

RECON Online Working Paper  
2008/06

On the ‘Social Deficit’ of the  
European Integration Project and  
its Perpetuation through the ECJ  
Judgements in *Viking* and *Laval*

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April 2008

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RECON Online Working Paper Series | ISSN 1504-6907

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Issued by ARENA

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P.O.Box 1143 Blindern | 0317 Oslo | Norway

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## **Abstract**

The December judgments of the ECJ in *Viking* and *Laval* on the compatibility of national collective labour law with European prerogatives have caused a quite heated critical debate. This paper seeks to put this debate in constitutional perspectives. In its first part it reconstructs in legal categories what Fritz W. Scharpf has characterized as a decoupling of economic integration from the various welfare traditions of the Member States. European constitutionalism, it is submitted, is bound to respond to this *problématique*. The second develops a perspective, within which such a response can be found. That perspective is a supranational European conflict of laws which seeks to realize what the Draft Constitutional Treaty had called the "motto of the union": *unitas in pluralitate*. Within that framework the third part analyses two seemingly contradictory trends, namely first, albeit very briefly, the turn to "soft" modes of governance in the realm of social policy and then, in much more detail, the ECJ's "hard" interpretations of the supremacy of European freedoms and its strict interpretation of pertinent secondary legislation. The conflict-of-law approach would suggest a greater respect for national autonomy in particular in view of the limited EU competences in the field of labour law.

## **Keywords**

Competences - EU Charter of Fundamental Rights - European Social Model - Industrial Relations - Legitimacy - Posting of Workers - Social Democracy - Supremacy - Trade Unions - Welfare State



## Introductory remark

This paper will reflect on the recent ECJ-cases *Viking* and *Laval* by putting the two cases into a wider perspective of Europe's 'social deficit' and the recent political and constitutional attempts to cope with it. The paper will start in Section I with a reconstruction of the European Community's 'social deficit', arguing that a credible response to this deficit would be a pre-condition for the democratic legitimacy of the deepened integration project. Such a response can be developed in a re-conceptualisation of European law as a new type of supranational conflict of laws – this is the thesis defended in Section II. This vision is contrasted in Section III, first with the steps towards Social Europe envisaged in the Draft Constitutional Treaty, and then with the messages of the recent judgments of the ECJ in *Viking* and *Laval*. It goes without saying that the theoretical premises of the argument, let alone its many interdisciplinary dimensions and empirical background, can often only be signalled, but not developed systematically.

## I: European integration and democracy A legacy of unresolved tensions

The project of European integration was launched not as an experiment in supranational democracy, but under the impression of the Second World War and its devastating effects on the European economies. It was meant to ensure lasting peace among former enemies, and it had as its design an integration strategy which would mitigate between the very different objectives and anxieties of Germany on the one hand, and the allied victors on the other.<sup>1</sup> This was accomplished through a primarily economic and technocratic integration strategy. This was a by no means surprising choice. In hindsight, however, the implications of this choice, which were hardly foreseeable and certainly not a salient issue half a century ago, become apparent. This is true for both the queries on which our analysis will focus.

The first may be called a 'normative fact', namely, the exclusion of 'the social' sphere from the integrationist objectives which Fritz W. Scharpf has famously characterised as the decoupling of the social sphere from the economic sphere.<sup>2</sup> But why should this decoupling be problematical? This question is of constitutional significance: The exclusion of 'the social' sphere from the integration project is a potential failure of constitutional significance for those who assume that the citizens of constitutional democracies are entitled to vote in favour of welfare policies. This is by no means a trivial premise, not even at national level.<sup>3</sup> The second premise concerns the

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<sup>1</sup> Students of European law tend to focus their analyses too much on the history of 'institutionalised Europe' rather than on the diverse histories of the Member States and their complex relations; J.H.H. Weiler's dichotomy between 'supranational law' and 'political intergovernmentalism' reflects this perspective (see also note 13 below).

<sup>2</sup> F.W. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity', *Journal of Common Market Studies* 40 (2002), 645-670. It deserves to be stressed that the founding fathers of ordo-liberalism to whom we owe the theory of the economic constitution have insisted on the interdependence of both spheres (the *Interdependenz der Ordnungen*; see, famously, W. Eucken, *Grundzüge der Wirtschaftspolitik* (Tübingen: Mohr/Siebeck, 1952), 6th ed., 1990, 180 *et seq.*); out of the rich literature on the interdependence theorem, see, for an extremely subtle reconstruction, M. Wegmann, *Früher Neoliberalismus und europäische Integration: Interdependenz der nationalen, supranationalen und internationalen Ordnung von Wirtschaft und Gesellschaft (1932-1965)* (Baden-Baden: Nomos, 2002), in particular at 369 *et seq.*

<sup>3</sup> Friedrich August von Hayek was the most outspoken critic of this thesis; the turn to welfare policies

integration process. Only in the course of its deepening and growing impact on the 'economy and society' will a response to the 'social deficit' become a political must.<sup>4</sup>

## **I.1 Europe's equilibrium in the formative period of the integration process**

Legal integration theory is an effort to provide a contextually (historically, socially and politically) 'adequate' legal conceptualisation of the state of the European Community (now Union). Two such efforts to capture the 'nature of the beast' in its formative period stand out and remain important:<sup>5</sup> Germany's ordo-liberalism and Joseph Weiler's theory of supranationalism.

Ordo-liberalism is an important theoretical tradition in Germany, and a powerful contributor to German ideational politics. The ordo-liberal school<sup>6</sup> reconstructed the legal essence of the European project as an 'economic constitution' which was not in need of something like democratic legitimacy. The freedoms guaranteed in the EEC Treaty, the opening up of national economies, and anti-discrimination rules and the commitment to a system of undistorted competition were interpreted as a 'decision' that supported an economic constitution, and which also matched the ordo-liberal conceptions of the framework conditions for a market economic system. The fact that Europe had started out on its integrationist path as a mere economic community lent plausibility to ordo-liberal arguments – and even required them: in the ordo-liberal account, the Community acquired a legitimacy of its own by interpreting its pertinent provisions as prescribing a law-based order committed to guaranteeing economic freedoms and protecting competition by supranational institutions. This legitimacy was independent of the state's democratic constitutional institutions. By the same token, it imposed limits upon the Community: thus, discretionary economic policies seemed illegitimate and unlawful.<sup>7</sup> The ordo-liberal European polity has a twofold structure: at supranational level, it is committed to economic rationality and a system of undistorted competition, while, at national level, re-distributive (social) policies may be pursued and developed further.

