1 Social Europe after Lisbon: Putting the 'Social' into the 'Market Economy'

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1.1 Introduction

The Working Group on Social Europe, set up late in the day as part of the Convention process, mooted a number of values that should be listed in the Treaties to help reinforce the European Union's (EU) social face. These values subsequently appeared in the Constitutional Treaty and finally in the Lisbon Treaty: solidarity, social justice and the social market economy. This is very different from the position under the Treaty of Rome in 1957, when social questions were not considered matters of EU law at all: the view at that time was that economic integration realised by the four freedoms would in time ensure the optimum allocation of resources throughout the Union, the optimum rate of economic growth and thus an optimum social system.[1] In other words, social progress would be the consequence of growth, not an input into that growth.

Implicit in this assumption was the belief that social policy remained a domestic matter.[2] This argument was sustainable so long as national markets were relatively closed and national budgets independent. However, once nations created a common currency and joined in a single market, then social policy in one country became relevant to other nations.[3] This was brought into sharp focus by the debate surrounding the Polish plumber in the context of the Services Directive 2006/123[4] and more recently the controversial – and much discussed – decisions of the Court of Justice in *Viking* and *Laval*.[5] These cases and their progeny highlighted just how deep the reach of the internal market into national

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1 M. Shanks, 'Introductory Article: The Social Policy of the European Community', 14 *CML Rev.* 1977, p. 375.

2 C. Joerges & F. Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*', 15 *ELJ*, 2009, pp. 1, 3-4.

3 D. Trubek & L. Trubek, 'Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination', 11 *ELJ* 2005, pp. 343, 345.

4 [2006] OJ L376/36.

5 Case C-438/05, *Viking Line ABP v. The International Transport Workers' Federation, the Finnish Seaman's Union* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

social systems had become and confirmed the fundamental instability of the initial compromise contained in the Treaty of Rome: social policy was no longer a purely domestic matter, it was an EU issue and one that risked being sacrificed on the altar of the internal market, unless steps were taken to protect it.

This is where the Lisbon Treaty comes in. First, it introduced a new aim for the EU in Article 3(3) Treaty on European Union (hereinafter 'TEU'), first paragraph, to work for 'a highly competitive *social market economy*, aiming at full employment and social progress'. Article 3(3), second paragraph, adds that

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

These values suggest – or at least provide the excuse for – a reconsideration of the balance between the claims of the internal market and the needs for a national social policy.

Second, Article 6(1) TEU incorporated the Charter of Fundamental Rights (hereinafter 'CFR') into EU law. Despite the controversy surrounding the supposed dichotomy between civil and political *rights* and social and economic *principles*, introduced by Article 52(5) CFR and the UK/Poland so-called 'opt-out' in Protocol No. 30,[6] the fact is that the Charter significantly raises the profile of social rights. For many commentators, this suggests that since social rights are included in the same document as economic (and civil and political) rights, they should be more evenly balanced with.

This chapter begins by considering the meaning of the phrase 'social market economy' (Section 1.2). It then considers how the court, while thinking it was actually balancing the social with the economic domain in *Viking* and *Laval,* failed to deliver this in practice, and how the structure of the single market reasoning deployed inevitably prioritised the economic over the social (Section 1.3). Section 1.4 examines the proposal made by the Advocate General in *Commission v. Germany (occupational pensions)*,[7] one of the first post-Lisbon cases where fundamental freedoms had to be balanced against fundamental rights, suggesting that the two can be reconciled through the principle of proportionality, drawing on the German constitutional law tradition of 'practical concordance'. It will be argued that, while this type of balancing is appealing, it may still result in the economic interests of the EU in attaining the single market prevailing over the social interests of the member states, particularly in 'hard' cases involving, for example, collective action. It will therefore be argued that the principle of proportionality itself may need to be imbued with some of the EU's values in order to give meaning to the social dimension of the 'market economy' (Section 1.5). Section 1.6 concludes.

6 *See Saaedi* [2010] EWCA Civ 990, para. 8 and also Joined Cases C-411/10 and C-493/10 *NS* [2011] ECR I-000.

