
Viking – Laval – Ruffert: Consequences and policy perspectives

Edited by
Andreas Bucker and Wiebke Warneck

Report 111

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This publication, part of a project entitled 'The ECJ's Viking, Laval and Rüffert judgments: Consequences and Policy Perspectives', was prepared by a group of academic lawyers and practitioners:

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Preface

The *Viking – Laval – Rüffert* cases raise the question of the relationship between market freedoms and fundamental social rights, with a particular focus on the freedom of association, the right to collective bargaining and the right to strike.

In its rulings on these cases the European Court of Justice (ECJ) has put in question the traditional relationship between market freedoms on a European level and national systems of industrial relations.

Up to now there has been a clear division between social and economic regulations, attributable to the EU's evolution path: At its beginning the European Economic Community's scope was limited to economic policy, with social policy being excluded. The social embedding of the market was not within the scope of EU responsibility, intentionally left within the national realm. This changed with the Treaty of Maastricht, with certain relevant social competences being transferred to the European level. The Treaty of Lisbon aimed at strengthening a "Social Europe", to be built on three cornerstones: social market economy, social rights and new forms of soft law. But these developments did not call into question either the different national systems of industrial relations or such national social rights as the freedom of association, the right to collective bargaining or the right to strike.

The *Viking – Laval – Rüffert* cases have fundamentally changed this status, with the ECJ ruling that even if the named areas were outside the scope of the Community's competence, Member States must nevertheless comply with Community law. As the cases illustrate, their potential impact on national industrial relations systems is great. The ECJ decisions highlight the conflict-laden relationship between economic freedoms and social rights, not only as a conflict between two opposing sets of rights but also, from a vertical perspective, as a conflict between European law and national industrial relations law and established practices.

The focus of this project is to analyse from both a legal and policy perspective the consequences the ECJ decisions have on national industrial relations systems. Due to their diversity within the European Community the impact of the *Viking – Laval – Rüffert* cases will vary substantially from one Member State to another. With regard to national industrial relations systems, the operational scope of governments, national trade unions and employers' organisations will be restricted to different degrees by the ECJ decisions.

Similarly, there will be no homogeneous influence on Member States' case law throughout the Community.

A further aim of the overall project is to develop a new approach in which the relationship between economic integration under Community law and fundamental social rights embedded in national industrial relations systems is determined within a co-operative structure establishing a balance between market freedoms and social rights.

Published as part of the overall project, the aim of this initial "Phase I" publication is much more limited. It is based on the results of two workshops held by a group of academic lawyers and practitioners in which the ECJ decisions were discussed. On the basis of these workshops the participants drafted a proposal for a research project (Phase II) to be funded by the EU Commission. Within this research project the cooperating partners will address the issues and challenges described above in greater depth.

This initial publication has the purpose of making the group's deliberations and discussions accessible to a broader audience. Interested persons are invited to comment on this project and its questions and design. We will be very happy to receive your comments under either of the two email-addresses: andreas.buecker@hs-wismar.de or wwarneck@etui.org.

The partners participating in this project come from different countries representing the Anglo-Saxon, German, Nordic and Romanic models of industrial relations as well as the situation in the new Member States.

You will find below country reports on the influence the ECJ decisions are having on national industrial relations systems from a legal and a policy perspective. In order to reach a sufficient level of consistency, we provided the authors of the country reports with guidelines for their compilation. These can be found in the annex. Nevertheless, each of the reports has been written autonomously. As the situation in each of the countries varies substantially, there are good reasons for the reports emphasising different aspects. We will start with the Nordic countries, the scene of two of the relevant cases - *Viking* and *Laval*. We will then move on to Germany, the scene of the third case - *Rüffert*. From there we will proceed with countries not directly affected by the cases.

The ECJ's *Luxembourg* decision is excluded from the scope of this study because the freedom of association, the right to collective bargaining and the right to strike are not its main focus. Only a partial aspect of the initial plea in law involves collective agreements (see paragraph numbers 21 and 61 et seq. of decision C-319/06) and again this in a very specific form. However should the decision prove to be relevant, the *Luxembourg* case may be included at a later date.

Wismar and Brussels, November 2009
Andreas Bucker and Wiebke Warneck

I. The ECJ decisions

The debate over the relationship between market freedoms and fundamental social rights, with a particular focus on the freedom of association, the right to collective bargaining and the right to strike, was initiated by the *Viking*¹, *Laval*² and *Rüffert*³ decisions. These have received a great amount of public, political and scientific attention. Since all the national reports on the consequences and policy perspectives of these ECJ decisions are based on these cases, we would like to first give a brief summary of the facts behind the cases. The full text of the decisions is available on both the ECJ⁴ and ETUI⁵ websites.

The facts behind the cases:

Viking: The Viking shipping line runs ferry services between Finland and Estonia under the Finnish flag. The company's management decided to re-flag their ferries under the Estonian flag. The decision was also taken to employ Estonian labour in order to take advantage of lower Estonian wages. In response, the Finnish Seamen's Union (FSU) warned Viking that they might take collective action to stop the re-flagging process. In an attempt to prevent wages being undercut, it also requested the International Transport Workers' Federation (ITF), with reference to its flag of convenience campaign, to ask their members outside Finland not to enter into any negotiations with Viking. Under this campaign, ITF affiliates agreed that only trade unions established in the state where the vessel's owner was based should have the right to conclude collective agreements covering the vessel concerned.

Laval: The Latvian company Laval won a tender for construction work at a school in the Swedish town of Vaxholm. To fulfil the contract, they posted their workers from Latvia to Sweden. As is standard practice in the Swedish industrial relations system the Swedish unions then started negotiations with Laval with the intention of having a collective agreement signed on wages and other working conditions. These are always negotiated on a case-by-case basis. As Laval wanted to take advantage of Latvia's lower wages, it signed a collective agreement there. Following the failure of the Swedish negotiations, the Swedish trade unions took action by blockading the construction site.

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1. ECJ, Case C-438/05 Viking [2007] ECR I-10779-10840.
 2. ECJ, Case C-341/05, Laval [2007] ECR I-11767-11894.
 3. ECJ, Case C-346/06, Rüffert [2008] ECR I-1989.
 4. http://curia.europa.eu/jcms/jcms/j_6/
 5. <http://www.etui.org/en/Headline-issues/Viking-Laval-Ruffert-Luxembourg>

This was supported by solidarity action from the Swedish electricians' trade unions.

Rüffert: A German company won a tender with the Land Niedersachsen (*the German state of Lower Saxony*) involving construction work at a prison. Niedersachsen's public procurement law states that "contracts for building services shall be awarded only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement in the place where those services are performed ...". We find similar regulations in a number of German Federal States. The German company subcontracted the work to a Polish company. It then transpired that the 53 Polish workers were actually only receiving 46.57% of wages paid to their German colleagues working on the site. This led the Land Niedersachsen to apply the contract non-compliance clauses, annulling the contract and imposing financial penalties on the company.

This following section summarises the line of argument used and interpretation given by the judges in each of the cases.

Viking

In the *Viking* case four main points can be filtered out of the judgment for close examination: the right to take collective action as a fundamental right; the scope of freedom of establishment and the question whether employment law is included in this scope; the horizontal direct effect; and the proportionality test with regard to collective action.

The ECJ has recognised the right to take collective action, including the right to strike, as a fundamental right and an integral part of the general principles of Community law. However, as set forth in Article 28 of the Charter of Fundamental Rights of the European Union, this right is subject to "Community law and national laws and practices", meaning that its exercise may nonetheless be subject to certain restrictions.

The ECJ states that national employment legislation falls within the scope of Community free movement law: i.e. there is no specific treatment applied in the employment law sphere. This is not self-evident. The trade unions concerned argued before the Court that the ECJ's reasoning given in the *Albany* case⁶ should be applied in the *Viking* case too. In *Albany* the Court gave precedence to social considerations over economic ones by creating an employment-related exemption from EC competition law. The Court ruled that a collective agreement negotiated by the social partners, by virtue of its nature and purpose, fell outside the scope of Article 105 TFEU (ex Article 85

6. ECJ, Case C-67/96 *Albany* [1999] I-5863-5899.

(1) EC: the prohibition of agreements between undertakings/concerted practices). In *Viking* the Court could have similarly argued that collective agreements fall outside the scope of the freedom of establishment. However it did not do so, arguing that (Par. 51) “*that reasoning cannot be applied in the context of the fundamental freedoms set out in Title III of the Treaty*” and that (Par. 52) “*it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced to a certain degree.*”⁷

Indeed, the judges went one step further, ruling that not only do collective agreements fall within the scope of free movement law but also that the law may be invoked against trade unions (the so-called “horizontal direct effect”). In principle the freedoms set forth in the Treaty are directed at Member States. The Court now says that the freedom of establishment “*may be relied on by a private undertaking against a trade union or an association of trade unions*”⁸, meaning that employers can now take trade unions to court to obtain a judgment on the legality of any collective action, arguing that the collective action is violating their economic freedoms.

Having set up these principles the ECJ was then able to go to the heart of the matter. It viewed the trade unions’ right to take collective action as a restriction on the freedom to provide services and the freedom of establishment. This being the case they went on to ask whether such collective action could be justified. In its view, collective action needs to have a legitimate aim, must be justified by overriding reasons of public interest, must be suited to attaining the objective pursued and not go beyond what is necessary in order to attain it⁹. Those conditions are often called the “proportionality test”, now introduced by the Court with regard to trade union rights.

According to the Court the right to take collective action to protect workers’ interests is a legitimate aim, which in principle justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty¹⁰.

It is up to the national courts to ascertain whether the objectives pursued by collective action involve the protection of workers’ interests. However the Court sets strict guidelines on how national courts should judge such cases. The question to be answered is whether jobs and/or conditions of employment are actually jeopardised or under serious threat by the behaviour of the enterprise. Furthermore national courts must check whether the collective action enabled the objective for which it was taken to be achieved, and whether no other means less restrictive to the freedom of establishment existed and had been exhausted before the collective action was taken¹¹.

7. ECJ, Case C-438/05 *Viking* [2007] ECR I-10779, Paragraph 51-52.

8. ECJ, Case C-438/05 *Viking* [2007] ECR I-10779, paragraph 61

9. ECJ, Case C-438/05 *Viking* [2007] ECR I-10779, paragraph 75

10. ECJ, Case C-438/05 *Viking* [2007] ECR I-10779, paragraph 77

11. ECJ, Case C-438/05 *Viking* [2007] ECR I-10779, paragraph 80-89

Laval

In this case, the ECJ not only declared the *Lex Britannia* incompatible with EU law, but also laid down certain strict interpretations regarding the Posting of Workers Directive (PWD). Though the ECJ again acknowledged trade unions' fundamental right to take collective action, it ruled that the specific action taken in this concrete case was illegal with respect to Article 56 TFEU (ex Article 49 EC) and PWD provisions.

With regard to the right to strike as a fundamental right and the scope of the freedoms, the *Laval* judgment takes over the *Viking* wording. The ECJ again applies the proportionality test, stating that collective action taken to protect the interests of host state workers against social dumping may constitute an overriding reason of public interest, thereby in principle justifying a restriction of one of the fundamental freedoms¹². Blockading by a trade union falls within the objective of protecting workers¹³. But in the concrete case the action could be justified neither by PWD provisions nor by overriding reasons of public interest.

The major part of the ruling concerns the ECJ's interpretation of the PWD. The Court is of the opinion that wage negotiation at the place of work, conducted on a case-by-case basis and where minimum rates of pay are not determined in accordance with one of the ways provided for in the PWD, are not permissible under the Directive¹⁴. The Court recognises the alleged lack of certainty for companies unable to determine in advance the conditions they will have to guarantee their posted workers¹⁵.

The PWD objective is to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided. The PWD, as with all directives in the social field, is to be understood as a "minimum directive", in the sense that it lays down a "hard core" of minimum working conditions that member states have to ensure. However, the PWD does not rule out the provision of higher standards of protection. In the *Laval* case the ECJ establishes a radical change to this interpretation by saying that the PWD limits the level of protection guaranteed to posted workers¹⁶. Neither the host Member State nor the social partners can ask for more favourable conditions going beyond the mandatory rules for minimum protection set forth in the Directive¹⁷. This is now often referred to as a switch from a minimum to a maximum directive.

12. ECJ, Case C-341/05, *Laval* [2007] ECR I-11767-11894, paragraph 103.

13. ECJ, Case C-341/05, *Laval* [2007] ECR I-11767-11894, paragraph 107.

14. ECJ, Case C-341/05, *Laval* [2007] ECR I-11767-11894, paragraph 69-70.

15. ECJ, Case C-341/05, *Laval* [2007] ECR I-11767-11894, paragraph 71.

16. ECJ, Case C-341/05, *Laval* [2007] ECR I-11767-11894, paragraph 80.

17. ECJ, Case C-341/05, *Laval* [2007] ECR I-11767-11894, paragraph 80.

Rüffert

The ECJ ruled that the Public Procurement Act (*Landesvergabegesetz*) of the German Federal State of Niedersachsen (*Lower Saxony*) did not comply with Article 56 TFEU (ex Article 49 EC) and PWD provisions since the Act referred to collective agreements not universally applicable and since the scope of the Act was restricted to public procurement, meaning that workers working on private construction contracts enjoyed no such protection.

Here again the ECJ has come up with a judgment along the lines of the PWD. In its view the situation in Niedersachsen did not fulfil the criteria for fixing minimum rates of pay as set forth in the Directive, i.e. by laws, regulations or statutory provisions and/or by collective agreements or arbitration awards which have been declared universally applicable¹⁸. The Niedersachsen law involved (*Landesvergabegesetz*) did not itself fix any minimum rate of pay and the collective agreement in question had not been declared universally applicable. Therefore such a rate of pay could not be imposed on foreign service providers.

Once again the Court argued that the PWD outlines the maximum level of protection for posted workers, stating that no collective agreement may, as in this case, specify a higher level of protection¹⁹ (see *Laval* above).

Again the Court underlines the need for justifying the restriction of the freedom to provide services. The ECJ rejects the justification of protecting workers' interests in this particular case, as the legislation only applies to and protects workers in the public and not in the private sector. Neither does the ECJ accept the financial sustainability of social security systems or the autonomy of trade unions as justifications (put forward by Germany) for any restriction²⁰.

This interpretation given to the PWD with regard to the freedom to provide services precludes a Member State demanding in a public tender that companies undertake to pay at a minimum the wages set by a collective agreement in force at the place where the service is performed²¹.

18. ECJ, Case C-346/06, *Rüffert* [2008] ECR I-1989, paragraph 21 et seq.

19. ECJ, Case C-346/06, *Rüffert* [2008] ECR I-1989, paragraph 32-33

20. ECJ, Case C-346/06, *Rüffert* [2008] ECR I-1989, paragraph 41-42

21. ECJ, Case C-346/06, *Rüffert* [2008] ECR I-1989, paragraph 43

II. Country reports

A. Nordic countries

Consequences and policy perspectives in the Nordic Countries as a result of certain important decisions of the European Court of Justice

Niklas Bruun and Claes-Mikael Jonsson

Abstract

This paper discusses the impact of the *Laval*, *Viking*, *Rüffert* and *Luxembourg* cases in the Nordic countries. Our main focus is on reactions of the social partners, legislators and courts in Sweden, Finland and Denmark. Self-regulation is a widely cherished concept for the social partners in the Nordic countries. This paper includes a background description of the characteristics of the self-regulating labour markets in the Nordic countries, as well as different reactions to the ECJ decisions. In Finland, where there is a system for declaring collective agreements universally binding, there have been no calls for legal changes, while Denmark and Sweden have set up legal committees and come up with legal proposals, as well as changes in their autonomous collective bargaining systems.

Our conclusions are that Denmark and Sweden have tried to resolve the conflict between their autonomous collective bargaining systems and the free movement provisions in the EC Treaty through legal restrictions affecting the right to take collective action. Whether this strategy proves to be successful will depend to some extent on future activities by social partners within the autonomous system, there being also some doubts as to the extent to which the autonomous system will be able to withstand interference from EC law.

Introduction

This contribution discusses the impact of the *Viking*, *Laval*, *Rüffert* and *Luxembourg* judgments in the Nordic industrial relations systems.

1. Summary of the Nordic industrial relations systems

One of the most predominant features of the Nordic industrial relations systems is the high degree of organisation, with the social partners having high levels of membership. About 70% of employees are members of a trade union (ranging from about 60% in Norway to about 90 % in Iceland). Membership is basically equally distributed between men and women, the private and public sectors, as well as employees with typical and atypical contracts.

In general the social partners in the Nordic countries enjoy extensive self-governance. There is little or no state or other authority overseeing the activities of the social partners and how they operate. The absence of legislative regulations gives social partners considerable freedom in running their internal affairs. This means that collective organisations in Nordic countries are accustomed to a high degree of inner self-regulation without state interference.

The collective bargaining system, in Sweden for example, is to a certain extent centralised. Collective bargaining takes place at three levels in the private sector: at national cross-sector level between the central collective organisations, at sectoral or branch level and at company level. At present a process of decentralisation is taking place. Collective bargaining on pay and certain conditions of employment no longer takes place at national cross-sector level. Bargaining on the sectoral level has also changed, now being less detailed, but remaining the key element of the system of collective bargaining. Legally binding collective agreements can be concluded at all three bargaining levels.

There is a collective agreement for each sector of economic activity. Notice of any intended industrial action can first be given at sectoral level. The final bargaining process takes place at local company level, where much of the scope for wage increases agreed at sectoral level is translated into actual wage increases.

Local collective agreements are negotiated between the individual employer and the local trade union. These agreements run parallel with, and complement, the central sector agreement. Wage negotiations take place both at sector and local level. The system for determining wage levels is both greatly centralised (at sector level) and very flexible at the local level. This can be explained by strong local trade union representation.

Companies not belonging to an employer's organisation that have signed a collective agreement can sign an application agreement (*hängavtal*), the term used for an agreement that a union concludes with an individual employer not belonging to a signatory employers' organisation. This essentially means that the employer undertakes to apply the collective agreement referred to in the application agreement, usually the sectoral agreement covering the branch of activity. According to the social partners in the construction sector, most foreign companies operating in the Swedish construction sector sign such an application agreement. These agreements play a central role for foreign companies operating Sweden within the scope of the PWD. Sweden and Denmark are similar in this respect, while Iceland, Finland and Norway use different forms of *erga omnes* systems.

A spirit of co-operation between the trade unions and the employers' organisations has long characterised the Nordic model of collective bargaining. But recently this appears to be changing, in particular in Sweden, but also to some extent in Norway. Nevertheless in general the links between trade unions and employers have a long-standing nature based on mutual co-

operation and - sometimes grudging - understanding of the point of view of the opposite side. The co-operation between the social partners is underlined by numerous agreements forming a base for continuity in their relationship.

The ideological and political consensus on self-regulation does not necessarily mean that relationships between trade unions and employers' organisations are not without conflict. The conflict of interest between the social partners can result in recourse to different strategies to strengthen their respective interests. There are, at least in some Nordic countries, calls for state intervention in the self-regulation of industrial relations.

When calls for legislation come from the employers' organisation, the objective is generally to restrict trade union power, i.e. certain forms of industrial action or statutory provisions strengthening trade union bargaining positions. Calls for legislation from trade unions will mostly be for further statutory provisions strengthening a trade union's bargaining position or reducing employers' managerial prerogatives (*arbetsledningsrätten*).

The interaction between public and private regulation, legislation and collective agreements is rather complex. However, legislation is in many cases kept general, leaving more detailed provisions to be settled by collective agreements. The statutory provisions can to a large extent be substituted by collective agreements. It should be underlined that there are no statutory minimum wages in the Nordic countries, with the social partners themselves regulating rates of pay and working conditions. The roles played by collective agreements and the social partners are very strong in this area. In certain white-collar sectors wages are negotiated on an individual basis.

Rates of pay in collective agreements are in general not subject to judicial examination, though, in all Nordic countries, undue individual contracts or contract clauses on wages can be scrutinized and modified by the courts on the basis of the regulation in the general Contracts Act. In its decision the court will always use the leading collective agreement in the industry concerned as its starting point. Collective agreements can thus be said to constitute a normative source for establishing minimum rates of pay. It should also be mentioned that employees not covered by a collective agreement may negotiate individual rates freely with their employer.

The right to take industrial action enjoys constitutional protection in Sweden. More detailed legislation is contained in the 1976 Co-Determination Act (MBL)²². The starting point here is that the right to take industrial action is unrestricted. The only significant limitation is that such action is prohibited while collective agreements are in force. There are no requirements that any industrial action must have a reasonable purpose or be proportionate. Secondary action is also permitted. The right to take industrial action is bilateral in the sense that both parties can exercise this right.

22. Lag om Medbestämmande i arbetslivet, *MBL* (1976:580)

Labour courts play a dominant role in resolving labour disputes in the Nordic countries. The labour court is generally the court of first instance for actions brought by a union or an employer's organisation or an individual employer bound by a collective agreement. Other disputes are heard in the first instance by district courts, with the possibility to appeal to the labour court.

With such a background it is understandable that there has been much scepticism towards EU legislation in the field of labour law. EU legislation seldom permits exceptions in national legislation or collective agreements and is therefore generally seen as restricting the freedom of the labour market and the cherished self-regulation by the social partners. This is in sharp contrast to the Nordic concept that regulation of the labour market is primarily a matter for the social partners themselves.

Article 3.8 of the Directive states that "(...) In the absence of a system for declaring collective agreements to be of universal application (...), Member States may, if they so decide, base themselves on (...) collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory." No use however is made of this option in Sweden and Denmark, even though it was written with the Nordic collective bargaining systems in mind. The fact that Sweden and Denmark make no use of it does not mean that it is not valuable. Industrial relations structures differ between Member States and the option was regarded as being valuable as a political declaration of acceptance for the Nordic model of collective bargaining. However it apparently had little effect on the ECJ.

2. Reactions to the judgments by different actors in the Nordic Member States

2.1 Sweden - The ECJ reshapes Swedish labour legislation – an ongoing process

The origin of the *Laval* dispute is to be found within the Swedish industrial relations system. The Latvian company received financial support from the Swedish Employers Confederation. Though never officially admitted, it would seem that the agenda was to try to establish a principle of proportionality for industrial action within Swedish law. The litigation strategy seems to have been to establish, through the ECJ, a proportionality test for industrial action in cross-border disputes, which could eventually also be applied to purely domestic disputes. However, the *Laval* case ended up having a much wider impact on the Swedish autonomous collective bargaining model.

One specific aspect of the *Laval* case concerned the so-called *Lex Britannia* legislation. The question was whether the *Lex Britannia* contravened the provisions of the EC Treaty, and in particular the free movement of services as set forth in the EC Treaty. A 1989 labour court judgment (AD 120/1989)

established that industrial action aimed at *replacing or altering an existing collective agreement* applicable to a given workplace is prohibited even if those taking the action are not bound by the agreement concerned (the Britannia principle is named after the case involved M/S Britannia, a ship flying a flag of convenience).

Through the subsequent amendment to §42 of the MBL, introduced in 1991, the legislature made it clear that this principle does not hold good where a union takes industrial action in connection with employment relationships to which the MBL is not directly applicable, e.g. in cases where a foreign company posts individuals to perform work in Sweden. Under such circumstances a Swedish union may, notwithstanding the Britannia principle, take industrial action with a view to replacing the collective agreement already concluded by the employer. In practice, application of the *Lex Britannia* means that the ban on industrial action is not applicable when such action is directed against a foreign company temporarily active in Sweden and bringing in its own workforce.

In its judgment the ECJ pointed out that the *Lex Britannia* failed to take into account collective agreements to which companies posting workers to Sweden were already bound in their home Member State, irrespective of the content of those agreements. This led to discrimination against such companies, as they were treated under national (in this case Swedish) legislation in the same way as domestic companies which have not concluded any collective agreement. Referring to Article 52 TFEU (ex Article 46 EC), the Court declared that discriminatory rules may be justified only on grounds of “public policy, public security or public health”. As this was not the case, the *Lex Britannia* was incompatible with Article 56 and 57 TFEU (ex Articles 49 and 50 EC).

2.2 The Laval Committee and the governmental proposal

The ECJ’s interpretation of the PWD as a maximum free movement of services directive, combined with the direct horizontal effect Article 56 TFEU (ex Article 49 EC) has on trade unions, could have wide-ranging consequences, especially for Member States such as Sweden whose industrial relations regimes are based on the autonomous collective bargaining model.

This led to a Governmental Committee (the *Laval* Committee) being set up in Sweden in early 2008. The Committee’s terms of reference were to find a solution which made sure that, on the one hand, the Swedish labour market model – and especially the autonomous collective agreements model – was preserved and, on the other hand, EU legislation fully respected. The Committee delivered its report in December 2008.²³ In November 2009 the Government put forward a legislative proposal which in all essential parts is more or less identical with the *Laval* Committee’s proposal.

23. SOU 2008:123 Förslag till åtgärder med anledning av Lavaldomen.

The *Laval* Committee proposed a special statutory provision concerning the right to take collective action against an employer from another EEA country. This provision contains three components, all of which must be satisfied for any industrial action aimed at regulating conditions for posted workers to be legal.

The *first component* states that the conditions demanded must correspond to the conditions contained in nationwide collective agreements generally applied in the relevant sector. This component is based on an interpretation of Article 3 (8) of the PWD, according to which a Member State which does not have a system for declaring collective agreements universally applicable may base themselves on certain kinds of collective agreements. It seems obvious that those drafting the Directive had a specific model in mind where the Member State decides on a particular collective agreement which would apply to the posted workers. In the Swedish proposal the foreign service provider would be informed that he might be confronted with a demand for concluding certain kinds of collective agreement.

The *second component* relates to core conditions and their levels. Industrial action against an employer from another EEA country may be used in support of a demand for such conditions to be applied. The trade union may only demand conditions falling within the 'hard core' of the PWD. The demands may only involve minimum levels as regards rates of pay or other conditions derived from the central sector agreement. In Sweden the term 'minimum rates of pay' applies not only to basic pay, but also to mandatory overtime rates and supplements for inconvenient working hours, night and shift work. Moreover, basic pay may be differentiated according to type of work, experience and skills, and the level of responsibility involved.

The *third component* is that no collective action may be taken if the posted workers already enjoy at least the same conditions in their home countries, with reference to a collective agreement for example or a separate contract of employment. To gain protection against industrial action the posting employer must prove that the conditions applied in relation to the posted workers are already at the same level as those demanded. The employer may be obliged to present documentation in the form of information on rates of pay, collective agreements or individual contracts of employment as proof. This requirement to provide proof can be imposed on the employer throughout the posting.

