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THE SOCIAL PROGRESS PROTOCOL OF THE ETUC: A SUGGESTION FOR ITS FUTURE DEVELOPMENT

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SUMMARY

The Social Progress Protocol is a proposal formulated by the European Trade Union Confederation (ETUC). It is a response to judicial decisions of the European Court of Justice on the relationship between fundamental freedoms and collective social rights. The proposal essentially demands a supplementing of European primary law in a way that gives precedence to fundamental social rights in the event of a conflict of laws. This paper underscores the justification of the goals pursued by the Social Progress Protocol and makes suggestions on how it can be developed further. The suggestion consists of two parts. The first part suggests that it is the ambit of European fundamental freedoms that should be focused on rather than the general prioritizing of collective social rights. The second part recommends that the proposal for an activation of European legislation in matters involving collective bargaining rights be dispensed with.

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1 What is the Social Progress Protocol?

The social progress protocol is not a component of European primary law or European secondary law (i.e. it is not a component of the European treaties, directives, or regulations); it is a political proposal. It was drafted by the European Trade Union Confederation (ETUC) and was presented to the public for the first time in March 2008.¹ Since then it has undergone further revision.²

The proposal is a response to a series of judgments of the European Court of Justice that began in December 2007. In the Viking and Laval cases, the Court of Justice began testing those laws and practices of the Member States dealing with collective bargaining rights and with the exercising of the freedom of collective bargaining in particular against the European fundamental freedoms and – depending on the outcome of the test – held that some of these constituted obstacles to the single market.³ The ETUC is calling on the Member States of the EU to respond to these decisions in the form of a supplementary protocol to the European treaties. The protocol is essentially intended to ensure that social rights are given priority in general if they conflict with European fundamental freedoms (the actual content of the proposed protocol is discussed in Part 2).

Although the German trade unions and the German political parties SPD, Die Grünen, and Die Linke basically endorse the proposals of the ETUC, their endorsement relates to the general direction of the demands and not necessarily to the concrete wording of the desired protocol. On two occasions – once in May 2009 and once in March 2010 – the parliamentary group of Die Linke made applications to the German Bundestag requesting it to instruct the German Federal Government to advocate such a supplementation of primary law at the European level.⁴ And although the SPD and Die Grünen confirmed their endorsement of the general goals, they voted against the actual application (SPD) or withheld their vote (Die Grünen) on account of reservations concerning the proposed text.⁵

In its election campaign in September 2013, the German Trade Union Confederation (DGB) reiterated its demand for a Social Progress Protocol.⁶ Following this, the Hugo Sinzheimer Institut – a pro trade union institute for labor law – retained the Regensburg lawyer Thorsten Kingreen to prepare an expert opinion on the potential of a Social Progress Protocol. Frequent reference will be made to this in this paper (Kingreen 2014). The opinion sees in the decisions of the Court of Justice a danger for the freedom of association and in this respect supports the goals pursued by the Social

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¹ Declaration of the Executive Committee of the European Trade Union Confederation dated March 4, 2008.

² The full text of the current version is found at: https://www.etuc.org/sites/www.etuc.org/files/social_progress_protocolEN_1.pdf.

³ Court of Justice, C-438/05 (Viking) and Court of Justice, C-341/05 (Laval). On the classification, see Bercusson (2007).

⁴ Bundestagsdrucksachen 16/13056 from May 14, 2009 and 17/902 from March 3, 2010.

⁵ For details on the positions taken by the political parties, see the report [in German] of the Committee on the Affairs of the European Union in the Bundestagsdrucksache 17/4773 dated February 14, 2011.

⁶ See the DGB's election-campaign motto of September 20, 2013: "For political change—Cast your vote!"

Progress Protocol. However, the report is dubious about the suggested wording of it and instead recommends incorporating the social partnership in the horizontal clause of Article 9 TFEU and amending European law in relation to the posting of workers and in relation to public procurement law.

