



The competence of the EU concerning the right to strike

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1. One of the missing tiles in the mosaic

21st century Europe has within its reach to limit the cost of roaming in mobile telephony. Nonetheless, it has been unable to consolidate the social dimension of the internal market, even though the issue has been in its agenda since the 1980s, when the European Union, the single currency or the mobile phone were distant utopias. More than 60 years after the Treaty of Paris, the outlook shows nowadays a clear victory of the ‘Europe of the merchants’ over the ‘Europe of workers’, bringing to an end almost definitely the doctrinal attempts to find a ray of ‘social sunshine’ in European integration. The ‘almost’ stems from the realisation of the pessimist that, even against all odds, something social subsists in this internal market.

According to the increasingly remote Veil Report of 1997¹, with very few exceptions there was already in Europe a legislative framework that guaranteed freedom of movement of persons. Most of the problems that people encountered could be solved without needing to change the legislation². Workers and employers would thus regard the territory of member states as a single field of action for the workforce, but only in its individual dimension.

The collective dimension that inexcusably comes along with every system of industrial relations did not enjoy then, neither does it now, the same relevance. In fact, although the aforementioned Report, of significant length and drafted by a notable group of sages, is one of the best reflexions ever made

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¹ “Report of the High-Level Panel on the free movement of persons chaired by Mrs. Simone Veil”, presented to the Commission on 18th march 1997, C4-0181/97.

² The Communication of the Commission “Free movement of workers – the complete fulfilment of its advantages and possibilities”, less optimistic, recognized that “the reality is that there are still many practical, administrative and legal obstacles that keep citizens of the European Union from exercising their freedom of movement. It is also obvious that these difficulties prevent workers and employers from fully achieving the benefits and possibilities of geographic mobility”. Michèle BONNECHÈRE: La libre circulation des travailleurs dans l’Union européenne. *Droit Ouvrier*, no. 561 (1995), 322–323, 328–331, points out the situation of job seekers as one of the main deficiencies.

about free circulation, not a single reference to this extent could be found. And this is so, in spite of the strong social profiles of several members of the group, with backgrounds in politics and trade unionism.

The evaluation of the extent of the presence of a collective labour law in EU Law must start from the somewhat obvious delimitation of the category of “the collective” in the framework of the Social Policy of the European Union. Let us take as a departing platform a national *a priori*: the elements which will be analysed in pursuit of the collective dimension of the market are, with no originality, the identification of the workers’ representatives, inside or outside the company, collective bargaining and collective disputes. This national starting point is necessary because terminology in EU practice avoids an strict labelling and the doctrine itself is not much more expressive.

Resorting, in the first place, to the classification given by the *Directory of European Union Legislation in Force*³, it is easy to verify that in section 05, “Freedom of movement for workers and social policy”, none of the more than (obsolete, there is no denying it) 20 subsection yields such denomination. On the other hand, the somewhat more modern *Summary of EU legislation*⁴ includes the category “Social dialogue and employee participation”. This section is composed of “Cross-industry social dialogue, Sectoral social dialogue, Information, Consultation and Participation of employees”. In the EU terminology, here lies a peculiar manifestation of collective bargaining and workers’ representation in the company. Finding other aspects of collective bargaining and any mention to the conflict has proven itself to be more difficult, even though they are present in the outlook of the Union.

In any case, the three elements that articulate collective law are, all of them, present in primary EU legislation. The Treaty on the Functioning contains mentions of various natures to each of them, but its simple presence entails the base of the argument that the collective is not at all alien to the design of the EU. It could be argued that the notorious difference between the national systems of industrial relations makes it especially hard to tackle this issue. In an international organization that has been able to create a currency that buried the *Deutschemark*, the *franc* and the *peseta*, such excuse can only be laughed at. Political opportunity, and not legal foundations, is the main cause of the little development this subject has had. Ultimately, there does not seem to exist any interest in regulating intensively this issue, overlooking the evident benefits that could bring to the development of the internal market. It remains, thus, evoking Brillat-Savarin, like a dinner without cheese.

2. The regulation of the right to strike in the European Union: the orthodox approach

Among the aforementioned issues, disputes are the most significant absence. It cannot be maintained, truly, that the right to strike is not present in the Treaty on the Functioning of the European Union,

³ <http://eur-lex.europa.eu/browse/directories/legislation.html>

⁴ http://europa.eu/legislation_summaries/employment_and_social_policy/index_en.htm

since the Amsterdam reforms incorporated the content of the Social Protocol to the text of the then Treaty of the European Community. Nonetheless, its presence has a negative sense⁵.

Heir of the primordial article 2.6 of the Agreement on Social Policy of 1992⁶, article 153.5 TFEU states that “the provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs”⁷. From this wording it has been restrictively concluded that the European Union is not competent to regulate strike⁸. Such is the orthodox *opinio iuris*, which will be developed *comme il faut* in this section. In the next section, however, the aim will be to tear it down, since another understanding of the precept is more than possible.

The issues enumerated in this precept are especially sensitive. There is no need to talk about pay, money. It is enough to remember the naive statements of the Spaak Report, which included a reference to the spontaneous harmonization of salary levels and forwarded to the trade unions the task to “align” the working conditions. Since the 1950s there has not been the slightest intention to invade this field of state competence, except for the purpose of guaranteeing equality between men and women, resorting to other legal basis, as it will be seen further on.

On the other hand, both fundamental social rights, freedom of association and strike, are, probably, part of the sector of “the most sacred competences” of a State. As the highest exponents, along with collective bargaining, of the sense of a national model of industrial relations, they belong to the hard core of state power and any European incursion is not welcome.

In this section of the Treaty on the Functioning, the freedoms of association of workers and of employers are, anecdotally, at the same level⁹. Nonetheless, the wording knows numerous terminological variations, monistic and dualistic, in the different languages to express the diverse national situations. In any case, there should not be drawn any conclusion of this, since what this article does is purely and simply stating the limitations of the competence of the Union, without

⁵ MASSIMO ROCCELLA – TIZIANO TREU: *Diritto del Lavoro della Comunità Europea*. Padova, Cedam, 1992. 319.: “Il sostegno a tale diritti non si dovrebbe attuare necessariamente con direttive o regolamenti, ma tramite iniziative politiche delle autorità comunitarie: in specie di stimolo al riconoscimento reciproco fra le parti sociali e alla pratica del metodo negoziale”.

⁶ ROCCELLA–TREU op. cit. 314.: “La norma conferma la competenza esclusiva degli Stati membri, e quindi la non configurabilità di interventi regolatori delle autorità comunitarie (regolamenti/direttive), per gli aspetti interni delle dinamiche collettive”. Also Barry FITZPATRICK: Community Social Law after Maastricht. *Industrial Law Journal*, vol. 21, no. 3, (1992) 209.: “Despite some occasional examples of Community law upon collective labour relations [...], the bulk of Community Social Law harmonization to date, as Kahn-Freund might have anticipated, has been on the basis of substantive, individual rights. Hence the exclusion of the most sensitive Collective Labour Law issues from the operation of Article 2.6 of the SCA is hardly a great surprise”.

⁷ DAIVA PETRYLAITÉ – CHARLES WOOLFSON: Missing in action: The Right to Strike in the Baltic New Member States – an Absent EU Competence. *International Journal of Comparative Labour Law and Industrial Relations*, vol. 22, no. 4, (2006) 442.: “The absence of specific EU competence in the area of collective bargaining with respect to strikes has meant that the ILO has been the key norm-setting agency”.

