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RÜFFERT V. LAND NIEDERSACHSEN: THE ECJ'S DEPARTURE FROM TRADITIONAL EUROPEAN SOCIALISM

*Michelle Meyer**

I. INTRODUCTION

In April of 2008, the European Court of Justice (ECJ) secured the final nail in the coffin, burying Europe's traditionally socialist view towards its workers. In *Rüffert v. Land Niedersachsen*, the Court held that a German state could not assign public works contracts to only those contractors who agreed, in writing, to pay their employees the local agreed-upon union rates.¹ This is one of three recent decisions by the ECJ placing the European Union's (EU) important "freedom of services" policies—and some would say corporate financial gain—above the socialist ideals of the individual European nations. Because the Court has ruled that union collective bargaining agreements are only regionally valid,² the practice of cross-border employment within the EU will undoubtedly continue to grow. While this is music to the ears of those who prefer more industrial competition in Europe, it is of great concern to those fighting for workers' rights.

This article proposes that the ECJ's recent decision in *Rüffert* leads EU nations adrift of their socialist ideals by supporting a free-market economy, where the freedom to provide cross-border

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1. See Case C-346/06, *Rüffert v. Land Niedersachsen*, 2008 E.C.R. I-1989, 2 C.M.L.R. 39, ¶¶21-43.

2. *Id.* at ¶ 39.

services will result in changes to the demographics and regional economies of member states.

There is much criticism of the ECJ in light of its recent decision. Some believe the ECJ has overstepped its bounds, while others call to reassert the supremacy of social rights over economic freedoms.³

This article will demonstrate how the ECJ's recent decisions correspond to economic unity, which lies at the center of the European Union's goals, by upholding the economic freedoms that form the foundation of the EU itself. The first section gives a brief overview of the European Union's history and creation, and discusses its economic foundations. The second section of this article describes the ECJ's recent decision in the *Rüffert* case, as well as two other recent decisions containing strikingly similar approaches to balancing social and economic rights. The third section describes how the ECJ's support of free movement of people and the freedom to provide services will change European nations.

II. THE EUROPEAN UNION IS AN ECONOMIC ALLIANCE

A. Pre-European Union Organizations

In 1951, Belgium, France, Italy, Luxemburg, the Netherlands, and West Germany formed the European Coal and Steel Community (ECSC).⁴ The ECSC had the dual goals of managing the production and distribution of both coal and steel within Europe, and preventing Germany from re-arming itself in light of the tragedy caused by World War II.⁵ Shortly thereafter in 1957, the European Economic Community (EEC) was established by the ECSC's founding states.⁶ The states united to coordinate

3. *Collective Agreements: MEPS React to ECJ Viking and Laval Rulings*, EUR. SOC. POL'Y, Oct. 13, 2008.

4. Natalie Shimmel, *Welcome to Europe, but Please Stay Out: Freedom of Movement and the May 2004 Expansion of the European Union*, 24 BERKELEY J. INT'L LAW 760, 761 (2006).

5. *Id.*; Brian J. Woodruff, Comment, *The Qualified Right to Free Movement of Workers: How the Big Bang Accession has Forever Changed a Fundamental EU Freedom*, 10 DUQ. BUS. L.J. 127, 128 (2008).

6. Europa, *The EU at a Glance, Europe in 12 Lessons: Ten Historic Steps*, http://europa.eu/abc/12lessons/lesson_2/index_en.htm (last visited Jan. 18, 2010) [hereinafter *Ten Historic Steps*].

economic policies and build a common internal market organized around four fundamental freedoms: (1) free movement of capital, (2) freedom to provide services, (3) free movement of goods, and (4) free movement of people.⁷

The EEC quickly became powerful enough to incorporate political goals into its European integration efforts.⁸ The social and political goals the EEC chose to incorporate were set out specifically in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and the 1961 European Social Charter.

The 1950 Convention, commonly referred to as the ECHR, ensured citizens: the right to life, liberty, security, marriage, and a fair trial; the freedom of expression, assembly, association, thought, conscience, and religion; respect for private and family life; and the prohibition of discrimination, slavery, forced labor, and torture. These rights closely resemble the freedoms guaranteed to American citizens in the United States' Bill of Rights.

The 1961 Charter gave further rights to citizens of EEC states, especially with respect to workers' rights. It guaranteed equality and fair working conditions and the right to social welfare benefits.¹⁰ The 1961 Charter began what many now consider the principles of European social democracy: a democratic nation seeking to ensure the well-being of its citizens through the implementation of social welfare legislation and benefits.¹¹

During the years following the 1957 creation of the EEC, the organization expanded to include new member states. The first expansion occurred in 1973, with the accession of Denmark, Ireland, and the United Kingdom.¹² Two years later, the states adopted a common social policy, by implementing the European Regional Development Fund (ERDF).¹³ The goal of the ERDF

7. Shimmel, *supra* note 4, at 761.

8. Woodruff, *supra* note 5, at 128.

9. Convention for the Protection of Human Rights and Fundamental Freedoms § I, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

10. See European Social Charter, Oct. 18, 1961, Europ. T.S. No. 35.

11. See George S. Katrougalos, *The Implementation of Social Rights in Europe*, 2 COLUM. J. EUR. L. 277, 301 (1996); see also Rafael Leal-Arcas, *The Resumption of the Doha Round and the Future of Services Trade*, 29 Loy. L.A. Int'l & Comp. L. Rev. 339, 390 (2007) (“[P]ublic services are an essential feature of the [European] social model . . .”).

12. Leal-Arcas, *supra* note 11, at 390.

13. *Id.*

was to decrease regional imbalances within the EU by funding regional development projects, thus stimulating economic growth in the poorer regions. Projects, such as the development of infrastructure, and industrial activities, were initiated with the hopes of creating jobs and improving regional economies.¹⁴ ERDF's implementation is a good example of one of the first large-scale occurrences of what may be called European socialism.

B. Formation and Expansion of the European Union

The creation of the European Union, with the Maastricht Treaty of 1992, is a classic example of political integration in the European states.¹⁵ In 1992, there were twelve member states in the EU: Belgium, Denmark, France, a newly united Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, and the United Kingdom.¹⁶ The envisioned success of the EU led Austria, Finland, and Sweden to join in 1995.¹⁷ These nations as a whole are commonly referred to as the EU-15, distinguishing these early member states from later acceding nations.

In May 2004, the EU expanded significantly. Referred to as the "big bang" expansion, the EU allowed the accession of ten new member states: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.¹⁸ The last two nations to join the EU, Bulgaria and Romania, were originally part of the "big bang" group seeking accession in 2004, but their entry took a bit longer and they joined the EU in 2007.¹⁹

The EU's political integration is based on what are referred to as the three pillars: (1) the European Community, (2) a common foreign and security policy, and (3) police and judicial cooperation in criminal matters.²⁰ To achieve its goal of creating a common

14. See Council Regulation 724/75, Establishing a European Regional Development Fund, 1975 O.J. (L 73) 1 (EEC).

15. See Shimmel, *supra* note 4.

16. Ten Historic Steps, *supra* note 6.

17. *Id.*

18. Woodruff, *supra* note 5, at 127.

19. See Europa, The EU at a Glance, Europe in 12 Lessons: Freedom, Security and Justice, http://europa.eu/abc/12lessons/lesson_10/index_en.htm (last visited Jan. 18, 2010) [hereinafter Freedom, Security and Justice].

