights are exercised it must comply with Community law. But one has to remember that these fundamental rights are not within the competence of the EU. The competence to regulate national industrial relations lies with the Member States. In fact the Court is therefore trying, whether knowingly or without realizing, to disconnect the autonomy of the Member States to regulate those matters. The Court also does not give any substantial guidance about what the fundamental character of the right to collective action means. The Court seems eager to stress that that right can be subject to limitations, both at national and EU level and it seems clear from the judgments that the free movement provisions can impose restrictions, even far-reaching ones, on these rights.

As should be clear now the issues discussed above are far from being simple and there are many factors that the EU has to be aware of when trying to address issues of this kind. One way for the EU to take social rights, and in particular the right to industrial action, into the realm of fundamental rights could be to establish a link with the Strasbourg Court which has a developed stance on fundamental rights. The EU could also look into the constitutional traditions of the 27 Member States, as many of them have very good labour and social rights systems. That is an approach the ECtHR chose to take in the recent case law concerning the right to collective action, as explored in chapter 5.2. In the Laval case the ECJ avoids these issues more or less. The result is a judgment that according to some critical commentators has its main goal to confirm the inviolability of the economic freedoms. The ECJ states a few important and almost revolutionary facts when it comes to the right to strike in the Viking and Laval cases. Firstly, the right to strike is recognized as a fundamental right. Secondly, when a cross-border strike has an effect that is limiting the

258 The impact of the ECJ judgements on Viking, Laval, Rüffert and Luxembourg on the practice of collective bargaining and the effectiveness of social action, page 7.
262 Laval, para 92.
free movement of services, the limitation has to be capable of being justified.\textsuperscript{263} Thirdly, the limitations can in principle be justified by reasons of general interest, such as the protection of workers, and they have to be appropriate to assure the achievement of the objective and do not go further than is necessary for achieving this objective.\textsuperscript{264} Other means to solve the conflict have to be exhausted before collective action is commenced and it depends on the national legislation how this is evaluated.\textsuperscript{265}

It is also interesting to consider the Laval quartet cases in the light of the circumstances the Court believes the fundamental right to take collective action can actually be used. This is a reoccurring comment from some of the critics of the Laval quartet. To Professor Claire Kilpatrick it is clear that this right cannot be used straightforwardly to set a minimum wage, not to obtain the same collectively agreed wages and conditions for posted workers as for home state workers. It can furthermore not be used to ensure compliance with a statutory minimum wage. To her it seems, by a process of exclusion, that collective action, in the eyes of the ECJ, can only be justified as a last resort method to enforce collectively agreed minimum wage. It is not an overstatement to say that the right to collective action does not sound so fundamental when looked at in this light.\textsuperscript{266}

Some actors are of the opinion that the ECJ did not fully capture the message of labour law or the historical meaning and functioning of the right to strike as a part of an autonomous system of collective bargaining.\textsuperscript{267}

6.4 Whose fundamental rights?

In general, when considering situations that concern posted workers the most important question is whether the posted workers can earn the same salary as the domestic workers receive in general. The case law of the ECJ in the Laval quartet opens up a new question, whether the host workers can still exercise their collective rights, such as the right to strike.\textsuperscript{268} This right is stated in the Charter of Fundamental Rights, it is entailed in art. 11 of the ECHR and it is stated in some of the national constitutions of the EU Member States.

\textsuperscript{263} Laval, para 97.
\textsuperscript{264} Viking, para 90.
\textsuperscript{265} Viking, para 87.
\textsuperscript{266} Claire Kilpatrick. “British Jobs for British Workers? UK Industrial Action an Free Movement of Services in EU Law”, page 19.
\textsuperscript{268} Antonio Lo Faro. “Toward a de-fundamentalisation of collective labour rights in European social law?”, page 205.
This important question can be looked at from different perspectives. If considered from the view of the company involved, a service provider using posted workers becomes immune to any kind of collective action, and even public procurement rules (like in the Rüffert case). That creates a situation of discrimination between local and foreign undertakings.\textsuperscript{269} From the point of view of the workers’ rights the situation is also complex, because workers can use their collective action against a national undertaking but not against a foreign one. As Professor Antonio Lo Faro puts it:

How can a right be declared fundamental when such obvious disparities are permitted – or rather required – in its application? Can the content and the limits of a fundamental right change according to the person toward it is exercised? Or even according to the geographical place in which that person is temporarily located? Should not a ‘European’ fundamental right be such, irrespective of the national or geographical qualities of the addressee?\textsuperscript{270}

What would the situation be if a national law would treat the right to strike in this way? I.e. if the law in a Member State allowed collective action against companies registered in the home country but not against foreign companies? It is very likely that such situation would be viewed as a case of discrimination according to EU law. But how then can the EU institutions get away with treating these collective rights in the manner they have done? One might assume it made more sense, according to the general principle of no discrimination in EU law, that all collective action was banned.\textsuperscript{271}

The ECJ has usually been very much aware of combating discrimination, such as discrimination based on sex, and it has even been very forward thinking when it comes to discrimination based on disability and sexual orientation.\textsuperscript{272} Maybe the difference is that the market freedoms do not play as big a role in these cases as in the Laval quartet.

\subsection*{6.5 Relationship between economic freedoms and fundamental rights}

When analyzing the Laval quartet some conclusions about the relationship between liberalization of services and the European Social Model have been drawn by various

\textsuperscript{269} Antonio Lo Faro. “Toward a de-fundamentalisation of collective labour rights in European social law?”, pages 205-206.
\textsuperscript{270} Antonio Lo Faro. “Toward a de-fundamentalisation of collective labour rights in European social law?”, page 206.
\textsuperscript{271} Antonio Lo Faro. “Toward a de-fundamentalisation of collective labour rights in European social law?”, pages 206-207.
\textsuperscript{272} Antonio Lo Faro. “Toward a de-fundamentalisation of collective labour rights in European social law?”, page 207. See for example cases Maruko (Case C-267/06 of 1 April 2008) and Coleman (Case C-303/06 of 17 July 2008).
commentators. It has been pointed out that the observations of the Commission in both Laval and Viking represent a compromising position between these two. In the Laval case, for instance, the Commission said that both the principles of the market freedoms and the fundamental rights must be upheld and it should be up to national courts and the ECJ to decide which principle should prevail on a case-by-case basis.\textsuperscript{273} This is somewhat surprising, as the Commission has generally been viewed as a driving force of market liberalization. It seems as if the Commission is increasingly looking towards the ECJ to decide on issues connected to the internal market and social protection. If that turns out to be the case the ECJ becomes an increasingly relevant player in determining the future of the internal market and social protection in Europe.\textsuperscript{274} It is interesting to reflect on why it has come to this. The role of the ECJ should be to interpret the legislation at hand, not be a key player in determining what rules apply and how they are made. Has this happened because the Commission is unable to make laws on social policy that are good enough? Are the political EU institutions afraid of starting conflicts between the Member States so they leave that task for the ECJ? It is hard to identify the underlying reasons.

6.6 Divergence between Member States of EU

Another development that can be read from this case law is that the cases point to emerging divergences between the Member States in the enlarged EU. The judgments of ECJ in these cases were in opposition to the position of powerful member states such as Germany and France. Even though the ECJ is independent and in no way bound by the opinions of individual Member States, some commentators have claimed that its decisions typically reflect the preferences of the most powerful states.\textsuperscript{275} The new Member States are aligning with the more neo-liberal of the old Member States, such as the Netherlands, UK and Ireland, and that could have some future implications for social protection in the EU. The future developments will also depend on the responses of the social partners. The fact that Svensk Näringsliv funded Laval’s proceedings in Sweden (as described in section 4.2) points towards the fact that private actors and interest groups are increasingly pursuing their agendas through

\textsuperscript{273} Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 13.

