

Editorial

Human rights are slowly taking precedence over fundamental freedoms in EU employment law

When the EEC was founded, the general idea was that the free market would result in prosperity, which in turn would lead to social progress. Curtailment of the free market was an exception. As a result, market freedoms regularly outweighed social rights. An example is the original draft of the Services in the Internal Market Directive of 2004. Free movement was the way forward and obstacles needed to be torn down, including rules on employment law, save for the provisions of the Posted Workers Directive. Due to great criticism, this draft was amended significantly and currently the Services Directive incorporates the wording that there is a need to make the internal market for services fully operational, while preserving the European social model. Market freedoms and social rights were placed on a par. That changed, however, after the 2007 *Viking* and *Laval* rulings, in which the ECJ had to assess whether industrial actions were allowed if they hindered companies' fundamental rights to establishment and to perform transnational services. According to the ECJ that depends: the restrictions to these market freedoms caused by the industrial action may be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective. The economic freedoms were placed first but may be restricted by industrial actions that meet the aforementioned criteria.

The outcome of these cases was not accepted by all. The changes made in national legislation in Sweden due to the *Viking* and *Laval* cases were criticized in the decision of the European Committee of Social Rights on 3 July 2013. The Committee *inter alia* held that “legal rules relating to the exercise of economic freedoms ... should be interpreted in such a way as to not impose

disproportionate restrictions upon the exercise of labour rights”

EU legislation has also changed since the *Viking* and *Laval* cases. Article 6 TEU establishes as of 1 December 2009 that the EU recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, which have the same legal value as the Treaties. Moreover, the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Human rights, including fundamental employment rights, gain standing.

This process has been enhanced by the 2017 Pillar of Social Rights. This also emphasizes the importance of social rights, also in the light of market freedoms. For instance, recently, the second phase consultation of the social partners under Article 154 TFEU on a possible action addressing the challenges related to fair minimum wages was published. It states that upward social convergence benefits both workers and business in the EU, while contributing to a better level playing field in the Single Market, where competition is based on innovation and productivity coupled with adequate social standards. No priority of market freedoms.

The ECtHR has taken these developments a step further. In the 10 June 2021 case of *Norwegian Confederation of Trade Unions – v – Norway* it held that, from the perspective of Article 11 of the European Convention on Human Rights, freedom of establishment is not a counterbalancing fundamental right to freedom of association but rather one element, albeit an important one, to be taken into consideration in the assessment of proportionality under Article 11, paragraph 2. Social human rights were placed first but can be curtailed by market freedoms (which actually and rightfully happened in that case). I'm curious where these developments will take us, let's say in five years from now.

Right now, however, there are other priorities. There is once again a very interesting new volume of the EELC right in front of you. Enjoy!

Zef Even
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