On 29 November 2016, the heads of the Social Democratic parties and trade union confederations of Austria, Germany and Sweden met in Vienna and agreed on demands for a “European Pact for Social Progress”. Part of the demands is, although German Social Democrats voted against it in the Bundestag in 2009 and 2010, the Social Progress Protocol. Just as the Social Progress Protocol in its original wording, the paper makes clear that a protocol shall ensure that “[i]n the event of conflict, fundamental social rights must have priority”.⁷

The purpose of this paper is to continue on with the debate and to enrich it with new points of view. The basis of the discussion is that the ETUC has correctly recognized that the line of judicial decisions beginning with Viking and Laval represent a potential tool for weakening the freedom of collective bargaining and that there is therefore a need to act. After a brief outline of the content of the proposed Social Progress Protocol (Part 2), I will underscore the importance of the goal being pursued (Part 3). This will be followed by a more in-depth discussion of two relevant aspects: One is the problem of the equal ranking of fundamental freedoms and fundamental social rights, which is proclaimed to nominally exist by the Court of Justice but which in fact does not actually exist in the judicial decisions (Part 4). The other is whether the Commission’s competence to initiate European legislation should be extended to collective bargaining rights (Part 5). I will then discuss the implications of this for the future development of the proposal (Part 6) and will conclude with a brief outlook (Part 7).

2 The contents of the proposed protocol text

The ETUC is calling on the Member States and the European institutions to work towards the enactment of a supplementary protocol to the European treaties. Such a protocol would have to be treated as a part of primary European law. The current version of the proposed text contains four articles.

Article 1 maintains that the “highly competitive social market economy” strived for in primary European law (Article 3(3) TEU) obligates the EU to pursue the goals of social progress. Article 2 sets out the tasks imposed on the Union institutions (subsection 1) and those imposed on the Member States and on the Social Partners (subsection 2). The Union institutions are being requested to work towards improving social conditions and to guaranteeing the collective bargaining rights of employees. They must recognize the right of trade unions to strive for the improvement of working conditions

⁷ The English version of the document is to be found here: <http://www.dgb.de/themen/++co++dd1d6ec8-b625-11e6-a182-525400e5a74a>.

“also beyond existing (minimum) standards” and to prevent any regression in respect of secondary legislation already in existence. The Member States and the Social Partners must also avoid any such regression when implementing Union law and are not to be “prevented from maintaining or introducing more stringent protective measures compatible with the Treaties”.

This paper centers around Articles 3 and 4. Article 3 deals with the relationship between fundamental rights and economic freedoms and should be read chiefly as an interpretation aid directed at the Court of Justice. In cases where laws conflict, the fundamental social rights are to take precedence. Economic freedoms are to be interpreted in a way that does not violate the exercising of fundamental social rights, including the right to negotiate, conclude, and enforce collective bargaining agreements.

Article 4 mandates the Union institutions to take action: “To the end of ensuring social progress, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.” Article 352 TFEU is the so-called flexibility clause. It enables Union institutions to take action to achieve the goals of the Treaty – which in this case means the goals of the Social Progress Protocol – in cases where it is deemed necessary but where the treaties lack the required competency provision. The difficulty with the reference to the flexibility clause lies in the fact that the main area dealt with in the Social Progress Protocol, i.e. the collective rights of employees, is an area that pursuant to Article 153(5) TFEU cannot be legislated on at the European level. I will return to this issue in Part 5.

3 Why the Social Progress Protocol is headed in the right direction

Before I turn to those aspects of the Social Progress Protocol that should be tightened even further, I would like to address and set the record straight on three basic misgivings that may be held by some readers who are confronted with the ETUC proposal for the first time. These three misgivings are of a politico-economic nature, a legal nature, and a political power nature.

One could argue that the demand for a Social Progress Protocol actually misconstrues a politico-economic problem as a legal problem, and that it is therefore reaching for the wrong tool in the tool box. There is certainly no doubt that the reasons for the disillusionment about the failure to fulfill the promise of a “social Europe” are far more complex than the mere absence of a supplementary protocol. The socio-political potential of European integration has been the topic of much written commentary and heated debate (for example Leibfried/Obinger 2008, Scharpf 2010 and Seikel 2016). The often complained of barrier to the more ambitious endeavors to create a “European social community” – such as the harmonization of the social sys-

tems of the Member States, European collective bargaining agreements, or a Europe-wide model of employee co-determination rights – lies in the heterogeneity of the production and distribution systems of the EU countries (Höpner/Schäfer 2012). The discrepancies between the various interests and traditions of the Member States render any attempt to harmonize the social sphere an extremely complicated undertaking. And no supplementary protocol of any conceivable kind can do anything to change this.

