TRANSNATIONAL SECONDARY COLLECTIVE ACTION IN THE EU LEGAL FRAMEWORK. THE NARROW PATH OF SOLIDARITY.

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BRIEF BIOGRAPHY

Digennaro received a Bachelor Degree in Legal Business Science (2006) and later a Master Degree cum Laude in Law (2008) discussing a thesis on the matter of strike in the European legal framework that was awarded the AIDLASS Barassi Prize as the best thesis of the year in Italy.

He obtained a Phd in Labor law (June 2014) at the University of Bari.

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«On The labor side, power is collective power»
(Otto Kahn-Freund, 1972)

1. Foreword.

In these past years, notwithstanding the traditions of each Member State founded on the fundamental rights, which include social rights, in the European Union there has been an erosion of the latter and a factual risk of backwardness.

The reasons for this are related also to phenomena that have a global scope and concern the factual organization of capital and the evolution of the types and structures of economy and society, namely the material context in which such rights subsist. Other reasons, instead, are totally contained within the framework of the European Union and the policies which stem from it, still considerably affected by the centrality of the market and of the economic freedoms which are the original pillars of the integration process.

The material and legal frameworks are mutually influenced and intertwined as the balance between social rights and economic freedoms determine, on the one hand, the context within which the real economy is engaged and, on the other, the true possibilities for citizens to claim such solidarity rights and achieve a democratic participation.

This contribution aims at assessing the European Union's legal system in order to investigate whether there is a possibility of interpreting it in a way that will curb the friction with the factual manifestation of social rights and, particularly, of the transnational solidarity right to strike.

It appears, therefore, necessary to outline the economic scenario in order to support the choice of focusing down the attention on this specific type of strike.

2. The economic context.

In approximately forty years, the national economy based on Taylor's model of the vertical enterprise has completely changed into a global economy in which companies move across supra-national horizons and use all the legal tools that enable them to

appear, according to the case, as a single business or as a plurality of self-standing enterprises.

Hence, we are assisting to the utilization, for economic purposes, of the non-precise correspondence between legal observation and social reality, which is possible by exploiting the screen of the legal personality which tends to appear as a flexibility factor.

The organization of production does not merely consist in the 'make or buy' choice, but rather involves also relations outside the company, which is usually placed within a broader entrepreneurial and organizational system.

There are diverse types of enterprise organizations, more or less different from the traditional vertical company. Nevertheless, there are commonalities among the various approaches that have established themselves in the past decades, due to the fact that there is no longer overlapping between the legal-organizational aspects of the enterprise and the managerial-technical aspects of the same enterprise.

The internationalization of companies, the financialisation of the economy and, in general, the transformation of labour[1] (related to the first two elements) have weakened, in time, the workers' organizations and their capability of showing a countervailing power by means of the forms typically used in the 20th century.

The greatest difficulty labor unions have when operating at an international level, as well as in attempting to harmonize the behaviors of their members in common actions to meet the various needs of the workers employed in compliance with very different

[1] A reference to focus on Europe is the report *Transformation of Labour and Future of Labour Law in Europe* drafted for the Directorate General for Employment and Social Affairs of the European Commission by a group of experts (economists, jurists and sociologists) coordinated by A. SUPIOT, published at first in French (Id., *Au-delà de l'emploi*, Paris, Flammarion, 1999).
For a diachronic analysis of the transformations of Labour Law in 15 European countries after the world wars, see B. HEPPLE, B. VENEZIANI, *The Transformation of Labour Law in Europe*, Hart Publishing, Oxford, 2009.

legal conditions, have led to the crisis of the conflict operated by means of the right to strike.

According to the doctrine, it appears necessary to reconsider the tools through more inclusive types of coalitions, as well as using new types of collective actions to consider not only the actions of the citizen/worker but also the ones of the citizen/consumer and investor[2].

This would undoubtedly be desirable and useful, but the strike is historically characterized as a type of conflict internal to the productive process, i.e. through the solidarity in the organization of subordinate interests and the concurrent interruption of work aiming at giving visibility to the social aspect of the same productive process which is denied by the legal forms and by the individual nature of the employment contract[3].

Hence, within an economic scenario where the law and the market are used indifferently as connectors among the strategic choices made by the leading enterprise and by each node of the network-system (let us think of the possibility of having a traditional direct control through the control of shares or, rather, an 'external' control carried out via contractual relations such as contracting and sub-contracting or single-buyer contracts) the function of the strike can be maintained, adjusting it to the changing modes in which the capital flows.

This may occur if the strike is used to deny what, oftentimes, large multinational companies or major industrial groups conceal behind the legal frame, i.e. not the

[2] A. SUPIOT, *Revisiter les droits d'action collective, Droit social*., 7/8, 2001, pp. 687 ff, and also M. FRIEDMANN, *A positive approach to organized consumer action: the «boycott» as an alternative to the boycott*, Journal of Consumer Policy, 19, 1996, pp. 439 ff.

[3] Basically, in other words, the power of the entrepreneur is based on the denial of the concrete sociability of the production process thanks to the legal forms of the employment contract and the strike is a way to refuse that denial. See also on this issue M. G. GAROFALO, *Libertà, lavoro e imprese*, Diritto romano attuale, 15, 2006, pp. 117ff.

sociality of the production process within each company but, rather, the utmost level of the intelligence of the overall productivity process or the joint strategy of the companies working one with another.

From this standpoint, the transnational solidarity strike (and the transnational collective bargaining which is closely related to it) becomes the only effective way to exercise this right as it is capable of keeping up with the organization of capital and enterprises[4].

Leaving aside the material difficulties which stand between the utilization of such a tool, due to the absence, within society, of the connection between social rights and the social practice of national and supranational solidarity[5], one could think that the European Union is the ideal context for the expression of such type of strikes on a transnational scale, having ascertained the fact that the creation of a unique space should imply not only a market without barriers where enterprises can move freely, but also the full accomplishment, without borders, of the individual rights as the fundamental social rights.

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[4] The same ILO Committee of Experts underlined the importance of the solidarity strike whereby it expressed concern for the regulations on the issue by means of the Report III (1B) of 2008 (Giving globalization a human face). The report stated, in fact, that "With regard to so-called 'sympathy strikes', the Committee considers that a general prohibition of this form of strike action could lead to abuse, particularly in the context of globalization characterized by increasing interdependence and the internationalization of production, and the workers should be able to take such action, provided that the initial strike they are supporting is itself lawful" (paragraph 125).

[5] Examples of this phenomenon may be, at a political level, the increasing consensus in many European Member States of nationalist movements which are openly anti-European or, selecting an example in the industrial relation field, the case of the strike which took place in *Lincolnshire* opposing to hiring Italian and Portuguese workers in the *Lindsey* refinery employed by Irem (February 2009). In countertrend to these events is the European-wide strike of 14 November 2012 called by CES, as a successful attempt to make the European labour union be the social and political stakeholder in the change of the EU policies, as well as the creation of global labour unions such as the *Council of Global Unions* and the *International Trade Union Confederation.* The difficulty of gaining consensus to forms of pressure or protest at a level beyond the direct interests of each individual or of a small community, is definitely great if compared, for example, to the events of the 70s. This is in line with the general difficulty in a hyperconnected and liquid society to differentiate oneself and see oneself as a member of a broader community, and not simply as dots interconnected by a network which is basically neutral and horizontal. For a broader approach to the issue, see the ample production of Z. BAUMAN, and in particular his first work which expounds a sociological analysis of a globalized society, namely *Liquid Modernity*, Cambridge, Polity Press, 2000.

