

# Competition, Economic Freedoms and Collective Action: What the Us can teach Europe

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## Abstract

The article analyses, under a comparative approach, the case law of Us Courts and of the CJEU on the relationships between economic freedoms, competition law and collective action. In the first section, it describes the most controversial conclusions reached by the CJEU during the last decades. In the second one, it explains the rationales of American case law, on the basis of their historical development. In the third section, it compares the principles held in US case law with the decisions delivered by the CJEU and explains how they could be adapted to the problems recently emerged within European law, in order to correct the theoretical inconsistencies of the decisions upheld by the CJEU.

**Keyword:** Competition; Collective Action; Economic Freedoms; United States Law; European Union Law.

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## 1. Introduction. Economic freedoms and their Immanent Conflict with Collective Action: Balance or Autonomous Scopes?

The conflict between economic freedoms and collective action has deep roots and concerns trade unions' typical social functions<sup>1</sup>. Nonetheless, while it has always been given remarkable attention by the American case law and legal scholarship, it has not been object of the European academic debate and judiciary practices until recent times.

The US labor law has been strikingly affected by Courts' decisions on the enforcement of antitrust provisions on collective action and collective bargaining agreements. US experience demonstrates that trade unions' action can condition the economic processes<sup>2</sup>, not only immunizing wages and salaries from competition, but also affecting companies in their access to the market and in their strategic decisions, infringing the principles that regulate competition in US law<sup>3</sup>. After a long and controversial process, Courts have recognized immunity from antitrust law to collective action and collective bargaining agreements, allowing them to perform their typical economic functions by limiting competition.

In the European scenario, the conflict between economic freedom and labor has explicitly come out within the CJEU case law only more recently. In order to prevent social dumping linked to the transnational supply of services, trade unions have tried to impose the implementation of national collective agreements on foreign investor companies, by means of strike or other economic weapons on a transnational scale, hindering the free exercise of companies' economic freedoms within the common market and calling into question the balance between labor and trade-related interests, theoretically both protected by the European law.

The decisions delivered by the CJEU have been often criticized, since the Court has treated collective action as domestic provisions in conflict with the European law, scrutinizing their legitimacy under the proportionality test<sup>4</sup>. According to most European scholars, this approach could frustrate the recognition of strike and collective bargaining as fundamental rights, affirmed by the European Charter of Fundamental rights and by the Court itself<sup>5</sup>.

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<sup>1</sup> Handler M., Zifchak W.C., *Collective bargaining and the antitrust law: the emasculation of the labor exemption*, in *Columbia Law Review*, 81, 1981, 459; Leslie D.L., *Principles of labor antitrust*, in *Virginia Law Review*, 66, 7, 1980, 1185 ff.; Cox A., *Labor and the Antitrust Laws-A Preliminary Analysis*, in *University Pennsylvania Law. Review*, 104, 1955, 252, 256 - 257.

<sup>2</sup> St. Antoine T.J., *Antitrust Law at the Expense of Labor Law*, in *Virginia Law Review*, 62, 2015, 603.

<sup>3</sup> Leslie D.L., (1), 1185 ff.; Cox A., (1), 267, 276.

<sup>4</sup> Freedland M., Prassl, J. Viking, *Laval and Beyond: An Introduction*, in Freedland M., Prassl J. (eds.), *Viking, Laval and Beyond*, Hart Publishing, Oxford, 2014, 11; Velyvyte V., *The Right to Strike in the European Union after Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence*, in *Human Rights Law Review*, 15, 2015, 73 -84; Reich N., *How proportionate is the proportionality principle?* Paper presented at the Oslo conference on "The reach of free movement", 18 – 19 May 2011, 11; Micklitz H.W., De Witte B. (eds.), *The European Court of Justice and the Autonomy of the Member States*, Intersentia, Antwerp, 2012, 83; Hös N., *The principle of proportionality in the Viking and Laval cases: An Appropriate standard of Judicial Review?*, EUI Working Paper Law 2009/06, 3.

<sup>5</sup> See Deinert O., *Art 28 CFREU. Right of collective bargaining and action*, in Ales E, Bell M., Deinert O., Robin-Olivier S. (eds.), *International and European Labour Law. Article by Article Commentary*, Hart, 2018, 1454 ff.; Ballestrero M.V., Lo Faro A., Razzolini O., *Sub. Art. 28*, in Mastroianni R.N., Pollicino O., Allegrezza S., Pappalardo F., Razzolini O., *Carta dei diritti fondamentali dell'Unione Europea*, Giuffrè, Milano, 2017, 553; Freedland M., Prassl J, (4), 4; Weatherill S., *Viking and Laval: The EU Internal market perspective*, in Freedland

This paper maintains that CJEU's approach is founded on a misleading notion of collective action and of its very nature as an economic and social phenomenon, and that the CJEU erroneously differentiates the balance between collective action and economic freedoms, based on the fact that 'Treaties' provisions on competition either on freedom of establishment are at stake, with more favorable approach for employers in the latter case.

In its most well-known decisions on this subject (the so-called *Laval* quartet) the Court affirmed that collective action infringing the freedom of establishment have to be subject to the proportionality test, as well as domestic statutory or administrative provisions, undermining the effectiveness of trade unions' action as private parties exercising a private autonomy in the economic and productive scenario. In doing that, the Court moved away from its previous pro-labor approach, held in *Albany*, exactly on the grounds that, in that case, labor interests were not infringing the freedom of establishment but the treaties' provisions on competition. The misleading foundation of the CJEU's doctrine can be challenged through a comparative approach, confronting it with the opposite ideas upheld by US case law on the same matter<sup>6</sup>.

In the first section, the article describes the most controversial conclusions reached by the CJEU on the relationship between collective action, collective bargaining agreements and economic freedoms. In the second one, it explains the rationales of American case law on the same matter and their historical development. In the third section, it compares the US case law with the decisions delivered by the CJEU and explains how the principles adopted by American Courts could be adapted to the problems emerged within the European law, in order to correct the misleading theories upheld by the European Court.

## Section 1.

### 1. Collective Bargaining Agreements, Economic Freedoms and Competition in the CJEU Case Law.

Social issues have been core to the development of the different legal systems of European member states. Most European Constitutions explicitly protect the right to strike and collective bargaining<sup>7</sup> and, in most member states, economic freedoms are subject to explicit restrictions in order not to collide with the development of collective bargaining processes.

Nonetheless, from the one hand, the European Union has only recently recognized formal protection to workers' rights to strike and to undertake collective action, through

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M., Prassl J. (eds.) (4), 23; Counturis N., Engblom S., *Civilising the European Posted Workers Directive*, in Freedland M., Prassl J. (eds.), (5), 279 ff; Velyvyte V., (4), 75; Reich N., (4), at 6; Deakin S., *The Lisbon Treaty, The Viking and Laval Judgments and the Financial Crisis: In search of New Foundations for Europe's 'Social Market Economy'*, in Bruun N., K. Lörcher, Schömann I. (eds), *The Lisbon Treaty and Social Europe*, Hart Publishing, Oxford, 2012.

<sup>6</sup> For a similar approach, but based on the opposite point of view, see Willborn S.L., *Laval, Viking and American labour law*, in *Comparative Labor Law and Policy journal*, 66, 2011, 1079 ff.; here, the author deals with the comparison of US and European law more from the point of view of statutory law, analyzing how the state and federal American labor law would have faced a problem similar to the ones raised within Viking and Laval.

<sup>7</sup> Carabelli U., *Europa dei Mercati e Conflitto Sociale*, Cacucci, Bari, 2009, 162.

Art. 28 of the Charter of Fundamental Rights of the European Union<sup>8</sup>; from the other hand, the relationship between economic freedoms, collective action and collective agreements has always been particularly controversial in the EU law.

In its first leading case on this matter<sup>9</sup>, the CJEU adopted a pro-labor approach, granting collective bargaining agreements a wide space of autonomy from competition law<sup>10</sup>. The court recognized that the correct and natural functioning of collective bargaining does not allow scrutiny on the strategies of social partners, grounded in competition law<sup>11</sup>; on the contrary, they have to be free in using economic weapons, as far as they are addressed to carrying out negotiations on employment conditions:

“The social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment”<sup>12</sup>.

About 8 years after *Albany*, in *Viking*, the CJEU<sup>13</sup>, although affirming that “the right to take collective action, including the right to strike, must be recognized as a fundamental right which forms an integral part of the general principles of Community law”<sup>14</sup>, substantially subverted the *Albany* doctrine, maintaining that collective action is not immune from judiciary control when it does constraint the freedom of establishment protected by art. 43 of the treaty (now art. 49 of the TFEU).

In more recent cases, the Court confirmed that the decisive point producing the shift from the *Albany* to the *Viking* approach was the fact that fundamental economic freedoms, namely freedom of establishment and to provide services, were explicitly at stake. When the case is to be decided only on the basis of art. 101 of the TFEU, and art. 49 and 56 are not into question, the Court appears to be more inclined to recognize wider immunity to collective bargaining agreements, following the *Albany* doctrine, as it has recently done in *FNV Kunsten Informatie en Media*<sup>15</sup>.

On the contrary, when collective action or collective bargaining agreements hinder fundamental economic freedoms, they have to be subject to a case-by-case scrutiny based

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<sup>8</sup> Deinert O. (5), at 1454 ff.; See Ballestrero M.V., Lo Faro A. Razzolini O., (5), 528 ff.; Velyvyte V., (5), 74; Carabelli, (7), at. 160 and 161.

<sup>9</sup> CJEU, Case C-67/96 *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* (1996) ECLI:EU:C:1999:430. See also CJEU, Case C-115/97 *Brentjens' Handelsonderneming BV v. Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen*, ECLI:EU:C:1999:434; CJEU – Case C-219/97 *Maatschappij Drijvende Bokken BV v. Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* (1997) ECLI:EU:C:1999:437. More recently, CJEU, Case C-180/98 *Pavel Pavlov and others v. Stichting Pensioenfonds Medische Specialisten* (1998) ECLI:EU:C:2000:428.

<sup>10</sup> Ballestrero M.V., Lo Faro A., Razzolini O., (5), 535; Freedland M., Prassl J., (4), 16.