But if one follows Scharpf's analytical distinction between a positive integration – whose aim is to harmonize at the European level – and a negative integration – whose aim is to eliminate real or purported market restrictions at the Member State level (basic discussion: Scharpf 1999, Chapter 2) – then we see that the obstacles to a positive integration are only one side of the problem, albeit a very serious problem from the point of view of the trade unions. The other side is the asymmetry of market-enforcing integration, which to a large extent is not being enforced through European policy but through the Court of Justice of the European Communities and which then impacts the regulating of the social systems – specifically the right to collective bargaining – at the Member State level. This asymmetry was the reason behind the ETUC's proposal and it is the precise point that the proposal is targeting: The European trade unions are calling on the participants to search for ways to prevent collective bargaining rights from being increasingly eroded at the Member State level through overly broad interpretations of European market freedoms.

The Social Progress Protocol should therefore not be burdened with false expectations. The implementation of the protocol alone will certainly not create a "social Europe". But what the proposal does do is provide a coherent thrust in the right direction. It has correctly identified a part of the problem and it is responding to it. Other problems – such as the social repercussions of the euro crisis – demand other answers.

Let us now turn to the second misgiving, the one of a legal nature. It was Thüsing (2010, p. 16) and Kingreen (2014, p. 61) in particular who brought this legal issue to the debate and who said that the suggested wording of the Social Progress Protocol was demanding a legal impossibility. It was demanding what Thüsing referred to as the creation of a "super fundamental right", a right that would always supersede the fundamental freedoms and that would always "defeat" these whenever there was a conflict or a weighing of interests, regardless of the concrete constellation at hand. The second sentence of Article 3(1) does indeed hardly allow for any other interpretation: "In case of conflict fundamental social rights shall take precedence."

One must remember, however, that the Social Progress Protocol is a proposal that is meant to trigger a debate. Proposals always tend to overshoot the mark of what is generally considered a realistic compromise. What I would therefore suggest is to reinterpret the demanded general priority as a prohibition of subordination and to refrain from rejecting the idea prematurely. I will discuss this in more depth in Part 4.

The third misgiving concerns strategic political powers. The ETUC's proposal provides for an amendment of primary law, something which can only be effected with a consensus of all 28 – after the likely Brexit: 27 – Member States (the proposed form of the supplementary protocol does nothing to change this) and therefore with a considerable amount of difficulty.⁸ My suggestion here too would be to refrain from confusing the proposal – which is only meant to trigger a debate about a legitimate concern – with the result that is realistically attainable. Other viable legal or political ways of implementing the desired prohibition of subordination that may be opened up during the course of the debate – direct treaty amendments, new secondary law, or amendments to existing secondary law are all conceivable apart from the supplementary protocol – should not be excluded as options.

There is no doubt that the goals being strived for are not easily attainable. Confirmation of this is found in the way the debates have gone up to now, a good example of which being the hearing before the respective committee of the German Bundestag.⁹ But a good proposal does not wait to be lodged only until the power required to enforce it already exists *ex ante*. If a proposal appears justified – if it is consistent in and of itself and does not conflict with any fundamental interests of a veto holder – then everything else will depend on the powers of persuasion of the backers of it.

It is true that the preferences for an amendment of the law, which is what the intended effect of the protocol would be, differ from one EU Member State to the other. High-wage economies with strong trade unions and high collectively negotiated wage scales have more to lose through the Court of Justice's more recent decisions on fundamental freedoms than for example the eastern European accession countries. But the chances of success of a prohibition of subordination are better for example than the chances of enforcing ambitious standards with respect to social security or employee co-determination rights. This is because the goal of the social progress clause is not to harmonize but is primarily meant to ensure that the various forms of collective bargaining rights are compatible with the progression of European economic integration. There is no reason to assume that such goals cannot be attained, at least approximately, through European package solutions. Of course the chances of realizing such goals in such constellations also depend on which price the countries that are trying to realize the goal are willing to pay in other areas.