In 1972, Lord Wedderburn wrote, with amazing farsightedness, that «the logical correlative, of a freedom of trans-national movement for 'capital' would be a legal right of trans-national, collective industrial action for labour»[6].

To date, however, this has not occurred as we may see from the evolution of the primary Law, of the rulings of the European Court of Justice and of the policies adopted across the years in Europe which have lately been established with the so-called austerity[7].

The best way to solve this contradiction would consist in the re-evaluation and in-depth revisiting of the present Treaties and European policies, especially at this time of the economic crisis in the Eurozone. This avenue, however, does not appear, to be viable at the moment.

Rebus sic stantibus, the practice of solidarity takes on more relevance and, from a juridical standpoint, an interpretative effort should be made in order to reduce to the utmost the friction between norms and the concrete expression of the fundamental social rights.

The latter action demands a preliminary step which consists in the analysis of the reasons whereby there has come to be an unnatural counterposition between the

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[6] First published in *Industrial Law Journal*, Vol. 1 and re-edited in LORD WEDDERBURN, *Labour Law and freedom, further essay in Labour Law*, Lawrence & Wishart, London, 1995 (quotation on page 243)

[7] The same analysis which sees, in the policies adopted by Member States in these past years, spurred by the so-called Troika, but also by the institutions of the Union such as the Commission, the origin of the erosion of social rights and of the general normative standards in Member States, may be found in the MANIFESTO of European Labour Law experts and lawyers whereby they urge the European Union and its institutions to respect and promote the values established in the Treaties (arts. 2 and 3 EUT) and in the Charter of the Fundamental Rights.

For a comparative study on the reforms introduced at the time of the economic crisis in a deregulatory sense in the Member States, see S. CLAUWAERT, I. SCHÖMANN, *The Crisis and National labour law reforms: a mapping exercise*, Brussels, 2012.

For an overview on the impact that the austerity measures had on the collective labour law see N. BRUUN, K. LÖRCHER, I. SCHÖMANN (eds), *The Economic and Financial Crisis and Collective Labour Law in Europe*, Hart Publishing, Oxford, 2014.

expression of the fundamental social rights and the *acquis* of the Union – these reasons are to be found in an analysis of the evolution of the EC Law and later of the EU Law.

3. **The original matrix of the European integration process.**

It is evident that the 'functionalist' choice, which prevailed at the onset of the European integration process, imposed a «difficult march»[8] on the fundamental social rights characterized by an irregular course which was abruptly halted by the well-known rulings of the European Court of Justice regarding Viking[9], Laval[10], Ruffert[11], and Luxembourg[12] cases.

Actually, the founding fathers did not deem it necessary to take into account social rights as they fell into the prerogatives of the Member States. Moreover, they considered that a greater economic wellbeing and economic growth, arising from a "harmonious development of economic activities" in the member states (Art. 2, among the principles of the EEC Treaty of 1957), would have indirectly benefited social policies in each member state.

In brief, it was considered that ensuring a proper functioning of the common market would have, almost naturally, granted "improvement of the living and working condition of labor so as to permit the equalization of such condition in a upward direction" (Art 117, par 1 of the Founding Treaty, Rome, 1957) without depriving the

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[8] B. VENEZIANI, , *Nel nome di Erasmo da Rotterdam. La faticosa marcia dei diritti sociali fondamentali nell'ordinamento comunitario*, Rivista giuridica del lavoro, I, 2000, p. 719 ff.

[9] Case C-438/05 CGCE.

[10] Case C-341/05 CGCE.

[11] Case C-346/06 CGCE.

[12] Case C-319/06 CGCE.

nation-states of the social competencies, except for some functional aspects of the common market building[13].

The Community set the goal of building an open and highly competitive market by removing all hurdles to the free accomplishment of economic forces. Supporting the social policies of each member state would have become an indirect effect of the economic improvement of the entire area, determined by the free growth of the market.

Hence, the Treaty laid down minimum social goals which acted as 'social' corrective measures of the internal free market, to be achieved by means of actions aiming at doing away with treatment inequalities which could have distorted the competition conditions among national economies or in specific industrial sectors.

The only countermeasure in order to avoid disparities or negative effects on the economic structure of some countries, induced by the enlarged market, was the Social Fund.

The European Community, therefore, was being established on the competition law and on the market based on the fundamental economic freedoms, without which the final goal of the best possible economic wellbeing by means of the development of the common market, would not have been feasible.

The theoretical background of the original setting of the founding Treaties may be seen in the neo-classical economic theories whereby in the capitalistic economy, the market's spontaneous forces lead the economic system towards a 'natural' balance where all those who are willing to work with the current salaries will find employment, as long as

[13] Obviously, the fact that one thesis prevailed, does not imply that, at the time, the Treaty of Rome did not undergo a debate. See S. GIUBBONI, *Diritti Sociali e Mercato. La dimensione sociale dell'integrazione europea,* Bologna, 2003 published in English in an expanded and revised version as *Social Rights and Market Freedom in the European Constitution. A Labour Law Perspective*, Cambridge University Press, 2006, and S. DEAKIN, *Labour Law as Market regulation: the economic foundation of European Social Policy, in* P. DAVIS, A. LYON CAEN, S. SCIARRA, S. SIMITIS, (eds), *European Community Labour Law: Principles and Perspectives,* in *Liber Amicorum Lord Wedderburn*, Oxford, pp. 63 ff., 1996.

there are no 'distorsions' caused by government or institutional measures or by labour union actions[14].

With this outlook, the general economic progress would generate, according to the principle of the invisible hand[15], a generalized social progress within society.

In subsequent years, those assumptions and the original structure of the European Community were placed under scrutiny and even partially altered, depending on the political balance of power [16] without causing a clear deflection from the original course.

Even the strides forward accomplished at first with the APS[17] (although not for all member States) ad, subsequently, with the Amsterdam Treaty, occurred in the remarkable absence of the direct acknowledgement of the fundamental social rights, in a structure whereby the latter remained in the background as they could only be satisfied to the extent in which they were related to the objectives to be pursued by the implementation of the Community.

Hence, the pressing demand for an expressed and explicit recognition of the fundamental social rights[18] which seemed to be achieved with the proclamation of the Charter of Fundamental Rights of the European Union.

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[14] For this line of thought, in particular, see A. C. PIGOU who maintained, although denied by facts, in his *Theory of Unemployment* of 1933 (London, McMillan), that the crisis and unemployment at the time could be ascribed to the distortion on the trading rates of the labour force produced by the labour union actions.

[15] According to the well-known expression used by A. SMITH in his *The Wealth of Nations* (1776), Penguin, Harmondsworth, 1986.