By means of this proposal the *Laval* Committee and the Swedish Government intend to reconcile the Swedish interest in preserving the country's labour market model and the EU requirement for free movement of services. Whether this proposal will be accepted by the Swedish Parliament²⁴, the European Commission and, ultimately, the European Court of Justice,

24. The Swedish Parliament will decide on the legislative proposal in spring 2010. The proposal is to have the new *Lex Laval* in place by 1 April 2010.

remains to be seen. The process of harmonising national labour legislation with EU legislation will continue.

2.3 Finland – the status quo remains

The *Viking* case involves Finnish conditions, and just like the *Laval* case, there are specific national concerns here as well. Viking Line, the operator of a ferry between Tallin (Estonia) and Helsinki (Finland) under Finnish flag, had for a long time tried to lower its wage costs by re-flagging to Estonia. When the trade unions threatened Viking Line with collective action, the company brought legal proceedings against the ITF (International Transport Workers' Federation) and the FSU (Finnish Seamen's Union) in the English Commercial Court. The English court was chosen since the ITF is based in London, although Finnish law was applied to the case.

The *Viking* case was settled in a confidential deal between Viking, the FSU and ITF and as yet there have been no reactions or demands for legal changes made in Finland.

Since Finland has an *erga omnes* system for declaring collective agreements universally applicable, the *Laval* case has not been the subject of any great attention in Finland. Although there has been much debate around the judgments it has been stressed that they only apply in cross-border situations. The general impression is that it might lead courts to show increased willingness to grant interim injunctions in labour law cases.

2.4 Denmark – tripartite changes concerning posting

In Denmark a tripartite commission (the Laval Commission) was established in spring 2008, quickly coming up with its proposal in June 2008. The proposal was adopted by the Danish Parliament in December 2008 and the amendments entered into force on 1 January 2009.

The Laval Commission proposed an amendment to the Danish Posting of Workers Act, making it clear that Danish trade unions may use collective action against foreign service providers in order to conclude a collective agreement regulating pay (but not other employment conditions) for posted workers. However, collective action is subject to four criteria:

- Wage claims should correspond to the wages that Danish employers are obliged to pay for similar work;
- Pay shall be regulated by a collective agreement which
 - a) is agreed upon by the most representative social partners in Denmark, and
 - b) applies throughout Danish territory;

- The foreign service provider must be properly informed about the provisions contained in the applicable collective agreement;
- The provisions contained in the agreements must be of the requisite clarity, containing a clear reference to the wages to be paid.

Denmark has in at least two ways actively utilised the possibility to interpret uncertainties in the *acquis communautaire*, thereby preventing any negative consequences for the Danish labour market model.

First, Denmark has, in an innovative manner, re-interpreted article 3.8 of the Directive. According to this provision a Member State which does not have a system for declaring collective agreements universally applicable may base themselves on “collective agreements which have been concluded by the most representative employers’ and labour organisations at national level and which are applied throughout national territory.” It seems obvious that those drafting the Directive had a specific model in mind where the Member State decides on a particular collective agreement which would apply to the posted workers. Instead the Danish amendment provides for the foreign service provider being informed that he might be confronted with a demand for concluding certain collective agreements on pay.

Second, the Danish interpretation of the concept of minimum pay seems rather wide-ranging. As already mentioned, the right to take collective action – according to the new Danish law – may only be exercised in order to conclude collective agreements on pay. The concept of minimum rates of pay may, according to the Directive, be defined by national law and/or practice of the host state (Article 3.1). Denmark has made extensive use of this possibility to nationally define what constitutes pay. It should, according to the *travaux préparatoires*, be possible to ‘convert’ the cost a collective agreement imposes on a Danish employer (for instance, regarding holidays and leave) into a fixed sum in cash. It is argued that this needs to be done in order to make the pay of a posted worker equivalent to that a Danish employer has to pay to comply with the collective agreement.

Certain features of the Danish legislative process need to be highlighted here. The process was extremely fast, the Commission’s report was very short (just 21 pages) and the Commission’s findings were fully supported by both the trade unions and employers’ organisations. Furthermore, the findings were not challenged by the government or parliament.

There seems to be a basic consensus amongst Danish social partners on preserving their traditional autonomy. They take pride in stating that they are able ‘to crack the nuts themselves’. The external pressure put on the Danish industrial relation system by the *Laval* judgment seems to have united the social partners as well as the government into finding a practical solution which would not interfere with the way the model works.

The difference between the Danish and Swedish *Laval* solutions mirrors the level of trust between the social partners in the two countries. In Sweden, there was no joint position adopted or any joint analysis of the judgment conducted by the social partners, whereas in Denmark the social partners seem to have found common ground in order to protect the autonomy of their collective bargaining system.

The Danish solution also appears less legalistic compared to current Swedish proposals. Nonetheless, there are important structural similarities between the two. The right to take collective action against foreign service providers is restricted by very similar criteria. The major difference seems to lie in the more generous interpretation of minimum rates of pay in Denmark.

2.5 Reactions by the social partners and the courts

Industrial relations in the Nordic countries are characterised by broad support for self-regulation by social partners. Generally all significant political parties in the Nordic countries, whether on the left and right, support the concept of self-regulation on the labour market. Employers accept collective bargaining and collective agreements as the primary instruments for regulating working conditions.

The devolution of labour regulation from the state to social partners puts them in a position of great responsibility. Most rights and obligations deriving from employment relationships are put in the hands of the social partners, obliging them to handle their collective relations with care. Ensuring individual worker's rights is generally seen as the responsibility of the social partners, in sharp contrast to continental industrial relations where the state is generally the final guarantor of individual rights.

The strong ideological and political consensus that the social partners should have responsibility for wage setting and wage policy in the Nordic countries have given the Nordic industrial relations models noteworthy stability. This tradition of self-regulation can be traced back to the first half of the 1900s in most Nordic countries.

Recourse by the social partners to legislation restricting or supporting collective self-regulation has no effect on the underlying general consensus that wages and employment conditions should be fixed by the social partners through autonomous collective bargaining.

However, it is in this context that European legislation is increasingly becoming an important tool used by the social partners to further their respective interests. The Swedish Employers' Confederation would seem to be the social partner going furthest in leveraging EU legislation to restrict trade union power. On the one hand they see that legal changes are necessary and do not openly challenge the Swedish model. On the other hand they are

satisfied with the weakened position of Swedish trade unions and therefore welcome the undermining effects of the judgments on the Swedish model.

The situation in Denmark is somewhat different. The social partners cooperate in joint defence of the Danish model. The employers are not taking recourse to EU law in order to diminish trade union power. The Danish social partners negotiating on the impact of the *Laval* judgment seem to have had a joint agenda on diminishing the consequences and influence of EU law within their autonomous collective bargaining model.

Finnish employers view the maritime sector as being very special. Lodging the *Viking* case does not however appear to have been part of a concerted effort to make use of EU law to achieve a general reduction of trade union power in Finland, but rather as a legal measure to further employer interests in a specific issue in the maritime sector.

In Finland the National Labour Court recently gave a ruling on a case concerning the posting of employees. It regarded the special situation of cabin crews posted to Finland in order to fly the Helsinki-Phuket-Helsinki route.²⁵ The context of the case was that the Finnish airline Finnair had made a so-called “wet-lease” agreement with the Spanish airline Air Europe, according to which Air Europe leased an airplane with a full crew to Finnair, which then used this plane during the 2008-2009 winter season on its own routes between Helsinki and Thailand. The crew on board this plane was employed by Air Europe, and consequently Spanish legislation and collective agreements were applied.

The Finnish cabin crew union (representing the interests of air-hostesses and stewards) took legal action in the Finnish Labour Court, claiming that Finnair was in breach of the clause in the Finnish Collective Agreement, which stated that, in cases of temporary agency work or outsourcing, a provision is to be included in the contract between the user and the provider of the manpower according to which the user company undertakes to apply this collective agreement and the labour and social law that is in force. The plaintiff argued that Finnair was in breach of this undertaking in the collective agreement since Spanish conditions were applied to the employees performing work for Finnair.

The Labour Court came to the conclusion that a “wet-lease” agreement could be regarded as a situation covered by Article 2 of the Collective Agreement. Furthermore the Labour Court was of the opinion that this article, when implemented, would have the effect of applying terms and conditions of employment that go far beyond those required by the PWD and its transposed Finnish counterpart. Therefore the full application of this article of the collective agreement would, when taking the ECJ decisions into account, fulfil

25. See Labour Court (TT) 2009:90, issued 9.10.2009, N:o R 126/08.

the criteria for restricting the free movement of services in the EU in a way contrary to Article 56 TFEU (ex Article 49 EC). Therefore the non-inclusion of this requirement in the agreement between Finnair and Air Europe could not be regarded as a breach of the collective agreement. Finnair was under no obligation to examine whether any less strict requirements could have been possible.

The Finnish Labour Court includes some lay judges nominated either by employers or trade unions. The trade union nominees issued a dissenting opinion to the judgment (a rather unusual situation in the Finnish Labour Court), arguing that the judgment should have recognised at least the obligation to apply minimum terms with regard to wages, working time and annual holidays. They went on to argue that the interpretation restricted the right to freedom of association since the parties had no opportunity to implement a clause that had been explicitly agreed upon to protect workers' interests.²⁶

The courts in the other Nordic countries have not given any rulings on any new cases following the *Laval*, *Viking*, *Rüffert* and *Luxembourg* cases. It is still too early to say how the courts will react to the new legislation in Denmark and Sweden. But it will be interesting to see whether national courts follow the ECJ and apply the European principles or whether they look for alternative solutions in the future?

However, it is important to mention that the final judgment on the *Laval* case has not yet been delivered in Sweden's Labour Court. The remaining issues involve claims for damages resulting from the industrial action. Basing their claim on EU legislation, *Laval* has demanded compensation from the trade unions for illegal collective action. The trade unions argue that no damages should be awarded under EU legislation since the collective actions were legal under national law at the time undertaken. Should the Labour Court decide to ask for another preliminary ECJ ruling on economic damages for collective actions under EU law, this will lead to a *Laval II* case. The decision whether to do so is due to be taken by the Labour Court in early December 2009.

3. Consequences for the Nordic industrial relations systems in cross-border situations

3.1 Scope for the usage of collective action and restrictions in applicable conditions in collective agreements

The primary impact of the *Laval* judgment concerns the scope for the usage of collective action. The wage and employment conditions against which the

²⁶. See further the dissenting opinion written by Salonen and Ahokas.

trade unions can ultimately take collective action are now limited. The social partners in Sweden and Denmark have up to now enjoyed great freedom to negotiate and conclude collective agreements in just about any issue concerning the relationship between employers and employees. The restriction on which collective agreement provisions apply when is new in Sweden. The impact of the judgments is therefore of major importance for Sweden's industrial relations system.

The social partners have reacted differently to this new agenda imposed by EU legislation. The trade unions have made a joint effort to preserve the industrial relations system's autonomy vis-à-vis the Swedish state (in its dual capacity as legislator and upholder of EU legislation), arguing in favour of continuing minimal intervention by the Swedish legislator. On the basis of the *Laval* judgment, employers on the other hand have questioned the consistency of the Swedish industrial relations model in the light of the requirements emanating from EU legislation, arguing that the only solution open to the Swedish legislator is to introduce either a national statutory minimum wage or a system of declaring collective agreements universally binding.

The reaction of the social partners in Denmark has been somewhat more pragmatic, while at the same time cautious in their interpretation of the judgments. It would seem that an interpretation of the judgments less legalistic than in Sweden has been promoted, with the social partners adopting a common position.

3.2 No negotiations and collective bargaining with foreign service providers

The *Laval* judgment makes it clear that there can be no collective bargaining with EEA companies posting workers to Sweden, ruling that a demand from trade unions to enter into bargaining on the conditions applicable is an obstacle to the free movement of services. The foreign service provider must be in a position to foresee its labour costs before service provision begins. This restriction has been severely criticised. All forms of trade call for a certain level of negotiation and bargaining. For the system as such, the areas in which collective bargaining can take place are now subject to legal constraints emanating from EU legislation. With regard to ILO conventions nos. 87 and 98, such restriction needs to be questioned.

3.3 Extension of trade union responsibility for damages resulting from collective action?

It is still too early to establish whether there will be any extension of trade union responsibility for damages resulting from collective action under EU legislation. Should a call for a preliminary ruling be sent to the ECJ, and should the latter establish such a principle, then collective action will in practice become subject to major and severe restrictions.

Though not seen as likely, the Swedish Labour Court may itself grant economic damages on the basis of an interpretation of EU legislation.

4. Policy consequences for the Nordic industrial relations systems

The consequence of the judgments in Sweden is that employers may now use the principles laid down by the ECJ as tools and arguments to avoid participating in the industrial relations system. The restriction of the autonomy of the social partners in cross-border situations appears to have contributed to a general feeling among employers that the social partners no longer control the rules of the game. The employers are therefore calling on the state to intervene with a national statutory minimum wage, which would serve on the one hand as an instrument for achieving transparency in cross-border situations, but on the other hand as an instrument to put downward pressure on wages set by collective agreements. This dual strategy means that the Swedish employers are leveraging ECJ judgments on cross-border situations to achieve national wage policy objectives. This development appears to be less applicable to Denmark, where greater consensus on the benefit of the autonomous collective bargaining model seems to reign.

However, employers' calls for EU intervention appear to be aimed at restricting trade union power, i.e. certain forms of industrial action or other statutory provisions that strengthen trade union bargaining positions. EU legislation has become an important strategic tool for employers in the national arena. The lack of predictability on how EU legislation will affect national systems might, at the same time, have a restraining influence on employers leveraging EU legislation to further their interests. It is still too early to say whether employers are trying to scrap the autonomous system altogether, or whether they just intend to leverage EU legislation to further their bargaining interests in certain situations. Future employer choices of strategy have the potential to endanger the social partners' autonomy.

Greater state and judicial involvement constitutes a further risk for the autonomous collective bargaining systems. Without consensus between the social partners, involvement from "outside" actors represents a frightening scenario. Courts in Finland and Sweden could introduce a principle of proportionality, possibly based on EU legislation, in assessing industrial action on a national level (in Denmark such a principle already exists).

There is also a certain amount of discontent discernible among national SMEs (small and medium size enterprises). They see themselves discriminated, as foreign service providers are being given added advantages when competing against national service providers. The Swedish Employers Confederation has been criticised by national SME organisations, though it is still too early to estimate the influence of such criticism.

The immediate effect of the collective action against Laval and the associated media attention the case attracted was for foreign service providers to show increased willingness to sign application agreements in Sweden. This can be explained by the fact that foreign providers prefer non-confrontation, thereby avoiding negative media coverage. There have been very few cases where it was necessary to resort to collective action in order to achieve application agreements. However, the *Laval* judgment also created a number of ambiguities as to the legal framework for collective action in Swedish law. An unclear legal framework for collective action can work as a deterrent, implicitly restricting the right to collective action, in particular when combined with a potential responsibility for economic damages. The legal certainty which the new *Lex Laval* will provide when adopted should bring clarity to the conditions permitting collective action and might result in an active approach to collective action in Sweden. In Denmark collective action to achieve application agreements has continued even after the *Laval* judgment. It would seem here that the consensus between the social partners has prevented the use of collective action for achieving application agreements being discontinued.

The *Laval* judgment seems to have promoted negative attitudes towards foreigners and foreign service providers. Sweden, which had no transitional rules following accession, has seen increasing xenophobia recently. It was commonly held that the autonomous collective bargaining system would act as a bulwark against wage competition. However, the *Laval* judgment has partly undermined the efficiency of the system. It is no longer able to guarantee equal treatment of foreign and domestic workers alike.

The *Laval* judgment has also contributed to a greater negative attitude within the trade union movement towards the EU and any increased cooperation. This is especially true in Sweden where the trade union movement was given guarantees that EU membership would not affect or undermine the autonomous collective bargaining model. Trade unionists are finding it increasingly difficult to accept that EU legislation diminishes the area in which the autonomy of collective bargaining can function. It is commonly held that a new balance between fundamental social rights and economic freedoms needs to be found. Such issues can be expected to also alert those who are in favour of further European integration.

B. Germany

The decisions of the European Court of Justice in the Viking, Laval and Ruffert cases from a German legal perspective

Andreas Bucker

Abstract

This article is about the consequences and reactions the *Viking*, *Laval* and *Ruffert* cases have caused in German politics, legislation, jurisdiction and jurisprudence. The focus is on the consequences and repercussions the decisions have on German labour legislation and industrial relations.

With regard to the academic debate, German criticism is summarised, with particular attention being paid to a specific German phenomenon which might lead to the ECJ's rulings having to be disobeyed in Germany.

With regard to *Ruffert* two interesting cases are presented and the legal development is described.

The article argues that the hitherto existing perception that Community law has no significant influence on national industrial relations systems no longer holds true. Fundamental differences between the Community's and Germany's conception of freedom of association are highlighted, with the conclusion being reached that further conflicts can be expected.

1. Introduction

Although only the *Ruffert* case is directly related to the German legal system, all three decisions of the European Court of Justice (ECJ) have attracted much attention in the German academic and political debate. The freedom of association and the regulation of working conditions by collective agreements traditionally play a major role in the German industrial relations system. European law appeared to have practically no relevance in this domain of labour law (without regard to European level agreements of the social partners). The *Viking*, *Laval* and *Ruffert* cases have fundamentally shattered this perception within a very short period. Accordingly there is very intensive debate on the consequences of this change in perception and the options for influencing further developments.

Furthermore the ECJ decisions were taken against a socio-economic background of great relevance to Germany from a societal, political and legal perspective: in each of the three decisions there is a conflict between old

(high-wage) Member States on the one hand and new Member States on the other hand wanting to gain a competitive advantage from their lower wage costs. This constellation naturally has a long-lasting influence on policy issues involving collective agreements, meaning that the legal and political repercussions of the *Viking* and *Laval* cases - though embedded in the Swedish and Finnish environments - nevertheless have a direct effect on the German situation from an economic, political and legal perspective.

This report will analyze how the ECJ decisions were received by German courts and in German literature. Particular attention will be paid to any criticism of the decisions and to political and judicial reactions.

2. The Reception of the Viking Decision

In the *Viking* case, the ECJ acknowledged for the first time the right to take collective action and the right to strike as fundamental rights. However at the end of the day the Court gave priority to the freedom of establishment over the newly acknowledged fundamental rights.

In Germany, freedom of association is enshrined in the Constitution (Art. 9 Abs. 3 GG). The freedom to take collective action and the freedom to strike are parts of the freedom of association. What constitutes freedom of association in Germany is mainly shaped by case law. One of the major aims and guidelines of such case law is to guarantee a balance of power and strength between social partners with regard to collective bargaining.

Part of the freedom of association involves the right of the social partners - i.e. trade unions and employers' organisations - to negotiate collective agreements independently of any state influence. Any restrictions to the freedom of association need a statutory basis and can only be justified by other fundamental rights or other rights guaranteed by the Constitution (*Grundgesetz* - GG). Even so, any kind of restriction has to uphold the principle of proportionality.

It would seem appropriate to compare the design and concept of the newly acknowledged European freedoms with Germany's fundamental freedom of association. Such a comparison must however take into account the fact that the ECJ has not as yet sufficiently outlined what is meant by freedom of association.

The *Viking* case would appear not to have yet had any influence on German court rulings. The same holds true for German legislation, since legislation on collective bargaining is mainly based on case law.

27. BT-Drs. 16/9416 (Question); BT-Drs. 16/9721 (Answer).

However the decision has been discussed in the political sphere: The *Viking* and *Laval* decisions were discussed in Parliament, the German government was formally asked for its opinion²⁷ and some members of Parliament even went as far as proposing the non-ratification of the Treaty of Lisbon²⁸ as a consequence of the decisions.

In the academic legal debate the decision has received major attention. Although certain aspects of the decision have found approval, negative criticism predominates.²⁹ The fact that the ECJ has acknowledged the freedom to take collective action and the freedom to strike for the first time is seen as a positive aspect.³⁰

28. BT-Drs. 16/8879.

29. Bayreuther, F. (2008) „Das Verhältnis zwischen dem nationalen Streikrecht und der EU-Wirtschaftsverfassung“, *Europäische Zeitschrift für Arbeitsrecht*, EuZA 1 (3), 395 – 408; Blanke, T. (2009) „Die Entscheidungen des EuGH in den Fällen *Viking*, *Laval* und *Rüffert* – Domestizierung des Streikrechts und europaweite Nivellierung der industriellen Beziehungen“, in: Schubert, J. (Ed.) *Sozialer Dialog in der Krise - Social dialogue in crisis?* Baden-Baden, 131-145; Buchner, H. (2008) „Zukunft des Arbeitsrechts: Eingriff in das nationale Arbeitsrecht durch den EuGH - Missachtung des Subsidiaritätsprinzips?“, *Betriebs-Berater Beilage Nr. 4*, 6 – 11; Bücken, A. (2008) „Die Rosella-Entscheidung des EuGH zu gewerkschaftlichen Maßnahmen gegen Standortverlagerungen: der Vorhang zu viele Fragen offen“, *Neue Zeitschrift für Arbeitsrecht* 25 (4), 212-216; Däubler, W. (2008) „ITF-Aktionen gegen Billig-Flaggen-Schiffe - im Widerspruch zum EG-Recht?“, *Arbeit und Recht* 56 (12) 409 – 417; Joerges, C., F. Rödl (2008) „Von der Entformalisierung europäischer Politik und dem Formalismus europäischer Rechtsprechung im Umgang mit dem „sozialen Defizit“ des Integrationsprojekts - Ein Beitrag aus Anlass der Urteile des EuGH in den Rechtssachen *Viking* und *Laval*“, *ZERP-Diskussionspapier 2/2008*; Junker, A. (2008) „Grundfreiheiten und „kollektive Maßnahmen“ - die Urteile des EuGH in Sachen *Viking Line* und *Laval*“, *Sammlung arbeitsrechtlicher Entscheidungen* 77 (6), 209 – 217; Junker, A., „Europäisches Arbeitsrecht 2007/2008, *Recht der Internationalen Wirtschaft*“, 54, 824 – 832; Kocher, E. (2008) „Kollektivverhandlungen und Tarifautonomie - welche Rolle spielt das europäische Recht?“, *Arbeit und Recht* 56 (1), 13-18; Nagel, B. (2009), „Europäische Marktfreiheiten, Koalitionsfreiheit und Sozialstaatsprinzip“, *Arbeit und Recht* 57 (5), 155 – 160; Rebhahn, R. (2008) „Grundfreiheit vor Arbeitskampf - der Fall *Viking*“, *Zeitschrift für europäisches Sozial- und Arbeitsrecht* 7, 109 -117; Rödl, F. (2009) „Bleierne Zeiten für die Arbeitsbeziehungen“, *Mitbestimmung* (3), 10 – 15; Schubert, C. (2008) „Europäische Grundfreiheiten und nationales Arbeitskampfrecht im Konflikt“, *Recht der Arbeit* 61 (5), 289 – 299; Skouris, V. (2009) „Das Verhältnis der Grundfreiheiten zu den Gemeinschaftsgrundrechten“, *Vortrag auf dem europarechtlichen Symposium des Bundesarbeitsgerichts*; Supiot, A. (2009) „Europa im Griff der Kommunistischen Marktwirtschaft“, *Arbeit und Recht* 57 (5), 151 – 154; Temming, F. (2008) „Mit wie viel Verlust muss eine Fähre betrieben werden? Der Fall *Viking* vor dem EuGH“, *European Law Reporter* (6), 190 – 205; Weiss, M. (2008) „Europa im Spannungsfeld zwischen Marktfreiheiten und Arbeitnehmerschutz“, in: Bauer, J., Kort, M., Möllers, J. (ed.), *Festschrift für Wolfgang Hromadka*, 493 – 509; Wendeling-Schröder, U. (2009): „Arbeitskampfrecht in Europa – Die *Viking*-Entscheidung des EuGH“, *der Betriebsrat* 5 (6), 16-19; Wendeling-Schröder, U. (2008) „Streikrecht und gemeinschaftsrechtliche Grundfreiheiten“, *Arbeitsrecht im Betrieb* 29 (4), 179 – 183; Wißmann, H. (2009) „Zwischenruf: *Viking* und *Laval*: Grundfreiheiten über alles?“, *Arbeit und Recht* 57 (5), 149-151; Zwanziger, B. (2009) „Nationale Koalitionsfreiheit vs. europäische Grundfreiheiten - aus deutscher Sicht“, *Vortrag auf dem europarechtlichen Symposium des Bundesarbeitsgerichts*; Zwanziger, B. (2008) „Arbeitskampf- und Tarifrecht nach dem EuGH-Entscheidungen „*Laval*“ und „*Viking*“, *der Betrieb* 61 (6), 294 – 298.