<sup>11</sup> CJEU, Case C-67/96 *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* (1996) ECLI:EU:C:1999:430. See. Deinert O. (5), at 1454 ff.

<sup>12</sup> CJEU, Case C-67/96 *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* (1996) ECLI:EU:C:1999:430, par. 59. Similar conclusions have been reached by The EFTA Court in *Norwegian Federation of Trade Unions and Others v. Norwegian association of Local and Regional Authorities and Others*, 22.3.2002, case E-08/00; see Kilpatrick C., Fitzpatrick B., *The 'Albany-test' compared with the 'EFTA guidelines'*, in 33 *Industrial Law Journal*, 33, 2004, 73, 74.

<sup>13</sup> CJEU – C-438/05 *International Transport Workers' Federation e Finnish Seamen's Union v. Viking Line ABP e OÜ Viking Line Eesti*, (2005) ECLI:EU:C:2007:772, paras 6 -27.

<sup>14</sup> See Hös N., (4), 2

<sup>15</sup> CJEU, Case C-413/13 *FNV Kunsten Informatie en Media V. Staat der Nederlanden* (2013) ECLI:EU:C:2014:2411; see Grosheide E., Barenberg M., *Minimum Fees for the Self-Employed: A European Response to the "Uberized" Economy?* in *Columbia Journal of European Law*, 22, 2016, 193.

on the proportionality test<sup>16</sup>. On this regard, collective actions are treated as provisions adopted by public authorities in contrast with freedom of establishment<sup>17</sup> and are considered lawful only when a legitimate aim, deduced by a member state in order to justify a restriction to art. 49 TFEU, is proved<sup>18</sup>.

## 2. Collective Action and the Definition of Minimum Wage and Working Conditions for Posted Workers according to the CJEU.

Many decisions of the CJEU involving the conflict between collective action and economic freedoms concern the implementation of directive No. 96/71 on posted workers<sup>19</sup>. Companies located in Eastern countries provide services at lower conditions, exploiting the lower level of wages and workers' treatments provided for by their domestic laws, obtaining remarkable competitive advantages<sup>20</sup>. Most of the time, these companies provide services within the territory of other member states employing workers posted from their country of incorporation. The competition triggered by the mobility of these employers and of their employees foster the race to the bottom for labor standards and jeopardize the maintenance of the acquired levels of workers' protection in many European member states, as well as job opportunities of national workers of the state where the service is performed<sup>21</sup>.

In order to prevent such processes, Directive 96/71 allows member states to establish minimum conditions for posted workers, with a very limited role for collective bargaining agreements. Pursuant to art. 3(1) of the Directive, only collective agreements universally applied, according to domestic law, may participate in the definition of minimum treatments.

Trade unions have tried to force foreign enterprises to subscribe national collective agreements, in order to grant the same working conditions to domestic and foreign workers and, therefore, reduce social dumping. The CJEU dealt with these problems in *Laval*<sup>22</sup>, *Riiffert*<sup>23</sup> and *Commission v. Luxembourg*<sup>24</sup>.

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<sup>16</sup> Velyvyte V. (5), 75.

<sup>17</sup> Even if the Court has admitted restrictions on economic freedoms founded on non-labor fundamental rights; see CJEU, C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich, (2000) ECLI:EU:C:2003:333; CJEU, C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn (2002) ECLI:EU:C:2004:614; see also Carabelli U., (7), 173; Reich N., (4), 24; de Vries S. A., *Protecting fundamental (social) rights through the lens of the European single market: the quest for a more "holistic approach"*, 32 in *International Journal of Comparative Labour Law*, 293, 32, 2016, 216.

<sup>18</sup> Even "a fundamental right, such as the right to bargain collectively (...) must (...) be reconciled with the requirements stemming from the freedoms protected by the FEU Treaty (...) and be in accordance with the principle of proportionality", CJEU, C-271/08 *Commission v. Germany*, (2008) ECLI:EU:C:2010:426, pr. 44.

<sup>19</sup> Recently amended by "Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018".

<sup>20</sup> Countouris N, Engblom S., (5), 286; Deakin S., (5), 25.

<sup>21</sup> See Bercusson B., *The Trade Union Movement and the European Union: Judgment Day*, in *European Law Journal*, 13, 3, 2007, 279, 305.

<sup>22</sup> CJEU, Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan e Svenska Elektrikerförbundet (2005) ECLI:EU:C:2007:809.



In *Laval*, confirming “labor restrictive” interpretations adopted in *Viking*, the Court maintained that, since fundamental freedoms “could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law”<sup>25</sup>, “the right to take collective action” is subject to restrictions when it infringes in such freedoms, even though it “must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law”<sup>26</sup>.

Like in *Viking*, the court submitted the exercise of collective rights to the proportionality test, considering it not legitimate in the relevant case, since the lack of precise and clear provisions on collective bargaining within the Swedish law, connected with the uncertainties naturally related to any kind of negotiation, made investment too risky for foreign enterprises and, as a consequence, constituted an obstacle to the exercise of economic freedoms, disproportionate respect the legitimate objective of protecting workers<sup>27</sup>.

Competition and race to the bottom issues have been explicitly called into question in *Rüffert*. *Rüffert* referred to the law of the German Land Niedersachsen, which expressly provided for a “social clause” establishing that “public contracting authorities may award contracts for building works and local public transport services only to undertakings which pay the wage laid down in the collective agreements at the place where the service is provided”, in order to “counteracts distortions of competition which arise in the field of construction and local public transport services resulting from the use of cheap labour”<sup>28</sup>.

Even though - theoretically - both domestic and European law were aimed at favoring fairer competition between undertakings, the European Court has criticized the German legislation, since any restriction imposed by member states to economic freedom has to be interpreted strictly. While, in *Albany*, the Court had clearly established immunity for collective agreements, in *Rüffert*, minimum levels of wages or working conditions imposed by them have been considered as “an additional economic burden that may prohibit, impede or render less attractive the provision of (...) services in the host Member State”, and, as such, subject to the proportionality test<sup>29</sup>.

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<sup>23</sup> CJEU, C-346/06 Dirk Rüffert v. Land Niedersachsen (2006) ECLI:EU:C:2008:189.

<sup>24</sup> CJEU, C-209/08 Commission v. Luxemburg (2008) ECLI:EU:C:2008:776.

<sup>25</sup> CJEU, Case C – 341/05 Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan e Svenska Elektrikerförbundet (2005) ECLI:EU:C:2007:809, pr. 91.

<sup>26</sup> CJEU, Case C – 341/05 Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan e Svenska Elektrikerförbundet (2005) ECLI:EU:C:2007:809, pr. 91.

<sup>27</sup> CJEU, Case C – 341/05 Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan e Svenska Elektrikerförbundet (2005) ECLI:EU:C:2007:809, pr.112.

<sup>28</sup> CJEU, C-346/06 Dirk Rüffert v. Land Niedersachsen (2006) ECLI:EU:C:2008:189, pr. 30.

<sup>29</sup> CJEU, C-346/06 Dirk Rüffert v. Land Niedersachsen (2006) ECLI:EU:C:2008:189, par. 37. The more “pro labor” approach adopted by the Court in the more recent *RegioPost* decision is not decisive for our reasoning<sup>29</sup>, since, while “in the judgment in *Rüffert*, the Court based its conclusion on the finding that what was at issue (...) was a collective agreement applying solely to the construction sector, which did not cover private contracts and had not been declared universally applicable” (CJEU, C-115/14 *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz* (2014) ECLI:EU:C:2015:760, par.74), there, “the minimum rate of pay imposed by the measure at issue in the main proceedings is laid down in a legislative provision, which, as a mandatory rule for minimum protection, in principle applies generally to the award of any public contract in the Land of Rhineland-Palatinate, irrespective of the sector concerned” (paragraph 75). Had the provision at

The CJEU confirmed this doctrine in *Commission v. Luxembourg*<sup>30</sup>, holding that “article 3(1) sets out an exhaustive list of the matters in respect of which the Member States may give priority to the rules in force in the host Member State”<sup>31</sup>. Therefore, the treatments granted to national workers by collective bargaining agreements are not to be extended, by domestic law, to foreign posted workers outside the scope of the matters specified by pr. 3(1) of Directive 96/71, which does not refer to an “automatic adjustment to reflect changes in the cost of living”, but only to “minimum rates of payments”<sup>32</sup>.

## Section 2.

### 1. At the Origins of the Relationship between Antitrust Law and Labor within US Law.

In the US, the debate on the relationship between labor action and economic freedoms has a longer tradition and the Sherman Act has been enforced against labor unions more often than against companies<sup>33</sup>.

Since the second half of XIX century, US industrial relations have been characterized by an intense economic conflict<sup>34</sup>. Through various forms of collective action and bargaining agreements, American trade unions have been able to block companies’ commercial activities, hindering their economic exchanges and their possibility to compete in the interstate market, in order to obtain more favorable working conditions and affect managerial strategic decisions<sup>35</sup>.

Because of the absence of a specific and organic system of rules for labor relations<sup>36</sup>, courts have governed the collective conflict as a matter of individual rights, assuring intense protection to companies’ economic interests<sup>37</sup>. In that phase, as mere agents of employees, unions were not considered as holders of autonomous “property rights”<sup>38</sup> or legal personality<sup>39</sup>, and their activities were mostly repressed as inadmissible restrictions of employers’ economic freedoms<sup>40</sup>.

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issue been contained in a collective agreement, *RegioPost* would have been decided on the basis of the *Rüffert* doctrine.

<sup>30</sup>CJEU, C-209/08 *Commission v. Luxembourg* (2008) ECLI:EU:C:2008:776, paras. 4 – 7.

<sup>31</sup> CJEU, C-209/08 *Commission v. Luxembourg* (2008) ECLI:EU:C:2008:776, para. 26.

<sup>32</sup> See Freedland M., Prassl J., (5), 17; Counturis N., Engblom S. (5), 279 and 283 ff.; McCrudden C., *The Rüffert Case and Public Procurement*, in Cremona M. (ed.), *Market Integration and Public Services in the European Union*, Oxford University Press, Oxford, 2011, 128.