[16] As testified by the fact that the golden age of the social action within the Community began in the 70s with the conference of Heads of States and Governments held in Paris in 1972, which was to give rise to the first 'Social Action Programme', and came to an end at the beginning of the 80s without the full accomplishment of the Social Program, because of the vetoes imposed by some States to the Council's decisions.

[17] Reference is made to the *Agreement on Social Policy* signed by eleven Member States and attached to the Maastricht Treaty of 1992, which gives rise to the so-called double-track social policy, with an extension of competences to the European Community on social matters.

[18] That was the request clearly addressed to the European Institution through the so called SIMITIS REPORT (*Affirming Fundamental Rights in the European Union, Time to Act*), i.e. the report drafted by a group of

Paradoxically, however, when the definition of a list of fundamental rights was achieved, recognized directly by the Union instead of by means the national Constitutions, the attention of scholars and experts was captured by the rulings[19] listed in the previous paragraph.

The Court of Justice, albeit it recognized the fundamental social rights, actually ended by limiting them considerably.

In some passages of the rulings, the Court adopted a clearly neo-liberalist outlook, hence considering both the public standards and the freely negotiated norms stemming from collective contracts (i.e. private law) in the same way that is from the point of view of the effect on the common market. The Court establishes that if the workers' collective action aims at obtaining a collective contract, which, due to its normative content compresses the economic freedoms, also the labour union's action has to be evaluated as a hurdle to such freedoms.

This viewpoint is definitely in line with the neo-classical theories whereby trade union actions have a dysfunctional effect on the labour market (labour is compared, in fact, to other goods) as it acts by fixing an exact level for the supply which cannot stabilize itself on what would be the natural balance of the market itself[20].

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independent experts appointed by the *Directorate General on Employment, Industrial Relations and Social Affairs* of the European Commission with the aim of examining the state of the fundamental social rights in the light of the Amsterdam Treaty, at the time in force.

The text of the report can be downloaded at: infoeuropa.eurocid.pt.

The above mentioned demand appeared even more urgent when the Agreement on Social Policies was embedded in the Amsterdam Treaty, which implied the enlargement of the legal bases of the community social legislation, the extension of the qualified majority procedure referring to social issues and the recognition of the institutional role of the collective bargaining.

[19] Viking, Laval, Ruffert, Luxembourg.

[20] On this issue see R. POSNER, , *Some Economics of Labor Law*, *University of Chicago Law Review*, 51, 1984, p. 988 ff. In general, the following economic thinking considers labour standards as having a dysfunctional effect on the efficiency and appropriateness of exchange on the market between labour-supply and demand: R. EPSTEIN, *A common Law for Labour Relations: a Critique of a New Deal Labor*

Nevertheless, compared to the general picture referred to by the judges of the Court of Justice, there have been two fundamental changes, i.e. on one hand, an economic crisis which grips all of Europe and has cleft the idea of the primacy of the self-regulating market, even with the prevailing economic doctrine, and on the other hand the enforcement of the Lisbon Treaty.

At this point, the question arises on the extent in which the second element, considered within an ever-changing cultural context, might pave the way to an interpretative paradigm as an alternative to the one used by the Court of Justice in defining the relationship between economic freedoms and fundamental social rights.

To do so, we shall focus on the regulatory changes which occurred following the Lisbon Treaty.

4. The Charter of the Fundamental Rights and the Treaties in force: a brief analysis.

Compared to the previous drafting of the European Community Treaty, there are no literal changes in art 153 (par 5) TFEU[21], which however should be read, today, in relation to art 28 of the Charter of the Fundamental Rights.

The Charter, in fact, has acquired the same legal value as that of the Treaties, due to the expressed anticipation of Article 6 (par 1) of the Treaty of the European Union.

This mere fact gives rise to the need for a dialogue, by means of a coordinated and systematic interpretation, between the Charter of Rights and the norms of the Treaties

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Legislation, 1983, 92, pp. 1357ff. and J. HELDMAN, J. BENNET, M. JOHNSON, *Deregulating Labor Relations*, Fisher Institute, Dallas, 1981.

[21] As per Art. 137, par. 5 TCE which excludes the competency of the Union on issues regarding remunerations, the right of association, strike or lockout.

which point out the objectives and policies of the Union, in order to understand which is the magnetic pole orienting the course.

Particular importance takes on, within this context, article 3 of the TEU, which lays down that 'The Union *shall establish* an internal market" (par. 3) […] and "*shall establish* an economic and monetary union whose currency is the euro' (par. 4).

The expressions employ the indicative to express the existence of what has already been achieved and created, and is no longer a goal to be attained. The goals of the Union evolve differently, namely the text refers about "sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress" [22].

The previous Treaty in force, instead, established that the Community had the task of promoting a harmonious, balanced and sustainable development, as well as a high level of employment and social protection "*by establishing a common market* and an *economic and monetary union*" (Article 2).

In the writer's opinion, the difference between the two texts implies that the market proper, and per se, is no longer the goal to be attained. The consequence of the new wording of the articles highlighted is to set aside the idea that establishing a common market and having it operate might produce per se a promotion of the working conditions and an improvement of standard of living for workers making it possible "by their harmonisation while the improvement is being maintained" (Art. 117 par. 1).

[22] A game of cross-reference appears whereby mentioning a balanced and sustainable development is a reference found also in the Charter of Fundamental Rights, so much so that, according to an eminent scholar, from that principle stems a limitation to the exercise of the property right, making the illegitimacy of an absolute prevalence of the economic dimension unsustainable, in the light of the acquired indivisibility of rights, see S. RODOTÁ, *Il diritto di avere diritti*, Laterza, Bari, 2012, p. 39.

A deviation from a typically and markedly liberalistic vision which determines the total abstension of the institutions from any type of interference may be found also in expressions such as *combating* social exclusion and discriminations and *promoting* justice and social protection, gender equality and generational solidarity, and lastly, the economic, social and territorial cohesion, mentioned in article 3. All of these policies, in fact, entail a direct intervention of the Union's institutions, albeit in some cases they are actually shouldered by Member States, therefore with an interference in the economic system.

The two horizontal social clauses are tinted with the same tones, as may be read in articles 9[23] and 10[24] of the TFEU, that mark a commitment to action for the Union which, in accomplishing its policies, will have to bear in mind the needs related to employment promotion and protection, as well as the discrimination bans.

It is possible, also from this standpoint, to see a discontinuity compared to what was established earlier in article 4 of the Treaty Establishing the European Economic Community (formerly article 3A) whereby, conversely, "the activities of the Member States and the Community shall include […] the adoption of an economic policy *which is based […] on the internal market and […] conducted in accordance with the principle of an open market economy with free competition*".

The differences highlighted grant the possibility of maintaining that, in the new normative setting, competition and the policies that aim at banning the limitations to competition, shift from being a goal to becoming an instrumental function for the

[23] "In defining and implementing its policies and activities, The Union shall take into account requirements linked to the promotion of an high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and high level of education, training and protection of human health".

