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EUROPEAN LEGAL INTEGRATION: THE NEW ITALIAN SCHOLARSHIP

Jean Monnet Working Paper 8/07

Giovanni Orlandini

**Right to Strike, Transnational Collective Action and European Law: Time to Move On?**

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## **European Legal Integration: The New Italian Scholarship (ELINIS)**

This Working Paper is part of the ELINIS project: *European Legal Integration: The New Italian Scholarship*. Even the most cursory examination of the major scientific literature in the field of European Integration, whether in English, French, German and even Spanish points to a dearth of references to Italian scholarship. In part the barrier is linguistic. If Italian scholars do not publish in English or French or German, they simply will not be read. In part, it is because of a certain image of Italian scholarship which ascribes to it a rigidity in the articulation of research questions, methodology employed and the presentation of research, a perception of rigidity which acts as an additional barrier even to those for whom Italian as such is not an obstacle. The ELINIS project, like its predecessor – the New German Scholarship (JMWP 3/2003) – is not simply about recent Italian research, though it is that too. It is also new in the substantive sense and helps explode some of the old stereotypes and demonstrates the freshness, creativity and indispensability of Italian legal scholarship in the field of European integration, an indispensability already familiar to those working in, say, Public International law.

The ELINIS project challenged some of the traditional conventions of academic organization. There was a “Call for Papers” and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions to ELINIS were not limited to scholars in the field of “European Law.” Such a restriction would impose a debilitating limitation. In Italy as elsewhere, the expanding reach of European legal integration has forced scholars from other legal disciplines such as labor law, or administrative law etc. to meet the normative challenge and “reprocess” both precepts of their discipline as well as European law itself. Put differently, the field of “European Law” can no longer be limited to scholars whose primary interest is in the Institutions and legal order of the European Union.

ELINIS was the result of a particularly felicitous cooperation between the Faculty of Law at the University of Trento – already distinguished for its non-parochial approach to legal scholarship and education and the Jean Monnet Center at NYU. Many contributed to the successful completion of ELINIS. The geniality and patience of Professor Roberto Toniatti and Dr Marco Dani were, however, the leaven which made this intellectual dough rise.

The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

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## **Right to Strike, Transnational Collective Action and European Law: Time to Move On?**

Giovanni Orlandini

### **Abstract**

Starting from an analysis of two pending cases before the ECJ (*Laval* and *Viking* case), the paper focuses on the issue of the scope and significance the EU intends to accord to collective actions within the dynamics of European integration. In the first part of the paper the author deals with the principles governing the internal market of services in order to assess whether and how the performance of collective actions might fall within the scope of Article 49 TEC. In the second part, the different solutions arising as to collective actions violating *prima facie* article 49 will lead to an investigation on the possibility to accommodate the exercise of the right to strike with the constraints posed by the internal market principles. In the final part of this essay the author deals with the issue of the legitimacy of the right to take collective action from a “procedural” perspective, considering the increasing influence of the deliberative theories on the debate about European governance.

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## *Introduction*

'Rosella' is the name of a vessel of Viking Line Abp, a shipping company transporting goods and passengers between Helsinki and Tallinn. Following a well-known practice, in November 2003 Viking decided that, if they flew an Estonian flag, its vessel could gain a competitive advantage versus other companies operating the same route; re-flagging enables them to hire Estonian seafarers and, notably, to apply Estonian legal and contractual terms to the crew, that are much more profitable than Finnish terms. The Finnish Union too (FSU) follows a practice that is well-known to Scandinavian seafarers and, with the support of the ITF (International Transport Workers' Federation), it organised a collective action aimed at preventing the re-flagging and make Viking recognise it as a contractual counterpart. The novelty is that Estonia has been a new EU Member State since 2004 and the industrial action prevents the Finnish company from freely exercising the right of establishment pursuant to Article 43 TEC and to provide services in the Community market pursuant to Article 49 TEC. For this reason Viking filed a complaint against FSU and ITF with the London Commercial Court (which has jurisdiction as ITF has its registered office there) and obtains an injunction ordering to stay the collective action. The Court of Appeal, in appellate jurisdiction, referred the solution of the problem of the legitimacy of the industrial action to the Court of Justice under Community law <sup>1</sup>.

Some months before the Viking case was brought to the Court, the Latvian building firm Laval was awarded a public contract to refurbish a school in Vaxholm, a town near Stockholm. Laval employs Latvian workers and applies the working conditions and economic treatment that are agreed by contract with the Baltic trade union. The Swedish Union of Construction Workers (SBWU) asked to be recognised as counterpart and to sign a collective bargaining agreement extending the treatment granted to Swedish workers to Latvian workers as well. Since Laval rejected the claim, a strike and a boycott action were organised that blocked the company's activity. The company decided to bring the case before the Swedish court to claim that the industrial action was unlawful in that it infringed the right to provide services conferred by

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<sup>1</sup> Case C-438/05, *International Transport Workers' Federation (ITWF) and Finnish Seamen's Union (FSU) v Viking Line ABP and Viking Line Eesti*. For a comment on the judgment of the Court of Appeal (*Viking Line ABP v International Transport Workers' Union* [2005] EWCA Civ 1299, in *IRLR* 2006, 58 ff and *CMLR* 2006, 27 ff) see A.C.L. Davies, *The Right to Strike Versus Freedom of Establishment in EC Law: The Battle Commences*, in *ILJ* 2006, 75 ff.

Article 49 TEC as well as by the provisions of Directive 96/71 governing the relationship of workers involved in transnational service contracts. It was argued that Sweden had not implemented the Directive compelling foreign companies to abide by Swedish collective agreements, hence any collective action pursuing this goal had to be considered unlawful. The solution of the problem of the legitimacy of the collective action in the light of the principles pursuant to Article 49 TEC was also referred to the Court of Justice<sup>2</sup>.

The rules governing the internal market for services draw the attention of the Community institutions on an issue – industrial action – that they have guiltily neglected since they (wrongly) considered that it could be confined within the single national legal orders. The cases brought before the Court require investigating the issue of the scope and significance that the EU intends to accord to collective actions within the dynamics of European integration. This issue is in turn linked to the more general issue of the relationship between economic freedoms and social rights that is gradually taking shape in the Community legal system.

The aim of these pages is clearly not to anticipate the Court by addressing the merits of the specific points raised by the national judges in the mentioned cases<sup>3</sup>, but to provide an overview of the main problematic issues that must be solved to tackle a problem that is of the utmost importance for the future EU structure. Hence, in the first part the Court of Justice's case-law on Article 49 TEC will be reviewed to assess whether and how the performance of collective actions might fall in its scope. In particular, the issue of the so-called "direct horizontal effect" of the provision will be tackled, i.e. whether not only Member States but also private subjects have to respect the free movement of services and the principles developed thereon by the Court of Justice (*paragraphs* 1.1, 1.2, 1.3). It will then be cleared how the relevance of private actions for the internal service market may also stem from the principle "indirect liability" of the State developed by the Court in the field of the free movement of goods (*paragraph* 2). It is just the Court's case law on the "indirect liability" that underscores how the Court, in deciding whether

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<sup>2</sup> *Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Avdelning 1 of the Svenska Byggnadsarbetareförbundet, Svenska Elektrikerförbundet*. The judgment of the Swedish Labour Court (Decision 2005, n. 49) is published in *RIDL 2006, II, 229 ff.* with a note of M. Pallini, *Il caso Laval-Vaxholm: il diritto del lavoro comunitario ha già la sua Bolkestein?*. See also R.Eklund, *The Laval Case*, in *ILJ 2006, 202 ff.*, that analyses the Swedish law applied to Laval-Vaxholm Case

<sup>3</sup> In each Case written and oral submissions were made to the ECJ by Member States and Norway, as well as by the parties, the Commission and the European Trade Unions Confederation. The submissions in the Viking Case are analysed by B.Bercusson, *The Trade Union Movement and the European Union: Judgment Day*, in *ELJ 2007, 279 ff.*

the State behaviour may be justified on the grounds of the respect of a fundamental right, ends up striking a balance between the latter and the fundamental economic freedom that has allegedly been violated (*paragraph 3*).

The principles on the working conditions applicable to posted workers in the framework of the provision of services may affect the internal market for services and, in turn, the exercise of collective actions. The investigation will concern whether and how the principles developed by the Court of Justice and transposed into Directive 96/71 may be invoked in the case of a strike performed by both posted workers (*paragraph 4.1*) and workers of the host State (*paragraph 4.2*).

The different solutions as to whether collective actions by private subjects may fall in the scope of Article 49 TEC will require, in the second part, to investigate the issue of the recognition of the right to take collective action in the Community legal system, which is indispensable to justify its exercise in the light of the constraints posed by the internal market. This will in turn lead to an analysis of the definition adopted in the Nice Charter for that right, given its importance within the Community legal system, regardless of the uncertainties affecting the process of constitutionalisation of the Treaties (*paragraphs 1.1; 1.2*). The weighing of this right against free movement of services may bring about different scenarios, depending on the balance that will be achieved within the European legal system between market rules and collective autonomy of organized workers (*paragraph 2*). In the final part of this essay I suggest that the Community legal system may become the best suited place to afford larger areas of freedom to collective autonomy (*paragraphs 3.1; 3.2; 4*) and that the theories inspiring the new forms of European governance may provide arguments to support such solution (*paragraph 5*).

## *Part I*

### *1.1 Direct Horizontal Effect of Article 49 TEC*

The integration of the market for services will apparently be completed by the implementation of the much controversial Directive that bears the name of the Commissioner



who first suggested its introduction<sup>4</sup>. Directive 2006/123/CE (“Service Directive”), however, is not going to operate on a virgin territory, since the Court of Justice has so far contributed to define the rules of the market for services by means of its interpretation of Article 49 TEC and the provisions linked thereto.

Based on the case-law on services, an interpretation of the Treaty provisions protecting the fundamental economic freedoms has been adopted, so that not only measures that, directly or indirectly, cause discrimination on the grounds of nationality are banned, but also any restriction or obstacle to their exercise. The move from an approach based on the principle of non discrimination to the principle of free market access was made with the *Säger* case that has then provided inspiration to the Court of Justice in subsequent decisions on the other freedoms of movement of persons<sup>5</sup>. This approach has indeed been a clear step forward in acknowledging the power of the Court to appraise State conducts that, often inspired by protectionist aims, slow down the full integration of the Community market.

This interpretation, that is clearly aimed at enlarging the TEC scope, is not matched by a comparably straightforward approach that clarifies whether Article 49 TEC may also be invoked in cases in which access to the market is impeded by actions and conducts carried out by private subjects, which of course is crucial for the topic in discussion. A solution to the issue of the so-called horizontal effect of Article 49 is the prerequisite to conclude that collective actions and strikes preventing the free circulation of services fall in the scope of the internal market rules.

The term “horizontal effect” may be misleading: TEC provisions are unanimously considered to be relevant also in litigations between private parties when domestic legal provisions have to be construed in the light of Community law<sup>6</sup>. It is appropriate to clarify that in these pages “horizontal effect” refers to a different and more complex issue of the binding nature of a provision<sup>7</sup>, in particular, whether people, acting as individuals or in a group, have to abide by those rules when exercising their private autonomy.

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<sup>4</sup> See Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market, [2006] OJ L376/26, for a first comment on which see G.Davies, *The Service Directive: extending the country of origin principle and reforming public administration*, in *ELR* 2007, 232 ff.

<sup>5</sup> Case C-76/90, *Säger v Dennemeyer & Ltd* [1991] ECR I-4221. For Case-law on Articles 39, 43 and 49 TEC based on “market access” see C. Barnard, *The Substantive Law of the EU. The Four Freedoms*, Oxford, 2004, 256 ff.

<sup>6</sup> See P. Oliver- W.H. Roth, *The internal market and the four freedoms*, in *CMLR* 2004, 421

<sup>7</sup> As J. Baquero Cruz, *Free movement and private autonomy*, in *ELR* 1999, 604 ff, rightly observes, the issue of the subjective scope of TEC norms on freedom of circulation must be solved: given their “direct” effect, who is bound by them and in respect of whom? If the Treaty provisions are only binding on States, then actions by private

The balancing between economic freedoms and Arts. 81 ff seems to outline a division within the Treaty between competition rules addressed to private subjects and rules on free movement addressed to States<sup>8</sup>. In fact, this schematic division, that was immediately adopted by Commission and Council<sup>9</sup>, was soon denied by a case-law approach aimed at enlarging the subjective scope of the four freedoms.

But in what cases are the free movement rules binding on private subjects? Similarly to what happens elsewhere in the Community rules on free movement, if on the one hand in the relevant Court's case-law a single approach to the four freedoms seems to be developing<sup>10</sup>, on the other there are significant differences that impede to simply transfer the principles developed by it on different TEC rules.

The Court has considered Article 28 TEC applicable to private subjects performing public functions and producing "private rules"<sup>11</sup>. The Court adopts in those cases a "substantial" or "functionalist" approach by ignoring the "formal" aspect of the legal nature of the body. On closer scrutiny, those who stress how this case-law adopts a wider notion of Member State rather than recognizing the binding nature of the TEC norms in respect of private parties are certainly right<sup>12</sup>: in fact, what is decisive is whether the "measure" can be attributed to the State, even though in practice it is implemented by private subjects. With reference to Article 28, the Court does not seem to depart from this "restrictive" approach<sup>13</sup>. This approach is soundly based on the

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subjects are outside their scope, otherwise citizens, as individuals or groups, would have to comply with them, both in respect of other private subjects (horizontal effect) and the State (vertical effect).

<sup>8</sup> According to G. Davies, *National Discrimination in the European Internal Market*, The Hague/London/New York, 2002, 145 "The initial impression from the Treaty is [...] of a division of labour between the rules governing free movement and the rules governing competition".

<sup>9</sup> See General Programme on Services adopted unanimously by the Council on the Commission's proposal in 1961 ([1974] OJ Spec Ed 2<sup>nd</sup> Series IX 3)

<sup>10</sup> On the debate about a "possible" unified approach to the four freedoms see M. Poiars Maduro, *Harmony and Dissonance in Free Movement*, in Andenas- W. Roth (eds.), *Services and Free Movement in EU Law*, Oxford, 2002, 41 ff and H. Jarrass, *A Unified Approach to the Fundamental Freedoms*, *ibid.*, 141 ff

<sup>11</sup> See Case 249/81, *Commission v Ireland (Buy Irish)* [1982] ECR 4005 and Case 222/82, *Apple and Pear Development Council v K.J. Lewis Ltd* [1982] ECR 3091. Each judgement deals with Semi-Public Bodies (G. Davies, footnote 8 above, 150 ff.) that can be regarded as a form of out sourcing of certain public regulatory functions and are often created or financially supported by the government. The ECJ follows this approach also when the private body has autonomy and discretion in the exercise of the regulatory power (see Case 267/87, *R v Royal Pharmaceutical Society of Great Britain ex parte Association of Pharmaceutical Importers* [1989] ECR 295)

<sup>12</sup> See J. Snell, *Goods and Services in EC Law*, Oxford, 2002, 139

<sup>13</sup> The ECJ case-law on intellectual property rights is an only aparent departure from the general principles on the horizontal direct effect of Article 28 TEC (see C.Barnard, *The Substantive Law of the EU. The Four Freedoms*, Oxford, 2004, 155 ff). It is true that the ECJ directly applies Article 28 to private acts and agreements with which IPRs are exercised, but the subject of this review in these Cases is the domestic legislation that made this conduct possible in certain circumstances (considered contrary to the constraints of the TEC), rather than the

Treaty's letter: Article 28, unlike Arts. 49 and 43 (that adopt similar wordings) and Article 39, expressly refers to "restrictions" "between Member States".

The case-law on the free movement of workers and services is quite different. The difference with the case-law on Article 28 consists in attracting in the scope of the TEC rules also private individuals or organisations that have no relationships whatsoever with State powers, but which exercise their own regulatory power that originates from the autonomy granted to them by the legal order. In the cases regarding the free movement of workers<sup>14</sup>, the Court's arguments are certainly strengthened by the fact that the prohibition to discriminate on the grounds of nationality necessarily applies also to the relationships between private subjects if they concern contracts of employment (Arts. 39 and 7.4 Reg. 1612/1968). What is most interesting here is that the Court (though with little systematic consistency) uses Article 39 to extend the principle of horizontal effect also to Article 49, based on the argument whereby "*the fact that [services] are performed outside the ties of a contract of employment [...] cannot justify a more restrictive interpretation of the scope of the freedom to be ensured*"<sup>15</sup>. The horizontal effect of Article 49 is stressed in more than one judgement, always in respect of private bodies (mainly sporting organisations) having (private) collective regulatory powers<sup>16</sup>.

The step forward in respect of the case-law on Article 28 is by no means little: the public/private nature of the subject that enforces the "measures" is irrelevant, if these imply a violation of fundamental economic freedoms; what is relevant is their "collective nature"<sup>17</sup>. Hence, the problem of defining what "private measures" may be considered to have "collective nature". The crucial issue is understanding if they have to translate themselves into "rules" (though of private nature) or if they can also consist of collective conducts.