'Integration through law' is the legal paradigm commonly associated with the formative era of the European Community outside the German borders.<sup>8</sup> It is not by

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means taking *The Road to Serfdom* (London: Routledge, 1944). A legendary debate in the young German Federal Republic between Wolfgang Abendroth and Ernst Forsthoff concerned precisely that *problématique* [see A. Fischer-Lescano & O. Eberl, 'Der Kampf um ein soziales und demokratisches Recht. Zum 100. Geburtstag von Wolfgang Abendroth', *Blätter für deutsche und internationale Politik*, 51 (2006), 577-585] and these debates are going on until today [see the Special Issue on 'Social Democracy' of the *Canadian Journal of Law and Jurisprudence on Social Democracy* 17 (2004) (Guest Editor: Colin Harvey)].

<sup>4</sup> For a brilliant recent analysis of this interdependence cf. J.P. McCormick, *Weber, Habermas, and Transformations of the European State: Constitutional, Social, and Supranational Democracy* (Cambridge: Cambridge University Press, 2007).

<sup>5</sup> *Viking* and *Laval* can even be read as a revival of ordo-liberal ideas; see Section III.2 below.

<sup>6</sup> European integration was, in its early years, by no means an uncontested project in the ordo-liberal school (see M. Wegmann, note 2). Her analyses fit well the enquiry into the politics of competition policy by Y. Karagiannis, 'Preference Heterogeneity and Equilibrium Institutions: The Case of European Competition Policy', PhD Thesis EUI Florence 2007, Ch. 7.

<sup>7</sup> Significant, here, is A. Müller-Armack, 'Die Wirtschaftsordnung des Gemeinsamen Marktes', in: *ibid. Wirtschaftsordnung und Wirtschaftspolitik* (Freiburg i.Br: Rombach, 1966), 401 *et seq.*

<sup>8</sup> See, path breaking, J.H.H. Weiler, 'The Community system: the dual character of supranationalism', *Yearbook of European Law* 1 (1981), 257-306.

chance that generations of scholars have built upon it or tried to decipher its sociological basis.<sup>9</sup> The strength of the paradigm may well rest (in part) on assumptions that become apparent only when we look at social and economic policy through its lenses. Then, we become aware of the *Wahlverwandtschaft* with German ordo-liberalism, in that only the European market-building project was juridified through supranational law, whereas social policy at European level could, at best, be said to have been handled through intergovernmental bargaining processes.

Fritz Scharpf's decoupling thesis is, at least on the surface, not meant as a contribution to the debates on the constitutionalisation of Europe. But it does build upon sociological assumptions with constitutional implications. This holds true in particular for the argument that the social integration of capitalist societies will require equilibrium between social and economic rationality. This is, of course, again a primarily empirical issue, but it is one with obvious implications for the legitimacy of the polity under scrutiny.<sup>10</sup> Since we can assume that 'welfarism' – notwithstanding its very diverse modes – is a common European heritage,<sup>11</sup> it will become imperative for the integration project to address 'the social' sphere. Interesting enough, German ordo-liberalism used to be well aware of this *problématique*. Its early proponents conceptualised it as the interdependence of societal and the economic 'orders' (*Ordnungen/Verfassungen*<sup>12</sup>).

To summarise: Europe was constituted as a dual polity. Its 'economic constitution' was non-political in the sense that it was not subject to political interventions. This was its constitutional-supranational *raison d'être*. Social policy was treated as a categorically-distinct subject. It belonged to the domain of political legislation, and, as such, had to remain national. The social embeddedness of the market could, and, indeed, should, be accomplished by the Member States in differentiated ways – and, for a decade or so, the balance seemed stable.<sup>13</sup>

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<sup>9</sup> Most recently, A. Vauchet, 'A Europe of Norms: A Political Sociology of a "Community of Law"', Manuscript 2007 (on file with authors).

<sup>10</sup> See the classical Studies by J. Habermas: *Legitimationsprobleme im Spätkapitalismus* (Frankfurt a. M.: Suhrkamp, 1973); *Zur Rekonstruktion des Historischen Materialismus* (Frankfurt a.M.: Suhrkamp, 1976) and J. P. McCormick (note 4), 176 *et seq.*

<sup>11</sup> See T. Judt, *Postwar: A History of Europe Since 1945* (New York: Penguin, 2005), *e.g.*, at 777 *et seq.*

<sup>12</sup> *Verfassung* in German has a double meaning. It can be a legal constitution and a social structure or pattern. The notion of *Ordnung* (order), too, comprises this twofold meaning. This clarification is necessary to convey our idea of a constitutionalisation of the economy, of other societal spheres or parts of the legal system. Such constitutionalisation can either claim the dignity of constitutional law (*e.g.*, supremacy within the legal system) or be an integral part of the constitutional order (in this sense, Jürgen Habermas talks of the co-originality of private and public law; see his *Faktizität und Geltung* (Frankfurt a.M.: Suhrkamp, 1992), 112 *et seq.*

<sup>13</sup> This all fits well into the analysis of 'the national configuration of the state in the Golden Age', by St. Leibfried & M. Zürn, 'Reconfiguring the national constellation', in: St. Leibfried & Michael Zürn (eds) *Transformation of the State* (Cambridge: Cambridge University Press, 2005), 93-117 [also published in *European Review*, 13 (2005), Supplement S1, available at: <http://journals.cambridge.org>]; it seems worth noting that the ordo-liberal construct has structural affinities, or is at least compatible, with J.H.H. Weiler's analysis of the co-existence of, and interdependence between, legal supranationalism and political intergovernmentalism in the EEC (see note 1 above).