30. Blanke (Fn. 29); Bücken (Fn. 3), *NZA* 2008, 212, 214; Kocher (Fn. 29), *ArbuR* 2008, 13, 18.

On the other hand there is criticism of the ECJ ruling that the economic freedoms of the EC Treaty have a horizontal direct effect and may also be applied against trade unions.³¹ Another point of criticism is that the ECJ does not have the competence to regulate issues falling within the scope of Article 153 (5) TFEU (ex Art. 137 (5) EC Treaty).³²

The major issue criticism is focused on is that the ECJ does not provide the right to take collective action with sufficient status compared with the status accorded to the freedom of establishment and that, at the end of the day, the ECJ gives priority to the freedom of establishment over the right to take collective action.³³ This imbalance is illustrated for example by the fact that the ECJ merely mentions the right to strike without giving this fundamental right its own value and relevance within the process of finding a balance between the conflicting rights. On examining whether the restriction of the freedom of establishment is justified, the Court pays no attention to the fact that the right to strike is a fundamental right. It merely asks if the restriction can be justified by overriding reasons of public interest, taking into sole account the goal of the collective action.³⁴

In doing so, the Court contradicts earlier rulings. In the *Schmidberger* case the Court held that fundamental rights can justify the restriction of fundamental freedoms laid down in the EC Treaty. The subjective rights which are in conflict - the fundamental freedom on the one hand and the fundamental right on the other hand - needed to be balanced against each other and all specific facts of the case taken into account before priority is given to either side.³⁵

A further point of criticism is that without a systematic interpretation of the right to take collective action and the right to strike it was not possible to balance the freedom of establishment and the right to take collective action in a differentiated way with a sufficient level of generalisation. This meant that

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31. Blanke (Fn. 29); Rödl, F. (2009) „Wirklich auf „gutem Mittelweg“?“, in: Friedrich Ebert Stiftung (Ed.): Der EuGH und das Soziale, 2009, p. 42, 43.; Mayer, F (2009) „Der EuGH und das Soziale“, in: Friedrich Ebert Stiftung (Ed.): Der EuGH und das Soziale, 2009, p. 7, 20.
 32. Blanke (Fn. 29); Däubler (Fn.29), ArbuR 2008, 409 ff.; Nagel (Fn. 29), Arbeit und Recht 2009, 155, 160.
 33. Blanke (Fn. 29); Nagel (Fn. 29), Arbeit und Recht 2009, 155, 159; Wißmann (Fn. 29), Arbeit und Recht 2009, 149; Zwanziger, Vortrag auf dem europarechtlichen Symposium des Bundesarbeitsgerichts 2009 (Fn. 29), p. 15.
 34. Wißmann (Fn. 29), Arbeit und Recht 2009, 149; Zwanziger, Vortrag auf dem europarechtlichen Symposium des Bundesarbeitsgerichts 2009 (Fn. 29), p. 15; Kocher, E. (2009) „Das Soziale in der Rechtsprechung des EuGH“, in: Friedrich Ebert Stiftung (Ed.): Der EuGH und das Soziale, 2009, p. 38, 39.; Rödl, F. (2009) „Wirklich auf „gutem Mittelweg“?, in: Friedrich Ebert Stiftung (Ed.): Der EuGH und das Soziale, 2009, p. 42, 43.
 35. Blanke (Fn. 29); Wißmann (Fn. 29), Arbeit und Recht 2009, 149; Zwanziger, Vortrag auf dem europarechtlichen Symposium des Bundesarbeitsgerichts 2009 (Fn. 29), p. 15; different view: Skouris (Fn. 29), p. 16, who argues, that the ECJ treats the fundamental freedoms and the fundamental rights with equal priority and that the ECJ does not intend to introduce a hirarchical structure.

the decision and in particular the application of the principle of proportionality were restricted to the details of the case at hand, thereby increasing the risk of the decision being unpredictable, imbalanced or even distorted by apparent facts.³⁶

These points of criticism, all related to Community law, gain added relevance in Germany due to Art. 23.1.1 of the German Constitution (GG) and the *Solange II* ruling of the *Bundesverfassungsgericht* (the German Constitutional Court)³⁷. According to Art. 23.1.1 GG, the Federal Republic of Germany shall participate in building a united Europe committed to the principle of subsidiarity and guaranteeing a level of protection of fundamental rights basically comparable to that afforded by the German Constitution.

Should such a level of protection not be ensured, the requirements set forth in the *Solange II* ruling of the German *Bundesverfassungsgericht* could come into force, meaning that it would not be possible to apply the ECJ rulings to Germany and that the issue would have to be referred to the *Bundesverfassungsgericht*. With regard to the prominent position accorded to the freedom of association by Art. 9.3.1 of the German Constitution, several authors see a major discrepancy in the ECJ's handling of the freedom of association, infringing the provisions of Art. 23.1.1 of the German Constitution upheld in the *Solange II* ruling.³⁸

3. The Reception of the Laval Decision

Like the *Viking* decision the *Laval* case is also about an industrial conflict. More specifically the case concerns the Swedish way of applying collective agreements to posted workers, characterised by a long tradition of specific societal and legal framework conditions.³⁹ A specific Swedish law - the so-called *Lex Britannia* - allows unions to request foreign companies posting workers to Sweden to comply with Swedish collective agreements even if the foreign companies have already signed collective agreements in their home countries. Although the ECJ again acknowledged the right of trade unions to take collective action, it held the collective actions of the trade unions to be illegal with regard to the freedom to provide services Article 56 TFEU (ex Art. 49 EC Treaty).

In Germany there is no directly comparable situation: The Swedish system of industrial relations is characterised by a union membership rate of around

36. Blanke (Fn. 29); Bückler (Fn. 29), *Neue Zeitschrift für Arbeitsrecht* 2008, 212, 215.

37. BVerfG, Beschluss vom 22. Oktober 1986, Az: 2 BvR 197/83, BVerfGE 73, 339-388.

38. Nagel (Fn. 29), *Arbeit und Recht* 2009, 155, 159; Wißmann (Fn. 29), *Arbeit und Recht* 2009, 149; Zwanziger, Vortrag auf dem europarechtlichen Symposium des Bundesarbeitsgerichts 2009 (Fn. 29), p. 15.

39. See: Koch, M. (2009) „Nationale Koalitionsfreiheit vs. europäische Grundfreiheit – aus schwedischer Sicht“, Vortrag auf dem europarechtlichen Symposium des Bundesarbeitsgerichts, p. 2 ff.

70%. Within this system it is neither possible nor necessary to attribute universal applicability to collective agreements. Since collective agreements are applied throughout the country no-one felt any need for minimum wages in Sweden. It was also generally thought that trade unions would guarantee that posted workers sent to Sweden would also be covered by Swedish collective agreements.⁴⁰

In Germany the approach is different: The *Arbeitnehmerentsendegesetz* (Posted Workers Act) stipulates that in specific branches collective agreements that have been given universal applicability cover posted workers as well. This approach is in accordance with the PWD, as witnessed by the ECJ approval given - apart from some minor exceptions - in 2007.⁴¹

Because of these structural differences between the Swedish system of industrial relations and the German legal order it would seem that *Laval* has not yet had any influence on German court rulings.

However, as in the *Viking* case, the *Laval* decision has been the subject of intensive political debate. Together with the *Viking* case the judgment was discussed in Parliament⁴², giving rise to a petition to postpone ratification of the Treaty of Lisbon⁴³ and a petition to insert a social progress clause into the Treaty.⁴⁴ However the government did not take any of the requested measures.

With regard to the legislative process aimed at amending the *Arbeitnehmerentsendegesetz*⁴⁵ (Posted Workers Act) with a view to improving the conditions for minimum wages in specific sectors, the decision did have certain relevance. One legislative proposal⁴⁶ aimed at permitting not just national but also regional collective agreements to be assigned universal applicability would have allowed such agreements to be also applied against posted workers. However this proposal was not accepted.

Within the jurisprudential discussion the *Laval* case was given broad attention even though the German and Swedish systems of industrial relations differ greatly as far as the regulation of posted workers is concerned.⁴⁷

40. Koch (Fn. 39), p. 2 ff.

41. EuGH, Urt. v. 18.07.2007, Rs. C-490/04, Slg. 2007, I-06095.

42. BT-Drs. 16/9416 (Question); BT-Drs. 16/9721 (Answer).

43. BT-Drs. 16/8879.

44. BT-Drs. 16/13056.

45. Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen (Arbeitnehmer-Entsendegesetz - AEntG) vom 20. April 2009 (BGBl. I S. 799); BT -DRS 16/10486 (Gesetzentwurf); BT -DRS 16/11669 (Beschlussempfehlung und Bericht).

46. BT-Drs. 16/11676.

47. Blanke (Fn. 29); Buchner, H. (2008) „Zukunft des Arbeitsrechts: Eingriff in das nationale Arbeitsrecht durch den EuGH - Missachtung des Subsidiaritätsprinzips?“, Betriebs-Berater Beilage, Nr. 4, 6 – 11; Coen, M. (2008) „Dienstleistungsfreiheit und Arbeitskampf (“Laval”)“, jurisPraxisReport-Arbeitsrecht 15/2008 Anm. 3; Huke, R. (2008) „Grundfreiheiten sind

One likely reason for this is that the *Laval* case - just as the *Rüffert* case - involves fundamental issues relating to the freedom of association on European level with potential repercussions on German collective labour legislation in the long run.

In a number of substantial issues the criticism of *Laval* and *Viking* goes hand in hand. Again the competence of the ECJ to judge national systems of industrial relations⁴⁸ and the application of fundamental freedoms to the detriment of trade unions⁴⁹ has been criticised.

There are also objections to the priority⁵⁰ the ECJ gives to fundamental freedoms over social rights, especially in the light of its earlier *Schmidberger* and *Omega* decisions, seen as contradicting its latest decisions.⁵¹

With regard to the specific circumstances of the *Laval* case the following points are raised.

It is argued that this case demonstrates in an exceptional manner the ECJ's lack of willingness to take into account the characteristics of national industrial relations systems, simply disqualifying the Swedish system as being illegal⁵².

Since the decision underlines the incompatibility of the Swedish industrial relations system with the PWD, the content and the protection offered by fundamental freedoms and rights are eroded: according to the German understanding of fundamental freedoms and rights every form of governmental or public power - including legislative power - is obliged to

auch bei kollektiven Maßnahmen zu berücksichtigen, Anmerkung zum EuGH-Urteil vom 18.12.2007“, Betriebs-Berater ,172; Joerges / Rödl (Fn. 29); Jousen, J. (2008) „Schritte zum europäischen Streikrecht - die Entscheidung *Laval*“, Zeitschrift für Europäisches Sozial- und Arbeitsrecht, 7, 333 – 339; Junker, A. (2008) „Grundfreiheiten und „kollektive Maßnahmen“ - die Urteile des EuGH in Sachen *Viking Line* und *Laval*“, Sammlung arbeitsrechtlicher Entscheidungen 77 (6), 209 – 217; Junker, A. (Fn. 29), Recht der Internationalen Wirtschaft, 2008, 824 – 832; Koch (Fn. 39); Kocher, E. (2008) „Kollektivverhandlungen und Tarifautonomie - welche Rolle spielt das europäische Recht?“, Arbeit und Recht 56 (1), 13-18; Köhler, P. (2008) „Das kollektive Arbeitsrecht Schwedens auf dem europarechtlichen Prüfstand“, Zeitschrift für Europäisches Sozial- und Arbeitsrecht, 7, 65 – 74; Maack, N. (2008) „Die Rechtmäßigkeit kollektiver Maßnahmen im Lichte der Entsende-Richtlinie“, Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht 22 (4), 355 – 359; Nagel (Fn. 29); Rebhahn (Fn. 29); Rödl (Fn. 29); Schubert (Fn. 29); Skouris, Vassilios (Fn. 29); Supiot, A. (Fn. 29); Temming, F. (2008) „Das „schwedische Modell“ auf dem Prüfstand in Luxemburg - der Fall *Laval*“, Zeitschrift für Europäisches Sozial- und Arbeitsrecht, 7, 231 – 242; Weiss (Fn. 29); Wendeling-Schröder, U. (2008) „Streikrecht und gemeinschaftsrechtliche Grundfreiheiten“, Arbeitsrecht im Betrieb 29 (4), 179 – 183; Wißmann (Fn. 29); Zwanziger, Vortrag auf dem europarechtlichen Symposium des Bundesarbeitsgerichts 2009 (Fn. 29); Zwanziger, Bertram: der Betrieb 2008, 294 – 298 (Fn. 29).

48. Blanke (Fn. 29); Nagel (Fn. 29), ArbuR 2009, p. 155, 160;

49. Blanke (Fn. 29);

50. Blanke (Fn. 29); Nagel (Fn. 29), ArbuR 2009, p. 155, 159;

51. Blanke (Fn. 29);

52. Blanke (Fn. 29).

respect such. It follows that first the PWD should have been assessed as to whether it took into account the right to take collective action and the right to strike. The ECJ decision went the reverse way, assessing whether exercising the right to take collective action and the right to strike were within the bounds of the PWD.⁵³

Further criticism is levelled against the ECJ's interpretation of the PWD, seen as disregarding the intention of the legislator⁵⁴ and thus infringing the whole principle of democracy.

From the German perspective the authors again refer to Art. 23.1.1 GG and the obligation derivable from this provision not to transpose the ECJ rulings into national law.⁵⁵ The ECJ's approach of not assessing the PWD on the basis of the fundamental rights or freedom of association but instead assessing the respect of fundamental freedoms on the basis of the Directive⁵⁶ is seen as a fundamental discrepancy between the European and German protection of human rights. This is regarded as a potential obligation to disobey the ECJ's jurisdiction and to appeal to the German *Bundesverfassungsgericht* (Constitutional Court).

4. Reactions to the Rüffert Case

The subject of the *Rüffert* case is the compatibility of a German law – Niedersachsen's Public Procurement Act (hereinafter referred to as the *Landesvergabegesetz*) - with the freedom to provide services (Article 56 TFEU = ex Art. 49 EC Treaty) and the PWD. Under § 3.1 of the *Landesvergabegesetz*, contracts for building services shall be awarded only to companies which, when submitting a tender, undertake in writing to pay their employees, when performing such services, at least the remuneration prescribed by the collective agreement in use at the place where those services are performed and at the time prescribed by the collective agreement. We find similar statutes in several German Federal States⁵⁷, though there is no comparable regulation on the federal level.

The Federal State of Berlin has a regulation similar to Niedersachsen's *Landesvergabegesetz*. In 2006 this regulation was the subject of a case heard before the *Bundesverfassungsgericht*⁵⁸ which ended with the Court declaring the *Landesvergabegesetz* to be in accordance with the German constitution.

53. Zwanziger, Europarechtliches Symposium (Fn. 29), p. 19.

54. Blanke (Fn. 29).

55. Nagel (Fn. 29), *ArbuR* 2009, p. 155, 160; Wißmann (Fn. 29), *Arbeit und Recht* 2009, 149, 150f.

56. Zwanziger, Europarechtliches Symposium (Fn. 29), p. 19.

57. Concerning the regulation of the federal states: Walter, T. „The practical consequences of the Rüffert decision“, in the report at hand p. 43-51; Steiff, J. / Andre T. (2008) „Konsequenzen aus dem EuGH-Urteil zur Tariftreue“, *Neue Zeitschrift für Baurecht und Vergaberecht* 9 (6), 364 – 367.

58. BVerfG, Beschluss vom 11.7.2006, Az. 1 BvL 4/00, BVerfGE 116, 202-228.

The ECJ decision states that Niedersachsen's *Landesvergabegesetz* does not comply with Article 56 TFEU (ex Article 49 EC) and the provisions of the PWD due to the fact that a) the *Landesvergabegesetz* refers to collective agreements which are not universally applicable⁵⁹ and b) the scope of the Act is limited to public procurement meaning that workers enjoy no protection when working on private construction contracts.⁶⁰ The ECJ decision led to all German Federal States with similar regulations (see Torsten Walter's report below) needing to take action.

At federal level no action is required as the public procurement regulations set down in the *Gesetz gegen Wettbewerbsbeschränkungen* (Antitrust Act) contain no obligation to pay employees at least the remuneration laid down by collective agreements. Though the public procurement regulations were changed⁶¹ almost at the same time as the *Rüffert* decision, the major reason for the amendment was not the ECJ decision but the necessity to transpose the EU public procurement directives 2004/17/EC and 2004/18/EC into German law.⁶²

Although there is no obligation to pay rates set down in collective agreements in the Federal Public Procurement Act there was an intensive political debate at federal level, with the topic being debated several times in Parliament.⁶³ For example there was a controversial debate about how social aspects such as protecting the interests of employees working for service providers engaged by federal authorities could be guaranteed.⁶⁴ Also the inclusion of a social progress clause into the Treaties was again discussed in this context. The German government however had major reservations about such a clause as it would have necessitated a complicated ratification procedure. This was not seen as being necessary, as the Treaty of Lisbon contained provisions reinforcing social aspects anyhow.⁶⁵

German courts have naturally applied the ECJ decision, thus rejecting obligations that bind service providers to pay their workers according to collective agreements laid down in public procurement law since such an obligation is in conflict with EU legislation.⁶⁶ (see Torsten Walter's report below)

59. EuGH, Urt. v. 3.4.2008, Rs. C-346/06, Slg. 2008, I-01989, Rz. 17-35.

60. EuGH, Urt. v. 3.4.2008, Rs. C-346/06, Slg. 2008, I-01989, Rz. 39.

61. Gesetz zur Modernisierung des Vergaberechts vom 20. April 2009, BGBl I, S. 790ff.

62. Entwurf eines Gesetz zur Modernisierung des Vergaberechts vom 13. August 2008, BT-Drs. 16/10117, p. 1.

63. BT -DRS 16/10965 (Question); BT -DRS 16/11181 (Answer); BT -DRS 16/9636: Antrag, Tarifreuregelungen durch europarechtliche Maßnahmen abzusichern.

64. BT -DRS 16/10965 (Question); BT -DRS 16/11181 (Answer).

65. BT -DRS 16/9416 (Question); BT -DRS 16/9721 (Answer).

66. Z.B.: OLG Düsseldorf Vergabesenat, Beschluss vom 8.12.2008, Az. VII-Verg 55/08; Vergabekammer bei der Bezirksregierung Arnsberg, Beschluss vom 21.08.2008, Az. VK 16/08.

The *Bayerische Verfassungsgerichtshof* (constitutional court of Bavaria) took an interesting decision on the validity of the obligation concerning collective agreements laid down in the Bavarian Public Procurement Act (Art. 3.1 BayBauVG)⁶⁷, ruling that said obligation was in accordance with the Bavarian Constitution. With regard to the *Rüffert* case, the Court pointed out that, as the Bavarian Procurement Act is similar to that cited in the *Rüffert* case, it could be assumed that the Bavarian regulation was also incompatible with Community law. This did not however mean that the Bavarian Procurement Act was completely invalid, but only that it was not applicable in situations where Community law took priority.⁶⁸ In the meantime the Bavarian Government has however requested the administration not to apply the *Tariftreueklausel* (obligation to abide by collective agreements) any longer.

The proceedings involving the awarding of a contract for a public transport service network in Greater Bremen are also worth mentioning.⁶⁹ Here prospective companies were also requested to pay wages in line with local collective agreements. One losing bidder appealed to the procurement watchdog body (*Vergabekammer bei der Bezirksregierung Lüneburg*), which rescinded the award decision, citing the ECJ's *Rüffert* decision. In the following appeal procedure the Celle Court of Appeal, which stated that it would overturn the previous ruling, indicating that the *Rüffert* decision could not be applied to public transport services, as the PWD 96/71/EC explicitly excluded the transport sector. In reaction to this indication the appeal was withdrawn.

Like the *Viking* and *Laval* decision the *Rüffert* case has also triggered a large amount of reaction in legal literature⁷⁰, with the following criticism being levelled against the decision.

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67. Bayerischer Verfassungsgerichtshof, Entscheidung v. 20.06.2008, Az. Vf. 14-VII-00, NJW-RR 2008, 1403-1405.
68. Bayerischer Verfassungsgerichtshof, Entscheidung v. 20.06.2008, Az. Vf. 14-VII-00, Rz. 53.
69. Vergabekammer bei der Bezirksregierung Lüneburg, Beschluss vom 15.05.2008, Az. VgK-12/2008.
70. Bayreuther, F. (2008) „Tariftreue vor dem aus - Konsequenzen der *Rüffert*-Entscheidung des EuGH für die Tariflandschaft“, *Neue Zeitschrift für Arbeitsrecht* 25 (11), 626 – 630; Becker, U. (2008) „Gemeinschaftsrechtswidrigkeit sog. Tariftreueklauseln bei Vergabe öffentlicher Aufträge“, *Juristenzeitung* 63 ,891 – 893; Bitterich, K. (2008) „Tariftreue vor dem EuGH“, *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis* 29, 1455 – 1463; Blanke (Fn. 29); Bruun, N. / Jacobs A. (2008) „Das ILO-Übereinkommen 94 am Morgen nach *Rüffert*“, *Arbeit und Recht* 56 (12), 417 – 423; Buchner, H. (2008) „Zukunft des Arbeitsrechts: Eingriff in das nationale Arbeitsrecht durch den EuGH - Missachtung des Subsidiaritätsprinzips?, *Betriebs-Berater, Beilage, Nr. 4, 6 – 11*; Dobmann, V. (2008) „Zu Tariftreueerklärungen bei grenzüberschreitenden Entsendungen – Anmerkung“, *Vergaberecht* 8, 484 – 486; Frenz, W. (2009), „Die Tariftreueentscheidung im europäischen Rechtssystem“, *Vergaberecht* 9, 563 – 569; Hanau, P. (2008) „Tariftreue nicht überall vor dem Aus, *Neue Zeitschrift für Arbeitsrecht* 25 (13), 751 – 752; Hänlein, A. (2008) „Das *Rüffert*-Urteil des EuGH zum Gebot der „Tariftreue“ bei der Vergabe öffentlicher Aufträge“, *Zeitschrift für europäisches Sozial-und Arbeitsrecht* 7, 275 – 282; Heuschmid, J. (2008) „Europarechtskonformität des Landesvergabegesetzes in Niedersachsen („*Rüffert*)“, *jurisPraxisReport-Arbeitsrecht* 29/2008, Anm. 2; Jaap, P. (2008) „Tariftreueklausel nach

The decision demonstrates once again the ECJ's lack of willingness to respect the specific characteristics of national industrial relations systems.⁷¹ The decision attaches little value to the principle of subsidiarity,⁷² the autonomy of social partners' collective negotiations and the fundamental right to take collective action.⁷³ Particular criticism is directed at the fact that the decision is in conflict with ILO Convention 94. In order to resolve the contradiction between the *Rüffert* decision and ILO Convention 94 the PWD 96/71/EC needed to be changed. It should further be clarified that levels of pay complying with collective agreements laid down at national or federal state level were to be understood as mandatory rules providing minimum protection to posted workers and needing to be observed by the service provider too. It should also be made clear that the public sector is a specific sector within the meaning of Art. 8 of the PWD.⁷⁴

With regard to ILO Convention 94 it is also argued that Germany would no longer be in a position to ratify this Convention. Other Member States would now be obliged to withdraw their ratification even though this would be in contradiction to the aims of European social policy.⁷⁵

Furthermore the decision was based on a serious misunderstanding of German industrial relations practice. Collective agreements always constituted minimum standards for all employment contracts covered by the collective agreement. Deviations from collective agreements were only possible and legally binding if they were to the benefit of the employees but they were not binding if they were to the disadvantage of employees.⁷⁶

dem "Rüffert"-Urteil des EuGH", Zeitschrift für Tarifrecht 22, 476 – 479; Junker, A. (2008) „Europäisches Arbeitsrecht 2007/2008“, Recht der Internationalen Wirtschaft, 54, 824 – 832; Kefler, J. / Dahlke, A. (2008) „Keine Tarifreueerklärung im EU-weiten Vergabeverfahren“, Europäisches Wirtschafts- und Steuerrecht 19 (6), 247 – 248; Klumpp, S. (2008) „Dienstleistungsfreiheit versus Tarifreue, Neue Juristische Wochenschrift 61 (48), 3473 – 3477; Koberski, W. / Schierle, F. (2008) „Balance zwischen Dienstleistungsfreiheit und Arbeitnehmerschutz gewahrt?“, Recht der Arbeit 61 (4), 233 – 238; Kocher, E. (2008) „Die Tarifreueerklärung vor dem EuGH“, Der Betrieb 61 (19), 1042 – 1045; Mohr, J. (2009) „Ein soziales Vergaberecht?“, Vergaberecht 9, 543 – 563; Nagel, B. (2009) „Europäische Marktfreiheiten, Koalitionsfreiheit und Sozialstaatsprinzip“, Arbeit und Recht 57 (5), 155 – 160; Rödl, F. (2009) „Bleierne Zeiten für die Arbeitsbeziehungen, Mitbestimmung (3), 10 – 15; Seifert, A. (2008) „Die vergaberechtliche Tarifreuepflicht vor dem Europäischen Gerichtshof“, Europäische Zeitschrift für Arbeitsrecht, 526 – 539; Skouris, V. (Fn. 29); Steiff, J. / Andre T. (Fn. 57); Thüsing, G. / Granetzny, T. (2009) „Noch einmal: Was folgt aus Rüffert?“, Neue Zeitschrift für Arbeitsrecht 26 (4), 183 – 186; Wiedmann, A. (2008) „Verstoß gegen Richtlinie 96/71/EG für den Fall der Vergabe öffentlicher Bauaufträge lediglich an tariflohnzahlende Unternehmen, Europäische Zeitschrift für Wirtschaftsrecht 19 (10), 308 – 310; Wittjen, M. (2009) „Tarifreue am Ende?, Zeitschrift für Baurecht, 30 – 33; Zwanziger, Europarechtlichen Symposium (Fn. 29).

71. Blanke (Fn. 29); Bruun / Jacobs (Fn. 44), Arbeit und Recht 2008, 417 – 423.

72. Blanke (Fn. 29);

73. Bruun / Jacobs (Fn. 70), Arbeit und Recht 2008, 417 – 423.

74. Bruun / Jacobs (Fn. 70), Arbeit und Recht 2008, 417 – 423.

75. Heuschmid (Fn. 70), jurisPR-ArbR 29/2008, Anm. 2.

76. Blanke (Fn. 29).

Due to the decision it was in principle no longer possible to supplement autonomous collective agreements with public procurement criteria when collective agreements had not been declared universally applicable.

The relevance of Art. 26 of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts remains to be clarified. According to this provision contracting authorities may set special contract conditions, in particular social aspects, provided that these are compatible with Community law and are indicated in the notice of tender or the specifications.⁷⁷

5. Conclusions

The ECJ decisions do have an influence on the German system of industrial relations.

Up to now the notion dominated that freedom of association and the regulation of working conditions by national level collective agreements of the social partners were not influenced by Community law except in the case of the agreements of the European social partners. The ECJ rulings have fundamentally changed this perception: the buttressing of collective agreements by public procurement legislation - as previously practiced in Germany - is substantially restricted by the ECJ. The *Viking* and *Laval* cases have also triggered an intensive debate on the possible consequences for freedom of association on a national level as well as possible measures to safeguard the national system - in Germany the freedom of association is a fundamental right enshrined in the Constitution and enjoying wide-ranging protection well beyond the level found in the ECJ rulings. Being accustomed to a well-developed level of protection of fundamental rights, the expectation from a German perspective is that freedom of association should be guaranteed on a comparable level when the ECJ takes decisions in transnational cases. At the same time there is concern in Germany that the German system of industrial relations might be threatened in the middle or long term as a consequence of the ECJ rulings. In particular the distinction between national cases falling within the scope of the German constitution and transnational cases within the scope of Community law gains relevance in this context and might in the end lead to Germany's system being damaged to a certain degree.