⁸ In this connection Kingreen is correct in pointing out the discrepancy between the desired form of the supplementary protocol on the one hand (protocols are generally used to clarify individual questions) and the extremely ambitious goals of it on the other hand: If what is truly being strived for is an "earth-moving change" (Kingreen 2014, p. 59) to the relationship between fundamental social rights and fundamental economic freedoms (the "super fundamental right"), then a supplementary protocol would hardly be the suitable place for such a codification.

⁹ See n. 5.

4 The hierarchy of fundamental freedoms and fundamental rights

We already saw in Part 2 that the Social Progress Protocol, in its proposed form, contains an interpretation aid for the Court of Justice. Article 3 states that in the case of conflict, social rights take precedence over fundamental freedoms. As discussed in Part 3, my suggestion is to interpret this proposal – certainly more moderately – as a prohibition of subordination.

Why does the ETUC propose a prohibition of subordination or even an imperative of superordination? The proposal is the result of a specific kind of reading of the line of judicial decisions that began with *Viking* and *Laval*. According to such a reading, the Court of Justice had begun subordinating the collective bargaining right to the European fundamental freedoms. If one looks at the judgments from the point of view of their effects, then the term “subordination” is indeed fitting: The collective rights of employees had to surrender to the freedom to provide services (*Laval*) or to the freedom of establishment (*Viking*). However, to be able to formulate a coherent counteroffensive, it is crucial to understand that the Court of Justice was able to reach its conclusions without postulating a hierarchy between the fundamental rights at issue and the fundamental freedoms. This is a point worth looking at more closely.

With the image of subordination in mind, it is easy to misconstrue the Court of Justice in *Viking* and *Laval* as having attempted, in principle, to weigh equal-ranking fundamental rights and fundamental freedoms against each other, the result of which was that the fundamental right got the bad end of the deal (and was therefore “subordinated”). In German constitutional theory one would speak of an attempt to produce “practical concordance”, meaning that if two fundamental rights conflict with each other, both must be restricted in such a way that in the end both are valid to the greatest possible extent (see paras. 72 and 318 in Hesse, 1988). But that is not what happened in *Viking* and *Laval*. What actually happened was that the collective right of employees was subjected to the four-step fundamental freedoms test that had been developed for single-market obstacles by the court in the *Cassis de Dijon* and following cases, and it was according to this test that it had to prove itself – a process fundamentally different from Hesse’s practical concordance.¹⁰

The Court of Justice construes the fundamental freedoms as prohibitions of restrictions (Büchtele 2008, pp. 347–355). Anything that renders the transnational exercising of a fundamental freedom less attractive (more precisely: anything that could make it less attractive because there is no need for an empirical restrictive effect) needs to be justified. Restrictions on the transnational exercising of fundamental freedoms are only then compatible with European law if they are justified on the basis of compulsory reasons of public interest, are applied in a non-discriminatory way, are truly suitable

¹⁰ Court of Justice, C-120/78 (*Cassis de Dijon*).

for achieving an aim that is recognized as compulsory, and do not exceed what is needed to achieve such aim. It is easy to see that this test is fundamentally different than a weighing of equal-ranking rights (see Heuschmid 2009, pp. 207-210). A norm – in this case a collective employee right – is having to be justified in an asymmetric way preferential to another norm – in this case a fundamental freedom.

The difference between a weighing of equal-ranking rights and what the Court of Justice did is clearly expressed in the Opinion of the Advocate General Trstenjak in *Commission versus Germany*, a case involving a complaint about a collective bargaining agreement regulating the old-age pensions of public employees.¹¹ In this Opinion, the Advocate General contrasts both scenarios. She states that what a judge has to produce is a result “which ensures the optimum [sic] effectiveness of fundamental rights and fundamental freedoms” (from para. 191). Konrad Hesse, the creator of the principle of “practical concordance”, would certainly not have formulated the purpose of the weighing, which the conflict had made necessary, any differently himself. But the Court of Justice, in the opinion of the Advocate General, took a different approach in *Viking* and *Laval*. She maintains that the Court of Justice remained “within the traditional scheme of analysis” (from para. 181) and resolved the conflict “by reference to [...] the grounds [...] justifying restrictions on fundamental freedoms” (from para. 179). According to the Advocate General, this classification in the fundamental freedoms test “sits uncomfortably alongside the principle of equal ranking for fundamental rights and fundamental freedoms” (from para. 183).