## **I.2 The completion of the internal market, the erosion of the economic constitution and the advent of social Europe**

The original equilibrium was not, however, to remain stable. One important reason for its instability is the progress of the integration project. This is not really paradoxical, not even surprising in the light of the considerations in Section I.

The Delors Commission's 1985 *White Paper on Completion of the Internal Market*<sup>14</sup> is widely perceived as a turning point and a breakthrough in the integration process. Jacques Delors' initiative promised to overcome a long phase of stagnation; the means to this end was the strengthening of Europe's competitiveness. Economic rationality, rather than 'law', was, from now on, to be understood as Europe's orienting maxim, its first commitment and its regulative idea. In this sense, it seems justified to characterise Delors' programme as a deliberate move towards an institutionalisation of economic rationality. This seems even more plausible when we consider the two complementary institutional innovations accomplished through, and subsequent to, the Maastricht Treaty, namely, Monetary Union and the Stability Pact. Europe looked like a market-embedded polity governed by an economic constitution, rather than by political rule.

This characterisation, however, soon proved to be too simplistic by far.<sup>15</sup> What had started out as an effort to strengthen Europe's competitiveness and to accomplish this objective through new (de-regulatory) strategies, soon led to the entanglement of the EU in ever more policy fields and the development of sophisticated regulatory machinery. It was, in particular, the concern of European legislation and the Commission with 'social regulation' (the health and safety of consumers and workers, and environmental protection) which served as irrefutable proof of this. The weight and dynamics of these policy fields had been thoroughly under-estimated by the proponents of the 'economic constitution'. Equally important and equally unsurprising was the fact that the integration process deepened with the completion of the Internal Market and affected ever more policy fields. This was significant not so much in terms of its factual weight, but, in view of Europe's 'social deficit', in terms of the new efforts to strengthen Europe's presence in the spheres of labour and social policy.

These tendencies became mainstream during the preparation of the Maastricht Treaty, which was adopted in 1992. This is why this Amendment of the Treaty, officially presented as both a deepening and a consolidation of the integration project, met with fierce criticism. The most outspoken critique came not from the political left, but from the proponents of the new economic philosophy, and, in particular, from Germany's ordo-liberals.<sup>16</sup> And, indeed, the Maastricht Treaty of 1992 can be read as a break with the ordo-liberal economic constitution. After the explicit recognition and strengthening of new policy competences, which was accomplished in Maastricht, it

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<sup>14</sup> Commission of the EC, 'Commission White Paper to the European Council on Completion of the Internal Market', COM(85) 310 final of 14 June 1985.

<sup>15</sup> See, on the following, in more detail, Ch. Joerges, 'Economic Law, the Nation-State and the Maastricht Treaty', in: R. Dehousse (ed.), *Europe after Maastricht: an Ever Closer Union?* (Munich: C.H. Beck, 1994), 29-62, and the reconstruction in K.W. Nörr, *Die Republik der Wirtschaft. Teil II. Vom der sozial-liberalen Koalition bis zur Wiedervereinigung* (Tübingen: Mohr/Siebeck), 44-60.

<sup>16</sup> See M. Streit & W. Mussler, 'The Economic Constitution of the European Community. From "Rome" to "Maastricht"', *European Law Journal* 1 (1995), 5-30.



seemed simply no longer plausible to assign a constitutive function to the 'system of undistorted competition' because this very 'system' had been now downgraded to one among many others. In addition, the expansion of competences in labour law by the Social Protocol and Agreement on Social Policy of the Treaty blurred the formerly clear lines between Europe's (apolitical) economic constitution and the political responsibility that Member States had for social and labour policies.

Until today, a consensus on the interpretation of this new constellation did not emerge. Was this a result of contingent events and decisions? Was there a deeper 'logic' at work? Back in 1944, Karl Polanyi, in his seminal 'Great Transformation', had argued that markets will always be 'socially embedded'.<sup>17</sup> He had not spelled out the political and normative implications of his sociological observations, but the European experience seems, in principle, reconcilable with his messages. Once it became apparent that markets could not be understood simply as being mechanisms that functioned perfectly and automatically to adjust supply and demand,

'[t]he critical question is no longer the quantitative issue of how much state or how much market, but rather the qualitative issue of how and for what ends should markets and states be combined and what are the structures and practices in civil society that will sustain a productive synergy of states and markets'.<sup>18</sup>

It is our contention that the 'social embeddedness' thesis can help us to understand why Europe has developed an ever more sophisticated regulatory machinery entrusted with the management of the internal market – and why the social deficit of the European construction has become a prominent part of the European agenda.

## II: Conflict of laws as constitutional form

Lawyers are not the first ones to decipher the historical, political and sociological determinants of the developments of law. Their vocation is, in the first instance, to offer legal conceptualisations which are compatible with what we know about the law's context – and, at the same time, seek to explain whether, or under what conditions, a deliberate adaptation to these contexts would 'deserve recognition'.

This is not a revolutionary suggestion, but a continuous challenge for legal scholarship, in particular for students of European law who are confronted with a moving target and thus have to conceptualise a '*Wandelverfassung*'.<sup>19</sup> The idea of a new type of conflict of laws as Europe's proper constitutional form which this section will submit should be read in this light. Our submission is less idiosyncratic in substance than the terminology it uses may suggest. The core argument upon which it rests is in fact quite simple. Back in 1997, Jürgen Neyer and Christian Joerges

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<sup>17</sup> K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (1944) (Boston: Bacon Press, 1992), esp. at 45-58, & 71-80.

<sup>18</sup> See F. Block, 'Towards a New Understanding of Economic Modernity,' in: Ch. Joerges, B. Stråth & P. Wagner (eds), *The economy as a polity: The political construction of modern capitalism – an interdisciplinary perspective* (London: UCL Press, 2005), 3 and, most recently, J. Beckert, 'The Great Transformation of Embeddedness: Karl Polanyi and the New Economic Sociology', MPIfG Discussion Paper 07/1.