⁸ ROLF BIRK: Grundlagen des Europäischen Arbeitsrecht. In Reinhard RICHARDI – Otfried WLOTZKE (eds.): *Münchener Handbuch zum Arbeitsrecht*. 2nd edition. Munich, Verlag C. H. Beck, 2000. §35: “Für diese heißen Bereiche bleibt es bei der Alleinzuständigkeit der Mitgliedstaaten und je nach innerstaatlichem Verfassungsrecht auch der Sozialpartner [...]. Der Ausschluß der genannten Rechtsmaterien durch Art.137 Abs.6 EGV [...] führt im übrigen auch zur restriktiven Auslegung der wirtschaftspolitischen Zuständigkeiten im Rahmen der Rechtsangleichung nach Art.94, 95 EGV”.

⁹ WOLFGANG DÄUBLER: La Carta de los Derechos Fundamentales de la Unión Europea y el Derecho Colectivo de Trabajo. *Revista de Derecho Social*, vol. 17 (2002) 24.: “El carácter de compromiso que de modo general define a los derechos sociales se hace aquí especialmente claro: tanto los empresarios como los trabajadores reciben su golosina, si bien ello no conduce de modo seguro hacia un sistema libre de contradicciones. También el debate respecto a la aceptación del cierre patronal se debe desarrollar previsiblemente de modo controvertido”.

entering in considerations about what is excluded. On the extent of this limit, even when admitting that the reserve of state competence in the internal sphere is legitimate¹⁰, it must be pointed out that the exclusion for the supranational aspects is especially objectionable. As long as there is not a clear mechanism that regulates the aggregate activity of workers and employers at a European level, the practical implementation of a European system of industrial relations will be severely handicapped, as reality shows with stubborn insistence.

Getting to the main point of this paper, as far as strike is concerned, it has been pointed out that the configuration of the EU model of social dialogue as collaboration rather than confrontation entails the exclusion of collective disputes¹¹. There have been, nonetheless, proposals for the creation of mechanisms of transnational solidarity on the occasion of national strikes, but they have not been taken into account. In reality some collective disputes that exceeded national borders have taken place, but they have been solved in accordance with the law of each country, with no intervention whatsoever by the Union or its legal *acquis*¹².

Another issue that must be highlighted about the treatment of strike in EU law, or more precisely the lack thereof¹³, is, similarly to what has been said for freedom of association, its placement at the same level as lockout in article 153.5 TFEU. This decision has been subject to turbulent debates¹⁴, since it entails altering the traditional treatment of the subject in the national legal systems. The fact that the Charter of Fundamental Rights has insisted in this parity approach, overlooking the avalanche

¹⁰ Fernando VALDÉS DAL-RÉ: Presentación. In: Fernando VALDÉS DAL-RÉ (dir.): *Libertad de asociación de trabajadores y empresarios en los países de la Unión Europea*. Madrid, MTAS, 2006. 34.: “Al margen de ello, tampoco puede pasarse por alto la difundida convicción – que en numerosos países forma parte de tradiciones sociales profundamente arraigadas – de que las libertades sindicales, tanto en su vertiente organizativa como en su vertiente de actividad, han de regirse por un principio de autonomía, debiendo limitarse la función de los poderes públicos a establecer unas reglas de juego muy amplias y flexibles, enderezadas si acaso, en su finalidad, a promover la autonomía colectiva [...]. Un lugar destacado ha correspondido a una causa en la que confluyen factores políticos con factores técnicos; esto es, la acusada heterogeneidad de los ordenamientos nacionales, heterogeneidad esta que afecta a los elementos más estructurales y estructuradores de los sistemas de relaciones laborales colectivas”.

¹¹ Brian BERCUSSON: *European Labour Law*. London, Butterworths, 1996. 540.: “The logic to this auto-exclusion is, perhaps, that the current state of EC level social dialogue is qualitatively different in that the normal means of pressure – strikes – are not (yet) operational at Community level”. In the same line, Jean-Michel DENIS: Les mobilisations collectives européennes: de l’impuissance à la nécessité d’alliance. *Droit Social*, no. 6, (2006) 675.: “D’abord, la CES privilégierait la carte de l’institutionnalisation, sa volonté acharnée de se voir reconnue comme l’interlocuteur privilégié de la Commission européenne et de l’UNICE s’effectuant au détriment d’une orientation plus mobilisatrice et combative”.

¹² DENIS op. cit. 674.: “Or, ce ne sont pas les conflits défensifs qui permettent la création d’une solidarité à large échelle. Lorsqu’il y a des licenciements collectifs dans différents pays d’Europe, chaque salarié souhaite qu’ils aient lieu dans le pays voisin. La solidarité n’est ni spontanée ni naturelle et l’unification du salariat a historiquement toujours été une tâche ardue”.

¹³ Miguel RODRÍGUEZ-PIÑERO Y BRAVO-FERRER: De Maastricht a Amsterdam: Derechos sociales y empleo. *Relaciones Laborales*, vol. I, (1998) 4.: “Esta exclusión ya fue criticada en su momento, no sólo por la asimilación del derecho de huelga y el de cierre, sino por dejar fuera de consideración una temática tan central en las relaciones laborales como es la libertad sindical”.

¹⁴ Bernard TEYSSIÉ: Le droit de lock-out. *Droit Social*, no. 9–10, (1994) 795–796.: “Il est, de surcroît, fort clair: le lock-out est un droit, à l’égal de la grève. Le temps n’est plus aux formules ambiguës, telle la reconnaissance par la charte sociale européenne [...]. Communautarisation du droit du travail [...] Le temps de l’esquisse est révolu: depuis longtemps dans le champ des relations individuelles, aujourd’hui dans celui, plus difficile à appréhender, des rapports collectifs. Négociation collective, conflits collectifs, représentation communautaire, tombent dans l’escarcelle du droit communautaire, recevant dessins nouveaux, volets supplémentaires [...] Pour le meilleur et pour le pire”. Against, Jean-Maurice VERDIER – Antoine LYON-CAEN: Sur le droit de lock-out et l’Accord européen relatif à la politique sociale du 7 février 1992. *Droit Social*, no. 1, (1995) 49–54.

of critics, can respond to a pursuit of consensus with the corporate bench, more reluctant to the recognition of these rights at the supranational level¹⁵.

Although the theoretical dimension of the scenario cannot be overlooked, its true practical consequences are negligible. The EU cannot regulate either, according to the orthodox version developed here. It has been argued, nonetheless, that the regulation of collective redundancies effectively protects workers on strike, as laid off collectively due to “one or several motives not inherent to the person of the workers”¹⁶.

The limited presence of strike in the background of the European Union is mainly placed in the hazy field of Charters of Rights. Once ruled out the resort to the main legal foundation of the Treaty, strike has been present in the Charters of Strasbourg and Nice¹⁷. In 1989, it was proclaimed “the right to resort, in case of conflict of interests, to collective actions, including the right to strike, notwithstanding the obligations arising from national regulations and from collective agreements”. In turn, the subsequent text, with a more careful wording, stated that “workers and employers, or its corresponding organizations, according to European Union Law and with national legislations and practices, are entitled to negotiate and sign collective agreements, at the appropriate levels, and to undertake, in case of conflict of interests, collective actions for the defence of its interests, including strike”. Obviously, no legal regulation has stemmed from such declaration, since the Strasbourg text lacked legal binding force and the Nice one, as it is known, includes the article 51.1 clause that reminds that the Charter “does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties”. The Charters of Rights, ultimately, are a dead end for the right to strike.