7 Case C-271/08, *Commission v. Germany* [2010] ECR I-7091.

1.2 Social Market Economy

One of the most remarkable changes introduced by the Lisbon Treaty was the inclusion of 'a highly competitive social market economy' as an aim of the EU. This aim was introduced by the German representatives on the Convention and reflects a

> linguistic symbol for the German model (*Modell Deutschland*) which flourished during the fifties and sixties . . . It is widely seen as both economically successful and stable as well as socially protective and progressive.[8]

Joerges and Rödl explore the term in their paper "'Social Market Economy' as Europe's Social Model?." They say that the invention of the term 'social market economy' is attributed to Alfred Müller-Armack, who was secretary of state to the Minister of Economic Affairs, Ludwig Erhard, who in turn was the father of the German economic miracle. Müller-Armack also represented the Federal Republic of Germany as chief negotiator of the Treaty of Rome. He argued that the ordo-liberal focus on the legal framework for a market economy (whereby the state guaranteed freedom of contract, individual property rights, freedom of occupation and trade, free movement of persons and effective legal protection of those rights and freedoms)[9] was too limited. He therefore called for an additional 'system of social and societal measures geared to market requirements' or, putting it another way, combining 'the principle of market freedom with the principle of social balance.'

Joerges and Rödl then identify three ways in which, according to Müller-Armack, the realization of the social market economy leads to the infusion of market economy with social fabric. First, he proposed that a market economy that is structured according to the principles of ordo-liberalism generated social effects automatically and directly. As we have seen, this was reflected in the original conception of the common market where, as a result of increased prosperity generated by the realization of a common market, social prosperity would ensue. This is one of the reasons why the EU-10 were keen to join the EU in 2004 and 2007: unrestricted access to the markets in the EU-15 would help improve prosperity in the EU-10 (as well as providing an injection of competition into the markets of the EU-15, with the consequent economic benefits which would accrue to those states too).

However, establishing a market economy was not enough. Müller-Armack therefore argued, secondly, that the concept of the social market economy promoted additional interventionist state measures and polices, which were to serve the social balance of society, including 'approximate full employment', redistributive policies (welfare, pensions, subsidies for homeowners) and other social instruments such as fixing minimum wages, albeit that all social

8 C. Joerges & F. Rödl, "'Social Market Economy" as Europe's Social Model?', EUI Working Paper Law No. 2004/8, p. 18.

9 *Ibid.,* p. 13.

policies would be subordinated to the functionality of the market mechanism. Therefore, taxation could be progressive but not excessive, rents could be subsidised but not fixed.
Thirdly, Müller-Armack envisaged 'societal polices' aimed at combating the social isolation of the individual in the face of big business. Such policies included increased public investment in higher education, currency stability to protect individuals' savings and the expansion of public services.
Clearly, Müller-Armack's ambitious vision of a social market economy was not realisable as a whole at EU level, largely due to a lack of competence as well as budgetary capacity to deliver key elements of the second and third strands. However, his vision does suggest that the social and the economic spheres are not necessarily in opposition but can work in conjunction.[10] The question, then, was whether the Treaty, as interpreted by the court, was capable of delivering in any way on this vision. *Viking*, a pre-Lisbon case, suggested not.

1.3 Viking

The facts of *Viking* are well known: a Finnish company wanted to reflag its vessel, the Rosella, under the Estonian flag so that it could staff the ship with an Estonian crew to be paid considerably less than the existing Finnish crew. The International Transport Workers' Federation (hereinafter ITF) told its affiliates to boycott the *Rosella* and to take other solidarity industrial action. Viking therefore sought an injunction in the English High Court, restraining the ITF and the Finnish Seaman's Union (hereinafter FSU), now threatening strike action, from breaching Article 49 of the Treaty on the functioning of the European Union (hereinafter TFEU).
For the Court of Justice, these cases posed a major challenge as to how to reconcile the companies' *economic* (EU) rights of free movement with the trade unions' (domestic) *social* rights to take industrial action. If the Court found in favour of the companies, it would be accused of facilitating social dumping and undermining the European social model. If it found in favour of the trade unions, it would be accused of removing the comparative advantage enjoyed by the Eastern European countries – their cheaper labour and thus their means to greater prosperity.
The Court addressed the question head on. It did not say that labour law and fundamental social rights fell outside the scope of Union law (the solution the legislature had adopted to secure agreement on the Services Directive 2006/123). However, it sweetened the pill by acknowledging for the first time that the right to take collective action, including the right to strike, was a fundamental right. Referring to Article 28 CFR, the Court did, however, say that the right was subject to limits laid down by both national law and practices

10 *See also* the Commission's approach in COM(2000) 379, 17.