[24] "In defining and implementing its policies and activities the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

implementation of a new list of goals, with a totally different outlook if compared to the previous Treaties.

It should be reiterated that this does not mean that the Union does not yet believe in the centrality of the market, which is still evaluated as the prime mover of social and economic progress, but rather it means having shifted from a Neo-Classical outlook to the 'social market economy'.

Considering the use, including on the media and oftentimes unaware, of the latter expression, it is expedient to shed light on its meaning as it is used in a critical article in the text of the Treaty.

The expression[25] identifies an economic and political school of thought, which in turn was a sort of continuity of the school of Freiburg's ordoliberalism, established in Germany in the 30s stemming from the writings of Professor W. Eucken.

The above-mentioned scholar maintained the assumption that the market cannot be left completely to itself as it would produce distorsions, monopolies and dominant positions which would not lead to a general wellbeing. Likewise, Eucken, however, believed that the free market was the only way to create that wellbeing, rejecting with determination 'collectivism' and the governmental control over the economy.

Hence, he asserted that the economic system has to be designed and deliberately built establishing the rules of the economy seen as a whole, at a national and at an international level, without planning or controlling the economy. In other words, in his

[25] It appeared for the first time in 1946. *Soziale Marktwirtschaft* was exactly the title of an essay by MÜLLER-ARMACK (under-secretary of the Ministry of Federal Economy) who would reutilize the expression later in his *Wirtschaftsordnung und Wirtschaftspolitik*, Bern-Stuttgard, 1976, on p. 245. He was Erhard's assistant, the latter being at first Economy Minister of Adenauer's government and then was appointed Chancellor after him. This school did not only theorize the social market economy, but applied its model to the German economy after the Second World War.

point of view, the State has to act on the forms of economy, but should not direct the economic processes itself[26].

The bottom line, therefore, is that the legal framework affects the model of economy by regulating it and saving it from being subject to mere individualistic purposes, and that, moreover, the economy must be seen within the constitutional framework of a State.

Wilhelm Röpke[27], one of the major theoreticians of the social market economy, who pertained to the subsequent generation, made the same assumptions regarding the free market system but explained more exhaustively the role and the space for a direct action by the State.

According to the scholar's opinion, in order to avoid the distorsions of Capitalism, there was the need for a framework policy which was to set the norms, by means of the institutions, that impose regulations on competition in order to save it from degenerating (i.e. by setting up monopolies) and ensure their enforcement.

The monitoring of the observance of the established rules was meant to take place by means of two different tools: by means of 'adjustment interventions' aimed at attenuating the frictions and sharp angles of the economy's changes and turmoil, and to aid the weaker groups, and by means of 'conforming policies', i.e. the ones guaranteeing social goals, without causing disturbance to the market[28].

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[26] W. EUKEN, *The foundation of economics, history and theory of economic reality*, William Hodge and Co., London-Edinburgh-Glasgow, 1950, p. 314 and also in W. EUCKEN, *This Unsuccessful Age or The Pains of Economic Progress*. With an introduction by John Jewkes, London, Edinburgh, Glasgow, 1951, pp. 95 ss.

[27] It was not a chance that he was counselor to Chancellor Adenauer.

[28] In particular, 'conforming policies' are meant to be the interventions that do not suppress the mechanics of pricing and the market's self-governance, but are introduced as 'new data' and as such are assimilated. 'Non-conforming' are the ones that disrupt the mechanics of pricing and must, consequently, replace it with a programmatic economic order, i.e. collectivist. W. RÖPKE, *Civitas humana. I problemi fondamentali della riforma sociale ed economica*, Rizzoli, Milano, 1947. Edited in English, *Civitas Humana* , William Hodge and Company, London, 1948.

The government was, hence, considered to be the institution which established the general rules whereby competition can freely take place, within a framework of shared values and goals.

It is a government which intervenes when it appears to be necessary to the economy, by means of its branches and according to the horizontal and vertical subsidiarity principle, to ensure that economy will not go astray from the rules imposed in order to guarantee the appropriate functioning, aiming at specific goals and values.

This idea of political economy has, without doubt, clear-cut commonalities with the picture outlined by the Treaties in force, although the Union cannot be compared to a federal state.

Hence, the reference to that specific phrase – 'social market economy'– appears to be in line with the above mentioned norms, which introduced innovations to the previous 'fabric' of the Treaties.

Unlike the Economic Community, the Union no longer needs to tackle the issue of setting up a common market, but rather that of ensuring it will work effectively, even implying a possible intervention; hence –from a totally Liberalist outlook– altering it in order to achieve an economic growth leading to social progress and, consequently, also to the utmost employment rise.

The current institutional framework seems right to have absorbed the Röpke's thought according to which economy is a brief portion of social life, framed and contained in a broader field, an external field where men and women are not just competitors, producers, business-oriented people or consumers[29].

[29] RÖPKE *Ivi*, page. 37. This broader point of view, not limited to the methodological individualism, brings closer this school of thought to the institutionalist school of thought whereby there appear to be further commonalities when considering as relevant the function of the legal norm on the market functioning, hence the functional aim of the latter in reaching the reference values.

This is why market economy is acknowledged and defended as a pillar of the building in which, however, the focus is on shared values and the rights supported by that pillar.

If in Nation-States the Constitutional Charter contains the fundamental mutual principles, within the European Union's legal system the apex of the legal framework consists in the Treaties and the fundamental rights acknowledged by the Charter of Fundamental Rights, in the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the constitutional tradition common to the Member States[30].

For this reason, the current binding nature of the Charter of Fundamental Rights is not irrelevant. The solidarity rights enclosed, to be found in Chapter IV (that include the right to strike and the right to collective bargaining), acquire a special relevance as they provide substance and are necessary for the promotion of the wellbeing of the peoples of the Union (Art. 3, par. 1 of the TEU), for the respect of the values of dignity, freedom and equality the Union is founded on (Art. 2, TEU), and for the achievement of the above mentioned goals.

These make up the legal framework and the 'positive' limit that cannot be superceded nor submitted to the market economy if, by its means, the common goals of economic and social progress are to be achieved.

Hence, it is deemed expedient to underline the close relation between the Treaties and the Charter of Rights, that determines the need for a systematic interpretation, and to highlight that the TEU mentions dignity, equality and solidarity as the founding values of the Union in Article 2.

[30]Attention should be paid to the fact that the last paragraph of Article 6 of the EUT refers to those rights stemming from the common constitutional traditions and not to the single norms of each Constitution. It could not be otherwise, since every Constitution has its peculiarities.

As it was well explained by an eminent Italian scholar, the latter Article mentions exactly those values that become concrete when the Charter translates them into an axiology implied within the specific norms in each of its chapters; hence, the Charter becomes a measure of the European set of norms, in the reconstruction of the system and in the definition of the principles that will guide its functioning[31].

Within this system the market economy and the common market should serve the purpose of the implementation of specific goals, by means of which the rights become concretely viable. It is by no means possible to pursue a way that should deny those rights to preserve the instrument.

As to the above, it would be expedient to add the following consideration with specific reference to the social rights.

