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THE TREATY NEEDS TO BE AMENDED

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I agree with Manfred Weiss that the Treaty has to be used to its full extent. This is an important step, but it is not sufficient. The Treaty needs to be amended.

1. SOCIAL VERSUS ECONOMIC RIGHTS

First, let it be said that fundamental social and economic rights have the same legal value. There is no predominance of economic rights & freedoms over social fundamental rights. When there is conflict between two rights, the ECJ rules on the merits of he case.

1.1. COLLECTIVE BARGAINING, BINDING *ERGA OMNES* AND FREEDOM OF COMPETITION

When there was a conflict between a collective agreement setting up a supplementary pension scheme, made compulsory for a whole sector, and freedom of competition, the court ruled in favour of the negotiated pension scheme. The Court[1] held that (1999):

> 'A supplementary occupational scheme was established by a sectoral collective agreement, which had been declared binding *erga omnes*. This had as a consequence that all employers and employees had to be affiliated to this fund. Some companies did not like this obligation, and contended that they could provide arrangements at a lower price, and that the compulsory arrangement was contrary to free competition in the common market. The Court confirmed the validity of the collective agreements declared binding *erga omnes*.'

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1 ECJ, 21 September 1999, *Albany v. Stichting Bedrijfspensioenfonds Textielindustries*, Case C-67/96; *Brentjes' Handelsonderneming v. Stichting Bedrijfspensioensfonds voor de handel in bouwmaterialen*, Joined Cases 115–117/97 and *Drijvende Bokken v. Stichting Pensioenfonds voor de vervoer en havenbedrijven*, Case C-219/97, *ECR* 1999, 5751. *See* N. Bruun and J. Hellsten (eds.), *Collective Agreement and Competition in the EU: The Report of the COLCOM project*, Copenhagen, 2001, 226 pp.

The Court stated that Article 101(1) and Articles 151 to 159 TFEU are construed as an effective and consistent body of provisions; it follows that agreements concluded in the context of collective negotiations between management and labour, in pursuit of social policy objectives such as the improvement of conditions of work and employment, must, by virtue of their nature and purpose, be regarded as falling outside the scope of 101(1) of the Treaty. The Court continued: An understanding in the form of a collective agreement, which sets up, in a particular sector, a supplementary pension scheme to be managed by a pension fund, to which affiliation may be made compulsory by the public authorities, does not, by virtue of its nature and purpose, fall within the scope of Article 101(1) of the Treaty. Such a scheme seeks, generally, to guarantee a certain level of pension for all workers in that sector, and therefore contributes directly to improving one of their working conditions, namely their remuneration.

A decision by the public authorities, at the request of the parties to the agreement, to make affiliation to such a fund compulsory, cannot therefore be regarded as requiring or favouring the adoption of agreements, decisions or concerted practices contrary to Article 101 of the Treaty, or as reinforcing their effects. Accordingly, the Treaty does not preclude a decision by the public authorities to make affiliation to a sectoral pension fund compulsory at the request of organisations representing employers and workers in a given sector.

1.2. THE *LAVAL* CASE: FREEDOM OF SERVICES *VERSUS* THE RIGHT TO STRIKE

The workers of Laval came from the East – from Latvia, a new EU Member State. They were engaged by a Latvian company to build a school, near Stockholm in Sweden. Their Latvian trade union had concluded a collective agreement with their employer. They were going to make more money than by staying at home. How many they were we do not know.

Due to a boycott by a trade union of Swedish counterparts, their company became bankrupt and they lost their jobs. Whether they received any compensation from their bankrupt employer, remains unclear. Indeed, no one seems to care.

Most – if not all – of the attention, at a national as well as a European level, focused on the action of the Swedish trade union, which wanted to impose its own tariff agreement, an agreement that was considerably more expensive than the Latvian collective agreement. In fact, Swedish unions were defending their own interests and those of their members, even if Latvian workers would suffer and lose their jobs as a result.

The issues at stake before the Courts were social dumping by a cheaper labour force from an Eastern European country, equal treatment (the right of workers to equal wages and conditions), the untouchability of the right to strike (a national prerogative), and the right for Sweden to impose its own industrial relations system.

Indeed, why would Latvian workers not be entitled to the same, or similar, wages and conditions as their Swedish counterparts? Why would Swedish trade unions not be allowed to engage in the same industrial action regarding employers, regardless of

the nationality of the workers they employed (equal treatment, why not?)? Why set up a double labour system in the same country? Why should the EU meddle in all this, especially since the EU Treaty clearly indicates that the EU is not competent to regulate remuneration, as well as freedom of association, strikes and lockouts?

No wonder that quite a number of (older) EU Member States, and particularly the trade unions, were pleading strongly in this case for:

- equal treatment;
- the untouchability of the right to strike, as a fundamental human right; and
- the right for a Member State to impose its own system of industrial relations.

However valid these points may sound, they are wrong, not only for legal reasons, but also for societal reasons, namely for reasons of social justice.

Indeed, a European common market has existed for over 50 years now, providing for the right of EU citizens and employees to move freely between Member States; to start businesses in other Member States, to work permanently in other Member States, and the right to provide services in other Member States. This common market has brought us all greater freedom, peace, well-being and welfare. Although there are already 27 Member States, many still want to join the European Union.

The freedom of services has not only economic, but also social advantages. It creates jobs. Today some 70% of the jobs are service jobs. In order to create even more jobs, we have to open the doors of the Member States even more, so that workers have work; a more decent lifestyle and can contribute to the social security system in particular, and overall welfare in general.