(*e.g.* notice and balloting rules) *and* Union law (*e.g.* rules on free movement considered below). The Court also confirmed that Articles 49 TFEU applied to trade unions.
Having established that EU law applied, the Court then followed its standard *Säger* market access approach (breach, justification and proportionality).[11] It found that the collective action constituted a restriction on free movement and so breached Article 49. On justification, the Court began by noting that

> [s]ince the [Union] has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article [151 TFEU], inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.[12]

The Court then noted that the right to take collective action for the protection of workers was an overriding reason of public interest provided that jobs or conditions of employment were jeopardized or under serious threat. On the facts, the Court suggested this was unlikely because Viking had given an undertaking that no Finnish workers would be made redundant.
If, however, the trade unions could justify the collective action, the national court would have to apply the proportionality test. The Court then applied the strictest form of the proportionality test, unmitigated by any references to 'margin of appreciation'. On the question of suitability, the Court said that collective action might be one of the main ways in which trade unions protected the interests of their members. However, on the question of necessity, the Court said it was for the national court to examine whether FSU had other means less restrictive of freedom of establishment to bring the collective negotiations with Viking to a successful conclusion, and whether FSU had exhausted those means before starting the collective action. In other words, industrial action should be the last resort. Since *Viking* has been settled we shall never know what conclusions the Court of Appeal would have reached on the questions of justification and proportionality.
In *Viking* (and in the subsequent case of *Laval*) the Court conducted the balancing between the economic and social through justifications and proportionality. This is balance in name, not substance. The moment collective action is found to be a 'restriction' and thus in breach of Union law, the 'social' interests are on the back-foot, having to defend themselves from the economic. And the Court has made it difficult to defend the social interests due

11 Case C-76/90, *Manfred Säger v. Dennemeyer & Co* [1991] ECR 1-4221.
12 Para. 79.

to its strict approach to justification and proportionality. So, despite the Court's recognition of the right to strike in the early part of the judgment in *Viking*,[13] the limitations on the exercise of that right, laid down by Union law, subsumed much of the substance of the right. The precedence of the economic over the social is pretty clear.

From Müller-Armack's perspective, the decisions in *Viking* and *Laval* may have merits: in his version of a social market economy, a market economy which is structured according to the principles of ordo-liberalism generates social effects automatically and directly. Transposing this to the *Viking* context, Estonian workers need to exploit their comparative advantage – their cheaper labour – in order to improve their own prosperity and the prosperity of the country as a whole. Thus the fundamental economic freedoms could be construed as fundamental (social) rights for these individuals and their (developing) countries.

Yet this essentially liberal reading of the phrase social market economy is narrower than its modern conception. Take, for example, the Monti report. It says:

> The ECJ rulings pre-date the entry into force of the Lisbon Treaty, which explicitly sets out the social market economy as an objective for the Union and makes the European Charter [. . .] legally binding at Treaty level. These elements should shape a new legal context, in which the issues and the concerns raised by the trade unions should hopefully find an adequate response.[14]

In other words, the phrase 'social market economy' should ensure that there is still space for the maintenance of social standards set at national level by the original, EU-15 states. The internal market rules should not lead to a wide destruction of national social legislation in the old member states. The problem is that, so long as the Court maintains its *Säger* market access analysis, the interests of the four freedoms inevitably take precedence over other competing interests (*e.g.* the right to strike) since the presumption is that the national social concerns constitute a restriction on the four freedoms and are thus unlawful unless they can be justified *and* the defendant state or trade union can show that the steps taken are proportionate.

In this respect, the Court of Justice's approach stands in stark contrast to the Court of Human Rights' (hereinafter 'ECtHR'). Its starting point would have been with the fundamental right, namely the right to strike – recognised by the Court of Human Rights in *Demir and Baykara* and *Enerji-Yapi Yol.*[15] The ECtHR's view would have been that any restriction on the right to strike is unlawful unless it can be justified and the steps taken

13 Para. 44.

14 <www.europarl.europa.eu/document/activities/cont/201005/20100527ATT75093/20100527ATT75093EN.pdf> (last accessed 5 April 2013).