As it has been accurately pointed out, what the European Union does is merely recognizing the existence of the right to strike and freedom of association in the different member states and its full legitimacy, saving their its regulation for the internal dimension¹⁸. Nonetheless, isolation is not perfect and sometimes the *acquis* of the Union has an impact on the regulation of fundamental rights in industrial relations, as *Viking*, *Laval* and *Rüffert* brought to light.

The right to strike deserves a lot of attention from Members of the European Parliament, who have made more than one hundred written questions and oral interventions on the subject. Beyond that, strike is approached in the supranational legal system as a national reality which must be taken into account, or from a negative viewpoint, as a limit of the law. The first situation can be found in a

¹⁵ Massimo ROCCELLA: La Carta dei diritti fondamentali: un passo avanti verso l'Unione politica. *Lavoro e Diritto*, no. 2, (2001) 336.: “Un'equiparazione del genere, tributaria dell'idea di parità delle armi nel conflitto industriale, è peraltro da sempre presente in ordinamenti come quello tedesco e certamente avrà influenzato gli estensori della Carta”.

¹⁶ BERCUSSON op. cit. 516–517.

¹⁷ DAUBLER op. cit. 22–23.: “La Carta también contiene garantías sobre supuestos en lo que hasta el momento la Unión no tiene competencia. Un ejemplo significativo es la prohibición de la pena de muerte y de su ejecución en el Art.2.2, sin que hasta aquí la UE disponga de competencia penal ni tampoco competencias respecto a guillotinas o verdugos”.

¹⁸ Giovanni ORLANDINI: Libertà di circolazione delle merci: un limite comunitario al conflitto sindacale. *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, no. 4, (1999) 623.

norm so far away from social issues as Directive 77/489/EEC of the Council, of 18th July 1977, on the protection of animals during international transport¹⁹, but also in Regulations on labour statistics²⁰ or in Decisions of the Administrative Commission on Social Security for Migrant Workers²¹.

In turn, EU's incapacity to react urgently against grave violations of certain fundamental freedoms, pointed out by the judgement *Commission v. France*, led to the approval, on the basis of article 235 TEC, of Council Regulation (EC) No 2679/98, of 7 December 1998, on the functioning of the internal market in relation to the free movement of goods among the Member States²², later known as "Monti I" after the appearance of the "Monti II" proposal. This text recognises the superior value of the right to strike²³, pointing in Article 2 that "this Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States".

At the time, the first proposal of the Commission²⁴, nonetheless, had not adopted this viewpoint. It was severely criticized by the Economic and Social Committee²⁵ and by the Parliament²⁶, being modified by the Council, which established the current wording²⁷.

¹⁹ Its article 4.2 states that Member States "take all necessary measures to avoid or reduce to a minimum the suffering of animals when strikes or other unforeseeable circumstances in their territory impede application of this Directive".

²⁰ E.g., the Commission Regulation (EC) No 1737/2005, of 21st October 2005.

²¹ Decision no. 167 establishes that "with regard to the condition, laid down in Article 94(9), of the person concerned remaining subject to French legislation, no account shall be taken of interruptions of work of less than one month or of periods of temporary suspension of work due to illness, maternity, accident at work, occupational disease or unemployment, with the continued receipt of pay or receipt of corresponding benefits, except for pensions and annuities or because of paid leave, a strike or a lock out".

²² Stefan KADELBACH – Niels PETERSEN: Europäische Grundrechte als Schranken der Grundfreiheiten. *Europäische Grundrechte Zeitschrift*, no. 22–23, (2003) 695.: "Die ausdrückliche Nennung des Streikrechts in der bezeichneten Verordnung deutet jedenfalls darauf hin, dass man hier nicht unbeträchtliche Divergenzen befürchtet hat".

²³ Against, ORLANDINI op. cit. 662.: "Se il valore per così dire simbolico della disposizione in esame è innegabile, appare assai più dubbio il fatto che da essa possano ricavarsi significativi effetti di rilevanza giuridica [...]. L'articolo 2 del regolamento non pare insomma contribuire in maniera sostanziale al processo di emersione di una nozione europea di diritto di sciopero". Especialmente en su conclusión, pp.667-8: "Emerge cioè a livello comunitario un limite di natura puramente economica al conflitto collettivo, capace di incidere in varia forma sugli equilibri delle relazioni sindacali nazionali. Sia attraverso i principi fatti propri dalla Corte di Giustizia che attraverso il regolamento, viene esercitata una pressione sugli stati per impedire nei modi più efficaci l'attuazione dell'autotutela collettiva, se questa danneggia gli scambi commerciali transnazionali [...]. C'è quindi, un emergente principio ricavabile dal diritto comunitario che assume innegabile importanza per la regolamentazione del conflitto nei servizi essenziali; la libertà degli scambi è indicata come un bene essenziale nell'ordinamento comunitario da tenere in debita considerazione nella gestione di un conflitto sindacale. Il formale rispetto delle competenze statali, come visto, non impedisce che questo principio influisca sugli equilibri dei sistemi interni".

²⁴ COM (97) 619 final of 26.11.1997.

²⁵ Opinion of the Economic and Social Committee of 29th April 1998 on the 'Proposal for a Council Regulation (EC) creating a mechanism whereby the Commission can intervene in order to remove certain obstacles to trade': "Problems would arise if the Court of Justice were to be required to rule on the legitimacy of labour disputes, thereby encroaching on national legal systems. That would be at odds with the subsidiarity principle".

²⁶ Legislative resolution embodying Parliament's opinion on the proposal for a Council Regulation (EC) creating a mechanism whereby the Commission can intervene in order to remove certain obstacles to trade (9348/98 – C4-0441/98 97/ 0330(CNS)).

²⁷ Dyonissis DIMITRAKOPOULOS: Power, Norms and Institutional Change in the European Union: The Protection of the Free Movement of Goods. *European Journal of Political Research*, vol. 42, no. 2, (2003) 258–259.: "In addition, the initial reaction of the European Parliament was negative, on two grounds. As Peter Skinner, the European Parliament's rapporteur, put it, the Parliament considered that the Commission proposal was disrespectful of the principle of subsidiarity and the fundamental right of workers to take industrial action and strike. Contrary to long-established patterns of inter-institutional alliances, the Council thus found in the European Parliament an unexpected ally who allowed it to 'draw the teeth of the original Commission proposal' as Friedrich Wolf (a German Green MEP) put it".

It must also be highlighted the proposal of amendment of the President of the European Trade Union Confederation, E. Gabaglio, finally rejected, to introduce a clause on this subject in the European Constitution, in article III-153, on the free circulation of goods. Directive 2006/123/EC, for its part, also includes a precision of this kind, excluding from its field of application “the right to strike and to take industrial action in accordance with national law and practices which respect Community law”.

What is the conclusion that must finally be drawn from the prohibition of article 153.5 TFEU? That the competence of the European Union declared in article 153.1.f TFEU, concerning “representation and collective defence of the interests of workers and employers” does not include in this functional field the right to strike. Therefore, the European Union cannot support and complete the action of Member States in this subject, not even through the complex legislative procedure designed in article 153.2, which requires unanimity. There is no possible harmonization of national legislations.

3. The regulation of the right to strike in the European Union: the heterodox approach

Notwithstanding the stated, there is another way to understand article 153.5 TFEU and it cannot be exhibited as novelty. The debate from the viewpoint of the competence of the Union on strike must focus on the hypothetical resort to other legal basis to elaborate binding supranational legislation concerning these issues. The only sure thing is that there does not exist doctrinal consensus on the possible utilization of generic bases to elaborate, given a previous political agreement, typical acts with this content. As a sample of these dissident stances, arguments based on the literality of article 153.5 TFEU²⁸ and the necessity to interpret restrictively the exceptions included in the Treaty have been used to defend this possibility²⁹.