<sup>19</sup> H.P. Ipsen, 'Die Verfassungsrolle des Europäischen Gerichtshofs für die Integration', in: J. Schwarze (ed.), *Der Europäische Gerichtshof als Verfassungsgericht und Rechtsschutzinstanz* (Baden-Baden: Nomos, 1982), 29 et seq.

submitted it under the heading of 'deliberative' (as opposed to 'orthodox') supranationalism:<sup>20</sup>

'The legitimacy of governance within constitutional states is flawed in so far as it remains inevitably one-sided and parochial or selfish. The taming of the nation-state through democratic constitutions has its limits. [If and, indeed, because] democracies pre-suppose and represent collective identities, they have very few mechanisms [through which] to ensure that 'foreign' identities and their interests are taken into account within their decision-making processes.'<sup>21</sup>

If the legitimacy of supranational institutions can be designed to cure these deficiencies - as a correction of 'nation-state failures', as it were - they may then derive their legitimacy from this compensatory function. To quote a recent restatement:

'We must conceptualise supranational constitutionalism as an alternative to the model of the constitutional nation-state which respects that state's constitutional legitimacy, but, at the same time, clarifies and sanctions the commitments arising from its interdependence with equally democratically legitimised states and with the supranational prerogatives that an institutionalisation of this interdependence requires.'<sup>22</sup>

This, of course, is not the way in which the supranational validity of European law was originally understood and justified. Fortunately enough, however, the methodologically and theoretically bold and practically successful ECJ decision in favour of a European legal constitution<sup>23</sup> can be rationalised in this way. The European 'federation' thus found a legal constitution that did not have to aim at Europe's becoming a state, but was able to derive its legitimacy from the fact that it compensates for the democratic deficits of the nation states. This is precisely the point of deliberative supranationalism. Existing European law had, according to the argument, validated principles and rules that meet with and deserve supranational recognition because they constitute a palpable community project: Community members cannot implement their interests or laws without restraint, but are obliged to respect the European freedoms; they are not allowed to discriminate and can pursue only legitimate regulatory policies which have been blessed by the Community; they must, in relation to the objectives that they wish to pursue through regulation, harmonise with each other, and they must shape their national systems in the most community-friendly way possible.

Why should this type of law be called a new type of conflict of laws? This notion reminds us of Europe's internal diversity, that it represents the effort to live with diversity rather than to strive for uniformity, the fact that diversity is a cause of conflict of interests both, horizontally, among Member States and societal actors, and,

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<sup>20</sup> Ch. Joerges & J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes', *European Law Journal* 3 (1997), 273-299.

<sup>21</sup> *Ibid.*, at 293.

<sup>22</sup> Ch. Joerges "'Deliberative Political Processes" Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making', *Journal of Common Market Studies* 44 (2006), 779-802, at 790.

<sup>23</sup> Case 26/62, [1963] ECR 1 - *Van Gend en Loos v. Nederlandse Administratie der Belastingen*.

vertically, between the different levels of governance and the institutional actors representing them.<sup>24</sup> On the other hand, conflict of laws has traditionally – in all its sub-disciplines: private international law, international administrative law, international labour law, *etc.*, – refused to award claims under foreign ‘public’ law; each state determined the international scope of its own public law unilaterally and was solely responsible for its enforcement. Traditional conflict of laws is, therefore, a paradigm example of what Michael Zürn characterises as ‘methodological nationalism’.<sup>25</sup> The ‘new’ European conflict of laws has, of course, to overcome this hostility. And the principles just cited do exactly that: they guide the search for responses to conflicting claims where no higher substantive law is readily available. To give voice to ‘foreign’ concerns means, in the EU, first of all, that Member States mutually ‘recognise’ their laws (that they are prepared to ‘apply’ foreign law), that they tolerate legal differences and refrain from insisting on their own *lex fori* and domestic interests. This European law of conflict of laws is ‘deliberative’ in that it does not content itself with appealing to the supremacy of European law; it is ‘European’ because it seeks to identify principles and rules that make different laws within the EU compatible with one another.<sup>26</sup> The conflict of laws approach envisages a horizontal constitutionalism for the EU. It distances itself from both the orthodoxy of conflict of laws and from orthodox supranationalism which promotes top-down solutions to Europe’s diversity. It seeks to accomplish what the Draft Constitutional Treaty had called the ‘motto of the Union’,<sup>27</sup> namely, the vision of ‘unity in diversity’.

Should this provide us with a new perspective for the cure of Europe’s social deficit? Let us see.

### III: Soft and hard responses to the quest for Social Europe

In a recent essay dealing with the state of the European Union after the signing of the reform treaty, Jürgen Habermas took issue with the tendency of Germany’s Social Democrats to respond to the risks of economic globalisation by using the means of the national welfare state. Would it not be preferable, he asked, to search for co-ordinated responses within the whole European economic space?<sup>28</sup> His question implicitly acknowledges the importance of Europe’s social deficit. What answers are available? We are currently witnessing two seemingly contradictory, in fact however

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<sup>24</sup> R. Mayntz, ‘The Architecture of Multi-level Governance of Economic Sectors’, MPIfG Discussion Paper 07/13, at 22-24.

<sup>25</sup> M. Zürn, ‘The State in the Post-national Constellation – Societal Denationalization and Multi-Level Governance’, ARENA Working Paper, 1999/35.

<sup>26</sup> We refrain here from explaining two further implications. One is methodological: European conflict of laws requires a proceduralisation of the category of law. It has to be understood as a ‘law of law-making’ (F.I. Michelman, *Brennan and Democracy* (Princeton, NJ: Princeton University Press, 1999), 34), a *Rechtfertigungs-Recht* (R. Wiethölter, ‘Justifications of a Law of Society’, in: O. Perez & G. Teubner, (eds), *Paradoxes and Inconsistencies in the Law* (Oxford: Hart, 2005), 65-77). The second concerns the need for a ‘second order of conflict of laws’. This need stems from the ‘turn to governance’ which we witness not just at the European level but also with nation states. Just as nation states have long had to learn to deal with complex conflict situations, to integrate expertise in legal decision-making and to co-operate with non-governmental actors, the EU had to build up governance arrangements which complement its primary and secondary law. ‘Second order conflict of laws’ seeks to constitutionalise this sphere primarily through a proceduralisation of law; see, in more detail, Ch. Joerges, ‘Integration through Delegalisation? An irritated heckler’, European Governance Papers, N-07-03.