<sup>33</sup> Tomlins C.L., *The State and the Unions. Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960*, Cambridge University Press, 1985, 6.

<sup>34</sup> See Forbath W.E., *Law and the Shaping of the American Labor Movement*, Harvard University Press, Cambridge, 1991, 11, 59; Tomlins C.L., (33), 11; Brody D., *Section 8(a)(2) and the Origins of the Wagner Act*, in Friedman S., Hurd R.W., Oswald E.A., Seeber R.L. (eds), *Restoring the Promise of American Labor Law*, Cornell University Press, 1994, 32. For a description of the labor conflicts at the end of XIX century in US, see the report of the facts object of decision in *U.S. v. Debs*, 64 F. 724 (1894).

<sup>35</sup> Forbath W.E., (34), at 26; Tomlins C.L., (33), 8 - 16 ff.; Brody D., (34), 35.

<sup>36</sup> Forbath W.E., (34), 33; Leslie, (1), 1183.

<sup>37</sup> Tomlins C.L., (33), 26 – 27 (1985); St. Antoine T.J., (2), 604 ff.

<sup>38</sup> See Forbath W.E., (34), 86; Tomlins C.L., (33), 64.

<sup>39</sup> Tomlins C.L., (34), 121. Only gradually courts attributed autonomous legal positions to unions within the collective bargaining process; Tomlins C.L., (33), 117; Brody D., (34), 32.

<sup>40</sup> Tomlins C.L., (34), 58.

Within this scenario, it is not surprising that antitrust law has appeared to judicial authorities as the most effective tool for restricting trade unions' powers in favor of enterprises' interests and contain their activism<sup>41</sup>, assuming that common and statutory law did not provide for any legal grounds to exempt collective action from the enforcement of Sherman Act<sup>42</sup>. As the Supreme Court affirmed, the Sherman Act "prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the States, or restricts, in that regard, the liberty of a trader to engage in business"<sup>43</sup>, and, as a matter of fact, under a mere antitrust law perspective, trade unions are conspiracies and collective agreements are cartels<sup>44</sup>. In particular US courts' decisions strikingly hit "secondary" boycotts and "sympathy" strikes, which represented fundamental and effective instruments of pressure against employers for American trade unions<sup>45</sup>.

In order to contain the restrictive attitude of courts toward labor actions, Congress enacted statutory provisions aimed at immunizing collective action from the enforcement of antitrust law<sup>46</sup>. In 1914, sections 6 and 20 of the Clayton Antitrust Act has been passed<sup>47</sup>, establishing (namely at sec. 6) that, since labor is "not a commodity or article of commerce", labor organizations were not to be considered *per se* illegal and should have been exempted from the enforcement of Sherman Act. Sec. 20 of the Clayton Act prohibited the issuing of restrictive orders or injunctions against collective actions "involving, or growing out of, a dispute concerning terms or conditions of employment", if "peaceful", "lawful" and undertaken through "lawful means".

Nonetheless, Clayton Act provisions were construed as specific exemptions from the antitrust law and Courts interpreted them in a restrictive way, in absence of any statutory general recognition of labor as a fundamental social and economic value.

In *Duplex Printing Press v. Deering*<sup>48</sup>, the Supreme Court maintained that secondary boycotts and sympathy strikes<sup>49</sup> were not included within the scope of Clayton Act's exemptions, because they were not "peaceful and lawful" and the targeted enterprises were not "concerned as parties" in the dispute, as required by a strict interpretation of the statutory language of the Clayton Act<sup>50</sup>.

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<sup>41</sup> Cox A., (1), 256; Tomlins C.L., (33), 37 ff.

<sup>42</sup> *U.S. v. Debs*, 64 F. 724 (1894).

<sup>43</sup> *Loewe v. Lawlor*, 208 U.S. 274, 307 (1908).

<sup>44</sup> Tomlins C.L., (33), 39; Bogg A., Viking and Laval: *The International Labour Law Perspective*, in Freedland M., Prassl J., (eds.), (4), 71. See also Deinert O. (5), 1454 ff.

<sup>45</sup> Handler M., Zifchak W.C., (1), 462 ff.

<sup>46</sup> Forbath W.E., (34), 17; Cox A., (1), at 156 – 158 and 257; Handler M., Zifchak W.C., (1), 471.

<sup>47</sup> As a reaction to *Loewe v. Lawlor*, where the Supreme Court had enforced the Sherman Act on a nationwide boycott aimed at forcing an employer to unionize its shops, on grounds that a combination and a conspiracy forbidden by the statute has been proved; *Loewe v. Lawlor*, 208 U.S. 274, 307 (1908).

<sup>48</sup> *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921)

<sup>49</sup> See Forbath W.E., (34), at 61, 95; Cox A., (1), 259.

<sup>50</sup> While, on the one hand, Clayton act "exemption is limited to pressure exerted upon a 'party to such dispute' by means of 'peaceful and lawful 'influence upon neutrals'" [*Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 473 (1921)]; on the other hand, labor exemptions had to be enforced only within industrial disputes strictly related to "terms or conditions of employment". Any immunity could not have been granted "beyond the parties affected in a proximate and substantial, not merely a sentimental or sympathetic, sense by the cause of dispute" [*Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 472 (1921)], and, for this reasons, "the restriction upon the use of the injunction" was to be intended "in favor only of those concerned as parties" in the labor dispute, excluding workers and unions involved within "sympathetic strikes" [*Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 470 (1921)]. See Forbath W.E., (34), 61; Meltzer B.D., *Labor Unions, Collective*



*Duplex* would have deeply affected trade unions' strategies and, in order to prevent courts' restrictive decisions from undermining collective bargaining processes, Norris - La Guardia Act extended the number of actions exempted from antitrust law under the Clayton Act and established that labor immunity from antitrust law was not to be restricted to immediate employer - employees disputes, as it had been the case in *Duplex*<sup>51</sup>.

## 2. The Immunity of Unilateral Unions' Action from Antitrust Law: the "Statutory Exemption".

*Duplex* doctrine was based on the idea that labor immunities from antitrust law had to be founded on statutory provisions specifically aimed at exempting unions and their activities. Twenty years later, in *Apex Hosiery*<sup>52</sup>, the Supreme Court explored a different approach, deducing the limits to the enforcement of antitrust law to labor actions from the Sherman Act itself, and finding, within the language of the statute, an autonomous and reasonable balance between labor and companies' economic freedoms<sup>53</sup>, on the basis of a systematic interpretation of the policies pursued by the Congress<sup>54</sup>.

According to the Court, for its very nature, "successful union activity (...) may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards", and "an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act"<sup>55</sup>.

According to the *Apex Hosiery* doctrine, the immanent conflict between labor and antitrust law could find a reasonable balance in an organic and systematic understanding of their reciprocal ends and scopes<sup>56</sup>, founded only on the Sherman act itself:

"If (...) we were to hold that a local factory strike, stopping production and shipment of its product interstate, violates the Sherman law, practically every strike in modern industry would be brought within the jurisdiction of the federal courts, under the Sherman Act, to remedy local law violations. The Act was plainly not intended to reach such a result, its language does not require it, and the course of our decisions precludes it"<sup>57</sup>.

Nonetheless, the most significant breakthrough in the historical development of the relationship between antitrust and labor law in the US legal system has been marked by NLRA<sup>58</sup>, which made unions' activities object of a specific and organic body of statutory rules<sup>59</sup>, by which Congress's policies explicitly intended to support labor and to maintain

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*Bargaining, and the Antitrust Laws*, in *The Journal of Law and Economics*, 6, 1963, 152,158); Cox A., (1), 258.

<sup>51</sup> Forbath W. E., (34), 158 – 164; Cox A., (1), 259.

<sup>52</sup> *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

<sup>53</sup> St. Antoine T.J., (2), 606 ff.; for a critical vision of this approach see Handler M., Zifchak W.C., (1), 479.

<sup>54</sup> St. Antoine T.J., (2), 606.

<sup>55</sup> *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 504 (1940).

<sup>56</sup> See St. Antoine T.J., (2), 614.

<sup>57</sup> *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 513 (1940). See, more recently, *Wood v. NBA*, 809 F.2d 954, 960 (2d Cir. 1987).

<sup>58</sup> See Handler M., Zifchak W.C., (1), at 471; Forbath W.E., (34), 165; Cox A., (1), 254.

<sup>59</sup> Brody D., (34), 33; Tomlins C. L., (33), at 159; Handler M., Zifchak W.C., (1), 479.

“workplace relations (...) in the realm of free collective bargaining”<sup>60</sup>. Therefore, labor actions were covered by a general statutory immunity, derived directly from labor legislation.

The impact of the Congress’ pro-labor policies was made clear in *United States v. Hutcheson et al.*<sup>61</sup>. Under the so called “statutory exemption” doctrine, unilateral action of trade unions were *per se* immunized from any restrictive order or injunction grounded in any U.S. statute, without being subject to any scrutiny by courts on “the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means”<sup>62</sup>.

### 3. Collective Agreements and Antitrust Law: the “Non-statutory Exemption”.

The “statutory exemption” did not merely represent the effect of one or more provisions immunizing unilateral trade unions’ action from the antitrust law implementation. It has been the consequence of a general and profound change in the US law as regards the conflict between labor and competition, due to the NLRA<sup>63</sup>.

As the Supreme Court affirmed in *United Mine Workers of America*<sup>64</sup>, “harmonizing the Sherman Act with the national policy expressed in the National Labor Relations Act, of promoting “the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation”<sup>65</sup>, had become the crucial theoretical point for regulating the conflict between antitrust and labor law. The prerogatives granted to unions and collective bargaining by NLRA were only partially restricted by the so called Taft-Hartely and Landrum-Griffin amendments<sup>65</sup>, but the systemic and organic protection granted by the congress to Labor actions was not reverted.

Nonetheless, on the sole basis of “statutory exemption”, unions were allowed to use their traditional economic weapons only if acting unilaterally, without any combination with non-labor groups or parties (employers, groups or associations of employers)<sup>66</sup>. Such approach would have seriously jeopardized NLRA policies and the Congress’ intent to promote collective bargaining, because collective agreements were not immunized from being considered as conspiracies between labor and non-labor groups<sup>67</sup>.