15 *Demir and Baykara v. Turkey* [*2008*] *ECHR 1345*, Appl. No. 34503/97, 12 November 2008. *See also Enerji Yapi-Yol* [2009] *ECHR* 2251, Appl. No. 68959/01) confirms right to strike part of Art. 11.

are proportionate. This 'human rights' approach influenced the Advocate General in *Commission v. Germany (occupational pensions*).[16]

1.4 Commission v. Germany (Occupational Pensions)

All member states recognize collective agreements as a source of labour law. In some member states, particularly in the Nordic countries, collective agreements provide the main source of employment rights, and the principle of autonomy of the social partners is keenly felt. What happens when this principle comes into conflict with internal market law? This was at issue in *Commission v. Germany (occupational pensions).*

A number of local authorities entered into a collective agreement with the trade unions concerning the conversion of earnings into pension savings. The collective agreement identified a limited list of pension providers entrusted with implementing the salary conversion measure. Given the existence of this collective agreement, the local authorities did not issue a call for tenders, as required by Directive 2004/18 on public procurement, with the result that other pension providers were denied the chance to offer their services. The Commission therefore stepped in.

So, as with *Viking,* this case pitted the fundamental (national) social right to engage in collective bargaining against the fundamental (EU) economic right to freedom to provide services. How can they be reconciled? Advocate General Trstenjak argued that

> [t]he approach adopted in *Viking Lane* and *Laval un Partneri,* according to which Community fundamental social rights as such may not justify – having due regard to the principle of proportionality – a restriction on a fundamental freedom but that a written or unwritten ground of justification incorporated within that fundamental right must, in addition, always be found, sits uncomfortably alongside the principle of equal ranking for fundamental rights and fundamental freedoms.[17]

She continued that

> Such an analytical approach suggests, in fact, the existence of a hierarchical relationship between fundamental freedoms and fundamental rights in which fundamental rights are subordinated to fundamental freedoms and, consequently, may restrict fundamental freedoms only with the assistance of a written or unwritten ground of justification.[18]

16 Case C-271/08, *European Commission v. Germany (occupational pensions)* [2010] ECR I-7091.
17 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CC0271:EN:NOT>, para. 183.
18 *Ibid.,* para. 184.

She did not think that there was such a hierarchical relationship between fundamental freedoms and fundamental rights.[19] She argued:

> 188. Therefore, if in an individual case, as a result of exercising a fundamental right, a fundamental freedom is restricted, a fair balance between both of those legal positions must be sought. In that regard, it must be presumed that the realisation of a fundamental freedom constitutes a legitimate objective which may limit a fundamental right. Conversely, however, the realisation of a fundamental right must be recognised also as a legitimate objective which may restrict a fundamental freedom.
> 189. For the purposes of drawing an exact boundary between fundamental freedoms and fundamental rights, the principle of proportionality is of particular importance. In that context, for the purposes of evaluating proportionality, in particular, a three-stage scheme of analysis must be deployed where (1) the appropriateness (2) the necessity and (3) the reasonableness of the measure in question must be reviewed.
> 190. A fair balance between fundamental rights and fundamental freedoms is ensured in the case of a conflict only when the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom.[20]

In other words, she appears to advocate a mix of the Court of Justice's and the Court of Human Rights' approach: first check whether the restriction on the fundamental freedom can be justified by a fundamental right and see whether the steps taken to protect the fundamental right are proportionate (the Court of Justice's approach). Second, check whether the restriction on the fundamental right can be justified by a fundamental freedom and see whether the steps taken to protect the fundamental freedom are proportionate (the Court of Human Rights' approach). In reaching this conclusion, the Advocate General may have been influenced by 'practical concordance' approach adopted by the German Constitutional Court to balancing fundamental rights of equal weight.[21] The idea of 'practical concordance' is attributed to Professor Hesse. According to Donald Kommers:

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19 *Ibid.,* para. 186.

20 *Ibid.*

21 This argument is developed further *in* C. Barnard, 'A Proportionate Response to Proportionality in the field of collective action', *ELRev,* Vol. 37, 2012, p. 117.