<sup>27</sup> Article I-8 of the Draft Treaty on a Constitution for Europe, OJ C310/1, 16 December 2004.

<sup>28</sup> ‘Erste Hilfe für Europa’, DIE ZEIT no.49/2007.

complementary responses, namely, the resort to soft modes of governance on the one hand, and the turn to orthodox supranationalism on the other.

### III.1 'Social market economy', social rights and soft co-ordination

The first-mentioned alternative was the option pursued by the Draft Constitutional Treaty<sup>29</sup>, it was supported by a great number of its proponents and can be found largely unchanged in the so-called reform treaty of Lisbon. 'Social Europe' was to rest, in particular, on three corner stones: the commitment to a 'competitive social market economy',<sup>30</sup> the recognition of 'social rights'<sup>31</sup> and new 'soft law' mechanisms for the co-ordination of social and labour market policies.<sup>32</sup> Joschka Fischer and Dominique de Villepin, to whom we owe the assignment of constitutional significance to the concept of the 'social market economy', gave thereby a political signal. But they were hardly aware of the interdependence between the economic and the social constitution in the theory of the '*social market economy*'. The latter's legacy would have required what was not yet an imperative in the formative era of the European Economic Community, namely, a compensation for the decoupling of both spheres in the European Treaties.<sup>33</sup> Thus, all hope for a cure rested on new social rights and new co-ordination competences.<sup>34</sup> But these expectations were never substantially justified.<sup>35</sup> If the reform treaty of Lisbon comes one day really into force, those institutions, the constitutional aims 'social market economy', the social rights and the open coordination procedure for labour and social policy will be part and parcel of a European Constitution, but their consequences are currently highly uncertain. In the present context, however, we cannot and indeed need not to examine the intrinsic merits and failures of these options, specifically because the recent jurisprudence of the ECJ has re-configured the agenda substantially. After *Viking* and *Laval*, one will have to ask what the aim of soft methods of co-ordination can be vis-a-vis the 'hard law' of negative integration.

### III.2 The ECJ judgments in *Viking* and *Laval*<sup>36</sup>

The two cases have attracted wide attention over the last years. The conflicts they are dealing with are directly related to the new socio-economic diversity in the Union after enlargement. In both cases, 'old' (high wage-) Member States defend the principle that their wage level must not be eroded by low wage offers from new Member States. And, in both cases, the latter states invoke the economic freedoms

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<sup>29</sup> The Lisbon Treaty, as signed on 13 December 2007, does not advance this agenda.

<sup>30</sup> Article 3 (3), DCT.

<sup>31</sup> See Title IV DCT.

<sup>32</sup> See, especially, Article I-14 (4) DCT; the assignment of a competence 'to promote and co-ordinate the economic and employment policies of the Member States' has been repealed. Article I-11 (3) as amended on 22 June 2004.

<sup>33</sup> See, in more detail, Ch. Joerges & F. Rödl, 'The "Social Market Economy" as Europe's Social Model?', in: L. Magnusson & B. Stråth (eds), *A European Social Citizenship? Pre-conditions for Future Policies in Historical Light*, (Brussels: Lang, 2005), 125-158.

<sup>34</sup> See the contributions to G. de Búrca & B. de Witte (eds.), *Social Rights in Europe* (Oxford: Hart, 2005), G. de Búrca & J. Scott (eds), *Law and Governance in the EU and the US* (Oxford: Hart, 2006).

<sup>35</sup> See Ch. Joerges & F. Rödl, note 33 above.

<sup>36</sup> For a comprehensive analysis of the two cases see N. Reich, 'Free movement vs. Social Rights in an Enlarged Union - The Laval and Viking Cases before the ECJ', *German Law Journal* 9 (2008), 125-161, who comes in the case of *Viking* some similar, in the case of *Laval* to opposite conclusions as we do.

guaranteed by the Treaty and strategically used not least by companies in the old Member States, which seek to operate at home at the wage levels of their eastern neighbours. 'It is a bracing reminder to EU lawyers of the power of political and economic context to influence legal doctrine', observes Brian Bercusson,<sup>37</sup> 'that the new Member States making submissions were unanimous on one side of the arguments on issues of fundamental legal doctrine (horizontal direct effect, discrimination, proportionality) and the old Member States virtually unanimous on the other.'

### III.2.a Viking: Freedoms in primary law and individual state labour constitutions

The plaintiffs in the *Viking* case<sup>38</sup> are a Finnish shipping company (Viking) and its Estonian subsidiary. Viking is a large ferry operator, running among others the ferry *Rosella* registered in Finland. Its crew was predominantly Finnish. A labour agreement negotiated by the Finnish Seamen's Union provided that the wages and conditions of employment were to follow Finnish standards. But as the *Rosella* did not yield a sufficient profit, Viking decided to re-flag the ferry in Estonia. The Finnish crew was to be replaced by Estonian seamen, as under Estonian labour law they were far less expensive. This caused the Finnish Seamen's union to threaten to go to strike. Both the Finnish and the Estonian unions are affiliates of the International Transport Workers' Federation (ITF). One of the ITF's prime policy targets are 'flags of convenience'. It is the ITF's aim to achieve collective agreements under the law in force at the very place where the ownership and control of a vessel is situated. In this way, it tries to defend seafarers against low wage strategies from employers such as Viking, who replace their seamen with labour from low wage countries. In the case of Viking, ownership and control are situated in Finland; this meant that, according to the internal rules of the ITF, only Finnish unions were alleged to agree wage settlements with Viking. Therefore, the ITF sent its member unions the written request not to enter collective negotiations with Viking, a suggestion that was also followed by the Estonian union.

This is why Viking took legal action against union activities, first in Helsinki and then, with reference to the ITF having its headquarters in London, at the Court of Justice for England and Wales, Queen's Bench Division (Commercial Court) – this was a strategic *forum shopping*, which allowed the rules for European civil jurisdiction to take effect (Art. 6 no. 1, Art. 2 (1), 60 (1)(a) Brussels I-Regulation)<sup>39</sup>. Viking argued *inter alia* that the threat of collective action by the Finish union and the political activities of the ITF were incompatible with Viking's right of establishment as guaranteed by Article 43 EC.