The Court has always mentioned "rules" and the cases at issue are referred to examples of rules emanating from private bodies. However, it is also true that in the field of free

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company's conduct, that could be assessed not in the light of Article 28, but of Article 81 (in legal literature see J. Snell, footnote 12 above, 133; G.Davies, footnote 8 above, 156; J. Bacquero Cruz, footnote 7 above, 608).

<sup>14</sup> Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v Jean Marc Bosman* [1995] ECR I-4921

<sup>15</sup> Case 36/74, *Walrave and Kock v Association Union Cycliste Internationale* [1974] ECR 1405, paragraphs 23- 24

<sup>16</sup> See Case 13/76, *Donà v Mantero* [1976] ECR 1333; Cases 51/96 and 191/97, *Deliège v Ligue Française de Judo et Discipline Associées ASBL* [2000] ECR I-2549; Case C-309/99, *J.C.J. Wouters et al. V Algemene Raad van de Nederlandse Orde van Advocate* [2002] ECR I-1577

<sup>17</sup> As the ECJ ruled in Case 36/74, *Walrave*, paragraph 17, provisions on free movement "*not only apply to the action of public authorities but extended likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services*"

movement the Court refrains from formalistic approaches: what matters are the effects (infringing TEC freedom), and not the form through which they are performed. The restrictive effects on the market produced by private subjects must be similar to those produced by a State norm or a public act. Based on this consideration, the majority's doctrine considers relevant, on equal terms as regulatory sources, "collective" acts and behaviours that can create obstacles and disruption to the supply of intra-Community services<sup>18</sup>. If this argument is founded, then the way is paved for collective actions to fall in the scope of the TEC, when they produce "significant" effects on the functioning of the internal market.

However, doubts are still harboured because, as for the effects, there is a substantial difference between a "rule" and an action or conduct, a "norm", even of private nature, and a "fact": the former has a general scope and applies to cases and subjects in general (all those that fall in its scope); the latter produces effects limited to the time in which it is carried out. In sum, there is a hardly questionable "qualitative" difference in terms of the effects on the internal market.

That the equalization between private actions and norms, even of private nature, is an all but foregone conclusion from an interpretation viewpoint is confirmed by the TEC itself that, as already mentioned, addresses the competition rules to the former. Arts. 81 ff TEC are indeed binding upon private subjects, but only if they take on the form of an "undertaking". One of the most thorny interpretative issues for the rules in question concerns the definition of "undertaking" for the purposes of Community competition law<sup>19</sup>. The "rules" for the functioning of the internal market therefore outline a system in which respect of the economic freedoms and protection of competition perform complementary functions, just because of the subjective scope in which they can be respectively invoked. An interpretative approach that considered economic freedoms binding upon private subjects and their conducts is by no means trivial, since it would upset the balance that underlies the system of rules for the functioning of the market envisaged by the TEC. The boundary where these rules have to stop and cannot be invoked would therefore

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<sup>18</sup> As J. Baquero Cruz, footnote 7 above, 618 argues "*Only in those instance in which private action is comparable to that of the States should be caught by Community law under free movement, because otherwise the purpose of such rules would be severely damages. Competition will do the rest*"; similarly, J. Snell, footnote 12 above, 150-151

<sup>19</sup> On this matter see, in general, L. Di Via, *L'impresa*, in N. Lipari, *Diritto privato europeo*, Padova, 1997, vol. I., 252 ff. In *Albany* (Case C-67/96, *Albany International BV v Stichting Bedrijfspensioen fonds Textielindustrie* [1999] ECR I-5751) AG Jacobs pointed out, in paragraphs 218-227 of his Opinion, that a trade union too may be considered an undertaking if it is engaged in economic activities.

not be marked by the meaning to be given to the notion of "undertaking"; those rules would apply to all market players, subject to an assessment of the effects and the consequences of their actions, and possibly the reasons why those effects have been brought about<sup>20</sup>. Moreover, it must be added that, for undertakings, "agreements" and not unilateral actions are relevant for the internal market: the latter infringe competition rules only if the undertaking performing them holds a dominant position in the market<sup>21</sup>.

### 1. 2. *Collective Measures or Individual Acts (also)?*

The issue of the different relevance of the effects produced by private conducts as against the "rules" would be greatly weakened if the Treaty norms were considered applicable not only to "collective measures", but also to individual contracts, as ruled by the Court in the *Angonese* case<sup>22</sup>. In this case the Court extends the principle of equality of treatment beyond the hypotheses of discrimination based on regulatory or collective sources and includes also those produced by the conditions set by a single private employer to a contract of employment<sup>23</sup>.

If the *Walrave* ruling is considered, i.e. that the scope of the free movement of services and workers must be considered to be identical under any aspect<sup>24</sup>, it should follow that the principle adopted in *Angonese* also applies to individual contracts for the provision of services<sup>25</sup>. This would pave the way to the scrutiny, pursuant to Article 49 of TEC, of the obstacles put in place also by single private subjects in their trade relations, at least when they have a discriminatory nature. Hence, collective actions should *a fortiori* be considered to fall in the scope of that Article, due to the greater impact on inter-Community exchanges that these may have versus a single commercial transaction.

Here, however, the differences between the four freedoms appear significant. In the case at issue, the question concerns the free movement of workers, where Community lawmaker, as

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<sup>20</sup> On the relationship between provisions on free movement and Articles 81 ff see J. Snell, *Private Parties and Free Movement of Goods and Services*, in M. Andenas-W. Roth (eds), *Services and Free Movement in EU Law*, Oxford, 2002, 233. The Author (in contrast to the opinion expressed above in the text) considers the fact that Article 81 applies only to undertaking an argument for extending the scope of Article 49: "if the private party creating obstacles to the free movement of goods or services is not an undertaking [...] Articles 28 and 49 should be applicable in certain circumstances. Otherwise, a lacuna is formed".

<sup>21</sup> See P. Oliver- W.H. Roth, footnote 6 above, 423-424

<sup>22</sup> Case C-281/98, *Angonese (Roman) v Cassa di Risparmio di Bolzano* [2000] ECR I-4139

<sup>23</sup> In *Angonese*, applicants applying for jobs in a private bank had to produce a certificate of bilingualism issued by the local authority.

<sup>24</sup> See footnote 15 above.

<sup>25</sup> In this sense, see P. Delannay, *annotation on Walrave*, CDE 1976, 223

already mentioned, have laid down the binding nature of the prohibition to discriminate on the grounds of nationality in the relationships among private parties with reference to labour conditions. The step forward of *Angonese* as against the "positive" Community law consisted in extending the principle of non discrimination also to the conditions of access to employment set by a single employer<sup>26</sup>.

The extension of the effects of the free movement rules to individual contracts may be considered to be confined to Article 39 because of the peculiar nature of this freedom, that is linked to the needs to protect workers, i.e. the weak party in the contract. It is not a chance that in *Angonese* the Court has referred to the settled case-law on equal pay for men and women sanctioned by Article 141 TEC<sup>27</sup>. The "peculiarity" of the "good" under Article 39 (human labour) would require a different qualification of the owner's status as against the other economic freedoms<sup>28</sup>. Hence the advocacy for a more comprehensive interpretation of the norm as a source of protection of a fundamental right that, as such, cannot be violated by any (public or private) subject and with any "means" (norm, private action, contract, conduct)<sup>29</sup>.

The Court of Justice does not provide unequivocal indications on the issue of the legal qualification of the economic freedoms sanctioned by the Treaty. However, it is significant that (with just one exception<sup>30</sup>) the term "fundamental right" has been used with reference to Article 39 only<sup>31</sup>. Neither can it be neglected that the Court has used Article 39 as a provision that is increasingly less based on market logics and increasingly more used to guarantee a full integration of Community citizens in the host country. For this reason, the wide interpretation of the subjective scope of Article 39 cannot automatically be extended to the other TEC freedoms<sup>32</sup>.

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<sup>26</sup> Most of legal scholars support the view that Article 39 EC applies to all private measures (see, among others, J.M. Fernandez Martin, *Re-defining Obstacles to the Free Movement of Workers*, in *ELR* 1996, 323 ff. and S. Weatherill, *Discrimination on Grounds of nationality in Sport*, in *YEL* 1989, 65).

<sup>27</sup> See C-281/98, *Angonese*, paragraph 34

<sup>28</sup> See J. Baquero Cruz, footnote 7 above, 115, 124; see also P. Oliver- W.H. Roth, footnote 6 above, 424 that recall Article 15(1) of the Nice Charter according to which every persons has a right to work.

<sup>29</sup> See R.C.A. White, *Workers, Establishment and Services in the European Union*, Oxford, 2004, 255 ff

<sup>30</sup> Case C-228/98, *Dounias v Minister for Economic Affairs* [2000] ECR I-577, paragraph 64, on free movement of goods

<sup>31</sup> Case 152/82, *Forcheri v Belgium* [1983] ECR 2323, paragraph 11; Case 222/86, *UNCTEF v Heylens* [1987] ECR 4097, paragraph 14; see also AG Lenz in Case C-415/93, *Bosman*, Opinion, paragraph 203; on the different qualifications of economic freedoms by legal scholars see P. Oliver-W.H. Roth, footnote 6 above, 410.

<sup>32</sup> Haug Adrion case on Article 49 (Case 251/83, *Eberhard Haug-Adrion v Frankfurter Versicherungs-AG* [1984] ECR 4277) is only apparently similar to *Angonese*. This Case concerned a contract for motor insurance which it was claimed was offered on discriminatory terms. The ECJ seemed to assume that in principle such a private conduct fell within the Treaty. However, as pointed out in doctrine, "in issue was not a single decision by an independently acting firm but a tariff condition based on governmental regulation and authorisation and, thus,

### 1.3 (Open) Conclusions on the Issue of the Horizontal Effect of Article 49 TEC

Based on the principles derived from the Court's case-law, Article 49 can be considered to be binding on private subjects adopting "measures of a collective nature". This notion includes rules set by bodies of a private nature, whether they are the expression of a power delegated and conferred by the public authority or the exercise of private autonomy. The majority's doctrine maintains that "measures of collective nature" have to include also actions and conducts causing obstacles to the free movement of services, similar to those produced by regulatory sources. The author's opinion is that this conclusion cannot be fully shared because of the "qualitatively" different nature of the "effects" that "actions" can produce as against "norms".

Even if the mere extension of the "horizontal effects" to collective conducts were denied, the boundary between the two situations gets blurred if the impact and aims pursued by collective actions, especially if organised on a wide scale, are considered. For instance, a boycott action or an industrial action aimed at blocking trade relationships with foreign companies (a case that involves Article 81 TEC also), or at imposing collective protection standards that deter the provision of services for all the companies of a certain sector. The application of the rules on free movement to the "private collective rules", that is self-evident for the Court of Justice, opens up scenarios in which collective bargaining can be called upon to confront itself with the respect of the freedoms under the Treaty, similarly to what has already happened for competition rules<sup>33</sup>. In the *Laval-Vaxholm* case, that was mentioned in the opening, the Court is asked to rule on this issue, since the action of the Swedish union was aimed at extending the same contractual treatments of national workers to Latvian workers, which the contractor considered to be contrary to Community law. The Court is asked to rule on the legitimacy of the collective action, since it would result in the adoption of "private collective actions" (i.e. collective agreements) with restrictive effects on the free movement. The union's initiative is allegedly unlawful under Community law because of the aim pursued, if the aim itself is not permissible under the internal market rules. Under this interpretation, the obstacle would not be brought about by the collective action, it would be caused by the aim pursued with the action. Hence, the appraisal must concern

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*presumably commonly used by other insurance companies*" (see J. Snell, footnote 12, 143; in the same sense, see G. Davies, footnote 8 above, 167).

<sup>33</sup> See Case C-67/96, *Albany*, paragraphs 62-65. The Court ruled that the agreement at issue did not fall within the scope of Article 85(1) of the Treaty simply because 'by reason of its nature and purpose' it performed functions that are typical and 'normal' for collective bargaining. For critical comment on the 'functional' approach to collective agreements adopted by the Court see S. Giubboni, *Social Rights and market freedom in the European Constitution*, Cambridge, 2006, 200 ff.

the nature and relevance of the private rules (as are collective agreements) that are intended to be imposed, and not the action as such, which acquires an "indirect" relevance for Community law. This distinction may appear pedantic, yet it is important as it may mark the boundary of the scope of Article 49 (yet the same could hold true for the other freedoms) with regards to private conducts.

An argument to exclude the possible existence of an obstacle pursuant to Article 49 also in the present case could be provided by the Service Directive, as was suggested in the literature<sup>34</sup>. The Directive defines the "requirements" that the States cannot impose on service providers and provides a definition of what must be considered as a "requirement". This notion includes, beside State's laws, "the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy", while it is expressly provided for that the "rules laid down in collective agreements negotiated by social partners shall not as such be seen as requirements within the meaning of this Directive" (Article 4(7)). Hence it may be inferred that the collective agreements cannot be considered as obstacles to the free circulation of services pursuant to Article 49 TEC. Indeed this provision seems to be the inevitable consequence of the fact that the Directive does not affect the rules on employment relationships of seconded workers in the case of service provision, a case that is still governed by Directive 96/71/EC (Article 17(2)). Directive 96/71 itself (that is also based on the Treaty rules on the free provision of services) applies also to collective agreements, which would confirm that the latter fall within the scope of Article 49 TEC. It is also appropriate to recall that the alleged immunity of collective agreements from the Treaty constraints was expressly ruled out by the Court of Justice in the *Kuntz-Bauer* judgement<sup>35</sup>.

If the majority's opinion in the legal literature is accepted, then collective actions may *per se* (as mere facts) become an obstacle to the free movement, regardless of their being aimed at the adoption of rules prohibited by Article 49 TEC. If this opinion is accepted, it must in any case be assessed what type of collective actions can be considered, because of its effects, as "obstacles" comparable to collective rules. The assessment becomes in this case particularly hard

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<sup>34</sup> See B. Bercusson, footnote 3 above, 288-289.

<sup>35</sup> See Case C-187/00, *Kuntz-Bauer* [2003], ECR I- 2711, in which the Court stated that "*It would be incompatible with the very nature of Community law if the court having jurisdiction to apply that law were to be precluded at the time of such application from being able to take all necessary steps to set aside the provisions of a collective agreement which might constitute an obstacle to the full effectiveness of Community rules*".



and requires the adoption of a “*de minimis test*”<sup>36</sup> capable of discriminating obstacles having a scarce impact and obstacles that severely deny access to the market. The principles developed to recognise the direct liability of the States increase the level of uncertainty if applied as such to private actions, as the Court denies that liability for the latter depends on the magnitude of the effects produced on exchanges, that might be merely potential<sup>37</sup>. Clearly, the level of discretion of those who have to take the decision is high and depends on the assessment criteria adopted to determine the limit beyond which the obstacle is assumed to exist.

Moreover, the application of Article 49 to private collective conducts raises the issue of the relationship between them and the State norms that permit them or that in any case do not overtly prohibit them. Indeed, the legitimacy of private actions under Community law cannot depend on what is laid down in domestic law, as the latter cannot permit what the former prohibits<sup>38</sup>. The direct effect of the Treaty norm enables to apply the Community rule to a collective conduct, even in the absence of a domestic law provision sanctioning it. The situation obviously changes when such conduct entails the exercise of a constitutional right. The issue of the relationship with the national legislation, in this case, involves the acknowledgment of fundamental rights in the EU legal system as a ground justifying derogation from TEC rules.

This problem comes up again, though under rather different terms, also when the "theory" of the indirect State liability – which the Court has adopted in respect of the free movement of goods, but that can theoretically be invoked for the provision of services also - is applied to private actions.

## *2. The Indirect Review of Actions by Private Subjects: State Liability*

In the case-law on Article 28 TEC, the Court of Justice has developed a principle whereby, in the case of actions by private subjects that obstruct the free movement of goods, the State is compelled to intervene under the duty to co-operate pursuant to Article 10 TEC, and if it takes no action it is exposed to the infringement proceeding initiated by the Commission

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<sup>36</sup> See J. Snell, footnote 12 above, 101, who notes that “*a de minimis test suffers from a fundamental practical weakness. Although the test is conceptually clear, it is very difficult to use*”. also C. Barnard, *Fitting the Remaining Pieces into Goods and services Jigsaw?*, in *ELR* 2001, 48 ff and L. Gormley, *Two Years after Keck*, in *FILR* 1996, 882-883.

<sup>37</sup> See the general definition adopted in Case 8/74, *Procureur du Roi v Dassonville* [1974] ECR 837, paragraph 5 (“Dassonville Formula”)

<sup>38</sup> See J. Snell, footnote 12 above, 152

pursuant to Article 169 TEC<sup>39</sup>. This principle has been "positivised" and strengthened at procedural level by Regulation 2679/98 (so-called Monti Regulation), that introduces a special regime for the exchange of information between Member State and Commission, so that the latter may monitor the facts occurring in the territory of the former<sup>40</sup>.