One of the corollaries of the theory of the social market economy is the construction of a system of non-conflicting industrial relations, based on the model of co-determination and on the collaboration with the social partners; in fact, the Constitution of the Country where those theories have been actually applied, envisages exclusively the freedom of association (Article 9 III of the German Constitution).

The acknowledgement of the collective bargaining and, especially, of the right of conflict via Art. 28[32] of the Charter of Fundamental Rights, therefore, pinpoints a considerable difference compared to that legal framework, as well as the implicit denial of the above mentioned corollary.

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[31] Paraphrasing the words of S. RODOTÁ, S. *Il diritto di avere diritti*, Laterza, Bari, 2012, p.33.

[32] "Art. 28. **Right of collective bargaining and action.** Workers and employers, or their respective organizations, have, in accordance with Community law and the national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action".

Concluding on this first point, albeit the Treaties in force and the general policy[33] the European Union has continued to pursue are strongly disputable, this brief analysis allows us to assert that a systematic examination of the norms offers us the opportunity to target the core of the concept, contained in the European Court of Justice case law, that European Union Law should indeed be read in the sense it expounds social rights as functionalized and, consequently, sub-ordinate to the economic liberties[34].

5. **Secondary legislation in the rulings of the Court of Justice.**

Considering the above, it sheds a different light on the rulings of the Court of Justice of the European Union in the well-known *Viking* and *Laval* case.

It is expedient, however, to add another piece to the picture, which refers to the competency of the Court in judging issues regarding the right to strike. The Court has, in fact, overcome the objections of those who referred to the constraint posed by Art. 137, par. 5 TEC (now Art. 153 [par. 5] TFEU) specifying that – despite the norm was considered as a devolution of some issues, including strikes, to the exclusive

[33] It is important to highlight the fact that a significant portion of such policies, issued by the Union for many years, is also based on the principles of the economic school of thought described in the text. Reference is made to currency stability and, consequently, price stability. This axiom has also threatened by the quantitative easing recently announced by the ECB. The measure should produce an inflation rise and an easing of the general purchasing power of the euro; on the long run, however, it risks (if the economy does not recover) to increase public debt in the Member State. This is a currency injection, with a consequent devaluation of the currency and prices rise – i.e. the opposite of what the doctrine of the social market economy teaches.

[34] In effect, the above mentioned rulings have been issued in compliance with the old legal framework. From this outlook, it is expedient to underline that the recent ruling of the European Court of Justice C-328/13 of 11 September 2014 appears to be a discontinuity to the previous trend. The Court, in fact, has interpreted the second paragraph of Article 3 of the Directive 2001/23 by stating that in the event of transfers of undertakings, businesses or parts of undertakings the terms and conditions laid down in a collective agreement, which, pursuant to the law of a Member State, despite the rescission of that agreement, continue to produce their effects as regards the employment relationship which was governed by them before the agreement was terminated, constitute 'terms and conditions agreed in any collective agreement' so long as that employment relationship is not subject to a new collective agreement or a new individual agreement is not concluded with the employees concerned.

competency of the Member States – the national norms which regulate in each State such issues, must be read in the light of the general principles of the Union's legal framework, as the former cannot compress or delete the latter, and also because the Community Law prevails over the national legislations when the conflict interacts with the common market.

Hence, if one examines the issue from a traditional standpoint within the Civil Law legal system, since the Court's ruling are not a source of written law, they would not have affected the distribution of competencies maintained in the Treaties.

From that perspective, in fact, such rulings simply reaffirmed the general principle of the primacy of Community Law over national legislations with reference to strikes, establishing that the domestic norms on the issue should be harmonized in accordance with the economic freedoms protected by the Treaty which – as the Judge ruled – cannot be impaired by balancing with Fundamental Social Rights.

Actually, the Court dealt with the strikes held within the national borders on the assumption that such actions came in contrast with the economic freedoms defended by the Treaties; substantially, by assessing its jurisdiction according to the community-wide scope of the effects of such strikes.

By so doing, the result appeared to be a true Court-established regulation of the right to strike, and this should not surprise, basically for two reasons.

Firstly, because every interpretation of the law is 'a new law'[35] itself and, therefore, acquires a legal value, producing effects on the legal system when generated by qualified practitioners or institutions, as in the case of the higher Courts.

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[35] The same mind is also expressed in the "Separate opinion of judge Zagrebelsky" added to the Demir and Baykara v. Turkey case which will be later mentioned and briefly examined. Among the Italian academic writing see T. ASCARELLI, *Studi di diritto comparato e in tema di interpretazione*, Giuffrè, Milano, 1952.

Secondly, because it is not the first time that the devolution of competencies from Member States to the Union stemmed from the Court of Justice case law and via the interpretation of the Treaties[36].

The issue at stake, however, is different, as the main point that should be stressed is that the system resulting from the Court's rulings implies two different regulatory levels.

Strikes are still regulated exhaustively by the national law only when they have a national scope. Should they interact with the common market, they will have to comply with the Community Law and the Community acquis and, consequently, the Court establishes they will have to pass the tests of necessity, adequacy and proportionality[37].

Entering a higher set of rules implies also the access to norms that pertain to that same regulatory level, contained in the Treaties and in the Charter of Fundamental Rights[38] and, this makes the following critical assertion regarding the Court's reasoning possible.

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[36] In the past there were those who criticized what was considered to be a judiciary activism, claiming that the Court was acting more as a lawmaker than as an interpreter (see H. RASMUSSEN, *On Law and Policy in the European Court of Justice: A Comparative Study of Judicial Policymaking*, Dordrecht: Nijhoff, 1986 e P. NEILL, *The European Court of Justice: A case study in Judicial Activism.*, London: European Policy Forum, 1995. The role played in the European integration by the dialogue between the national Courts and the ECJ was underlined in S. SCIARRA (ed.), *Labour Law in the Courts*, Hart Publishing, Oxford, 2001.

[37] N. COUNTORIS, *La Corte di giustizia e il vaso di Pandora del diritto sindacale europeo. Un punto di vista britannico,* in A. VIMERCATI (eds.), *op. cit.*, page 98 seems to share this view whereby the Author asserts, en passant, when examining the consequences of the jurisprudence under discussion on the British legal system, that the consequence of Viking e Laval cases means introducing a binary system in the judgment regarding the legitimacy of the trade unions action in the British legal system, since two different approaches and legal arguments are possible, depending on whether the strike has a national scope or it has elements relevant to the European Community.

[38] What is mentioned above, and namely the court-based regulation of strikes with a Union-wide scope interacting with the market of the Union, implying the existence of a different regulatory level pinpointed for such collective actions, is indirectly conformed by the regulation proposal known as Monti II, later removed by the Commission due to fact that it was impossible to reach a unanimous decision of the Council and the Parliament's approval needed for it to be passed in accordance with Art 352 TFEU. First of all, the Commission highlighted that the regulation aimed *"to clarify the general principles and applicable rules at Union level to reconcile the exercise of fundamental right with the economic freedoms in cross border situations" (explanatory memorandum of the regulation proposal, part 3.2 page 11).*

The statements and effects of the judgments are well known to all[39] and, making an extreme synthesis, may be reconstructed in three steps.