> Professor Konrad Hesse wrote "The principle of the constitution's unity requires the optimisation of (values in conflict): Both legal values need to be limited so that each can attain its optimal effect. In each concrete case, therefore, the limitations must satisfy the principle of proportionality; that is, they may not go any further than necessary to produce a concordance of both legal values."[22]

Kommers continues:

> In its German version, proportionality is a three-step process. First, whenever Parliament enacts a law impinging on a basic right, the means used must be appropriate (eignung) to the achievement of a legitimate end. [. . .] Second, the means used to achieve a valid purpose must have a least restrictive effect (Erforderlichkeit) on a constitutional value. This test is applied flexibly and must meet the standard of rationality. As applied by the constitutional court, it is less than the 'strict scrutiny' and more than 'minimum rationality' test of American constitutional law. Finally, the means used must be proportionate to the end. The burden on the right must not be excessive relative to the benefit secured by the state's objective (Zumutbarkeit). This three pronged test of proportionality seems fully compatible with, if not required by, the principle of practical concordance.[23]

Thus, the full three pronged test of proportionality is to be used to do the balancing, as Advocate General Trstenjak argued. There are some signs that her opinion influenced the Court when it said:

> Exercise of the fundamental right to bargain collectively must therefore be reconciled with the requirements stemming from the freedoms protected by the FEU Treaty, which in the present instance Directives 92/50 and 2004/18 are intended to implement, and be in accordance with the principle of proportionality [. . .][24]

The Court said that reconciling the competing interests entails verification as to whether, when establishing the content of the collective agreement,

> a fair balance was struck in the account taken of the respective interests involved, namely enhancement of the level of the retirement pensions of the

22 D.P. Commers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edn, Duke University Press, 1997, p. 46.

23 *Ibid.*

24 Case C-271/08, *European Commission v. Germany (occupational pensions)* [2010] ECR I-7091, para. 44.

> workers concerned, on the one hand, and attainment of freedom of establishment and of the freedom to provide services, and opening up to competition at EU level, on the other.[25]

However, it concluded that a balance on the facts of this case had not been struck (because no procurement process had been undertaken at all) but then outlined a way for a better balance (opening up the tendering process but providing more space for contracting authorities to specify social conditions).

Sceptics might argue that the language of balancing in fact disguises a court's decision ultimately to prioritize the factor with which it has greatest sympathy (*i.e.* promoting the four freedoms) – in other words, dressing up policy choices in the garb of balancing. In *Commission v. Germany*, both the Advocate General and the Court ultimately concluded that the economic interest should prevail – the same result reached in *Viking* and *Laval* – so lots of rhetoric of rights and balancing but no change in outcome.

There is a further problem: what happens when the competing interests are ultimately irreconcilable? Let us take the example of the *Balpa* case,[26] one of the first cases to arise post *Viking*. BALPA, the British Airline Pilots' Association, balloted its members for industrial action when it learned of British Airways' (BA) plans to start an operation out of Paris using pilots paid less than the BA pilots. Had the strike action gone ahead, BA said it would lose £50 million a day in revenue and so it wanted the strike action stopped. So this case is reminiscent of the conflict in *Viking*: the fundamental (economic) right of BA to establish an operation in Paris under Article 49 TFEU as against the fundamental social right of the trade union to go on strike. How would the test of practical concordance work in this case?

The human rights (European Court of Human Rights) approach would start from the premise that any restriction on the right to strike is unlawful but can be justified by the need to secure freedom of establishment, provided the steps taken to protect the freedom of establishment are proportionate. Since the strike had been the subject of a ballot in advance and would last for a number of days but would not be permanent, this might suggest that the right to strike should prevail. On the other hand, given the potentially devastating costs to the airline, even the Court of Human Rights might decide that there should be limitations on the right to strike in this case. This would certainly be the case with the Court of Justice's approach. It would start from the premise that any restriction on the fundamental freedom to set up the operation in Paris is unlawful and can be

25 *Ibid.*, para. 52.

26 This case was not reported but has been extensively discussed in the literature: *e.g.* R. O'Donoghue & B. Carr, 'Dealing with *Viking* and *Laval*', 11 *CYELS*, 2010, p. 123; K. Apps, 'Damages Claims Against Trade Unions after Viking and Laval', 34 *ELRev,* 2009, p. 141.

justified by the fundamental right to strike, provided that the strike action is proportionate. *Viking* already tells us that strike action must be the last resort; the test of 'no more restrictive than necessary' might mean that the strike action should not cost an employer millions of pounds.