So far the political and judicial reactions to the ECJ rulings have been cautious. The *Arbeitnehmerentsendegesetz* (Posting of Workers Act transposing the PWD) has been changed, though the changes were initiated independently of the *Laval* decision. The Act had already been the subject of an ECJ decision in 2007, when the Court had decided that it was basically in accordance with Community law.

77. Zwanziger, *Europarechtliches Symposium* (Fn. 29), p. 25.

The position of the German government has been cautious too, with the government giving top priority to the Treaty of Lisbon entering into force. It also has certain reservations about such political initiatives as the introduction of a social progress clause into the Treaty.

Concrete measures have been taken as a consequence of the *Rüffert* decision: those German Federal States whose public procurement acts contain an obligation to comply with collective agreements have changed them (see Torsten Walter's report), illustrating the fact that the ECJ rulings have an impact not only on transnational cases but also on national situations.

Viking and *Laval* have not as yet - as far as can be seen - had any influence on German case law. However we can expect interesting conflicts in the future. As stated above there are major differences between the ECJ's interpretation of how fundamental freedoms are guaranteed and that developed by the *Bundesverfassungsgericht* and national labour courts on the basis of Art. 9.3 GG. Article 23.1.1 GG and the *Bundesverfassungsgericht's Solange II* ruling might lead to a German obligation to ignore the rulings of the European Court of Justice.

The *Rüffert* decision is however being applied by German courts and public procurement bodies. Interesting aspects are the decision of the Bavarian Constitutional Court not to classify the Bavarian Procurement Act as invalid and the proceedings around the awarding of a contract for a public transport services network in Greater Bremen,⁷⁸ where the court of appeal indicated that the *Rüffert* decision could not be applied to the transport sector.

Further interesting research is looking into the relation between Community law and national law from a German point of view. The *Rüffert* decision has restricted one element of the German industrial relations system substantially. The *Viking* and *Laval* cases illustrate fundamental differences between Germany's and the ECJ's interpretation of the concept of freedom of association which have the potential to cause substantial conflicts in the future. Therefore further legal analysis should address the question of if and how latitude for the specific characteristics of national industrial relations systems can be guaranteed.⁷⁹

From a German perspective it appears worthwhile to analyse the degree of protection that Art. 23.1.1 GG together with the *Bundesverfassungsgericht's Solange II* ruling can provide. Looked at from the perspective of Community law the question is whether there are legal options to restrict the EU legal dominance within the field of industrial relations. One possibility could be the fact that national industrial relations systems are not covered by the EU's legislative competence. One potential conclusion could be that the legality of

78. Vergabekammer bei der Bezirksregierung Lüneburg, Beschluss vom 15.05.2008, Az. VgK-12/2008.

79. See: Joerges / Rödl, ZERP-Diskussionspapier 2/2008 (Fn. 29), p. 7f. and 21.

any collective action is to be examined primarily under national law, with a special focus on protecting national fundamental rights interpreted in the light of the fundamental freedoms guaranteed by the EC Treaty.⁸⁰

An additional option could arise from the Treaty of Lisbon and its charter of human rights. In this respect the question is if and to what degree the protection of a fundamental right guaranteed on an EU level includes the devolution of competences to Member States with regard to the protection of human rights. The grounds for such devolution of competences can be found in the fact that the notion and interpretation of fundamental freedoms differs greatly among individual Member States.⁸¹ The distinction between national and transnational constellations also needs clarification in this context.

80. See: Wißmann (Fn. 29), *ArbuR* 2009, 149, 151.

81. Zwanziger, *Europarechtliches Symposium* (Fn. 29), p. 18.

B. Germany

The practical consequences of the Ruffert decision

Torsten Walter

Abstract

The German *Ruffert* case was all about public procurement. Within Germany's federal structure, certain individual states (*Bundesländer*) had clauses in their statutory procurement regulations stipulating that collective agreements were to be complied with (*Tariftreueklauseln*). This meant that bidders for public-sector contracts needed to provide a commitment that they would pay wages at the local levels laid down in collective agreements.

In this section of the report on Germany, the situation with regard to legislative competence is first examined. In Germany this is divided up between the Federal government (*der Bund*) in Berlin and the individual Federal States (*die Bundesländer*). The latter are responsible for procurement legislation insofar as their own procurement is involved. This section looks briefly into the procurement acts of individual federal states. Procurement legislation taking social criteria into account. Now been adopted in the state of Berlin and is planned in Bremen and Thuringia. In Brandenburg there is an official declaration of intent to do so.

This is followed by a description of federal procurement legislation where the new procurement legislation does provide for social aspects playing a role in public procurement. Then comes a summary and appraisal of the Düsseldorf Court of Appeal's (*Oberlandesgericht*) decision regarding the social aspects involved in the awarding of contracts for postal services at Dortmund city council, together with the opinions of the social partners (for the employer side: *Zentralverband Deutsches Baugewerbe*, *BUSINESSEUROPE* and *Hauptverband der Deutschen Bauindustrie*; for the employee side: the DGB) on minimum wages and compliance with collective agreements.

* Trainee lawyer Özgül Altunkas was responsible for compiling the list of collective agreement compliance clauses used in the Federal States, upon which this report is based, and analysing them with regard to their legal status. She also went through the election programmes of the political parties represented in the German Bundestag, looking for statements concerning minimum wages, the universal applicability of collective agreements and mandatory compliance with them. I would like to thank her very much for this effort.

1. Legislative competence

The situation in Germany is made complicated by the fact that procurement legislation lies within the responsibility of individual Federal States. Articles 72 and 74 of the German Constitution (*Grundgesetz*) provide for competing legislative competence (*konkurrierende Gesetzgebung*) in the area of public procurement (specifically Art. 74.1.11). Competing legislative competence means that an area can be regulated by state-level legislation insofar as the Federal Government has not made use of its legislative prerogative by adopting a national law. In the case of public procurement, the Federal Government has not done this, meaning that the individual Federal States are responsible for public procurement insofar as the objects to be procured are for their own use⁸². The consequence of this situation is that there is not one legal constellation needing to be taken into account, but 17 – that of the Federal Government and those of the 16 Federal States.

2. The situation in individual Federal States

There follows a description of the procurement situation in the Federal States following the *Rüffert* decision. To provide greater clarity, a distinction is made between Federal States not having clauses relating to minimum wages and working conditions (hereinafter referred to as “social clauses”) in their procurement legislation at the time of the *Rüffert* decision, and those having such clauses.

2.1 Federal States with no social clauses in their procurement legislation at the time of the Rüffert decision in April 2008

Baden-Württemberg und Brandenburg had no social clauses. As a result of the ECJ decisions, Thuringia⁸³ and Mecklenburg-Vorpommern have, on the other hand, now drafted social clauses. Mecklenburg-Vorpommern’s draft is currently being examined with regard to its compliance with EU legislation.

2.2 Federal States with social clauses in their procurement legislation at the time of the Rüffert decision

The second group consists of the following Federal States: Bavaria, Berlin, Bremen, Hamburg, Hessen, Niedersachsen (*Lower Saxony*), the Saar and Schleswig-Holstein.

⁸². cf. decision of the Federal Constitutional Court, BVerfG of 11.07.2006, 1 BvL 4/00

⁸³. Procurement Act relating to SMEs (*Vergabe-Mittelstandsgesetz*) containing a verifiable commitment to comply with minimum wages declared universally applicable.

In April 2008, the public works department of the Bavarian Interior Ministry called on all subordinate public works authorities to no longer demand a commitment to abide by collective agreements in state public works contracts. Local authorities were requested to follow suite.

The Federal State of Berlin's new procurement act containing a social clause came into force just a short time before the *Rüffert* decision. At the end of April, a decree was issued rescinding the social clause. In September Parliament passed a revised procurement act, stipulating that public contracts would in the future only be awarded to companies paying at least the minimum wage of EUR 7.50.

Bremen reacted to the decision by sending out two circulars stating that the companies no longer needed to provide a commitment to abide by collective agreements, but could do so on a voluntary basis. Hamburg followed suite. In October 2009 the socialist-green Bremen coalition government reached agreement on a new procurement act, setting minimum wages and making the payment of wages stipulated by collective agreements mandatory for transport service contracts. The Act should come into force by the end of 2009.

Hessen's procurement act stipulated that a commitment to abide by collective agreements was only mandatory for certain sectors and certain named agreements. Which agreements were involved was no longer stipulated, as the Act obviously did not comply with EU legislation due to its similarity with Niedersachsen's procurement act, the subject of the ECJ's *Rüffert* decision. Both acts contained a stipulation requiring contractors to provide a commitment to comply with certain collective agreements, not just for themselves but also for any subcontractors they might engage.

In Niedersachsen an official recommendation was issued in April 2008, applying to all new and current public works tenders. The new state Public Procurement Act came into effect in January 2009, stipulating that collective agreements still had to be complied with for contracts worth EUR 30,000 or more.

The Saar published a decree with respect to the consequences of the *Rüffert* decision, stating that no commitment to abide by collective agreements would be demanded from bidders for public contracts in the future. Furthermore all bidders in current tenders were to be informed that the commitment was no longer to be taken into account when calculating bids. At the same time bidders were to be given the opportunity of submitting a modified bid taking the changed circumstances into account.

Schleswig-Holstein's has had a law stipulating compliance with collective agreements (*Tariftreuegesetz*) since 2003, valid until 31.12.2010. In 2008 a new version of the state's procurement regulations without any social clause came into effect. In May 2009, the Ministry issued a recommendation with regard to compliance with collective agreements, stating that:

- written commitments were only to be demanded with respect to collective agreements declared universally applicable;
- the ECJ decision was to be applied not only to construction contracts, but also to public rail transport and refuse collection contracts, as well as for any procurement below the EU threshold value.

Schleswig-Holstein's *Tariftreuegesetz* nevertheless remains unchanged.

3. Legal situation on a national level

The Antitrust Act (Gesetz gegen Wettbewerbsbeschränkungen, GWB)

The Antitrust Act⁸⁴ (April 2009) is the principal statute regulating competition in Germany. Its scope extends to all acts of unfair competition, including gaining and misusing market dominance and any restrictions to the competitive behaviour of independent players on the German market. It further contains provisions relating to public procurement, as competition needs protecting and regulating in this area as well. Social aspects are taken into account here.⁸⁵

GWB § 97.4 has not yet been subjected to ECJ verification, probably as it has only very recently come into force. The EU Directive on the coordination of procedures for the award of public sector contracts⁸⁶ stipulates in Art. 26, 27 and 53.1 further procurement criteria, including social ones, thereby providing justification for the inclusion of social aspects in public tenders. Nevertheless, as a consequence of the *Rüffert* decision, there is still a risk related to EU legislation. It needs to be pointed out that paragraph 34 of the ECJ decision states that "Therefore ... the level of protection which must be guaranteed to workers posted to the territory of the host Member State is

84. Antitrust Act (*Gesetz gegen Wettbewerbsbeschränkungen*), BGBl I 2005, 2114, last amendment: Act on Modernising Procurement Legislation (*Gesetz zur Modernisierung des Vergaberechts*) of 20.4.2009, BGBl I 2009, 790-798.

85. § 97 Abs. 4: "Contracts will be awarded to law-abiding and reliable companies with the necessary expertise and ability to carry out the contract. Additional requirements related to the execution of the contract may be requested from the contractor with respect to social, environmental or innovative aspects, should there be a concrete connection between such and the subject of the contract derived from the contract specifications. Other requirements going beyond these may only be requested from the contractor when provided for by federal or state legislation." (§ 97 Abs. 4).

On the other hand, the decree published on 23 September 2009 in the Official Journal (*Bundesgesetzblatt*) redefining the regulations applying to procurement in the fields of transport, drinking water and energy supply, based on § 97.6 and § 127.1, .2, .8 and .9 GWB does not contain any social criteria.

86. The 31 March 2004 Directive 2004/18/EG of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. OJ L 134, 30.4.2004, p. 114).

limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g), of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision (*Laval un Partneri*, paragraph 81).” The sword of Damocles resulting from the *Rüffert* decision hangs over every demand addressed to a contractor going beyond these provisions.

4. Non-payment of minimum wages a ground for exclusion from a public tender?⁸⁷

4.1 Decision VII Verg 18/09 of the Düsseldorf Court of Appeal (Oberlandesgericht)

ECJ apologists point out that the *Rüffert* decision only concerns obligations regarding the application of collective agreements. It has nothing to do with minimum wages. However, even in situations where there is a minimum wage, a tender demanding payment of such can be rejected, as illustrated by the Düsseldorf Court of Appeal’s decision VII Verg 18/09 of 29 July 2009 in the legal dispute between the company TNT GmbH and Dortmund City Council concerning a tender for municipal postal services. The gist of the decision was that the non-payment of minimum wages was no valid reason for excluding TNT GmbH from the tender. On the other hand, Dortmund City Council was not obliged to award TNT GmbH the contract, as this would, in the opinion of the judges, be too great an incursion in the prerogatives of the city. The decision is not appealable.

The following are the grounds behind the decision. Procurement started with Dortmund City Council publishing the notice of procurement in the EU journal on 30 June 2008. Two lots pertaining to the provision of postal services for a two-year period, twice renewable for a further year, were announced. Lot 2 for delivery services was awarded without any problem to the Deutsche Post AG. The award of Lot 1 for general postal services was disputed until the announcement of the Düsseldorf Court of Appeal’s decision.

The starting point for the legal dispute with TNT GmbH was the City Council’s requirement that minimum wages be paid, based on the 28.12.2007 decree (*Postmindestlohnverordnung*) on mandatory working conditions, including minimum wages, in the postal services sector. In the course of the procurement process, this decree was declared invalid in all three levels of jurisdiction. In its 27 April 2009 decision, the Arnsberg procurement chamber (*Vergabekammer*), the regional procurement watchdog authority,

⁸⁷. Source: Press release of Dortmund City Council

ruled that TNT's bid was not acceptable as it did not take into account the payment of minimum wages in the postal sector. This led to TNT appealing to Düsseldorf Court of Appeal, where a final decision was taken. The Court of Appeal reasoned that the City Council, as defendant, had, through its demand for compliance with a collective agreement, set an additional eligibility criterion going beyond the normal criteria of subject matter knowledge, ability to perform the contract and reliability. The currently valid legal situation, applicable to the disputed tender, only allowed additional award criteria when such were provided for by a federal or state law (§ 97.4, 2. Hs. GWB, § 138. 8 GWB 2009).

4.2 Commentary

In my opinion such a decision could no longer be taken under current legislation, as discussed below:

The Dortmund postal services procurement took place under the old Antitrust Act. § 97.4 thereof merely stated that “contracts are to be awarded to companies satisfying criteria of subject matter knowledge, ability to perform the contract and reliability. Other or supplementary criteria may only be set when provided for by federal or state law.” The social criterion contained in the new version was however not part of the previous version. It follows that in any new procurement process conducted under the new version of the Act, the demand for payment of minimum wages would be justified.

As stated above, the social criterion contained in the new version of the Antitrust Act is endangered by the ECJ rulings. But even if this is rejected by the ECJ, a further legal change should lead to the acceptance of minimum wages as an award criterion. §4.3 of Germany's new Posted Workers' Act (*Arbeitnehmer-Entsendegesetz*)⁸⁸, which came into force in April 2009, includes postal services in its scope. Even if the Düsseldorf Court of Appeal rejects the eligibility of the 29.11.2007 collective agreement on minimum wages in the postal sector on the grounds that the Antitrust Act calls for a formal law and not merely a regulation (the minimum wage for postal workers is stipulated in a government regulation issued by the Federal Ministry of Employment and Social Affairs on 28.12.2007), this gap is filled by the new Posted Workers' Act. The Antitrust Act criterion stating that “other or supplementary criteria may only be set when provided for by federal or state law” should therefore be fulfilled by the latest version of the Posted Workers' Act.

88. Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen, (*Act regulating mandatory working conditions for workers on cross-border postings or regularly working within Germany*) BGBl I 2009, 799.

5. The views of the social partners

5.1 For the employers

The European Employers' Association BUSINESSEUROPE welcomes the *Laval*, *Viking*, *Commission v. Luxembourg* and *Rüffert* decisions⁸⁹, stating that the ECJ was right in coming to the conclusion that national legislation did not comply with the PWD. It was not a case, as stated elsewhere, of the ECJ rulings leading to social dumping. The PWD did not need revising. The Commission's efforts to provide Member States with guidelines for the correct transposition of the PWD in accordance with the ECJ rulings were to be welcomed.

In a statement issued by lawyer Michael Knipper, the chairman of the German Construction Industry Federation, it was stated that the German construction industry saw its long-followed minimum wage strategy confirmed by the ECJ decision. Construction industry compliance with minimum wage stipulations needed to be closely monitored, thereby guaranteeing fair competition on German building sites. As stated by Knipper, "the important aspect of the ECJ ruling is that companies can be obliged to pay minimum wages when these have been declared universally applicable, but not to adhere to any collective agreements with additional provisions. At the end of the day, the decision means that, in tenders for public sector contracts, no wage payment commitments can be demanded going beyond the minimum wage levels set by universally applicable collective agreements. The ECJ decision does not therefore undermine the current legal situation existing in the German construction industry." Knipper called on the German legislative to take the ECJ rulings into account in the planned reform of procurement legislation and the inclusion of social aspects as an additional procurement criterion.⁹⁰

5.2 For the workers

In an October 2010 resolution⁹¹, the national executive of the Confederation of German Trade Unions, the DGB, calls for reforms, including a modification of Art. 3 of the PWD to clarify the fact that the article merely referred to minimum conditions and that Member States could set more favourable working conditions for their workers if deemed necessary. The DGB further demands a limit on the duration of any posting. Also, in cases where

89. Position paper: No Need for Revision of Posting of Workers Directive after ECJ Rulings, available under http://www.nho.no/getfile.php/filer%20og%20vedlegg/2008-10-07_PP_on_ECJ-Posting_-_Final.pdf

90. Available under <http://www.bauindustrie.de/index.php?page=188&article=1005>

91. DGB demands as a reaction to the four ECJ decisions ((*Viking*, *Lafal*, *Rüffert*, *Commission v. Luxembourg*). Resolution of the DGB National Executive of 7 October 2008, cf. http://www.dgb.de/themen/europa/index_html

employment contracts are only established for the purpose of a posting abroad, such contracts should be automatically subject to the legislation of the host country. Furthermore, EU legislation needed to recognise internationally accepted workers' and trade union rights. The Federal Ministry of Employment should be empowered to delegate the right to declare collective agreements universally applicable to the individual Federal States. Any rescinding of legislation on the mandatory application of collective agreements is to be rejected. New collective agreement compliance legislation is demanded. The Federal Government should launch a political initiative aimed at having the European Council issue a declaration giving priority to fundamental rights. In the opinion of the DGB, the inclusion of all sectors in the PWD is of further major importance.⁹²

The post-*Rüffert* efforts of the legislatures in Bremen and Berlin to limit the damage caused by the ECJ rulings by adopting new laws is welcomed by the DGB: "we see the minimum wage stipulation in Berlin's new Public Procurement Act as a step towards a universal minimum wage as a bottom limit", said DGB Berlin/Brandenburg chairwoman, Doro Zinke. She reminded everyone that the original paragraph of the Public Procurement Act dictating compliance with valid collective agreements had had to be rescinded due to the anti-worker ECJ rulings. The setting of social and ecological criteria such as the requirement only to procure goods produced in compliance with the ILO's fundamental working conditions, was a further small breakthrough. Requirements regarding minimum wages, compliance with collective agreements, and "fair procurement" did however necessitate adequate controls and sanctions. In the opinion of the DGB there was still room for improvement here. "We will be tabling our recommendations in the parliamentary legislative process", said Zinke.

6. Conclusion

Due to the complicated nature of Germany's federal structure and the associated legal situation regarding public procurement, the *Rüffert* decision has caused major problems, with the danger of social dumping emerging. Foreign bidders, who need to be taken into account when public sector contracts are awarded, have a competitive advantage due to their lower rates of pay and lower social security benefits, allowing them to win tenders almost automatically. The two possible consequences are that either German companies are squeezed out of the market or that they are forced to cut their pay levels.

92. The German Posted Workers Act (AEntG) extends the scope of universally applicable minimum wage and vacation entitlements in the following sectors to workers not covered by German labour legislation: the construction industry, cleaners, postal services, security services, special mining work in coal mines, industrial laundry services, waste management including street cleaning and winter services, and vocational training services for the unemployed. Non-compliance is subject to fines and can lead to exclusion from public sector contracts.

Laws making compliance with collective agreements mandatory are now no longer being applied by the individual Federal States except in Berlin, Hamburg, Bremen and Niedersachsen (Lower Saxony) – with the above-mentioned restrictions. On the other hand there are new legislative initiatives aimed at introducing social criteria into procurement legislation. It is as yet unclear whether these will be accepted by the ECJ. In the light of such uncertainty, urgent clarification of EU legislation is needed to enable social criteria – going beyond just minimum wages – to be taken into account in public procurement.

C. Belgium

The potential impact and the policy perspectives of the Viking, Laval, Ruffert and Commission versus Luxembourg cases for the Belgian legal system and the country's industrial relations

Filip Dorssemont and André Leurs

Abstract

This contribution analyses the potential impact and some policy perspectives of the *Viking*, *Laval*, *Ruffert* and *Commission versus Luxembourg* judgments for the Belgian legal system and the country's industrial relations. Those aspects of Belgian legislation relating to collective action, public procurement and the transposition of the PWD into national legislation which are relevant when examining the impact of these four cases will be put into context. The potential impact of *Laval* and *Viking* on trade unions' collective action will be assessed. Furthermore, the impact of *Ruffert* and *Commission versus Luxembourg* on the Belgian government's ability to combat social dumping will be studied. Last but not least, we will indicate how the social partners have reacted to these four judgments.

1. The right to take collective action under Belgian law

1.1 Legal issues at stake

The *Viking* and *Laval* judgments have restricted the right to take collective action insofar as its exercise conflicts with the freedom of establishment and the freedom to provide services. In both *Viking* and *Laval*, two distinct kinds of boycott were at stake. In *Viking* the ITF had issued a circular to its members requesting them *not* to conclude any collective agreement with a Finnish ship owner, with the exception of the trade union situated in the Member State where the *Rosella* was beneficially owned. In *Laval*, the Swedish trade unions organised a boycott against a construction site.

Prior to analysing the impact of both judgments on domestic (Belgian) strike law, it is worthwhile comparing the following aspects of Belgian law with EU legislation:

- a) the scope of the notion "collective action" under Belgian law;
- b) the legal status of the right to take collective action under Belgian law;
- c) the issue of balancing the right to take collective action with conflicting rights and interests under Belgian law;
- d) the issue of teleological and contextual restrictions under Belgian Law.

This analysis will help assess whether the approach the ECJ adopted *vis-à-vis* the legitimacy of the collective action involved corresponds to or conflicts with the manner in which the legitimacy of (domestic) collective action not conflicting with fundamental EU-defined freedoms is interpreted under Belgian law.

1.2 The concept of strike action in Belgian statutory provisions

The first statutory instrument explicitly referring to a collective and voluntary refusal to perform the employment contract⁹³ was adopted in 1948. It was the “*Loi relative aux prestations d'intérêt public en temps de paix*” (The Law relating to services of public interest in times of peace) and in it the legislature refrained from actually using the word “*grève*” (strike). Instead, the statute circumscribed the term by defining the phenomenon. The same statute also referred to the phenomenon of lock-outs, unfortunately describing them as a collective redundancy. The aim of the statute was to guarantee so-called “vital services” and protect the economic infrastructure (machines and/or material) which might be jeopardised in the event of a strike or lock-out.

The Belgian Constitution (1831) makes *no* specific reference to strike action. Neither has the legislature adopted any instrument providing comprehensive regulation of the right to strike, let alone the right to take collective action. Certain provisions in specific statutory instruments do refer to the concept of a strike, without providing any definition thereof.⁹⁴

1.3 The legal status of collective action

1.3.1 The recognition of the right to strike and the right to lock-out by the judiciary

In its landmark decision of 21 December 1981 (the *Debruyne* judgment) the *Cour de Cassation* (i.e. the Supreme Court of Belgium as opposed to the Constitutional Court) was asked to assess whether the refusal of a judge *a quo* (i.e. the *Cour de travail*) to construe the participation of a workers' representative in a “wild cat strike” as a *motif grave* (grounds for immediate dismissal for gross misconduct) was indeed compatible with the civil logic of contractual liability, Advocate-General Lenaerts argued that the *Loi relative aux prestations d'intérêt public en temps de paix* did implicitly recognise the right of workers to have recourse to a strike in the meaning of that statute.

93. Article 1 *Loi relative aux prestations d'intérêt public en temps de paix*, which states that the law is applicable in a case of « cessation collective et volontaire de travail ». For an analysis of the Law, see Rigaux and Dorseemont 2003, 213.

94. See for example, the following provisions : Article 11ter *Loi sur les contrats de travail* and Article 1 § 5 of the Law of 24 July 1987 (*Travail temporaire, travail interimaire, mise à disposition des travailleurs*).

The Court acknowledged the existence of the right of a worker “*not to work due to the strike and not to execute his obligation*”. The Court did not merely grant an exception, but attributed a right to workers. On the other hand, the Court did not *explicitly* state that this right could be regarded as a right to strike. It just stated that there was a right *due* to a strike not to perform the contracted work. Due to the definition of the right to strike as a “collective and voluntary cessation of work”, the landmark judgment does *not* cover collective action which cannot be construed as a (total) refusal to perform the work described in an employment contract. The reference to the strike definition contained in the *Loi relative aux Prestations d'intérêt public* constitutes an implicit restriction of the right to collective action.

On the other hand, the definition of a strike as a “*cessation collective et volontaire de travail*” (a collective and voluntary stopping of work) is deprived of any further *teleological* restriction related to the objectives of the strike or to the identity of the party in the dispute. In this respect, it may be observed that the Advocate General explicitly argued that, in the absence of any more specific statutory instrument, the recognition also covered so-called political strikes and wild cat strikes.

The formal ratification of the European Social Charter (ESC) in 1990 gave *momentum* to the modernisation of the legal basis of the right to strike, *casu quo* of the right to take collective action. In addition, there is major consensus among Belgian scholars to recognize that ESC Article 6 § 4⁹⁵ does have a direct effect upon the Belgian legal system. However, the *Cour de Cassation* has never referred to ESC Article 6 § 4 as being the legal basis of the right to strike under Belgian legislation, though one Advocate General has explicitly referred to it in such a context.⁹⁶ In the case in question, the employer himself invoked Article 6 as a *moyen de cassation* (a legal argument raised in the appeal before the *Cour de Cassation*) in a legal dispute regarding the strike. This strategy was based on the expectation that ESC Article 31⁹⁷ constituted a source for restricting the right to strike under Belgian law. Such an approach to Article 31 needs to be rejected. The Article serves to limit the restrictions available to the contracting parties. There is no obligation for the contracting parties to make use of these restrictions. In other words, whereas Article 6 has

95. “4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.”