To reiterate: The problem in *Viking* and *Laval* was not that the Court of Justice had proclaimed a hierarchy between fundamental social rights and fundamental freedoms. It did not have to do this to reach its result. Instead, the Court of Justice left intact the nominal equal ranking of fundamental freedoms and fundamental social rights (see para. 44 in *Viking* and para. 91 in *Laval*) and applied the fundamental freedoms test developed for single-market obstacles. When this is done, then the nominal equal ranking of fundamental economic freedoms and fundamental social rights, which continues to exist, is transformed into a *de facto* hierarchy.

This result has implications for the work on a coherent counteroffensive. Since the problem is not a supposed nominal hierarchy of the rights at issue here, the anchoring – in primary law – of a prohibition of subordination would be completely ineffectual (as would an imperative of superordination). The problem is rather that collective employee rights fall within the reach of the four-step fundamental freedoms test. It is therefore the reach and scope of the fundamental freedoms that the counteroffensive has to focus on.

¹¹ Court of Justice, C-271/08. I would like to thank Florian Rödl who brought the Opinion of the Advocate General to my attention.

5 New competences for Brussels?

What also needs to be thoroughly reconsidered in my estimation is a second peculiarity of the draft protocol, namely that the text requests Union institutions to take legislative action in the area of collective bargaining rights.

The EU institutions up to now have very little legislative competence in the social area, and in relation to collective bargaining rights, the Member States have excluded European legislation altogether. According to Article 153(5) TFEU, the Commission may not enact legislation in the areas of pay, the right of association, the right to strike, and the right to impose lock-outs – i.e. in precisely those areas addressed by the Social Progress Protocol. But it is just such legislative acts that the Social Progress Protocol is requesting the Commission to do: For the purposes of ensuring social progress within the meaning of the protocol, Article 4 states that “the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.”

As already mentioned in Part 2, Article 352 TFEU is the so-called flexibility clause. It allows for European legislation making through a unanimous Council decision if one of the objectives stipulated in the treaties is being pursued but the competence norm needed for this is missing. Therefore, when the ETUC requests the Commission to use Article 352 TFEU to enact legislation in the area of collective bargaining rights, it is requesting it in effect to circumvent Article 153(5) TFEU or practically to recognize a new, not yet existent area of Union competence.¹² Let us now put ourselves in the position of a political advisor. Should he or she advise the trade unions to grant the Commission competence to submit proposals for directives and regulations regarding collective bargaining rights (or to employ a circumvention strategy with the same practical effect)?

It is worthwhile at this point to take a look at the political debates that were precipitated by Viking and Laval. The ETUC succeeded in triggering a debate in several European countries and in EU institutions about collective bargaining rights falling within the ambit of European fundamental freedoms. In September 2009, the Commission President Barroso announced that if he were re-elected, he would want to work towards a solution for the problems created by the Court of Justice decisions. In March 2012, the Commission then submitted a proposal for a “Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services” modeled on an older regulation frequently referred to as “Monti II”.¹³

¹² Kingreen (2014, pp. 65–67) also concludes (with reference to Monti II) that the text of the protocol demands an action on the part of the Commission in areas that are actually excluded from Union competence.

¹³ COM(2012) 130 final, dated March 31, 2012.

The contents of “Monti II” were, however, the complete opposite of what the ETUC and the progressive powers associated with it had hoped for (cf. details in Bruun/Brücker 2012). Instead of a prohibition against subordinating collective bargaining rights to the fundamental freedoms or an exception of collective bargaining rights from the ambit of them (the latter will be discussed in Part 6), the proposal aimed at a codification of the judge-made law pronounced in 2007 and assigned the labor courts the task of reviewing “whether the [labor dispute] actions concerned pursue objectives that constitute a legitimate interest (from Point 3.3 of the grounds for the proposal). In addition, Article 4 of the proposed regulation provided for the creation of an early alert mechanism for strikes with transnational effects. In short, “Monti II” would not have cleared the situation up for the trade unions, it would have made it worse.

“Monti II” was a failure. We have already seen that Article 153(5) TFEU excludes the labor-dispute right from the areas of competence of the EU institutions. The proposal submitted by the Commission was therefore relying on the flexibility clause of Article 352 TFEU and thereby presupposed the unanimity of the Council. By May 2012, twelve parliaments of the Member States had responded to the proposed regulation with subsidiarity complaints. With these twelve complaints, the Commission realized that the unanimity needed to enact the regulation could not be reached. It therefore withdrew its proposal in September 2012.