As it is well known, the functioning of the European Union is based on the principle of conferral of competences. That is, the Union only has the competences conferred by Member States through primary EU legislation. To guarantee legal security in this complex situation, the system relays on the election of the appropriate legal bases³⁰. The specific character of the competence of the Union, its condition of conferred competence and of variable intensity and the general principle that keeps the Union and its institutions from overstepping the limits and objectives that the Treaty imposes, thus, require that all action is based on a legal basis or foundation.

²⁸ For all, when the numeration was 137.6 TEC, Pierre RODIÈRE: *Droit social de l'Union Européenne*. Paris, LGDJ, 2002. 54.: “Il ne faut voir dans ces exclusions qu'un principe traduisant une volonté politique. Il n'empêche que le réservoir de compétence potentielle de la Communauté que ménagent les dispositions de l'article 100, celles de l'article 235, voire encore celles de l'article 100 A, est très largement ouvert [...]. Si nécessité il y a, il peut être passé outre aux exclusions proclamées. Bien entendu, les principes de subsidiarité-proportionnalité s'exprimeront alors avec la plus grande force”.

²⁹ Roger BLANPAIN: *European Labour Law*. 8th edition. The Hague, Kluwer, 2002. 127.: “In the light of the fact that the Chapter on Social Provisions aims at the construction of a social Europe, Article 137 (6) TEC must be seen as an exception to the general rule and has thus to be interpreted restrictively”.

³⁰ Luis Miguel HINOJOSA MARTÍNEZ: *El reparto de competencias entre la Unión Europea y sus Estados miembros*. Valencia, Tirant lo Blanch, 2006. 29.: “Debe quedar claro, en cualquier caso, que es la base jurídica, y no la norma que establece los objetivos, el único fundamento de la competencia comunitaria”.

From there arises the importance of the determination of the legal basis of each intervention, when analysing the extension of the competences of the Union and its translation through the exercise of the corresponding powers. The grand and evanescent statements of the initial articles of the Treaties must be thus completed with the detailed provisions of the precepts that will constitute the necessary legal support for the practical implementation of the mechanisms destined to realise such objectives.

The content of the legal basis includes the actors, the means and the modes of operation, detailing the pertinent procedures and instruments. This guarantees the respect to legal security and offers the European Court of Justice a parameter of control. In fact, the case-law of the Court has insisted in the importance of the correct election of the legal basis, which must be founded on objective elements susceptible of jurisdictional control, among which are the purpose and the content of the act³¹, not being admitted the belief of an institution as a single cause³². Sometimes, this election will have to be settled between two or more precepts, which can forward to different procedures, voting rules or instruments. Throughout several judgements, the Court has coined the criterion of the “centre of gravity”, which means that the analysis of the particular content of the act can evidence which is its main purpose³³. At times, such election will not be necessary; on the contrary, a multiple foundation will be imperative, as the Court has also pointed out³⁴.

In general, two types of legal bases can be distinguished: the specific or particular ones³⁵ and the generic ones. The first ones correspond to articles included in particular parts of the constitutive Treaties, which regulate exclusively the activity of the Union in an exact field. The afore-mentioned article 153.1 TFEU is the perfect example in social issues, a catalogue of fields of action with its procedures and its limitations.

In turn, when referencing the generic bases, we have in mind precepts whose field of application is defined more vaguely, accommodating multiple measures that may have little in common and that are of application in the absence of a specific basis. Their exercise must always be linked to the achievement of a goal set in the Treaty³⁶. This kind of generic legal bases is not free from controversy³⁷, and three articles of the Treaty of Functioning, as far as this work is concerned, respond to this diffuse characterization: 114, 115 and 352 TFEU (former articles 100 A, 100 and 235 TEEC; and 95, 94 and 308 TEC, successively).

³¹ C-155/91, *Commission of the European Communities v Council of the European Communities* [ECLI:EU:C:1993:98].

³² 45/86, *Commission of the European Communities v Council of the European Communities* [ECLI:EU:C:1987:163].

³³ Tomás DE LA QUADRA-SALCEDO JANINI: *El sistema europeo de distribución de competencias*. Madrid, Thomson-Civitas, 2006. 108–114.

³⁴ 165/87, *Commission of the European Communities v Council of the European Communities* [ECLI:EU:C:1988:458].

³⁵ José MARTÍN Y PÉREZ DE NANCLARES: *El sistema de competencias de la Comunidad Europea*. Madrid, MacGraw Hill, 1997. 147.

³⁶ C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union* [ECLI:EU:C:2000:544], concerning Article 95 TEC: “To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it.”

³⁷ HINOJOSA MARTÍNEZ op. cit. 51–54.

The relation between articles 114 and 115 TFEU is patent, inasmuch as both are placed in Chapter 3 of Title VII of the Treaty, dedicated to the approximation of legislations. The Treaty of Lisbon has inversed their classic placement, since the first one traditionally functioned as *lex specialis* before the second one³⁸.

The problems detected in the functioning of article 100 TEEC throughout the years led to the creation, with the Single European Act, of article 100 A TEEC, re-enumerated in Amsterdam as article 95 TEC³⁹ and in Lisbon as 114 TFEU. It is much longer and more verbose than its predecessor and it was reformed several times before reaching its current wording. Its first section establishes that “save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26”. The Court has nuanced its scope, pointing out that “if a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of article 100 TEEC as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory”, requiring that the adopted act “must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market”⁴⁰.

Under this article, the Council, acting in accordance with the ordinary legislative procedure and after consulting the European Economic and Social Committee, shall adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. In the wording of the Single Act, the prescribed procedure was cooperation, being substituted due to the Treaty of Maastricht by co-decision. The current voting rule for the ordinary legislative procedure is qualified majority, with all that this represents for extra flexibility, and has been so since its inclusion in the Treaty. Additionally, there is not here a direct prescription on the instrument that shall be applied, referring to “measures”, thereby being the election subjected to the principle of proportionality.

Nine more sections complete this precept, limiting and conditioning its scope one way or another⁴¹. The most important limitation is included in paragraph 2 through the prohibition of the utilization of Article 114 TFEU to regulate “the rights and interests of employed persons”⁴². That is the only appearance of such terminology in the language employed in primary EU law⁴³. As far as the content of the

³⁸ Javier Díez-Hochleitner – Carmen Martínez Capdevilla: *Derecho de la Unión Europea*. Madrid, MacGraw Hill, 2001. 181.

³⁹ On this precept, de la Quadra-Salcedo Janini op. cit. 69–72. On its possible condition of exclusive competence of the Community, 125-6. It endured in the Project of European Constitution in Article III-172.

⁴⁰ C-376/98, Federal Republic of Germany v European Parliament and Council of the European Union [ECLI:EU:C:2000:544]

⁴¹ Cfr. Díez-Hochleitner–Martínez Capdevilla op. cit. 182.: “Aunque la realización del mercado interior comporta la libre circulación de mercancías, personas, servicios y capitales, el artículo 95 prácticamente ha limitado su juego al primero de los ámbitos citados; en otras palabras, los actos adoptados en virtud del artículo 95 tienen por objeto, fundamentalmente, la aproximación de las legislaciones nacionales que los artículos 28ss. dejan subsistir y cuyas divergencias afectan al intercambio intracomunitario de bienes [...]. Ello se explica por cuanto las otras libertades cuentan con cláusulas específicas para la aproximación de las legislaciones”.

⁴² Introduced either by German pressure (Elianne Vogel-Polsky: *L’Acte Unique ouvre-t-il l’espace social européen? Droit Social*, no. 2, (1989) 184.) or British pressure (Bercusson op. cit. 68.; Rodière op. cit. 42.).