96. See the Conclusions of Advocate-General Deriemaecker to Cour de Cassation, 31 January 1997, *Arresten Cassatie*, 1997, 56.

97. “Article 31 – Restrictions

1. The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

2. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed.”

a direct effect, the restrictions mentioned in Article 31 do not have a direct effect.

In some cases, judges have in fact referred to Article 6 § 4 as the legal basis of the right to strike.⁹⁸ Furthermore in cases related to industrial disputes in the public sector, the *Conseil d'Etat* (Council of State or the King's Council, i.e. the Supreme Administrative Court) did recognize the direct effect of Article 6 § 4 of the European Social Charter.⁹⁹

1.3.2 Right to strike

At the end of the day a strike is nothing more than a refusal to perform work described in an employment contract. It follows that the right to strike can only be attributed to workers. As trade unions are not in a position to conclude an employment contract, they cannot exercise a right to strike. Trade unions are however able to *organise, recognise and support* strikes.

In an organic approach the organisation of a strike is the exclusive prerogative of trade unions. Strikes organised by workers in absence of any trade union recognition are regarded as illegitimate or *wild cat* strikes. In a more liberal approach, the right to strike needs to be construed as a collective freedom (*liberté collective*). It is a right attributed to a citizen in his capacity as a worker, despite the fact that it can only be exercised in a collective way, i.e. together with other citizens. The collective nature of its exercise does not presuppose that a strike needs trade union recognition. Insofar as the right to strike is a citizenship issue, it can only, in contrast to a collective agreement, be restricted by a statutory law.

In view of the absence of constitutional recognition and any contextualisation of a strike within the *Loi relative aux prestations d'intérêt public*, it seems hazardous to predict anything whatsoever on the issue of a right to strike under Belgian law.

The aforementioned *Debruyne* judgment provides a major clue to tackling the issue of a right to strike. The *Cour de Cassation* had to address the issue whether the participation in a wild cat strike as such could be construed as a "*motif grave*" (gross misconduct) justifying a *stante pede* dismissal.¹⁰⁰ Though the distinction needed to be made between this question and whether participation could constitute a *iusta causa demissionis* (a just cause for dismissal) the Court took a very general and laconic stance stating that "no statutory provision under Belgian law prohibits a worker from participating in a strike not recognised by a representative workers' organisation". This statement of the Court is a logical consequence of the absence of any

98. Tribunal de Travail d'Anvers, 18 mai 2001 ; unpublished.

99. CE nr 113.168 3 December 2002 (Vermote, Meyfroidt contre Intercommunale vereniging voor vuilverwijdering en- verwerking voor Izegem en Ommeland; CE nr 52.424 22 mars 1995 (Henry contre la Poste) ; CE nr 154.836 (Adyns, contre NMBS).

100. Cour de Cassation 21 December 1981, *Pasicrisie* 1982, I, 531 and *Rechtskundig Weekblad* 1981-82, 2525 (with the conclusions of the Advocate General H. Lenaerts).

comprehensive statutory regulation on strikes. It does not provide any clarification on the ability of the signatory parties of a collective agreement to impose restrictions on the exercise of the right to strike. The facts of the *Debruyne* case outlined by the judge reveal that a collective agreement at sector level, which had not been declared universally binding, did make strike action regarding the work of union delegates dependent on procedural requirements (mediation and conciliation and peace obligation). The judge *a quo* argued that these obligations had been set down in the so-called obligatory part of the collective agreement. But they were only binding for the contracting parties concerned and had no effect on the employment relationship of the union delegate Debruyne. Since the *Cour de Cassation* is unable to examine the legality of judgments referring to collective agreements not declared to be universally binding, the *Debruyne* judgment does not shed any light on the question to what extent and how collective agreements could make individual employees' exercising their right to strike dependent on prior recognition by a signatory trade union. From a technical point of view, this would require trade unions to set down such an arrangement within the individual normative part of any collective agreement, leading to it being incorporated *ex lege* in the individual employment contracts of all employees of an employer bound by the collective agreement. Should such an arrangement be set down in the so-called collective normative part of a collective agreement, it is conceivable that the provisions thereof could have an individual character in respect of union delegates as well.

1.4 Balancing collective action with other rights and freedoms

Unilateral requests in summary proceedings intended to prohibit strikes are rare. Few have been granted and some which have been granted have been successfully revised after *tierce opposition* (a remedy available to a person affected by the ruling following the unilateral request). The unsatisfactory stance taken by the *Cour de Cassation* with regard to monitoring the reasoning undertaken by judges in summary proceedings has not been conducive in helping judges unfamiliar with labour law¹⁰¹ to excel in complex legal reasoning.

Since recognition of the right to strike, there have been only four disputes giving rise to summary proceedings to prevent workers from taking strike action as such. These four disputes have given rise to case law balancing the right to strike with other rights and freedoms or rather with conflicting interests.¹⁰²

101. Unfamiliar with labour law : the *Tribunaux de première instance* are definitely not the most natural *fora* to deal with these issues in a legal system which has established more specialised *Tribunaux de travail*.

102. Tribunal de Bruxelles (référé), 5 August 1987, *Revue de Droit social*, 1987 464. The *tierce opposition* was judged by Tribunal de Bruxelles (référé), 31 August 1987, *Revue de Droit social* 1987, 469

The first case¹⁰³ involved a proposed strike which had been notified by a sectoral trade union representing a number of SABENA pilots. SABENA responded with a unilateral request for the strike to be prohibited. The prohibition had to be addressed to the pilots specifically mentioned, though SABENA did not issue them with summons. The President of the *Tribunal de Bruxelles* prohibited the strike in his famous *ordonnance* of 5 August 1987. He judged the strike to be illegal for a variety of reasons. A strike not organised by the representative trade union involved in the bargaining process was regarded as a wild cat strike (*sic*), despite the fact that it had been duly notified by the non-representative trade union. Furthermore, the President did not refrain from assessing “the usefulness” of the strike, considering the demands of the sectoral union to be “excessive”. The President went on to argue that the right to strike was subject to the proportionality principle.

On *terce opposition*, the *ordonnance* (court order), which was being imposed under the threat of an *astreinte* (penalty clause), was rescinded. The *Tribunal de Bruxelles* even denied that it had the competence to prohibit a strike for such a long period.

In 1988 the *Regie der Luchtweegen* (Belgium’s Civil Aviation Authority) unsuccessfully tried to obtain a prohibition of a pilots’ strike. The President of the *Tribunal de Bruxelles* questioned the practicality of a proportionality test, arguing that a strike was intended *per se* to provoke damage.

On the occasion of the royal marriage, the Belgian state railway company SNCFB decided to issue free transport tickets allowing Belgian residents to travel to Brussels to join in the marriage celebrations of Prince Philippe of Belgium and Princess Mathilde. The management was afraid that the SNCFB trade unions would organise a strike on the day of the marriage. They decided to file a unilateral request with the Presidents of all Civil Tribunals of Belgium to prohibit such a strike within their respective districts. The result was an unprecedented restriction of the very exercise of the right to strike by a majority of the Presidents of the *Tribunaux de première instance* (Tribunal of First Instance) in Flanders as well as by the President of the Brussels’

103. See Tribunal de Bruxelles (référé), 5 August 1987, *Revue de Droit social*, 1987 464. The *terce opposition* was judged by Tribunal de Bruxelles (référé), 31 August 1987, *Revue de Droit social* 1987, 469 ; Tribunal de Bruxelles (référé), 12 February 1988, *Chroniques de Droit social* 1988, 174; The « *Mathilde Ordonnances* » published in the December issue of the *Jurisprudence de Liège, de Mons et de Bruxelles* (1999) as well in the September issue of the *Chroniques de Droit social* (2000). For a commentary: F. Dorssemont, “De NMBS stakingsverboden : een gemiste kans tot reflectie over de grenzen van het recht te staken”, *Chroniques de Droit social* 1999, 413-421 and last but not least: Tribunal de Bruxelles (référé) 7 September 2001, unpublished and Tribunal de Bruxelles (référé sur *terce opposition*), 26 September 2001 (unpublished). For comment on both judgments, see Dorssemont (2002, 53-62).

Tribunal. The majority of the Presidents of the Wallonian *Tribunaux de première instance* felt reluctant to impose an order prohibiting strike action.¹⁰⁴

The most recent judicial intervention prohibiting strike action dates from 7 September 2001.¹⁰⁵ Once again a strike of SABENA pilots was at the heart of the issue. Pilots resorted to strike action in the face of projected mass redundancies in the final days of the Belgian airline. The employer requested the President of the *Tribunal de première Instance* to prohibit the strike. The Tribunal's President imposed a strike prohibition under the threat of *an astreinte* without any motivation whatsoever. A sectoral union of pilots and the representative trade unions opposed the ruling and filed a *tierce opposition*. The outcome was a well-grounded judgment of (another) President of the *Tribunal de Première Instance* rescinding the strike prohibition. He rejected the argument that the strike could be deemed illegal due to the alleged fact that the sectoral union had not given notification in due time. In addition, the President was extremely reluctant to construe the strike as an *abus de droit* (breach of law). He questioned whether such a test was compatible with ESC Article 31, arguing that such a proportionality test could only be applied in an extremely marginal way.

In sum, all prohibitions of strike action seem to have been based on an intuitive application of the proportionality test. Judges applying the test seldom tried to identify anything more than a mere conflict of interest, avoiding any conflict between the right to strike and other (fundamental) rights.

1.5 Teleological and contextual restrictions of the right to take collective action under Belgian law

The *Cour de Cassation* derived the existence of a right not to perform the contracted work from the reference in the *Loi relative aux prestations d'intérêt public en temps de paix* to the “*cessation collective et volontaire de travail*”. The 1948 Law makes no attempt to go into either the context or the *telos* of the “strike” concerned. The lack of contextualisation tends to safeguard any recourse to strike action. In fact, the judiciary has rarely prohibited strike action other than in exceptional cases. In view of the absence of an explicit constitutional recognition of the right to strike, the Constitution has not been a source for the contextualisation of the right to strike.

¹⁰⁴. The *ordonnances* were published in the December issue of the *Jurisprudence de Liège, de Mons et de Bruxelles* (1999) as well in the September Issue of the *Chroniques de Droit social* (2000). For a commentary: F. Dorssemont, “De NMBS stakingsverboden: een gemiste kans tot reflectie over de grenzen van het recht te staken”, *Chroniques de Droit social* 1999, 413-421.

¹⁰⁵. See Tribunal de Bruxelles (référé) 7 September 2001, unpublished and Tribunal de Bruxelles (référé sur tierce opposition), 26 september 2001 (unpublished).

The only case brought before the *Cour de Cassation* involving a strike directed against the Government was related to the question whether workers engaged in such a strike had implicitly expressed their will to end their contracts of employment.¹⁰⁶ The *Cour de Cassation* came out against such an interpretation, since the workers concerned were not challenging existing working conditions applicable to their employment relation with their employer. The presumption that the strike could be construed as an implicit refusal to continue the employment relationship under existing working conditions (constructive dismissal) was therefore not valid.

1.6 A comparison of the approaches of the ECJ and the Belgian judiciary legitimising collective action.

References to the right to strike and to the right to take collective action are to be found in the EC Treaty¹⁰⁷ (competences) and in secondary EU legislation (upholding national standards on the right to take collective action). Both references constitute the first formal recognition of the right to take collective action as a general principle of EU legislation. In this respect, there is a certain similarity with Belgian legislation. It was left up to the Belgian judiciary to recognize the right to strike, in the absence of clear-cut constitutional and statutory recognition. Contrary to Belgian case law, the ECJ did not merely recognise the right to strike, referring also to the right to take collective action, including boycott actions. The fact that the ECJ does recognize alternative kinds of collective action, such as boycotts and picketing (cf. *Schmidberger*) could act as an inspiration for Belgian judges. However, there is no obligation requiring Belgian legislation to be adapted to encompass boycotts and picketing within the scope of the right to take collective action under domestic Belgian law.

Belgian judges have seldom imposed *teleological* restrictions on the right to strike. Furthermore, they have seldom applied a genuine proportionality test in restricting the right to strike in any case of conflicting “rights”. They tend to outlaw those aspects of collective action conflicting with other rights, thus reducing the right to take collective action to the collective and voluntary refusal to perform the work specified in the employment contract. Where any proportionality test was applied, it involved the very exercise of the right to strike. In some rare cases, strikes were prohibited on the grounds that they were considered to be abusive. Such decisions were based on a comparison between the economic damage inflicted upon the employers and the workers’ interests at stake. In our view, such a proportionality test is fundamentally different to that undertaken by the ECJ. The latter’s proportionality test is related to a conflict between fundamental rights recognised as general principles and so-called fundamental freedoms. It seeks to examine whether

106. Cour de Cassation, 23 November 1967, *Revue critique de jurisprudence belge* 1968, 401.

107. Article 153 (5) TFEU (ex Article 137(5) EC) stipulates: ‘The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lockouts.’

restrictions to fundamental freedoms in order to safeguard the exercise of fundamental rights can be considered to be “proportionate”.

2. The implementation of the Posted Workers' Directive (PWD)

For a proper understanding of the *Laval*, *Rüffert* and *Commission v. Luxembourg* cases, it is essential to examine the way in which Sweden, Germany and Luxembourg have actually transposed the Posted Workers' Directive (PWD) into their respective legislation. The *Laval* judgment shows that highly institutionalised systems of collective bargaining are more “suited” for imposing the precepts of collective autonomy on foreign service providers than less institutionalised systems with a greater company-level focus. Indeed, the picketing was intended to remedy the absence of any administrative intervention declaring collective agreements “universally binding”.

Rüffert highlights the need to assess the conformity of statutory law on public procurement with PWD provisions. Statutory obligations for service providers operating under public procurement contracts to respect working conditions set down in collective agreements need to be compatible with PWD Article 3 (1) in combination with Article 3 (8). *Last but not least*, the ruling in *Commission v. Luxembourg* sheds light on the meaning of the concept of “public policy provisions” as set forth in PWD Article 3 (10).

For an impact assessment of these three judgments it is therefore essential to indicate:

- to what extent Belgian collective agreements have been institutionalised or to which extent boycotts are a necessary prerequisite to submit a foreign service provider to Belgian collective agreements (2.1)
- whether and how Belgian legislation obliges a service provider who has signed a public procurement contract to respect Belgian labour law (2.2)
- which kind of labour law provisions are considered to be “public policy provisions” and are being imposed as such on foreign service providers (2.3)

2.1 Collective agreements declared universally applicable

According to the *Loi sur les conventions collectives et les commissions paritaires* (The law on collective agreements and joint committees) collective agreements concluded at sector or cross-sector level are generally binding in two respects. It is important to understand that an administrative intervention to declare a collective agreement concluded at both levels “universally applicable” constitutes an extension of an existing legal status which in itself can be qualified as a status of a universally binding agreement.

Collective agreements will be binding for all employees of an employer bound by such. Collective agreements concluded at sector or cross-sector level will be binding when the employer is affiliated to the signatory employer’s organisation.

Furthermore, collective agreements at sector and cross-sector level are binding for non-affiliated employers as well, unless individual employment contracts state otherwise.

In Belgium, collective agreements at sector and cross-sector level can be declared universally binding at the request of one of the signatory parties.

In sum, there is no need for either boycott actions or closed shops to prevent either social competition between workers of the same plant or competition between employers active within the same sector.

2.2 Labour law and public procurement

Companies providing services under a Belgian public procurement contract are bound by the *Loi relative aux marchés publics et à certains marchés de travaux, de fournitures et de services* (Law on public procurement and on the procurement related to specific work, goods and services) of 15 June 2006, irrespective of their nationality.

Article 40 of the law provides an opportunity for Belgian public authorities to dictate compliance of certain work-related conditions, such as labour law provisions stemming from ILO core conventions¹⁰⁸. They relate to issues such as working time, prohibition of forced labour and child labour, the freedom of association and of collective bargaining, discrimination in the field of labour and employment and annual leave.

Article 42 obliges a company providing services under a public procurement contract to respect general working conditions as well as those related to health and safety which are set down in collective agreements at national,

108. ILO core conventions are Conventions nos. 29, 87, 98, 100, 105, 111, 132 and 182

regional and local level, as well as in statutory or administrative regulations. Article 42 makes no provision for these collective agreements needing to be declared universally applicable.

In this respect, Article 42 goes far beyond the approach of PWD Article 3 (2) in combination with Article 3 (8). Its approach is much more in line with ILO convention no. 94, ratified by Belgium.

2.3 Public policy provisions and the PWD

In Belgium the PWD has been transposed by the *Loi transposant la directive 96/71 du Parlement européen et du Conseil du 16 décembre 1996 concernant le détachement de travailleurs effectué dans le cadre d'une prestation de services et instaurant un régime simplifié pour la tenue de documents sociaux par les entreprises qui détachent des travailleurs en Belgique*.

Article 5 thereof sets down that all provisions related to “working conditions” enshrined in instruments sanctioned by penal sanctions need to be applied by the service provider.¹⁰⁹

The Belgian government was convinced that these instruments had to be considered as public policy provisions in the meaning of the PWD. Both the penal sanctions and the issue of workers’ protection bear witness to this assessment.

3. Legal impact of the Laval and Viking judgments

The issue of the potential impact of the *Viking* and *Laval* cases on the development of Belgian strike law is basically a non-issue and definitely not a Belgian issue. From a formal point of view, the impact *in abstracto* of the interpretation of EU legislation by the European Court of Justice is supposed to be identical for all Member States concerned. The impact of ECJ case law on purely domestic strikes which do not affect the exercise of so-called EU fundamental freedoms at trans-national level is nil.

However, it should be stressed that there is a serious risk of improper use in that judges, legal practitioners and legal scholars might make use of the *Viking* and *Laval* judgments to restrict the right to take collective action in situations which have no effect at all on the exercise of fundamental freedoms. As indicated above, the bulk of summary proceedings concern recourse to picketing where access to an establishment or undertaking is obstructed. The

¹⁰⁹. Art. 5. § 1er. L'employeur qui occupe en Belgique un travailleur détaché est tenu de respecter, pour les prestations de travail qui y sont effectuées, les conditions de travail, de rémunérations et d'emploi qui sont prévues par des dispositions légales, réglementaires ou conventionnelles, sanctionnées pénalement.

facts of *Viking* and *Laval* do not even deal with picket action blocking access to the enterprises. The use of the semantics in both cases (blockade/picketing, boycott) might lead to confusion. A distinction needs to be made between obstructive pickets and boycotts. In *Viking* the primary action of the Finnish trade unions was a mere threat to engage in strike action. In addition, the ITF's "boycott" involved a circular addressed to its affiliates requesting them not to sign any collective agreement with the Finnish ship owner. As part of its "Flag of Convenience" campaign, the ITF favoured the conclusion of collective agreements between the ship owner and the trade unions of the country where the vessel was beneficially owned.

In the *Laval* case, the so-called blockade did not primarily involve a physical blockade of the construction site. Except for a minor incident lasting about ten minutes, the Latvian posted workers were free to enter and leave the construction site. The so-called blockade was a refusal by Swedish employees of other companies to furnish goods and services for the benefit of the blacklisted Latvian service provider. Hence, there is no analogy, let alone similarity, between the nature of the collective action in question in *Viking* and *Laval* and obstructive picketing.

Some have tried to use *Viking* and *Laval* to argue that the ECJ made the recourse to collective action dependent on the so-called proportionality principle. In this respect, both judgments are seen as enshrining a principle that the economic damage provoked by the collective action needs to be proportionate to union objectives.

Notwithstanding both that strikes have seldom been forbidden on the basis of such a proportionality test and that the application of this principle has been considered not to conform to the ESC, the interpretation is appealing to some legal practitioners. However, this interpretation of the *Laval* and *Viking* judgments is not convincing at all. As mentioned earlier on, both judgments are relevant only to collective action in conflict with fundamental EU freedoms. Furthermore, the Court has never recognised the principle of proportionality construed in this manner as a restriction of collective action in conflict with the exercise of fundamental freedoms.

4. Legal impact of *Rüffert* and *Commission v. Luxembourg*

In *Rüffert* and *Commission v. Luxembourg* the Court has restricted the leeway of Member States to combat social dumping entailed by the freedom to provide services on their territory. The impact of *Rüffert* needs to be examined in relation to the *Loi relative aux marchés publics et à certains marchés de travaux, de fournitures et de services*. As seen above, that statute does not seem to restrict the applicable collective agreements to those declared universally binding. Furthermore, it does not as such restrict their application to the circumstances set forth in Article 3 (1) of the PWD. In theory, this raises a serious issue of conformity of the statute with the PWD.

In our view, Belgium is under an obligation to abide by ILO Convention no. 94. As it ratified this convention back in 1952, it can therefore invoke Article 351 TFEU (ex Article 307 EC).

As indicated above, the Court of Justice took a very restrictive stance on the issue of public policy provisions. It has been questioned¹¹⁰ whether the wide-ranging interpretation enshrined in the *Loi transposant la directive 96/71 du Parlement européen et du Conseil du 16 décembre 1996 concernant le détachement de travailleurs effectué dans le cadre d'une prestation de services et instaurant un régime simplifié pour la tenue de documents sociaux par les entreprises qui détachent des travailleurs en Belgique* is indeed in line with the PWD in combination with Article 56 TFEU (ex Article 49 of the EC).

In our view, it is impossible to answer this issue in a generic way. Indeed, it would be difficult to state that any collective agreement, whatever its content, can be considered to have a public policy character, let alone a provision not disproportionately restricting the freedom to provide services. The issue can however only be assessed on an *ad hoc* basis. This was the attitude adopted by the ECJ in *Commission v. Luxembourg*.

5. Reactions of the social partners

5.1 Impact of the ECJ decisions on the national situation

Though not having any direct impact it would seem that the ECJ decisions have had a chilling effect on industrial action. As pointed out, the Belgian law on collective action is case-law. The consequence is that judges feel the need to intervene in collective actions, mostly in summary proceedings against the actors. Intervention is limited to proceedings against pickets. However, the *Cour de Cassation* has already accepted the use of strike pickets as an integral part of the right to strike provided that picketing is done peacefully. Employers appeal to the courts because they fear the abuse of picketing. They act against strikes because of the so-called disproportionate effects of the strike. Employers argue that the right to strike has to be restricted by other rights (right of ownership, right to work, freedom of enterprise). In this context, the courts claim to deal with a conflict between fundamental rights, leading to an evaluation of the appropriateness of a strike. Employers feel

¹¹⁰. Blanpain, R. *Vrij verrichten van diensten en arbeidsrecht*, Vanden Broele, 189; Van Regenmortel, A. (2009) "De openbare orde en dwingend recht : een confrontatie tussen de Europese en de Belgische invulling", in H. Verscheuren en M.S. Houwerzijl, *Toepasselijk arbeidsrecht over de grenzen heen*, Deventer, Kluwer, 2009, 142-147 and Van Schoebeke, B. (2005) "Het grensoverschrijdend verrichten van diensten en de terbeschikkingstelling van werknemers: de toepassing van het nationale arbeidsrecht onder druk door het principe van vrij verkeer van diensten", in B. TILLEMANN en A. VERBEKE (ed.), *Actualia Vermogensrecht*, Brugge, Die Keure 2005, 677-678

themselves encouraged by the European judgments which can also be seen as establishing a balance between fundamental rights. Under the argument that it involves conflicts between fundamental rights, the judge is invited to make an assessment of the appropriateness of a strike's objectives.

5.2 Reactions to the European jurisdiction

Belgium does have a system to make collective agreements universally applicable. A collective agreement can get an *erga omnes* binding effect by royal decree. This kind of legal instrument makes the violation of the collective agreement a criminal breach of justice. The PWD was transposed in such a way that all collective agreements which can lead to penalties being imposed under criminal law have to be considered as part of the minimum standards for all workers employed on Belgian territory. This provides trade unions with a powerful instrument for enforcing the majority of wage and working conditions. No industrial action is needed to make collective agreements applicable on foreign workers.

5.3 Influence of the decisions on the social partners

A discussion took place in the National Labour Council in order to find out whether the Belgium social system was in harmony with the ECJ decisions (system of making collective agreements universally binding as well as PWD transposition). The social partners felt that the Belgian Government might be forced to explain how and why the obligation of the service provider to apply labour law which is enforced through criminal sanctions could be construed as a matter of public policy. In view of the *Commission v. Luxemburg* (C-319/06) judgment the social partners feared that the "public policy" concept (all collective agreements which are binding *erga omnes* are enforceable on the basis of criminal law) could be considered by the ECJ as being too broad.

5.4 Influence on the decisions on national courts

Employers are using the judgments to fight strikes and picketing. At the moment there is a case before the Brussels civil court about a strike at the airport in April 2007. Firemen at the national airport came out on strike on the last Friday of the Easter holidays, causing a large number of passengers to be stuck at the airport for a day. A lawyer brought together some 275 passengers who were victims of the strike and introduced a kind of class action against the trade unions and the strikers. One of the arguments used before the court was that the action's objectives were disproportionate to the damage caused. The applicants further argued that the strike violated free movement principles. The case is still pending. On 29 October 2009 an interlocutory ruling was given. The Tribunal de Première Instance of Brussels called for a re-opening of the debate, urging the parties to examine whether the applicants could invoke rights guaranteed under Community law against

the workers on strike and if so which were these rights. Furthermore, the judge urged the parties to examine whether the fact that the strike had not been notified violated these rights.

6. Conclusions

At present, the four ECJ cases have not yet resulted in any parliamentary debate on adapting Belgian legislation. The law on collective action continues to be case-law. Moreover the statutory instruments relating to public procurement and PWD implementation have not been amended. Until now, courts have not made reference to these four cases. In the field of collective action, a tendency to refer to *Laval* and *Viking* in a highly improper manner in legal doctrine and debate needs highlighting. Thus, it has been erroneously argued that these judgments would make purely internal collective action, completely unassociated with fundamental freedoms, subject to the principle of proportionality. Furthermore, *Rüffert* raises questions with regard to the conformity of a Belgian statutory instrument related to public procurement which urges a company providing services under a public procurement contract to respect collective agreement irrespective of whether they are universally binding. A major concern affects the statutory implementation of the PWD. The statute provides evidence of a broad interpretation of the public policy exception, since under Belgian law all labour law provisions enforceable with criminal sanctions are considered to have a public policy character.