Two of the ECJ's arguments are of particular interest here. Pompously, it states: 'the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general

<sup>37</sup> B. Bercusson, 'The Trade Union Movement and the European Union: Judgment Day', *European Law Journal* 13 (2007), 279-308.

<sup>38</sup> Case C-438/05 (*Viking*). For a detailed analysis, see B. Bercusson (note 37) and *id.*, Bercusson, "'Six Scenarios in Search of an Author...'" Or Solutions for the European Court in the Cases of *Laval* and *Viking*', (Typescript, London, 2007) (on file with authors).

<sup>39</sup> According to English international civil procedure, the case fell actually not under English but finish jurisdiction, which was indeed discussed through all the courts. But this *forum non conveniens*-doctrin cannot take effect under the EuGVVO (Case C-281/02 (*Owusu*)), the operative part of the judgement in: ABl. C 106/2, 30 April 2005.

principles of Community law the observance of which the Court ensures [...].<sup>40</sup> This rather nice confirmation of employees' fundamental right to strike explains the favourable reaction the judgement received, not least on part of the European unions.<sup>41</sup> The following argumentative step by the ECJ does however deserve hardly any approval, as here the Court fundamentally reconfigures the traditional balance between economic freedoms at the European level and social rights at the national level:

It is sufficient to point out that, even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law.<sup>42</sup>

At a first glance, it is a marginal step the Court suggests here. All the ECJ does is to bring to bear the framework which Community law has already developed in assessing the legitimacy of restrictions imposed by national law. But, in the present case, this move concerns a social autonomy, protected by fundamental rights, whose articulation lies not within the competence of the Community, as it can be derived not least from Article 137 (5) EC which leaves 'pay, the right of association, the right to strike or the right to impose lock-outs' explicitly to be regulated by the Member States.

The second argument brought forward by the ECJ concerns the limits imposed by community law on those fundamental rights guaranteed by national law in the area of their domestic labour and social constitutions. The just highlighted remarkable scope of Article 43 EC is, it seems, qualified. The Court refers to a formula, well-known from the cases *Schmidberger*<sup>43</sup> and *Omega*<sup>44</sup> according to which

the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty.<sup>45</sup>

But the text continues:

However, in *Schmidberger* and *Omega*, the Court held that the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty and considered that such exercise must

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<sup>40</sup> Case C-438/05 (*Viking*), para 44.

<sup>41</sup> Press statement by the European Trade Union Confederation, 11 December 2007, available <http://www.etuc.org/a/4376> (4 February 2008). Whether an outright denial of a European fundamental right to strike would have been realistic can be doubted given the ECJ judgement of 21 September 1999 – Case C 67/96 (*Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, ECR 1999, I-5751). The focus on this very aspect seems therefore odd.

<sup>42</sup> Case C-438/05 (*Viking*), para. 40.

<sup>43</sup> ECJ, Case C-112/00 (*Schmidberger*), ECR 2003, I-5659.

<sup>44</sup> ECJ, Case C 36/02 (*Omega*), ECR 2004, I-9609.

<sup>45</sup> Case C-438/05 (*Viking*), para. 45.

be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality.<sup>46</sup>

With this asymmetrical (diagonal) interlinking of the fundamental rights of the European economic constitution with the fundamental rights of national labour constitutions, the very autonomy of Member States' labour and social constitutions is attacked, although it should have been protected by the principle of enumerative competences. This remarkable move is given even more effect by submitting not only national labour legislation to the European restraints but also directly the unions as actors entitled by such this laws<sup>47</sup> – although their threat to go to strike cannot be equated with onesided regulation which were indeed comparable to state legislation.<sup>48</sup>

After this bombshell, the EJC adapts a more conciliatory language, which it again refers to in the *Laval* case:

According to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an 'internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', but also 'a policy in the social sphere'. Article 2 EC states that the Community is to have as its task, inter alia, the promotion of 'a harmonious, balanced and sustainable development of economic activities' and 'a high level of employment and of social protection'.

Since the Community 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 136 EC, 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'.<sup>49</sup>

What conclusion can be drawn from all this? In principle, the 'social purpose' would legitimize collective action that aims at 'protecting the jobs and conditions of employment'. The preconditions however are that the 'jobs or conditions of

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<sup>46</sup> *Ibid.*, para. 46.

<sup>47</sup> It is in our view mistaken to extend the 'liability under fundamental freedoms' to the policy of the ITF, which in the case became apparent through the posting of a letter. It presumably rests in the statements of GA Maduro (GA Maduro, Opinion delivered 23 May 2007 - Case C-438/05 (*Viking*), paras. 71, 72), who seems to hold the remarkable position that effective transnational union activity represents an infringement of fundamental rights. However, the ITF does not claim any union rights, but the rights to political organization and action. We cannot further elaborate on this point here, yet it may be suggested that (see *Viking*, paras. 64 f.) the threat of delimiting the horizontal effect of fundamental rights looms here, which deserves utmost attention.

<sup>48</sup> *Ibid.*, para. 57. We have to refrain from discussing the case law the Court referred to. It might suffice to recall, how cautiously Community law and policy have acted against restrictions of the free movement of goods by non-state norms. See H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Oxford: Hart, 2005), 37 ff.

<sup>49</sup> Case C-438/05 (*Viking*), paras. 78-79; this is in similar wording confirmed in *Laval* (Case C-341/05, para. 104-105).

employment at issue ... are in fact jeopardised or under serious threat' and that actions taken 'do not go beyond what is necessary to attain that objective'.<sup>50</sup>

The Court leaves such evaluation to those national court having jurisdiction – in this case ironically an English court<sup>51</sup>. Still the ECJ provides some indication that the actions of the Finnish union were presumably 'not necessary'<sup>52</sup>, as Viking had offered not to discharge any Finnish employees. Apparently, Viking had planned to gradually replace the expensive Finish crew by a cheap Estonian workforce both through the non-renewal of fixed-term contracts and through transfers. This concession would therefore only have meant that the process of re-flagging would have been not as cost-effective as originally intended. These vague indications given by the ECJ reduce in the end – after the European usurpation of Member States' labour constitutions and the direct obligation of unions to the European imperatives – the fundamental rights of the union to a right to protect contracts of employment as they stand.