⁴³ Three possible interpretations in Elianne Vogel-Polsky: *Quel futur pour l’Europe sociale après le sommet de Strasbourg? Droit Social*, no. 2, (1990) 222–223. Against these interpretation Roccella–Treu op. cit. 19.: “Il significato di quest’espressione è stato

rule is concerned, it was severely criticized at the moment of its appearance, since it pushed aside the promising flexibility of this instrument in social issues, at a time where qualified majority and the co-operation procedure opened unexplored ways for the realization of the internal market⁴⁴. Reality has demonstrated that social issues were indeed excluded from the scope of this precept⁴⁵, with some possible and discussed exceptions in the area of workplace health and safety⁴⁶. The social norms passed with the entry into force of the Single Act and the passing of the Treaty of Maastricht had as legal basis either Article 118 A TEEC on health and safety or Article 100 TEEC for the remaining cases (Directives 91/533/EEC and 92/56/EEC). The current existence of proper legal bases, which foresee the making of decisions by qualified majority, seems to have relegated this discussion to academic bookshelves⁴⁷.

On the other hand, Article 115 TFEU establishes that “without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market”. This was basically the 1957 text inasmuch as Article 100 TEEC, since it has only been affected by procedural adjustments that reflect the changing institutional balance⁴⁸. It enumerates subjects, establishes a voting rule, unanimity, and a special legislative procedure (the classic consultation), both very strict, and it sets directives as the only legal instrument applicable⁴⁹, in accordance to a cause which at first glance can be considered very wide⁵⁰.

oggetto di diverse interpretazioni tendenti a restringerlo, ma con poca fortuna ed invero scarso fondamento”.

⁴⁴ Vid. VOGEL-POLSKY (1989) op. cit. 184.

⁴⁵ So it was already considered by John A. USHER: The Competences of the European Community with respect to Social Law and the Principle of Subsidiarity. In: Georg RESS – Torsten STEIN (eds.): *Europäischer Sozialraum*. Baden-Baden, Nomos, 1995. 70.: “Nevertheless, by its terms art.100 A cannot be used in relation to the free movement of persons or in relation to the rights and interests of employed persons, which limits, if it does not totally eliminate, its scope in the area of social policy”.

⁴⁶ In pursuit of an exception for this stony uniformity, RODIÈRE op. cit. 42.: “C’était oublier le principe que l’accessoire suit le principal. Malgré l’exclusion formulée par son paragraphe 2, il a été possible de fonder sur l’ex-article 100 A des textes intéressant les intérêts des travailleurs. Encore a-t-il fallu que cet objet – les droits des travailleurs – apparaisse comme secondaire par rapport à un objet principal entrant dans le domaine de l’ex-article 100 A. Exemple, la liberté de circulation de ce type particulier de marchandises que constituent des machines utilisées dans les entreprises a formé l’objet principal d’une directive fondée sur l’article 100 A, dont l’objet était aussi de protéger les travailleurs contre des dangers que présentent ces marchandises, objet secondaire qui suit le principal”. Also BERCUSSON op. cit. 68–69.

⁴⁷ Nevertheless, some have thought to see connexions between this prohibition and what is included in Title XI. Carl Fredrik BERGSTROM: L’Europa oltre il mercato interno: commento al Trattato di Amsterdam. *Rivista Italiana di Diritto Pubblico Comunitario*, no. 1, (1998) 7.: “Si deve inoltre osservare che nel Trattato di Amsterdam non è stato fatto niente per revocare l’esclusione attuali dei diritti ed interessi dei lavoratori dipendenti dalla procedura per l’adozione di disposizioni legislative e regolamentari d’armonizzazione a maggioranza qualificata”. Also Gianni ARRIGO: Gli aspetti positivi delle riforme in materia sociale. In: *Trattato di Amsterdam e dialogo sociale europeo*. Milan, Giuffrè, 1998. 52.: “Problemi di coordinamento sussistono tra il par. 1 dell’art. 118 e il par.2 dell’art.100 A, che prescrive la procedura di deliberazione all’unanimità quando si tratti di diritti e interessi dei lavoratori dipendenti nel quadro del mercato unico”.

⁴⁸ The version that included Article III-173 of the Project of European Constitution was very similar.

⁴⁹ Riccardo MONACO: Comparaison et rapprochement des législations dans le marché commun européen. *Revue Internationale de Droit Comparé*, no.1, (1960) 67–68.: “Evidemment le rapprochement des normes est assigné comme but obligatoire aux Etats membres, mais il faut bien se rendre compte que les institutions de la Communauté ne sauraient jamais indiquer le procédé concret d’après lequel chaque Etat devrait effectuer le rapprochement recherché. Voilà pourquoi le système de la directive répond assez bien à la nécessité d’obliger l’État à pourvoir au rapprochement sans, d’autre part, altérer son système normatif”.

⁵⁰ Daniel VIGNES: Rapprochement des législations. In: J. MEGRET (dir.): *Le Droit de la Communauté Économique Européenne. Commentaire du Traité et des textes pris pour son application*, vol.5. Brussels, Éditions de l’Université de Bruxelles, 1973. 154–155.: “Certes, en bonne logique, on ne peut rapprocher ce qui n’existe pas et il semble ambitieux, sur la base de l’article 100,

In fact, the incidence in the common market sheltered for some time a very considerable number of directives on the most diverse topics, among which were, indeed, social issues. Under this legal basis the directives on salary equality between men and women, collective redundancies, transfer of undertakings or protection of employees in the event of the insolvency of their employer, among others, were passed. This balance is ample proof that the precept is a very powerful instrument for the construction of social Europe.

Lastly, the *finalist* instrument *par excellence* must be mentioned: Article 352 TFEU (initially 235 TEEC and subsequently 308 TEC). The Treaty of Rome stated that “if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures”.

Nowadays, after the reform carried out by the Treaty of Lisbon, it states that “if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament”.

The new paragraph 3 is much more interesting than the change in wording, which does not alter the essential content of the precept. It established that “measures based on this Article shall not entail harmonisation of Member States’ laws or regulations in cases where the Treaties exclude such harmonisation”. The connection to Article 153.5 TFEU is obvious and will be subject to further consideration.

This “competence improvidence clause”⁵¹ has its origin in the lack of symmetry between the particular powers conferred to the institutions and the objectives assigned by the constitutive Treaties⁵². From the beginnings, the instruments put into the hands of the supranational organization were clearly insufficient for the achievement of the set aims, and hence this clause was included, which avoided Treaty reform to adapt and update the operating mechanisms of the organization⁵³.

d’obliger un État membre à créer une législation dont il n’a pas jusqu’ici éprouvé le besoin [...]. Quoi qu’il en soit, le Conseil a interprété l’article 100 comme lui donnant la possibilité de prendre une directive nonobstant l’absence dans un ou plusieurs Etats membres d’une législation spécifique applicable”.

⁵¹ HINOJOSA MARTÍNEZ op. cit. 44.

⁵² Guy ISAAC: *Manual de Derecho Comunitario General*. (translation by G-L. Ramos Ruano), 3rd edition. Barcelona, Ariel, 1995. 47.