D. Italy

The impact of Viking and Laval on Italian legislation and regulations concerning collective action*

Edoardo Ales** and Giovanni Orlandini***

Abstract

In Italy workers and employers are free to organise themselves collectively (Art. 39 Const.) and strike is a right exercised within the framework of the statutory provisions regulating it (Art. 40 Const.). The lack of any statutory intervention enforcing and specifying the principle laid down in Art. 40 Const., together with the decision not to repeal the provisions contained in Art. 502 ff. of the fascist Penal Code raised the question about the effectiveness of the right to strike and its real meaning. The *Corte di Cassazione* (Supreme Court of Cassation) and, above all, the Constitutional Court, were called to answer these questions by establishing a set of principles which still stand. Any constraints to the exercise of the right to strike involve the non-infringement of other rights protected by the Constitution (so-called “external limits” to the right to strike). These include the right of employers (Art. 41 Const.) to resume productive activities once the strike is over. Art. 41 Const. enables courts to identify an employer’s interest in protecting his company in its “static” or vertical dimension, while under Community law a company must be considered in its “dynamic” and horizontal dimension. The ECJ considers the right to strike a last resort to settle collective disputes, i.e. as an instrument that is, through the proportionality principle, only justified when all other options to settle a dispute have been exhausted. In Italy, there is no generally legally binding procedural restriction on collective action. The situation is quite different for “essential” services, where workers and trade unions are bound to comply with the rules laid down by Law 146/90 aimed at “balancing the exercise of the right to strike with the enjoyment of the personal rights protected by the Constitution”. As a consequence of the ECJ’s judgments, strikes posing “unjustified” obstacles to the “fundamental” economic freedoms would justify tort liability stemming from an event that occurs legally under a contract, exposing strikers to liability for the damage incurred by holders of legitimate interests that are “external” to the employment relationship. The calling of a strike, then, could be considered as a sort of inducement on the part of the association to commit a tort; but it is

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difficult to predict if Italian labour courts will adopt such an unusual interpretation of the civil law principles in this sector.

1. Collective action in Italy: what are we talking about?

1.1 Historical background

After the fall of the Fascist regime (1943), freedom of association and the right to take collective action were *de facto* restored. The 1948 Constitution eventually provided the legislative framework for a new legal order firmly rejecting the fascist-corporatist ideology and getting rid of the liberal “collective laissez-faire” (Giugni 2001, 215). Workers and employers shall be free to organise themselves collectively (Art. 39 Const.); strike is a right exercised within the framework of the statutory provisions which regulate it (Art. 40 Const.). Nothing is said about lock-outs.

However, the lack of any statutory intervention enforcing and specifying the principle laid down in Art. 40 Const.¹¹¹, together with the decision not to repeal the provisions contained in Art. 502 ff. of the fascist Penal Code, soon raised the question about the effectiveness of the right to strike and its real meaning. The *Corte di Cassazione* and, above all, the Constitutional Court, were called to answer these questions by establishing a set of principles which still stand.

Although the *Corte di Cassazione* had already clearly stated in 1952 that, within the framework of the new constitutional order, the right to strike protected participants from any breach of contract (the only consequence being the loss of their wages¹¹²), and, though subsequently affirming in 1953 that lock-out could no longer be considered a criminal offence¹¹³, the Constitutional Court was called upon in 1960 to decide upon the role Art. 502 of the Penal Code (lock-out and strike as a criminal offence) still played after the fall of the fascist-corporatist regime¹¹⁴. In its landmark decision, the Court judged Art. 502 to be incompatible with the new constitutional order in which freedom of association (Art. 39 Const.) was strongly linked to the right to strike (Art. 40 Const.) and to employers’ freedom to lock workers out - the only consequence of the latter being that workers can claim their wages (according to the principle of *mora credendi* – Art. 1206 Civil Code), except in the case of an illegitimate strike.

111. Statutory regulations restricting the right to strike have been explicitly provided only in the case of workers employed in nuclear sites (Decree of the P.R. n. 185 of 1964, Art. 49 and 129), air traffic controllers (Act n. 42 of 1980, Art. 4), and for so-called essential services (Act n. 146 of 1990) - see below par. VI.

112. Corte di Cassazione, 7 June 1952, n. 1682, in *Massimario di Giurisprudenza del Lavoro*, 1952, 124.

113. Corte di Cassazione, 18 June 1952, n. 1841, in *Massimario di Giurisprudenza del Lavoro*, 1953, 203.

114. Corte Costituzionale, 4 May 1960, n. 29, in *Giurisprudenza Costituzionale*, 1960, 497.

1.2 Concept of collective action

According to a long-lasting tradition in Italian industrial relations, collective action and strike can be basically understood as synonymous from the employees' side. This finds confirmation in Art. 40 Const. which refers directly to strikes when actually naming the instrument workers can rely on for defending their interests and rights. Without any precise statutory definition of what constitutes a strike, there has been a thirty-year reciprocal and productive confrontation involving the highly differentiated views about how to balance workers' social rights and employers' economic freedoms in case law and legal doctrine (Borgogelli 1998; Romei 1999).

Paradoxically, after having, in the 1950's, strictly defined strike as a collective, complete and continuous withdrawal of labour by the whole workforce for the entire working day(s), preceded by a notice, which shall take place outside the plant, producing proportionate damage to the employer and to the employee and aimed at concluding a collective agreement¹¹⁵, the *Corte di Cassazione*, in the 1980's, buttressed by the doctrine (Ghezzi 1968; Tarello 1972), reached the opposite conclusion according to which the very notion of strike has to be found in what is practically understood as such by common social sense¹¹⁶.

This meant that forms of strike previously regarded as anomalous and illegitimate, such as intermittent strikes (*scioperi a singhiozzo*), rotating or articulated strikes - i.e. strikes by groups or shifts (*scioperi a scacchiera o articolati*)¹¹⁷, strikes without leaving premises for a limited period of time (*scioperi bianchi*) and bans on overtime¹¹⁸ now undisputedly fall under the scope of Art. 40 Const.

On the other hand, there was no convergence in *Corte di Cassazione* case law regarding the legality of a worker's refusal to perform his duties in full or in part because of a strike (the so-called *sciopero delle mansioni*). This has been regarded both as legitimate¹¹⁹ and as in breach of contract¹²⁰ (Giugni 2001, 263; Vallebona 2005, 243) - in the latter case permitting the employer to refuse to pay for work only partially carried out. Working to rule, go-slows

115. See, for example, Corte di Cassazione, 4 March 1952, n. 584, in *Foro Italiano*, 1952, I, c. 420; Corte di Cassazione, 3 March 1967, n. 512, in *Massimario di Giurisprudenza del Lavoro*, 1967, 363.

116. Corte di Cassazione, 30 January 1980, n. 711, in *Foro Italiano*, 1980, I, c. 25.

117. Corte di Cassazione, 28 October 1991, n. 11477, in *Rivista Italiana di Diritto del Lavoro*, 1992, II, 854.

118. Corte di Cassazione, 25 November 2003, n. 17995, in *Massimario di Giurisprudenza del Lavoro*, 2004, 232.

119. See, for example, Corte di Cassazione, 9 May 1984, n. 2840, in *Giustizia Civile*, 1984, I, 2070; Corte di Cassazione, 6 October 1999, n. 11147, in *Massimario di Giurisprudenza del Lavoro*, 1999, 1286.

120. See, for example, Corte di Cassazione, 28 March 1986, n. 2214, in *Massimario di Giurisprudenza del Lavoro*, 1986, 472; Corte di Cassazione, 10 January 1994, n. 162, in *Diritto e Pratica del Lavoro*, 1994, 893.

and non-cooperation are on the other hand clearly considered to be in breach of contract¹²¹ (Giugni 2001, 262; Vallebona 2005, 244).

In a more general perspective, case law unanimously sets forth that employers facing the above-mentioned forms of atypical strikes shall not be obliged to accept and pay for any work done by workers on the day of the strike after the strike has ended, if they can prove (Art. 1256 and 1464 Civil Code) that such work is not in keeping with the organisation of the enterprise¹²² (for a critical review cf. Borgogelli 1998, 171 ff).

According to case law, all other forms of collective action fall outside the concept of a strike and are consequently excluded from the scope of application of Art. 40 Const.

Moreover, one needs to bear in mind that the decision not to repeal the relevant provisions set down in the fascist Penal Code in this field still left open the question whether boycotts (Art. 507 Penal Code), factory occupation/sit-ins (Art. 508 par. 1 Penal Code) and sabotage (Art. 508 par. 2 Penal Code) are to be seen as criminal offences. The Constitutional Court, once again called upon to answer this question, came to the conclusion that all these forms of collective action, as they affected employers' freedom to perform their economic activity and were not essentially connected to the withdrawal of labour, should be regarded as criminal offences, even within the democratic legal framework¹²³.

As picketing and blockades of goods entering or leaving factories were not explicitly referred to in the provisions laid down by the fascist Penal Code, no compatibility test had ever been applied to them by the Constitutional Court. It has been up to the *Corte di Cassazione* to decide whether they fall within the scope and context of a strike, meaning that they would be covered by Art. 40 Const. According to the *Corte di Cassazione*, any blockade of goods entering or leaving factories had to be regarded as a criminal offence under Art. 610 Penal Code¹²⁴, while picketing was to be considered as such only if it

121. See, for example, Corte di Cassazione, 3 March 1967, n. 512, in *Massimario di Giurisprudenza del Lavoro*, 1967, 363.

122. See, for example, Corte di Cassazione, 13 February 1978, n. 688, in *Foro Italiano*, 1978, I, c. 1196; Corte di Cassazione, 13 January 1988, n. 150, in *Orientamenti di Giurisprudenza del Lavoro*, 1988, 13; Corte di Cassazione, 1 September 1997, n. 8273, in *Massimario di Giurisprudenza del Lavoro*, 1997, 800; Corte di Cassazione, 4 March 2000, n. 2446, in *Giustizia Civile Massimario*, 1986, 3.

123. As for boycotts conducted without violence and threat, see Corte Costituzionale, 17 April 1969, no. 84, in *Massimario di Giurisprudenza del Lavoro*, 1969, 177; as for factory occupation, only if workers' intent to impede or disrupt labour has been proved by the public prosecutor, see Corte Costituzionale, 17 July 1975, no. 220, in *Massimario di Giurisprudenza del Lavoro*, 1975, 282; as for sabotage, Corte Costituzionale, 17 July 1975, n. 220.

124. Corte di Cassazione, Penal Chamber, 7 October 1980, n. 10676 (Ferretti), in *Foro Italiano. Repertorio, ad vocem Violenza privata*, 5.

involved the violent¹²⁵ and/or physical impediment¹²⁶ of non-strikers reaching their places of work. On the other hand, a moral suasion campaign, also seen as a blockade of goods, is not subject to prosecution¹²⁷. This is to protect, on the one hand, non-strikers' general right to work, as guaranteed by Art. 4 Const. and, on the other hand, employers' economic freedom, as recognised by Art. 41 § 1 Const. (see section VII below).

Although, at least in our view, a major problem for the effectiveness of the right to strike, the hiring of workers on an open-ended basis (so-called *crumiri esterni*) or the employment of non-strikers (so-called *crumiri interni*) in order to keep operations going is permitted by case law, on the grounds that it allows an employer to mitigate the impact of the strike¹²⁸. On the contrary, the hiring of fixed-term or on-call workers or using the services of a temporary agency to substitute strikers is explicitly prohibited by the law¹²⁹.

2. Collective action: juridical status.

2.1 Sources of definition and regulation of collective action

International instruments have never had any significant impact on the Italian legal framework concerning the definition and regulation of collective action.

This is also true if one looks at the restrictive principles adopted by the ILO's Freedom of Association Committee in relation to the (allegedly too tight) limitations on the right to strike in essential services (ILO 2006, §§ 572 – 627) and at the conclusions reached by the European Committee of Social Rights on the non-conformity of the situation in Italy with regard to Art. 6 § 4 of the European Social Charta (Revised)¹³⁰ (ECSR 2006, 11). None of these have been seriously taken into account by the Italian legislator. Furthermore they have been largely ignored by national trade unions.

On the other hand, without the backing of any legislative implementation of Art. 40 Const. in the years before 1990, collective action or, better, the right to strike, had been conceptualised through the already mentioned productive

¹²⁵. See, for example, Corte di Cassazione, 3 November 1992, n. 11905, in *Diritto e Pratica del Lavoro*, 1993, 54.

¹²⁶. Corte di Cassazione, Penal Chamber, 25 June 1979, n. 5828 (Filippi), in *Massimario di Giurisprudenza del Lavoro*, 1980, 304.

¹²⁷. See, for example, Corte di Cassazione, Penal Chamber, 26 March 1975, n. 516 (Vanzo), in *Massimario di Giurisprudenza del Lavoro*, 1976, 787.

¹²⁸. See, for example, Corte di Cassazione, 4 July 2002, n. 9709, in *Foro Italiano*, 2003, I, 205.

¹²⁹. Respectively by Art. 3 § 1 Legislative Decree no. 368 of 2001; Art. 34 § 3.a Legislative Decree no. 276 of 2003; Art. 20 §5.a Legislative Decree no. 276 of 2003.

¹³⁰. “On the ground that – (the Committee) is not able to assess whether the Government’s right to issue decrees restricting strikes in essential public services falls within the limits of Art. G of the Revised Charter; - the requirement to notify the duration of strikes concerning essential public services to the employer prior to strike action is excessive.”

dialogue between doctrine and case law, with collective bargaining being focused more on establishing procedural requirements such as no-strike clauses and cooling-off periods.

2.2 (Legal) definition of the main features of collective action

As already stated, for decades the lack of statutory definitions or restrictions was the main characteristic of the Italian legal framework on collective action. Even when drafting the statutory strike restrictions for essential services (Law 146/1990, substantially amended by Law 83/2000), the legislator was reticent about giving any definition of what exactly was meant by collective action in general and by strike in particular. Indeed, the main aim of the above-mentioned legislative provisions is more regulation than definition (see section VI below).

Consequently, strikes – the main manifestation of collective action in Italy – have been conceptualised through the productive dialogue between doctrine and case law. Indeed, according to a widely accepted definition already proposed in the late 1940's (F. Santoro Passarelli 1949), a strike is first and foremost the withdrawal of work by a single worker. A coalition of workers (collectivity) is needed, on the other hand, to call out a strike. However, as stated by the *Corte di Cassazione* in its already mentioned 1980 landmark decision¹³¹, the very notion of a strike is to be found in what is understood in practice by common social sense, i.e. “a collective abstention from work decided by a group of workers and aimed at reaching a common goal”. No limitation can be imposed on this broad notion either with regard to the duration of the abstention (continuous, not intermittent), or to its comprehensiveness (affecting the whole and not just part of productive activity) or, at the end of the day, to its damage factor (‘too high’ for the employer, according to the last resort principle: see section VI below).

3. Economic freedoms as constraints on industrial disputes

Viking and *Laval* do not say much on strikes themselves¹³², but they do say a lot about market freedoms, their content and their consequent place in the hierarchy of constitutional values. The issue of the “direct horizontal effect” of

¹³¹. Corte di Cassazione, 30 January 1980, n. 711, in *Foro Italiano*, 1980, I, c. 25.

¹³². Beside a formal reference to Art. 28 of the Nice Charter and other international sources (ECJ, C-438/05, *Viking*, p. 44 and C-341/05, *Laval*, p. 91), the Court does not adopt any Community “notion” on top of those existing in national legal systems (possibly enhancing or strengthening them). The Charter only supports the statement that, if the right is recognised in national legal systems, it also belongs to the general EU principles; but for this to occur, it must be lawfully exercised under domestic law. In other words, the “fundamental” right to take collective action in the EU exists as long as it exists in national systems. If this is not the case or if the right is not protected in specific cases, the problem of its assertion for the EU disappears.

Community laws granting economic freedoms is crucial in this context (see, *inter alia*, Ballestrero 2008, 374 ff. and Lo Faro 2008, 77 ff.). Market freedoms are not only fundamental freedoms whose exercise must be guaranteed by the State but, indeed, “rights” that must be protected also from any harm arising from acts of private individuals.

A fundamental economic right previously unknown in the Italian constitutional traditions is introduced into national legislation. The new principle that can be inferred from *Viking* and *Laval* does not, however, consist of acknowledging that industrial action can be restricted in order to protect the other party’s interest. What is new is the type of restriction that has been identified, leading to a major upgrading of the content of freedom of enterprise acknowledged by all European constitutional systems.

In Italy, an employer’s economic freedom is protected against industrial action. In this respect *Viking* and *Laval* therefore represent no surprise. The *Corte di Cassazione* has specified that any restrictions on exercising the right to strike stem from the requirement that such a right, in whatever form or way exercised, should not infringe upon other constitutionally protected rights (“external limits” of the right to strike), including the right of employers to resume productive activities once the strike is over (so-called “business productivity” protected by Art. 41 Const.)¹³³.

There is, however, a substantial difference between the restriction inferred by Italian courts on the basis of Art. 41 Const. and that inferred by Community judges on the basis of EC Treaty Art. 43 and 49. To use Natalino Irti’s words (2001, 19), Art. 41 Const. enables courts to establish an employer’s interest (which cannot be restricted by the right to strike) to protect his company in its “static” or vertical dimension, while under Community law a company must be considered in its “dynamic” and horizontal dimension.

The first, national restriction concerns the pathological stage of a company’s life-cycle, protecting its survival and its ability to “remain” on the market once the industrial dispute is over; hence, the restriction also protects workers’ interests, as demonstrated by the reference that the *Corte di Cassazione* makes to the duality of the provisions contained in Art. 4 Const (on the right to work) and in Art. 41 Const. (Garofalo 1991, 285).

The second EU restriction concerns the physiology of a company’s life-cycle, involving the protection of its business and its freedom to move and act on the market; hence, the assertion that this interest cannot be restricted by a collective agreement (the merits of which thereby become open to review), whose function is precisely to regulate the exercise of the economic freedom of the employer. Such an assertion undoubtedly clashes with the “voluntaristic” principle upon which modern collective labour law has developed (including contributions from Italian scholars (Carabelli 2008, 162

¹³³. Cassazione civile 30 January 1980, no. 711.

recalling Giugni's and Mancini's teachings), yet it must be borne in mind that this principle was developed in the context of another legal system not "contaminated" by Community market principles and therefore characterised by a different scale of "constitutional" values.

4. The principle of last resort and the purpose of the strike

In *Viking* the ECJ considers the right to strike as a last resort to settle collective disputes, i.e. as an instrument that, on the basis of the proportionality principle, is justified only when all the other options to settle a dispute have been exhausted (*Viking*, paragraph 87).

The principle of "last resort" expressed by the ECJ in *Viking* testifies to a preference for institutionalised and participatory industrial relation systems. The infringement of arbitration or conciliation procedures provided for by the national legal system may give rise to unprecedented liabilities directly based on internal market law.

In the Italian private sector there is no legally binding procedural restriction on collective action. The situation is quite different, however, for "essential" public services, where workers and trade unions are bound to comply with the rules and regulations explicitly listed in Law 146/90 aimed at "balancing the exercise of the right to strike with the enjoyment of the personal rights protected by the Constitution. Those rules have both a procedural and a substantive nature, i.e. they concern both the "quantum" (quantity) of services to be supplied regardless of any strike (the so-called *prestazioni indispensabili*) and the procedure needing to be complied with before going on strike. A trade union or a group of workers calling a strike have to give at least ten days' notice and indicate how long the strike will last. Unions are also required to attempt conciliation, which takes place either before a public body or under the procedure specified in a collective agreement.

In the light of what the European Court of Justice has stated in *Viking*, trade unions and workers involved in essential public services who go on strike without complying with the conciliation procedures provided for in Law 146/90 and in collective agreements the former refers to, risk not only having the sanctions laid down by the law imposed, but also being held liable for any damage incurred to the company, if the strike affects its freedom of movement.

In the private sector as well uncertainties arise, should collective agreements make the conduct of a strike dependent upon compliance with procedural obligations. Under Italian law, only the signatories of such an agreement are bound by it.

Even more uncertain are issues pertaining to industrial action for reasons other than the bargaining of a collective agreement, for example for political reasons or protests, all of which represent legitimate expressions of industrial

dispute under Italian case-law¹³⁴. This case-law may be overturned if applied to internal market issues, since strikes outside the framework of collective bargaining are potentially illegal under Community law in the light of necessity and proportionality tests. In such cases it is difficult to rely on the objective of “protection of workers” and, more generally, the existence of any “overriding reasons of public interest” on which the action is grounded (*Viking*, paragraph 77).

Last but not least, the need to demonstrate that “jobs and conditions of employment” are “jeopardised or under serious threat” (*Viking*, paragraph 81) acts as a deterrent against any trade union action taken to prevent the exercise of market freedom (and not to regulate it, as in the *Viking* case) and founded on fears attributable for example to the “indirect” effects of any outsourcing or off-shoring. Looked at more closely, this is the most outstanding direct effect of *Viking*: to cast doubts on the legality of any strike whose aim is to oppose outsourcing or off-shoring.

5. Freedom to provide services and collective agreements

As a consequence of the liberal (Reich 2008, 156) interpretation of the PWD, collective agreements only play a marginal role among instruments regulating the services market. A Member State needs to assess carefully which collective agreements it can require companies providing services in its territory to comply with. Such collective agreements must be generally applicable and be binding for all companies operating in the respective service sector. The general application of the agreements may stem from their having *erga omnes* effects or having acquired such “in practice” in the ways indicated by Art. 3(8) of the Directive.

Compliance with a collective agreement may be imposed on foreign service companies only with reference to clauses that set minimum “mandatory” standards throughout the national territory in matters indicated by the Directive in Art. 3(1). The necessarily mandatory nature of a national collective agreement as against any lower level contracts stems from the fact that, as already clarified in *Portugaia Construções* of 2002 (ECJ C-164/99, paragraph 34), the ability of employers in the host state to derogate from a collective agreement when bargaining at company level would amount to a competitive advantage prohibited under Art. 49 EC Treaty.

In Italy, collective agreements are not universally applicable, which strongly reduces the possibility of requiring compliance with them by foreign service

¹³⁴. The Corte di Cassazione (21 August 2004, no. 16515), by overruling the notion of a political strike as a mere freedom adopted by the Constitutional Court (27 December 1974, no. 290), has recognised that industrial action conducted for political purposes is fully legal from a civil and criminal law point of view.

companies. Even if an employer is not a member of the employers' association signatory to the industry-wide agreement, he is nonetheless bound to comply with the minimum wage levels provided for in the collective agreement¹³⁵. Given these effects of collective agreements, compliance with the clauses on minimum rates of pay, the only ones that in fact have general effects, is all that can be imposed on foreign service providers in Italy. This exposes the Italian law implementing Directive 96/71 to attacks or at least to an interpretation that conforms to Community law, since it does not draw a distinction between clauses that are universally applicable and clauses that are only binding for the signatories of a collective agreement (Art. 3(1), Legislative Decree 72/00) (Orlandini 2008, 65 ff.).

It is worth reflecting on the implications of the enforcement of such market regulation principles for those cases and matters which (though included in the list of Art. 3(1) of the Directive) are regulated by collective agreement derogating from the law. Such regulation can hardly be applied to foreign companies.

If one considers, for instance, the Italian regulation on working time, the Directive lays down that the law and (possibly) collective agreements on "maximum work periods and minimum rest periods" are to be applied. Legislative Decree 66/03 (implementing Directives 93/104/EC and 2000/34/EC) merely sets (in Art. 3) 40 hours as the regular weekly working time (an issue that does not fall under Art. 3(1) of Directive 96/71) and 48 hours as the maximum weekly working time (Art. 4(2)), always to be calculated as an average (a matter that theoretically falls under the list contained in the Directive). Though the decree does not stipulate anything else, it does refer to collective bargaining at all levels both for the identification of possible weekly limits (Art. 4(1)) and for the definition of the reference period in the case of a multi-period calculation (Art. 4(3, 4))¹³⁶. The same regulation applies to minimum daily (Art. 7 and 17) and weekly (Art. 9) rest periods.

A regulatory framework emerges that does not in fact set minimum standards on "maximum work periods and minimum rest periods" common to all companies of a sector, and therefore the relevant national regulation is not applicable to foreign companies. Since the law of the host country enables national companies to "escape" the restrictions imposed by the law or a

135. This partial extension of the subjective enforceability of collective agreements has been recognised by the *Corte di Cassazione's* case law, which, since the '50s, has sanctioned the mandatory nature of Art. 36 Const.. This Article recognises the right of workers to a wage that is proportionate to the quantity and quality of the work performed and sufficient in any case to ensure a free and decent life for workers and their families; all lower Courts (under Art. 2099(2) of the Civil Code) have to define the wage level imposed by the Constitution by specifically referring to the minimum pay provided for in industry-wide collective agreements.

136. The multi-period calculation then raises further problems of application to foreign posted workers, suffice it to think of what it means to apply average limits for a reference period of 10 or 12 months, if posting lasts 6 months.

national agreement, these restrictions cannot be imposed on companies whose place of establishment is located in other Member States. In short, the “liberal” interpretation of Directive 96/71 ends up producing the contradictory, if not paradoxical effect, of rendering the Directive inapplicable in practice.

The residual role played by collective agreements in Italy has a restrictive impact on the feasibility of any industrial dispute. The Court considers the principles restricting the State’s power to also be applicable even when compliance with a collective agreement is imposed through industrial action. In this respect, *Laval* is indeed rather ambiguous. It is not clear whether the Luxembourg Court does or does not envisage the possibility of taking industrial action in order to impose compliance with a collective agreement, as an alternative to the methods laid down in Art. 3(8) of the Directive. Even if this possibility is acknowledged, trade unions are not permitted to rely on the public policy clause under Art. 3(10) (for a critical assessment, see Ales 2008, 12 and Giubboni 2008)¹³⁷. Looked at more closely, this latter aspect is hardly relevant in the Italian legal system because the constraints on the use of collective agreements due to their effects and contractual structure are such that the issue of public policy provisions cannot be raised. If industrial action can only be used to demand foreign companies to apply the minimum contract level imposed by the State using the implementation law, the only strike that can be conducted legally in Italy on the internal service market is one whose aim is to achieve compliance with the minimum rates of pay established by the national collective agreement in force.