In the first place, the collective conflict is strictly connected to the collective bargaining procedure, at its functionally and almost structurally 'serving' the activity aiming to, as the Court saw it, pacify the contrasting interest of the parties[40].

Secondly, the collective agreements that are the products of the private legal autonomy are considered, in the same manner as the regulatory sources, as having a possible limiting effect on the economic liberties, disregarding the private nature of such agreements.

To complete the picture, there is a sharp contraction of the free determination of the trade union strategies, via an *ab externo* assessment of necessity, adequacy and proportionality of the trade union action.

The right to strike, in the eyes of the Court, is a pressure element through which a business is forced to comply with contract constraints which it would not have applied,

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Furthermore the very Commission had underlined that "g*iven the lack of explicit provision in the Treaty for the necessary powers, the present Regulation is based on Article 352 TFEU. Article 153(5) TFEU excludes the right to strike from the range of matters that can be regulated across the EU by way of minimum standards through Directives. However the Court rulings have clearly shown that the fact that Article 153 does not apply to the right to strike does not as such exclude collective action from the scope of EU law" (*3.3 of the *explanatory memorandum).* The unanimous approval was necessary to substitute the regulation based on the jurisprudence with provision of written law, by means of an *ad hoc* directive.

[39] The contributions given by the doctrine that analyze such rulings and the other two reported in notes 11 and 12 are countless due to the extensive scientific debate stemming from them; see for bibliographical references R. BLANPAIN & A. M. SWIATKOWSKY (eds), *The Laval and Viking Cases Freedom of Services and Estabilishment in the European Economic Area and Russia*, Kluwer, 2009; A. BÜCKER & W. WARNECK (eds), *Viking-Laval-Rüffert: Conseguences and Policy Perspective*, ETUI, 2010; E. ALES, T. NOVITZ, A. BAYLOS, (eds), *Collective action and Fundamental Freedoms in Europe. Striking the Balance,* Mortsel: Intersentia, 2010; U. CARABELLI, *Europa dei mercati e conflitto sociale*, Cacucci, Bari, 2009, A. VIMERCATI (eds), op. cit., S. SCIARRA, J. MALMBERG, N. BRUUN., G. ORLANDINI, B. DE WITTE, A. LO FARO, R. ZAHN, *Il dopo Laval. Uno sguardo comparato*, Giornale di diritto del lavoro e di relazioni industriali, 2011, p.363ff.

[40] If one adds to this the possible utilization, as per articles 154 and 155 of the TFEU and the collective bargaining as a tool to establish the regulations at a Union level, and a useful tool to enforce the directives in the national legal system, it turns out to be a model that may well be defined as neo-corporative.

and would be ‘contaminated’ by the collective action, determining an unjust compression of the economic freedom.

The passage summarized above, as well as the related ideological concept, are explained, to a great extent, referring to the original cultural matrixes whose signs appeared already in the pre-Lisbon Treaties.

If in a neo-liberalist outlook what matters is not the nature of the source but, rather, the distortive effect that standards, as well as the agreements between private parties, produce on the market, and if the ultimate goal is a highly competitive common market, free from influence and constraints, the coalition between the workers and the collective bargaining become a hurdle to the attainment of the major goals of the Treaties. This is because, within that perspective, the collective agreement and the actions related to it are considered tools useful to concentrate the labor supply, thus having a negative influence on the trading rates.

Only considering each individual worker according to the classical theories of political economy as a self-standing market player, can the labor unions and the collective bargaining be considered capable of determining a labor concentration and, consequently, a distortion of competition. The assumption reveals to be fallacious when one considers as market players various social groups (as there are several trade unions) instead of any single worker, from the standpoint of a liberal pluralism.

The *collective laissez faire*[41] inherited from liberalism, in fact, the conviction that the best possible allocation of resources takes place if the subjects are free to self-determine themselves and come in conflict one with the other, yet being detached, since the market players are the social groups themselves.

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[41] Synthetic expression used by O. KAHN-FREUND, *Labour Law*, in *Selected Writings*, London, Stevens, 1ff., 1978.

The strike is, in fact, the main tool in the ritualized social conflict, by means of which workers claim their reasons in the economic forum; that right cannot exist without causing a damage to the employer's production.

Form this standpoint, the Court's rulings appeared disputable when they bore in mind the fundamental social rights, yet substantially denying them in their essence.

So much so that when the Charter of Fundamental Rights became legally binding and the social rights and the right to conflict came to be considered among the ones protected, it is an easy remark to underline that it was contradictory to recognize the right to collective bargaining and the right to strike if in the balancing exercise with the economic liberties, the essential core of such rights is denied.

Article 52 of the Charter signed in Nice establishes, in fact, that "any limitation on the exercise of the rights and the freedoms recognized by this Charter must be provided for by law and **respect the essence** of those rights and freedoms. Subject to the principle of proportionality, limitations may be made **only if they are necessary and genuinely meet objectives of general interest recognized by the Union** […]".

The essential core of collective bargaining and strike, which share the function of regulating working conditions with an attitude of solidarity among workers, consists in deliberately determining a limitation to or an influence on the economic freedom, without being sanctioned by the public powers nor entailing civil liability in the individual employment relations[42].

[42] Actually, in the legal systems of some countries (e.g. Italy), the function of the strike is also a political *latu sensu*, becoming also a social participation and democratic rebalancing medium. In the Italian doctrine see, among others, M. RUSCIANO, *Diritto di sciopero e assetto costituzionale*, in Rivista italiana di diritto del lavoro, I, pp. 53ff., 2009, and also M. LUCIANI, *Diritto di sciopero, forma di Stato e forma di governo*, in Argomenti di diritto del lavoro, I, pp. 16ff., 2009. The strike as a means of transformation of the Labour Law and of social conditions is highlighted by J. LOPEZ, C. CHACARTEGUI, C. G. CANTÓN, *From Conflict to Regulation: The transformative Function of Labour Law*, in G. DAVIDOV and B. LANGILLE (eds.), *The Idea of Labour Law*, Cambridge University Press, 2011.

Hence, no norm of Community Law, nor rulings of the judges, will deny the essential core of such rights and, consequently, the appropriate functioning of the market social economy.

In the light of the norms of the Treaties analyzed, it is impossible to consider that the limitations of the fundamental social rights are necessary and that they meet the objectives of general interest recognized by the Union.

It is unthinkable that there may be a sustainable development, balanced economic growth and social cohesion if 'social dumping' is allowed, together with a deterioration of the working conditions, which are effects of the decisions taken by the Court of Justice.

The instrumental use of economic freedoms as well as of the definition of the company's "legal boundary" carried out by means of the legal personality status, with the aim of decreasing the labour cost, can actually distort the competition game and will certainly not spur businesses to innovate nor to enter into a loyal competition context played – not on the lower cost of labor in each of the Member States of the Union – but on the process and product innovation, besides on the effective and efficient use of economic and production factors[43].