This analysis suggests that there is little middle ground between the human-rights-based approach and the economic-based approach: a court will have to opt for one or the other – and a court such as the Court of Justice which has traditionally favoured the interests of the economic over the social might conclude that the cost of the strike is simply too high and so find that the strike has an excessive effect on the employer's interests. This may even be the case with the rights-based approach. Those sitting frustratedly at the airport suffering the consequences of such strike action might also agree but, examining collective action through the prism of fundamental rights, reveals that the only effective sanction that airline pilots have is to withdraw their labour ('working to rule' is not possible since in a highly regulated industry they have to do that anyway) and it so happens that in their industry going on strike has instant, dramatic and costly effects (compared with, by contrast, a strike by, say, university teachers).

As this example shows, what the proportionality/practical concordance review fails to address is whether the essence of the fundamental right is undermined. This lies at the heart of Tsakyrakis' criticism of the proportionality principle:

> The balancing approach, in the form of the principle of proportionality, appears to pervert rather than elucidate human rights adjudication. With the balancing approach, we no longer ask what is right or wrong in a human rights case but, instead, try to investigate whether something is appropriate, adequate, intensive or far-reaching.[27]

1.5 Putting the Social Back In?

So does this mean we should reject the balancing approach altogether? As we have seen, it has a well respected pedigree and, as Advocate General Trstenjak neatly pointed out,

> this approach characterised by an equal ranking of fundamental rights and fundamental freedoms in which the principle of proportionality serves as the basis for the resolution of conflicts between the exercise of fundamental freedoms and the exercise of fundamental rights would not constitute a

27 S. Tsakyrakis, 'Proportionality: An assault on Human Rights', <http://icon.oxfordjournals.org/content/7/3/468.abstract>.

> fundamental reorientation in the case-law. Instead, this analysis implies a return to the values already inherent in *Schmidberger*.[28]

In which case, should the proportionality principle itself be revisited? In the UK, the argument would be: abolish the proportionality review altogether. When strike action is contemplated in the UK there are onerous procedural rules to be complied with concerning, for example, the nature of the trade dispute, and balloting and notice requirements but, once satisfied, the British courts do not then subject the strike action to a substantive proportionality review. British trade unions would like a return to this position under EU law too, but the pass has already been sold on this.[29] So at European level the question remains: can anything be done to improve the application of the proportionality principle to make it more suitable for collective action situations?

The standard proportionality test reads: Is the measure (1) suitable; (2) necessary (*i.e* no more restrictive than necessary to achieve the aim (ie narrowly tailored); and (in some cases) (3) does the measure nevertheless have an excessive effect on the applicant's interests? In order to accommodate the *Balpa* concern, should the third limb read: 'Is the outcome compatible with the human right being protected (taking a pure cost-benefit analysis out of the equation?)'. So in the *Balpa* example, it could be argued that given that airline pilots have no alternative other than to strike to express their dissatisfaction with their employer's conduct, and that since the right to strike is a fundamental right, denial of a right to strike in these circumstances would undermine the essence – or core – of the right.

An analogous approach can be seen in the field of protection of intellectual property rights (hereinafter IPR). This pits the *EU* fundamental freedom (free movement of goods) against *national* property rights (property rights have also been deemed fundamental rights).[30] Early in its case law, the Court distinguished between the *existence* of an IPR and its *exercise*. It said that, following Article 345 TFEU, EU law did not affect the existence of an IPR recognized by the law of a member state, but it did regulate its exercise. For example, in *Deutsche Grammophon*, a case concerning copyright, the Court said:

> although the Treaty does not affect the *existence* of rights recognized by the legislation of a Member State with regard to industrial and commercial property, the *exercise* of such rights may nevertheless fall within the prohibitions laid down by the Treaty. Although it permits prohibitions or restrictions on the free movement of products, which are justified for the purpose of protecting industrial and commercial property, Article [36 TFEU] only admits

28 Case C-112/00, *Schmidberger v. Austria* [2003] ECR I-5659.

29 *See also* the failed Monti II proposal: COM(2012) 130.

30 *See* Art. 17 CFR and for a fuller discussion, *see* <http://ec.europa.eu/justice/fundamental-rights/files/charter-brochure-report_en.pdf>.