20. Europa, Glossary, Pillars of the European Union, http://europa.eu/scadplus/glossary/eu_pillars_en.htm (last visited Jan. 18, 2010).

internal market, the European Community set forth four fundamental freedoms: free movement of capital, free movement of goods,²¹ free movement of people, and the freedom to provide services.

Originally, the free movement of people applied only to workers traveling to other EU states in search of employment, since this alone was necessary to achieve the EU's desired economic integration.²² However, political integration required more. In the 1970s, legislation was passed allowing foreign workers employed in a member state to permanently reside in that state after living there continuously for three years.²³ The same legislation also granted permanent residency to foreign workers after the employee retired, or after the employee suffered a permanent injury prohibiting employment.²⁴

Free movement was further realized as a result of the Schengen Agreement. In 1985, in the small Luxembourg border town of Schengen, five nations (Belgium, France, Germany, Luxembourg, and the Netherlands) signed an agreement to "abolish all checks on people, regardless of nationality, at their shared borders, to harmoni[z]e controls at their borders with non-EU countries and to introduce a common policy on visas."²⁵ This established the "Schengen Area," meaning an area without borders, which has continued to expand since 1985.²⁶ By the end of 2007, most EU member states were included in the Schengen area, with the exception of Ireland, the United Kingdom, Cyprus, Bulgaria, and Romania.²⁷ Two non-EU countries, Iceland and Norway, also chose to apply the Schengen rules for travelling through their borders.²⁸

The free movement of people worried some EU citizens. The 2004 expansion was greatly feared by many EU-15 citizens, who believed that workers from the newly-admitted Central and

21. Shimmel, *supra* note 4, at 761. See Woodruff, *supra* note 5, at 128.

22. Shimmel, *supra* note 4, at 764.

23. *Id.* at 770.

24. *Id.* at 764.

25. Freedom, Security and Justice, *supra* note 19.

26. *Id.*

27. *Id.*

28. *Id.*

Eastern European countries (CEECs) would flood their home countries, taking jobs and siphoning welfare programs.²⁹

To alleviate these fears, the EU allowed EU-15 member states to institute transitional measures for the accession of the new countries. These measures allowed individual EU-15 states to “determine the proper timeline for the implementation of free movement of workers rights” for the acceding states, as long as full rights to free movement were eventually granted.³⁰ The EU-15 states were given a limited period of time in which these transitional measures were allowed. The EU declared that full rights to free movement should be given by 2011.³¹ The states choosing to implement transitional measures must do so following a 2+3+2 year format.³² During the first two years after accession, the EU-15 state can continue to apply their national measures regulating immigration without any individualized showing of harm. The European Council reviews this process at the end of this two-year period. After the review, the member state must inform the Commission of any intention to continue applying such transitional measures for the next three years. Otherwise, freedom of movement immediately becomes the rule.³³ After this five-year period, a member state can only continue to apply such restrictions if there is a serious disturbance, or threat of such, to its labor market.³⁴

These transitional measures are one of the first restrictions on free movement rights implemented by the EU.³⁵ Even with this departure from the EU’s typical ideals of fundamental freedoms, other nations remain eager to join the ranks of the EU. There are currently three countries, Turkey, Croatia, and the former Yugoslav Republic of Macedonia, that have been approved by the European Council as candidates for accession.³⁶ These hopeful

29. Woodruff, *supra* note 5, at 134.

30. Woodruff, *supra* note 5, at 137.

31. Woodruff, *supra* note 5, at 139.

32. Shimmel, *supra* note 4, at 779.

33. *Id.* at 778-9.

34. *Id.* at 779.

35. Woodruff, *supra* note 5, at 139.

36. *Id.* Turkey remains the most problematic candidate for accession. David Schilling, *European Islamophobia and Turkey – Refah Partisi (The Welfare Party) v. Turkey*, 26 Loy. L.A. Int'l & Comp. L. Rev. 501, 514-15 (2004) (explaining that Europeans “fear the possibility of a fundamental Islamic state, not only on the border of Europe, but within the European Union.”). If Turkey is successful in accession, the country, with a population of

nations seek the economic opportunities afforded by the EU's now enormous common internal market,³⁷ and the political strength of the EU's common goals. For example, as of 2007 the EU has an estimated GDP per capita of \$29,400 (as compared to \$43,500 in the United States) and is the world's largest and most technologically advanced industrial sector.³⁸ Neighboring countries eager to join the ranks of other EU states are strongly induced by the possibility of achieving the economic strength that accompanies EU membership.

C. European Court of Justice Enforces the European Union Policies

The ECJ is one of the three courts that make up the Court of Justice of the European Communities and is responsible for both determining whether European Community (EC) measures are legal, and ensuring Community law (directives and regulations established by the European Commission which take precedence over the laws of member states) is uniformly interpreted and applied.³⁹ The Court derives its authority from the Treaty Establishing the European Community (EC Treaty)⁴⁰ and has the ability to issue preliminary rulings.⁴¹

While the ECJ only had limited powers during its early years, it has become one of the strongest institutions of the EU.⁴²

approximately 71 million, would be the second largest populated nation in the EU (behind Germany); however, there is much opposition throughout the EU with regard to Turkey's accession with the majority of the resistance attributable to human rights issues. CIA, *The World Factbook 2007: Turkey*, 577, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html>.

37. CIA, *The World Factbook 2007: European Union*, 641, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ee.html>.

38. *Id.* CIA, *The World Factbook 2007: United States*, 600, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/us>.

39. Europa, *The Court of Justice of the European Communities: The Institution*, General Presentation, http://curia.europa.eu/jcms/jcms/Jo2_11972/ (last visited Feb. 6, 2010) [hereinafter General Presentation]; see also Susan W. Tiefenbrun, *The Role of the World Court in Settling International Disputes: A Recent Assessment*, 20 *Loy. L.A. Int'l & Comp. L. Rev.* 1, 26-27 (1997).

40. Consolidated Version of the Treaty Establishing the European Community, art. 7, 220, 227, 230, Dec. 24, 2002, 2002 O.J. (C 325) 33; available at http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf [hereinafter EC Treaty].

41. *Id.* at art. 234.