Since in the current legal system of the Union the market social economy must be considered as a tool to achieve objectives and to ascribe truthfulness to the shared values and rights, it is no longer possible balancing social fundamental rights with economic freedoms in favor of the latter and of the common market.

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[43] Competition based exclusively on the low cost of labour limits the companies' capability of adopting strategies to improve the product and to achieve a high productivity. Conversely, effective labour standards determine an incentive since they fix a basic threshold under which companies cannot go. On this topic, see S. DEAKIN and F. WILKINSON, *Labour Law and Economic Theory: A Reappraisal*, *in* G. DE GEEST, J. SIEGERS, R. J. VAN DEN BERGH (eds), *Law and Economics and the Labour Market*, Edward Elgar, Aldershot, 1999.

The market economy is part of the overall institutional framework and is a tool which has its functional limit in the objectives established in Article 3 of the TEU, and a 'positive' limit in the fundamental rights included in the Charter.

The overall legal framework determines, in fact, the type of domestic market economy that is meant to function efficiently for it to become effective, thus shifting from an ultimate objective to a tool to implement the policies of the Union.

6. **The scope of the feasibility of a solidarity strike.**

In this setting, the regulatory dual-track system that was, *de facto*, created pursuant to the decisions undertaken by the Court of Justice, as well as the entry into force of the new Treaties would actually widen the chance for transnational solidarity strike.

Indeed, leaving the regulation of multiple coordinated actions up to the internal legislation of a plurality of member States would mean subjecting them to the many constraints and limits envisaged in single national legislations, thus making transnational sympathy strikes extremely complicated and unlikely.

The case of National Union of Workers vs. the United Kingdom decided by the European Court of Human Rights is visible evidence thereof[44].

On that occasion, the Court specified that States have a proportionally higher margin of appreciation in adopting legislative measures regarding the non-essential elements of the rights protected by the Charter in their national legislation, and considered solidarity strikes as a secondary aspect of trade union activity, albeit from a questionable point of view. The Court therefore decided that in the specific case at hand, even though it takes

[44] European Court of Human Rights (IV Section), 8th April 2014, *Case of the National Union of Rail, Maritime and Transport Workers v. The United Kingdom* (Application no. 31045/10).

into account its latest broader interpretation of art. 11 ECHR, the latter provision had not been violated.

The Court, however, ruling in relation to the circumstances of the case, had to refer to the provision's more limited regulatory scope, which did not even mention the right to strike, and consequently pointed out that its conclusions in no way questioned the analyses performed by the ILO Committee of Experts or by ECSR which, in monitoring the compliance of national legislations, are based on a "more specific and exacting norm regarding industrial action".

Mutatis mutandis, the same obviously also applies to the Charter of Fundamental Rights of the European Union, which contains the much more detailed Article 28.

The effect produced by the ECHR decision is that it enabled the United Kingdom to maintain a restrictive regulation on secondary strikes although this could only apply to national strikes, like the one examined by the Court, and not to European-wide strikes.

According to the approach taken in this paper, Art. 28 of the Charter of Fundamental Rights is considered to directly regulate actions involving the common market and this in compliance with the subsidiarity principle referred to in Art. 51[45] and with Art. 53 of the Nice Charter, which specifies that none of the Charter's provisions may be interpreted as restricting the rights as they are recognised "in their respective fields of application".

The distinction between the two regulatory levels offers the opportunity to use transnational solidarity strikes as a way of balancing out economic power: reference to

[45] "Art. 51, **Scope:** The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties".

European Union legislation guarantees immunity to collective actions hypothetically carried out in a plurality of member States even when national legislation would exclude, restrict or ban secondary strikes.

It consequently becomes essential to verify whether the letter of Art. 28 is sufficient to exclude the feasibility of collective solidarity actions or not.

The provision, although reflecting the loose wording generally used in the Charter, is interpreted as being capable of placing some restrictions on strikes.

More specifically, a point of weakness could be found in the wording, already present in the 1981 Charter on Fundamental Social Rights and in the 1961 European Social Charter, according to which collective actions and strikes are possible only in the case of *conflicts of interest.*

In order to better understand the scope and meaning of this expression, it could be useful to refer to the European Committee of Social Rights' interpretation of the 1961 European Social Charter[46].

The expression is commonly intended to mean that collective actions and strikes are allowed if they are instrumental to supporting the claims of workers within the dynamic of counterposed interests between workers and employers, thus excluding, for example, strikes exclusively called for political reasons or to protest against authorities. On the other hand, economic interests are not intended to exclusively imply an interest that is negotiable through collective bargaining because, in this case, it would for example

[46] On this point, see the valuable work of A. M. ŚWIĄTKOWSKI, *Resocialising Europe through a European Right to strike modelled on the Social Charter?*, in N. COUNTOURIS, M. FRIEDLAND (eds), *Resocialising Europe in a time of crisis*, Cambridge University Press, Cambridge, 2013, pp. 390ff., and also the preceding work by E. KOVÁCS, *The right to strike in the european social Charter*, in Comparative Labour Law&Policy Journal, 2006, pp. 445ff.

exclude a strike called because of non-compliance with safety regulations which, on the contrary, would rightfully form part of the aforesaid dynamic[47].

The Committee of Social Rights has never taken a clear-cut position on sympathy strikes, although it judged that a legislation (of Great Britain, in the case at hand) violated Art. 6 of the Charter for not applying immunity to solidarity actions performed by workers who, although employed by a different employer and specifically by a different intermediary company, nonetheless worked for the same user.

This bring us to the core of our reasoning, i. e. the need to change viewpoint in order to verify, case by case, the concrete interest in the collective action regardless of the formal legal relationship between employer and strikers, thus allowing the actual economic interests existing between labour and capital to arise and truly countervail in an equal footing.

In any case, even considering the most limiting path, it should be pointed out that the national legal systems, providing for a restrictive regulation of strikes, generally allow sympathy strikes, as long as there is a communion of interests between the groups of workers and the principal strike is legitimately called against the formal employer.

In either of the two cases, if we were to consider the preceding Committee of Social Rights' interpretation to be applicable to the Art. 28 ECFR, because of the considerable similarity in the wording, it would be possible to offset the lexical bottleneck of the rule by the concretely exercising the solidarity action.

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[47] Among the scholar's works which collect case law of the ECSR, mention must be made of A. M. ŚWIĄTKOWSKI, *The Charter of Social Right of the Council of Europe*, Kluwer Law International, 2007, J. DARCY and D. HARRIS, *The European Social Charter, The procedural aspects of international Law book Series*, vol. 25, New York, 2nd edition, 2001 and ARSDLEY, L SAMUEL, *Fundamental Social Rights-Case Law of the European Social Charter*, Council of Europe Publishing, 2002.

If we consider what was said in the foreword on the ways of organising capital and the concrete interests of strikers, we can unarguably affirm that, even on the basis of a more restrictive interpretation, when the first group of workers directly interested in a labour dispute or in a claim against their own employer calls a strike, all subsequent solidarity actions by workers belonging to the same group or to the same corporate network, as well as workers who, in a broader perspective, share a common economic concrete interest with the first group of workers, are to be considered legitimate under Art. 28 of the Charter.