The principle developed by the Court is affirmed in general terms and seems to be claimable in the case of actions impeding any fundamental freedom under the TEC, hence also in the case of provision of services<sup>41</sup>. If Article 49 were assumed to have horizontal effects, it would not hinder a similar conclusion, since the same fact may be considered as a source of "direct" liability for private subjects and source of "indirect" liability for Member States<sup>42</sup>. The completion of the internal market for services could then imply the adoption of instruments similar to the so-called Monti Regulation, also to protect the freedom acknowledged by Article 49 TEC.

However, also in this case the analogy between the different freedoms is not self-evident. As mentioned above, it must be considered that the Court of Justice is less inclined to include private actions in the scope of Article 28 than as regards Article 49. This could lead to an evolution of the Court's case-law with a twofold approach, equally aimed at attracting private conducts in the scope of the rules on free movement: the first approach - based on the indirect liability of the States - would concern goods, and the second - based on the acknowledgment of the direct and horizontal effect of the Treaty norms - would affect services (and hence *a fortiori* workers).

In the absence of Court's judgements on this issue, it can only be assumed that the principles developed by the Court in the case-law on Article 28 can be applied also in case of obstacles to the free movement of services. In this way, actions by private individuals would be attracted in the scope of Article 49 without having to tackle the theoretical issue of whether it is binding on the relationships between private individuals. However, this does not eliminate the problem of private actions becoming obstacles to a market freedom. Indeed, when do actions by

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<sup>39</sup> Case C-265/95, *Commission v France* [1997] ECR I-6959 ("farmer Case") and Case C-112/00, *Eugen Schmidberger, Internationale Transport und Planzüge v Republic of Austria* [2003]

<sup>40</sup> Regulation no. 2679/98, OJ L 337/8; on the Regulation see, G. Orlandini, *The Free Movement of Goods as a Possible "Community" Limitation on Industrial Conflict*, in *ELJ* 2000, 652 ff.

<sup>41</sup> See G. Davies, footnote 8 above, 162 and J. Snell, footnote 12 above, 154

<sup>42</sup> See J. Snell, *ibidem*

private individuals become an obstacle to the free movement, for which the State can be held liable?

Regulation 2796/98 provides indications on this matter<sup>43</sup>, yet these, beside being extremely generic, are for initiating the special information and monitoring procedure and cannot be considered to be binding on the Court in its appraisal of the State liability<sup>44</sup>. This is all the more true in the case of obstacles to the provision of services, to which the Regulation does not apply. It is possible to consider irrelevant the actions of private individuals that have a scarce impact on trade, but how should the "severity" of an action be assessed? The problems raised by the recognition of the horizontal effect of the rule do recur when the indirect State liability is appraised.

The assumption of a State liability for actions by private individuals irrespective of the existence of a liability of the authors of those actions raises complex interpretation problems<sup>45</sup>. It is true that this State liability appears to "intrude" less on the areas of autonomy of private individuals and it is preferable also for this reason.<sup>46</sup> Yet, it is indeed difficult to ground the liability of a State on an action that the legal system considers to be lawful<sup>47</sup>. The Court could then consider (by means of very convoluted interpretation) that the State liability due to failure to take action or cooperate implies the liability also of those who have brought about the obstacle, of which it might be held liable before national courts.

Clearly, the theory of indirect liability stems from a forced reading of the Treaty and a logical leap that consists in considering relevant for the Community legal system a fact (actions by private subjects that restrict economic freedoms) that is not contemplated by the TEC whose enforcement is intended; it is the same logical leap that underlies the interpretations whereby those rules have a "horizontal" direct effect.

As anticipated, the issue of indirect liability of Member States too raises the question of whether the action by private individuals has to be unlawful also under domestic law: a related

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<sup>43</sup> Article 1 of Regulation 2679/98 states that it applies to "*obstacle [...] which leads to serious disruption of the free movement of goods; causes serious loss to individuals affected; requires immediate action in order to prevent any continuation, increase or intensification of the disruption or loss in question*"

<sup>44</sup> See J. Snell, footnote 12 above, 155 and G. Orlandini, footnote 40 above, 654 ff.

<sup>45</sup> See G. Davies, footnote 8 above, 163-164.

<sup>46</sup> Ibidem, 164

<sup>47</sup> According to J. Snell, footnote 12 above, 154, "*it is logically a rather curious move to place a Member State under obligation to adopt appropriate measure to ensure that private individuals do not create obstacles to the free movement of goods, when those private individuals do not have any obligation not to create those obstacles in the first place*"

but different question from that of its illegitimacy under Community law. In the absence of a Court's ruling, it can be observed that, should the "omission" under Article 10 be considered to exist only in the case of unlawful actions under domestic law, then the scope of the rule of "indirect liability" would be very limited<sup>48</sup>. The "obstacle" would only exist in cases of private conducts that are already censured by the national law and the States could only be held liable if they refrained from applying domestic rules. Hence, it can be justly maintained that the obligation to take action exists in any case, even if the action is legitimate under domestic law. It is for the State to decide the most effective way to take action and for the Court (the Commission in the first place when Regulation 2796/98 applies) to assess whether this approach is sufficient to consider the duty to cooperate complied with<sup>49</sup>.

Some scholars maintain that the State is liable even when the domestic rules are not changed in order to make the censured actions unlawful, if they are not already<sup>50</sup>. This approach leads to the conclusion, in practice and *ex post*, that indirect State liability and horizontal effects cannot be separated. In fact, the State would in no cases be the only liable subject for infringements of the TEC, on the contrary its liability would always entail the liability of private subjects also.

Even if this last opinion were not shared, the rule adopted by the Court on indirect State liability prompts in any case the States to modify their legislation so as to hinder as far as possible actions capable of disrupting the free operation of the internal market and avoid to be held accountable at Community level. As already mentioned, the horizontal effect may not be considered the implicit pre-requisite of the indirect liability theory, yet the two aspects are closely linked – if not from a legal viewpoint<sup>51</sup> - at least in actual practice. This link becomes even clearer if one considers the scrutiny performed by Court of Justice on the "justifying grounds" adduced by the State to escape liability originating from actions by private individuals.

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<sup>48</sup> Doubts on it are expressed by G. Davies, footnote 8 above, 165-166.

<sup>49</sup> The ECJ considers the State under an "*obligation de moyens*", not under an "*obligation de résultat*". For this reason, as J. Snell, footnote 12 above, 156 argues "*the fact that a private party may have created an obstacle to free trade does not automatically indicate a violation by the State and, thus, a right of an individual to claim damages from the State*".

<sup>50</sup> Ibidem, 155

<sup>51</sup> P. Oliver- W-H Roth, above footnote 6, 427, on the contrary, consider that the "indirect approach" "*should be up to the Member State to delimit the respective spheres of private autonomy on the one hand and the objectives of the four freedoms on the other*".

### 3. Justifications and Fundamental Rights

The doubts harboured on the recognition of full horizontal effect to Article 49 (yet the same could be said of the other freedoms) increase if one considers the possible reasons that might justify restrictions to free movement. This occurs not only since Article 46 TEC - that allows for exceptions to TEC rules on the grounds of public policy, public security and public health – explicitly and exclusively mentions "*provisions laid down by law, regulation or administrative action*", but also because the principles developed by the case-law in the field of "general interests" or "mandatory requirements" as justifications for "non discriminatory"<sup>52</sup> obstacles are inappropriate for conducts by private individuals.

The Court has ruled that, in the field of free movement of workers, grounds of public policy, public security and public health may be relied on also by private individuals<sup>53</sup>. Yet the cases concerned "para-legislative measures" for which the equalisation with State sources appears less problematic<sup>54</sup>. When mere conducts of private individuals are considered (as in the case of collective actions) the picture becomes more complex.

To apply to private collective actions the exceptions of Article 46 and those developed in the case-law on the grounds of general interest<sup>55</sup> implies that they have to be appraised in terms of "proportionality", which (though under different forms) translates into a twofold assessment: the measure must be appropriate to the aim pursued and must not impose unnecessary limitations to its furtherance, as would be the case if equally effective measures that impinge less on the freedom granted by the Treaty could be adopted<sup>56</sup>. It is just the proportionality principle that raises evident problems if applied to actions by private individuals. How is it possible to appraise

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<sup>52</sup> See generally J. M. Fernandez Martin- S. O' Leary, *Judicial Exceptions on the Free Provision of Services*, in M. Andenas- W. Roth (eds), *Services and Free Movement in EU Law*, Oxford, 2002.

<sup>53</sup> Case C-415/93, *Bosman*, paragraph 86; Case C-350/96, *Clean Car Autoservice GmbH v Landeshauptmann von Wien* [1998] ECR I-2521, paragraph 24.

<sup>54</sup> See J.M. Fernandez Martin, footnote 26 above, 324.

<sup>55</sup> In this sense see J. Snell, footnote 12 above, 151: "*Furthermore, in the Case of trade unions, pressure groups etc, the exceptions found in Articles 30 and 46 EC as well as the public interest exceptions developed in the Court's Case-law are easier to apply than in the Case of private profit-oriented undertakings. It is more conceivable that such an entity is in reality pursuing a goal in the general interest than that a private firm is*".

<sup>56</sup> See the "Formula" adopted by the ECJ in Case C-288/98, *Gouda* [1991], ECR I-4007, paragraph 15: "*the application of national provisions to providers of services established in other Member State must be such as to guarantee the achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive rules*". On the principle of proportionality in EC law see generally F.G. Jacobs, *Recent Developments in the Principle of Proportionality in European Community Law*, in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe*, Oxford, 1999, 1 ff and T. Tridimas, *Proportionality in the Community Law: Searching for the Appropriate Standard of Scrutiny*, *ibidem*, 65 ff.

the "proportionality" of the means adopted with respect to the goal pursued in conducts by private individuals? How can this appraisal be reconciled with their freedom of self-determination? Clearly, the application of those principles to actions by private individuals is not only problematic but it also changes their meaning<sup>57</sup>.

The Author's opinion may therefore be shared, whereby on these grounds it is preferable to construe Article 49 TEC so that its application does not impinge on the autonomy of organised groups in the furtherance of their interests, thus excluding *a priori* the problem of the grounds for justification. However, in order to appropriately cover this subject, the opposite approach must be adopted, that is in any case prevalent among legal scholars and (also for this reason) is likely to be adopted by the Court of Justice.

A collective action considered as a "restriction to the free provision of services" may acquire different connotations depending on how it is put in place and on the domestic legal rules that are applied to it. Under domestic law it can be considered unlawful or lawful, and it is clearly in this latter case that derogations from the TEC constraints might apply. If the legitimacy of the action can be said to be grounded on a fundamental right, than its compliance by the Community legal order will be relied on. However, the reference to fundamental rights does not guarantee *per se* a mere "immunity" from Community constraints for actions carried out by private individuals: as demonstrated by the Court's case-law, also in this case the proportionality tests do apply<sup>58</sup>.

In the *Omega* case the Court has ruled that the protection of a fundamental right comes under the grounds of public policy that, pursuant to Article 55 TEC, justify a restriction of the freedom conferred by Article 49 TEC. The ban imposed in Germany on the commercial exploitation of the so-called "war games" was considered as a legitimate measure, since it aimed

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<sup>57</sup> See, similarly, P. Oliver-W. Roth, footnote 6 above, 427; W. Roth, *Drittwirkung der Grundfreiheiten?*, in O. Due et alii (eds.), *Festschrift für Ulrich Everling*, Baden-Baden, 1995, 1241-1242. With reference to Article 28 TEC see M. Quinn-N. MacGowan, *Could Article 30 Impose Obligations on Individuals?*, in *ELR* 1987, 176.

<sup>58</sup> In this sense see A.C.L. Davies, footnote 1 above, 83 and M.K. Bulterman- H.R. Kranenborg, *What if rules on free movement and human rights collide? About laser game and human dignity in the Omega Case*, in *ELR* 2006, 99. The relationship between justifications based on fundamental rights and justifications based of "public policy" and "general interest" is not clear in the Court of Justice Case-law, and it is discussed in doctrine (see, recently, J. Morijin, *Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of European Constitution*, in *ELJ* 2005, 30-39)

at protecting the respect of "human dignity" sanctioned by the German Constitution, and it was deemed necessary and not "disproportionate" to the goal pursued<sup>59</sup>.

The Court has recently dealt with fundamental rights as constraints to economic freedoms also in the *Schmidberger* case, where the principle of indirect State liability was applied<sup>60</sup>. The Court was asked to rule on whether Austria could be held liable for the restriction on the free movement of goods at the Brenner pass caused by groups of environmental protesters. The judgement is extremely interesting since it manifests how the Court, in appraising the State liability, cannot refrain from an in-depth investigation of the modalities and effects of the action, as well of the meaning that must be acknowledged in the Community legal system to the right that is invoked to justify the "inertia" of national public authorities.

The Court does not just recognise that the action by private individuals is justified by a fundamental right enshrined in the Austrian legal system in order to rule that the lack of intervention in favour of free movement was justified, yet it also considers whether this right could be maintained to form part of the general principles of Community law by referring to the settled case-law rule, adopted by Article 6(2) TEC<sup>61</sup>. The presence of the freedom of expression and assembly in the "*constitutional traditions common to the Member States*" and in the ECHR enables it to hold that the protection of the rights in question is a "*legitimate interest which, in principle, justifies a restriction of the [...] free movement of goods*" (paragraph 74). Once the argument has been linked to the "justifying grounds", the Court applies to the case at issue the principle of "proportionality" of the means used versus the aims, which translates into a weighing of the fundamental freedom of protesters against the free movement of goods: it must in fact be ascertained whether in the case at issue other limitations to this freedom were possible that "*in fact correspond to objectives of general interest and do not [...] constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed*" (paragraph 80). In other words, the appraisal of the "proportionality" in the case in which the derogation from a fundamental freedom under the TEC is based on the need to protect

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<sup>59</sup> Case C-36/02, *Omega Spielhallen und Automatenaufstellungs GmbH v Oberbürgermeister der Bundesstadt Bonn*, [2005], ECR I-9609. For a critical comment on this Case see T. Ackermann, in *CMLR* 2005, 1107 ff, that considers the principle adopted by the ECJ too vague.

<sup>60</sup> Case C-112/00, footnote 39 above

<sup>61</sup> As P. Oliver- W. Roth, footnote 6 above, 438 underline, with reference to the *Schmidberger* Case, "*attention should [...] be drawn to the insistence that only those fundamental rights recognized as such in Community law itself are thus protected*".

another fundamental right acquires a "bilateral" significance, since also the latter admits of limitations that are necessary and proportionate to the objective pursued.

In its appraisal, the Court considers both that the demonstration had been previously authorized (and therefore was lawful as a matter of domestic law) and that its effects had been limited to the local area: basically, it was a single event limited to a single transit route. Moreover, in the final assessment an important role was played by the absence of "protectionist" aims of the protesters (who were only moved by environmental objectives)<sup>62</sup> and by the adoption, on the part of Austrian authorities, of measures that, without banning the demonstration, were aimed at limiting damage and disruption to road traffic (paragraphs 86-88). Finally the Court considers grounded the concerns of the Austrian government on the counterproductive effects that more incisive actions could have caused on public order and, hence, the same free movement that was intended to be protected (paragraph 92).

Hence, to rule out State liability, a fundamental right considered by the Court to be part of the general principles of Community law does not suffice; it is necessary for the State to demonstrate that in the case at issue restrictions and limitations to that right, that were necessary to protect the economic freedom threatened by its exercise, would have impaired "its very substance". It is therefore for the Court, and not the Member State, to weigh right against freedom, depending on the right at stake and the more or less considerable effects that its exercise produces on inter-Community exchanges.

It is true that in this case the Court has respected the discretionary choices made by the Member State<sup>63</sup> and it is also true that in applying the principle of proportionality, the Court always acknowledges a certain discretion to States, and in some cases leaves to the national Courts the appraisal of whether it has been correctly applied<sup>64</sup>. Yet never does the Court of

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<sup>62</sup> See paragraph 86. The statement of the Court is not clear on the crucial point related with the relevance of individuals' motives. The Court seems to contradict itself in another sentence of its ruling (paragraph 66), where it states that "*the specific aims of the demonstration are not in themselves material in legal proceedings such as those instituted by Schmidberger*". In the "farmer Case" the ECJ stated the relevance of the aims pursued by the collective actions (see Case 265/95, paragraph 62); similarly, in doctrine, C. Brown, *Note on Schmidberger*, CMLR 2003, 1505 and J. Morijin, footnote 58 above, 29 that (ignoring paragraph 86) considers paragraph 66 of the judgement the main critical point of the Court's reasoning

<sup>63</sup> See C. Barnard, footnote 5 above, 70.

<sup>64</sup> This occurs especially in Articles 177 proceedings; see F.C. Jacobs, footnote 56, 19.



Justice renounce giving guidance to the national Courts and stress that the State discretion must in any case be exercised "*in compliance with the Treaty*"<sup>65</sup>.