42. Karen J. Alter, *The European Court's Political Power*, 19 *W. EUR. POL.* 458, 459 (1996).

Scholars note key ECJ decisions in the early 1960s that created two doctrines, which in turn, gave rise to the ECJ's current level of influence. The doctrine of direct effect allows EC law to create individual rights which member-state citizens could then claim in their national courts.⁴³ The doctrine of EC law supremacy declares that Community law is supreme to national law (regardless of whether the national law was passed prior to, or after, the EC law).⁴⁴ There was much controversy surrounding these doctrines. Many national judiciaries are loath to have their decisions regarding national law overseen by the ECJ and there has been a subtle tug-of-war over legal turf. The highest national courts often refer matters to the ECJ, asking for only a very narrow or technical interpretation of EU law in an effort to hamper the expansion of the ECJ's authority, and the courts of some countries have avoided referrals to the ECJ altogether.⁴⁵ The ECJ was careful, too. It often established legal principles, but did not apply them to the case at hand; this was an intentional strategy to "avoid issuing decisions which would move politicians to action."⁴⁶

The doctrines of direct effect and supremacy are still highly controversial today and some scholars argue that the ECJ managed to generate its own importance with the assertion of the two doctrines. Those who dispute the ECJ's power question the legal basis of the Court's decisions establishing such precedent.⁴⁷ EC law supremacy is a direct challenge to the sovereignty of the EU's member states and many scholars and judges conflict with regard to exactly what type of limitations the states have agreed to accept by signing the Treaty of Rome.

The discussions surrounding the ECJ's exercise of power continue today. One such scholar who scrutinizes the ECJ's decisions, Ian Eliasoph, argues that the current constitutional debates within the EU, regarding the balancing of social and economic rights and the proper role of the ECJ, are reminiscent of *Lochnerism* in the United States.⁴⁸ Eliasoph compares the judicial

43. *Id.*

44. *Id.*

45. *Id.* at 463.

46. *Id.* at 470.

47. *Id.* at 461.

48. Ian H. Eliasoph, A "Switch in Time" for the European Community? *Lochner Discourse and the Recalibration of Economic and Social Rights in Europe*, 14 COLUM. J. EUR. L. 467, 469-70 (2008).

activism of the United States Supreme Court seen in the early 1900s with the recent jurisprudence of the ECJ, which tends to place economic freedoms above social rights.⁴⁹ There are numerous similarities between the policy-making decisions of the two courts (the ECJ and the United States Supreme Court) which makes the argument particularly interesting.

Today, the ECJ has numerous tasks. It issues preliminary rulings concerning the interpretation of Community law, determines whether a member state has fulfilled its obligations under Community law, decides the outcome in an action for the annulment of a legislative measure, reviews the lawfulness of a Community institution's failure to act, decides appeals on points of law, and may even review decisions of the Court of First Instance.⁵⁰ The ECJ has become one of the strongest courts in Europe, and thus, a political institution, influencing EU policy in both domestic and international matters.⁵¹ This article addresses its particular influence with regard to the EU's economic policies.

III. DIRK RÜFFERT V. LAND NIEDERSACHSEN

A. Facts

The *Rüffert* case arises from a wage dispute between a German state, which mandated certain minimum wages for public works, and a construction company that hired a Polish subcontractor who failed to pay such minimum wages.⁵² While the dispute seems simple, the ECJ's decision is far-reaching.

The German state of Land Niedersachsen (Lower Saxony) has legislation regarding the awarding of public works contracts (*Landesvergabegesetz*) that requires all public contracts exceeding €10,000 be awarded only to employers which "pay the wage laid down in the collective agreements at the place where the service is provided."⁵³ It specifically requires employers who wish to be awarded public construction contracts to agree, in writing at the time of their bid, to pay their employees working under the contract at least the minimum rate of pay set out in the collective

49. *Id.* at 470-71.

50. See General Presentation, *supra* note 39.

51. Alter, *supra* note 42, at 460.

52. *Rüffert*, 2008 E.C.R. I-1989, 2 C.M.L.R. at ¶ ¶ 10-16.

53. *Id.* at ¶ 5.

agreement in force where the services are performed.⁵⁴ The employer must also agree to require any subcontractors it may employ to comply with these requirements.⁵⁵ The *Landesvergabegesetz* also ensures compliance with these obligations by requiring contracting authorities to include provisions in the public works contracts that impose penalties in the event of non-compliance.⁵⁶ The penalty for one occurrence of non-compliance is one percent of the value of the contract; however, this penalty may rise to ten percent if there are repeated occurrences.⁵⁷

In late 2003, a German construction company, Objekt und Bauregie (Objekt), placed a bid for and was awarded a public works contract valued at nearly €8.5 million for structural work on the construction of Göttingen-Rosdorf prison.⁵⁸ Lower Saxony, the awarding German state, included a provision in the contract that required Objekt to pay its employees—and require its subcontractors to pay their employees—at least the minimum wages set out in the collective agreement in force where the services are performed.⁵⁹ Objekt employed a Polish subcontractor to perform the structural work at the prison site. After an investigation, it was concluded that the Polish subcontractor was paying his fifty-three on-site employees less than half of the requisite minimum wage.⁶⁰

Shortly thereafter, Lower Saxony and the construction company terminated the contract for the construction work. Lower Saxony based its termination of the contract on its allegation that the construction company failed to comply with the minimum wage requirements set out in the collective agreement.⁶¹ Lower Saxony sought to enforce the penalty provision of the contract, which required a payment of one percent of the contract value (here, approximately €85,000) to Lower Saxony.⁶² The regional court, or the *Landgericht Hannover*, upheld the penalty in favor of

54. *Id.* at ¶ 6.

55. *Id.* at ¶ 7.

56. *Id.* at ¶ 9.

57. *Id.*

58. *Id.* at ¶ 10.

59. *Id.*

60. *Id.* at ¶ 11.

61. *Id.*

62. *Id.* at ¶¶ 11-12.

Lower Saxony, stating that the construction company's claim for the termination of the contract was offset by the penalty payment, and dismissed all of the company's remaining claims.⁶³ The matter was appealed to the national court, the *Oberlandesgericht Celle*, which stayed the proceeding and referred the matter to the ECJ for a preliminary ruling.⁶⁴

B. Question Referred to the European Court of Justice

The German national court believed that its decision was dependent on whether it was precluded from applying Lower Saxony's legislation regarding the awarding of public works contracts, referred to as *Landesvergabegesetz*, because of its potential incompatibility with Article 49 of the EC Treaty, which provides for the freedom to provide services.⁶⁵ Therefore, the national court stayed the proceedings and referred the matter to the ECJ to determine whether Article 49 of the EC Treaty:

[P]recludes an authority of a member state from adopting a measure of a legislative nature requiring the contracting authority to designate as contractors for public works contracts only contractors which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the wage provided for in the collective agreement in force at the place where those services are performed.⁶⁶

Essentially, the German court asked if Article 49 prevents a state agency from hiring only contractors who agree to pay the minimum wage set out in the local collective agreement, to work on public projects. The ECJ concluded that it would have to examine Council Directive 96/71, Concerning the Posting of Workers⁶⁷ in order to issue its decision.⁶⁸

63. *Id.* at ¶ 12.

64. *Id.* at ¶ 16.

65. *Id.* at ¶¶ 16-17.

66. *Id.* at ¶ 17.

67. A posted worker is defined in Directive 96/71 as "a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works." Council Directive 96/71, Concerning the Posting of Workers in the Framework of the Provision of Services, art. 2, 1997 O.J. (L 18) 1(EC).