In *United Mine*, the Supreme Court recognized that Congress’ policies grant immunities from antitrust law, not only (explicitly) to collective action, but also (implicitly) to collective agreements, since the statutory law promotes collective bargaining as the proper and most effective way for defining salaries and working conditions<sup>68</sup>.

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<sup>60</sup> See M. Biasi, *Statutory Employee Representation in Italian and U.S. Workplaces: A Comparative Analysis of the Fiat/Chrysler Case*, in *Labour law journal*, 2015, p. 241 ss.; Brody, *supra* note 35, at 42. See Forbath W.E., (34), 165; Tomlins C.L., (33), 101 and 138

<sup>61</sup> *U.S. v. Hutcheson*, 312 U.S. 219 (1941).

<sup>62</sup> *U.S. v. Hutcheson*, 312 U.S. 219, 232 (1941).

<sup>63</sup> Leslie D. L., (1), 1206 ff.

<sup>64</sup> *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

<sup>65</sup> Handler M., Zifchak W.C., (1), 466 ff.

<sup>66</sup> Leslie D.L., (1), 1204.

<sup>67</sup> Cox A., (1), 270 - 271; for a different opinion St. Antoine T.J., (2), 615.

<sup>68</sup> *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

It cleared that the exemption can be enforced only as long as collective partners do not go beyond their traditional economic function of regulating employment conditions and salaries, recognized by the statutory law. In fact, a “union forfeits its exemption from the antitrust laws” when collective agreements – or part of their provisions – do not genuinely pursue the regulation of labor matters, but aim at goals prohibited by the antitrust law, like supporting employers in limiting the access of competitors to a relevant market<sup>69</sup>.

In *Jewel Tea*, the Supreme Court clarified that collective agreements are immunized from the antitrust law when they concern mandatory subjects of bargaining according to the NLRA:

“Employers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects”<sup>70</sup>.

According to *Jewel Tea*, legitimate intents of collective bargaining are to be appreciated on the basis of an objective criterion<sup>71</sup>, concerning the subjects treated by the agreement at stake<sup>72</sup>. Only when collective agreements have no relation – even indirect - with wages, hour or working conditions<sup>73</sup>, antitrust law has to be enforced and agreements’ effects on competition scrutinized on the basis of the “rule of reason”<sup>74</sup>.

#### 4. Collective Bargaining in the Sport Sector: “Non-statutory exemption” in Favor of Employers.

Subsequent developments of US case law confirmed the approach adopted by the Supreme Court in *United Mine* and *Jewel Tea*<sup>75</sup>. Nonetheless, in the last decades, the relationship between antitrust and labor law has lost its grasp on US scholarship and it is

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<sup>69</sup> In *United Mine*, in order to increase the level of wages in the relevant economic sector, unions took part in negotiations with bigger coal mining enterprises whose intent was to exclude smaller companies from the coal market, by making access conditions too onerous for them. The approach held by the court in *United Mine* has been highly criticized, since they have been deemed to open more space for a scrutiny on collective actions based on antitrust law, but this idea denied by the successive development of US case law, mostly in sport sector; Handler M., Zifchak W.C., (1), 483 ff.

<sup>70</sup> *Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, et al. v. Jewel Tea Company, Inc.*, 381 U.S. 676, 689 (1965).

<sup>71</sup> See also *Conn. Ironworkers Empls. Assoc. v. New Eng. Reg’l Council of Carpenters*, 157, F.Supp.3d 173 (D. Conn. 2016); *KSW Mech. Servs. v. Mech. Contrs. Ass’n of N.Y.*, 2012 U.S. Dist. LEXIS 42248; *California ex rel. Harris v. Safeway, Inc.*, 651, F.3d 1118 (9<sup>th</sup> Cir. 2011).

<sup>72</sup> See Leslie D.L. (1), 1213; Meltzer D.B., (50), 185. For a in-depth clarification of what as to be understood as mandatory working conditions see Handler M., Zifchak W.C., (1), at 503 ff.

<sup>73</sup> It has been confirmed by recent case law; see *KSW Mech. Servs. v. Mech. Contrs. Ass’n of N.Y.*, 2012 U.S. Dist. LEXIS 42248; *Conn. Ironworkers Empls. Assoc. v. New Eng. Reg’l Council of Carpenters* 157, F.Supp.3d 173 (D. Conn. 2016); *Am. Steel Erectors, Inc. v. Local Union No. 7, Int’l Ass’n of Bridge*, 932 F. Supp. 2d 240. According to *Steel Erectors, Inc. v. Local Union No. 7*.

<sup>74</sup> According to the court, agreements’ content has to be “so intimately related to wages, hours and working conditions that the unions’ successful attempt to obtain that provision (...) in pursuit of their own labor union policies, and not at the behest of or in combination with non-labor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act”; *Local Union No. 189, Amalgamated Meat Cutters and Butcher...*, 381 U.S. 676, 690 (1965). See St. Antoine, *supra* note 2, at 606; Leslie, (1), 1192; Meltzer D.B., (50), 177, 186 and 222.

<sup>75</sup> See *Connel construction c. v. Plumbe Local 100*, 421 U.S. 616 (1975)

no longer a major topic of discussion in Courts, probably because of the loss in power and consensus suffered by trade unions within the US society, especially in the private sector<sup>76</sup>.

The American Labor movement has changed radically<sup>77</sup> and no longer has the power to affect competition between employers, as it did at the times of *Jewel Tea* or *United Mine*; neither is it able to control workers' access to employment or to condition employers' strategic choices under the pressure of economic weapons<sup>78</sup>.

The most recent and innovative decisions on this matter concern collective conflicts in the sports sector. In this field, the terms of the economic conflict have been reversed, since it is the workers who invoke the antitrust law to protect their economic freedoms<sup>79</sup>.

In fact, in order to limit any excessive increases in salaries, to distribute talented players among all teams and to improve the attractiveness of sport entertainment, collective agreements restrict the possibility for especially skilled athletes - with more remarkable negotiating power - to compete freely on the labor market<sup>80</sup>. They also impose strict limits to players' income and to their possibility to move from one team to the others<sup>81</sup>. Therefore, most disputes rose from players' challenges to such contractual provisions<sup>82</sup>.

This situation has exacerbated the economic conflict and, on the one hand, teams have undertaken aggressive unilateral actions, namely through lockouts or unilateral enforcement of contractual conditions; on the other hand, through the so called "decertification strategy", major players have tried to prevent the enforcement of "non-statutory exemption" on employers' collective action and to escape the limits imposed by collective agreements to their negotiation freedom, by terminating their labor organization's status as their collective bargaining agent and maintaining that, since trade union were no longer involved, the controversy was not to be included within the scope of labor immunities.

A major contribution in this field has been given by lower courts, which have adapted the general principles defined by the Supreme Court on "statutory" and "non-statutory" exemptions to the specificities of collective action in the sports sector. In particular, it has been established whether non-statutory exemption was to be enforced to employers' unilateral action.

In *Mackey*<sup>83</sup>, the Eighth Circuit Court of Appeals held that, "since the basis of the non-statutory exemption is the national policy favoring collective bargaining, and since the exemption extends to agreements, the benefits of the exemption logically extend to both

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<sup>76</sup> Rosenfeld J., *What Unions No Longer Do*, Harvard University Press, 2014, 10 ff.

<sup>77</sup> See Dau-Schmidt K.G., *The Changing Face of Collective Representation: The Future of Collective Bargaining*, in *Indiana University School of Law-Bloomington Legal Studies Research Paper Series*, Research Paper N. 72, 2007, 9.

<sup>78</sup> Rosenfeld J., (76), 90 ff.

<sup>79</sup> Leroy M.H., *The narcotic effect of antitrust law in professional sports: how the Sherman act subverts collective bargaining*, in *Tulane Law Review*, 86, 2012, 859, 889 ff.

<sup>80</sup> Leroy M.H., (79), 860 ff.

<sup>81</sup> For a clear explanation of these phenomena see Farzin L., *On the antitrust exemption for professional sports in the United States and Europe*, in *Jeffrey S. Moorad Sports Law Journal*, 22, 2015, 75 and 77 ff.; Parlow M.J., *The NBA and The Great Recession: Implications For The Upcoming Collective Bargaining Agreement Renegotiation*, in *Marquette University Law School Legal Studies Research Paper Series. Research Paper No. 10-29*, 102 ff.

<sup>82</sup> Violations of this kind of clauses entailed the inclusion of the player in a black-list that excluded him from the market, with severe penalties on recalcitrant member clubs. See *Haywood v. National Basketball Ass'n*, 401 U.S. 1204 (1971).

<sup>83</sup> *Mackey v. National Football League*, 543 F.2d 606 (1976).

parties to the agreement”, so that “under appropriate circumstances (...) a non-labor group may avail itself of the labor exemption”<sup>84</sup>.

The enforceability of labor exemption on all the action involved in collective negotiations has been motivated by Courts on grounds of the preeminence of the labor legislation over the antitrust law in regulating collective bargaining, consistently with the principles defined by the Supreme Court in *United Mine* and *Jewel Tea*<sup>85</sup>.

As long as negotiations deal with labor matters, the antitrust law cannot be enforced on collective bargaining, which involves not only the agreement itself, but also all the unilateral initiatives undertaken by the involved social partners in order to negotiate<sup>86</sup>. Employers’ traditional economic weapons are essential for the natural development of collective bargaining and an uneven situation - where only employees’ action were immune from the antitrust legislation - would jeopardize the successful conclusion of the collective bargaining process or the very existence of the process itself<sup>87</sup>.

In *Antony Brown et al. v. Pro Football*<sup>88</sup>, the Supreme Court has sustained lower Courts’ decisions, confirming that the bargaining process is the result of a complex negotiation, grounded on an array of unilateral actions and interactions, whose limits are to be defined on grounds of labor law principles and of rules commonly accepted within the industrial relations environment:

“Antitrust liability (...) threatens to introduce instability and uncertainty into the collective-bargaining process, for antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective-bargaining process invites or requires”<sup>89</sup>.

An effective implementation of the *United Mine* and *Jewel Tea* principles implies that collective action adopted by both parties to the bargaining processes are to be immunized from the antitrust law, as long as they can be considered normal phases of the negotiations<sup>90</sup>.