\textsuperscript{274} Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 19.

\textsuperscript{275} Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 20.
the courts. The ECJ ruled that the free movement provisions have horizontal direct effect and that opens up possibilities for companies to seek redress against union actors.\textsuperscript{276}

A related impact of the enlargement on the European social model is the fact that the new Member States are also far more neo-liberal than most of the old ones. They are likely to join forces with Member States like UK and Ireland and push for further liberalization of the EU. The proclivity of new Member States towards neo-liberal rather than social-democratic ideals is often attributed to the legacy of state socialism, where decades of communist rule leave liberal reformers skeptical of any sort of state intervention.\textsuperscript{277} To them EU accession was promoted as a means to reunite Europe, not only in symbolic terms, but also to harmonize social and economic rules across the continent. As it turned out the harmonization of the single market proceeded much faster than the harmonization of labour and social policies. Perhaps that should not be surprising, given the Commission’s prioritization of the internal market over other fields.\textsuperscript{278}

6.7 Social dumping

The issue of social dumping is in the background in the Laval quartet. Various labour unions have voiced their concerns about the risk of social dumping after the enlargement of the EU and especially after these judgments. The risk of social dumping arises when employers start to take advantage of differences between Member States concerning for example pay and working conditions. The Member States, unions and employers, as well as the EU institutions all have a responsibility to try to fight social dumping and keep improving living and working conditions across Europe. There are a number of factors that might encourage a process of social dumping in the EU, especially after the Eastern enlargement; labour mobility, labour costs, employer’s cost burden and the different welfare standards in terms of wages, rest periods, workplace safety and other working conditions.\textsuperscript{279}

In Laval the Court stated, “social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a

\textsuperscript{276} Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 21.
\textsuperscript{277} Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 8.
\textsuperscript{278} Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 8.
\textsuperscript{279} Uladzislau Belavusau. “The Case of Laval in the Context of the Post-Enlargement EC Law Development”, page 2287.
restriction of one of the fundamental freedoms guaranteed by the Treaty.” The Court however does not frame social derogations into the “fundamental rights exception” but it leaves an essential potential for the fundamentalization of social rights in the future, similar to what it did in the Rush Portuguesa case as explained in chapter 2.6.

6.8 Impact on the role of trade unions in Europe

These judgments can furthermore have various impacts on the role and functions of trade unions in Europe. The cases were truly transnational, the ITF intervened in the Viking case and the ETUC and other trade unions were active in the proceedings. Looking into the responses of the ETUC and other trade unions it is clear that the organization has an ongoing strategy to protect the right to industrial action and preserve labour and social protection against further liberalization of the market. It has been pointed out that if the ETUC wants to succeed in that mission, the organization must be careful to include workers and unions from new as well as old Member States. The interests of old Member State unions are clear; they want to prevent social dumping from new Member States. The new Member States unions are, however, beginning to feel the pressure from lower wage and weaker regulated states further east, like Ukraine or Moldova. So it could well be that they join forces in the near future in the protection of European workers.

In these cases the ECJ clearly restricts the right of trade unions to take collective action. It is however uncertain if the ECJ has looked at national legislation or customs of the labour market in connection with the cases and if the ECJ has any general knowledge on how the labour market works. In Sweden the right to strike is stated in the constitution and the rights of unions are strongly respected there. It can even be said that strong unions are inherent in Swedish culture. The ECJ makes it very clear that free movement of establishment and services prevails over this constitutionally protected right in the cases. It is interesting to compare the judgment in Laval with the one in the Omega case (see section 2.2), where a constitutionally protected right to human dignity in the German constitution prevailed over

280 Laval case, para. 103.
282 Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 21.
283 Nicole Lindstrom. “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 21.
the free movement of goods. It seems as if the two cases involve similar clashes between fundamental national law and the free movement provisions of EU law, as human dignity is the most important right stated in the German Constitution and union right’s are of great importance in Sweden.

Since the ECJ extended the horizontal direct effect of freedom of services and establishment in Viking and Laval that could have additional consequences for unions and employers. Unions could become liable for industrial action and they would possibly have to pay some damage fines. There are different rules on union liability in the Member States but in the UK for example this responsibility is very wide. Unions can become liable for strike activity even when the union has not initiated the strike. It remains to be seen how this will work in practice but subsequent to the Laval case the Swedish Labour Court in its final judgment held the trade unions liable to pay punitive damages, as already discussed in chapter 4.2.3.

6.9 Questions on human dignity

The Laval quartet can be looked at from many perspectives, as indicated by preceding sections. One perspective involves looking at it from the perspective of human dignity. In that light it can be argued that the jurisprudence of the ECJ entails one capital mistake. The four freedoms are regarded as given, as a rule, and an absolute starting point for interpretation. The social rights are recognized, but they are treated as exceptions from the rule. Their application is relative to the market freedoms; social rights have to respect the market freedoms, and not the other way around. According to some commentators this is a serious misinterpretation by the Court, as the social rights do enjoy the same legal force of the primary EU law. It would make more sense to treat them as rights of the same calibre and then weigh the two against each other in a mutually compatible fashion.

The fundamental idea behind the judgments is that respect for human dignity must be reconciled with the requirements relating to economic rights protected by the Treaty. This judgement is certainly stretched far from the original idea behind the EU. After the Second World War the notion of human dignity was high on the agenda worldwide. The deep

287 The impact of the ECJ judgements on Viking, Laval, Räffert and Luxembourg on the practice of collective bargaining and the effectiveness of social action, page 5.
289 See for example, Viking, para 46.
meaning of the principle of dignity is that in no case and under no circumstances is it permitted to treat men like animals or machines.\textsuperscript{290} The Viking judgment states that the respect for human dignity must be reconciled with the free movement provisions. This raises questions whether the ECJ judges really knew what they were talking about when they referred to human dignity. Respect for human dignity is at the head of the German Constitution and protecting human dignity has been among the most important tasks of the EU up until now.

\textbf{6.10 The Commodification of social rights}

Social issues have for a long time been interlinked with the internal market and the EU has been concerned with the protection of social rights for a long time. The social dimension of the EU was originally focused on the protection of workers but with the Laval quartet it seems that in some regard that aim has been dissolved. According to the most critical commentators the citizen is now viewed as a consumer and trade unions like ordinary organizations, they can for example be held liable for taking part in collective action.\textsuperscript{291} This development could be dangerous. If economic rules prevail over everything else, things that come with a price tag will have the upper hand.

\textbf{6.11 Solidarity against the market freedoms}

The original idea of solidarity can be traced back to the French Revolution.\textsuperscript{292} Solidarity is a concept that is hard to define and even though the concept has been used by Union institutions for a long time there has been no attempt of defining the term concretely.\textsuperscript{293} Even though the concept is hard to define there are some elements to it that are clear. Solidarity is more than a mere membership of a group or entity. Rather, it possesses an essentially active character. Solidarity can address the ways in which the legal and constitutional outcomes of the functions of societies are developed.\textsuperscript{294} The core idea of solidarity is that individuals identify with others and feel a sense of community, a sense of inclusiveness.\textsuperscript{295} Recently,

\begin{itemize}
  \item Alain Supiot. “Conclusion: Europe’s awakening”, page 297.
  \item Marie-Ange Moreau. “Introduction”, page 12.
  \item Malcom Ross. “Solidarity – A New Constitutional Paradigm for the EU?”, page 23.
  \item Catherine Barnard. “Solidarity and the Commission’s ‘Renewed Social Agenda’”, page 80.
  \item Malcom Ross. “Solidarity – A New Constitutional Paradigm for the EU?”, page 40.
  \item Catherine Barnard. “Solidarity and the Commission’s ‘Renewed Social Agenda’”, page 81.
\end{itemize}
solidarity has been engaged in conflict with market values as the dominant paradigm.\textsuperscript{296} The Laval quartet can be viewed as an example of this conflict between solidarity and the market.