In the *Schmidberger* case, the Court was asked to appraise the legitimacy of an "omissive" conduct of the State and not to assess the legitimacy of actions by private individuals in the light of Article 28 TEC, since the horizontal effect of that provision was not the matter in dispute. However, this did not prevent it from assessing whether that action could be considered as an exercise of a fundamental right acknowledged by the EU and (more significantly) whether it had been carried out without protectionist aims and so as to limit the impact on inter-Community flows. In other words, only part of the Court's assessment was focused on the conduct of the State and the measures adopted by it, thus confirming that also the principle of indirect liability implies an assessment of the constraints to the exercise of collective actions by private individuals<sup>66</sup>.

The weighing of economic freedoms against fundamental rights that the Court is asked to carry out is very similar if the merits concern the indirect State liability or in the (today still hypothetical) case of liability of private individuals for infringing TEC rules. What changes (beside the effects of those appraisals) is that in the first case, even though the fundamental right exercised by private individuals is considered lawful, the State could nonetheless be held liable if it has not adopted all the measures that are necessary and compatible with the exercise of that right in order to remove the obstacle or reduce its impact on inter-Community exchanges.

It can therefore be concluded that the "immunity" of a collective action from the constraints of Article 49 TEC depends on its qualification as fundamental right in the Community legal order. However, even in such a case, the Court of Justice is not deprived of its power to appraise the modalities of exercise of the right so as to weigh it against the fundamental freedoms of the Treaty that have allegedly been infringed.

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<sup>65</sup> In Case C-36/02, *Omega*, paragraph 30-31, the Court confirms that "*the possibility of a Member State relying on a derogation laid down by the Treaty does not prevent judicial review of measures applying that derogation. In addition, the concept of 'public policy' in the Community context, particularly as justification for derogation from fundamental principle of the freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the Community institutions. Thus, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. The fact remains, however, that the specific circumstances which may justify recourse to the concept of public order may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty*".

<sup>66</sup> Similarly, on the scrutiny of the ECJ in the "farmer Case", K. Mully, *Angry Farmer and Passive Policemen: Private Conduct and the Free Movement of Goods*, in *ELR* 1998, 471-474.

*4.1 Applicable Law and the Posting Directive. Legitimacy of the Collective Action carried out by Posted Workers.*

An issue that is linked to, but does not coincide with, the binding nature of Article 49 upon those who carry out an industrial action concerns the law applicable to the strike performed by foreign posted workers in the framework of the transnational provision of services. The above mentioned *Vaxholm* and *Viking* cases concern strikes carried out by workers of a Member State to impose on a foreign company the compliance with the working standards of that State or to stop an undertaking (in the *Viking* case a shipping company) from moving to a Member State to benefit from the labour cost differentials. The applicable law is uncontroversial, i.e. the law of the country of origin of the workers who carry out the collective action. The problem brought to the attention of the Court concerns the legitimacy of such action in the light of Community law, hence the importance of the issue that has been reviewed so far, i.e. the effects of Article 49 TEC in the relationships between private individuals.

Yet what happens if the collective action is carried out by posted workers, whether in coordination with the workers of the host State or on their own? In this case the problem (that also exists as regards the workers of the host State) of the compatibility of their conduct with “horizontal effect” of Article 49 is coupled with that of the rules applicable during their posting, since the answer to the issue of the legitimacy of the collective action may depend on whether the law of the country of origin or that of the country where the performance is provided is applied.

In the case of a strike by posted workers, it might be argued that the compatibility with Community law must be appraised at two levels. The legitimacy of the collective action performed must be appraised as to whether it implies an obstacle to the free movement of services (obviously if it can be protected also against actions by private individuals), and as to whether the extension of the rules on strikes of the host State are compatible with the norms of the TEC or are in turn an obstacle to the free movement of services. The first appraisal concerns the "horizontal" effects of Article 49 TEC, the second the "vertical" effects and refers to whether labour rules of a Member State that are assumed to be applicable to the employees of a foreign undertaking may be considered as obstacles to the free movement of services<sup>67</sup>. And the purpose

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<sup>67</sup> The application to posted workers of the same working conditions as national workers must be considered as a restriction on the free movement of services insofar as it can hinder or make less attractive the activity of the

of Directive 96/71/EC is just to cast light on the extent to which labour rules of the host country may be applied to posted workers<sup>68</sup>, specifying the principles elaborated by the Court of Justice in its case-law. The two issues (vertical and horizontal effects), though closely linked, are conceptually distinct.

The legitimacy of "collective actions" under Community law depends on whether they can be associated with the exercise of a fundamental right, acknowledged as such by the legal order of the Union (*Schmidberger* case), yet this appraisal is based on the assumption that the action is considered legitimate by the domestic rules applicable to it. The legitimacy of the action could then depend on the application to the case at issue of the rules (if more favourable) of the host State; this is possible, though not automatic, and the legitimacy depends once again on the appraisal of whether the reasons justifying an impediment to free movement, caused (this time) by a rule, are grounded: the rule is in fact that which the host State claims to apply to foreign workers. What I would like to stress is that this appraisal does not coincide with that on the legitimacy of the conducts of the individuals who carry out the collective action, although it is based on the interpretation of the same Article of the TEC (Article 49).

The appraisal of the applicability of the rules on the working conditions (of both heteronomous and conventional nature) of posted workers requires analysing the nature of the norm that is intended to be applied (i.e. whether it is functional to the requirements relating to the public interest), the absence in the country of origin of rules that could satisfy the interests that are intended to be protected and whether the applied rules are necessary and proportionate to the objectives that were intended to be pursued with it<sup>69</sup>. The nature of this appraisal is not changed by the provisions of Directive 96/71/EC: beside the matters listed in Article 3(1), which do not

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provider established in another Member State. It must then be assessed whether this restriction is grounded on "mandatory" or "public interest" requirements pursued with "proportionate" means (see Case 279/80, *Criminal proceeding against Webb* [1981] ECR 3305; Joined Cases 62-63/81, *Seco v EVI* [1982], ECR 223; see also Cases cited in footnote 69)

<sup>68</sup> In essence the Directive "requires" to Member States to apply to posted workers certain key labour law rules, in particular relating to minimum wages, working time and equal treatment (Article 3.1) and it "permits" Member States to apply to them other national labour rules relating to "other" matters, provided that these rules fall into the category of "*public policy provisions*" (Article 3.10). On Directive 96/71/EC see P. Davies, *Posted Workers: Single Market or Protection of National Labour Law Systems*, in *CMLR* 1997, 571 ff.

<sup>69</sup> The Court applied the proportionality test to evaluate the application of national law to host State service providers in several judgments: see Joined Cases C-369, 376/96, *Criminal Proceedings against Jean-Claude Arblade and others* [1999] ECR I-2189; Joined Cases C-49, 50, 52, 54, 68, 71/98, *Finalarte Sociedade de Construcao Civil Lda* [2001] ECR I-7831; Case C-165/98, *Criminal Proceedings against André Mazzoleni and Intersurveillance Assistance SARL* [2001] ECR I-2189; Case C-164/99, *Portugaia Construcoes Lda* [2002] ECR I-787; Case C-445/03, *Commission v Luxemburg* [2004] ECR I-10191; Case C-341/02, *Commission v Germany* [2005] ECR I-2733; Case C-244/04, *Commission v Germany* [2006] ECR I-885.

include the right to strike, the possibility is awarded to Member States to apply their rules in the case of "*public policy provisions*" compatible with TEC rules (Paragraph 10 of Article 3)<sup>70</sup>. The direct effect of Article 49 does not preclude the examination by the Court of the legitimacy of the extension to posted workers of provisions that are considered to be related to "public policy" in the light of the principles adopted in its case-law<sup>71</sup>. So, also the content of the notion of "*public policy provisions*" under Article 3.10 of the Directive depends on the interpretation of the Court of Justice.

The extension to posted workers of national rules on the right to strike could be considered admissible insofar as it is deemed to be "public policy" and functional for the attainment of a protection that is not afforded by the law of the country of origin; hence a strike that may be illegitimate under the rules of the country of origin, could be considered legitimate if the rules of the host State are applied, without being censured by the Court as an obstacle to the free movement of services. However, this does not rule out that, if a collective action that is legitimately governed by the law of the host State interferes with the provision of services, the State itself could be held liable under the principles developed by the Court on indirect liability or even on the grounds of "direct" liability of those who have carried out this action (if the thesis of the "horizontal effect" is accepted).

The opposite hypothesis is also possible: for instance, in the case of performance of an action that is justifiable in theory on the grounds of fundamental rights, but that can be "legitimately" attacked under Community law on the grounds of the applicability to the case at issue of the law of the country of origin of the posted workers.

The assessments on the law applicable under Article 49 TCE (and the provisions of the Directive) and on the legitimacy of the collective action under the same Article pertain to different levels. The case-law that has assessed the legitimacy of the labour provisions in the light of Article 49 TEC sets principles of private international law; and also Directive 96/71 is a source of international private law<sup>72</sup>. It does not provide answers on the protection standards, but

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<sup>70</sup> See footnote 68 above

<sup>71</sup> The Commission itself invites Member States to a strict and rigorous interpretation of the notion of "public policy", that must not be considered equivalent to "*internal public order*" but to "*international public order*" (see Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions - The implementation of Directive 96/71/EC in the Member States, COM (2003) 458 def., 13-14).

<sup>72</sup> The relationship between Directive 96/71 and Rome Convention of 19<sup>th</sup> June 1980 is clarified in the Preamble of the Directive (recital 11): "*Whereas, according to the principle of precedence of Community law laid*

only on the law applicable to posted workers during the posting period. The recognition of a right as a fundamental value for the EU does not solve the problem of the different ways of governing that right in the various legal systems. For the purposes of this paper, even if the right to strike were considered as a fundamental right belonging to the general principles of Community law, this would not prevent a Member State from limiting its exercise in favour of the free provision of services.

In other words, the disruption produced by a collective action to the free provision of services may be compatible with Community law if considered as an exercise of a fundamental right, yet this recognition does not affect the issue of the protection of that right on the part of "posted" workers if the law applicable to them does not provide for adequate protection.

These two aspects could be combined only if collective actions were considered to fall in the competences of the EU, which, as it is known, is excluded by Article 137(5) TEC. In this case the fundamental right could perform the twofold function of boundary to negative integration and guidance for positive integration that has repeatedly been emphasised in the literature<sup>73</sup>. The way would be paved to define protection standards for that right whose respect would be mandatory for all Member States.

#### *4.2. Applicable Collective Agreement and Industrial Action of Workers in the Host State.*

If it is true that Directive 96/71 is a (special) source of private international law, it may be surprising to read, in its preamble, that it is without prejudice "*to the law of the Member States concerning collective action to defend the interests of trades and professions*" (recital 22). Since the Directive just provides for rules on the choice of the law applicable to posted workers, it is hard to imagine how its application may affect the law in force in the Member States. What is at stake, in fact, is not the law in force in the Member States (that is not affected by the Directive)

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*down in its Article 20, the said Convention does not affect the application of provisions which, in relation to a particular matter, lay down choice-of-law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts".* In the literature, see, most recently, M.E. Corrao, *Profili internazional-privatistici dei rapporti di lavoro nei gruppi di società*, in LD 2005, 518 ff.; for the author "*la direttiva [...] non intende sostituirsi alla convenzione [...] bensì prescrivere una tutela aggiuntiva nei confronti del prestatore di lavoro subordinato rispetto a quella da questa prevista*".

<sup>73</sup> See, among others, J.H.H. Weiler- S. Fries, *A Human Rights policy for the European Community and Union: The Question of Competences*, in P. Alston- M. Bustelo- J.Heenan (eds.), *The European Union and Human Rights*, Oxford, 1999 and S. Sciarra, *La constitutionnalisation de l'Europe sociale, entre droits sociaux fondamentaux et soft law*, in O. De Schutter- P. Nihoul (eds), *Une Constitution pour l'Europe. Reflexions sur les transformations du droit de l'Union européenne*, Brussels, 2004, 171

but the feasibility of an industrial action involving also posted workers, if the law of their country of origin were applied to them and, as a consequence, their action considered unlawful. More generally, the possibility to organize industrial action involving workers of the host country and posted workers is at stake, in the absence of common rules applicable to them.

However, the recital in question becomes relevant with reference to the above considerations on the relationship between collective action and collective agreement in the framework of the principles on the free provision of services (paragraph 1.3). A collective action aimed at imposing a collective agreement on a foreign undertaking beyond the boundaries provided for in Article 49 TEC and Directive 96/71, could be considered as an action capable of obstructing the free provision of services. This was in fact submitted in the *Laval-Vaxholm* case, that has raised preliminary questions based on the correct interpretation of the Directive. The Directive is invoked not to ascertain whether the right to strike of posted workers may be governed by the law of the host State, but to appraise the legitimacy of its exercise by Swedish workers who have taken industrial action to impose the application, which the Directive does not lay down, of collective agreement to posted workers, and to challenge the compatibility of the Swedish law that does not ban such action<sup>74</sup>. The Directive could reduce host State's standards of protection of the right to strike in case it prevents from applying to posted workers the collective agreement that striking national workers try to extend to home State's undertaking<sup>75</sup>. The strike would be unlawful given its aim considered in contrast with European Community law.

Hence, recital 22 bears significance, since on its grounds the Directive cannot be used to challenge domestic rules governing the right to take industrial action. This provision would prevent, *a priori*, any assessment on the compatibility with Article 49 TEC of the collective action taken by the workers of the host State: such assessment would once again involve the nature and the meaning attached to the right to strike in the Community legal system.

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<sup>74</sup> The first question referred to the ECJ in Case C-341/05 is the following: “ *Is it compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services for trade unions to attempt, by means of industrial action in the form of a blockade, to force a foreign temporary provider of services in the host country to sign a collective agreement in respect of terms and conditions of employment such as that set out in the above-mentioned decision of the Arbetsdomstolen, if the situation in the host country is such that the legislation intended to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?*”

<sup>75</sup> On this issue, see part II below, paragraph 3.1

However doubts can be harboured, not so much because the recital is not contained in the text of the Directive (since recitals are considered as provisions relevant for the interpretation of the operative part of the legal text), but due to the relationship between the Directive and the norms of the Treaty on the free provision of services. In fact, the latter have direct effect, hence the Directive is to be considered just as a mere instrument that clarifies and specifies their normative content. This is confirmed by the Court of Justice, that in the past few years has been applying Article 49 TEC to posted workers and interpreting the Directive in the light of the principles derived therefrom. The Court of Justice can hardly be considered to be bound by the recital of the Directive, when it interprets not the text of the latter but the norm of the Treaty, from which the Directive draws its legitimacy.

Similar considerations apply a fortiori with reference to Article 1(7) of the Service Directive. This provision, that did not exist in the original proposal, is actually the child of the Vaxholm and Viking Cases, that have played quite an important role in the troubled adoption procedure of the Directive. The latter states that: *“This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law”*. This clarification may indeed seem surprising since the Service Directive does not apply to employment relationships, that are still governed by Directive 96/71 (Article 17(2)). It seems that the Community lawmaker in this case too is addressing the Court of Justice rather than the Member States and calls on the former to take account of the right to collective action in applying Article 49 TEC to acts that bring about obstacles to the freedom to provide services.

The question must be rephrased and it should be considered whether recital 22 and Article 1(7) do not just transpose a principle already existing in the Community legal system whereby the latter is not in prejudice of what the national legal systems lay down in the sector of collective actions. If this were true it should be understood how this principle, that seems to entail no prejudice for the national standards on collective actions, relates to what has been said regarding the Court's case-law on the derogation to free movement, and notably, the argument based on the respect of the fundamental rights recognised by the EU. These issues require an analysis of the significance attached to the right to take industrial action in the Community legal order, which will be reviewed in the following pages.

## *Part II*

### *1.1. What Right to Strike? A Fundamental Right without Legal Basis*

The TEC excludes the right to strike from the competence of the European Community (Article 137(5)). This choice is confirmed by the Constitutional Treaty and can be read as the wish to respect the national standards thus avoiding any interference of Community law in fields where the harmonisation of rules is unfeasible given the excessive differences in national laws. The few references to strike and to the right to collective action in secondary legislation seem to confirm this reading. Recital 22 of Directive 96/71 and Article 1(7) of the Service Directive have already been mentioned; the analysis must be completed with Article 2 of Regulation 2679/98 (Monti Regulation), which lays down that any use of its provisions that might interfere with the exercise of fundamental rights shall be banned, including “*the right or freedom to strike*” and “*the right or freedom to take other actions covered by the specific industrial relations systems in Member States*”.

The conclusion should be drawn that Community law "cannot" deal with industrial disputes, and therefore also the regulatory instruments that could potentially affect the subject have to stop before the exercise of that right. In conclusion, this right would enjoy a sort of absolute immunity that would result in the mere acknowledgement of the compatibility with Community law of whatever a Member State lays down on the subject. The lack of power would not be a sign of poor consideration, but, conversely, of great care and safeguard, since thanks to it collective power would be hedged against the dynamics of the internal market. With reference to the topic of this essay, no limitations to the exercise of that right deriving from the application of the principles developed by the Court on the free movement of services would ever be possible.