### Section 3.

#### 1. How Collective Action and Collective Bargaining Agreements affect Economic Freedoms and Competition within US and EU Experience.

The evolution of the US and European case law demonstrates that the problematic relationship between competition, economic freedoms and collective action is highly controversial and its regulation requires a delicate balance between the various interests at

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<sup>84</sup> See Leroy M.H., (79), 893.

<sup>85</sup> *Wood v. NBA*, 809 F.2d 954, 959 (2d Cir. 1987); see, recently, *Clarett v. NFL*, 369 F.3d 124, 57 (2d Cir. 2004).

<sup>86</sup> Included “decertification”, when it is linked by a “close temporal and substantive relationship” with a “labor dispute between League and the Players’ union”; *Brady v. NFL*, 640 F.3d 785, 791 (2011). See also *Clarett v. NFL*, 369 F.3d 124, 57 (2d Cir. 2004)

<sup>87</sup> See also Second Circuit Court of Appeals in *NBA v. Williams*, 45 F.3d 684 (2d Cir. 1995).

<sup>88</sup> *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996).

<sup>89</sup> *Brown v. Pro Football, Inc.*, 518 U.S. 231, 242 (1996). See also *Powell v. NFL*, 930 F.2d 1293, 1303 (8th Cir. 1989); *White v. NFL*, 585 F.3d 1129, (8th Cir.).

<sup>90</sup> Even when the collective agreement has expired or the bargaining process is stuck; see *Brown v. Pro Football, Inc.*, 518 U.S. 231, 243 (1996).



stake. Different solutions are possible and most of the time they are affected by the historical, political and economic traditions of the concerned institutional contexts<sup>91</sup>.

Limiting competition among workers is the major institutional aim of collective agreements, in order to provide for uniform levels of wages and fairer working conditions<sup>92</sup>. Nonetheless, in the US, collective agreements have also been used in order to control the access of new workers to the labor market<sup>93</sup>, and, in both the US and Europe, they have been employed for regulating conflicts involving different groups of workers<sup>94</sup>.

Collective action and collective bargaining have affected competition also in achieving goals that do not have direct connection with labor related interests and labor market<sup>95</sup>, exploiting the impact of collective agreements on workforce costs<sup>96</sup>. In the US, through collective bargaining, unions have been able to exclude from the market companies refusing to bargain and employers have hindered the economic activities of their market competitors<sup>97</sup>.

The European scenario is particularly articulated from this point of view. On the one hand, labor and employment laws are mostly in the jurisdiction of national legal systems, which often present dramatic differences in the level of workers' protection<sup>98</sup>. On the other hand, the EU law endows all member states' companies with highly protected economic freedoms, in particular freedom of movement, freedom of establishment and of providing services.

In order to hinder race-to-the-bottom processes and to preserve national employment rates, unions of the member states with higher protection of workers' rights have attempted to impose uniform working conditions by means of strike and other collective action aimed at the implementation of national collective agreements. In some cases, member states themselves have required foreign companies to implement collective agreements, in order to protect the employment of their national workers, limiting competition advantages for foreigner investors.

The outcomes of these processes are highly controversial. They can generate positive effects on the enhancement of fair competition, preventing social dumping and ensuring uniform and acceptable conditions for undertaking businesses<sup>99</sup>. Nonetheless, unions' strategies can affect companies' economic freedoms and may reduce competitive benefits

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<sup>91</sup> See Freedland M, Prassl J., (4), 227.

<sup>92</sup> Leslie D.L., (1), 1185 ff.; St. Antoine T.J., (2), 604 and 612; Cox A., (1), 254 and 275 ff.

<sup>93</sup> Leslie D.L., (1), 1186.

<sup>94</sup> See Rebhahn R., *Broader Lessons for European and Domestic Labour Law*, in Freedland M., Prassl J., (4), 301.

<sup>95</sup> For an in-depth analysis see Leslie D.L., (1), 1185 ff.

<sup>96</sup> Leslie D.L., (1), 1188 ss.; Meltzer B.D., (50), 78; Cox A., (1), 278; St. Antoine T.J., (2), 611 ff.; Bogg A., (44), 54.

<sup>97</sup> Tomlins C.L., (33), 16 ff.; Meltzer B.D., (50), 179 ff.; Cox A., (1), 276; St. Antoine T.J., (2), 608 ff.

<sup>98</sup> See Deinert O. (5), at 1454 ff.

<sup>99</sup> See McCrudden C., (32), 140. On the capacity of labor action to foster fair competition, in that case, with reference to the collective action of self-employed workers, see Grosheide E., Barenberg M., (15), 196 - 199; see also Dau-Schmidt K.G., (77), 6 ff. Of course, the exclusion of genuine self-employed workers from the scope of "labor immunities" can hinder the general impact of the immunity itself, but this profile deals with the protection of self-employed workers and do not affect the rationales of the relationship between competition and labor from a more general perspective; for an in-depth analysis of this issue see M. Biasi, *"We Will All Laugh at Gilded Butterflies"*. *The Shadow of Antitrust Law on the Collective Negotiation of Fair Fees for Self-Employed Workers*, in <https://www.ssrn.com/index.cfm/en/>, p. 7 ff., also in *European Labour Law Journal*, 2018, 9, 4, 354 ff.

in terms of job opportunities for workers employed in countries with lower labor standards.

## 2. Competition, Economic Freedom and Labor: Simplistic Approaches and Misleading Assumptions.

Both the US and European experiences demonstrate that the way labor and competition interact is often problematic and diversified. Therefore, simplistic theoretical categories are not useful to analyze such intricate phenomena, which require a correct systematic approach.

The case law of the CJEU seems to be grounded on two major assumptions, both of which reveal them as misleading, under a more accurate survey. The first one is the idea that, in modern liberal capitalistic economies, labor rights and companies' economic freedoms are necessarily conflicting interests; while, on the contrary, in some circumstances collective bargaining agreements have positive effects on the development of beneficial economic relationships among enterprises and can foster economic growth and fair competition<sup>100</sup>.

European domestic legislations impose social clauses or promote collective bargaining in order to prevent social dumping phenomena based on the different levels of workers protection among member states<sup>101</sup>. As it was the case for the relevant national laws in *Laval* and *Rüffert*, they aim to “create a climate of fair competition, on an equal basis”<sup>102</sup> and to “counteracts distortions (...) resulting from the use of cheap labour”<sup>103</sup>.

While the CJEU seems to be aware of this phenomenon when approaching collective agreements and action conflicting with the European competition law, this is not the case when provisions protecting fundamental economic freedoms are directly at stake.

This differentiated approach brings into the light the other misleading assumption on which the rationales of the so called “Laval quartet” are grounded: the idea that the protection of fundamental economic freedoms and the regulation of competition are two separated issues and regulatory frameworks and that, consequently, a different legal approach to the solution of their respective conflicts with labor would be justified. On the contrary, the US case law clearly demonstrates that these two issues cannot be treated through different rationales.

As scholars have already explained:

“Market access and regulatory competition are two sides of the same coin. Within a federal constitutional framework (or in a transnational entity such as the EC), mobility of economic resources is one of the first preconditions for the emergence of a market in legal rules. When courts review laws of Member States against criteria of how far such laws

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<sup>100</sup> See Rebhahn R., (94), 298; Bercusson B., (21), 305; McCrudden C., (32), 145.

<sup>101</sup> See Freedland M., Prassl J., (4), 12; Meltzer D.B., (50), 160.

<sup>102</sup> CJEU, Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan e Svenska Elektrikerförbundet* (2005) ECLI:EU:C:2007:809.

<sup>103</sup> CJEU, C-346/06 *Dirk Rüffert v. Land Niedersachsen* (2006) ECLI:EU:C:2008:189, pr.14. See also CJEU - C-209/08 *Commission v. Luxemburg* (2008) ECLI:EU:C:2008:776, pr. 341

obstruct, or promote, economic mobility, they are necessarily defining the scope and nature of regulatory competition”<sup>104</sup>.

Within the European law, the legal regulation of competition and economic freedoms aims at creating a free common market, within which all economic players can freely undertake economic activities and compete, without distinctions or discriminations based on their national origins<sup>105</sup>. They have a sole objective and should be given the same “weight” when balancing them with other fundamental rights such as strike, collective action and collective bargaining.

### 3. The “Rationales” of the Judiciary Approach to the Conflict between Labor Rights and Economic Freedoms in US...

Both the European and US laws protect economic freedoms and collective action. Nonetheless, the regulation of conflicts between labor and competition has found a very different equilibrium in the two legal systems and the dialectic between Courts and political powers has generated different outcomes<sup>106</sup>.

In the US, under the pressure of the Congress’ statutory measures, Courts have gradually recognized the immunity of collective action and collective bargaining agreements from the antitrust law<sup>107</sup>. After a one-century case law experience, the idea that collective bargaining can achieve a fair balance among all the different interests at stake in the economic conflict has been accepted, along as the one that the collective bargaining process is effective only when it develops through genuine negotiations, consistently with industrial relations customary rules.

In the New Deal scenario, the US legislation has fostered collective bargaining under the assessment that it can produce positive effects for the development of the national economy. To this end, Congress enacted provisions designed to protect the dynamics of the industrial relations environment from interferences rooted in non-labor legislation. Within the NLRA framework and the limitations set by the NLRB, collective bargaining has developed through the free use of social partners’ traditional economic weapons, in order to obtain a balanced equilibrium between the concerned conflicting interests<sup>108</sup>. This clear trend in the legislation forced courts to accept that labor principles have to prevail on any non-labor system of rules in case of conflict between labor and non-labor interests, if labor matters were at stake<sup>109</sup>.

US case law has highlighted that courts’ interferences on the dynamics of negotiation could compromise the traditional economic function of collective bargaining or jeopardize the possibility of negotiations itself<sup>110</sup>. Only when social partners are free to use their

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<sup>104</sup> Barnard C., Deakin S., *Market Access and Regulatory Competition*, Jean Monnet Working Paper 9/0, 2001, 5.