What can we learn from these events? Firstly, the commission showed us, with “Monti II”, what its political vision is regarding the relationship between fundamental economic freedoms and the freedom of collective bargaining. We now know exactly what the Commission would do with legislative competence in the area of collective bargaining rights.¹⁴ Secondly, the fact that no genuine political competence regarding collective bargaining rights existed was exactly what prevented “Monti II”.

Note that in March 2008, when the proposal for a social progress clause was first being drafted, the developments outlined here could not yet have been foreseen. However, in light of what we now know, our imaginary political advisor – just to wrap up this fictional experiment – would have to strongly advise trade unions against making any kind of proposal that would grant the EU legislative competence in the area of collective bargaining rights.

¹⁴ Incidentally, the way that the wage-setting systems of the southern crisis countries were dealt with (documented in Schulten/Müller 2013, pp. 295–299 and Rödl/Callsen 2015, pp. 30–44) should remove any vestiges of doubt about whether more intrusions by the Commission on collective bargaining rights would have any benefit whatsoever in the foreseeable future for the trade unions.

6 Excluding collective bargaining from the scope of the fundamental freedoms

The considerations discussed above lead to two results: First, the experiences with “Monti II” have shown that any request for new areas of Union competence in the area of collective bargaining rights would be politically equivalent to kicking the ball into your own goal. The implications of this for the Social Progress Protocol are obvious: The proposal made in Article 4 of the current version, i.e. the activation of the European legislator via the flexibility clause of Article 352 TFEU, should be dispensed with. Secondly, what is needed is a coherent proposal whose objective is not the correction of the nominal hierarchy of fundamental freedoms and collective social rights but to exclude collective bargaining from the ambit of the fundamental freedoms. The implication of this second insight is, however, difficult to concretize.

What would first have to be reviewed is whether there are constellations known to European law in which regulated areas are fundamentally excluded from the scope of application of the fundamental freedoms. Such a notion is in fact not unknown to European law, because the Court of Justice recognized just such an excepted area in its decision in the Keck case.¹⁵ The case involved proceedings for the selling of goods at a loss. The highest European court held that selling methods do not fall within the scope of application of the free movement of goods.¹⁶ Therefore sale-related rules that apply without discrimination to all market participants and do not make market access more difficult are excluded from the fundamental freedoms test. Examples of this include the regulations of advertising and of retail opening-hours. What is interesting here is the Court of Justice’s reasoning for excluding the area: An indiscriminate application of the free movement of goods to all conceivable cases had to be curbed.¹⁷

How is the Keck decision instructive in our context? It is clear that sales methods on the one side and the regulating and exercising of the freedom of collective bargaining on the other have nothing factually to do with each other and that it would therefore be mistaken to try to infer from the Keck exception the need for an exception for collective bargaining rights. The insight that can be gained on is of a different nature. What the Court of Justice demonstrated in Keck is that the ambit of the fundamental freedoms is susceptible to incursions. And if such incursions are possible via judge-made law, then they must also be possible via the legislator.

Instructive in this connection is also the decision in the Albany case (see Kocher 2009, p. 334 and Rödl/Callsen, p. 57).¹⁸ Although the issue in Al-

¹⁵ Court of Justice, C-267/91 (Keck and Mithouard).

¹⁶ According to the summary of the judgment, the free movement of goods “must be interpreted to mean that [it] does not apply to provisions of the law that generally prohibit re-sales at a loss.”

¹⁷ “In view of the increasing tendency of traders to invoke [the free movement of goods] as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter.” (para. 14).

¹⁸ Court of Justice, C-67/96 (Albany).

bany was not the scope of application of the fundamental freedoms but rather the scope of application of European competition law, it is still remarkable with respect to its “target point”: The court in Albany carved out an area of exception for the freedom of collective bargaining. Analogous to the Keck exception, some authors refer to this as the Albany exception.¹⁹ Because the collective bargaining right necessarily and desirably restricts free competition, so the argument of the court, it then has to fall outside the scope of application of competition law. To reiterate: The fact that competition rights were being restricted – via judge-made law – by the freedom of collective bargaining does not automatically mean that there also has to be such a restriction for fundamental freedoms. But while Keck strengthens the position that some areas of regulation can fall outside the ambit of the fundamental freedoms, the Albany case provides support to the position that collective bargaining rights or the freedom of collective bargaining can be the very subject matter of such an excepted area.