Yet this approach is contradicted by the fact that the right to collective action has to come to terms with the Community integration process as all the other rights recognised in national legal systems over which Community institutions do not have specific powers. The right acquires relevance at the moment when its exercise clashes with rules and principles of Community law; when this occurs, the problem of the scope and boundaries of that right becomes inevitable, since it is necessary to balance and compare those principles. Once again, this holds true for any fundamental right, as the Court of Justice's case-law teaches. The above reported examples



demonstrate that, when the Court is asked to assess the grounds on which a derogation from a TEC norm is based, it cannot but consider whether this exception is justified by the reference to values pertaining to the "*acquis communautaire*". This seems to be confirmed by Article 1(7) of the Service Directive that, while it affirms the need to comply with the right to collective action, it specifies at the same time that it must in any case occur "*in accordance with national law national law practices which respect Community law*". Hence, it is not an absolute immunity, but a recognition that has to take account of the "systemic" constraints of the Community legal system<sup>76</sup>.

The identification of those values has been at the core of the discussions on fundamental rights that since the Eighties has involved institutions, legal scholars and civil society and that resulted in the drafting of the Charter of Fundamental Rights of the European Union, subsequently included into the Constitutional Treaty. And precisely because it is a stage in the long-standing process that has involved all the players that contribute to form the "*acquis communautaire*", the list of rights included in the Nice Charter acquires a significance (also legally) that overweighs the fate that the history of the European integration will reserve to the Constitutional Treaty<sup>77</sup>.

In the Nice Charter the right to collective action, including strike, is explicitly included: Article 28 (Article II-88 Const.)<sup>78</sup> if on the one hand contrasts with, if not contradicts, Article

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<sup>76</sup> A different interpretation is suggested by U.Carabelli, *Una sfida determinante per il futuro dei diritti sociali in Europa: la tutela dei lavoratori di fronte alla libertà di prestazione dei servizi nella CE*, WP C.S.D.L.E. "Massimo D'Antona".INT- 49/2006, 82, who, although recognising the ambiguity of the provision of Article 1(7), suggests to interpret it in the sense that "*the reference as such to national rules and practices*" occurs in compliance with Community law, i.e. it is consistent with what is provided for under Article 137(5) TEC. The admissibility of balancing Article 49 and the right to strike is excluded also by B. Bercusson, footnote 3 above, 304-305, who maintains that the principles developed by the Court in *Schmidberger* cannot be applied to that Case since they would always entail a "disproportionate" negation of the right at issue.

<sup>77</sup> The Court of Justice still appears little inclined to use the Charter as binding source of reference to identify the fundamental rights belonging to the general principles of Community Law, and faithfully follows the traditional approach that considers the constitutional traditions common to the Member States and the European Convention of Human Rights to be privileged sources of inspiration. This approach is not reassuring for the right to strike nor for the social rights in general, that are not included in the ECHR. The completion of the process of "constitutionalisation" of the Treaties would have entailed overcoming this position. Nevertheless, a slow but progressive opening towards the use of the Charter in the Court's Case-law is possible given the frequent references to it by the Advocates General and in some recent cases also by the Court itself (see Case C-540/03, *Parliament v Council* [2006] ECR I-5769; Case 432/05, *Unibet v Justitiekanslern*, nyp; Case C-303/05, *Advocaten voor de Wereld VZW*, nyp).

<sup>78</sup> Article 28 of the Charter states that: "*Workers and employers, or their respective organisations, 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*"

137(5) TEC (Article III-210.6 Const.), on the other reshapes or clarifies its scope. With reference to the right to strike, the EU renounces to take on regulatory functions that would translate into the too invasive harmonization by means of hard law sources, yet it does not divest itself of the role of supreme arbitrator of the Community integration dynamics, even when these overlap the exercise of that right. In the ongoing lack of competence over this subject, the function of Article 28 of the Nice Charter is to provide guidance to the Court of Justice in the delicate task of defining whether and to what extent the right to collective action may set the boundary to the effects of "negative" integration. The content of that Article becomes therefore a crucial reference to clarify the room afforded by the Community legal system to the direct action of social partners, when this enters the orbit of the internal market for services.

### *1.2. "Internal" Limits to Community Collective Action.*

The national "histories" of the right to strike teach that there is no single right to strike, but there are as many as the definitions provided for by the legal systems. In his classic essay, Lord Wedderburn cleared how in all the legal systems significant limits are posed to that right according to the principles that in each of them determine who is entitled to it, the aims that can be pursued with it and the extent to which it is aimed at the signing of a collective bargaining agreement, how it is exercised and the right and interests that strikers must guarantee<sup>79</sup>. If the legitimacy that is to be granted to that right depends – also at Community level – on the combination of these factors, then Article 28 is bound to become not the final step, but the starting point of a process of gradual definition of the foundations of the right to strike within the legal system of the Union.

The effects of this process appear to be the more uncertain the more complex is the combination of legal systems and national and supranational sources which the very Charter wants to refer to. It is not just a matter of legal value of the Charter and of its possible "constitutionalisation". The moment that strike becomes a fundamental right within the Community legal system, this system lays down that, in order to define its content, account must be taken of what is provided for by national systems, constitutional systems common to them,

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<sup>79</sup> See Lord Wedderburn, *The Right to Strike: Is There an European Standard?*, in Id., *Employment Rights in Britain and Europe: Selected Papers in Labour Law*, London, 1991.

international standards, TEC norms, the ECHR, and the European Social Charter (ESC)<sup>80</sup>. In interpreting the Charter, account must necessarily be taken of the Explanations drafted by the Presidium, given the surprising obligation addressed to national and Community Courts introduced by Article 52(7) (II-112(7) Const.).

The Explanations provide useful indications on the interpretation of Article 28. Firstly, the text of this Article is based on Article 6 of the ESC and Arts. 12-14 of the Community Charter of the Fundamental Social Rights of Workers of 1989. The two recalled Charters, beside being different in nature and content, use different language for the recognition of that right, while the Nice wording is in turn different from both.

In the Nice Charter, the right to resort to collective action is conferred not only to workers and employers, but also to "*their respective organisations*". The so-called "organic" models of strike, and the German one in particular, appear to be tackled with a twofold approach. Not only (hence in compliance with the ESC) is the principle of equal weapons accepted, which implies the recognition of equal dignity for lock-outs and strikes<sup>81</sup>, but only trade unions are considered to be entitled to strike. The difference with the standards developed by the ESC Committee of Independent Experts (now European Committee on Social Rights-ECSR) is by no means trivial, if one considers that Germany was criticised by it on the grounds that only collective bodies are entitled to strike<sup>82</sup>. The EU choice to depart from the ESC just on the entitlement aspect signals an opening towards those systems in which the "supervision" of the conflict by trade unions is stronger. By denying that strike is an individual right it follows that the decision concerning its exercise pertains to certain collective organisations: collective entitlement, in fact, entails the need to select the trade unions which can exercise the right to strike.

The EU does not choose a model of right to strike based on entitlement; however, it leans towards those systems in which the weapon of the dispute is in the hands of subjects considered to be "representative" and therefore more "accountable" or – to use the well-known Olsonian term – more "encompassing". This is an all but marginal aspect of the definition of strike that

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<sup>80</sup> On the relationship and dialogue between the Charter, national Constitutions and the other supra-national sources of fundamental rights, see, among other, S. Sciarra, *Diritti Sociali. Riflessioni sulla Carta Europea dei diritti fondamentali*, in *ADL*, 2001, 391 ff. and S. Giubboni, footnote 33 above, 215 ff.

<sup>81</sup> This principle is unknown in most of the European systems (as Italy, France or Spain), that recognise only the strike as a Constitutional right.

<sup>82</sup> See European Committee of Social Rights (ECSR), Conclusions XIV-I, 361.

emerges from the Charter, since it can support the tendency to reconsider the individual right to strike also in those legal systems where it is traditionally recognised<sup>83</sup>. In this regard it cannot be neglected that some of the first "European" strikes were carried out by trade union organisations that were not considered to be representative in the single legal systems and that just those trade unions are the ones that (for ideological reasons) attach more importance to transnational solidarity among workers and advocate a confrontational evolution of European industrial relations.

The Charter does not differ from the ESC in that the right to collective action is recognised "*in cases of conflicts of interest*". This wording once again draws from the North European systems and permits to limit the strike if it is carried out for grievances on rights, i.e. that can be adjudicated in court, as is the case of a grievance on the interpretation of a collective bargaining agreement with general enforceability. Besides introducing a limitation factor that is unknown in many national systems, the Charter adopts an interpretation of the right that is conducive to collective bargaining; on the other hand, in the systems that discriminate between conflicts of interest and rights, the signing of the contract implies an obligation to industrial peace. It is true that the European Committee on Social Rights has accepted a very wide definition of "collective bargaining", including also litigations that originate from employers' decisions that are bound to have effects on workers' conditions<sup>84</sup>. Yet, a definition of the right to strike is apparently gaining ground also at the Community level that is not inspired by the principle of self-determination of the collective interest on the part of organised workers<sup>85</sup>.

The close link between the signing of the collective agreement and the right to strike is confirmed by their being included in the same Article that sanctions the right of bargaining, in this case too similarly to Article 6 ESC. In line with this approach, Advocate General Jacobs, in his opinion in the *Albany* case, has not only placed the right of collective action among bargaining dynamics, but, by adopting a restrictive reading of what can be bargained without

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<sup>83</sup> Some Italian labour lawyers suggest to overcome the qualification of the right to strike as an individual right (see, among others, T. Treu, *Il conflitto e le regole*, in *GDLRI* 2000, 285 ff)

<sup>84</sup> See ECSR, Conclusions IV, 50: "*Any bargaining between one or more employers and a body of employees (whether de iure or de facto) aimed at solving a problem of common interest, whatever its nature may be, should be regarded as 'collective bargaining' within the meaning of Article 6*".

<sup>85</sup> In the Italian system this principle is based on Article 39 of Constitution (see G. Giugni, *Il diritto sindacale*, Bari 2006, 243)

infringing the European competition law, has implicitly restricted also the objectives that can be pursued with the strike<sup>86</sup>.

That of the legitimate objectives appears the field where the emergent Community right to strike seems to offer fewer safeguards, and this is not just due to the reference to the "conflict of interests" contained in Article 28. Collective action and strike are recognised as a right only if performed by workers or unions "to defend their interests", and therefore solidarity strikes can hardly be considered to fall in the notion adopted by the Charter<sup>87</sup>.

The introduction of this wording appears significant because it is not present in the corresponding provision of the ESC. Despite this, the protection of collective actions supporting the claims of others is not given in the cases where this international source has been applied. The ESC Committee of Experts, in interpreting Article 6(4) has not included solidarity strikes in the scope of this provision, although it criticised the British law under which this strike is always illegal and which therefore makes it impossible to strike against what, regardless of the legal qualification, may be the real workers' counterpart<sup>88</sup>. Neither do ILO sources – other possible "complementary" instruments for the interpretation of the EU Charter - provide more reassuring indications. The bodies entrusted with the supervision of ILO Conventions (in particular no. 87 of 1948 on the freedom of association and organization)<sup>89</sup>, if on the one hand adopt a wider notion of the socio-economic interests that can be pursued with industrial action<sup>90</sup>, on the other recognise the legitimacy of solidarity strikes only if performed to support a legitimate "primary" action<sup>91</sup>. A similar legitimacy test, if applied to transnational solidarity actions, would make the feasibility of the action depend on the more or less wide degree of protection afforded by the legal system of the workers involved in the main dispute<sup>92</sup>; the application of this criterion to cases of boycott and solidarity actions in support of non-EU workers from non democratic countries produces ludicrous effects.

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<sup>86</sup> Case C-67/96, *Albany*, paragraphs 193-194

<sup>87</sup> A "solidarity strike" is a collective abstention in support of an ongoing strike (so-called "primary strike") that involves workers employed by another employer or, more generally, any strike performed in furtherance of claims of other groups of workers.

<sup>88</sup> ECSR, Conclusions I, 183 and Conclusions XII-1, 131.

<sup>89</sup> On the supervisory procedures in the ILO, in particular on the ILO Committee on Freedom of Association (CFA) see in details T. Novitz, *International and European Protection of the Right to Strike*, Oxford, 2003, 185 ff.

<sup>90</sup> See ILO, CFA Digest of Decision, Geneva, 1985, paragraph 363 and CFA, Digest Decisions, Geneva, 1996, paragraph 475.

<sup>91</sup> ILO, Report of the Committee of Experts, Geneva, 1999, 87<sup>th</sup> session

<sup>92</sup> See B. Hepple, *Enforcement: The Law and Politics of Cooperation and Compliance*, in Id. (ed.), *Social and Labour Rights in a Global Context*, Cambridge, 2003, 245 ff.

In a similar context of international sources<sup>93</sup>, the addition in the Nice Charter of a reference to "*their interests*" may provide a further ground for legitimising restrictive interpretations with regard to the objectives pursued with the collective action, thus limiting the feasibility of transnational solidarity actions or actions performed against an employer established in another Member State.

In conclusion, the notion of strike adopted by the Charter does not appear to be in tune with the protection standards of the right enshrined in several European legal systems and does not include the possibility to carry out transnational action. The problem of transnational action will be reviewed further below. Here it can be remarked that, if Article 28 was aimed – as "suggested" by secondary legislation – at securing "immunity" from Community law to the protection standards of the single Member States, a more daring approach would have been preferable by adopting an "open" definition of the right of collective action that acknowledged the right to strike "*sans phrase*", which is the only one that could have hedged the exercise of collective action against internal market dynamics, in whatever national system it is carried out. A similar situation is not secured by the adoption of concepts belonging to peculiar systems of industrial relations, unknown to others.

The impression is that the provision at issue suffers from being the outcome of compromises and walking a tightrope between the need to stress that this sector is alien from the "positive" integration dynamics (a need that is especially felt in the States where strike is subject to stringent substantive and procedural constraints) and the need, now perceived also by the Community institutions, to provide a reference that can prevent the erosion of that right due to "negative" integration. The first need has ended up affecting the formula chosen to recognise it and has led to the introduction in the Article of the wording (which is present also in other provisions on "social rights") whereby collective action is performed "*in accordance with Union law and laws and practices of the Member States*". The compromise language adopted in Article 28 therefore translates into a contradictory formula, since the reference to national rules does not

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<sup>93</sup> The lack of protection of solidarity and secondary actions in the international sources is underlined by P. Germanotta, *Protecting Workers Solidarity Action: A critique of international Labour Law*, London-Geneva, 2002; see also P. Germanotta- T. Novitz, *Globalization and the Right to Strike: The Case for European-Level Protection of Secondary Action*, in *IJCLLR*, 2002, 67 ff

match with the adoption of a Community definition of right of collective action that introduces in many systems constraints unknown to them<sup>94</sup>.

## 2. Weighing Right to Collective Action against "other" Fundamental Rights and Freedoms

Pursuant to Article 28 the right to resort to collective action must be exercised "*in accordance with Union law*". This wording clarifies an important interpretative issue: both the States and the Union must respect the fundamental rights when enforcing Community law, but those rights must be exercised in compliance with the EU legal system in which they exist. In brief, a fundamental right, when it is recognised by Community law, is subject to the conditioning and constraints originating from the principles on which that legal system is grounded and from the rights that the system recognises. This consideration might sound trivial: the significance of a right obviously changes with the legal system that recognises it, since its exercise is necessarily constrained by the principles and rights that are equally considered to be fundamental therein. Hence, also the exercise of the right to strike may be subject to constraints in the Community legal system that do not exist in the national order. The Nice Charter, therefore, raises the issue of the limits to the exercise of the right to strike, which is different from and subsequent to its mere "recognition" as fundamental right.

The issue of the limits to the rights sanctioned in the Charter is the focus of the General Provisions closing it (in particular Arts. 52, 53 and 54). These, in turn, refer to principles sanctioned in several occasions by the Court of Justice, and especially to the principle of proportionality of the constraints that the right may be subject to, and to the question of whether they match objectives of general interest pursued by the EU. The *Schmidberger* case demonstrates how the proportionality criteria translates into the weighing of "fundamental rights", when the restriction of a right or freedom is imposed by the respect of another right recognised by Community law. The restriction may be imposed if it is not disproportionate to the objective pursued and does not in any case impair the "*very substance*" of the right<sup>95</sup>, i.e. its "*essence*".

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<sup>94</sup> A repercussion of those compromises can be also noticed in the Explanations of the Presidium in which, if on the one hand the adoption of a "Community" notion of strike is confirmed (inspired, as mentioned, by other supranational "sources"), on the other it is stressed that "*national rules establish modes and limits to the strike, while the Member States have the exclusive power to determine the question of whether [collective action] may be carried out in parallel in several Member States*".

<sup>95</sup> Case C-112/00, *Schmidberger*, paragraph 80

The notion of "*essence*" is adopted by Article 52(1) and is known to many European constitutional systems, first of all the German one, where German scholars have developed the concept<sup>96</sup>. In Italy this very definition is the core of Law no. 146/90 governing the right to strike: in essential public services, a strike can be carried out so as to secure the "*effectiveness of the essence of the rights*" of the individual enshrined in the Constitution (Article 1(2)). In this case too, the rationale is weighing the rights so as to preserve their effectiveness.