68. See *Rüffert*, 2008 E.C.R. I-1989, 2 C.M.L.R. at ¶ 18. The ECJ concluded such after other EU states and the Commission of the European Communities submitted observations to the Court regarding the matter.

C. European Court of Justice's Analysis and Decision

The Court began its analysis by interpreting Directive 96/71. It first concluded that the directive did in fact apply to a situation such as the matter at issue, where an employer (established in a member state) posts its workers in another member state under a contract between the employer and a party operating in the foreign member state.⁶⁹ It also concluded that the directive guaranteed those posted workers employment terms and conditions (including minimum rates of pay) that are "fixed by laws, regulations or administrative provisions and/or by collective agreements or arbitration awards which have been declared universally applicable."⁷⁰ Therefore, to be enforceable under Directive 96/71, the minimum rate of pay must be either: (1) fixed by a law, regulation, or administrative provision; or (2) fixed by a universally applicable collective agreement or arbitration award.

The Court turned its attention to Lower Saxony's legislation regarding the awarding of public works contracts, or the *Landesvergabegesetz*. The *Landesvergabegesetz* was found not to be a valid basis for a minimum rate of pay. The Court concluded that it cannot be considered a law for purposes of fixing minimum wages because it does not do such.⁷¹ The Court characterized the *Landesvergabegesetz* as merely a "legislative measure" requiring that certain public contracts only be awarded to employers who agree to comply with the collective agreements in force where the services are performed.⁷²

The Court also examined the collective agreement at issue here, to determine whether there was a fixed minimum wage. In order to ascertain if such was the case, the Court requested clarification from Lower Saxony about the status of the "Buildings and public works" collective agreement. Lower Saxony admitted that the agreement had not been declared universal in application.⁷³ In addition, the Court concluded that even if the

69. *Id.* at ¶ 19.

70. *Id.* at ¶ 21. The Court did find an alternative basis for those fixed terms and conditions of employment in the event there was not a system for declaring collective agreements or arbitration awards universally applicable, however, because Germany did have in place a system for declaring such, the alternative was not applicable here. *Id.* at ¶¶ 22, 27.

71. *Id.*

72. *Id.* at ¶ 5.

73. *Id.*

alternative basis for the fixing of wages was available here, the collective agreement at issue did not fit the requirements of being “generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned” because it only applied to a portion of the industry – those concerning public contracts, rather than private contracts.⁷⁴ Thus, the Court concluded that the *Landesvergabegesetz* could not be the basis for a fixed minimum rate of pay.

The Court further noted that the minimum rate of pay set out in the collective agreement is a restriction on the freedom to provide services, one of the four fundamental freedoms guaranteed by the EC Treaty.⁷⁵ It stated that such a restriction cannot be justified by the need to protect workers, especially in light of the fact that the restriction only protects workers employed under a public contract and not those under private contracts.⁷⁶

Ultimately, the Court declared, after interpreting Article 49 of the EC Treaty, that a legislative measure which requires a contracting authority to award public works contracts to only those employers which agree (in writing at the time of their bid) to pay their employees the minimum rate of pay, which is set out in the collective agreement in force where the services are performed, is an impermissible violation of Directive 96/71.⁷⁷

D. Disapproval of the European Court of Justice’s Decision

Many believe the *Rüffert* decision is destructive, viewing it as unfair and a threat to workers’ rights and fair working conditions in Europe. Opponents claim the judgment will open the doors for social dumping to occur, i.e. the forced decrease in wages due to unfair competition from countries with lower labor costs.⁷⁸ Another criticism is that local employers will not be able to fairly

74. *Id.* at ¶¶ 28-29.

75. *See id.* at ¶¶ 36-37.

76. *Id.* at ¶¶ 38-40.

77. *Id.* at ¶ 43.

78. Stephen S. Golub, *Are International Labor Standards Needed to Prevent Social Dumping?*, FIN. & DEV., Dec. 1997, at 20, available at <http://www.imf.org/external/pubs/ft/fandd/1997/12/pdf/golub.pdf>.

compete with foreign enterprises which have the economic advantage of lower labor costs.⁷⁹

The European Trade Union Confederation (ETUC) believes the *Rüffert* decision limits the rights of EU states to advance social rights. The ETUC stresses that because of this decision, member states can't use "public procurement instruments to counter unfair competition on wages and working conditions of workers by cross-border service providers."⁸⁰ The ETUC also emphasizes that the decision may fuel public opposition of open border policies.⁸¹

Individual trade unions also oppose the decision. They believe their right to demand equal pay and working conditions for migrant workers and their ability to ensure employer compliance with collective agreements are seriously undermined.⁸²

Of course, there is support for the ECJ's decision. Many corporations and small businesses will benefit. They will now be able to provide cross-border services at lower costs because many mandatory minimum wage restrictions and standards of employment contained in collective bargaining agreements are no longer valid.

79. See European Trade Union Confederation, *Rüffert case: ETUC Warns that ECJ's Judgement is Destructive and Damaging*, Apr. 3, 2008, <http://www.etuc.org/a/4830>.

80. Golub, *supra* note 78.

81. *Id.*

82. *Id.*

IV. THE EUROPEAN COURT OF JUSTICE'S DECISION IN THE RÜFFERT CASE SIGNALS THE COURT'S INTENT TO PUSH THE EUROPEAN UNION AWAY FROM THE SOCIALIST IDEALS OF ITS MEMBER STATES AND WILL RESULT IN SIGNIFICANT CHANGES TO THE DEMOGRAPHICS AND ECONOMIES OF ITS MEMBER STATES

A. The Rüffert Case is the Last in a Line of Similar Decisions by the European Court of Justice in Which the Court Holds the Principles of Freedom to Provide Services and Free Movement of People Above the Socialist Ideals of Equality and Human Rights.

1. The European Court of Justice's Recent Support of Free Markets Began With its Decision in the *Viking Line* Case Which Limits the Right of Workers to Strike.

In *Int'l Transp. Workers' Fed'n v. Viking Line ABP*,⁸³ a Finnish ferry operator, Viking Line, sought to reflag one of its ships by registering it in Estonia or Norway, in order to lower its costs.⁸⁴ Viking wanted to replace its high-wage, Finnish union crew with a low-wage, Norwegian or Estonian crew under a new collective agreement.⁸⁵ When Viking informed the Finnish union of its plans, the union notified the International Transport Workers' Federation (ITF), a group of 600 transport unions in different states, which asked its affiliate unions not to engage in negotiations with Viking under the principles of union solidarity.⁸⁶ Once the collective agreement between the Finnish union and the Viking ship at issue expired, the union gave notice of its intention to strike. But, before the union began to strike, Viking gave in.⁸⁷ Viking agreed to keep the Finnish crew employed at the wages set out in the prior collective agreement and further agreed not to pursue its plans to reflag the ship for a specified period of time.⁸⁸

Viking continued to attempt to reflag the ship months later, but the union's ban on negotiations hampered its efforts. As a

83. Case C-438/05, *Int'l Transp. Workers' Fed'n v. Viking Line ABP*, 2007 E.C.R. I-10779.

84. *Id.* at ¶¶ 5-6. As part of the EU, Finland must adhere to EU community law regarding collective agreements and labor regulations. See EC Treaty, *supra* note 40, at art. 2.