The Viking and Laval cases seem to favor the needs of individual employers over the collective interests of the Finnish and Swedish trade unions.\textsuperscript{297} In his opinion in the Viking case, Advocate General Maduro said that collective action was allowed only to try to stop Viking lines from relocating in Estonia. After the relocation collective action was not allowed. He said that if such action was allowed it would risk creating “an atmosphere of constant retaliation between social groups in different Member States, which could gravely threaten the common market and the spirit of solidarity embedded in it”.\textsuperscript{298} His point is that it is important to foster solidarity between all EU workers, so the Finnish workers should be able to protest to block the Estonian service provider to protect their jobs.\textsuperscript{299} The Court did not go with this argument and instead evaluated the collective action against the free movement principles as previously addressed (see section 4.3.3).\textsuperscript{300}

6.12 General comments on the bibliography on the Laval quartet

The bibliography on the Laval quartet is extensive and the cases have been viewed from many different perspectives. In general, most of the academic commentators have been critical, some more than other, but there are also some that have been more positive. Professor Roger Blanpain, for example, states that the ECJ took the right decision in the Laval case. In his view the best way for the EU is to push for the European market. That creates more jobs for everyone. He also thinks that the EU is still too much a region of nation states and that if that does not change the ones that end up at loss are the weakest ones, like the Latvian workers in the Laval case.\textsuperscript{301} A similar view can be found in an article by American researcher Eric Engle. He states that the right way is to look for the best solution for Europe as a whole, not the best solution for the workers or the employers. He even states that the basis of all human rights is economic.\textsuperscript{302}

\textsuperscript{296} Malcom Ross. “Solidarity – A New Constitutional Paradigm for the EU?”, page 40.
\textsuperscript{297} Catherine Barnard. “Solidarity and the Commission’s ‘Renewed Social Agenda’”, page 89.
\textsuperscript{298} C-438/05, Viking [2007] ECR I-10779, para 68.
\textsuperscript{299} Catherine Barnard. “Solidarity and the Commission’s ‘Renewed Social Agenda’”, page 79.
\textsuperscript{300} Catherine Barnard. “Solidarity and the Commission’s ‘Renewed Social Agenda’”, page 79.
\textsuperscript{301} R. Blanpain. “General Comments. Laval and Viking: Who Pays the Price?”, page 4.
\textsuperscript{302} Eric Engle. “A Viking We Will Go! Neo-Corporatism and Social Europe”.

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Like stated earlier the mass of the commentators have been critical, some more than others. One of the most critical has been Professor Alain Supiot.\textsuperscript{303}

Professor Claire Kilpatrick has written extensively about the Laval quartet from many different perspectives. In addition to the more general comments she has given on the cases\textsuperscript{304}, she has analyzed the case law from a British point of view\textsuperscript{305} and made some suggestions on how the internal market could be altered to better fit the changed circumstances.\textsuperscript{306} To her, the ECJ got it wrong in the Laval quartet. She has some interesting points. She states that collective bargaining is essential for the public good in Europe\textsuperscript{307} and she’s also worried about the divergence between the ECJ and other international bodies, such as the ILO and ECtHR.\textsuperscript{308} She thinks it is important for Europe to provide the Member States with space to regulate their own labour markets and expresses concern about that the approach of the Court could lead to serious unsettlement in the Member States, as has been the case in the UK.\textsuperscript{309} She is currently working on a research project on reconstituting fundamental social rights in the EU.\textsuperscript{310}

Even though Professor Hans-W. Micklitz has not been focusing on the Laval quartet per se in his writings; he makes a lot of points that crystallize the essence of the Laval quartet. His concept, access justice, really captures what the EU is focused on, that is to grant access to the markets. The paradigm he claims the EU uses for the European worker as educated, informed and always looking for new opportunities in the internal market is also valid.\textsuperscript{311} Micklitz furthermore claims that while the ECJ is developing a social framework for Europe (based on access justice) it tends to substitute the national models with its own model.\textsuperscript{312} He fears that the EU system now to a very limited extent guarantees the protection of those who are in the

\begin{itemize}
\item\textsuperscript{303} Alain Supiot. “Europe won over to the “communist market economy” and Alain Supiot. “Conclusion: Europe’s awakening”. At the end of the more recent article there is a glimpse of hope that Europe might survive.
\item\textsuperscript{304} Claire Kilpatrick. “Laval’s regulatory conundrum: collective standard-setting and the Court’s new approach to posted workers” and Claire Kilpatrick. “What’s left? Labour, Trade and Free Movement of Persons in the EU”.
\item\textsuperscript{305} Claire Kilpatrick. “British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law”, and Claire Kilpatrick. “Laval’s regulatory conundrum: collective standard-setting and the Court’s new approach to posted workers”.
\item\textsuperscript{306} Claire Kilpatrick. “Internal Market Architecture and the Accommodation of Labour Rights: As Good as it gets?”.
\item\textsuperscript{307} Claire Kilpatrick. “Laval’s regulatory conundrum: collective standard-setting and the Court’s new approach to posted workers”, page 865.
\item\textsuperscript{308} Claire Kilpatrick. “Laval’s regulatory conundrum: collective standard-setting and the Court’s new approach to posted workers”, page 863.
\item\textsuperscript{309} Claire Kilpatrick, “British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law”, page 28.
\item\textsuperscript{310} See: http://www.eui.eu/seminarsandevents/index.aspx?eventid=71068.
\item\textsuperscript{311} Hans-W. Micklitz, “Social Justice and Access Justice in Private Law”.
\item\textsuperscript{312} Hans-W. Micklitz, “Judicial Activism of the European Court of Justice and the Development of the European Social Model in Anti-Discrimination and Consumer Law”.
\end{itemize}
most sensitive position in society and if that will not change the whole character of the EU legal system might change in the long run. One of his main points is that the methods of the market order are not fit to regulate social matters.

6.13 Concluding remarks

As has been explored in this chapter the case law of the ECJ in the Laval quartet sheds light on the relationship between the economic freedoms and fundamental rights in the EU legal order. There is extensive bibliography on the cases from various perspectives. The cases also bring up numerous other questions, many of which have no obvious answers. Regardless of the complexity, these questions have to be addressed by the EU institutions.

7 The current situation in the EU and some thoughts on the future

In the following chapter the current situation within the EU will be explored. Recent changes in the global economy have had an impact on social rights in Europe and these changes deserve some reflections. The Laval quartet leaves some unanswered questions, of legal and political nature, such as whether national social models can be preserved and what the role of the ECJ in the EU legal order should be. Issues of democracy within the EU will also be explored. At last recent development in the EU, new case law and some initiatives towards addressing the conflicts that have risen after the Laval quartet, will be discussed.

7.1 New political landscape in the EU

The last decades in Europe have been tainted with problematic encounters between the development of the welfare state and the European Union. It can be argued that these two institutions are two of the most significant achievements of the 20th century in Europe and that they have made an invaluable contribution to enriching the life chances of millions of people in the context of economic growth, social security, cohesion and peace. The social model has been centred on the national welfare state and the political system has been centred on the EU

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313 Hans-W. Micklitz. “Judicial Activism of the European Court of Justice and the Development of the European Social Model in Anti-Discrimination and Consumer Law”.