However, the reference to the Italian law on strike highlights the difference between the limits imposed by the national legislation and those imposed by the Community legal order: in consideration of the Union powers, the right to strike is not weighed against the fundamental rights of the individual, but against the economic freedoms sanctioned by the TEC. For this reason the integration of the internal market for services and goods could raise the issue not only of the recognition of the "Community" right to collective action, but of its regulation: the application of the proportionality test, in fact, implies an assessment as to whether that right can be exercised in ways that reduce the harmful effects on the functioning of the internal market, though preserving its effectiveness. Such an assessment translates into the regulation of the exercise of that right aimed at rendering it compatible with the constraints of the TEC. As of today, this need for regulation can not but find an answer in the appraisal of the Court of Justice and the national Courts that are asked to apply the proportionality principle to the case at issue, given the insurmountable obstacle of Article 137(5) TEC. Yet the momentum to overcome the present limitations of power over the matter at issue may come just from that appraisal.

It is therefore true that a functionalist approach may be adopted so as to let emerge the need for a recognition and regulation of the right to strike in the framework of the European integration process<sup>97</sup>. It has been suggested that this may be the necessary corollary to the European definition of "universal service", once this was clearly grounded on the fundamental rights recognised by the Charter<sup>98</sup>. At today's stage of Community integration, the issue of the regulation of industrial action is more likely to be posed with regard to the need to secure that its exercise does not disrupt the functioning of the internal market.

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<sup>96</sup> The notion of "*Wesensgehaltgarantie*" is adopted by Article 19.2 of Grundgesetz (see, within the wide German literature, P. Haberle, *Die Wesensgehaltgarantie des Artikels 19 Abs. 2 Grundgesetz*, Heidelberg, 1983).

<sup>97</sup> This approach is suggested by B. Caruso, *Il conflitto collettivo post-moderno*, in *GDLRI* 2002, 126 ff.

<sup>98</sup> *Ibid.*, 130.



In conclusion, Europe does not seem to be accepting the founding principle of the Italian rules governing the right to strike (weighing it against the fundamental rights of the individual), but on the contrary it seems to be adopting a principle that disrupts those rules as well as the rules governing industrial action in many other Member Countries: the weighing of the right to strike against economic freedoms, to which the players of the internal market are entitled to.

The provision of Article 53 of the Charter is hardly sufficient to ward off these trade-offs: in fact, it excludes that the provisions contained therein can be interpreted as restricting or adversely affecting “*human rights and fundamental freedoms, as recognised ... by Members States' constitutions*”. Firstly, strike, as well as other “social rights”, is not included among the “human rights” and “fundamental freedoms” in many Member States' constitutions. Secondly, the provision of Article 53 is silent as to the possible conflict between the principles and fundamental freedoms in the Community market (enshrined in the EC Treaty) and the fundamental rights that are indeed recognised by the Charter; as mentioned, it is for the Court to settle this contrast with a balanced approach, which does not imply full “immunity” of “national” law. Thirdly, the influence of Community law over the exercise of a fundamental right (and of social rights in particular) does not occur only at the level of “hard law”, i.e. it does not necessarily translate itself into a legally binding obligation to change national rules imposed by the ECJ, but it can take an indirect and “soft” form. The potential contrast between internal market rules and fundamental rights can be settled without leading to an overt contrast between ECJ and Member States' institutions, thanks to the adjusting interpretation of the domestic legislation on the part of national Courts or to their progressive adjustment that may be voluntarily carried out by Member States themselves.

### *3.1 A Different Approach*

The right to strike may become the ground on which the tensions between the economic principles guiding the integration of the internal market and the "social" values on which the modern European democracies have formed and that contribute to define the so-called European social model are exposed at the highest level.

If the right to take collective action (similarly to what may happen to other social rights) is attracted into market dynamics, the way is paved for its "pretorian" limitation (by means of negative integration) or "normative" regulation (if areas of positive integration ever open up) that

would make its exercise compatible with the constraints of the internal market, i.e. with the "essence" of the economic freedoms on whose respect it is grounded. This approach might be considered advisable to the extent that it would enable greater control on union conflicts and compel trade unions also, while carrying out their actions, to take stock of the effects that the latter have on market dynamics. More generally, the reduction of the room for conflicts may be favoured by those who maintain that by doing so greater protection is afforded to other rights and freedoms that are potentially conflicting with them. If this approach is adopted, no changes to Community legislation appear necessary: European law might indeed entail a constraint to the right to strike, but this will in turn benefit both the good functioning of the market and other fundamental rights and freedoms. Of course a different perspective is equally acceptable (that the Author supports) whereby, on the contrary, freedom of industrial action is necessarily to be excluded from the "economic rationality" assessment imposed by the market; otherwise the principle of collective autonomy and trade union rights, that is the foundation of the national systems of industrial relations and, more generally, the keystone of the European social model would be radically questioned.

If this second approach is adopted, then an area of immunity will have to be defined to secure the exercise of collective actions against the "fundamental" economic freedoms and the competition rules. The issue of functionalist integration should be tackled in a way that is opposite to that used so far, with an aim to justify the recognition of new and higher standards of protection of that right and not to limit or obstruct its exercise. The introduction of the right to strike into Community values prompts a change of perspective and does not pose only the problem of how it should be curbed to fit the constraints of the internal market. The Community system may become the ground on which the right of collective action finds new areas of enforceability and new reasons for its justification. This right is new and distinctive from national experiences because it is attracted into the dynamics of Community integration: these dynamics underscore how the right of collective action, as is recognised in the single legal systems (in terms of ways of exercise, subjects entitled, and aims pursued), is not sufficient to secure appropriate areas of autonomy to the collective subjects at the supranational level, or when they operate at the level of the European legal system or interact with the rules on which it is founded.

The case of the solidarity strike is the clearest example of how this prospect might develop. This form of strike is not allowed – though with different degrees of "intensity" – in most national legal systems. It is often restricted to the aim of collective bargaining, hence the obligation of industrial peace once the agreement is signed. I have underscored how the wording of Article 28 risks to exclude just that form of conflict from the Community definition of strike, thus rendering problematic the performance of collective actions agreed between trade unions subject to different legal systems. However, this conclusion may be denied by the consideration that Community law must acknowledge the legitimacy of this type of action so as to secure the pursuance of objectives that the Community law itself imposes or consents. Directive 96/71 would therefore not become a means to question the internal rules on the right to strike – as claimed by the complainants in the *Vaxholm* case – but, conversely, it would provide the legal basis for that right at Community level. The Directive provides for minimum standards to protect posted workers, even if those are defined by collective agreements and not by the law. In Sweden – but the same holds true for other systems, including Italy- it is the collective agreement that lays down minimum rates of pay, since there exists no minimum set by the law. The signing of a collective agreement is in turn left to bargaining dynamics and to power relations between management and labour. There is indeed no other way to extend the contractual standards to foreign workers temporarily posted to the national territory but to enable trade unions to exercise their power in respect of foreign undertakings, similarly to what happens with national firms<sup>99</sup>.

Solidarity strike, as a form of pressure for prompting a foreign undertaking to apply the "national" minimum rates of pay, thus becomes a tool necessary to implement the Directive, since this cannot be transposed (as for this aspect) by law<sup>100</sup>. To argue that – as it occurs in the

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<sup>99</sup> The Court of Strasbourg itself has recently stated that, in a not-binding system of collective bargaining, the right to take collective action in order to induce the employer to sign a collective agreement, is guaranteed by Article 11 of ECHR (see *Wilson and the National Union of Journalist and others v UK* [2002], IRLR 128; for a detailed discussion on the Case see K. Ewing, *The implications of Wilson and Palmer*, in *ILJ* 2003, 1 ff).

<sup>100</sup> Article 3.8 of the Directive faces not clearly the problem of the application to foreign undertakings of collective agreements not legally enforceable "erga omnes": "*Member States may, if they so decide, base themselves on:- collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or- collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory, provided that their application to the undertakings referred to in Article 1 (1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position*". It is evident that (as M. Pallini, footnote 2 above, 246, points out) a law imposing national collective agreement to be respected by host State's firms would be irreconcilable with the internal industrial relations rules and with the

*Vaxholm* case – the Directive (and the rules of the Treaty on free provision of services) would be infringed by a strike carried out to support foreign workers who are already "covered" by their agreement, means to neglect that under that Directive, those workers can be granted the minimum rates of pay that are "secured" to national workers not by the law but by the free interplay of bargaining dynamics. Hence, it is the Directive itself (and Article 49 TCE, on which the Directive is based) that permits the free development of those dynamics also with regards to "foreign" employers.

The mentioned example is provided by the case reported at the beginning of this essay. Yet these considerations may be applied also to other fields of Community law, other than the market for services that has been reviewed so far, most importantly collective bargaining. In order to develop collective bargaining at transnational level (as called for by the Commission in the Social Agenda 2005<sup>101</sup>) it is necessary to acknowledge the feasibility of strike at the same level, which, once again, may imply overcoming the limits possibly set to solidarity actions by the national legislation. An action carried out by a national trade union to make the management of a multinational apply the same contractual terms to productive units located in different countries may have just those connotations.

That Community law itself provides the foundation for transnational collective actions is demonstrated by the fact that the most significant industrial disputes that have involved European multinational companies in the past few years originated from the infringement of information and consultation obligations imposed by secondary Community sources and were organised thanks to the decisive "coordination" role performed by the European Workers' Councils established with Directive 95/45/EC. It is the case of the union mobilisation of 1997, following the closing down of the Renault plant in Vilvoorde, that prompted the Commission to criticise the company's conduct, or of the strikes involving Michelin in 1998, Abb Alstom Power in 2000, and General Motors at the end of 2004<sup>102</sup>: all of them concerned drastic restructuring. In the case of General Motors, the European mobilisation, that has involved German, Belgian, Polish, Swedish and British workers, has made it possible to conclude a framework agreement

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Community principle of non-discrimination on the ground of nationality. In these systems, the strike is the only means for implementing the part of the Directive concerning collective agreements.

<sup>101</sup> Communication from the Commission on Social Agenda, COM (2005)33 final, 9 February 2005.

<sup>102</sup> These "European" industrial disputes are discussed in S. Giubboni- G. Orlandini, *Lo sciopero e l'Unione Europea. Appunti critici*, in *QRS*, 2005, 295 ff; for a detailed analysis of the different forms of European collective action see A. Baylos Grau, *La autonomía colectiva en el Derecho Social Comunitario*, in Id. (ed), *La dimensión europea y transnacional de la autonomía colectiva*, Albacete, 2003, 33 ff.

that was signed by the European management of the US multinational and by the European Workers' Council, which should bring about a "soft" management of the restructuring plans. This is just an example of how the development of a transnational bargaining practice must necessarily imply the acknowledgement of the right to perform collective action at the same level.

The acknowledgement of the collective agreement as "pre-legislative" source in Arts. 138 and 139 TEC<sup>103</sup> then justifies the acknowledgement of the right of collective action beyond the microeconomic dimension of the industrial relations in the company. Also in this respect, the peculiarity of the role acknowledged to trade unions in the system of Community sources implies the adoption of an approach that is not limited to national traditions, since national legislation often denies legitimacy to strikes that are not aimed at signing a collective agreement, or that even pursue political objectives. When management and labour are afforded the right to take part in the Community law-making process the way is paved for a "parallel" recognition of the political aims of their action<sup>104</sup>.

### 3.2 Beyond the Right to Strike

The functionalist argument may be invoked also to tackle the issue of forms of action other than strike, i.e. those types of industrial action other than what is commonly identified as strike in the national experience. Community dynamics certainly show how transnational collective action often takes on forms different from the traditional "concerted abstention from work" and acquire more disruptive forms that can impact on the interests of third parties other than the "contractual" counterpart<sup>105</sup>.

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<sup>103</sup> See A. Lo Faro, *Funzioni e finzioni della contrattazione collettiva comunitaria*, Milano, 1998.

<sup>104</sup> This happened in Italy: the Constitutional Court recognised the legitimacy of political strikes considering the involvement and the role of trade unions in political and economic decisions (see Const. Court no. 290/1975, in FI 1975, I, c.550 ff). This judgement was adopted when the first "trilateral agreements" between Government and Social partners were signed.

<sup>105</sup> Similar evolutions can be observed also in the union dynamics within national systems. The events that have featured the renewal of the metal workers' national collective agreement in January 2006 are extremely significant in this regard. After three months of "traditional" strikes with substantially no effects on bargaining, the deadlock was broken thanks to a two days road block that reached its climax in the occupation of the Bologna railway station, carried out with the tacit approval of the confederated unions. In what is the most traditional "Fordist" economic sector, evidence was given of the lack of efficacy of the "historic" forms of industrial dispute; hence the social partners have to move it out of the factory, which is often the only way to recover the lost incisiveness.

The recent cases brought to the Court of Justice underscore also how the issue of collective action exceeds the boundaries of the employment relationship and increasingly often involves new subjects, be it hauliers, small farmers, or organisations of the civil society<sup>106</sup>. This is all but surprising, since the profound changes brought about by the "globalized" economy have blurred the distinction between employment and self-employment. It is precisely the ongoing dynamics of the "global" market which underscore that, in order to recover the lost effectiveness, the post-industrial conflict must find new solidarities and support between those who are inside and outside the firm. Undoubtedly, boycott is one of the modes of action that has the greatest impact on the strategies of multinationals, that prove to be vulnerable when the "traditional" conflict organised inside the company is supported by the mobilisation of the so-called civil society, and ends up affecting collective consumers' choices<sup>107</sup>.

The above are just some examples of how the new industrial dynamics pose new problems pertaining to the entitlement to collective action, when it is exercised by subjects that are not the formal parties of an employment relationship, and to its modalities, when industrial action acquires forms other than the concerted abstention from work. The legal literature has started to reflect on those transformations and there is a growing awareness that, if on the one hand the traditional categories of trade union law appear "outdated", on the other they can provide the foundations for building the new legal basis of the right of collective action<sup>108</sup>. A comprehensive analysis of those issues is outside the scope of this essay; what I would like to underline is that Community law may become the privileged forum for overcoming the limits of the "traditional" national approaches.

Collective actions that take place in the arena of the global market (boycotts, roadblocks, occupations of premises, solidarity actions) directly clash with the rules on which the market is based and that are raised to the rank of fundamental principles and rights in the TEC (free

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<sup>106</sup> See Lord Wedderburn, *European Collective Bargaining in the Age of Blockades*, in *ILJ* 2001, 136 ff.. On the transformations of the actors of "post-modern" industrial action and the consequences that this entails for the entitlement of the right to strike, see B. Caruso- G. Nicosia, *Il conflitto post moderno: lo "sciopero" dei lavoratori autonomi*, WP "Massimo D'Antona".IT- n. 43/2006

<sup>107</sup> See A. Supiot, *Governing Work and Welfare in a Global Economy*, in J. Zeitlin- D.M. Trubeck (eds.), *Governing Work and Welfare in a New Economy. European and American Experiments*, Oxford, 2003, 401, who notes that "in the new world economic order, pre-industrial forms of collective action are making a come-back, and with them the quest for an alliance of workers and consumers to target the Achilles heel of the big companies: sensitivity to demand for their products. The expression par excellence of this alliance is the boycott".

<sup>108</sup> For a wide and detailed analysis of this subject see A. Supiot, *Revisiter les droit d'action collective*, in *DS* 2001, 687 ff; see also B. Caruso, footnote 97 above, 102 ff

circulation and competition rules). The EU institutions are called upon to tackle the issue of the relationship between those rules and the dynamics of transnational disputes. A possible answer could be the subordination of the latter to the former based on economic rationality. However, in this sector too a new prospect may open up whereby on the one hand new areas of immunity from market constraints in favour of the autonomy of organised groups may be acknowledged, and on the other rules for the co-existence may be developed by weighing fundamental rights of the individual. In this scenario, “trans-national” litigations may provide the starting point to define the rights that concur to determine the content of the European citizenship<sup>109</sup>.

The basic choice becomes political: it must be decided whether or not in the EU model of "social market economy" there is room for social conflict or whether market constraints and the requirements of global competition do not leave room for those dynamics.

The choice to award areas of freedom to the social players and to let them reacquire autonomy of action with reference to the market dynamics requires awarding legitimacy to the new forms of collective action, and adopting a wide definition of right of litigation that renders it immune from the constraints of the TEC. This definition must take account of the historic "function" of strike (that also provides the grounds for its legitimacy in many national legal systems), i.e. that it is a necessary instrument to redress the balance between unequal power relations, emerging as a collective counter power against the economic power of businesses. As authoritatively observed, the recognition of that function could lead to reconsider the right of collective action not only in the "formalistic" terms of the right of workers to abstain from working, but as the right of all citizens to collectively exert influence on the economic power<sup>110</sup>.