⁵³ Emmanuelle HAMAMDJIAN: *Le système de répartition des compétences entre la Communauté et les Etats membres*. Paris, Université Paris I – Panthéon – Sorbonne, 2000. 32–33.: “On ne trouve pas de compétence dont il faudrait renforcer l’exercice mais, à l’inverse, un constat d’incompétence, obstacle à la réalisation d’un objectif communautaire. Aussi, les compétences subsidiaires ont-elles pour objet de pallier directement les lacunes de l’attribution de compétence de compétence à la Communauté. Elles constituent, en ce sens, un supplément de compétence, c’est-à-dire une extension de compétence au-delà des prescriptions du droit originaire, à tel point que l’on a pu s’interroger sur les rapports qu’entretient la réserve de compétence de l’article 308 avec la procédure formelle du Traité qui faisait alors l’objet de l’article 236”.

The existence of this article has known many diverse phases. It was initially refused by the States, having on the other hand during the 70s a very wide utilization, going well beyond 80 specific acts between 1973 and 1977, which extended communitarian competence in the most various sectors⁵⁴. Among them were social issues, which in this period and the 80s added to its normative cast the directives on equal workplace treatment between men and women and on social security. Once more it is confirmed that one of the generic bases has the capability to intervene in social issues.

The consolidation in the Treaties of some of these issues due to the Single Act and the Treaty of Maastricht was a deterrent for its utilization. Opinion of the Court of Justice 2/94⁵⁵, on the accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, established the doctrine that can be considered definitive and the only one valid in a field which has been subject to many doctrinal divergences.

According to it, the conditions of application of Article 352 TFEU, which are still the same as for Article 235 TEEC, can be derived from its own formulation: the action must be necessary, must be oriented to the achievement of the objectives set in the Treaty and the precise powers of action must have not been foreseen in the text. The interpretation of these criteria after the 70s has been more flexible⁵⁶, allowing for a frequent resort to this mechanism. Since the Summit of Heads of State and Government of Paris in 1972, it was decided to “make the widest possible use of all the dispositions of the Treaties, including Article 235 of the EEC Treaty” to deepen European integration. The procedure for the making of such measures still requires for unanimity in the Council, on a proposal from the Commission and now also after obtaining the consent of the European Parliament.

The “finalist” condition clearly redirected in its beginnings to Articles 2 and 3 TEEC, to which was added the idea of economic and social cohesion, and also any objective cited specifically in any other part of the Treaty⁵⁷, hence relieving notably this requirement. The inclusion in the current Treaty of the European Union of a wide catalogue of goals, which goes beyond the initial list, notably extends the possibilities.

A consultation to the Directory of EU legislation, nonetheless, cools down these high expectations, inasmuch as from 2012 this legal basis has seldom been utilized, except for international relations with Switzerland and San Marino and punctual acts such as the electronic publication of the Official Journal of the European Union or the “Europe for Citizens” programme.

The lack of powers also presents many different shades. The Council can decide that those foreseen in the Treaty are inadequate, because they are either temporarily inapplicable or insufficient to achieve the desired objectives. In this case the resort to Article 352 TFEU would also be considered

⁵⁴ ISAAC op. cit. 48–49., for a synthetic enumeration.

⁵⁵ Opinion of 28.03.1996, 2/94, Rec.1996, I-1759.

⁵⁶ The Council, questioned by a Member of the European Parliament in 1982, affirmed that an abstract and general reading of this article was not possible, but the specific case had to be addressed.

⁵⁷ A. G. TOTH: *Oxford Encyclopaedia of European Community Law*. Oxford, Clarendon Press, 1990. 500.

correct, in pursuit of a more appropriate legal basis⁵⁸ as a complement to fundament the competence from which derive all the measures to adopt. Finally, the requirement of the necessity of the action remains. It must be valued not only from a legal perspective, but also taking into account economic, technical, and political or any other factors, so the decision-making capacity of the Commission, which acts as promoter, is very high.

Ultimately, the three generic legal bases offer very different results when examined from the perspective of the right to strike. Article 114 TFEU must be set aside. The prohibition of its second paragraph of regulating the rights and interests of employed workers is an unsurmountable barrier against the elaboration of social legislation. The precedent of not having been used for this subject is definitive.

The most flexible of the bases, Article 352 TFEU, is in turn hampered by the prohibition of harmonization of what is forbidden. As it has been already pointed out, the connexion with Article 153.5 TFEU is obvious and it would not make sense to use this basis to harmonize the national legislations on strike. Inasmuch the prohibition concerns harmonization, strictly. Paradoxically, the precept prohibits the least, but not the most: it talks about “appropriate measures”, not about Directives like Article 115 TFEU does. Article 352 TFEU could hence be the basis to unify regulations on strike, provided that it was linked to any of the aims included in the Treaties.

Let us simply think on the scope that could be derived from the proclamation in Article 3.3 TEU of a “highly competitive social market economy, aiming at full employment and social progress”. A democratic model of industrial relations, obvious corollary of social progress besides totalitarian fantasies, must necessarily include the recognition of the right to strike.

It is evident that the possibility here considered is close to *lege ferenda – fiction*. Only an Isaac Asimov of European Union Law may conceive an EU Regulation that unifies national law on the right to strike. But what would happen if such Regulation placed itself in the “creative” position that had the Regulations on Social Security? Who but the European Union could create, *ex nihilo*, a legislation on an issue that escapes national competence? The States, due to their own configuration in international society, see their competences vanish beyond their own borders. The transnational powers escape their powers and only the Union can fill that void. In the next section, when analysing the proposal of Regulation Monti II, this idea will be resumed.

The third flexible legal basis, Article 115 TFEU, was at a time the arsenal of the Social Europe, paraphrasing FDR. It only allows for the passing of Directives, certainly, that contribute to the better functioning of the internal market. And the free circulation of workers is, obviously, a key element of the internal market. Those workers’ collective rights should therefore be a part of the regulation of the

⁵⁸ G. ARRIGO: Politiche sociali comunitarie. In: A. BAYLOS GRAU (ed.): *Dizionario di Diritto del Lavoro Comunitario*. Bologna, Monduzzi, 1996. 234.: “Il solo limite invalicabile è costituito dalla natura socioeconomica dell’azione, corrispondente del resto allo scopo generale della Comunità: non è quindi consentito il ricorso all’articolo 235 per un’azione diretta a scopi meramente culturali o di difesa”.

internal market. The question is if such regulation could be national or supranational. History shows that Article 100 TEEC made the approximation of national legislations possible, but common sense points out that only a supranational regulation would be viable politically.

Finally, it can be affirmed that there are in the Treaty on the Functioning of the European Union enough legal bases for the elaboration of a European regulation on the exercise of the right to strike in its transnational dimension. The prohibition of Article 153.5 TFEU must be understood as a limitation of the capacity to harmonize national legislations on this subject, but it cannot go beyond. Therefore, we can. Do we want to?

4. Collective actions vs. Community freedoms: the Regulation Monti II.

Fewer unborn have given rise to such an effusion of literature, and so little optimistic⁵⁹, as the Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, better known as Monti II⁶⁰.

As it is well known, judgements *Viking*, *Laval* and *Rüffert* caused a socio-political storm like no other the European Court of Justice had ever unleashed. There was no actor in the European social panorama that did not take a stand, overwhelmingly against. Directive 96/71/EC was challenged and the calls to boost the social dimension of the internal market were in the rise.

In his context, the European Commission entrusted the former commissary of Competence, Mario Monti (still not embarked in his unsuccessful Presidency of the Council of Ministers of Italy), with the elaboration of a Report entitled “A New Strategy for the Single Market”, which was presented on May 9th 2010.

Picturesquely, the Report opened with two quotes from two characters so distant as Paul-Henri Spaak, who insisted in the necessity of political solutions and not just economic ones, and Margaret Thatcher, who supported the benefits of a single large market. Section 3.2, in the chapter dedicated to the building of a consensus that made the market stronger, addressed directly the question of economic freedoms and workers’ rights.