314 Hans-W. Micklitz. “Judicial Activism of the European Court of Justice and the Development of the European Social Model in Anti-Discrimination and Consumer Law”.
system of multi-level governance and shared sovereignty. These two systems rest on different principles. The welfare state essentially rests on a logic of ‘closure’, it is important that the members of a welfare state feel that they belong to the same ‘whole’ and they are linked by reciprocity and common needs. The European project on the other hand is guided by logic of ‘opening’, aimed at free movement and no discrimination and thereby weakening the systems that the individual welfare states have built so carefully.

The new political geography in the EU is a factor that has to be taken into account when discussing labour rights. It has been pointed out that the danger for labour markets of the old Member States lies not in the influx of workers from the new Eastern Member States but rather in the difference in wages and social standards. The line up of Member States before the Court of Justice in the Laval line of cases shows a strong division in the way Member States feel about those issues. In a way it can be said that victory has been awarded to new Europe that mainly export workers over old Europe, which is an importer of workers. Because of this, the EU institutions are under a lot of pressure. Should the ECJ back down due to pressure from the European public in the old Member States and the European Parliament? What about the Commission and other EU institutions? How should they react?

After the judgments in the Laval quartet were delivered big changes have been seen on the European markets because of the global financial crisis. This reality also has to be taken into account. The extensive deterioration of the “real” economy as a result of the crisis has created a lot of unease among the people of Europe. This can possibly lead to some sort of a new protectionism, threatening open markets across country borders. When times are tough and jobs are scarce it is really important to have a clear vision on how the free movement of persons should function in the EU. The economic crisis has accentuated the inequalities that existed in the EU prior to it and its consequences have hit the most vulnerable the hardest. Low wage workers, especially those who are not well educated or skilled, people.
belonging to minorities, migrant workers and other marginal groups are in most danger of losing their jobs or having their living standards cut seriously.  

7.2 Can national social models be preserved?

One of the questions that the Laval quartet leaves us with is whether there is room for preserving national social models while the internal market requires the removal of any restrictions. This is a major dilemma and it has to be faced in the years to come. The matter has become much more complicated now after the enlargement of the EU. The present Member States have much more diverse social models and differences in wages and working conditions than before the last two enlargements.

The Albany, Omega and Schmidberger cases, along with the case Dynamic Medien have been considered as examples of how the protection of constitutionalized rights can be qualified as legitimate obstacles to the market freedoms. Human dignity, freedom of expression and the rights of the child were all considered “fundamental enough” to result in allowing derogations from the rules of the internal market. Why should the right to collective bargaining not be treated in the same way, since it is already recognized as a fundamental right? Are collective rights less fundamental than individual rights?

The way of the ECJ is to look at the right to collective action as a limiting right, a right that limits the exercise of the market freedoms. The ECHR and national courts on the other hand have looked at it from the opposite perspective, seeing it as a limitable right and restrictions from it have to be justified. It seems as if the objective of the ECJ decisions in the Laval quartet is pushing economic freedoms, not safeguarding the right to strike. Even though the ECJ recognized the right to take collective action as a fundamental right, it was not “fundamental enough” to justify derogations from the free movement provisions. The methodology is more in line with situations when national restrictions restrict the fundamental rights. Therefore it can be argued that the right to strike is, in the eyes of the ECJ, not a European fundamental right, but a national obstacle to the full achievement of the Treaty provisions. Rather than balancing equal ranking rights the doctrine of primacy of EU law is

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322 Antonio Lo Faro. “Toward a de-fundamentalisation of collective labour rights in European social law?”, pages 210-211.
326 C-244/06, Dynamic Medien [2008] ECR I-00505
327 Antonio Lo Faro. “Toward a de-fundamentalisation of collective labour rights?”, page 211.
328 Antonio Lo Faro. “Toward a de-fundamentalisation of collective labour rights?”, page 211.
applied. In Omega and Dynamic Medien it was left up to the Member States to decide the substance of the fundamental rights at question, but that was not the case in the Laval quartet and the ECJ decided to take that task upon itself.\textsuperscript{329} This is somewhat surprising, since the regulation of labour law regarding collective action is explicitly left outside of EU competence in the Treaty.\textsuperscript{330}

7.3 The role of the ECJ and democratic deficiency in the EU

The role of the ECJ in the European legal order is very important. In the half century that the Court has operated it has gained real legitimacy and fostered many developments in Europe. This kind of legitimacy is always fragile, and even more so when it comes to non-elected institutions like the Court. In a legal context it is very interesting to reflect on the role of the ECJ. How did it come to the current situation where the ECJ has started creating law rather than just interpreting it? Was that a political decision on behalf of the European institutions or was it just a coincidence? Has this been a positive development for the ECJ and Europe as a whole?

Various commentators have reflected upon the role of the ECJ in the EU legal order and what has changed with the judgments in the Laval quartet. Claire Kilpatrick and Hans-W. Miklitz use the concept “creative destruction” in connection to the ECJ and ask whether the Court should be viewed as a “valuable agent of creative destruction”\textsuperscript{331} in the construction of internal market norms. The concept creative destruction means the process of transformation in which an established economic structure is destroyed by the emergence of a new, improved structure. The concept could be used concerning law and court’s interpretation as meaning the judicial breaking up of previously established, but no longer fitting, legal norms to fit a new environment, in this case a new internal market environment. This might be viewed as part of the lifeblood of the internal market process, the ability to adapt to new circumstances such as market changes and enlargement.\textsuperscript{332}

This analogy could be too simple to use for legal matters such as the one at hand. It is in no way clear that the way the ECJ interprets the internal market legislation and the fundamental rights clashing with them is a better way than what had previously been thought.

\textsuperscript{329} Antonio Lo Faro. “Toward a de-fundamentalisation of collective labour rights?”, pages 212-213.

\textsuperscript{330} Article 153(5) TFEU.

\textsuperscript{331} To use the words of Hans Micklitz as cited by Claire Kilpatrick, see Claire Kilpatrick. “Internal Market Architecture and the Accomodation of Labour Rights: As Good as it Gets?” page 18.

\textsuperscript{332} Claire Kilpatrick. “Internal Market Architecture and the Accomodation of Labour Rights: As Good as it Gets?”, page 18.
It is not like when electric light bulbs replaced candles, which is a clear-cut situation of a better way of providing light, whereas the best way of protecting labour rights within the internal market may be highly contested.\textsuperscript{333}

Leaving the role of the ECJ to the side, it can also be argued that the EU suffers from another kind of democratic deficit, as the general public does not have much impact on the composition of the EU institutions.\textsuperscript{334} According to Hayek the European Union became an accomplished model of what he called limited democracy. The goal of the ultra-liberal program was to dethrone politics to prevent ignorant populations from interfering with the economic laws, which are beyond their understanding.\textsuperscript{335} It has been suggested that the EU is in a way governed by this lack of policy. The resistance of the electorate in Europe has been apparent in many national referenda, such as in Denmark on the Maastricht Treaty, in Ireland on the Nice Treaty and the Lisbon Treaty, and in France and the Netherlands on the Constitutional Treaty. The leaders of Europe have, however, somehow always managed to turn around these rejections of the voters, ultimately getting the result they were out after. That seems to indicate that voted results are welcomed only if they are the “right” ones.\textsuperscript{336} The citizens of Europe have the right to vote in elections for the European Parliament, but in general the turnout is low and Europeans do not show much interest in those elections.