Similarly to what has happened to strike, post-modern social conflict requires areas of immunity from the market rule, in the name of the protection of those who are economically disadvantaged or lack protection. And similarly to what has happened to strike, also the new forms of litigation must comply with the "essence" of other rights of the individual recognised by the EU legal system. The future of the social Europe will depend to a not negligible extent on the dimension and configuration of those areas and on the "selection" of those rights.

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<sup>109</sup> The relation between labour law and citizenship rights, in the framework of public services, is discussed by S. Sciarra, *Labour Law - a Bridge between Public Services and Citizenship Rights*, in M. Freedland- S. Sciarra (eds.), *Public Services and Citizenship in European Law*, Oxford, 1997, 173 ff.

<sup>110</sup> See A. Supiot, footnote 108 above, 699: “il conviendrait de réexaminer la question des droits d’action collective: non plus seulement comme droit pour travailleurs de suspendre l’exécution de leur contrat, mais aussi comme droit pour les citoyens de peser collectivement sur le pouvoir économique”.

#### *4. Time to move on?*

The previous considerations should induce Community institutions to change their current approach to the right to strike and collective action, thus overcoming the timid approach of the “Nice formula” and abandoning the option contained in Article 137(5) TEC. This poses the problem of the unavoidable reluctance of Member States to accept a Community standard that risks being used to challenge the internal rules on labour disputes and ends up changing the dynamics of national industrial relations. It is therefore appropriate to raise the issue of how to guarantee a "Community" right of collective action without entering on a collision course bound to upset the delicate balances characterizing the national rules of collective actions, that have been treasured by national States.

The solution to this issue entails adopting a prospect that discriminates the Community system plane from that of national systems. By adopting a multi-system approach it is possible to outline a definition and the rules for a "Community strike" (and more generally for collective action) so as to secure its exercise when it acquires a transnational scope or affects the dynamics of European integration but does not necessarily alter the balances of national rules when it impacts on domestic systems. The protection afforded by Community law would be aimed at assuring the right of collective action in the Union legal system and at not changing the standards of the single Member States. By way of example, the constraints to solidarity strike under domestic law could not be applied to workers engaged in a transnational dispute, although they could be relied on in the case of a dispute within the national borders. This would obviously not exclude, as a consequence of Community rules, the creation of “virtuous effects” entailing the enlargement of areas of enforceability of the right also when it is exercised inside the Member States, yet the effects would merely be possible and not mandatory under Community law.

The guarantee of a right of collective action that was fully integrated into the Community legal system is hence twofold. Firstly, a "constitutional" definition of the right of collective action would be needed so as to provide a clear reference to the Court of Justice in the cases in which it is asked to assess its legitimacy in the light of the TEC norms. This definition must necessarily include an explicit reference to actions having transnational character as well as an "open" definition of the right of industrial action, and of its immunity when it is legally exercised in a Member State. In this way, the event (foreshadowed in the *Viking* and *Vaxholm* cases) of a limitation of existing national standards as a result of the weighing against the fundamental



freedoms under the Treaty would not be averted, yet there would not be a "Community" definition of the right to strike that clashes with that of the States where that right is more widely guaranteed.

This merely "negative" function (fundamental right of collective action as a boundary to negative integration) would be coupled with a "positive" function of the right of "Community" collective action capable of securing its exercise when the action acquires a transnational dimension, also in the case in which the application of the internal rules would render it unlawful or hard to perform. This second function of the fundamental right would obviously be hindered by the ongoing lack of regulatory powers on that subject that, as already underscored, restricts the scope of appraisal of the Court to those cases in which the transnational action involves principles and rules of the internal market. The "multi-system" argument mentioned above may have the Member States accept more willingly an overcoming of Article 137(5), thus rendering less "utopian" the idea of a directive aimed at translating the fundamental right into Community rules on supranational collective action; those rules should secure the exercise of a transnational solidarity that does not affect the delicate national industrial relation systems but prevents States from applying internal rules if the latter eventually render the action unfeasible at the level of the Community legal system.

Waiting for a (very difficult) change in EU powers, an important role in defining supranational standards for the exercise of the right could be played by the Community Agency for Fundamental Rights<sup>111</sup>. Its functions seem to be inspired by the logic of the Open Method of Coordination. Also in this case the soft law would make it possible to reach territories that are forbidden to hard law and coordination could serve to monitor the compliance with the fundamental rights recognised by the Charter of Rights on the part of the Member States, in the logic of a comparison and exchange of best practices typical of the OMC<sup>112</sup>. The Agency could perform a complementary function with respect to the Network of Independent Experts, which is already operational and has been drafting yearly reports on the compliance with the Charter in the single States of the Union since 2002. Interaction between these two bodies in the future would permit to enlarge the narrow room in which the social rights are confined by the TEC and

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<sup>111</sup> See Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights.

<sup>112</sup> See O. De Schutter, *The Implementation of the EU Charter of Fundamental Rights through the open method of Coordination*, *Jean Monnet WP 07/2004*, New York, 36 ff.

to use the Charter as a yardstick to assess national rules on strike (and of course on the other social rights), as is the case for other existing international bodies (ILO Committees and European Committee on Social Rights)<sup>113</sup>.

The Community Agency would interact with the ESC Committee, although the scope of action would be substantially different. The former could in fact bridge the gap that still characterizes the Committee's approach and that eventually depends on the formula adopted by Article 6(4) ESC: an approach that, as such, can not secure adequate protection standards to workers at the moment in which their action exceeds the country's boundaries, considering collective action as an exclusively national phenomenon.

##### *5. Digressions from the Subject. The Procedural Foundation of the Right to Collective Action.*

The Community legal system is a sort of laboratory of models of social regulation, that in turn refer to different models of democracy. In it, the model of pluralist regulation based on heteronomous (regulation and directive) and conventional (collective agreement) sources coexists and overlaps with the neo-corporative model, characterised by the involvement of management and labour in the institutional *fora* that are entrusted with the definition of Community policies. In the past decade those two models have progressively lost ground to a model of soft regulation, based on the principle of open coordination and "discursive confrontation" between institutional, social, local, national and Community players. In this interplay between different forms of regulation, which in turn implies a dialogue taking place at different systemic levels, lies the richness and "novelty" of the EU legal system.

The first two models refer to the national constitutional traditions established after the World War II, for which the recognition of the right to strike has represented an indispensable prerequisite<sup>114</sup>. The right to strike is indispensable for the functioning of a pluralist system based on the autonomy of action of organised groups and that considers collective bargaining as the privileged instrument of social regulation. Also systems inspired more by the neo-corporative model presuppose the exercise of the right to strike, although (often) in the framework of more

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<sup>113</sup> See S. Sciarra, *Fundamental Labour Rights after the Lisbon Agenda*, G.de Burca- B.de Witte (eds.), *Social Rights in Europe*, Oxford, 2005, 213 ff. Nevertheless, it cannot be ignored the limits of Agency's competences imposed by the Regulation 168/2007, that could obstruct the above mentioned perspective to be realized.

<sup>114</sup> The problem of the relation between legal protection of the right to strike and different models of democracy is faced by T. Novitz, footnote 89 above, 14 ff; the Author distinguishes three broad models or forms of democracy: 'representative', 'participatory' (corresponding to pluralistic and neo-corporatist system of industrial relations) and 'deliberative' (to which the European Governance seems to be inspired).

stringent procedural constraints and entitlements. Hence, the doctrine has underscored how the democratic deficit that characterises the process of European integration stems also from the lack of a full acknowledgement of collective rights, without which the Community system of social regulation is deprived of a crucial prerequisite of legitimisation<sup>115</sup>.

The problem of the function and legitimisation of the right of collective action must be formulated differently in the light of the new forms of social regulation that since the Lisbon Council have been brought to the forefront in the dynamics of European integration and that have their reference model in the Open Method of Coordination (OMC).

By emerging as source of soft regulation through the coordination of national policies, the OMC is legitimised as "governance model" complementary to the regulatory sources listed in the TEC. By definition, the OMC intervenes where the "traditional" hard sources do not intervene, and opens up potentially unlimited areas for the future "European" social regulation. This regulation is not expressed in the hard language of heteronomous, preceptive and binding norms, but takes shape by means of a "policy learning" process inspired by the "discursive logic" on whose grounds the coordination between the social policies of the Member States takes place thanks to continuous mutual confrontation and learning between the players participating in it<sup>116</sup>. The theoretical cornerstone of the new forms of European governance is represented by the "procedural" and "reflexive"<sup>117</sup> notions of law that - on the political science level - combine with and provide the legal basis for, the deliberative theories of democracy<sup>118</sup>. Procedural law provided the "toolkit" to build a post-national, more participatory model of democracy because it enriches the representative and pluralist paradigm with rights capable of opening up

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<sup>115</sup> See A. Lo Faro, footnote 103 above, 175 ff. and 280 ff.

<sup>116</sup> On the innovative logic of the OMC and its 'post-regulatory' character, see, among others, C. de la Porte-P. Pochet- G. Room, *Social Benchmarking, Policy Making and New Governance in the EU*, in *JESP* 2001, 291 ff.; S. Regent, *The Open Method of Coordination: a New Supranational Form of Governance?*, in *ELJ* 2003, 190 ff.; J. Mosher- D. Trubeck, *Alternative Approaches to Governance in the EU: EU Social Policy and the European Employment Strategy*, in *JCMS* 2003, 63 ff.

<sup>117</sup> The debt of OMC to reflexive theories of law and, particularly, to G. Teubner writings is underlined by C. Barnard- S. Deakin, *Corporate governance, European governance and social rights*, in B. Hepple (ed.), *Social and Labour Rights in a Global Context*, Cambridge, 2003, 218 ff.

<sup>118</sup> According to S. Giubboni, footnote 33 above, 268 "*Supranational intervention [...] is predominantly procedural and therefore essentially relies on the legitimacy that derives from the deliberative, open and participatory nature of the 'polyarchic' co-ordination processes activated by it*". On "deliberative supranationalism" see J. Cohen- C. Sabel, *Directly-Deliberative Polyarchy*, in *ELJ* 1997, 313 ff.; O. Gerstenberg, *Law's polyarchy: A Comment on Cohen and Sabel*, in *ELJ* 1997, 343 ff.; C. Georges, "*Deliberative Supranationalis*": *Two Defences*, in *ELJ* 2002, 133 ff..

unprecedented channels and areas for a "deliberative confrontation" between institutions and civil society"<sup>119</sup>.

Procedural rights are those rights that contribute to give an "active" connotation to citizenship, affording to people, both as individuals and in their collective and organised actions, the instruments to express themselves and to act in the market and society. By strengthening the "capabilities" of individuals and groups<sup>120</sup> those rights change the relationship between State and society, citizen and administration, by envisaging a greater involvement of the "civil society" in the social regulation process; this process is developed through the consensus grounded on rational arguments rather than the mediation of juxtaposed interests characterising the pluralist model.

Hence, "procedural" law ensures and legitimates the (open) confrontation between institutions and public (Community, national and local) subjects, social players and private organisations in the OMC framework. Yet also the rights that are protected and enforced by means of the new forms of soft regulation are "procedural": the right to "lifelong" learning, to equal opportunities, not to be discriminated on the grounds of one's identity, the new workfare rights, the right to actively look for a job, the right to free access to employment services, the right to reconcile private life and work, the right to income "continuity" when one does not work, and, on the collective level, the rights of information and consultation, that should feature more cooperative and less confrontational industrial relations thus rendering companies more competitive. The European social citizenship, whose main constituents have been defined by the Nice Charter and that the OMC intends to translate into concrete social policies in the single national systems, should consist of those rights.

In this context there seems to be no room for the right of collective action, as it is aimed at settling interests by means of negotiations and not in a "dialogic" way, and since the weapon of the litigation does not match with the notion of procedural rights. Under this point of view I cannot but endorse T. Novitz who, among the few that have tackled the issue of the relationship

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<sup>119</sup> The influence of Habermas' procedural theory of the law on the debate about European Governance is well known (see: J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt am Main, 1992). On this issue, see A. Andronico- A. Lo Faro, *Metodo aperto di coordinamento e diritti fondamentali: strumenti complementari o grammatiche differenti*, in *GDLRI* 2005, 539 ff.

<sup>120</sup> On the A. Sen's "capability approach" to European social and employment policy, see S. Deakin, *The 'Capability' Concept and the Evolution of European Social Policy*, in M. Dougan-E. Spaventa (eds.), *Social Welfare and UE Law*, Oxford, 2005, 3 ff.

between the right to strike and "deliberative" model of democracy, concludes that this model is the least capable of providing arguments for the legitimisation of the recognition of that right<sup>121</sup>. The evolution of Community social law in "procedural" terms and the growing importance that the soft sources of social regulation are acquiring within it should lead to consider the right of collective action as a right destined to lose ground in favour of modes and practices that involve the social players in the company's life and in the political decisions taken at institutional level. This conclusion might be challenged if one considers the criticism levelled by many against the OMC with regards to the pre-requisites that should legitimise its functioning and the constraints that the very advocates of "deliberative democracy" underscore with respect to its practical implementation.

It has been said that the legitimacy of social policies supported at Community level by means of the OMC lies in the method used to define them. The real, substantial difference between liberal and "solidaristic" policies is that the latter are adopted by means of a deliberative procedure involving all the players concerned<sup>122</sup>. The procedural approach inspires the process of creation of social policies "upstream"; it is in fact an "open", "participatory", not "regulatory" process as it is meant in the traditional forms of "representative" democracy. The way to pursue "social" objectives (thus giving substance to social rights) is to compare the national and local "best practices" and with the active participation of all the "stakeholders". The keyword is therefore "participation"<sup>123</sup>, a very ambiguous term (especially at microeconomic level) that has several meanings, but on which the democratic legitimisation of the new forms of social

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<sup>121</sup> See T. Novitz, footnote 89 above, 21: *"It does [...] appear that deliberative democracy calls into question the privileged access of workers' and employers' organizations. Moreover, it seems that their industrial weaponry, including a right to strike, is to be left at the door to the debating chamber, for this would lead to bargaining rather than rational choice. Similarly, conflict within the workplace is also no longer seen as a necessary feature of employment relations. Instead, workers are called upon to lay aside their perception of divergent interests, and instead work together in 'partnership' with management to achieve ends which are of mutual benefit to both. Within this framework, industrial action comes to be seen too confrontational to foster the trust needed for deliberation. It becomes redundant"*.

<sup>122</sup> According to C. Georges, *What is Left of the European Economic Constitution*, EUI WP Law, 2004/13, Florence, 30, *"Whereas Ordo-liberalism sought to protect the ordo of the economy through a strong state which would rigorously enforce laws against restrictive business practices and abuse of private power, democratic experimentalism is relying on political processes, softer modes of co-ordination and the subtle power of transparency and exposure to public critique. And, in contrast to the Hayekian discovery process, the proposal to 'institutionalize' democratic experimentalism invoke the imagination not just of entrepreneurs and market participants but also of deliberative political citizens, and trust in their readiness to engage in problem-solving and in their interest to learn from one another"*.

<sup>123</sup> As is well known, the issue of 'participation' is stressed by the Commission in the White Paper on European Governance, COM (2001) 428, July 2001.

regulation depend. "Soft" law is either participatory or it can not legitimately claim to be "alternative" to the traditional forms of "hard" social regulation, not even as a source "complementary" to it<sup>124</sup>.

In the political science literature the participatory aspiration is not considered to be essential to the democratic evolution of a system, on the contrary it was "traditionally" read (from Schumpeter, to Dahl and finally Sartori) as an element of instability and, as such, to be avoided<sup>125</sup>. Under this approach representative democracy works thanks to the activism of the elites and passivity of the masses<sup>126</sup>. Adopting a participatory view evidently entails overturning this vision of democracy and subscribing to an approach (that goes back to Rousseau before Habermas) whereby the democratic legitimacy of a norm is proportionate to the degree of its endorsement by the subjects to whom it is applied. The instability problem is solved precisely by the norm being endorsed "upstream".

An analysis of the critical aspects entailed in such a notion of democracy falls outside the scope of this paper. It suffices to recall the fact the general interest is not always and not necessarily the expression of the settlement of stakeholders' interests; on the contrary, it sometimes conflicts with them. The issue here is not whether to support the procedural and participatory concepts of democracy, but rather to reflect on their theoretical preconditions because, as mentioned, the forms of soft regulation are inspired and legitimised by them and through the coordination that characterises the present evolution stage of Community law (and of Community "social" law in the first place); the specific aim would be to carefully consider the soundness of the assumption whereby the participatory and procedural logic would exclude or marginalise the role of social conflict and of the right to strike in particular.

Based on the deliberative rationale, the decision derives from the transformation of individual preferences through rational arguing and mutual listening and learning<sup>127</sup>. Here lies the substantial difference between the "deliberative" and classical "participatory" theories of democracy, that are linked to the traditional forms of representation, and to "vote" and

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<sup>124</sup> As J. Cohen-C. Sabel, *Sovereignty and solidarity: EU and US*, in J. Zeitlin- D. Trubek (eds.), *Governing Work and Welfare in a New Economy: European and American Experiments*, 366 suggest "deliberation [...] is not intrinsically democratic: it can be conducted within cloistered bodies that make fateful choices, but are inattentive to the views or the interests of large numbers of affected parties".