The effect of these principles on the domestic labour market is that the more flexible and decentralised the bargaining structure and the greater the role of bargaining vis-à-vis the law is, the weaker State’s possibilities are of defending workers against social dumping. If a “flexible” model is adopted, with a “weak” national collective agreement that can be deviated from at lower levels, then the possibility of imposing “rigid” constraints on foreign companies temporarily operating on the national market disappears, since these constraints do not exist for “national” companies (Sciarra 2008, 264). It is also appropriate to reflect on the consequences for cross-border competition dynamics when, as is the case for Italy, a new collective bargaining structure is going to be adopted at national level¹³⁸.

¹³⁷. *Laval* (paragraph 84) does not seem to deny the possibility for public policy provisions to be included in collective agreement clauses, but it rules out the possibility that such a “qualification” be carried out in the context of management and labour bargaining, as these are not “bodies governed by public law”. This seems to be confirmed by the judgment delivered in *Commission/Luxembourg*, Case C-319/06, that, by stating that provisions of collective agreements “which in their entirety and for the simple reason that they derive from that type of measure, cannot fall under that definition either” (paragraph 66), implicitly admits that some of them may be considered as “public policy provisions”.

¹³⁸. On April 15th 2009 an agreement reforming the bargaining structure in a way that strengthens the role of decentralised bargaining was signed by the most important employers’ and workers’ organisations (against the opposition of CGIL).

6. Compensation claims from companies hit by an illegal strike

The recognition of the direct horizontal effects EC Treaty norms have on economic freedoms acknowledges the possibility an employer has to sue the other party for damages. This is similar to what is provided for in the case of infringements of Community competition law.

The type of action that can be brought and the liability that can be claimed is left to the State's discretion. However, under Community law "effective remedies" that can provide real relief to the victim, including compensating the actual loss and the loss of profit, must be granted (ECJ C-295/04, *Manfredi*). Interwoven problems thereby emerge between "Community" strike-related liability and national regulations, with liability potentially being incurred even though a strike is fully legal under national law.

Since in any conflict between domestic and Community law the primacy of the latter implies that the former should not be applied, one could maintain that in the Italian legal order collective action is no longer protected under Art. 40 Const., as this norm could no longer be relied on because of the infringement of the "new" external limit redefining its scope. A worker engaged in a strike that is contrary to the internal market rules would in such a case run the risk of having disciplinary sanctions imposed or even of being dismissed for breach of contract. In my opinion, such a threat should be avoided, as it is not required under Community law, which on the contrary stipulates that "effective remedies" are to be granted to the victim but does not mention anything on the contractual aspects of the employment relationship.

If workers are to be protected from disciplinary measures, then it becomes mandatory to envisage a tort liability (in Italian civil law, *responsabilità extra-contrattuale*) derived from a legal strike conducted under the "internal" point of view of the employment relationship (Ghera 1970, especially 403 ff.). A strike posing "unjustified" obstacles to the "fundamental" economic freedoms would justify tort liability stemming from an event that occurs legally under a contract. It would not stop the right to strike under Art. 40 Const. being legitimately exercised, thereby potentially discontinuing mutual contractual obligations, yet it would expose strikers to liability for the damage incurred by holders of legitimate interests "external" to the employment relationship.

The picture becomes even more complex if one considers that in the main proceedings of *Viking* and *Laval* it was the trade union and not the workers who were being sued for damages, thereby reflecting the organisation-related nature of the right to strike typical of the Swedish and Finnish systems (Wedderburn 1998, 168 ff.). In systems such as the Italian, in which every individual is entitled to strike, there emerges the problem of unions' liability that may be incremental to or replace that of individual workers. The solution to this problem is by no means easy, since it would entail recognizing the existence of the tort liability of an association without a legal personality (as

is the case with trade unions) due to actions of their members or even of third parties who are not members. Under Italian civil law, an association is responsible in terms of direct (under Art. 2043 c.c.) or indirect (under Art. 2049 c.c.) liability for tort obligations stemming from illegal acts committed by its managers or employees (*inter alia*, Basile 2000, 538). Workers on strike cannot be qualified as such. The calling of a strike could be interpreted as a kind of inducement to commit a tort on the part of the association; but it is difficult to predict if Italian labour courts will adopt such an unusual interpretation of the civil law principles in this sector.

7. Conclusion

It is difficult to predict if the ECJ decisions will have any impact on the Italian national situation. Up to now international instruments have never had any significant impact on the Italian legal framework concerning the definition and the regulation of collective action. The absence of statutory definitions and restrictions has been the main characteristic of the Italian legal framework regarding collective action. Therefore it is likely that the ECJ jurisdiction will not have any impact on industrial disputes of purely national nature.

In transnational cases falling under ECJ jurisdiction we can expect discrepancies between the national Italian and the supranational concepts.

Whereas Italian regulation of collective action is only directed at protecting a company's survival and its ability to remain on the market once an industrial dispute is over, Community law protects the company's business and its freedom to move and act on the market.

Also the relevance of procedural obligations is different: the ECJ considers the right to strike as a last resort to settle collective disputes. Under Italian law there is no legally binding procedural restriction on collective action applicable to the private sector.

ECJ rulings may result in conflicts with regard to the transposition of the PWD. In Italy collective agreements cannot be declared universally applicable. However Italian employers are bound to comply with the minimum wage levels provided for in collective agreements. Since the collective agreements are not universally applicable, any requirement for foreign service providers to comply with them by is greatly reduced.

E. Poland

Viking, Laval and Rüffert from a Polish perspective

Joanna Unterschütz

Abstract

This article describes the reception of the *Viking*, *Laval* and *Rüffert* decisions in Poland. The reception is analysed against the background of the Polish system of industrial relations. The system is described with regard to the labour law sources and the social reality of regulation by the social partners.

Based on a literature review and empirical evidence the author comes to the conclusion that the expected impact the recent ECJ judgments will have in Poland is not high. Possible explanations for this are discussed. One of the main reasons could be the Polish system of industrial relations where individual and collective industrial relations are regulated predominantly by statutory law, with collective agreements having lesser relevance. Another reason could be the weakness of the social partners.

1. Literature review

The recent ECJ judgments in the *Viking* (C-348/05), *Laval* (C-341/05) and *Rüffert* (C-346/06) cases have attracted a lot of attention, especially in the countries directly affected by their content.

It is however surprising that the impact is nearly unperceivable in Polish legal literature.

Authors of several publications mention the *Laval* and *Viking* case in reference to the ECJ position on fundamental freedoms and fundamental rights¹³⁹. A monographic work on the free movement of persons and the freedom to provide services¹⁴⁰ covering various aspects of these phenomena, including the posting of workers, was written before all three judgments were

139. A. Florczak (ed.) (2009) *Ochrona praw podstawowych w Unii Europejskiej*, Warszawa; Cieśliński, A. (2009) *Wspólnotowe prawo gospodarcze. T. 1, Swobody rynku wewnętrznego*, Warszawa; Wyrozumska, A. (2008) *Znaczenie prawne zmiany statusu Karty Praw Podstawowych Unii Europejskiej w Traktacie lizbońskim oraz Protokołu polsko-brytyjskiego*, Glosa nr 4.

140. Biernat, S., S. Dudzik (ed.) (2009) *Przepływ osób i świadczenie usług w Unii Europejskiej*, Warszawa

passed. Thus S. Majkowska- Szulc mentions the *Laval* case being filed, explains its background, but does not draw any conclusions for the PWD's application¹⁴¹.

A. Frąckowiak – Adamska in her work on the principle of proportionality mentions the *Viking* and *Laval* judgments in the context of the protection of fundamental rights. The author underlines ECJ statements relating to the necessity of finding the right balance between fundamental freedoms and fundamental rights and to the applicability of the proportionality principle, but also to the EU's social dimension¹⁴².

A.M. Świątkowski in his commentary on the Act on the Resolution of Collective Labour Disputes describes the regional dimension of the Act in relation to the *acquis communautaire* and European labour legislation in particular. The author also shortly presents the main conclusions of the *Viking* and *Laval* judgments, underlining both the fundamental character of the right to strike and the right to collective bargaining, and the fact that these fundamental rights must be exercised with respect to the fundamental freedoms and the proportionality principle¹⁴³.

In an article on the freedom to take collective action vs. free movement of goods and services¹⁴⁴ the same author disagrees with an opinion that the ECJ puts fundamental freedoms above fundamental rights. Quite to the contrary, in his mind the ECJ has in its *Laval* judgment taken into account the value of trade union freedom to take collective action. The author concludes with a statement that the ECJ in both sentences has found the right balance between the free movement of goods, services, persons and capital and the aims of EU social policy to improve working and living conditions of workers.

An annotation on the *Laval* case can be found as well without reference to the Polish legal system. The author extensively describes the case's background and the Court's reasoning, concluding with an approving remark¹⁴⁵. Another concerns the *Viking* case¹⁴⁶. The author, A. Woźniak, underlines the economic dimension of the EU and the importance of competition in the internal market. If trade unions were in a position to hinder the transfer of business to another EU country where the conduct of economic activity was more

141. Makowska – Szulc, S. *Sytuacja prawna pracownika delegowanego w ramach świadczenia usług [in:] Przepływ osób*

142. Frąckowiak – Adamska, A. (2009) *Zasada proporcjonalności jako gwarancja swobód rynku wewnętrznego Wspólnoty Europejskiej*, Warszawa

143. Świątkowski, A.M. (2009) *Zbiorowe prawo pracy. Komentarz do ustawy o rozwiązywaniu sporów zbiorowych* in Wratny, J., K. Walczak (ed.) *Lex*.

144. Świątkowski, A.M. (2008) *Wolność prowadzenia akcji zbiorowych przez związki zawodowe a swoboda prowadzenia działalności gospodarczej i swoboda przepływu usług w obrębie Unii Europejskiej*, MPP 10/2008

145. Klafkowska – Waśniowska, K. (2008) *Uniemożliwianie przedsiębiorcom zagranicznym korzystania ze swobody świadczenia usług*, Glosa 4

146. Woźniak, A. (2009) *Akcje strajkowe jako ograniczenie swobody działalności gospodarczej, wyrok ETS w sprawie Viking, C-438/05*, Edukacja Prawnicza online. 30.04.2009

attractive from an economic perspective, then companies in the “Old” Member States would have no stimulus for further development, thereby threatening the attainment of the Lisbon strategy goals, concludes the author.

The majority of publications mentioning the ECJ judgments in question concern mainly the EU legislation and not national labour legislation. None of the quoted authors reflects on common ground between the questions discussed in the judgments and the Polish legal system. Neither does anyone refer directly or even indirectly to the possible effects of the judgments on Polish labour legislation.

Doctrinal discussion in the area of collective labour legislation is currently concentrated around the issue of workers’ representation and the overlapping of individual and collective labour legislation, especially with reference to the right to information and the legal character of various agreements concluded by the social partners¹⁴⁷.

2. Overview of the industrial relations system in Poland

2.1 Overview of labour legislation

In order to understand Poland’s system of industrial relations, it is important to see it in the context of the system of individual and collective labour legislation.

Traditionally, there are both general and autonomous (specific) sources of labour legislation, belonging to a hierarchy illustrated in the table below.

General sources of law
Acquis communautaire
Constitution
International conventions (including the ILO ones)
Legal acts (Including the Labour Code)
Regulations
Autonomous sources of law
Collective agreements
Other agreements of social partners
Regulations (especially remuneration regulation and work regulation) and statutes

The main difference between the general and autonomous sources of law is that the first are generally binding (*erga omnes*) and the latter are applicable only to the company (or companies) involved.

¹⁴⁷ Florek, L. (ed.) (2007) *Indywidualne a zbiorowe prawo pracy* Warsaw; Kobczyk, A. (ed.) (2008) *Informowanie i konsultacja pracowników w poskim prawie pracy*, Kraków

It is also worth mentioning that most¹⁴⁸ of statutory labour provisions have “*semi- dispositive*” character, meaning that employee representatives (trade unions or employee representatives within an establishment) can negotiate employment conditions, bearing in mind that labour law regulations constitute minimum standards. The leeway for any co-regulatory social dialogue is to a certain extent limited, but also allows for some adaptation of labour law within a company. The Labour Code also contains what is called “a principle of workers’ privilege”, referring to a hierarchy of labour legislation norms. According to this principle, provisions contained in collective agreements and collective arrangements or regulations and statutes cannot be less favourable to employees than the provisions set forth in the Labour Code or other statutory provisions and secondary legislation. Moreover, the provisions contained in the regulations and statutes shall not be less favourable to employees than the provisions of collective agreements or collective arrangements. The provisions contained in an employment contract may not be less favourable to the employee than the provisions foreseen in labour legislation. Contract clauses or other provisions less favourable to the worker than provisions higher up in the hierarchy are invalid, with the relevant provisions of labour legislation applying instead.

Finally, any provisions contained in collective agreements and other collective arrangements based on the statutory provisions as well as rules and statutes specifying the rights and duties of the parties to the employment relationship that violate the principle of equal treatment in employment are deemed to be invalid.

This rule, together with the *semi-dispositive* character of statutory labour legislation limits social partners’ freedom to set working conditions at a company (or higher) level. This can only be done when the conditions contained therein are more favourable to workers than those specified in the Labour Code itself.

2.2 Statutory legislation

Labour legislation is set down in several laws and in regulations covering mainly more specific and technical questions. There are also some provisions in the Constitution referring to labour legislation, such as the right to equal treatment, prohibition of forced labour, the right to rest periods, health and safety conditions at work and minimum remuneration established by the state with regard to individual employment relationships. Collective rights include the right of association, the rule of social dialogue and co-operation between social partners, as well as the right of social partners to conclude agreements.

148. Except for the provisions on minor offences against workers’ rights and those regulating proceedings before courts, namely the terms of lodging any claim.

However, the basic source of labour legislation is the Labour Code, which includes quite detailed provisions on most of the areas covered by Article 3 of the PWD: conditions of employment, maximum work periods and minimum rest periods, minimum annual paid holidays, the method of calculating overtime rates, health, safety and hygiene at work¹⁴⁹, equal treatment of men and women and other non-discrimination provisions, as well as basic protective measures for pregnant women and women who have recently given birth, and for minors. The last two issues are also regulated in detail in a further law and other regulations¹⁵⁰.

Minimum rates of pay are to be negotiated by the Tripartite Commission for Economic and Social affairs¹⁵¹ every year. Should negotiations fail, the minimum rate of pay is set by the Government in the form of a regulation. The minimum wage applies to all workers in all sectors throughout the country. No person employed on the basis of an employment contract can earn less than the minimum wage. Part-time work is handled accordingly.

Employment conditions for agency workers are regulated by a specific law¹⁵², which makes reference to the Labour Code in certain areas e.g. working hours. Though discrimination of agency workers is prohibited, it may be difficult to apply if there is no comparable position within a company.

The traditional distinction between individual and collective labour legislation is not clearly mirrored by the contents of the statutory legislation covering it. There are two basic laws in the area of collective labour legislation: the Trade Union Act and the Act on the Resolution of Collective Labour Disputes. There is also a law on informing and consulting employees, regulating of the election of works councils and their rights. However the provisions relating to collective agreements and workplace regulations are part of the Labour Code.

2.3 Autonomous sources of labour legislation

Internal workplace regulations (working conditions and wages) need to be established in companies with at least 20 employees. They cover all employees of one employer (normally in one location) and specify the work processes involved, their organisation, and the associated rights and

149. This area is covered in a more detailed manner by regulations issued on the grounds of delegation contained in the Labour Code

150. Law on benefits in case of illness or maternity; various regulations on parental leave, types of work prohibited for women, vocational training for young workers, types of work prohibited for young workers and specific cases where employment of minors (children under 16 years of age) is permitted.

151. A tripartite body, consisting of employers' and employees' representatives and the Government.

152. Law of 09.07.2003 on employment of temporary workers (Journal of laws 2003.166.1608)

responsibilities of the employer and his employees¹⁵³. The employer needs to reach agreement with the company's trade union body on the content of the internal regulations. In cases where there is no trade union representation, the workplace regulations shall be specified by the employer. A regulation covering remuneration also needs to be established in companies with at least 20 employees, also to be agreed upon with the trade union organisation. No such regulation is required if an employer is covered by a collective agreement.

2.4 Collective agreements

Collective agreements are concluded on a company level or higher. There are over one hundred such collective agreements, covering some 500 000 workers, though it should be borne in mind that this category covers both sectoral collective agreements and ones that cover a single enterprise comprising more than one employer (e.g. with branches of a company handled as separate employers). Collective agreements can be concluded only by the representative¹⁵⁴ trade union and an employer (or employers' organisation, minister, or local authority representative for multi-company agreements). In a company not covered by a trade union a collective agreement cannot be concluded. This is an important fact, given that trade union membership is below 20%. Only one collective agreement may apply in any one company, meaning that it is not possible to conclude a separate collective agreement covering posted workers at the company making use of their services¹⁵⁵.

153. e.g. Organisation of work, required presence at an employing establishment during and after work, provision of equipment, tools and materials to employees, as well as provision of work clothing and footwear and personal protective and hygiene equipment; working time systems and schedules, and the reference periods adopted; the date, place, time and frequency of remuneration payments; duties relating to occupational safety and health and fire protection, including the manner of informing employees of any occupational risks involved in the work performed; clocking in/out procedures and justifying absence from work - all as adopted by a given employer;

154. According to LC Article 241(17). § 1. A multi-establishment trade union organisation shall be representative if it covers: at least five hundred thousand employees; or at least 10% of all employees to which the statute relates, however not less than ten thousand employees; or a maximum number of employees for whom a multi-establishment agreement is to be made. Article 241(25a) LC refers to a representative trade union body in an establishment. The representativity condition is fulfilled when a trade union organisation belonging to a trade union or representative federation under Article 241(17) § 1 (1) LC represents at least 7% of employees in the establishment. If this is not the case, it must represent at least 10% of the workforce in order to be representative on a company level. If none of the trade union bodies satisfies the requirements mentioned above, a representative is the organisation having the largest number of employees as its members.

155. Even though in practice various agreements include provisions for equal treatment of such employees. Sometimes specific agreements concerning agency workers are concluded, but they cannot be regarded as sources of labour legislation, so they may not be sources of employer obligations towards employees.

A collective agreement covers all employees of the employer party to the agreement, unless the parties agree otherwise (which normally is not the case). It may also be applied to persons employed on a legal basis other than an employment contract. When one of the parties (trade union or employer) authorised to conclude a collective agreement requests to initiate negotiations, the request cannot be refused. The parties authorised to enter into a collective agreement may make arrangements as to the applicability of the whole or a part of a collective agreement to which they are not parties. Such action, however, naturally requires the consent of both parties.

The Labour Code (LC) provides the option of extending the scope of a collective agreement to make it generally binding for a certain group of employers within the same sector. According to LC Article 241¹⁸ § 1, upon a joint request of the employers' organisation and the multi-establishment trade union organisations that entered into a multi-establishment agreement, the Minister responsible for labour affairs may, if an important social interest so requires, extend by way of regulation the applicability of the whole or a part of that agreement to the employees of an employer not covered by any multi-establishment agreement and who carries out business activities identical or similar to those carried out by employers covered by that agreement, specified on the basis of separate regulations on the classification of activities, after consultation with that employer or an employers' organisation nominated by him or her and the establishment's trade union body, if such a body is active at a given employing establishment, and also having sought the opinion of the Commission for Collective Agreements appointed on the basis of separate regulations. No such regulation has been issued so far.

Collective agreements are concluded mostly on a company level. Only rarely do they contain provisions more favourable to workers than the basic provisions of the Labour Code¹⁵⁶. Most of them involve remuneration systems and other employee benefits, together with working time arrangements as a form of labour flexibility. It should be stated that the social partners are not making sufficient use of the possibilities offered by the law concerning collective agreements as an instrument for adapting working conditions to the needs of the particular company. The main cause of this is the weakness of the social partners: trade unions are rarely present in privately owned companies, while employers' organisations do not cover many employers (especially true in the case of employment agencies¹⁵⁷). Collective agreement coverage is relatively low in small companies (estimated at 5%), but it is higher (more than 40%) in medium and large companies with unions. Overall coverage is estimated at about 35%¹⁵⁸.

156. Wratny, J. (2006) *Teoria i praktyka układów zbiorowych*, Dialog, 3/2006 . p. 37.

157. Wratny, J. *op.cit.* p. 36.

158. http://www.eurofound.europa.eu/eiro/country/poland_4.htm

2.5 Workers representation: trade unions

The organisations called upon to represent employees' rights within the framework of collective bargaining and collective dispute resolution procedures are trade unions. It is their prerogative to negotiate collective agreements and enterprise-level regulations (working conditions and remuneration). Another form of workers' representation are the works councils. These have been in existence in Poland since May 2006, though they have only information and consultation rights in companies employing more than 50 employees.

Some prerogatives traditionally reserved to trade union organisations were given also to employee representatives within a company where no trade unions operate. This was to be seen as a provisional form of staff representation, although questions were raised about the independence of such persons vis-à-vis employers, given that they had no protection against discrimination or unfair dismissal.

Trade union membership is acquired by joining a trade union organisation operating at an employer's establishment. Even so, workers are not always in a position to benefit from their collective rights. Trade unions may exercise their rights on a company level only when they represent at least 10 employees. Unfortunately trade union representation is not very high. Trade unions are present in about 20% of companies (mostly the large companies and foreign-owned and state-owned companies) and the trade union membership rate is about 12%¹⁵⁹.

According to the Trade Union Act, only employees and home-workers can belong to a union. However the statute of "Solidarność" trade union states that workers employed on any other legal basis may also join it¹⁶⁰. Given that such a statute has been registered and is legally binding, it is possible that other trade unions may include similar provisions. This is particularly relevant since the Trade Union Act was created in 1990, when atypical forms of work were not at all common in Poland.

2.6 Collective labour disputes

In Poland, the 1982 Act on Trade Unions made it mandatory to use a lengthy dispute resolution procedure, involving negotiation, conciliation and (voluntary) arbitration with a view to avoiding potential strikes. After transition to democracy, the 1991 Act on the Resolution of Collective Labour Disputes substantially simplified the collective dispute resolution procedure. However in practice it is not easy to judge whether a strike resulting from a

159. *Pracujący Polacy 2006*. http://i.wp.pl/a/f/rtf/9806/pracujacy_polacy.rtf

160. Statute of NSZZ Solidarność, which stipulates in the article 5 that also person employed on the basis of other type of contracts may join the trade union.

collective dispute is legal or not. According to the Act, a collective dispute is a conflict between employees and their employer over working conditions, remuneration and/or social benefits (disputes concerning workers' interests), or over union freedoms and union organisation rights (dispute concerning workers' rights). The Act grants authority solely to trade unions to represent the collective interests of employees in disputes. The procedure for resolving collective labour disputes comprises the following stages. To initiate the dispute, a trade union organisation first lodges a claim which may be subject to collective dispute procedure. If the employer does not fulfil the trade union's demands, the parties take up negotiations which may result either in an agreement or in the drafting and signing of a 'protocol of differences'. If the latter is the case, the dispute proceeds to a second stage – mediation. The parties may either appoint a mediator of their own choice or apply for one to be nominated from an official list. This stage may again lead to an agreement, but if it fails, the trade union may call a strike, or the parties may agree to refer the matter to a jointly chosen arbitrator. Where a dispute is referred to arbitration, the arbitrator's decision is binding for both parties as long as neither party disagreed with such an outcome prior to referring the dispute to arbitration.

2.7 Strikes

In order to defend the rights and interests of workers who do not have the right to strike, the trade union of another establishment may declare a solidarity strike not exceeding half a working day. Nevertheless, all rules concerning a strike must be observed. Any strike-related work stoppage affecting positions, equipment and installations where the interruption of work constitutes a hazard to human lives or health or to State security is prohibited.

There are also certain groups of workers not allowed to strike: people employed in State authorities, government and self-government administration, courts and public prosecutor's offices, together with employees of the Internal Security Agency, the Intelligence Agency, the police, the Polish armed forces, the prison service, the frontier guard, customs as well as fire brigade units.

During the strike, a company's management may not be hindered in the performance of duties and exercising of rights relating to employees not taking part in the strike as well as, to the extent that is necessary, to ensure the protection of the property of the establishment and the continuing operation of the structures, equipment and installations, the interruption of which could constitute a threat to human life or health or to the resumption of the normal activity of the establishment. The leaders of the strike shall cooperate with the management of the establishment to the extent necessary to ensure the protection of the property of the establishment and the continuing operation of the structures, equipment and installations. Failure to observe these rules is a criminal offence.

3. Stakeholders reaction to the ECJ judgments

3.1 Legislative

The recent ECJ judgments did not provoke any legislative initiatives, either from the social partners, the government or Parliament itself. No legislation changes are expected as a result of the sentences.

As shown above Polish labour law consists mainly of statutory legislation. Workplace regulations and collective agreements play no significant role in the system. Even when present they rarely modify the statutory provisions in any significant manner. In the following provisions the Labour Code (LC) regulates the terms and conditions of employment of workers posted¹⁶¹ to the territory of Poland both from other EU Member States and third countries. LC Article 67 stipulates that the terms and conditions of employment include: standards on working hours and schedules, daily and weekly rest periods; amount of vacation leave; minimum pay specified under separate regulations; overtime pay; occupational safety and health rules and regulations; parenthood-related rights of employees; employment of young people; non-discrimination in employment; work in compliance with regulations on temporary work.

The minimum requirements are no different from those provided for in Article 3 (1) of the PWD and are all regulated in the LC. The main area where minimum requirements stipulated in the LC and standards reached by means of collective agreement (or even a work regulation) vary is the wage level. The minimum wage is currently around 300 EUR, while the average wage is around 800 EUR. Even though the gap between the two is slowly diminishing, it remains impossible for a worker to live on 300 EUR without supplementary state benefits.

Collective agreements are usually concluded at a plant level. The mechanism for declaring a collective agreement universally applicable seems to be just an empty provision. Such agreements can therefore not be used as a tool for improving working standards for posted workers. It is also not possible to impose upon a third party any obligations deriving from a collective agreement. The agreement cannot therefore contain any obligations for a contractor – a party to the agreement -, even if they concern working conditions.