<sup>105</sup> See Caro de Sousa P., *Horizontal Expressions of Vertical Desires: Horizontal Effect and the Scope of the EU Fundamental Freedoms*, in *Cambridge Journal of International and Comparative Law*, 2, 3, 2013, 480, 487.

<sup>106</sup> See Willborn S.L., (6), 1080 ff.

<sup>107</sup> Forbath W.E., (34), 169.

<sup>108</sup> See Handler M, Zifchak W.C, (1), 469.

<sup>109</sup> Forbath W.E., (34), at 165. For a clear explanation and defense of this approach, with a strong critic to the “emasculatation” of this principle in the US case law after *Hutcheson*, see Handler M, Zifchak W.C., (1), 479 ff.

<sup>110</sup> See Deinert O. (5), at 1454 ff.; Leroy H.M., (79)1, 864 and 884.

traditional economic weapons, without the risk of any subsequent pervasive control by courts, the settlement of interests established by collective agreements can concretely achieve a well-balanced compromise<sup>111</sup> and effective protection of labor can be granted. According to US courts, the enforcement on labor phenomena of rules and principles developed within other sectors of the law, governing other fields of the economic life, may compromise the positive effects of collective bargaining on the economy. Instead, a reasonable balance between collective rights and economic freedoms can be established only by defining their separated scopes and by granting immunity to labor action as long as they remain within their proper “labor scope”<sup>112</sup>.

The scrutiny US courts applied to trade unions collective action or bargaining agreement does not take into account that they formally infringe antitrust law or the provisions protecting fundamental economic freedoms, or, according to a more “American” definition, economic “property rights”, since the US law does not acknowledge this differentiation as effect-generating in this field.

Therefore, in US law, the only admissible scrutiny by Courts on collective action involves the matter of the dispute and the players concerned by its effects. Despite the critiques by part of the scholarship<sup>113</sup>, this scrutiny has nothing to do with the antitrust reasonableness test, applied by US courts in order to evaluate whether or not the potential positive effect of a conspiracy can compensate the restraint imposed on competition, or with the proportionality test applied by the CJEU to domestic measures infringing in fundamental economic freedoms.

As long as the bargaining process deals with labor matters, under “statutory” and “non-statutory” exemption doctrines, courts are not allowed to evaluate the reasonableness of trade unions’ or employers’ strategies; neither can they judge the way economic weapons are employed by social partners; the intensity of the restriction suffered by competition because of collective action; whether or not that restriction is proportionate to the aim pursued by the concerned social players.

Originally, in their first decisions on the conflict between economic freedoms and labor, the US courts and the CJEU both have been inclined to consider collective action and collective bargaining as potential bias to the natural development of economic processes. It is not by case that the rationales of the first judgments adopted by the Supreme Court on this matter were very close to the ones held by the CJEU in the *Laval quartet*<sup>114</sup>.

Nonetheless, the statutory provisions adopted by the Congress in order to maintain labor immune from the antitrust law gradually reversed this trend. The creation - through the NLRA - of a regulatory framework for collective bargaining has forced courts to recognize the relevance that statutory law attributes to labor rights and to grant them the

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<sup>111</sup> One of the major NLRA principles is that “when an employer and union negotiate terms and conditions of employment, government should not interfere”; Leroy H.M., (79), 875. See Handler M, Zifchak W.C., (1), 486 ff.

<sup>112</sup> See Caro de Sousa P., (105), at 496; for analogous remarks see Bogg A., (44), 42.

<sup>113</sup> See *supra* pr. 4.7. This kind of potential interference with industrial relations dynamics has been highly criticized and considered as a “return to the era of Duplex v. Deering”, since it would have reintroduces, after *Hutcheson*, a sort of antitrust scrutiny on trade unions action; Handler M., Zifchak W.C., (1), 498.

<sup>114</sup> “If a State, with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?”; *Loewe v. Lamlor*, 208 U.S. 274, 304 (1908).

same value and dignity of economic freedoms. Trade unions actions within the collective bargaining process ceased to be considered as mere interference with the individual “property rights” and began to be seen as the exercise of autonomous rights themselves. The conflict between competition and labor had to be settled through the definition of a reasonable balance between the different interests involved and this new theoretical construct originated “statutory” and “non-statutory” exemption doctrines.

#### 4. ...and in European Law.

In EU law, this process is still at a primordial stage and collective rights seem to be highly undermined by the CJEU’s decisions, strikingly affected by a favor attitude to economic freedoms<sup>115</sup>. After adopting a different approach in *Albany*, the CJEU has deeply restrained unions’ autonomy in the economic conflict. According to the Court, when they infringe economic freedoms, collective actions are subject to the continuous threat of an “*a posteriori*” scrutiny through the proportionality test, which makes their exercise remarkably risky for trade unions and collective bargaining process ineffective<sup>116</sup>.

The CJEU theoretically recognizes strike and collective bargaining as fundamental rights, granting them the same importance and rank as economic freedoms<sup>117</sup>. Nonetheless, these rights should be, in practice, subject to continuous scrutiny by member states’ courts, in order to evaluate whether or not the restraint imposed to fundamental economic freedoms is “proportionate” and consistent with the EU law.

According to most European scholars, this approach challenges the protection granted by many European domestic laws to strike and collective agreements and undermines the fundamental principles traditionally at the basis of the European industrial relation systems<sup>118</sup>.

The comparison between the US and the European case law emphasizes the “lack of a coherent “dogmatic” structure”<sup>119</sup> in the CJEU’s reasoning<sup>120</sup>. The way the European court considers collective action and the way it regulates their conflict with fundamental economic freedoms is clearly destined to hinder labor rights’ protection. The acknowledgment – by the Court itself - of strike and collective bargaining as fundamental rights is at risk of turning into a merely abstract and vacuous declaration<sup>121</sup>.

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<sup>115</sup> See Kilpatrick C., *Has poliocentric strike law arrived in the UK? After Laval, after Viking, after Demir?* in *International Journal of Comparative Labour Law and Industrial Relations*, 30, 2014, 294 ff.; Novitz T., *The internationally recognized right to strike: a past present future basis upon which to evaluate remedies for unlawful collective actions*, in *International Journal of Comparative Labour Law and Industrial Relations*, 30, 2014, 371 ff.

<sup>116</sup> Deakin S., (5), 26.

<sup>117</sup> See Rebhahn R., (94), 295 and 296. On the protection of collective rights as fundamental within EU law see Bercusson B., (21), 300 ff.; de Vries A., (17), 213 ff.

<sup>118</sup> See note 4.

<sup>119</sup> See Rebhahn R., (94), 305.

<sup>120</sup> Regarding the need for more attention to be paid by the CJEU to the comparative approach in its legal discourse on human rights see de Búrca G., *After the EU charter of fundamental rights: the court of justice as a human rights adjudicator?*, in *Maastricht Journal of European and Comparative Law*, 168, 20, 2013, 179; more in general, on the comparative approach in the human rights’ field see Velyvyte V., (5), 79.

<sup>121</sup> See Deinert O. (5), at 1454 ff. For a critic view on the application of the proportionality test to fundamental rights, see Reich N., (4), 19.



US courts have made it clear that the idea of restraining trade unions' strategies, submitting them to reasonableness scrutiny by courts, would nullify the effectiveness of collective action and would prevent collective bargaining from successfully performing its social functions<sup>122</sup>.

The CJEU affirms that the *Laval* principles are meant to be “without prejudice to the right of undertakings established in other Member States to sign of their own accord a collective labor agreement in the host Member State, in particular in the context of a commitment made to their own posted staff, the terms of which might be more favorable”, but – as the US case law has taught - an agreement signed by undertakings “of their own accord” implies free development of bargaining dynamics and free employment of economic weapons. This process cannot take place under the Damoclean sword of judicial scrutiny on the “reasonableness” or “proportionality” of collective action<sup>123</sup>. A legal construct leading to such consequences cannot be considered consistent with the protection of strike and collective bargaining as fundamental rights (theoretically) guaranteed by the EU law<sup>124</sup>.

From this point of view, the debate on the horizontal or vertical effects of the directive on posted workers and of the provisions of European treaties on fundamental freedoms is overestimated<sup>125</sup>. The point is not whether or not these rules are enforceable on private associations, but whether their effects are consistent with the rank of fundamental rights recognized to collective action and collective bargaining by the EU law, under art. 28 of the Charter, and by normative acts, which the European Union and its member states are committed to under International law<sup>126</sup>.

The CJEU has treated labor action and collective bargaining agreements as provisions adopted by a member state - implying potential distortions of competition - that can be justified only on public interest grounds, and, as such, subject to the proportionality test<sup>127</sup>. This construct disregards the more genuine essence of collective action, which is constituted by the free exercise of an economic initiative, rooted within the rationales of private rather than of public law<sup>128</sup>.

As well as the fundamental economic freedoms established by the treaties, collective action are the fruit of autonomous economic strategies designed to achieve an economic

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<sup>122</sup> See Bercusson B., (21), 304.

<sup>123</sup> See Counturis N., Engblom S., (5), 290 and 291; Velyvyte V., (5), 90; Meltzer D.B., (50), 211.

<sup>124</sup> See Bercusson B., (21), 303; Deakin S., (5), 29. For an example of the possible consequences of CJEU's case law on member states' legal system, see Koukiadaki A., *The Far-Reaching Implications of the Laval Quartet: The Case of the UK Living Wage*, in *Industrial Law Journal*, 43, 2, 2014, 91.

<sup>125</sup> See Caro de Sousa P., (105), 480. For an analysis of the implications related to the implementation of horizontal effects of EU fundamental freedoms provisions to private parties see Hös N., (4), 13 ff.

<sup>126</sup> Among others the “ILO Declaration on fundamental principles and rights at work”, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998, which commits all the member states “to promote and to realize”, together with other fundamental principle on workers' protection, “freedom of association and the effective recognition of the right to collective bargaining”. See N. Counturis N., Engblom S., (5), 292; Velyvyte V., (5), 74; Freedland M., Prassl J., (5), 12; Bogg A., (44), 44; Novitz T., (115), 361 ff. Moreover, the treaty of Lisbon has extended the relevance of social rights within the EU law; Deakin S., (5), 20.