For the sake of completeness, one contentious point must be mentioned regarding the way the Albany exception and the areas of exception comparable to the Keck exception are to be understood: The exclusion of collective bargaining agreements (and collectively negotiated regulations) from the scope of application of competition rights does not apply in general but is tied to two requirements that must be satisfied in each individual case. One is that the collective bargaining contracts must have come into existence pursuant to negotiations between the social partners (i.e., trade unions and employers) and the other is that they must concern employment and working conditions. In this sense it is not a general exception from the scope of application of competition rights but an exception that must satisfy these requirements in each individual case.

In practice, however, one can see that these requirements are extremely easy to satisfy, as illustrated by the brevity of the review made in the Albany decision: The collective bargaining agreement challenged under competition law was concluded by the social partners (para. 62) and it regulated the working conditions of the employees (para. 63) – end of review. In this respect, one could also refer to it as a generally excepted area with an abuse-control mechanism factored into it.²⁰ It should be emphasized at this point that the distinction between generally and non-generally excepted areas is not a problem for the issues being discussed in this paper, because even if the regulating and the details of the freedom of collective bargaining were to be excluded via the legislative process from the ambit of fundamental freedoms, it could still be outfitted with an abuse-control mechanism.

Back to the actual line of argument: My suggestion is to request the European legislator to exclude the freedom of collective bargaining and the contents of collective bargaining agreements from the scope of application of

¹⁹ For example Ackermann (2010, p. 44) or also the Court of Justice decision C-271/08 at para. 61.

²⁰ The abuse-control mechanism is meant to prevent such things as general restrictive trade practices being passed off as collective bargaining agreements and in this way immunizing themselves against the effects of competition law.

the fundamental freedoms – in other words, to legislate a Keck exception modeled along the lines of the Albany exception. The wording of the core of such a directive could be modeled closely on the Keck exception: The free movement of goods, the free movement of capital, the freedom to provide services, and the freedom of establishment are to be construed in such a way that they do not apply to the regulating and exercising of the freedom of association. An interesting result of this is that it switches the focus from the nominal value of collective bargaining rights to the scope of application of the fundamental freedoms. Another is the suggested place where the desired correction could be made: It could perhaps be positioned in secondary law. Or more cautiously: It seems politically prudent to insist on such a possibility until the contrary has been proven.

Understandably enough, many readers might have their doubts at this point. Wouldn't the Court of Justice just reject such a secondary law the same way it did the rules and practices of the Member States in the series of decisions starting with Viking and Laval? What must be taken into consideration here is that the fundamental freedoms have different normative meanings for the Member States and for the EU. While the Member States are bound by the fundamental freedoms, the European legislator is entitled to harmonize market obstacles for Europe (and thereby allocate tasks to secondary law other than the affirming of fundamental freedoms). As discussed in-depth by Rödl (2011, p. 295), the Court of Justice therefore (correctly) affords the European legislator disproportionately wider powers of discretion regarding legislative content than it does the legislators of the Member States. The limits of its powers are not determined by applying the strict fundamental freedoms test but by the prohibition of manifest abuse. In other words, European secondary law is more "immune" to the fundamental freedoms than national law.

The practical consequences of this are heartening: It opens up – unintentionally to some extent – an additional advantage, namely a strategic-political advantage. The original ETUC proposal was aimed at enforcing a hierarchy of fundamental social freedoms and fundamental rights that without doubt was dependent on an amendment of primary law. The implementation of an excepted area in secondary law on the other hand is also conceivable and would not necessarily entail waiting for the proverbial window of opportunity to open up – i.e. treaty amendments –, which it seldom does.

7 Conclusion

In this paper I have underscored the justification of the goals pursued by the Social Progress Protocol and have suggested how it can be developed further. This suggestion consists of two parts. I first recommend that a proposal be made to restrict the scope of application of the fundamental freedoms rather than trying to enforce a general priority (or at least a prohibition of subordination) of collective social rights over fundamental economic

freedoms. I secondly recommend that – in light of the “Monti II” experiences – the proposal to activate the European legislator in the area of collective bargaining rights be dispensed with.