This can easily lead to serious problems in Europe. If people feel they can no longer express themselves through democratic means, and workers are banned from exercising their collective freedoms to strike and protest, a deep sense of social injustice is likely to emerge. That can then lead to hatred, especially against foreigners, since the ECJ has in a way put a competition between workers of different nationalities on the agenda, the Swedish against the Latvian and the Europeans against immigrants.\textsuperscript{337} This is already happening with extremely nationalistic political parties gaining support all over Europe.\textsuperscript{338}

Some commentators go even further. According to Professor Alain Supiot, who in general is very critical towards the EU, the European market has become what he calls a “communist market economy.” He states that the enlargement of Europe to post-communist countries did not mean the extension of the social market economy to the east, but the birth of the communist market economy. He compares this new economy with the system in China,

\textsuperscript{333} Claire Kilpatrick. “Internal Market Architecture and the Accommodation of Labour Rights: As Good as it Gets?”, page 19.
\textsuperscript{334} Alain Supiot. “Conclusion: Europe’s awakening, page 298.
\textsuperscript{336} Alain Supiot. “Conclusion: Europe’s awakening, page 299.
\textsuperscript{337} Alain Supiot. “Conclusion: Europe’s awakening, pages 300-301.
\textsuperscript{338} See for example on the upcoming Greek Parliamentary elections, “Fylgi nýnasista vex hratt”, visir.is.
where its characteristics are limitless economic freedom for the ruling class and a dramatic limitation of democracy and rights of employees. The only difference between China and Europe, according to Supiot, is that the leaders of China do not share the naïve faith of Europeans in the benefits of freedom of movement of capital and goods. They have only opened their markets enough to make it profitable. Whether this analysis is right is hard to say, but one thing is clear in Europe and that is and has been the strong belief in the free market. The difference also lies in that in China a single political party exercises this dictatorship, but in Europe the financial markets are in the governing position.

These urgent questions concerning democracy in Europe have to be addressed. If that is not done, support for the EU, both from citizens and national governments, might diminish and that might put the European project at risk. The German Constitutional Court has made that clear in its judgment on the Lisbon Treaty:

if an imbalance between type and extent of the sovereign powers exercised and the degree of democratic legitimation arises in the course of the development of the European integration, it is for the Federal Republic of Germany because of its responsibility for integration, to endeavor to effect a change, and in the worst case, even to refuse further participation in the European Union.

In this example the German Constitutional Court is defending the democratic rule in Germany. To the Court it is important that the people of Germany have an impact on how the EU is run, and if there is an imbalance between the principle of democracy and other legal interests something must be done about it.

It can be argued that at present in the EU Germany is the most powerful of the Member States. The Member States all have one representative both in the Council and the Commission and therefore it should not matter if an opinion comes from Malta or Germany. Politics, however, do not always work that way. It could have serious implications for the EU if Germany were to go further in this direction, but of course one has no means of predicting anything in that regard.

According to Brian Bercusson the role of the ECJ in the future of the European labour law depends on whether the Court can recover from the self-inflicted blows of the Laval quartet. In his mind, creation of labour law is too serious a matter to be left to judges. There is also

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342 Brian Bercusson. European Labour Law,
need for a clear policy from the political EU institutions and there is need to make clear which rights are fundamental.

7.4 Further development at EU level – Commission vs. Germany

An interesting case for this discussion of fundamental rights and fundamental freedoms is the judgment in the Germany case, that was delivered recently by the ECJ. In that case the ECJ again had to deal with questions of collective bargaining and whether that was a general principle of EU law. In that case, the Court confirmed that: “the exercise of the fundamental right to bargain collectively must be reconciled with the requirements stemming from the freedoms protected by the FEU Treaty.” The Court stated that the right provided for in article 28 of the Charter of Fundamental Rights (right to collective action) must be exercised in accordance with European law.

The facts of the case were that the Commission had started infringement procedures against Germany since local authorities and local authority undertakings had awarded service contracts in respect of occupational old-age pensions directly, without calling for tenders at EU level. The Commission argued that this action was in violation of a directive on public service contracts. The German government argued that their decisions were based on collective agreements and because of their nature and subject matter they fell outside the scope of the directive in question. The ECJ did not accept this argument and was forced to consider whether the application of these directives would have to be balanced against the right to bargain collectively. The Court recognized once again the right to bargain collectively as a general principle of EU law and referred to the ESC, Charter of Fundamental Rights and some other international documents. The ECJ in the judgment states that a balance must be struck between the workers that pay a part of their wages into pension funds and the banks and insurance companies that, according to the Commission, have a right to operate in the pension market.

This decision has been met with mixed reviews and academics do not seem to agree on what this means to the social dimension of Europe. According to Professor Alain Supiot this is a bad decision for social rights in Europe. In his opinion the notion of solidarity is completely overlooked and the influence of the markets is extended over to the management

344 Antonio Lo Faro. “Toward a de-fundamentalisation of collective labour rights in European social law?”, page 203.
of pension schemes of the social partners. Professors Catherine Barnard and Simon Deakin are more positive and see the decision as proof that the Lisbon Treaty changes the way social matters are handled on EU level, and that the ECJ’s approach is gradually changing. They cite the Advocate General Trstenjak and the decision of the Court in this case to support their view. The Advocate General Trstenjak talked in her opinion about achieving a greater balance between fundamental economic and social rights. In her opinion the decisions in the Laval quartet did not sit comfortably with the principle of equal ranking of fundamental rights and fundamental freedoms:

Such an analytical approach suggests, in fact, the existence of a hierarchical relationship between fundamental freedoms and fundamental rights in which fundamental rights are subordinated to fundamental freedoms and, consequently, may restrict fundamental freedoms only with the assistance of a written or unwritten ground of justification.

In her mind no such hierarchical relationship exists and she argues for the use of a proportionality test, like in the Schmidberger case, to find a proper balance between the two. The Court did not follow the opinion of the AG, but it seems to have taken some inspiration from it, as the proportionality principle is mentioned, there are some words about balance between the two sets of rights and the Schmidberger case is cited. In the view of the Court a fair balance has to be struck between these two interests, the interests of the people with pensions and the interests of freedom of establishment and services. According to the Court the German government failed to reach this balance when it decided not to call for tenders at EU level. The government could have set up certain conditions that protected the interest of the workers concerned, and then called for tenders. According to Barnard and Deakin this decision indicates that there is room for social factors to be taken into account when applying the free movement principles.

7.5 Possible ways to solve the dilemma

It is clear that the European institutions have to solve the dilemma of the clash between fundamental social rights and the market freedoms. Regardless of how the relationship with

350 Catherine Barnard and Simon Deakin. “European labour law after Laval”, page 266.
the ECtHR will evolve the EU can and must deal with the situation on its own. Several ways have been pointed out, some of which will be discussed below.

Professor Ulrich Mückenberger comes up with a few ideas in a recent article. According to him there are four steps towards renewing Social Europe. Firstly, the democratization process of Europe has to be promoted. Secondly, the social has to be freed from being an appendix to the economic; it has to be recognized as being fundamental to the political and economic. Thirdly, European polity has to be construed from its humane constituency and fourthly, Europe has to be considered in a cosmopolitan manner.351

Globalization and Europeanization are challenging the democratic foundation, which up until now has been reserved to the nation state. The powers are being shifted away from the nation states over to supranational authorities, what implies a partial loss of sovereignty and lack of democracy. Citizens feel like they do not have an impact. The EU is not a state in itself, it is an association of sovereign national states and it derives its authority exclusively from the legislative powers of its member states. In the modern multi-level system of Europe the questions of how to deal with the shared competences of the EU and the Member States, as well as other actors, have to be addressed more concretely.

Historically the social sphere of Europe has been treated as somewhat of an appendix to the economic rules. The question whether this understanding has been wrong arises, and maybe today more wrong than ever, because of the financial crisis. Wealth and social cohesion have always had their sources in human activity and cooperation. Markets are not autonomous and self-organizing, even though some neo-liberals would want to believe that. Markets are an artificial product of political, legal and social invention and intervention. Social, as well as economic factors are integral to the market phenomenon, but they must cooperate, and one cannot overrule the other. High wage countries, like most the European ones, depend mostly on labour, cooperation and innovation, and these are all factors that hardly exist without the social sphere.352 This is the core reason why the Union must strive to include the social dimension in the European legal order, even more now than ever.