85. *Int'l Transp. Workers' Fed'n*, [2007] E.C.R. at ¶¶ 5-6.

86. *Id.* at ¶¶ 4, 7.

87. *Id.* at ¶¶ 8-9.

88. *Id.* at ¶ 9.

result, it brought suit against the ITF and the Finnish Seamen's Union (FSU).⁸⁹ The local court issued an injunction in favor of Viking, essentially finding that the actions of the ITF and FSU were unlawful restrictions on the freedom of movement of workers and the freedom to provide services.⁹⁰ Of course, ITF and FSU appealed the decision, claiming that trade unions have a fundamental right to take collective action to preserve jobs.⁹¹ The appellate court referred the matter to the ECJ for a preliminary ruling on the interpretation of the EU laws which served as the bases for the appellate arguments of the ITF and FSU.⁹²

The ECJ acknowledged that the right to collective action is fundamental.⁹³ However, the ECJ limited the right to apply only to situations where the collective action: (1) is justified by public interest and (2) does not exceed the actions necessary to achieve the legitimate objective.⁹⁴ The Court held that 'collective action initiated by a trade union against a private employer to induce that employer to enter into a collective agreement, thus deterring that employer from exercising its freedom of establishment, constitutes a restriction on freedom of establishment under Article 43 of the EC Treaty.'⁹⁵

This decision damages European trade unions because it limits the rights of workers to strike, thereby reducing the power of union solidarity. The Court has essentially declared that the rights of employers are supreme to the rights of workers.

2. The European Court of Justice Confirmed its Support of the Furtherance of the Economic Goals of the European Union in the *Laval* Case When the Court Again Limited the Rights of Workers to Strike.

Only days after the *Viking Line* decision, the ECJ issued a similar decision in the *Laval un Partneri Ltd. v. Svenska*

89. *Id.* at ¶¶ 10-11.

90. *Id.* at ¶ 19.

91. *Id.* at ¶ 20.

92. *Id.* at ¶¶ 12-15.

93. *Id.* at ¶ 60.

94. *Id.* at ¶ 25.

95. *Id.* at ¶ 73.

*Byggnadsarbetareförbundet*⁹⁶ case. In *Laval*, a Latvian company posted workers in Sweden to perform construction work on a school in Vaxholm, Sweden.⁹⁷ When the company refused to sign a local collective agreement which would have applied to its posted workers, *Svenska Byggnadsarbetareförbundet* ('Byggnads'), a Swedish builders' union, and *Svenska Elektrikerförbundet* ('*Elektrikerna*'), an electrician's union, took collective action against the company by blockading the building site.⁹⁸ The unions prevented the delivery of goods to the site, and prevented access to the site by workers and vehicles.⁹⁹ Soon after, other affiliated unions boycotted all the sites in Sweden where the company posted its workers. The company was forced to stop its construction work at the Vaxholm school site and sent its workers back to Latvia. Because of the boycotts of its other construction sites, the company was unable to provide further services in Sweden and declared bankruptcy. The company brought suit against the unions, claiming that the collective action taken by the unions was a violation of its freedom of establishment and freedom to provide services established by Community law.¹⁰⁰ The Swedish court referred the matter to the ECJ for a preliminary ruling regarding whether EU law precluded trade unions from taking collection action in order to force a foreign employer posting workers to Sweden to comply with a Swedish collective agreement.¹⁰¹

The Court held that Article 49 of the EC Treaty and Directive 96/71 precludes a trade union from taking collective action against an employer, established in another member state which is temporarily posting workers in a host country, by the blockade of an employment site, in order to force that employer to agree to wages in excess of those established under relevant national legislation.¹⁰²

The *Laval* decision was another blow to European trade unions. Essentially, the Court declared that a union can only strike

96. Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767.

97. *Id.* at ¶ 27.

98. *Id.* at ¶¶ 32-34.

99. *Id.* at ¶ 34.

100. *Id.* at ¶¶ 37-40.

101. *Id.* at ¶ 40.

102. *Id.* at ¶ 111.

to achieve the minimum terms and conditions of employment which are prescribed by law. The unions may no longer take collective action to persuade employers to enter into collective agreements containing terms of employment more favorable than what is set out in legislation. This decision drastically impairs the ability of trade unions to increase, or even maintain, the existing wages and working conditions of members.

3. These Decisions are a Departure From Previous European Court of Justice Precedent That was Consistent With Socialist Policy Towards Workers Rights.

What is most interesting about the *Rüffert* decision is that it seems to be in direct contradiction with earlier decisions of the ECJ. For example, in 2002 the ECJ issued a preliminary ruling in the *Portugaia Construções*¹⁰³ case, holding that foreign workers working on German construction sites were to enjoy the minimum wages and working conditions which were set out in union collective bargaining agreements.¹⁰⁴

In the *Portugaia* matter, a Portuguese construction company, posting workers in Germany, paid less than the prevailing German wages. The local employment office, the *Arbeitsamt*, learned of the wage discrepancy and ordered the company to make payment to its workers for the difference between the two wages. The company lodged an objection in the labor court, challenging the fine imposed by the employment office.¹⁰⁵ The labor court, the *Amtsgericht Tauberbischofsheim*, referred the matter to the ECJ for a preliminary ruling regarding two issues. The first issue was whether minimum wage provisions can be remedied solely to protect the domestic construction industry. The second issue was whether domestic companies could pay employees wages below the minimum wage established by collective agreement, when the employees sign an agreement allowing the lower wages.¹⁰⁶

The ECJ declared that national minimum wage provisions, which require foreign companies to pay their workers the national

103. Case C-164/99, *Portugaia Construções Lda*, 2002 E.C.R. I-787.

104. See *id.* at ¶ 30.

105. *Id.* at ¶¶ 10-12.

106. *Id.* at ¶ 13.

minimum wage, are not precluded by EU law.¹⁰⁷ The Court stated that restrictions on the freedom to provide services cannot be justified by economic aims, such as the protection of the domestic construction industry. It further concluded that domestic companies could not underpay their employees using an express agreement, because such a practice restricts the ability of foreign employers to provide services in the state.¹⁰⁸ This would be an impermissible restriction on the fundamental freedom to provide services.¹⁰⁹

While on its face, the *Portugaia* decision seems to uphold the freedom to provide services, in actuality it contradicts the more recent ECJ ruling in *Rüffert*, *Laval*, and *Viking*. Perhaps we are seeing a change in the economic underpinnings of the EU, watching its position slide away from traditional European socialism toward Western capitalism.

4. The European Court of Justice's Holdings are Consistent With the Original Economic Principles That the European Union was Established to Support and Further.