> derogations from that freedom to the extent to which they are justified for the purpose of safeguarding rights which constitute the *specific subject-matter* of such property.[31]

Thus, EU law recognizes the core of the property rights – its specific subject matter – but once that core has been protected the principle of free movement of goods (through the doctrine of exhaustion) prevails.[32]

Protecting the essence of the fundamental right also helps to explain the controversial decision in *Ruiz-Zambrano.*[33] The case concerned a Colombian failed asylum seeker living and working in Belgium whom the Belgian authorities sought to deport. He argued that this would contravene EU law on citizenship since it would deprive his young children, Belgian nationals, of their EU citizen rights. The member states argued that this was a wholly internal situation so EU law did not apply.

The Court said that Article 20 TFEU "confers the status of citizen of the Union on every person holding the nationality of a Member State".[34] This applied to Mr Ruiz Zambrano's children who possessed Belgian nationality. The Court then said:

> 42. In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.
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> 43 A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.[35]

The Court then concluded that a refusal to grant a resident to a Third Country National (TCN) with EU national children would lead to 'a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents'.

This decision can be contrasted with in *McCarthy,*[36] a case concerning a British woman who also held Irish nationality but who had never left the UK, she wished to rely on EU

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31 Case 78/70, *Deutsche Grammophon v. Metro* [1971] ECR 487, para. 11 (emphasis added).

32 *See* further C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, Oxford University Press, Oxford, 2010, online chapter for further details.

33 Case C-34/09 [2011] ECR I-000.

34 *Ibid.,* para. 40.

35 *Ibid.,* paras 42 and 43.

36 Case C-434/09, *McCarthy v. Secretary of State for the Home Department* [2011] ECR I-3375.

law to justify bringing her TCN husband in to the UK. The Court ruled that there was no evidence that the national measure had the effect of depriving Mrs McCarthy of

> the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU.[37]

In other words, because the essence of her status as an EU citizen had not been interfered with, Ms McCarthy, unlike Mr Ruiz Zambrano's children, could not invoke EU law. These cases suggest that when faced with the argument in these absolute terms, the Court is willing to preserve the essence of the fundamental right. Translating this to the context of collective action, if strike action does mean that the costs to the employer are very grave, the Court should nevertheless allow such industrial action to go ahead where there is no other meaningful method for allowing workers to express their dissatisfaction.

1.6 Conclusions

If the 'social market economy' is to be more that a rhetorical device, thought needs to be given as to how to operationalize the idea. Most working in the field of labour law would argue that the *Säger* market access approach has the potential to wreak significant havoc on national labour law rules. The Court has a number of tools in its toolbox to avoid the application of market access rules altogether. For example, in some cases it has said that there is no breach of the Treaty because the measures under review are rules of the game,[38] or their effect on free movement is too indirect and uncertain,[39] or that the rules do not *considerably* hinder market access.[40] However, post *Viking* and *Laval* it seems unlikely that the Court will apply these approaches to transnational strike action. In other cases, the Court has found a breach but then applied a more relaxed test to proportionality. For example, in *Trailers* the Court said that

> the burden of proof cannot be so extensive as to require the Member States to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions.[41]

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37 *Ibid.,* para. 49.
38 Joined Cases C-51/96 and 191/96 *Deliège v. Ligue francophone de Judo* [2000] ECR I-2549.
39 C-190/98 *Graf v. Filzmozer Maschinenbau GmbH* [2000] ECR I-493.
40 Case C-110/05, *Commission v. Italy (Trailers)* [2009] ECR I-519, para. 37.
41 *Ibid.,* para. 2 of Summary of the judgment.

Yet, again in *Viking*, the Court could have referred to the margin of appreciation but failed to do so.

Given, then, that the Court seems determined to apply the proportionality principle to strike action, there is a need to find a way to accommodate fundamental social rights into the proportionality review. This article has therefore suggested one possibility: incorporating a final check into the third limb of the proportionality review to see whether the essence of the fundamental right has been undermined. Serious thought needs to be given to this and other suggestions. Failure to do so will eventually bring EU law into conflict with other international organs, notably the International Labour Organization and the European Committee of Social Rights which are already taking a close interest in what the EU has required in terms of social conditionality by member states in receipt of a bailout.[42]

42 *See e.g.*, ILO, High level committee report on Greece, <www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/missionreport/wcms_170433.pdf>; *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, Complaint No. 66/2011, <http://hudoc.esc.coe.int/esc2008/query.asp?action=query&timestamp=37159.77>.