In essence, the formulation of the ECJ come down to depriving the Finish unions of their power, relativizing their right to strike with the help of an entrepreneurial freedom of constitutional rank. However, it does not revise the Finish social model in the name of a European economic constitution – such a move would be difficult to comprehend given the degrading of 'the system of undistorted competition' from an objective to a mere instrument by the Lisbon Treaty<sup>53</sup> – but in the name of an incomplete European social constitution and despite the guarantee of Member State competences in Article 137(5) EC.

### III.2.b Laval: European secondary law and the Member States' autonomy of strike

The plaintiff in the *Laval* case<sup>54</sup> is a company incorporated under Latvian law, whose registered office is in Riga. Laval's previous Swedish subsidiary (Bygg AB) – later both companies were only linked by identical share owners, managers and their brand name<sup>55</sup> – had won the tender for a school building at the outskirts of Stockholm. In obtaining the tender, Bygg took advantage from its ability to post workers with considerably lower wages from Latvia to Sweden. In May 2004, Laval posted several dozen of its workers to work at the Swedish building sites.

Concerning the applicability of the freedom to provide services (Art 49 EC) – a question of primary law – the ECJ followed its judgement in *Viking*.<sup>56</sup> But *Laval* offers additional insights for secondary law, namely the 1996 Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.<sup>57</sup>

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<sup>50</sup> Case C-438/05 (*Viking*), paras. 81, 84.

<sup>51</sup> Due to the exemption of the British legal order from the Charta of Fundamental Rights of the reform treaty (see 'Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom'), even more complications might arise when the reform treaty finally comes into effect.

<sup>52</sup> Case C-438/05 (*Viking*), paras. 81-83.

<sup>53</sup> Cf. Article 4 EG and Article 3 (2) DCT on the one hand and Article 2 TEU on the other hand.

<sup>54</sup> Case C-341/05 (*Laval*).

<sup>55</sup> *Ibid.*, ms 43.

<sup>56</sup> See the previous section, especially the text accompanying notes 43 ff.

<sup>57</sup> Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. OJ 1996, L18/1.



This Directive did not harmonise the substantial-legal provisions concerning the employment of posted workers, but it asked Member States to ensure that the working conditions of those workers posted to their territory would in a number of essential working conditions (Article 3 (1)) comply with their own labour standards, provided by law or by collective bargaining agreements.<sup>58</sup>

Sweden implemented the posted workers directive in 1999. The legislation included some legal minimum working conditions, for instance concerning working hours, but no provisions regarding minimum wages; it also introduced no system of internal universal applicability of collective bargaining agreements. The latter is however required by Article 3 (1) of the Directive, in order to apply collectively bargained wage standards to the jobs of posted workers. Instead, Sweden intended to make use of the special ruling in Article 3 (8) (2) of the Directive, according to which de facto generally binding wage standards can be equipped with international applicability. However, the conferral of international applicability to collectively bargained internal standards should apparently again been left to employers and employees to fix in collective agreements and not been achieved by state law – a choice which again underlines the strength of the unions in the Swedish social model. In this context, a so-called *lex Britannia* within the Swedish labour law becomes of particular importance. It states that collective agreements under foreign law do not activate the obligation to refrain from collective action and strike. This seems to be consequent as well: if the enforcement of domestic wages by trade unions is meant to be functionally equivalent to legal minimum working requirements – which was the intention of the Swedish legislator – then a foreign collective agreement cannot be allowed to prevent collective action by the unions, as is equally the case for the application of minimum standards determined by state legislation.<sup>59</sup>

The Swedish building and public works union, supported by the electricians' trade union, was willing to bring to bear the transnational scope of its autonomy, guaranteed in Swedish law, against Laval with determination and intensity. Particularly effective was the blockade of the building sites, leading Laval to give in.

The EJC, however, declared illegal all demands and, accordingly, all associated activities of the Swedish unions. It interpreted the posted workers Directive, whose function was according to Europe's public opinion the restriction of a mere wage costs competition, as a Directive concerned with the broad restriction of the right to strike in Member States. The Directive bans all union activity beyond those essential working conditions enumerated in Article 3 (1) of the Directive, it bans union activity for essential working conditions that are better than those already legally provided<sup>60</sup>

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<sup>58</sup> This obligation to apply minimum working requirements to the jobs of posted workers has to be seen before the backdrop of the already established ECJ jurisdiction before the Directive came into effect. It stated that the law of fundamental rights included such a sanction, which had indeed been used, for instance, by France and Germany (cf. W. Eichhorst, *Europäische Sozialpolitik zwischen nationaler Autonomie und Marktfreiheit. Die Entsendung von Arbeitnehmern in der EU* (Frankfurt a. M.: Campus, 2000), 185 *et seq.*). For a systematic reconstruction of the directive in a conflict of law perspective, see F. Rödl, 'Weltbürgerliches Kollisionsrecht', PhD Thesis EUI Florence 2008, part 2, B II.2.

<sup>59</sup> See the paradigmatic decision of the ECJ (27 March 1990) – Case C-113/89 (*Rush Portuguesa*), ECR 1990, I-1417, para. 18, according to which the permissibility of legally extending legal and wage minimum working conditions to posted workers does not depend on the fact that the posted workers fall under a domestic collective agreement.

<sup>60</sup> *Ibid.*, para. 99.

and it bans union activity for all wages outside of the lowest wage group<sup>61</sup>. Thereby, the Court does not spend much energy on methodologically justified objections, such as – to cite just the most prominent one – recital 22 of the Directive which states that it does not touch upon 'the law of the Member States concerning collective action to defend the interests of trades and professions'.