Notwithstanding all the negative reaction to the ECJ's recent decisions, these decisions may be in harmony with the EU's original economic principles. Article Two of the EC Treaty sets out the tasks of the member states: to establish a common market and an economic and monetary union.¹¹⁰ The treaty further abolishes obstacles to the free movement of goods, persons, services, and capital.¹¹¹ From its earliest stages, it was an economic organization,¹¹² created to optimize economic resource allocation, with little focus on any social policies.¹¹³ The inclusion of social

107. Martin Behrens, *ECJ Upholds German Law on Posted Workers*, EUROFOUND, Feb. 25, 2002, <http://www.eurofound.europa.eu/eiro/2002/02/feature/de0202208f.htm>.

108. *Id.* at ¶ 34.

109. *Id.* at ¶ 35.

110. EC Treaty, *supra* note 40, at art. 2.

111. *Id.* at art. 3.

112. Richard Burchill, *The EU and European Democracy – Social Democracy or Democracy with a Social Dimension?*, 17 CAN. J.L. & JURIS. 185, 187 (2004). However, the European Commission has stated that the EU “was never intended to be simply an economic entity.” European Commission, Tampere: Kick-Start to the EU's Policy for Justice and Home Affairs, http://ec.europa.eu/councils/bx20040617/tampere_09_2002_en.pdf (last visited Feb. 3, 2010).

113. Manfred Weiss, *Convergence and/or Divergence in Labor Law Systems?: A European Perspective*, 28 COMP. LAB. L. & POL'Y J. 469, 475 (2007).

rights within the EU's overall objectives has been resisted. A constant tug-of-war exists between the nearly unlimited market freedoms needed to satisfy the common free market on one side, with social protections deeply important to European social democratic society on the other side.¹¹⁴

The Court has declared that workers' rights are inferior to the economic freedoms necessary to achieve the free market objective. It seems that the Court has realized that when social protections and economic freedoms conflict, economic freedoms must prevail in order for the EU to uphold its guarantee of the four fundamental freedoms.

B. The European Court of Justice Holds the Freedom to Provide Services and the Free Movement of People Important to the Success of the European Union but These Tenets will Result in Significant Changes to the Demographics and Regional Economies of the Member States.

1. Some Member States Will Experience High Levels of Migration.

Many of the member states that enjoy higher wage levels are concerned about the ECJ's strong support of the free movement of services within the EU. The states fear a large influx of foreign workers, who require lower wages, and will ultimately take jobs from higher paid domestic workers. These concerns have a logical basis for within the basic principles of economics. The market will adjust to prefer workers who can produce a product or provide a service at a lower cost.

There are, of course, a few assumptions one must make in arriving at such a conclusion. Most obviously, one must assume that the lower-wage workers are not hindered from traveling to foreign states for employment. This could take the form of legislative measures, such as the transitional measures adopted by the EU during the "big bang" accession, which restricts the numbers of foreign workers allowed to immigrate to certain EU-15 countries. Also, the personal considerations of the individual workers might hinder their travel. For instance, an individual with strong family or community ties will be less likely to relocate to

114. *Id.* at 474.

another member state and distance himself from his family. Language barriers might be another consideration. The need to learn a foreign language further discourages such relocation.

Despite such assumptions, there are overriding considerations that may also affect migration patterns. For example, a deep recession in an individual's home country may prompt him to relocate to another state for employment regardless of any family or community ties he may have to his home country. Similarly, the use of multiple languages, or a common language such as English, within EU countries provides an easier transition for migrants to a foreign region. Therefore, there are many factors which must be taken into account in any analysis of EU migration patterns.

Of most concern to the original EU member states was the accession of the Central and Eastern European countries (CEECs) into the EU.¹¹⁵ The economies of these states are considered weak or unstable, either because of their recent emersion from the constraints of Communism or their general lack of economic strength. For instance, the 2006 gross domestic product (GDP) per capita (measured in U.S. dollars) in Poland was \$14,100, which was less than half of Germany's GDP (\$31,400).¹¹⁶ Even more of a contrast is Romania and Bulgaria's economies, the European Union's newest members, whose GDP is \$8,800, and \$10,400, respectively.¹¹⁷

Due to decreased cost of land and production inputs, many Central and Eastern European Countries have an industrial advantage. These countries also have a labor advantage – lower wages due to lower costs of living. This becomes significant if a company or firm relocates its production facilities to one of these countries, or if there is an opportunity for employment migration from these countries, both of which are happening within the

115. Katherine Krause, *European Union Directives and Poland: A Case Study*, 27 U. PA. J INT'L. ECON L. 155, 157 (2006).

116. Compare CIA, *The World Factbook 2007: Germany*, 220, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html>, with CIA, *The World Factbook 2007: Poland*, 459, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/pl.html>.

117. Compare CIA, *The World Factbook 2007: Romania*, 470, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ro.html>, and CIA, *The World Factbook 2007: Bulgaria*, 91, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/bu.html>.

EU.¹¹⁸ There has been a significant increase in corporate competition based on the lowest cost of labor,¹¹⁹ and it will surely continue for years to come.

The EU has seen significant movement of workers between member states since the 2004 accession of the ten CEECs.¹²⁰ Most of the movement appears to be westward. Many residents of the newly-admitted Eastern European states migrate to "old Europe"¹²¹ for employment.¹²² The income gap between "old Europe" and the CEECs appears to be a strong motivation for the migration. Unfortunately, many of the states in the EU-15 fear that waves of low-skilled, immigrant workers coming into their countries will cause unemployment to rise and these workers will use up a disproportional amount of social welfare benefits.¹²³

These fears have created increased negative sentiments regarding the open border policies of the EU.¹²⁴ The UK in particular has seen a surge in so-called "domestic protectionism." There has been a movement among citizens concerned about social dumping to educate others about the "truth" of the government's claims regarding the benefits of an open border policy.¹²⁵ UK government researchers claimed that immigrants would be necessary to fill vacancies, would make a net contribution to the government revenue, and would keep inflation low.¹²⁶ Unfortunately, it seems that the government had incorrect estimates of the number of immigrants the UK would attract. The

118. Mark Jeffery, *European Labor Laws Relating to Business Restructuring*, 24 Comp. Lab. L. & Pol'y J 669, fn. 2 (2003).

119. Giovanni Orlandini, *Trade Union Rights and Market Freedoms: The European Court of Justice Sets Out the Rules*, 29 COMP. LAB. L. & POL'Y J. 573, 573 (2008).

120. See *Germany Blocks East European Workers Until 2011*, AGENCE FRANCE-PRESSE, July 16, 2008, <http://www.eubusiness.com/news-eu/1216207923.82>; see also *East European Workers Face 'Modern Slavery' in Old Europe*, EURACTIV, Sep. 17, 2008, <http://www.euractiv.com/en/socialeurope/east-european-workers-face-modern-slavery-old-europe/article-175427>.