Now there are some changes under way in the field of this legislation. The Commission has come up with a proposal both on a new regulation concerning the exercise of collective action within the context of freedom of services and establishment and a proposal for a directive on better implementation of the PWD. These proposals will be examined in chapter 7.8. The best way to look forward would be to include all groups that are affected by the

legislation, i.e. to treat employers, unions and public authorities as authors of these norms, rather than just as addressees and to use a bottom-up method, instead of a top-down method.\textsuperscript{353}

Do we need a European wide labour code?

The Laval quartet has disturbed the balance between EU law and national labour law that dates back to the foundation of the EU in the 1950’s. It was a political compromise at the time not to aim for formal legal harmonization of labour law at EU level. Instead, the national labour law should be protected from the potentially destabilizing influence of the free movement provisions.\textsuperscript{354} A possible impact of the Laval quartet is that national labour law could in the future be levelled down in the name of protecting free movement. Up until now there has not been a political will to come up with a European wide labour code, but maybe that will change after these judgments. A code like that could include minimum wages, provisions on holiday, pensions and other provisions on working conditions in general. However, such a change would need the support of both the European institutions and the Member States. As the situation in Europe is right now, it is unlikely that the leaders of Europe would make such a change a priority.

7.6 Future policymaking in the EU: The Commission’s 2020 agenda

The Lisbon Strategy that was adopted as the main strategy for Europe in 2000 had the main goal to increase the competitiveness of Europe and to create more and better jobs. The undertone of the Lisbon Strategy was quite neo-liberal. The EU has now adopted a new policy, the Europe 2020 agenda.\textsuperscript{355} In that agenda the Commission has put forward three priorities and five key objectives. The three mutually reinforcing priorities are:

1. Smart growth: developing an economy based on knowledge and information.
2. Sustainable growth: promoting a more resource efficient, greener and more competitive economy.

\textsuperscript{354} Catherine Barnard and Simon Deakin. “European labour law after Laval”, page 253.
3. Inclusive growth: fostering a high-employment economy delivering social and territorial cohesion.\(^{356}\)

It can be argued that all these priorities focus on economic priority. The five key objectives are:

1. 75 per cent of the population aged 20-64 should be employed.
2. 3 per cent of the EU’s GDP should be invested in R&D.
3. The ‘20/20/20’ climate/energy targets should be met (including an increase to 30 per cent of emission reduction if the conditions are right).
4. The percentage of early school leavers should be under 10 per cent and at least 40 per cent of the younger generation should have a tertiary degree.
5. 20 million less people should be at risk of poverty.\(^{357}\)

These principles and objectives reflect the European political landscape. According to Professor Alain Supiot the EU seems to be heading towards governance by numbers, rather than social justice and democracy. In his mind none of the fundamental questions that the future of Europe holds are asked, questions about market regulation, frontiers of commerce and social, tax and environmental policies. He thinks that the focus is clearly on economic factors, efficiency and competitiveness and not much space is given to thoughts on human concerns, solidarity, democracy and quality of life.\(^{358}\) One would have thought that the crisis that started in 2008 would have opened the eyes of the European authorities and that a change of policy would follow. A few actors have criticized the 2020 agenda for not suggesting sufficient policy changes after the crisis.\(^{359}\)

Brian Bercusson suggested several radical changes to the governance of the EU to respond to the judgments in the Laval quartet. He wanted the Lisbon Treaty to be amended to reduce the negative impact of the economic freedoms on fundamental rights, and especially on the right to collective action. It should be pointed out clearly that the economic freedoms could not be invoked against trade unions taking collective action. He also suggested a thorough reform of the ECJ, including a creation of a special social chamber. He furthermore wanted the composition of the Court to be altered on the basis of demographic distribution of

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\(^{358}\) Alain Supiot. “Conclusion: Europe’s awakening, page 308.
\(^{359}\) Philippe Pochet. “What’s Wrong With EU2020?”, page 144.
the other EU institutions. Instead of the ECJ being composed of one judge from each Member State the bigger states would have more numbers of judges. And finally he recommended the adoption of the adequate provisions to ensure the compliance of the EU with international labour law, including the ESC and the ILO conventions. These suggestions were made before the financial crisis hit but the crisis seems to have shown that there is a certain need to clear up the relationship between economic and social rights. One might even wonder if these suggested reforms are sufficient.

The Lisbon Treaty introduced three important changes that could all contribute to solving this dilemma the EU finds itself in. The Charter of Fundamental Rights has been made binding, the accession of the EU to the ECHR has been made possible (or mandatory) and in article 3 of the TEU the objective of the EU to achieve a “highly competitive social market economy.” If taken at face level these changes all point towards a change in the focus on the market within the EU. The opinion of Advocate General Cruz Villalon in the Santos Palhota case is interesting. He talked for the opinion that after the entry into force of the Lisbon Treaty in cases where worker protection is used to justify breaches of the free movement provisions, it should no longer be interpreted in a restrictive manner. It remains to be seen if the Court will accept this line of argument.


In October 2009, José Manuel Barrosso, then President of the European Commission, asked professor Mario Monti, who has since become the Prime Minster of Italy, to look into the single market and come up with proposals for a new strategy for the single market in the 21st century. According to Barrosso’s mission letter, the EU is faced with some urgent challenges that need to be addressed. The economic crisis has revealed a temptation for the Member States to decrease the role of the single market and resort to economic nationalism. The Commission wants to defend the single market and aims to fully achieve its benefits. The letter also calls for reconsideration of the social dimension of the internal market, as the Lisbon Treaty, with its reference to a social market economy, and a fresh look on how the market and the social dimensions can work together and be mutually strengthened. The report is extensive and covers many areas, such as environmental issues, the tax dimension of the

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360 Brian Bercusson. New Institutional Roads to a Stronger Social Dimension.  
363 Catherine Barnard and Simon Deakin. “European labour law after Laval”, page 264.  
internal market and the need to adapt to new technologies. The main goal is to create a better single market.

The report contains a chapter on the social dimension of the single market. The author is concerned about the “internal asymmetries between market integration at supranational level and social protection at national level, which generate frictions and are a source of disentanglement and hostility towards market opening.” It is said to be necessary to remove the sources of these frictions to make the single market sustainable in the long run. The ECJ decisions in the Laval quartet have revived an old split that had never been healed: “the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level.” If nothing is done then there could be a risk that worker’s movements and trade unions would stop supporting the economic integration. There is a need to clear up both issues related to the PWD and whether it provides enough protection, and questions of the place of workers’ rights to take industrial action and the status of that right vis-à-vis the economic freedoms. The political institutions of the EU need to address this because, according to Monti:

There is a broad awareness among policy makers that a clarification on these issues should not be left to future occasional litigation before the ECJ or national courts. Political forces have to engage in a search for a solution, in line with the Treaty objective of a "social market economy."  

The social partners were included in the drafting of the Monti report.

In Monti’s view the entry into force of the Lisbon Treaty changes the legal context of the Laval quartet, since the social market economy is now an objective of the EU and the Charter of Fundamental Rights has been made binding. According to him if that does not suffice to change the approach of the ECJ further policy action should be explored. There has been a reference to this by the Advocate General in the Santos case, but the full effects of this objective remain to be seen.