<sup>125</sup> Reference must still be made to C. Pateman, *Participation and Democratic Theory*, Cambridge, 1970.

<sup>126</sup> See the 'classic' C. Offe, *Strukturprobleme des kapitalistischen Staates*, Frankfurt am Main, 1972

<sup>127</sup> The reference here is, of course, to J. Habermas, *Theorie des kommunikativen Handelns*, Frankfurt am Main, 1981.

negotiation as an inevitable step to "produce rules"<sup>128</sup>. The fact remains that, in both approaches, the pre-requisite that legitimises a procedure aimed at producing social rules is that the participants must have the same power to influence its outcomes. There is full participation only when all the subjects concerned with the outcome of the process have equal power to determine it<sup>129</sup>. In other words, the more "equal" is the right of the "players" to affect the decision-making process, the more that process is democratically legitimised.

This approach is of the utmost importance (obviously in my view) for assessing the new "Community" forms of social regulation, and, in general, of European Governance. To acquire legitimisation, the "procedural" option must tackle the issue of the power of "Community" players to influence the outcomes of the process of rule setting, both in the "bottom-up" stage (production of "soft laws") and in the "top-down" stage (its implementation in the single systems), i.e. to decide the if and the how of the social policies to adopt.

It has been rightly observed that in the literature that refers to the "deliberative theory" (firstly Habermas, of course), the pre-requisite whereby the procedural rationale could be considered to be adopted (and not mystifying) is that the very definition of the problem to be solved and the ways to tackle it must be left to the players of the "deliberative arena"<sup>130</sup>. The legitimacy of the decision-making process is directly proportionate to its degree of openness and transparency. Under this perspective it is true that the procedural approach requires adopting a "different level of discourse" in which the categories and concepts that are typical of the traditional forms of social regulation are of no use<sup>131</sup>. This different level of discourse implies the assumption of a "model of social regulation without model", i.e. a model in which the "modus operandi" also is determined by means of the active contribution of the stakeholders of the decision-making process. Pre-conditions for the functioning of the latter (i.e. that can provide the grounds for its legitimisation) are, firstly, that the subject (or theme or issue tackled) and the

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<sup>128</sup> See B. Gbikpi, *Dalla teoria della democrazia partecipativa a quella deliberativa: quali possibili continuità?*, in SM 2005, 110 ff.

<sup>129</sup> J. Habermas (footnote 119 above, 149) identifies the procedural conditions for the formation of the political will in the recognition of "*fundamental rights under equal opportunities of participation in the decision-making processes*"; that among the pre-requisites of a decision there is the elimination of the power differences, as well as the overcoming of other asymmetries, is underscored also by J. Cohen-J. Rogers, *Power and Reason*, in A. Fung- E. O. Wright (eds), *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance*, London-New York, 2003.

<sup>130</sup> A. Andronico- A. Lo Faro, footnote 119 above, 548.

<sup>131</sup> See J. Scott-M. Trubek, *Mind the Gap: Law and new Approaches to Governance in the European Union*, in *ELJ* 2002, 18.

outcomes (the suggested solution) are "open", i.e. not predefined nor bound by premises that are subtracted to "discursive" confrontation; secondly, that all the "collective" (institutional and social) players involved are not only representative<sup>132</sup>, but also "autonomous", that is owners of an "effective" and unconditional power to influence the outcomes of the decision-making process. In the absence of those conditions, the deliberative process risks becoming a "*discussion between elites for elites*"<sup>133</sup>.

It is self-evident that in the OMC neither the outcome of the process nor the method are "open" and "participatory". The procedural rationale does not really inspire the OMC since the various players are not involved upstream of the decision-making process, but downstream; moreover, it legitimises *ex post* the policies that are considered necessary rather than defining *ex ante* the objectives to pursue<sup>134</sup>. It is not true that the "modalities" to reach the objective are "open" and subject to a logic of multi-systemic deliberative "confrontation" that is coordinated at Community level, since they are predetermined<sup>135</sup>. This is because what is really "pre-determined" (i.e. hedged against confrontation) are the rules of the "open market and free competition" that aim at securing comprehensive protection of the fundamental economic freedoms (that, conversely, are protected by "hard law" at the highest level). It is the relationship between social and market rights that is hedged against the logic of the procedural discourse, as it emerges clearly from the guidelines for jobs (now "integrated" into the economic guidelines)<sup>136</sup>. "The best practices" are those that are more consistent with the competition constraints that are considered to be unavoidable: it is the economic "hard law" that prevents

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<sup>132</sup> See C. Barnard- S. Deakin, footnote 117 above, 146

<sup>133</sup> Ibid., 147.

<sup>134</sup> As A. Andronico-A. Lo Faro, footnote 119 above, 549 note "*è proprio per questo che l'OMC rischia di essere in effetti semplicemente un metodo di "cooperazione": in quanto non prevede nessuna forma di 'coordinamento' al momento della costruzione del problema da risolvere, della identificazione degli interessi coinvolti nel procedimento e della selezione locale delle possibili soluzioni*". Similarly, C. Offe, *The European Model of 'Social' Capitalism: Can It Survive European Integration?*, in *JPP* 2003, 462 ff.

<sup>135</sup> According to S. Smismans, *The Open Method of Coordination and Fundamental Social Rights*, in G.de Burca- B.de Witte (eds.), *Social Rights in Europe*, Oxford, 2005, 220 "*while the precise impact of the 'soft' OMC procedure remains unclear, the first years of experience show at least its important potential in the diffusion of a cognitive framework defining in which terms and with which priorities debates on certain policies, such as employment, should take place in Member State. This framework defines the conceptual borders beyond which any alternative becomes increasingly more difficult to defend and even to imagine*"; see also, E. Szyszczak, *The Evolving European Employment Strategy*, in J.Shaw (ed.), *Social Law and Policy in an Evolving European Union*, Oxford-Portland Or., 2000, 211; D. Ashiagbor, *EMU and the Shift in the European Labour Law Agenda: From 'Social Policy' to 'Employment Policy'*, in *ELJ* 2001, 311; K. Jacobsson, *Soft Regulation and the Subtle Transformation of States: The Case of EU Employment Policy*, in *JEPP* 2004, 361.

<sup>136</sup> See Integrated Guidelines for Growth and Jobs (2005-2008) - Communication from the President, in agreement with vice-President Verheugen and Commissioners Almunia and Spidla, COM (2005)141 final,



both the social "soft law" and the method for its production to be really open and "procedural". On the other hand, the OMC was born out of the European Councils of the '90s that made anti-inflationary policies the primary objective of the Community agenda, while the OMC has ended up being functional to its attainment thanks to the spreading of the "best practices" drawn from the most flexible labour markets and the most economically virtuous welfare systems<sup>137</sup>.

Neither can the method of coordination be considered "procedural" under the viewpoint of the effective participation of the stakeholders concerned. It suffices to consider that the Italian National Action Plan 2004 on social inclusion (based on which the confrontation at Community level is "developed") was drafted by five ministerial officials<sup>138</sup> to consider how blatant the "participatory deficit" is.

At Community level, then, the problem known to the scholars of the pluralist theory of interest groups as "incomplete representation" is extremely evident<sup>139</sup>; in fact, some groups have the opportunity to exert an influence on final decisions that is more than proportionate to their actual representation. In particular, none of the social players - be it trade unions or organised forms of the civil society - participates "autonomously" in the definition of social policies. In this respect, it is eloquent to read how and to what extent the "European Partnership for Growth and Jobs" is considered indispensable for a new start of the Lisbon Strategy in the Communication of the President of the Commission<sup>140</sup>. The participation of social partners is considered to be a necessary tool to "*obtain confidence in and support for changes*". The development of a "European partnership" has "*one aim and one only: to facilitate and speed up delivery of the reforms needed to boost growth and employment*"<sup>141</sup>. Orientation on these reforms is indeed provided in the Guidelines adopted by the Council: so the process comes full circle.

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<sup>137</sup> See S. Deakin, footnote 120 above, 20-21; for the author the origin of employment strategy "*accounts for emphasis [...] upon the promotion of labour flexibility and the reduction of social security expenditure, themes which have led the Commission to give negative evaluations of the employment record of Nordic system while leaving the UK's neoliberal approach relatively free of criticism*". For a critical evaluation of the EES' impact on national labour markets see D. Ashiagbor, *The European Employment Strategy. Labour Market Regulation and New Governance*, Oxford, 2005, 242 ff.

<sup>138</sup> See M. Ferrera-S. Sacchi, *Il metodo aperto di coordinamento e le capacità istituzionali nazionali: l'esperienza italiana*, in *GDLRI* 2005, 59 ff.

<sup>139</sup> See the 'classic' works of T. J. Lowi, *The End of Liberalism: Ideology, Policy and the Crisis of Public Authority*, New York, 1969 and G. Mc Connel, *Private Power and American Democracy*, New York, 1966

<sup>140</sup> Communication to the Spring European Council- Working together for growth and jobs- A new start for the Lisbon Strategy- Communication from President Barroso in agreement with Vice-President Verheugen, COM(2005)24 final.

<sup>141</sup> Ibidem, 16. The Commission is even more explicit in its Communication to the Spring European Council- Time to move up a gear, COM (2006)30 final, 10: "*In fact, public acceptance depends on citizens and businesses*

The deficit of democratic legitimacy inherent in the OMC lies in the fact that this method is not sufficiently "open" and "participatory". However, this deficit had been largely anticipated by the supporters of deliberative theories. The conditions legitimising and securing the functioning of a "deliberative arena" are the more difficult to deliver the wider it is, i.e. the higher is the systemic level where it is placed<sup>142</sup>. It is not by chance that the most successful experiences of "participatory democracy" are to be found at local level<sup>143</sup>. The deliberative and procedural model for the production of rules, if adopted at the Community level, cannot but be imperfect, or continuously perfectible in terms of subjects involved, their representativeness and their ability to impact on the deliberative process.

In a context like that of the Community, the right to collective action then becomes an indispensable prerequisite for the new forms of social regulation to evolve – as wished by many – towards greater democratic legitimacy of the Community action, so as not to become a mere instrument of implementation of the effects of negative integration, or end up being sclerotized in practices of neo-corporative co-optation<sup>144</sup>, and, additionally, with players that are weakened in their ability to affect decisions. This right acquires the value of fundamental procedural right, if it is true that the procedural rationale tends to focus on the "problem" of power and the "unequal" way whereby it is exercised in institutional *fora*, as well as in the market and in society, and that a social right is the more justified under a procedural viewpoint the more it is an "autonomy" right aimed at redressing the balance of power among collective players in the processes of production of social rules.

The added value of the procedural notion of fundamental rights lies in their being aimed at strengthening the "capabilities" of individuals and groups to play an active role in social regulation. Under this perspective, the right of collective action enables those who have been

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*recognising that reform is needed and will help improve their lives; an ownership that can only come from having a role in shaping reform, either directly or through representative organisations. A lot remains to be done to convince people that reforms will contribute to greater, shared prosperity and to involve them in the process. This will require a major effort from both Member States and the EU institutions".*

<sup>142</sup> See J. Parkinson, *Legitimacy Problems in Deliberative Democracy*, in *PS* 2003, 180.

<sup>143</sup> See B. Gbikpi, footnote 128 above, 98 ff.

<sup>144</sup> J.H.H. Weiler, *The Commission as Euro-Skeptic: A Task Oriented Commission for a Project-Based Union. Comment on the First Version of the White Paper*, in C. Jeorges-Y.Meny-J.H.H.Weiler (eds.), *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, Jean Monnet WP 67/01, stresses the risk that "the inclusion of more players into the circle of decision making" should create "a system with strong crypto-corporatist elements coupled with worst danger of consociational models, notably the exclusion of those interests which are not privileged 'actors' and 'players'". Also J. Cohen- J. Rogers, *Solidarity, Democracy, Association*, in E.O. Wright (ed.), *Associations and Democracy*, London-New York, 1995, 237, talk about the risk that the "deliberative model" should evolve in a form of "post-modern corporatism".

excluded from the decision-making process to have their voice heard: in Habermas' categories, it is the right that secures an enlargement of the "public sphere" when this has been created without considering the opinions of those who are interested in the formation process of political will<sup>145</sup>.

### *Postscriptum*

When this paper had already been written and was in press the Advocates General in the Viking (M. Poiares Maduro) and Laval-Vaxholm (P. Mengozzi) Cases deposited their opinions, that could therefore not be taken into account in the text. However, they seem to confirm the approach that in this essay was considered to be the most consistent with the regulatory principles of the internal market.

The Advocates General have put aside any reservations on the fact that direct horizontal effect must be recognised to Article 49 TEC, denying that private subjects, including trade unions, can elude the rules of the internal market when they carry out any action "*that is capable of effectively restricting others from exercising their right to freedom of movement*" (P.M., paragraph 43; M. paragraphs 156-159), which occurs when the effect of the action is such that it cannot be easily circumvented by the holders of that right (P.M., paragraph 48). The Advocates General admit that the right to collective action is a fundamental right and as such protected by Community law, as the Charter of Fundamental Rights of the European Union confirms (P.M., paragraph 60; M, paragraph 78). However, it is not an absolute and illimitable right (M., paragraph 252), on the contrary it must be exercised compatibly with the respect of the other rights and values recognised by Community law, among which there are indeed the fundamental economic freedoms of the TEC (P.M., paragraph 23; M., paragraph 82).

It is therefore necessary to assess the ends that are pursued by means of a collective action (P.M., paragraph 60). Similarly to what happens when barriers to the access to the service

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<sup>145</sup> Also T. Novitz, footnote 89 above, 21-22, concluded that the right to strike is inevitable in the framework of the discursive principles, as inevitable are the situations in which juxtaposed interests can not be reconciled by means of a rational confrontation, but only through negotiated settlement; to deny that and maintain that there always exists an "*impartial point of view*" is mystifying and dangerous in the author's mind. I endorse these views. It might be added that the discursive principles, due to the difference between real and ideal "discursive situation" (particularly evident if those principles are applied at the Community level), justify the recognition of a right of collective action. A right that is not only aimed at collective bargaining but at becoming involved in the deliberative process and that includes, but is not confined to, the right to strike, since citizens are entitled to it and not just those who are "formal" parties to an employment relationship.

markets are put in place by the States and public powers, an assessment must be made in the light of the principle of non-discrimination (P.M., paragraphs 62 and 63) and the proportionality test (M., paragraphs 241 and 250) must be functional to enabling to “weigh” legitimate needs of social protection of workers and market rules (M., paragraph 86; P.M., paragraph 23).

It follows that under Community law a strike is legitimate when it aims at defending the working conditions of those who are affected by the consequences of the relocation of the undertaking they work for, but such a strike becomes illegitimate if it makes the relocation useless, seeking to prevent the undertaking from lawfully providing its services in the Member State in which it was previously established; this is for example the case of a strike whose aim is to compel the relocated undertaking to keep applying the collective agreements that were in force before the relocation or impede it to hire workers from other member States (P.M., paragraphs 62 and 67). Similarly, a strike is legitimate if it compels a foreign service undertaking to comply with the working conditions laid down by the laws and the collective agreements in force in the country where the service is provided, to the extent that it concerns the matters provided for and admitted by Directive 96/71; on the contrary, a strike exceeding those boundaries would be illegitimate, if it for instance imposed on a foreign company full compliance with the content of the collective agreement applied by the undertakings of the host country (M., paragraphs 218 and 280). As suggested above in the text, there is a close link between the limits that due to the content of a collective agreement derive from the rules of the internal market and the legitimacy of the collective action with which that collective agreement is intended to be imposed on the foreign service undertaking.

It remains to be seen whether the Luxembourg judges will follow the route indicated by the Advocates General or will prefer to refrain from interfering with competences that have always been jealously defended by the Member States and the social actors operating in them. The Court may indeed decide to declare its lack of jurisdiction over a matter that is excluded from Community action or rather adopt a more restrictive interpretation of the principle of horizontal direct effect. It is certain that accepting the opinions of the Advocates General means bringing forward the process of European integration to a considerable extent: the social actors, like the States, would be called upon to consider in their action not only the interests of the parties that they represent but also the needs of the internal market. The recognition of a “right” to collective action in Community law would be coupled with the “obligation” not to exercise it

to defend national markets from the dynamics of European integration. This may imply a significant limitation to private collective autonomy, but it could be at the same time a chance and a stimulus to develop new forms of transnational solidarity that can shift the plane of collective action from the national to the European level. Precondition for the fulfilment of this second opportunity is not only the existence of unions that are sufficiently strong in all of the Member States (which is not the case today, especially in the former Soviet States), but also the definition of appropriate legal bases that guarantee, in the Community legal system, the exercise of union rights and of the right to collective action in particular. The answer to the new challenges that the completion of the internal market poses to the systems of national industrial relations cannot but come from the Union policy and from a new momentum to the process of positive integration.