121. "Old Europe" refers to the early EU members such as France, Germany, the UK, etc. *East European Workers Face 'Modern Slavery' in Old Europe*, *supra* note 120:

122. *Id.*

123. *Id.*

124. See Woodruff, *supra* note 5 at 142.

125. MIGRATION WATCH U.K., SEVEN DEADLY SPINS, BRIEFING PAPER 1.14 (Jan. 15, 2007), http://www.migrationwatchuk.org/dynPdf/briefingPaper_1.14_16_20070115.pdf.

126. Andy McSmith & Ben Russell, *Migrants are Essential for Business Growth*, says CBI, THE INDEPENDENT, Jan 3, 2007, <http://www.independent.co.uk/news/uk/politics/migrants-are-essential-for-business-growth-says-cbi-430609.html>.

original numbers estimated by the government were significantly lower than the actual numbers of immigrants who came to the UK.¹²⁷ The actual figures, as of 2007, showed that foreign workers made up eight percent of the workforce and have filled forty percent of the new jobs created in the last ten years.¹²⁸

This fear and aversion has not been limited to the UK. In France, for example, the “Polish Plumber” became the central image of the French debate over rejection or acceptance of an EU constitution. This fictional character represented the cheap Eastern European laborers who would drive down Western Europe’s high wages.¹²⁹ Perhaps as a result of the notoriety of the Polish Plumber, France voted to reject the EU constitution in 2005.

And in Germany, the fears of social dumping were perhaps the worst of any of the EU-15 countries. Germany has, and continues to be, a prime candidate for Eastern European immigrants.¹³⁰ Germany enjoys a strong economy, even despite the high level of unemployment it has recently faced. Workers there have benefited from many social rights and, as a result, the populace fears an onslaught of Eastern European immigrants from the big bang accession and the EU’s open borders policy.¹³¹ To lessen what it viewed as possible turmoil within its economy, Germany has taken an unpopular approach to the incoming wave of migration. Not only has it chosen to implement transitional measures for the movement of persons from the newly-admitted Central and Eastern European Countries, but it has decided to keep those measures in place until 2011.¹³² The Germans most likely hope to protect their national labor market from the

127. Nigel Morris, *Government Red-Faced over Immigration Figures*, THE INDEPENDENT, Oct. 30, 2007, <http://www.independent.co.uk/news/uk/politics/government-redfaced-over-immigration-figures-395519.html> (last visited Feb. 8, 2009).

128. *Id.*

129. Andrew Leonard, *Exodus of the Polish Plumber*, SALON.COM, June 4, 2008, http://www.salon.com/tech/htww/2008/06/04/polish_plumbers.

130. PATRICIA ALVAREZ-PLATA, HERBERT BRÜCKER & BORISS SILVERSTOV, DEUTSCHES INSTITUT FÜR WIRTSCHAFTSFORSCHUNG, POTENTIAL MIGRATION FROM CENTRAL AND EASTERN EUROPE INTO THE EU-15 – AN UPDATE, REPORT FOR THE EUROPEAN COMMISSION, DG EMPLOYMENT AND SOCIAL AFFAIRS 1 (2003).

131. See Woodruff, *supra* note 5, at 129 (explaining that the “big bang” accession has created mixed feelings from the citizens of the EU-15 with some worried that the flood of poor migrants would take away scarce jobs).

132. *Germany Blocks East European Workers until 2011*, *supra* note 120.

perceived flood of immigrant workers with this postponement. The plausible theory is that as the job opportunities arise, domestic workers will fill the vacancies, thereby decreasing the country's high unemployment rate.

In spite of any hostility or transitional measures regulating migration, a great deal of cross-border mobility exists in the EU today. As of late 2007, 2.3 million Poles left Poland to work abroad, with 1.9 million of those, nearly eighty-five percent, relocating to another EU state.¹³³ Poles tended to favor the UK as the destination of choice, probably due in part to the strength of the British pound and their booming economy.¹³⁴ In the Netherlands, the number of workers from EU countries in Eastern Europe increased two percent in a single year (2007-2008).¹³⁵

The migration of workers westward has its benefits. Some of the Western European nations have experienced a benefit to their economy as a result of the increased workforce attributable to immigration.¹³⁶ One of the most critical problems facing European nations today is their aging population. The birth rate has consistently declined over the last several decades, and the average life expectancy has increased, which affects the social benefits regimes of many of these nations.¹³⁷ For Western European countries, the ratio of young people in the population poses a serious problem for national pension systems, as fewer and fewer young people contribute funds to support the growing older generation. An influx of young foreign workers who pay taxes into national social benefit systems, along with the restructuring of such benefit schemes, may provide the necessary funding to provide adequate support for the aging population of many Western European nations.

While the migration westward continues, it has not reached the high levels which were initially predicted. The preliminary influx of immigrants will be larger, due to the economic strains at

133. *East European Workers Face 'Modern Slavery' in Old Europe*, *supra* note 120.

134. Leonard, *supra* note 129.

135. *Nearly 95 Thousand East European Workers in the Netherlands*, STATISTICS NETHERLANDS, Oct. 14, 2008, <http://www.cbs.nl/en-GB/menu/themes/arbeid-sociale-zekerheid/publicaties/artikelen/archief/2008/2008-2578-wm.htm>.

136. Woodruff, *supra* note 5, at 140.

137. See Gary Duncan, *Ageing Population Brings Grave Problems*, TIMESONLINE, June 25, 2007, <http://business.timesonline.co.uk/tol/business/columnists/article1980413.ece>; Woodruff, *supra* note 5, at 143.

home or merely because of the novelty of having the freedom to relocate. However, this stream will decrease as time passes, and there may even be reverse migration as foreign workers return to their home countries to settle down with families. As people realize there are fewer and fewer job opportunities in Western Europe, and as companies relocate to Eastern nations, thereby creating large numbers of jobs in the region, residents in the CEECs will begin to remain home. There will be a point, years away, where the economies of EU states will have little to no discrepancies among themselves and most migration will occur for reasons unrelated to economics or job seeking.

2. The Power of Organized Labor Unions in the EU Will Decline.

The ECJ's rulings have degraded the power of the labor unions throughout the European Union. The Court has stated that the unions cannot interfere with an employer's right to provide services where it chooses to do so. Further, the Court placed limitations on the rights of labor unions to take collective action.¹³⁸ It seems that workers will lose the type of protectionism they enjoyed from labor unions over the last few decades.

Labor unions originated within Europe as a way to balance the power relationship between employer and employee. They stressed solidarity as a means to achieve social progress.¹³⁹ The fixing of wages is the central means of achieving the unions' goals. A standard rate of pay, based upon job descriptions and seniority of the employee, weakened the power of supervisors and diminished the possibility of discrimination and favoritism.¹⁴⁰ Labor unions also pressed for the standardization of employment contracts in an effort to maintain fixed wages and eliminate competition among workers, which helped to encourage union solidarity.¹⁴¹

Some scholars argue that there is now a greater emphasis on choice rather than equality in today's labor market due to significant changes.¹⁴² Europe's labor market, like those

138. See *supra* Part III.

139. Jelle Visser, *More Holes in the Bucket: Twenty Years of European Integration and Organized Labor*, 26 COMP. LAB. L. & POL'Y J. 477, 481 (2005).