⁵⁹ For all, Andreas BÜCKER: A comprehensive social progress protocol is needed more than ever. *European Labour Law Journal*, no. 4, (2013) 9 and Theodoros PAPADOPOULOS – Antonios ROUMPAKIS: Metarreglamentación de las relaciones laborales en Europa: dinámicas de poder y competencia entre normativas nacionales. *Revista internacional del Trabajo*, vol. 132, no. 2, (2013) 302–303.: “Junto a la cuestión fundamental de que la aplicación del principio de proporcionalidad no se ajusta al derecho internacional, sumada a las restricciones prácticas que pesan sobre el ejercicio del derecho de huelga debido al riesgo omnipresente de ruina que representaría para un sindicato una demanda por daños y perjuicios (Bruun y Bucker, 2012, pág. 3), los juristas han planteado otros dos problemas clave (Novitz, 2012). En primer lugar, la formulación de las disposiciones sobre protección de los derechos del trabajo sigue haciendo que el ejercicio del derecho de huelga esté sujeto a la legislación comunitaria. En otras palabras, somete al citado derecho a la misma jerarquía de valores consagrada en las sentencias del TJUE, la cual no puede calificarse precisamente de «enfoque equilibrado». En segundo lugar, como plantea Novitz, habida cuenta de que esta informalidad debilitaba considerablemente la capacidad de los sindicatos para ejercer eficazmente sus derechos, «¿qué función cumpliría ‘el mecanismo informal de resolución de conflictos’ en relación con la proporcionalidad, en lo que respecta a la capacidad de los sindicatos para adoptar medidas legales de acción colectiva?»”.

⁶⁰ COM (2012) 130 final, 21st March 2012.

Out of the five pages dedicated to the question, in which an assessment of the situation is made and the meetings held to form an opinion are revealed, it is worth pointing out that the mentioned rulings are previous to the Treaty of Lisbon and to the aforementioned social market economy clause and the normative force of the Charter of Fundamental Rights. According to Monti, not a suspect of any Social Democrat drift, this point had to have an influence in the elaboration of a new legislative context. Nonetheless, he pointed out that the regulation of strike at European Union level was explicitly forbidden by the Treaty, aligning with the orthodox opinion expressed in Section 2 of this paper.

His recommendation aimed at the conciliation of collective rights with economic freedoms, taking as a model the 1998 Regulation, elaborated during his period in office at the Commission. The new text would include the magical balance rule and a system of early warning among States⁶¹. The melody was hence composed. It was just necessary to orchestrate it and such was the Commission's task, expressed in the document that will be now analysed.

Formally, the proposal presented by the Commission was striking at the least. Out of a nineteen-page document, fourteen pages were the explanatory memorandum. And out of five pages dedicated to the proposal, almost three were the previous recitals, and the total five articles did not exceed the 700 words. Since the Gettysburg Address, never a text so short had caused such reaction.

In the strictly theoretical field, the proposal deserved some praising, although not much. Fewer times had a document collected at such length the jurisprudence of the Court of Justice and also that of the European Court of Human Rights. It is true nevertheless that its reading of *Viking* or *Laval* seemed to express just the opposite to which everyone else had understood in them⁶². In any case, the almost doctrinal elaboration effort was present.

As far as the consultations conducted between interested parties, the document clearly reflected the respective positions of European social agents. Whereas BusinessEurope did not consider necessary any new regulation, the European Trade Union Confederation still asked for the revision of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. This stance

⁶¹ “The purpose of the Regulation in fact is to renew the commitment to the free movement of goods while excluding any negative impact on the exercise of the right to strike. It sets out a prohibition of actions that “cause grave disruption to the proper functioning of the internal market and inflict serious losses on the individuals affected” whilst recognising that the right to strike is unaffected by that prohibition. A system of early warning about obstacles to free movement of goods and exchange of information between the concerned Member States is set up to build mutual confidence. The Commission plays an arbitration role, as it can request the Member State concerned to remove the identified obstacles to free movement of goods by a given deadline. Without the need to touch the posting of workers directive, if measures are adopted to clarify its application, the Commission and the social partners could examine in that context whether to look at the model offered by Council Regulation (EC) No 2679/98. This would require to introduce a provision ensuring that the posting of workers in the context of the cross-border provision of services, does not affect the right to take industrial action and the right to strike as it is protected by the European Charter of Fundamental Rights and in accordance with national law and practices which respect Community law. After all, a similar provision safeguarding labour law has been introduced in the text of the services directive, with slightly different terms from those of Council Regulation (EC) No 2679/98. Such a provision could be complemented by a system for the informal solutions of disputes concerning the application of the posted workers directive when they risk causing a significant impediment to the functioning of the single market. In such situations, the social partners should refer the matter to the host Member State. The Member State should seek an informal solution, keeping informed the Commission as well as the Member State of origin of the posted workers and companies involved. If the parties refuse the solution proposed, they would be free to defend their rights in court”.

⁶² For all, Diamond ASHAGBOR: Unravelling the embedded liberal bargain: Labour and social welfare law in the context of EU market integration. *European Law Journal*, vol. 19, no. 3, (2013): “Monti II Regulation is something of a disappointment, as it barely moves the debate on from the Court's existing jurisprudence”.

was supported, already since 2008, by the European Parliament, and since 2010 by the European Economic and Social Committee. Parallel to these opinions, the positions of the social interlocutors were the same concerning a regulation such as the one brought forward: for BusinessEurope, unnecessary; for the ETUC, a positive step in the right direction. Let us bear in mind, in any case, that these opinions derived from the consultations that the Commission conducted concerning the pertinence of an intervention by the Union, not on its content.

When addressing the relevant legal basis, however, the solidity of the proposal fell down, not because it was not right but due to a lack of justification. Article 352 TFEU was the appropriate basis, the document stated, without further explanation. There was not any reference to the objectives pursued, but the evidence that there was no other relevant competence. Ultimately, this motivation (or the lack thereof) completely ignored all that has been pointed out by the Court of Justice in its jurisprudence. It was almost a *Diktat* of the Commission and not a reasoned elaboration. Truth be said, as far as the principle of subsidiarity is concerned the explanation would be slightly more elaborate, but this deficiency was undeniable.

The justification of the use of a Regulation was, in contrast, more extensive. The first explanation offered was the fact that it would be a supranational regulation, for the entire Union, concerning cross-border questions, and therefore did not entail any harmonization at all. A second element was the reduction of the legal complexity based on a single norm for all Member States, which would doubtlessly solve the existing dilemmas on applicable legislation.

In third place, the analysis of the principles of subsidiarity and proportionality remained. Strikingly, here was where the proposal brought up Article 153.5 TFEU, as if the matter were the exercise of competences and not the conferral of such. In a nutshell, it insisted in two aspects: the incapacity of States to regulate the question on their own and the respect to national models of labour relations. The effect of the put into practice of the Protocol on these principles will be seen later.

Turning now to the text, the first article, to define the field of application of the Regulation, copied again Article 2 of the Regulation Monti I, adding in this occasion that besides not affecting strike, it did not influence the national practices of collective bargaining either.

The most controversial novelty appeared in Article 2 of the proposal, which imposed that the exercise of economic freedoms shall respect the fundamental right to take collective action, naturally including the right to strike, but that, conversely, this right shall respect economic freedoms. Such a Kantian formulation of the respect to both principles entailed a clear conflict of legitimacies. On the one hand, strike, enshrined in all national legal systems – more or less extensively, truth be said – as the supreme instrument of the workers for the defence of their interests. On the other hand, economic freedoms, arising exclusively from its supranational source, newcomers to the world of the social State.