In the case of a corporate group or network, the common interest in the dispute and in the settlement of issues that, for example, involve the lead company or one of the companies that take part in the common comprehensive production cycle, should be patently considered evident.

The Laval case is an example of the second type: if the Swedish trade union's action had been hinged on the primary action of the Latvian workers, the Court would not have judged it to be a national action aimed at defending the domestic market but rather a solidarity action having the common aim of raising the working conditions of Latvian workers up to the level of Swedish workers by underwriting a collective contract between Laval and the posted workers[48], with the result of creating a competition between companies not based on social dumping.

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[48] The faculty of underwriting such collective agreement is salvaged without prejudice by the Court in point 81 of its decision. This is in line with the analysis by G. ORLANDINI in *Autonomia collettiva e libertà economiche alla ricerca dell'equilibrio perduto in un mercato aperto ed in libera concorrenza*, in *Working paper* C.S.D.L.E. "Massimo D'Antona". INT 66/2008, 20.

Given the link with the matter at stake, a reference to the Case C-396/13 CGUE (February, 12th, 2015) has to be made to underline the importance of actions grounded on a solidarity-based viewpoint. In the case at hand, the Court recognised a Finnish trade Union as representative of some Polish posted workers employed by a company established in Poland which was carrying out an installation work in Finland. The Court, in particular, granted legal standing to such trade union in order to bring proceedings aiming at recovering pay claims which related to the minimum wage in the interest of the posted workers.

It is self-evident that, for similar actions to be successful, all the workers involved must correctly understand the need to lay aside their immediate interest in favour of a more widespread improvement in working conditions. In short, they must understand the need for solidarity.

Turning back to the norm, we can summarise by saying that from the point of view of the required common interest, Article 28 specifies that the action must be performed to defend "their" interest, meaning thereby the interests of all strikers and not their *own* interests, i.e. the specific interests inherent to each group of strikers.

In essence, this patently derives from the application of the principle of self-determination of collective interest which the Court of Justice rulings inevitably narrow down by assigning to judges the task of evaluating the validity of the aims pursued by trade unions.

This brief analysis leads us to assert that the critical interpretation of this provision does not specifically exclude that there may be solidarity strikes carried out by groups of workers that share a common interest insofar as they are employed by companies that, although having a separate legal personality, are nonetheless economically interconnected; neither does it exclude that the actions could be triggered by workers that share a common interest in defending or claiming given working conditions.

The only condition is that the strikes must necessarily be called for a case of *conflict of interest*, condition which questions the meaning of the latter expression, since the more or less broad interpretation of this concepts affects the more or less broad of the scope of art. 28.

7. Conclusions.

In concluding this line of reasoning, we can assert that if Community-wide strikes, like the transnational ones, fall under the scope of the Union's regulatory framework, then this entails that solidarity strikes, on the basis of the systematic interpretation of the provisions contained in EU Treaties and in the European Charter of Fundamental Rights, can be considered to be legitimate regardless of the national legislations of member States.

This would give workers an instrument enabling them to establish labour relations in which the balance of power is not top-heavy on the side of employers, but above all a flexible instrument of conflict which would be in line with modern industry's organisation of capital.

Granting the chance of practicing the social fundamental rights truly effective, by enlarging their concrete feasibility, must be considered as a factor that is instrumental to the construction of a truly competitive economy, free of dominant positions that disallow the very concept of free market, and even more importantly, a factor that is useful in building a European Union that does not deny the common cultural and constitutional roots of member States nor disregard social rights.

From this point of view, it is necessary to underscore the inseparability of fundamental social rights and especially the key role played by the right to strike as the archetype of the right to enter into conflict.

Underlining this inseparability does not mean that right to strike should be exclusively instrumental to collective bargaining, but simply that the broader the possibility of entering into conflict, the more effective the collective bargaining becomes and the greater the democratic participation in the spirit of solidarity.

Indeed, the Strasbourg Court of Justice appears to have underscored this inseparability in the Demir & Baykara vs Turkey[49] decision on the right to bargaining and in the Enerji Yapi-Yol Sen vs Turkey[50] decision on the right to strike. The Court thus awarded protection to at least the core principles of these rights by giving an evolutionary and extensive interpretation of Art. 11 of the European Convention on Human Rights which, if interpreted literally, would assure only the right to establish and to join trade unions. This reasoning was ultimately also applied by the Supreme Court of Canada in respect of the right to strike of public sector workers[51].

In drawing our conclusions we need to make a few more brief considerations.

First, the above reasoning leads us to say that, in the economic scenario briefly described in the second paragraph, a more effective recognition of fundamental social rights (besides consumer rights) should also envisage a sort of disclosure right, meaning thereby provisions obliging large corporations or groups to inform trade unions about the company's ownership structure and control systems not only when guaranteed on

[49] European Court of Human Rights (Grand Chamber), 12th November 2008, Case *Demir and Baykara v.* (Application no. 34503/97).

[50] European Court of Human Rights (Grand Chamber), 21th April 2009, Case *Enerji Yapi-Yol Sen v. Turkey* (Application no. 68959/01).

[51] Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4 (released on 30 January 2015). In this judgment justice Abella asserted that "The conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations […] The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right." (para. 3). For a first comment on the decision, see J. FUDGE, *Constitutional Protection for the Right to Strike in Canada* (OxHRH Blog, 6 February 2015). The same authoress reconstructs the case-law on the right to collective bargaining in Canada, in ID., *Constitutional Rights, collective bargaining and the Supreme Court of Canada: Retreat and reversal in the Fraser Case*, Industrial Law Journal, vol. 41, Issue 1 , March, 2012, pp.1ff., and in ID., *The Supreme Court of Canada and the Right to Bargain Collectively: The implications of the health services and support case in Canada and beyond*, Industrial Law Journal, 37 (1), 2008, pp. 25ff.

the basis of their shareholdings in other companies but also by contractual agreements and *de facto* (as in the case of economic dependence for example) [52].

The second reflection stems from the European trade unions' concrete capacity to also act as a 'political' player precisely thanks to transnational actions such as when the ETUC called a strike on November 14, 2012 against the austerity measures passed by member States following decisions taken at European Union level (and not only, considering that the so-called 'Troika' is not a EU Institution).

Evidently the effective sanctioning of the possible legitimacy of a strike depends, to a large extent, on the success or failure of the action itself and it is indeed interesting to observe that strikes, historically speaking, first arose as a social phenomenon, when they were not yet regulated or even when there were criminal provisions to sanction those who participated in strikes or picketing actions, whilst they only at a later stage became legally tolerated actions and, ultimately, protected.

Today instead, we feel obliged to first and foremost ponder over the regulatory conditions that might hamper this social action, which is inevitably connected to the impossibility of eliminating the power-subjection relationship between employers and employees.

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[52] At present through the application of Directive 109/2004 CE, which contains provisions on the transparency of information on relevant shareholdings, and Directive 46/2006 on the transparency of transactions with related parties, it is possible to draw useful information, although they were aimed at achieving different purposes than the ones outlined in this paper.

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