One of the toughest problems over the years concerned the wages, working conditions and industrial relations applicable to employers and employees from other Member States, within the framework of the freedom of services. A lot of case law was developed, also by the European Court of Justice, in an attempt to provide answers to these pressing queries. However, these answers were insufficient, and were not comprehensive enough to answer the basic question of which kind of working conditions would have to be mandatorily applied to employers and workers from other Member States, providing services.

The problem was, and is, not easy. Let us take a simple example. If the city of Brussels wants to build a new hospital, it has to publish a public tender, and all construction companies from the EU Member States can submit a proposal indicating how much they will charge to build the hospital.

If a Portuguese construction firm were to submit a proposal, bringing with him Portuguese workers on Portuguese salaries, the labour cost would be about 40% of that of Belgian workers. In such a case, Belgian construction companies, having to pay Belgian wages, would be unable to compete. If we were to ask the Portuguese construction firm to pay Belgian wages and apply Belgian conditions, the employer would be unable to compete, since on top of these wages, the Portuguese employer would have to pay travel expenses, as well as housing costs for his Portuguese workers, and he would not be able to compete, as costs would be exorbitant. So, what to do?

Consequently, the EU Member States looked for a compromise to solve this problem. It took them many years to agree on a solution. Agreement was reached in 1996, with the Directive of 16 December 1996, twelve years before Eastern European Countries joined the Common market.

The essence of Directive 96/71 is well known. It imposes a rigid core of wages and conditions to be guaranteed to posted workers, such as minimum wages imposed by governmental rules or collective agreements, generally binding in respect of building work. Workers can enjoy better conditions, which are provided by their home systems. Receiving Member States can impose working conditions relating to (international) public order as well the core obligations, contained in generally binding collective agreements in sectors other than the construction industry.

This is the general framework within which the European Court had to deal with the *Laval* case, as well as the *Viking* and the *Rüffert* cases. There is freedom of services, and posted workers are only guaranteed the minimum wages, which are generally binding. However, the fact is that this is not the case in Sweden. Sweden does not know a system of extending collective agreements to all enterprises of a given sector. In Sweden, the strong trade unions rely on their strength to impose the conditions they consider to be just and fair.

Was the industrial action – namely the boycott of Laval by the Swedish unions – compatible with the freedom of services? The Court said no, and rightly so. The boycott was contrary to Directive 96/71, trying to impose conditions beyond the 'core' foreseen in Article 3(7). Moreover, if the Court had judged otherwise, the freedom of services from Eastern European countries would have practically have come to an end, because it would be too costly.

In doing so, the Court placed certain limits on the right to strike: the right to strike had to respect the freedom of Latvian workers to work under the conditions they negotiated at home and in line with the 96/71 Directive. If Sweden wished to make its minimum wages binding for posted workers, it would have to extend its collective agreements, or provide for a minimum legal wage. The European Court made the right decision.

Concluding on this point, it seems to me that: 1) social and economic rights are of equal value; and 2) that the European Court of Justice looks for a justified balance when there exist two or more conflicting rights.

In essence, a social protocol is not needed.

2. THE TREATY NEEDS TO BE AMENDED

This needs to be done because the EU does not have sufficient competence to develop a fully-fledged European social policy. In considering this point, one needs to recall that the EU only has the competences transferred by the Member States to the EU, and that these competences have to be exercised in the way indicated by the Treaty.

On this point, the European Social Model is extremely weak. Indeed, social 'core' issues are excluded from the EU competence, namely:

– pay, the right of association, the right to strike and the right to impose lockouts (Article 153(5) TFEU).

For other important matters, unanimity in the Council is needed, namely:

– social security and social protection of workers;
– job security;
– representation and collective defence of interests, including co-determination (Article 153(2) TFEU).

Unanimity between 27 Member States on these issues is almost impossible.

Needless to say, the European Social Model, as far as competence is concerned, is almost non-existent. The catastrophe is that this will be a permanent feature, as the Treaty can only be changed by way of unanimity, which will, as far as social policies are concerned, prove to be impossible.

Obviously, there are other methods of convergence in the social field, such as the so-called 'enhanced co-ordination strategy', as shown in the case of the employment guidelines, which lead to national action plans and to peer pressure for Member States to conform to the guidelines. This strategy, which is important, could be used in other fields.

But this does not prevent the EU from being incompetent: to enact binding measures on core issues such as a European minimum wage, to declare a collective wage agreement at EU level binding; on core issues such as social security, job security, collective bargaining and others, for which unanimity is required; and binding European measures are absolutely unlikely.

The conclusion is clear: the EU lacks the essential competences that are needed to organise and establish a fully-fledged ESM. Even worse is that the political will to socially integrate further is lacking, and the more countries become members of the EU, the more difficult it will be to muster such a political will.

Wage cost and taxes remain national matters, and Member States are competing with each other in wages and taxes in order to attract foreign investment. Multinationals love it. The EU organises social dumping between Member States.

The EU is still too much a region of nation states without much solidarity between them – neither between employers, nor between workers. Everyone is fighting for his own job. Pushing the European market, the EU market of services would also create more jobs for everyone. It is time to work for more European solidarity across borders, because in most cases workers pay the price for this lack of solidarity, and usually the weakest ones, as the *Laval* case showed.

The goal is clear. The Treaty needs to be amended. The EU needs to be made competent in labour law and social security matters, across the board, and this, by way of majority decision-making. This may be a distant dream. A harmonious relationship has to be worked out between social and economic rights, and the EU needs to be fully competent in social matters.