140. *Id.*

141. *Id.*

142. *Id.* at 478.

worldwide, has been affected by globalization, specialization, technology, and policy. Globalization has radically increased competition, especially with respect to manufacturing, as countries such as China and India produce items at a fraction of the production cost in Western Europe.¹⁴³ Specialization has increased competition among producers, in both large-scale global markets and small-scale regional markets.¹⁴⁴ Technology, especially during the last 100 years, has increased competition, lowered production costs, allowed for specialization and greater efficiency, and increased worker safety. However, EU policy is emerging as the most important motivating factor for employer behavior in the European Union.

Policy, whether economic or social, and for that matter whether legislated or judicially created, is at the heart of many of the problems experienced by EU employers. It may also be responsible for much of the EU's progress, including increased rights for many European workers, as well as better pay and working conditions. Unfortunately, some believe that those policies may also have contributed to the high unemployment rates. Policy has been and continues to be an important modifier of the labor market and the recent ECJ decisions continue that tradition.

In the *Viking Line* case, the ECJ established a two-part test to determine the few situations where collective action against an employer which interferes with economic freedoms guaranteed by the EC Treaty is lawful. It stated that the collective action (1) must be justified by public interest and (2) cannot exceed what is necessary to achieve the organization's legitimate objective.¹⁴⁵ While the test seems reasonable on its face, it seems that its application by the ECJ is more favorable to the economic interests of employers rather than the unions' aspirations of equality and workers' rights. The second prong of the Court's test seems to be so subjective that the Court could use it to strike down nearly any type of collective action by a union against an employer, whenever

143. *Id.* at 479.

144. Dora Borbely, *EU Export Specialization Patterns of Selected Accession and Cohesion Countries: Tough Competition on the EU15?* (Universidad Complutense Madrid, Paper No. 9, 2004), available at <http://revistas.ucm.es/cee/15766500/articulos/PAPE0404220005A.PDF>.

145. Case C-438/05, *Int'l Transp. Workers' Fed'n v. Viking Line ABP*, 2007 E.C.R. I-10779, ¶ 25.

it sees fit. Collective action is a major part of the unions' arsenal of weaponry and the Court's ruling seems to significantly hinder this method of fighting for social rights.

The Court's nearly simultaneous decision in *Laval* further destroys union action against an employer. The *Laval* ruling incorporates the limitations laid out in *Viking Line* and further limits the collective action of unions to only situations where the strike is implemented to achieve minimum terms and conditions of employment which are prescribed by law.¹⁴⁶ Gone is the opportunity for unions to strike to obtain more favorable standardized wages or working conditions; they are limited to what is legislated or formally approved by government or EU legislation.

3. Free Movement of Persons and Services Results in Greater Efficiency.

Free movement within the EU is an important factor that affects all sorts of economic indicators, from GDP to unemployment rates. It allows employers, especially producers of goods, to compete globally because it results in increased efficiency.

In order to understand how free movement results in efficiency, one must understand some of the most basic principles of economics. With respect to the production of goods, i.e. manufacturing, the firm with the highest profit comes out on top. It is assumed that the firm with the highest profits is making use of its resources (production inputs and labor) in the best possible way. Because profit is the result of the firm's total revenue minus its costs, there are only two ways to increase profit: increase revenue or lower costs. There are limited ways to increase revenue, with increasing prices being the most obvious. Unfortunately, in a competitive market (which is nearly always the case with most manufactured goods), raising prices will probably decrease revenue due to the principles of supply and demand.

However, there are a myriad of ways to lower costs. Technology and specialization may help a firm decrease costs. In the EU, because of the expansion to include the CEECs, lowering

146. Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767, ¶ 111.

either production costs or labor costs is likely the method to be chosen.

The freedom to provide services allows employers to lower the costs of production by relocating their facilities. It is advantageous to relocate to regions with lower land costs (real estate costs, rent, property taxes, etc.), areas with lower operating costs (electricity, fuel, oil, etc.), or regions where natural resources (water, lumber, coal, etc.) are either more abundant or cheaper.¹⁴⁷

Many companies based in the EU-15 have chosen to relocate to such lower-cost regions in the years following the 2004 accession. For example, the Austrian company High Tech Industries relocated its production of car parts to Romania and Slovakia last year.¹⁴⁸ Mobile phone giant Nokia has also taken steps to relocate its production facilities. The company has decided to close a German plant, causing the loss of over 2,000 jobs, and announced plans to relocate the production facility to Romania, citing lower costs.¹⁴⁹ The mobile phone producer said that its labor costs in Germany are ten times higher than those in Romania.¹⁵⁰ Many companies operating in EU-15 countries understand that such a drastic reduction in labor costs warrants a relocation of facilities, in spite of any immediate costs associated with such a relocation.

In addition to the cost savings and efficient operations a company may experience because of the freedom to provide services, the free movement of persons within the EU also allows a firm to lower costs. Labor costs decrease when workers from the newest EU countries are allowed to migrate to other EU countries and provide their labor skills at wages which are significantly lower than the current wages being paid to domestic workers. This is the situation that lies at the heart of the *Rüffert* matter. These foreign workers require less pay because they are often young individuals

147. See, e.g., *HTI Relocates Car Parts Production to Romania and Slovakia*, NEW EUROPE, Sept. 8, 2008, <http://www.neurope.eu/articles/89696.php> [hereinafter *HTI Relocates*]; Dave Graham, Marcin Grajewski & Iona Wissenbach, *Nokia Closes Plant In Germany And Relocates In Romania*, REUTERS, Jan. 17, 2008 <http://communicatinglabourrights.wordpress.com/2008/01/17/nokia-closes-plant-in-germany-and-relocates-in-romania/> [hereinafter *Nokia Closes Plant*].

148. *HTI Relocates*, *supra* note 147.

149. *Nokia Closes Plant*, *supra* note 147.

150. Paul Carrel, *German Service Sector Resists Demands for Big Pay Increases*, INT'L HERALD TRIB., Feb. 20, 2008, available at <http://www.nytimes.com/2008/02/20/business/worldbusiness/20iht-gcon.4.10243541.html>.

who seek employment in another EU country only temporarily. Most often they anticipate a limited employment term and expect to return to their home country where the cost of living is usually less.

V. CONCLUSION

The ECJ's decision in *Rüffert* lays to rest what many view as Europe's socialist treatment of its workers. No longer are workers held in higher regard than an employer's economic rights. The Court has declared economic freedoms prevail. This may seem in opposition to the typical European stance on workers' rights; however, this policy is completely in line with the foundations of the EU as an economic unification.

The Court's limitations on the validity of collective bargaining agreements and trade union action will lead to more industrial competition throughout the EU. Coupled with the four fundamental freedoms guaranteed by the EC Treaty—the free movement of capital, the freedom to provide services, the free movement of goods, and the free movement of people—the ECJ's policy of upholding economic freedoms of firms and workers will change the face of the EU in the years to come. The European Union will progress closer to its goal of being a free-market economy, and the demographics and regional economies of the member states will see transformation.