Had anybody in the negotiations to the Directive realized that the Directive implied a European intervention into the unions' right to strike, protected by fundamental rights? Had anybody in Sweden noticed that the Directive, therefore, required a fundamental modification of the Swedish system of collective labour relations, as at least in the international context legal provisions about the universal validity of collective agreements have to be introduced? Even if Sweden's capable officials had properly understood the complex regulations and, hence, envisaged its danger: could they not rely on the fact that European interventions in Member States' collective action law would imply at least a careful and considerate examination of competences, given the negative competence norm in Article 137 (5) EC, as cautiously pointed out by GA Mengozzi?<sup>62</sup> Instead of charging the negotiations with Swedish concerns, could they not count on the fact that also the ECJ emphasised that the posted workers Directive did not aim at 'harmonising either the substantive rules of the Member States as regards employment law and the terms and conditions of employment relating, in particular, to rates of pay, or the right to resort to collective action'?<sup>63</sup>

The statements of the ECJ interpret the supremacy claim of European law in a very broad way: Directive 96/71 is certainly an important regulation in labour law. However, it is only concerned with a conflict situation within the internal market and is not element of a comprehensive European labour and social constitution, whereas the Sweden guarantee of the right to collective action has to be understood as an integral part of the Swedish social model.<sup>64</sup> Is the European Union, based on a rather daring interpretation of a European Directive, authorized to insist that Sweden reconfigures the role of unions and state competences, which constitute a part of the Swedish constitution?

### III.3 Viking, Laval and the vocation of the ECJ in constitutional politics

The references to conflict of laws in Section II above did not mention a query with traditional conflict of laws, which was raised by the American conflict of laws scholar Brainerd Currie back in the 1960s. This query concerned the judicial function in interstate constellations:

'[C]hoice between the competing interests of co-ordinate states is a political function of a high order, which ought not, in a democracy, to be committed to the judiciary: ... the court is not equipped to perform such a function; and the Constitution specifically confers that function upon Congress.'<sup>65</sup>

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<sup>61</sup> *Ibid.*, para. 70.

<sup>62</sup> GA Mengozzi, Opinion delivered 23.Mai 2007 – Rs. C-341/05 (*Laval*), Rz. 57 f. In sum, Mengozzi's examination does not convince. It is less problematic that he explicitly negates the barrier effect of Art. 137 (5) EC, but that he does not criticize the claimed competence according to Art. 47 (2) EC.

<sup>63</sup> Case C-341/05 (*Laval*), para. 68.

<sup>64</sup> See Case C-341/05 (*Laval*), paras. 10, 92.

<sup>65</sup> B. Currie, 'The Constitution and the Choice of Law: Governmental Interests and the Judicial Function',

Currie refers to the federal system of the US here. There are important differences to consider, before one applies his problematique to the EU.<sup>66</sup> One difference, or European peculiarity, was underlined at the beginning, namely, the sectoral decoupling of the social from the economic constitution – and the difficulties involved in the establishment of a single European *Sozialstaat*. The ECJ's argument implies that European economic freedoms, rhetorically tamed only by an unspecified 'social dimension' of the Union, trump the labour and social constitution (*Arbeits- and Sozialverfassung*) of a Member State. In view of the obstacles to the establishment of a comprehensive European welfare state, the respect for the common European legacy of *Sozialstaatlichkeit* seems to require both the acceptance of European diversity and judicial self-restraint wherever European economic freedoms come into conflict with national welfare state traditions. The ECJ is not a constitutional court with comprehensive competences. It is not legitimated to re-organize the interdependence of Europe's social and economic constitutions, let alone to replace the variety of European social models with a uniform Hayekian *Rechtsstaat*. It should therefore refrain from 'weighing' the values of *Sozialstaatlichkeit* against the value of free market access. Its proper function, we have argued, is to develop supranational law which compensates for the 'democracy failures' of nation states. National welfare traditions do not – by definition – represent such failures. Against the background outlined above (Section I), the watering down of welfare state positions through supranational law cannot be accepted as a correction of the failures of national democracy, but as a dismantling of modern democratic self-determination without offering any kind of replacement. The issue in the cases of *Laval* and *Viking* were the economic (ab)use of mere wage differences, which led the unions to react with national strategies in the *Laval* and post-national strategies in the *Viking* case. The unions took action, in order to counter the increased power of employers caused by the European economic freedoms. To argue that the right to collective action to national constellations is subject to a European right is not only to conceal the *de facto* decoupling of the social from the economic constitution, but also to *de jure* subordinate the former to the latter.

It seems telling that in both cases the move against old labour law was initiated from high wage countries. Is it in the long-term interest of the new Member States to dismantle the welfarism of their western and northern European neighbours? What would this mean for their long-term competitive advantage and their chances for similar developments? What does all this mean for Habermas' *monitum* to search for new co-operative European, instead of old national, responses to the social risks induced by globalisation?<sup>67</sup> A definite evaluation of the impact of *Viking* and *Laval* is not yet possible. It is sufficiently clear, however, that this jurisprudence is a step in the 'hard law' of negative integration. How about the chances for a correction of this step through 'social market economy', 'social rights' and the soft means of the Open Method of Co-ordination? It is evident that neither of these, despite the usually accompanying optimistic rhetoric, will do anything. The Court has, in its judgements, explicitly denied any legal effect of the EU-Charter's right to collective action, and it is more than doubtful that an already valid constitutional claim for a social dimension

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(1958), in *idem, Selected Essays* (Durham NC: Duke University Press, 1963), 188-282, at 272.

<sup>66</sup> The authors do not agree about the proper reading of Brainerd Currie. F. Rödl, 'Weltbürgerliches Kollisionsrecht' (note 58), part 2, A II.2, suggests that Currie's objection against a weighing of governmental interests in cases of true conflicts is to be understood in the light of the presence of federal legislator. Ch. Joerges believes, in contrast, that Currie's reserve against judicial activism is to be taken even more seriously in non-federal and truly international constellation.

<sup>67</sup> Cf. above at fn. 27.

of Europe's market economy would have led to a different conclusion. And it is sure that the question of supremacy of European market freedoms over the fundamental right to strike will not become a relevant issue in the proceedings of OMC.

Hence, Habermas may still be normatively right. The factual chances for his hopes to materialize, however, have further diminished.

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RECON is an Integrated Project financed by the European Commission's Sixth Framework Programme for Research, Priority 7 – Citizens and Governance in a Knowledge-based Society. Project No.: CIT4-CT-2006-028698.

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