<sup>127</sup> See Rebhahn R., (94), 298 and 299; Velyvyte V., (5), 90.

<sup>128</sup> The same misleading approach is expressed in the opinion of the Advocate general Mengozzi, of 23 May 2007, *Laval*, C-341/05, ECLI:EU:C:2007:291, par. 160. For critical remarks see Velyvyte V., (5), 89 - 90. On the horizontal effects of economic freedoms see Caro de Sousa P., (105), 498 ff.; Hös N., (4), 21.

goal, namely the definition of working conditions through collective bargaining agreements. Collective action and labor organizations are traditional institutions within the economic scenario that has developed after the second industrial revolution. Trade unions act autonomously in the economic environment, in pursuant of an economic objective<sup>129</sup>. Collective action is the instrument for the implementation of a private economic strategy, as well as economic freedoms. From this point of view, the CJEU's doctrine creates an obstacle to "freedom to contract and also to freedom of contract": it does not favor it, since it creates limits to an area – collective bargaining – based on the free exercise of negotiating power, aimed at achieving a fair balance in collective bargaining agreements, through collective partners' traditional economic weapons<sup>130</sup>.

## 5. Economic Freedoms vs. the "Essence" of the Fundamental Labor Rights: Courts and Political Institutions' Attitude in US and EU.

The inconsistencies of the CJEU's case law are remarkable and appear even more evident if compared with the opposite approach held, on the same subject, by the ECtHR, whose results appear, instead, extremely consonant with the US case law<sup>131</sup>.

In *Demir*, the Human rights Court affirmed that, under art. 11 of the ECHR, states are required not only to "permit" collective action, but also to make them "possible", implying that "under national law trade unions should be enabled to (...) strive for the protection of their members' interests"<sup>132</sup>, since the protection afforded by the ECHR to collective action is effective when the union is "free, in one way or another, to seek to persuade the employer to listen to what it had to say on behalf of its members"<sup>133</sup>.

According to the ECofHR, the rights to undertake collective action and collective bargaining are endowed with the same value as the other fundamental rights recognized by the Convention and they cannot be *a priori* subordinated to other economic rights<sup>134</sup>. Contracting states' laws have to achieve a reasonable balance between collective rights and other conflicting fundamental rights, granting all of them adequate protection. Restrictions to collective rights are to be interpreted strictly<sup>135</sup> and, in any case, cannot "impair the very essence of the right"<sup>136</sup>.

As US courts have gradually acknowledged, "the very essence" of collective rights is always impaired when action undertaken by trade unions, employers and associations of

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<sup>129</sup> See Hös N., (4), 13.

<sup>130</sup> See Hös N., (4), 29.

<sup>131</sup> See Mantouvalou V., *Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation*, in *Human Rights Law Review*, 13,3, 2013, 529.

<sup>132</sup> ECHR *Demir and Baykara v. Turkey* (2008) 48 EHRR 54, paragraph 141.

<sup>133</sup> ECHR *Demir and Baykara v. Turkey* (2008) 48 EHRR 54, paragraph 143.

<sup>134</sup> See Freedland M., Prassl J., (5), 7; Bogg A., (44), 42 ff.; Hendy E., *The Dramatic Implications of Demir and Baykara*, in *Industrial Law Journal*, 39, 2010, 47; Velyvyte V., (5), 77 ff.

<sup>135</sup> See also, *Enerji Yapı-Yol Sen v. Türkiye*, 26.4.2009 68950/01.

<sup>136</sup> *Demir and Baykara v. Turkey* (2008) 48 EHRR 54, paragraph 97. See. Ballestrero M.V., Lo Faro A., Razzolini O., (5), 528. On the possible limitation of the right to strike as a constitutional right see Davidov G., *A purposive approach to labour law*, Oxford University Press, 216.

employers are potentially subject to an *a posteriori* case-by-case scrutiny<sup>137</sup> and when labor conflict disputes are decided on the basis of rules and principles not deriving from labor law<sup>138</sup>. Being based on the opposite idea that courts should scrutinize collective action each time they infringe the economic freedoms of enterprises, the CJEU's constructs are inevitably destined to impair the "essence" of labor rights. Therefore, they are not consistent with the value recognized to collective rights in the EU law by the Charter of fundamental rights<sup>139</sup>, with the principles established by the ECofHR and with the recognition of strike and collective action as fundamental rights, as acknowledged by the Court itself<sup>140</sup>. CJEU doctrines concretely downgrade collective labor rights to a lower rank than economic freedoms<sup>141</sup>.

According to *Viking*, trade unions could never be certain of the lawfulness of the collective action they undertake, until scrutinized by a Court. Under the test defined by the CJEU, demonstrating the lawfulness of trade unions' action would become almost impossible, since unions would be required to prove not to have had at their disposal "other means (...) less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations" and that they had "exhausted those means before initiating" their action<sup>142</sup>. Moreover, domestic courts could find that collective action had not been supported by a justified overriding reason of public interest at all, should they not agree with the evaluation of trade unions on the potential harm that the challenged employer's behavior would cause to the concerned workers. Strategic autonomy of trade unions could radically be undermined, since the threat of judicial control would prevent trade unions from using their economic weapons, hindering dramatically the possibility of negotiations itself<sup>143</sup>.

In this regard, US law has reached a more reasonable equilibrium between labor and economic freedoms, thanks to the long-standing dialectic between Courts and Congress.

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<sup>137</sup> On the problems related to case-by-case scrutiny on unions' action legitimacy, see Leslie D.L., (1), at 1217; Bogg A., (44), 50.

<sup>138</sup> See St. Antoine T. J., (2), 631.

<sup>139</sup> See Deinert O. (4), at 1454 ff.; Höns N., (4), 12; On the importance of human rights within EU law and the case law of the CJEU see de Búrca G., (120), 173; Fudge J., *The new discourse of labor rights: from social to fundamental rights?* In *Comparative Labor Law and Policy Journal*, 29,1, 2007, 29 ss.

<sup>140</sup> See de Búrca G., (120), 171.

<sup>141</sup> See Höns N., (4), 28. It has been pointed out that the Court adopts a much more "deferential approach in cases concerning civil and political rights and leaves considerable room for manoeuvre for the national authorities in protecting them" in particular when economic freedoms are at stake: CJEU, Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich. (2000) ECLI:EU:C:2003:333; Velyvyte V., (5), 90; see CJEU, Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn (2002) ECLI:EU:C:2004:614; CJEU, Case C-244/06 Dynamic Medien Vertriebs GmbH v. Avides Media AG, (2006) ECLI:EU:C:2008:85; CJEU, Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien (2009) ECLI:EU:C:2010:806; CJEU, Case C-391/09 Malgožata Runevič-Vardyn e Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija (2009) ECLI:EU:C:2011:291. See Bogg A., (44), 53; Höns N. (4), 8; and Weatherill S., (5), 30, 32 and 35. Regarding, more specifically, economic freedoms, CJEU – Case C-201/15 Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalis kai Koinonikis Allilengyis (2015) ECLI:EU:C:2016:972; Bogg A., (44), 50.

<sup>142</sup> CJEU, Case C-438/05 International Transport Workers' Federation e Finnish Seamen's Union contro Viking Line ABP e OÜ Viking Line Eesti (2005) ECLI:EU:C:2007:772, par. 185. See Höns N., (4), 20, also 8; Velyvyte V., (5), 81.

<sup>143</sup> See Bercusson B., (21), 305; Bogg A., (44), 57 and 61; Counturis N., Engblom S., (5), 280; See Höns N., (4), 6; Rebhahn R., (94), 297; Weatherill S., (5), 36.

“Statutory” and “non-statutory” exemption doctrines have eventually prevented courts from enforcing rules created for other sectors of economic life on typical labor phenomena. Gradually, the synergic action of US Congress and legal scholarship has induced courts to accept the immunity of labor action from antitrust law as the result of an unquestionable power of legislative institutions to decide social policies in a democratic country.

The role Government and Congress played has made the difference between the US and the European legal scenarios<sup>144</sup>. The restrictive approach held by the CJEU toward collective action is consonant with the trends of social policies pursued by European political institutions<sup>145</sup>. The creation of a solid system of collective bargaining at European level would be in contrast with the trend toward the flexibilization of workers’ rights and working conditions and toward the containment of salaries that have dominated EU social strategies in the last decades<sup>146</sup>. EU strategies for workers rights’ protection have focused on antidiscrimination provisions, erroneously applauded by European scholarships as a progressive development of European law and as a sort of evolutionary panacea for the increase of social inequality and injustice within employment relationships<sup>147</sup>.

In the EU context, no institution has exercised the counterbalancing action performed by Congress on US courts’ restrictive attitude to collective action<sup>148</sup>. As US courts at the end of the XIX century, the CJEU has proved more sensitive to economic freedom instances than to labor interests<sup>149</sup>, but it has not found counterweights to its approach within the EU institutional framework.

Nonetheless, although European political institutions have not provided striking support to labor rights<sup>150</sup>, collective action and collective bargaining are still recognized as fundamental rights within the European legal system and deserve adequate protection both by the CJEU and the domestic courts of the member states<sup>151</sup>, all the more so after the implementation of the Lisbon treaty, which granted legal recognition to the Charter of Fundamental Rights and “provides some basis for a rebalancing of economic freedoms and social rights” within EU law<sup>152</sup>.

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<sup>144</sup> Tomlins C. L., (33).

<sup>145</sup> Ludlow A., *The Public Procurement Rules in Action: An Empirical Exploration of Social Impact and Ideology*, in *Cambridge Yearbook of European Legal Studies*, vol. 16. 2014, p 2019; Deakin S., (5), at 19 ff.

<sup>146</sup> Carabelli U., (7), 180.

<sup>147</sup> Conversely, the European antidiscrimination law has recently been interpreted as the blanket for hiding the gradual dismantlement of the traditional techniques of workers’ protection developed by national member states; Somek A., *Engineering Equality: An Essay on European anti-discrimination Law*, Oxford University Press, 2011, 10 - 11.

<sup>148</sup> See Rebhahn R., (94), 304; Deakin S., (5), 27; Ballestrero M.V., Lo Faro A., Razzolini O., (5), 543; Bogg A., (44), 69.