Monti sees two possible strategies to balance the economic freedoms and the right to strike. One would be to go with ETUC’s proposal for a Social Progress Clause that would exclude the right to strike from the application of the Treaty. He does not think that is a

realistic option in the short term, as it calls for Treaty amendments. Another strategy would be
to regulate the right to strike at EU level, but that’s not realistic either, since collective action
is excluded from EU competence.\textsuperscript{369} The best solution in his mind is a “targeted intervention
to better coordinate the interaction between social rights and economic freedoms within the
EU system.”\textsuperscript{370} Monti elaborates further on this in the report.\textsuperscript{371}

The Monti report has been used in policy making at EU level and it is cited in the new
regulation proposal on the right to take collective action that will be studied in the following
section.

7.8 Commission responses after the Laval quartet

After such a heated debate about the case law from Laval it is inevitable for the Commission
to interfere and make some suggestions on how to solve the problems that have risen from it.
The Commission has done several things, among others initiating the Monti report. In
October 2010 the Commission launched a public consultation on how to reinvigorate the
Single Market with its Communication ‘Towards a Single Market Act – For a highly
competitive social market economy – 50 proposals for improving our work, business and
exchanges with one another.’\textsuperscript{372} That initiative showed huge interest and support from unions,
individual citizens and NGOs. The ETUC and the European employers’ organizations
participated, along with many other important actors in the field of labour law. Among the
conclusions were that the rights set forth in the Charter of Fundamental Rights need to be
implemented effectively and that the Commission should guarantee the right to collective
action.\textsuperscript{373} Those who participated considered this one of the most important issues.\textsuperscript{374} The
Posting of Workers Directive should also be improved.\textsuperscript{375} After this consultation the
Commission came up with the ‘Single Market Act – Twelve levers to boost growth and
strengthen confidence’ in 2011.\textsuperscript{376} Among the conclusions were that there was need for
legislation aimed at clarifying the exercise of freedom of establishment and freedom to
provide services alongside fundamental social rights.

\textsuperscript{369} Mario Monti. \textit{A New Strategy for the Single Market}, page 70.
\textsuperscript{370} Mario Monti. \textit{A New Strategy for the Single Market}, page 71.
\textsuperscript{371} Mario Monti. \textit{A New Strategy for the Single Market},page 71.
The European Parliament adopted three resolutions right after this Commission act was adopted. The Parliament welcomed the initiative from the Commission but still stated some of the most important pro-labour views that the Parliament usually insists upon. Among the issues the European Parliament points out in these resolutions are that “[…] the Single Market cannot be regarded in purely economic terms, but must be seen as being embedded in a wider legal framework conferring specific, fundamental rights on citizens, consumers, workers, entrepreneurs and businesses […]” and that “[…] the Commission has to anchor fundamental rights in all legislation on the single market; […] this would ensure that implementation of the economic fundamental freedoms of the single market does not impede collective bargaining rights and the right to strike as defined by national legislation.”

7.8.1 New regulation proposal on the right to take collective action

Following all this consultation and debate on the right to take collective action and the market freedoms the Commission has finally come up with a new proposal for a regulation. The regulation is on the right to take collective action within the context of freedom of establishment and freedom to provide services. The Commission has also drafted a proposal for a directive on the enforcement on the PWD. The following discussion will focus on the regulation proposal.

The aim of the regulation is to clarify the relationship between the economic and social rights in question. In the Explanatory memorandum the Commission studies the strongly divergent views of those who have commented on the cases, including the social partners, politicians, legal practitioners and academics. The Commission examined the various opinions and resolutions of several interested parties during the processing of the proposal, such as the ETUC, BusinessEurope, the European Parliament and the EESC. These views have already been examined in chapter 4.6.

378 On a Single Market for Enterprises and Growth [2010/2277(INI)], para C.
380 Commission Communication. Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services. COM (2012) 130 final.
382 Commission Communication. Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services. COM (2012) 130 final, page 2.
The proposal builds on the views of the EESC that the social dimension is a core component of the internal market, which cannot function properly without a strong social dimension and the support of citizens. The case law of the ECtHR is also cited, as well as the reference in the Lisbon Treaty to a highly competitive social market economy. In the view of the Commission presented in this proposal economic freedoms and fundamental rights may both be subject to restrictions and limitations.

The Commission states that the Laval quartet has exposed the fault lines that run between the single market and the social dimension. The verdicts of the ECJ brought to light the need to ensure striking the right balance between the exercise of the right to take collective action and the freedom of establishment and the freedom to provide services. In the words of the Commission:

The present proposal aims to clarify the general principles and applicable rules at EU level with respect to the exercise of the fundamental right to take collective action within the context of the freedom to provide services and the freedom of establishment, including the need to reconcile them in practice in cross-border situations. Its scope covers not only the temporary posting of workers to another Member State for the cross-border provision of services but also any envisaged restructuring and/or relocation involving more than one Member State.

As stated earlier the regulation aims to clarify the relationship between the fundamental rights and economic freedoms. Article 1(2) is the so-called Monti-clause:

This Regulation shall not affect in any way the exercise of fundamental rights as recognized in the Member States, including the right or freedom to strike or to take other action covered by the specific industrial relation systems in Member States in accordance with national law and practices. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and practices.

Article 2 is on general principles:

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The exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms.

7.8.2 Responses to the proposal: Does the Commission have support?

This provision has received mixed reviews. A group of European lawyers who defend workers’ rights gathered at a conference in Berlin in the beginning of March 2012 to discuss collective labour rights in the context of the financial crisis. The group adopted a statement demanding the immediate withdrawal of the regulation. They state that article 2 asserts that a fundamental human right have no primacy over an economic freedom. In their opinion the “principle” of equivalence between human rights and business freedoms is entirely contrary to international human rights law. They fear that this regulation will lead to the primacy of economic freedoms and result in repeated intervention of courts in collective action, therefore reducing trade union autonomy. In their opinion the only satisfactory and legally correct solution would be to change the Treaties in a way to make it absolutely clear that nothing in EU legislation is allowed to have priority over fundamental social rights and in case of a conflict the fundamental rights shall prevail.  

The ETUC has rejected the proposal and states that the proposal falls short of correcting the problems brought about by the Laval quartet. What the ETUC calls for is a social contract for the European Union where all workers fully enjoy their fundamental rights.  

According to BusinessEurope the proposal disrespects the exclusion of the right to strike from EU competences in the Treaty and the organization fears that it could alter tried and tested industrial relation systems at national level. Philippe de Buck, BusinessEurope’s Director General said: “Going at odds with its growth agenda, the European Commission has proposed EU legislation which companies will have great difficulties to apply.” BusinessEurope is also strongly opposed to the new directive on the implementation of the PWD. The European Transport Workers Federation (ETF) also issued a statement where the voice their strong opposition.

The French employment ministry issued a statement criticizing the proposal stating it is ambiguous and contradicts the general objective of the proposal by stipulating that the right to strike should respect the right of companies to exercise their freedom of establishment and services to do business anywhere in Europe. The French employment minister Xavier Bertrand said that France would not approve the proposal unless it was amended. The proposal requires unanimity among the Member States.\(^{391}\)

The proposal has received mixed reviews in the Council. The employment and social affairs ministers of the Member States recently met for an informal meeting and discussed the proposal. They expressed concerns about the new regulation and many of them found that it interferes with the right of Member States to regulate their own labour markets.\(^{392}\) The regulation is now being reviewed by the Member States and it will be interesting to see how they will further respond to it.

Even though it is too early to predict on what the outcome of the new regulation proposal will be, it does not look good for the Commission. The intention of the Commission was to clarify matters of fundamental importance to the EU. Opinions on how to handle the interaction between the fundamental rights and the fundamental freedoms have been highly contested during the past few years as explored in this thesis. It does not seem as if the Commission has come up with a proposal that settles these differences. It will be interesting to see how these matters will continue to develop at European level.