Note that the exclusion of collective bargaining from the ambit of the fundamental freedoms would be an exceptionally “system-conform” measure; it would reinstate the original intention of the exception in Article 153(5) TFEU, i.e. the excluding of wage and labor dispute rights from the areas of competence of the Union institutions. The purpose of Article 153(5) TFEU was to effectively protect a particularly sensitive area from uncontrolled liberalization. Its purpose was not to create a situation in which the Court of Justice would be able to encroach on collective bargaining rights without leaving the legislator any possibility to correct the Court.

What I have suggested is a way that is more effective and easier to implement than the original proposal. As explained, there is good reason to assume that a prohibition – anchored in primary law – against subordinating the collective bargaining right to the fundamental freedoms would be completely ineffectual in the eyes of the Court of Justice. But an Albany-like Keck exception for collective bargaining rights could, if it were implemented, effectively put collective bargaining rights outside the ambit of fundamental freedoms. The likelihood of this suggestion being implemented is higher than what is proposed in the Social Progress Protocol because it dispels some of the objections that were raised against it especially with regard to the impossibility of “super fundamental rights”.

The idea to consider the secondary law path as an alternative to a treaty amendment will undoubtedly provoke criticism with respect to its “durability” before the Court of Justice. I have referred in this paper to the discretionary powers that the Court of Justice rightly affords the European legislator with respect to restricting fundamental freedoms. In my view, we should insist on the competence of the European legislator to specify the reach and scope of the fundamental freedoms. From a democratic-theoretical point of view, it would be bizarre to claim that the Court of Justice was allowed to exclude such things as selling methods from the ambit of the fundamental freedoms but the democratically legitimated legislator is not.

Nevertheless, the solution suggested here is indeed very much dependent on the willingness of the highest European court to cooperate in clearing up the problems created by Viking and Laval. My suggestion is that this willingness to cooperate be at least tested. If the Court of Justice refuses to cooperate, then the only way left would in fact be the way proposed by the ETUC, a supplementation of primary law.²¹ Jürgen Bast, Florian Rödl, and Philipp Terhechte have recently shown in the journal *Zeitschrift für Rechtspolitik* which form such a treaty amendment could take. They too suggest, in essence, the creation of areas of exception along the lines of

²¹ Which would also eliminate the advantage of easier implementation. There is, however, one other point to make regarding the argument that a primary law amendment would be more difficult to implement: A solution involving an amendment of primary law would not have to depend on the Commission exercising its monopoly with respect to initiate legislation.

the Albany decision. These areas would have to be positioned in the chapters on the single market in the Treaty on the Functioning of the European Union (in Articles 36, 51, 53, and 65 TFEU).²²

Note in addition that a reform of the range and scope of the fundamental freedoms must not necessarily stop here. In my view, we should additionally consider going back to the normative meaning that the fundamental freedoms had before the Dassonville and Cassis de Dijon decisions, which would imply that they would forbid discrimination practices. The non-restriction interpretation of the fundamental freedoms is, by contrast, in essence a liberalization imperative that has gone much too far. Everything beyond non-discrimination should, in my view, be up to the European legislator to decide. But obviously, if the reform proposed in this paper was implemented, the move from non-restriction to non-discrimination would not make any further difference for collective bargaining, since it would be excluded from the scope of the fundamental freedoms anyway.

To sum up, the ETUC, with its proposal for a Social Progress Protocol, has identified a problem in the judicial decisions at an early point in time and has responded to it with a solution that is headed in the right general direction. What now needs to be done is to bring coherent proposals into the reform discussions ignited by the Brexit debate. I hope that my ideas will be read as a helpful contribution to the urgently needed revival of the discussions surrounding the Social Progress Protocol.

²² The authors also suggest supplementing Art. 101 TFEU with a codification of the *Albany* decision and an exclusion in Art. 121 TFEU of the collective bargaining systems from the "strict" enforcement possibilities in connection with the politico-economic recommendations made to the Member States. Further details on this are found in the authors' essay in the journal *Zeitschrift für Rechtspolitik*.

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