<sup>149</sup> Reich N., (4), 23.

<sup>150</sup> But see, recently, the *European Pillar of Social Rights*, proclaimed by the European institutions on November, 17<sup>th</sup> 2017.

<sup>151</sup> On the duty for European institutions, including the Court, to grant adequate protection to labor rights under art. 28 of the Chart see Deinert O., (4), 1454.

<sup>152</sup> Deakin S., (5), 38 ff, 42; See Weatherill S., (5), 38 and 39; See Rebhahn R., (94), 302; de Vries A., (17), 227 ss.

## 6. Conclusions.

Through a comparison with the American case law, this essay has shown that the CJEU's doctrine on the relationship between labor actions and economic freedoms potentially undermines the very "essence" of the right to strike and bargain collectively, founded on the free exercise of customary economic weapons by social partners. These outcomes are inconsistent with the protection granted to the right to strike and to collective bargaining by EU law, and with the very statements of the CJEU itself, which has in many occasions explicitly recognized the rights to strike and to collective bargaining as fundamental.

The decisions of the European Court assume that the conflict between labor rights and economic freedoms is unsolvable in a modern capitalistic society and that the good functioning of the common market requires collective rights to be significantly restricted.

This theoretical construct disregards the positive effects that collective bargaining, especially at a transnational level, can exercise on European market. Collective bargaining could prevent the already increasing phenomena of social dumping; hinder the reduction in salaries in most European countries<sup>153</sup>; mitigate the dramatic polarization of the European labor market between workers coming from countries with high and low labor standards<sup>154</sup>, and fostering fairer economic competition among undertakings.

In the US legal system, labor immunities from antitrust law have been the consequence of a clear political choice, achieved with the implementation of an organic legislative framework for collective bargaining, and of a more in-depth understanding of the very nature of collective bargaining as an economic and social phenomenon. For the time being, a similar process has not taken place in the European scenario and CJEU case-law is grounded on a misleading idea of collective bargaining and of its relationship with competition and economic freedoms in the EU constitutional framework. Nonetheless, the doctrine of collective actions and collective bargaining as fundamental rights, already consolidated in its decisions, should lead the Court toward a different and fairer balance between labor rights and economic freedoms<sup>155</sup>.

## Bibliography

Ballestrero M.V., Lo Faro A., Razzolini O., *Sub. Art. 28*, in Mastroianni R.N., Pollicino O., Allegrezza S., Pappalardo F., Razzolini O., *Carta dei diritti fondamentali dell'Unione Europea*, Giuffrè, 2017, 527.

Barnard C., Deakin S., *Market Access and Regulatory Competition*, Jean Monnet Working Paper 9/0, 2001.

Bercusson B., *The Trade Union Movement and the European Union: Judgment Day*, in *European Law Journal*, 13, 3, 2007, 279, 279.

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<sup>153</sup> See Deakin S., (5), 30 ff.

<sup>154</sup> For an analysis of the negative consequences of trade unions' decline on economic and social equality within modern socio-economic systems, see Rosenfeld J., (76), 68 ff.

<sup>155</sup> Hös N., (4), 30 ff.



- Biasi M., *"We Will All Laugh at Gilded Butterflies". The Shadow of Antitrust Law on the Collective Negotiation of Fair Fees for Self-Employed Workers*, in <https://www.ssrn.com/index.cfm/en/>, also in *European Labour Law Journal*, 2018, 9, 4, 354.
- Biasi M., *Statutory Employee Representation in Italian and U.S. Workplaces: A Comparative Analysis of the Fiat/Chrysler Case*, in *Labour law journal*, 2015, p. 241 ss.;
- Bogg A., *Viking and Laval: The International Labour Law Perspective*, in Freedland M., Prassl J. (eds.), *Viking, Laval and Beyond*, Hart Publishing, 2014, 41.
- Brody D., *Section 8(a)(2) and the Origins of the Wagner Act*, in Friedman S., Hurd R.W., Oswald E.A., Seeber R.L. (eds.), *Restoring the Promise of American Labor Law*, Cornell University Press, 1994.
- Carabelli U., *Europa dei Mercati e Conflitto Sociale*, Cacucci, 2009, 162.
- Caro de Sousa P., *Horizontal Expressions of Vertical Desires: Horizontal Effect and the Scope of the EU Fundamental Freedoms*, in *Cambridge Journal of International and Comparative Law*, 2, 3, 2013, 480.
- Counturis N., Engblom S., *Civilising the European Posted Workers Directive*, in Freedland M., Prassl J. (eds.), *Viking, Laval and Beyond*, Hart Publishing, 2014, 279
- Cox A., *Labor and the Antitrust Laws-A Preliminary Analysis*, in *University Pennsylvania Law Review*, 104, 1955, 252.
- Dau-Schmidt K.G., *The Changing Face of Collective Representation: The Future of Collective Bargaining*, in *Indiana University School of Law-Bloomington Legal Studies Research Paper Series*, Research Paper N. 72, 2007.
- Davidov G., *A purposive approach to labour law*, Oxford University Press.
- de Búrca G., *After the EU charter of fundamental rights: the court of justice as a human rights adjudicator?*, in *Maastricht Journal of European and Comparative Law*, 168, 20, 2013, 168.
- De Vries S. A., *Protecting fundamental (social) rights through the lens of the European single market: the quest for a more "holistic approach"*, 32 in *International Journal of Comparative Labour Law*, 293, 32, 2016, 203.
- Deakin S., *The Lisbon Treaty, The Viking and Laval Judgments and the Financial Crisis: In search of New Foundations for Europe's 'Social Market Economy'*, in Bruun N., K. Lörcher, Schömann I.(eds), *The Lisbon Treaty and Social Europe*, Hart Publishing, 2012, 19.
- Deinert O., *Art 28 CFREU. Right of collective bargaining and action*, in Ales E, Bell M., Deinert O., Robin-Olivier S. (eds.), *International and European Labour Law. Article by Article Commentary*, Hart, 2018, 1454.
- Farzin L., *On the antitrust exemption for professional sports in the United States and Europe*, in *Jeffrey S. Moorad Sports Law Journal*, 22, 2015, 75.
- Forbath W.E., *Law and the Shaping of the American Labor Movement*, Harverd University Press, 1991.
- Freedland M., Prassl, J. *Viking, Laval and Beyond: An Introduction*, in Freedland M., Prassl J. (eds.), *Viking, Laval and Beyond*, Hart Publishing, 2014.
- Freedland M., Prassl, J. *Viking, Laval and Beyond: An Introduction*, in Freedland M., Prassl J. (eds.), *Viking, Laval and Beyond*, Hart Publishing, 2014.
- Grosheide E., Barenberg M., *Minimum Fees for the Self-Employed: A European Response to the "Uberized" Economy?* in *Columbia Journal of European Law*, 22, 2016, 193.

- Handler M., Zifchak W.C., *Collective bargaining and the antitrust law: the emasculation of the labor exemption*, in *Columbia Law Review*, 81, 1981, 459.
- Hendy E., *The Dramatic Implications of Demir and Baykara*, in *Industrial Law Journal*, 39, 2010, 2.
- Hös N., *The principle of proportionality in the Viking and Laval cases: An Appropriate standard of Judicial Review?*, EUI Working Paper Law 2009/06.
- Kilpatrick C., *Has policentric strike law arrived in the UK? After Laval, after Viking, after Demir?* in *International Journal of Comparative Labour Law and Industrial Relations*, 30, 2014, 293.
- Koukiadaki A., *The Far-Reaching Implications of the Laval Quartet: The Case of the UK Living Wage*, in *Industrial Law Journal*, 43, 2, 2014, 91.
- Leroy M.H., *The narcotic effect of antitrust law in professional sports: how the Sherman act subverts collective bargaining*, in *Tulane Law Review*, 86, 2012, 859.
- Leslie D.L., *Principles of labor antitrust*, in *Virginia Law Review*, 66, 7, 1980, 1183.
- Ludlow A., *The Public Procurement Rules in Action: An Empirical Exploration of Social Impact and Ideology*, in *Cambridge Yearbook of European Legal Studies*, vol. 16. 2014, p 2019.
- Mantouvalou, *Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation*, in *Human Rights Law Review*, 13, 3, 2013, 529.
- Meltzer B.D., *Labor Unions, Collective Bargaining, and the Antitrust Laws*, in *The Journal of Law and Economics*, 6, 1963, 152.
- Micklitz H.W., De Witte B. (eds.), *The European Court of Justice and the Autonomy of the Member States*, Antwerp, Intersentia, 2012.
- Novitz T., *The internationally recognized right to strike: a past present future basis upon which to evaluate remedies for unlawful collective actions*, in *International Journal of Comparative Labour Law and Industrial Relations*, 30, 2014, 357.
- Parlow M.J., *The NBA and The Great Recession: Implications for The Upcoming Collective Bargaining Agreement Renegotiation*, in *Marquette University Law School Legal Studies Research Paper Series. Research Paper No. 10-29*, 195.
- Rebhahn R., *Broader Lessons for European and Domestic Labour Law*, in Freedland M., Prassl J., *Viking, Laval and Beyond*, Hart Publishing, 2014, 295.
- Reich N., *How proportionate is the proportionality principle?* Paper presented at the Oslo conference on “The reach of free movement”, 18 – 19 May 2011, 11.
- Rosenfeld J. *What Unions No Longer Do*, Harvard University Press, 2014.
- Somek A., *Engineering Equality: An Essay on European anti-discrimination Law*, Oxford University Press, 2011.
- St. Antoine T.J., *Antitrust Law at the Expense of Labor Law*, in *Virginia Law Review*, 62, 2015, 603.
- Tomlins C.L., *The State and the Unions. Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960*, Cambridge University Press, 1985.
- Velyvyte V., *The Right to Strike in the European Union after Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence*, in *Human Rights Law Review*, 15, 2015, 73.
- Weatherill S., *Viking and Laval: The EU Internal market perspective*, in Freedland M., Prassl J. (eds.), *Viking, Laval and Beyond*, Hart Publishing, 2014.

Willborn S.L., *Laval, Viking and American labour law*, in *Comparative Labor Law and Policy journal*, 32, 2011, 1079.

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