This pacific coexistence reminds more of the Ribbentrop – Molotov pact than of a true coexistence agreement. It is a contrived distillation of the jurisprudence of the Court of Justice, which was strikingly cherry-picked, in an exercise already told in the memorandum of the proposal, to enshrine this equality in a text, despite the fact that such equality is not actually real⁶³.

Article 3 of the proposal is the longest in all the text and perfectly exemplifies the delicate balances to be reached when drafting regulation concerning such a sensitive issue. The precept was dedicated to the appropriate mechanisms for the resolution of this type of disputes, a question that has been part of the preoccupations of the European Commission for over a decade, and on which has requested three independent reports, besides other initiatives.

Article 3 of the proposal expressed a well settled line in the jurisprudence of the Court of Justice on a general basis, not specifically for this purpose. When in national legislation or practices there are procedures for the safeguarding or protection of certain rights, they shall also be applicable to the situations that derive from European Union Law. The internal dispute solution mechanisms, therefore, must also serve to cope with transnational disputes.

The second paragraph opened the door to a path of great theoretical interest, the elaboration of agreements or guiding principles by the European social interlocutors concerning extrajudicial solution of disputes. Two aspects, in the simple field of terminology, attract our attention. Firstly, mediation and conciliation were cited, but not arbitration, subsumed in “other mechanisms”. Secondly, the proposal kept (in the Spanish version) using the term “extrajudicial” instead of other more current wording such as “alternative solution”.

This proposal is a good indication of what the development of Article 152 TFEU could be, after it was introduced in the Treaty of Lisbon, if there were a true willingness for the development of autonomous social dialogue. However, the perspective of the elaboration of such an agreement at the present time brings us back once again to the domain of Law-fiction.

Paragraphs 3 and 4 pursued to fit together the described mechanisms and judicial procedures existing in each State. The highlight was the indication that it corresponded to the latter to determine the proportionality of collective actions⁶⁴. The reading of this indication stands out boldly after the *Fonnship* judgment of 2014, where in a new conflict between collective actions and economic freedoms the Swedish Court refused to present to the Court of Justice the material aspects and merely requested the interpretation of the purely commercial aspects of the case.

Article 4 of the proposal, in turn, designed an interstate alert mechanism for the most extreme situations. In a nutshell, it consisted in a duty to notify the member State of origin of the services,

⁶³ Jonas MALMBERG – Caroline JOHANSSON: The Commission’s Posting Package. *European Policy Analysis*, no. 8, (2012) 3.: “The ambition of the Commission is, according to its press release, to ‘send a strong message that workers’ rights and their freedom to strike are on an equal footing with the freedom to provide services’. Does the proposal send such a strong message?”

⁶⁴ MALMBERG–JOHANSSON op. cit. 4.: “The proposal uses a ‘three-stage test’ (appropriate, necessary and reasonable to realise the fundamental freedom). This does, however, not tell us about how intrusive the judicial review should be”.

in scenarios of grave perturbations in the functioning of the interior market, serious damages in the national systems of labour relations or social unrest. The State of origin should, in turn, respond as soon as possible.

The perspective is truly apocalyptic and the response is as if a child threatened a mail-clad knight with a bow of string and green willow. Not even the proposal itself (which was wrong, by the way, to place that mechanism in Article 5) was able to outline an explanation for one of the three described situations. It does not seem to be a simple strike or a boycott, fashioned after *Viking* or *Laval*, but almost a call to revolution produced by the posting of workers, *pogroms* more typical of czarist Russia than of Europe of 28.

And to face this situation, the State affected by the troubles (in an almost Northern Irish sense of the term) notifies the State from which the causing services have arisen, so that it responds. Speculating, before the threats of lynching to Romanian workers by German trade unionists, the Federal Republic would consult Romania on its low wages policy and its sending of cheap labour. Is this what the Commission actually had in mind?

Article 5, finally, determined the entry into force of the Regulation, a simple formality.

What was the point of this document? The contribution to social Europe of the Monti II proposal was, clearly, non-existent. On the other hand, its contribution to institutional Europe was very considerable. For the first time the alert mechanism designed by the Treaty of Lisbon was put into practice and included in the Protocol on the application of the principles of subsidiarity and proportionality, specifically in its Articles 6⁶⁵ and 7.2⁶⁶. Many national Parliaments⁶⁷ reached the sufficient quorum in the required term of eight weeks to express that, in their opinion, the proposal was contrary to the principle of subsidiarity, hence showing the commonly known – even in the institutional media – as “yellow card”. In the opinion of the Commission, there was no violation of the principle whatsoever, but the lack of political support to the proposal was evident⁶⁸. For that reason, on September 12th 2012 its withdrawal was announced and it was made official on the 26th of the same month.

⁶⁵ “Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers”.

⁶⁶ “Where reasoned opinions on a draft legislative act’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second subparagraph of paragraph 1, the draft must be reviewed”.

⁶⁷ The Opinion of the House of Commons may serve as an example: <http://www.parliament.uk/documents/commons-committees/european-scrutiny/2012-05-22-Reasoned-Opinion-from-the-UK-House-of-Commons.pdf>

⁶⁸ Karolina BOROŃSKA-HRYNIEWIECKA: Legitimacy through Subsidiarity? The Parliamentary Control of EU Policy-making. *Polish Political Science Review*, vol. 1, no. 1, (2013) 91–92.: “This first effective use of the yellow card deserves special attention since the nature of this particular parliamentary scrutiny has raised certain questions. Although, according to the Commission, the reasoned opinions of national parliaments did not address the material and procedural aspects of the principle of subsidiarity withdraw the proposal. At the same time it justified this decision by pointing to insufficient support for the measure on the side of national governments (in the EU Council). It is important to notice that the proposal was objected mainly by countries where industrial relations and high standards of social dialogue play important roles in domestic politics”.

5. Soliloquy as conclusion

To regulate the strike at the European level, or not to regulate. That is the question.

Whether 'tis nobler for the social Europe to suffer? The slings and arrows of outrageous fortune and the lament of the lack of competences that expresses Article 153 TFEU or to take arms against a sea of troubles and by opposing end them, showing a true regulatory will and resorting to a Regulation based on Article 352 TFEU or to a Directive based on Article 115 TFEU to cope with a question of transnational scale?

To die... is to allow the Court of Justice, on its own, to keep having the only voice... No more. And by a sleep to say we end the heart-ache and the thousand natural shocks that flesh is heir to, 'tis a consummation devoutly to be wish'd. To die, to comment, to criticize, perchance to dream.

Ay, there's the rub. For what legislation of the Union may come must give us pause, for through a hypothetical Regulation could extend indefinitely the calamities of *Viking* and *Laval*. For who would bear the whips and scorns of commercial freedoms, the wrong of the aforementioned procedures, the contumely of the freedom to provide services, the pangs of despised love for the Europe of social content, the law's delay, the insolence of merchants, and the spurns that patient merit of th'unworthy takes, when we ourselves might or quietus make with a swift stroke of the Official Journal? Who would the fardels of this situation of non-regulation bear, to grunt and sweat under a weary life, but for the dread of something which annihilates social rights, the undiscovered country, from whose bourn no traveller returns?

That is what puzzles the will and makes us rather bear those ills we have than fly to others that we know not of. Thus conscience does make cowards of us all, and thus the native hue of resolution is sicklied o'er with the pale cast of thought, and enterprise of great pitch and moment with this regard their currents turn awry and lose the name of action.

Soft you now, the fair Ophelia! — Nymph, in thy orisons be all my sins remembered.