8 Conclusions

Having viewed the right to take collective action together with the development of the internal market from the different perspectives discussed in this thesis it is useful to summarize the main points of the thesis.

In a way it seems as if the key word in Europe today is tension. There is an inherent tension between the economic freedoms and the fundamental rights and there is tension between the worker’s unions and the employer’s unions. There are deep tensions between the old and the new Member States of the EU and even some individual Member States and the Union. There is tension between the ECJ and the ECtHR. This must indicate that there is something wrong with the way things are being done. For centuries a lot of knowledge and experience has been accumulated. A lot of different models of governance have been tried,


\(^{392}\) “Mixed reaction in Council to Monti II regulation”. www.europolitics.info.
from communism to capitalism and everything in between. People are more educated and healthier than ever. It can be argued that the world, and maybe especially Europe, is going through a period of change. In the past decades the world order has gone through enormous changes. The Berlin Wall came down in 1989 followed by significant changes within Europe. 9/11 in 2001 was a big worldwide shock that lead to huge changes in the world order and since 2008 the financial crisis has had a great impact on how people think and act. It has been suggested that the Western world is going through an ideological crisis.\textsuperscript{393} Maybe new solutions should be looked for as the current way of doing things is not satisfactory. Major battles regarding how to structure modern politics and economics in Europe are unlikely as these battles have already been fought, resulting in the most successful system the world has ever seen.\textsuperscript{394} What is more realistic is to tweak the current system so that the principles people want to uphold are secured, democracy over economics and governance that has human rights and the public interest at heart.\textsuperscript{395}

Historically, the focus of the European integration has been centered on the economic freedoms. In the first two decades of the EU human rights or social policy were non-existent, as the EU was never meant to focus on these issues. The development of a fundamental rights regime started at EU level with the case law of the ECJ.\textsuperscript{396} The role of the ECJ in the development of the EU’s social scheme has been extensive. It raises the question why the EU and the ECJ developed that way. Was the Court meant to have such an impact on the development of EU law? Is that the way the Member States and the other EU institutions wanted it?

Several Treaty amendments followed after this progressive case law of the ECJ and the EU started working in more policy fields, such as social policy and environmental matters. The Lisbon Treaty introduced several changes and some of them are socially oriented. When the Lisbon Treaty entered into force the European Charter of Fundamental Rights became binding, which was seen as a significant step in the fundamental rights protection of the EU. Regardless of this development, the main competence in social matters was still to lie with the Member States.

The EU has also grown a lot since the beginning. The Member States are now 27 and with the two enlargements of 2004 and 2007 the Union became much more diverse. The difference

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in living standards between the old Member States and the new Eastern European Member States was, and still is, considerable. This difference fuelled the disputes that ended up before the ECJ, the Laval quartet.

The four cases, Laval, Viking, Rüffert and Commission vs. Luxembourg, got a lot of attention and generated strong responses. In legal terms the most interesting factor of the judgments is the relationship the ECJ created in these cases between the fundamental right to take collective action and the fundamental economic freedoms of the EU Treaties. The cases confirm that the right to strike is a fundamental right but that does not suffice, the fundamental freedoms prevailed before the ECJ and the Court seemed to give a fairly small margin to exercise the labour market rights. Many commentators were of the opinion that the Court had even taken over the role to review national labour legislation. That is not in line with the division of competences between the EU and the Member States. Issues of collective action are even excluded from the competences of the EU. The different EU institutions had various opinions concerning the Laval judgments. The Economic and Social Committee stated that the legal aspects of the social dimension of the internal market had been brought into question by the judgments and the European Parliament stated that economic freedoms could not be interpreted as granting the rights to evade national social and employment laws. The Commission suggested a compromise between the economic freedoms and fundamental rights and that it should be up to national courts and the ECJ to decide which principle should prevail on a case-by-case basis.

The words of Advocate General Trstenjak in Commission vs. Germany in a way confirm that since Laval, there exists a hierarchical relationship between the fundamental rights and fundamental freedoms in the EU and the latter prevail. In the opinion of many commentators, the adoption of the Lisbon Treaty and the Charter of Fundamental Rights should have changed the way these rights were viewed and given more weight to the fundamental rights.

Even though Iceland is not a part of the EU, through its membership in the EFTA and EEA the country is part of the internal market. The issues discussed in this thesis are therefore

398 European Economic and Social Committee opinion. The Social Dimension of the Internal Market.
399 European Parliament resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI)).
400 Nicole Lindstrom, “Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?”, page 13.
as important to Iceland as the Member States of the EU. The issues of posted workers have been discussed here and there was even a case against Iceland before the EFTA Court.\textsuperscript{403} The EFTA Surveillance Authority brought action against Iceland for failure of implementing the PWD properly. The issue at hand was what should be included in the “minimum rates of pay” concept in the PWD. The case resembles the Laval case in many ways and the EFTA Court refers to the case law in the Laval quartet in its judgment. Iceland was declared to have failed to implement the directive properly. It is therefore of importance for the Icelandic labour market how these issues continue to develop at EU level.

The Laval cases have generated political debates both in the Member States, at Union level and amongst various stakeholders. The cases are believed to have unveiled a division between older and newer or more liberal Member States. Like Commissioner Monti stated:

\begin{quote}
the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level.\textsuperscript{404}
\end{quote}

The different approaches of the ECJ and ECtHR are very interesting. The two courts start at opposite ends when evaluating cases concerning collective action. The ECJ asks whether there has been an infringement of the free movement provisions, but the ECtHR asks whether there has been a violation of fundamental rights. The ECtHR approach is more in line with international labour and human rights law, as recognized by various international instruments and bodies. This divergence is a cause for concern; it is not constructive when the EU and the ECtHR are moving in different directions. As the EU might accede to the ECHR in the future this is something that has to be resolved.

The fact that the cases have generated this much response indicates that there is something in there that has to be looked at very carefully. The ETUC, the ILO, the EESC and the European Parliament have all been very critical and worried about this development. So have many of the Member States. There have been a few suggestions made as to how to solve this complex matter. The common understanding is that issues of this caliber should not be left to the ECJ to decide, as clearly stated in the Monti Report.\textsuperscript{405} Many actors call for a solution that guarantees that the exercise of the fundamental right to collective action may not be jeopardized by the exercise of the fundamental freedoms. The ETUC has called for a Social

\textsuperscript{404} Mario Monti. \textit{A New Strategy for the Single Market} , page 68.
\textsuperscript{405} Brian Bercusson has said the same thing, see, \textit{European Labour Law}. 
Progress Protocol to be added to the Treaties. It is stated in the Monti Report that this is not a practical solution because it calls for Treaty amendments. It is very unlikely that there is political will or power to change the Treaties at this time. The situation in Europe is difficult at the moment, with the financial crisis having its effects, and the Commission prioritizes other matters at the moment. It also seems as it has become more and more difficult to change the Treaties with each new Treaty, and it is not unlikely that it would be even more difficult now, with the highest number of Member States ever.

The Commission has come up with some proposals on how to solve this dilemma. The new regulation proposal on the right to take collective action in the context of freedom of establishment and services has not been well received. In a way it can be said that these proposals from the Commission are too vague and lacking a clear proposal for a solution. Keeping in mind the long history of debate and conflicts about the issues at hand it might take several years to find a solution that the EU institutions, Member States, trade unions and businesses will be satisfied with.

The question arises whether the EU isn’t still trying to manage social rights with the methods of the market and it can be questioned if that is a good approach. It seems as if the EU is reluctant to realize that a change is needed. One can only hope that the people in charge will soon open their eyes and look for new ways to make Europe and the world a better place.

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