Collective action, in particular in the form of a strike, is only possible after all peaceful stages of collective conflict resolution have been exhausted. The issues that can be the subject of a collective dispute are also limited. There are

161. Posting according to the Article 67 definition, i.e. work performed in the territory of Poland by an employee seconded to this work for a fixed term by the employer established in a European Union Member State in connection with the implementation of a contract concluded by the employer with a foreign entity; in a foreign branch (affiliate) of that employer; as a temporary work agency.

also various obligations imposed on trade unions during strikes. All these provisions put a question-mark over the legality of many strikes, especially as the Act on the Resolution of Collective Labour Disputes contains many general clauses open to ambiguous interpretation.

The Polish industrial relations system can therefore be seen as constructed in such a way that such problems as those referred to in the *Laval* and the *Viking* cases cannot emerge.

The *Rüffert* case concerned not only working conditions for posted workers but also social clauses in public procurement contracts. Poland is one of the EU countries which did not ratify ILO Convention No 94. It follows that the mutual relations between the Convention and EU legislation are not a point of discussion. The law on public procurement¹⁶² specifies in detail the elements which need to be included in the tender, though this is an open-ended list. At the same time, the tender cannot be formulated in a way impeding fair competition.

The only employment-related provisions contained in the Public Procurement Act are those regarding the employment of unemployed or disabled people. Since May 2009 the basic terms of the contract may include requirements concerning the employment of such people or other groups covered by social security provisions. If such requirements are specified, the contractor must list the number of such persons and their periods of employment, as well as providing documentation confirming the employment of such workers. There are no provisions relating to levels of pay. One provision used by local authorities regarding the employment conditions of workers in a contracted company is Article 36.4, according to which an entrepreneur may entrust subcontractors with executing the contract, except when the awarding entity has specified in the contract's basic terms that the contract or a part thereof may not be subcontracted on account of the nature of the contract's object. Though this is no guarantee for adequate wages being paid, it can at least limit insecure work.

3.2 Social partners

The social partners' reaction was not as strong as in the countries directly affected by the judgments. Again, the main reason lies in the nature of Poland's labour legislation and its industrial relations system. In their day-to-day work, Poland's social partners are faced with specific national problems, which, though not conflicting with events on the EU level, generally have little relevance to EU concerns. Trade unions and employers' organisations are more concerned with pension system reform, emerging and evolving employment forms, and naturally the global economic crisis.

162. Act of 29.01.2004 on public procurement (Journal of law of 2007.223.1655)

Only one employers' organisation, the KPP¹⁶³, has issued a statement on the *Viking* case. In it, the KPP expresses its concern about the content of the judgment, seeing it as a threat to the freedom of economic activity within the EU¹⁶⁴. According to the KPP the fact that the ECJ has acknowledged the right of trade unions to take action to stop a company relocating will hinder freedom of movement of goods and threaten companies' competitiveness.

Trade union organisations belonging to the ETUC share the concern of the European Confederation about the judgment, and their representatives are participating in the ETUC work on the PWD. But no trade union analyses have yet been published. However, it is admitted that certain consequences can be felt by Polish workers working abroad, especially as posted workers. Less favourable working conditions for workers posted by a Polish company to another Member State do not comply with the principle of equal treatment and equal pay for equal work¹⁶⁵. Such concerns are not however expressed in official trade union statements.

3.3 Judiciary

The recent ECJ judgments have also had no influence on decisions of Polish courts. Leaving aside the specific structure of Poland's industrial relations system, one of the main and most plausible reasons is the relatively short time that has elapsed since the judgments were passed.

The practical experience of the author demonstrates that courts of first instance extremely rarely make any reference either to the ECJ decisions or to the *acquis communautaire* in general. To a great extent the same can be said for courts of second instance. Where references to the ECJ decisions do appear is in Supreme Court decisions, though only a small minority of all cases actually reach the Supreme Court due to formal restrictions. The Supreme Court is not the topmost instance in the system of civil proceedings, but rather an extraordinary resort available when an important legal issue needs resolving. The right to strike or to collective bargaining are not subjects commonly dealt with by the Supreme Court.

4. Outlook

The current discussions and developments in labour legislation (including the proposed New Labour Code and Collective Labour Code) do not point to any substantial changes in regulations concerning the posting of workers. The

163. KPP – Konfederacja Pracodawców Polskich / Polish Employers' Confederation

164. Wyrok ETS wstrząśnie rynkiem europejskim 04.01.200
<http://www.kpp.org.pl/index.html?action=sai&ida=6085>

165. Interview with International Secretary of NSZZ Solidarnosc A. Adamczyk

industrial relations model is gradually evolving from a model dominated by trade unions towards a dual model of trade union and works council representation. With regard to the relatively weak trade union representation, this leads to questions concerning the effectiveness and legitimacy of the current system of industrial conflict resolution, where trade union representation is obligatory.

Poland's social partners, both trade unions and employers' organisations, are not very strong. It is therefore unlikely that the current tendency to conclude collective agreements mainly on a company level will be reversed in a way which would make sectoral collective agreements a feasible alternative to statutory legislation for regulating industrial relations. Any impact arising from the ECJ *Laval* and *Rüffert* decisions would therefore tend to petrify the current state of legislation, rather than bringing about any changes in this area. Despite frequent amendments, the system does however have some advantages: it is transparent and the majority of basic provisions are set forth in a single law - the Labour Code. Naturally there is sometimes a need for interpreting ambiguous or unclear provisions, as is the case with LC regulations on working hours and in particular overtime rates.

The amendments to the Public Procurement Act introducing the possibility to insert the requirement to employ certain underprivileged categories of persons into basic contract specifications are too recent to assess how they will function in practice (they only entered into force on the 16 July 2009). The provisions certainly constitute a new element in the public procurement system, previously dominated by economic factors. However it has to be underlined that this amendment is not likely to affect the employment of foreigners posted to Poland, as the aim was rather to counteract unemployment and support social employment, especially as far as state or local authority procurement is concerned. At the same time it neither resolves the question of employee remuneration nor does it help combat unfair practices such as long chains of subcontractors or employing workers on the basis of civil law contracts. The latter, together with pseudo self-employment, are two practices with a negative influence on working conditions, as LC provisions do not need to be observed.

For some years now a commission has been working on codifying the text of a new Labour Code and another act called the Collective Labour Code with the aim of consolidating provisions contained in various laws regulating this area. However, neither Parliament nor the Ministry of Labour and Social Policy is actively working on the project. With social and legal reality changing from year to year, the draft texts of the two codes presented last year by the Ministry already need amending. Even though some of the planned changes could in principle strengthen trade unions (e.g. right of association not only for workers employed on the basis of an employment contract but also for others performing paid work), others break the ground for workers not represented by trade unions to bargain collectively (but the provision still remains that only trade unions are authorised to conclude a collective agreement). Entering into a collective dispute is also to remain a trade union

prerogative. However, the recent changes in the Act on the Information and Consultation of Employees confirm the trend towards building a dual representation model¹⁶⁶.

In implementing a given EU directive in Poland, it is quite common practice not to include its provisions in existing legislation¹⁶⁷, but to create a separate law taking over almost the whole text of the directive with only necessary alterations being made¹⁶⁸. Even though it would seem that the ECJ decisions have had no influence on such changes, such decisions as *Rüffert* and *Luxembourg* may further discourage the national legislator from enacting laws setting higher standards than those stipulated in the directives.

5. Conclusions

Poland is one of those countries where the recent ECJ judgments have not had any major impact. Any doctrinal reflection on the consequences is more concentrated on the European than the national dimension, with no analysis being made of potential common ground. What is also surprising is that the reaction of the legal doctrine towards ECJ judgments is, contrary to that encountered in other EU countries, is not critical but even approving. There is no reaction from the judiciary. What is more, the social partners are also generally remaining silent.

One of the possible reasons of such a limited impact is Poland's system of industrial relations. Firstly, both individual and collective labour law are regulated by statutory legislation. With regard to individual labour law the leeway for the co-regulatory function of social dialogue is limited, though a certain amount of adaptation is permitted within a company. Furthermore, collective agreements are concluded mainly on a company level and generally cover only a limited number of companies. The law also provides for certain

166. Following a 2008 decision of the Constitutional Court, only one mechanism for electing works council members remained: an election organised by the employer at the request of employees, with candidates appointed by workers from workers in the company. Before the amendments there were three possible forms of electing works council members: trade union appointment; election by employees from among candidates appointed by trade unions; and the one remaining in force. The latter is the most democratic, but deprives trade unions of their past strong influence on works council constitution.

167. This exception was the case with certain regulations concerning equal treatment that were inserted into the Labour Code, e.g. – Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC; Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services; Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive.

168. E.g. Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees; Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees;

limitations regarding the scope of a collective agreement: as there must be no infringement of a third party's rights, it cannot oblige an employer posting workers to apply such an agreement.

A further reason is to be found in the weakness of the social partners: trade unions are rarely present in privately owned companies, while employers' organisations do not cover any great number of employers. The right to strike (as well as the right to collective bargaining) is one of fundamental rights enshrined in the Constitution (Article 59). As far as collective disputes are concerned, there are statutory definitions listing justifiable disputable issues. There is an operative lack of objective and reliable criteria for delimiting what constitutes a justifiable issue for a collective dispute - there is doubt for example whether a collective dispute may relate to such employer decisions as privatisation or relocation. Though it is permissible to call a solidarity strike if the rights of posted workers are not observed, nevertheless trade unions in the company where the work is being performed cannot force an employer of posted workers to enter into negotiations over a collective agreement. Moreover, all rules governing strike action must be observed. One of the rules is the proportionality principle, according to which trade unions, before taking a decision to organise a strike, need to consider the potential gains and losses the strike can cause not just to the disputing parties, but also to any third parties such as the local community, consumers, customers, etc.

At the same time the industrial relations model is gradually evolving from a model dominated by trade unions towards a dual model with both trade union and works council representation, encouraging questions about the future of the current collective dispute resolution procedure based on mandatory trade union representation.

It is also unlikely that sectoral collective agreements will become any feasible alternative to statutory legislation for regulating industrial relations. Any impact arising from the ECJ *Laval* and *Rüffert* decisions would therefore tend to petrify the current state of legislation, rather than bringing about any changes in this area. On the other hand both *Rüffert* and *Luxemburg* may further discourage the national legislator from enacting laws setting higher standards than those stipulated in directives.

F. United Kingdom

The impact of the ECJ decisions on UK industrial relations

Tonia Novitz

Introduction

It is evident that the decisions of the European Court of Justice (ECJ) in *Viking*,¹⁶⁹ *Laval*,¹⁷⁰ *Rüffert*¹⁷¹ and *Luxembourg* could have considerable impact on UK industrial relations in two discrete ways:

1. These decisions will affect the ability of UK workers to take lawful industrial action (and UK trade unions to call such action) where the dispute has a transborder European dimension.
2. Following from the elaboration of the principles set out in the posted workers cases, questions now arise as to the legality under EC law of UK implementation of the Posted Workers Directive¹⁷² and any *de facto* treatment by the UK Government of public procurement.

The reaction of the UK legislature has been to be entirely unresponsive to either the limitations that recent ECJ jurisprudence has on the right to strike or the challenge to legality of UK legislation which extends various employment law rights to posted workers. The response of trade unions, particularly the Trades Union Congress (TUC), has been to welcome the express recognition of the right to strike by the ECJ, but also to express considerable concern at the practical limitations that the *Viking* and *Laval* cases have had on the ability of workers to take lawful industrial action. The *BALPA* litigation, discussed below, is a case in point. What is perhaps interesting is that workers refuse to be constrained by the law in this regard and spontaneous 'wild cat' strikes have been initiated, which arguably breach UK and EU law, but which have not been subjected to legal scrutiny. The *BALPA* litigation also demonstrates that employers are willing to invoke EU law to prevent industrial action from taking place.

169. Case C-438/05 *International Transport Workers' Federation (ITF) and Finnish Seamen's Union (FSU) v Viking Line* [2007] ECR I-10779; [2008] All E.R. (EC) 127; [2008] I.R.L.R. 143 (hereafter '*Viking*').

170. Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767; [2008] All E.R. (EC) 166; [2008] I.R.L.R. 160 (hereafter '*Laval*').

171. Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989 (hereafter '*Rüffert*').

172. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] O.J. L18/1 (hereafter '*PWD*').

1. Industrial Action

It should first be acknowledged that the decisions of the ECJ have not entirely deterred workers from taking unlawful wild cat strikes in disputes which have a European transnational aspect. However, it would seem that it remains extremely difficult for unions to call or support strikes where issues of entitlement to 'free movement' arise under the EC Treaty. The barriers to collective action concern:

- (a) constraints placed on legitimate objectives;
- (b) the 'proportionality' test;
- (c) the potential absence of a cap on damages;
- (d) the basis on which injunctions are granted in the UK;
and (although this is more doubtful)
- (e) potential exposure to dismissal.

It will be evident that the UK Government has, as yet, taken no action which would overcome the new 'chilling' effect of the judgments delivered by the ECJ in December 2007 (and subsequently). However, there is some hope that the Government will have to reconsider its position by virtue of concerns raised by UK trade unions within the International Labour Organisation (ILO) and the Council of Europe. Moreover, it may be that the need to comply with Article 11 of the European Convention on Human Rights 1950, both domestically and within the European Union (EU) will lead to the current legal position being revisited.

1.1 The ability to take unofficial industrial action

The decisions of the ECJ regarding the legality of industrial action have not inhibited workers who wish to take unofficial action, namely action taken by trade union members without the authorisation or endorsement of the union, or indeed secondary action in sympathy with the cause espoused in the original dispute.

The most obvious example is the industrial action taken by workers at the East Lindsey Oil Refinery and in support of their action by other workers throughout the UK. This action commenced in January 2009 following a dispute over the ability of UK workers to apply for jobs which were to be performed in the UK. Their employer at the Lincolnshire oil refinery was TOTAL, a French company, which awarded an Italian company, IREM, the contract to build the plant's de-sulphurisation unit. IREM was awarded the contract on the basis that it undertook to supply its own skilled workforce, consisting of Portuguese and Italian workers, and pay them equivalent wages to the local workforce. These were notably jobs for which local UK workers were not eligible to apply. The workers from Portugal and Italy were brought in on a barge moored in nearby Grimsby, where they would live while performing services for IREM. In effect, they were posted workers and the industrial action taken at the East Lindsey Oil Refinery was specifically aimed

at ending their employment, so that British workers could have the opportunity to do the same work. The incident sparked a number of sympathy walk outs in Grangemouth Oil Refinery, Aberthaw power station, near Barry, South Wales, and a refinery in Wilton near Redcar, Teesside, to name only a few.¹⁷³ The dispute gained national and international media coverage.

In response, TOTAL issued a statement to the effect that:

‘We recognise the concerns of contractors but we want to stress that there will be no direct redundancies as a result of this contract being awarded to IREM and that all IREM staff will be paid the same as the existing contractors working on the project.

It is important to note that we have been a major local employer for 40 years with 550 permanent staff employed at the refinery. There are also between 200 and 1,000 contractors working at the refinery, the vast majority of which work for UK companies employing local people.

On this one specific occasion, IREM was selected, through a fair and competitive tender process, as the most appropriate company to complete this work. We will continue to put contracts out to tender in the future and we are confident we will award further contracts to UK companies.’¹⁷⁴

However, an Advisory Conciliation and Arbitration Service (ACAS) *Report of an Inquiry into the Circumstances Surrounding the Lindsey Oil Refinery Dispute* (2009) was not able to confirm parity of pay levels. ACAS reported instead that (at para. 11):

‘ACAS inspected the contract documentation which commits IREM to pay the going rate, but IREM were not yet in a position to provide evidence that they were doing this.’

ACAS concluded (at para. 23) that there was, therefore no basis on which to conclude that IREM or TOTAL were acting unlawfully, or in a way which could give rise to an allegation of social dumping. However, other commentators have observed that the dispute raised important questions as to the appropriateness of the employers’ conduct, which have gone unanswered.¹⁷⁵

173. Booth, R. (2009) ‘Mediators called in as wildcat strikes spread across UK’, *The Guardian*, 31 January 2009.

174. Gillian, A., A. Sparrow (2009) ‘Strikes spread across Britain as oil refinery protest escalates’ *The Guardian* 30 January 2009.

175. Arthur, R. (2009) ‘Rüffert and Luxembourg: The Posted Workers’ Directive and ILO Convention No. 94’ in K.D. Ewing and John Hendy (eds.), *The New Spectre Haunting Europe – The ECJ, Trade Union Rights and the British Government* (Liverpool: Institute of Employment Rights), at 48. Cf. media coverage which reported that ACAS had found that union fears were groundless, e.g. Coates, S. (2009) ‘Anti-foreign strikes branded baseless by ACAS’, *The Times*, 17 February 2009.

A matter for concern was that far-right nationalist extremists seemed to capitalise on the dispute, relying on a phrase which the UK Prime Minister, Gordon Brown, had used at the recent Labour Party conference: 'British jobs for British workers'. One effect of the current regime relating to posted workers would therefore seem to be to stimulate hostility to workers from other European states and even xenophobia, although it should also be noted that unions were adamant that the issue was access to jobs and that the conduct of their members was often misrepresented.¹⁷⁶ Brown, however, was adamant that he had not intended this statement to be used for protectionist or racist purposes, but was referring to the need to provide resources to enhance the skills and thereby employment opportunities of workers in the UK.¹⁷⁷ Moreover, Peter Mandelson spoke out in support of EC law governing free movement of workers and services, pointing out how much British workers and business had to gain from the current legal position.¹⁷⁸

The initial industrial action surrounding the dispute at the East Lindsey Oil Refinery was settled without legal action being taken against the workers concerned and without their dismissal. A deal was struck whereby 102 jobs were to be made available on-site for which British workers could apply.¹⁷⁹ However, in June 2009 industrial unrest occurred again, when 51 redundancies were made at the Lindsey Oil Refinery in what workers believed was a breach of the deal reached when they returned in February 2009. The workers responded with a spontaneous walk out in protest, without union authorisation or endorsement, and were given an ultimatum to return to work or lose their jobs. Those who did not return were sacked and told to reapply for their jobs. Again, this decision by TOTAL generated a wave of sympathetic action across the UK. Nevertheless, the dispute was, once more, settled without dismissal or further recourse to legal action by the employer and the redundancies made were reversed.¹⁸⁰

It may be that the employer in this dispute, TOTAL, was not able to avail itself of EC law to bring any kind of action in reliance on the ECJ judgments in *Viking* and *Laval*, as these only contemplate liability of trade unions for industrial action and not private individuals. The former can be regarded as

176. Morris, S. (2009) "Give jobs to British people" say Aberthaw power station protesters', *The Guardian*, 30 January 2009; Holmwood, L. (2009) 'BBC apologises for misleading edit of striking worker', *The Guardian*, 6 February 2009.

177. Travis, A. (2009) 'Brown's British jobs promise was doomed from the start', *The Guardian*, 30 January 2009; A. Seager, 'I understand fears over jobs, says Brown on refinery strike', *The Guardian*, 31 January 2009; Press Association, 'Brown condemns 'indefensible' wildcat strikes in foreign labour row', *The Observer*, 1 February 2009.

178. Statement by Lord Mandelson, House of Lords Deb. 2 February 2009, Vol. 707, C472-4. Reported by A. Sparrow, 'Foreign workers row: Mandelson defends EU labour laws', *The Guardian*, 2 February 2009.

179. Wintour, P., M. Wainwright and A. Stratton (2009) 'Refinery strike is over - but jobs fight goes on', *The Guardian*, 5 February 2009.

180. Wearden, G. (2009) 'Deal ends Lindsey oil refinery dispute', *The Guardian*, 26 June 2009; P. Stiff, 'Lindsey dispute settled as workers reinstated', *The Times*, 26 June 2009.

‘quasi-regulatory bodies’, while individual workers taking wild cat action cannot perform this function.¹⁸¹ It should, however, be noted that it was open to TOTAL to seek an interim injunction to prevent the wildcat strike taking place, on the basis that the action taken was in breach of domestic UK common law, in reliance on certain economic torts.¹⁸² Moreover, other employers which were affected by secondary industrial action could have done likewise. They would seem not to have taken such action because it was not conducive to harmonious or productive industrial relations where there was a highly unionised (and activist) workforce.

1.2 The ability of trade unions to call official industrial action

The recent British Air Line Pilots Association (BALPA) dispute is illustrative of the difficulties faced by trade unions that wish to call industrial action which could potentially affect the entitlement to free movement of an employer.

BALPA voiced concern over the terms and conditions under which pilots would be employed by a new British Airways (BA) subsidiary, ‘Open Skies’, which was to operate out of other European states on US routes. Their concern was that terms and conditions for Open Skies pilots (and the mode of granting seniority) would undercut and thereby undermine the established terms and conditions of current BA ‘mainline’ pilots. BALPA did concede that inferior terms and conditions might need to be applicable to pilots employed by Open Skies and did accept the desirability of a separate bargaining unit for those pilots. However, BALPA did not receive the assurances and guarantees they desired in respect of career progression and terms and conditions for current BA mainline pilots. A strike ballot was held in which 93% of those eligible to vote did vote and 86% of those voting were in favour of a strike. BALPA then requested intervention by the ACAS on the basis that the weight of opinion in favour of collective action might lead the employer, BA, to make certain concessions. However, at the end of ACAS talks and with no settlement reached, BALPA gave seven days notice of industrial action. BA responded by arguing that any strike action taken would be unlawful by virtue of the principles established by the ECJ in *Viking* and *Laval*; so BALPA applied to the High Court for a declaration of the legality of their action. The hearing began on 19 May 2008, but was discontinued on 22 May 2008 after

181. Apps, K. (2009) ‘Damages Claims Against Trade Unions after *Viking* and *Laval*’ 34 *European Law Review* 141 at 147. See also broadly in support of this view, Syrpis, P., T. Novitz (2008) ‘Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation’ 33 *European Law Review* 411 at 420; and see Dashwood, A. (2007-8) ‘*Viking* and *Laval*: Issues of Horizontal Direct Effect’ in C. Barnard (ed.), *The Cambridge Yearbook of European Legal Studies* 463 at 536.

182. For the economic torts which potentially apply in this scenario, see Deakin, S., G. Morris (2009) *Labour Law*, Fifth Edition (Oxford: Hart Publishing) at 899 – 917 and on interim injunctions (discussed further below) see 943 - 949.

BALPA realised that, regardless of the outcome, the case would progress on appeal to the Court of Appeal and House of Lords, with the prospect of further reference to the European Court of Justice. No collective action was therefore taken.¹⁸³

There has been no further litigation on this issue in the UK, so we do not know the circumstances in which UK courts will regard free movement rights as being at issue, although we expect, given the judgments delivered in *Viking* and *Laval*, that this assumption will readily be made in cases which have a transnational dimension involving more than one EU Member State.¹⁸⁴ The issue is now the subject of an application by BALPA to the ILO CEACR for breach of ILO Convention No. 87, which has also been sent as an ‘observation’ to the UN Committee on Economic, Social and Cultural Rights (responsible for supervision of compliance with the UN Covenant on Economic, Social and Cultural Rights 1966) and the European Committee on Social Rights (responsible for supervision of the European Social Charter 1961).¹⁸⁵ What this dispute arguably illustrates is the ‘chilling effect’ that EC law has on the ability of UK unions to call industrial action.

Various issues are raised in complaint stemming from the BALPA case which merit further consideration. These are addressed here:

1.2.1 Constraints placed on legitimate objectives

It is only where industrial action is wholly or mainly concerned with one of the objectives associated with a legitimate ‘trade dispute’, as defined in under section 244 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), that UK trade unions are able to call a strike without incurring civil liability in tort.¹⁸⁶ The objectives of industrial action which the ECJ treats as legitimate in *Viking* are broadly consistent with some of those recognised under this statutory provision, in so far as ‘terms and conditions of employment’ and ‘engagement or non-engagement’ are listed therein.¹⁸⁷ These are not the only reasons for which industrial action may be taken while being covered by statutory immunity. Nevertheless, as the ECJ observes in

¹⁸³. ‘Pilots’ union drops court action’, *The Guardian* 22 May 2008.

¹⁸⁴. Barnard, C. (2007-8) ‘*Viking* and *Laval*: An Introduction’ in C. Barnard (ed.) *The Cambridge Yearbook of European Legal Studies* 463 at 466-70; Hos, N. (2009) ‘The Principle of Proportionality in the *Viking* and *Laval* Cases: An Appropriate Standard of Judicial Review?’ EUI Working Paper LAW 2009/06 at 19-21.

¹⁸⁵. See *Application by the British Air Line Pilots Association to the International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations against the United Kingdom for breach of ILO Convention No. 87* drafted by John Hendy QC, available at: <http://www.balpa.org/Document-Library/Industrial-Issues/BALPA-ILO-Application-2009-01-26.aspx> (Hereafter *Application by the British Air Line Pilots Association to the International Labour Organisation*).

¹⁸⁶. This view is also expressed in Novitz, T. (2009) ‘United Kingdom’ in Blanpain, R., A. Swiatkowski (Eds.), *The Laval and Viking Cases: Freedom of Services and Establishment v Industrial Conflict in the European Union* 69 *Bulletin of Comparative Labour Relations* 177-185.

¹⁸⁷. *Viking*, para. 80.

Viking, if an employer had given a legally enforceable undertaking to the effect that neither terms and conditions of employment nor job security would be affected, then that might suggest that these were not the objectives of the industrial action in question and the union would have to show that the industrial action was wholly or mainly concerned with the other legitimate objectives listed in section 244.¹⁸⁸

It might even be observed that the approach taken in *Viking* and *Laval* to the potentially legitimate objectives of industrial action is, in at least one respect, more generous than that presently recognised under domestic UK labour law, since secondary action is perceived to be permissible, (if not necessarily so on the actual facts of *Viking* and *Laval*).

For example, the *Laval* judgment explicitly stated that ‘in principle’ trade unions have the right to initiate secondary action to prevent ‘social dumping’.¹⁸⁹ As regards the ITF ‘flags of convenience’ policy, the Court did not have any objection to secondary action or sympathy strikes per se, but expressed concerns on other grounds – namely that the ITF is required, when asked by one of its members, to initiate solidarity action against the beneficial owner of a vessel which is registered in a State other than that of which that owner is a national, irrespective of whether or not that owner’s exercise of its right of freedom of establishment is liable to have a harmful effect on the work or conditions of employment of its employees.¹⁹⁰

Nevertheless, as noted above, those findings of the European Court of Justice would seem merely to tolerate national labour law which permits secondary or sympathy action; they do not in any way require the UK to introduce such protection. The most that might happen is that the UK legislature might view the Court’s position as persuasive when considering proposals to adopt new statutory provisions which allowed for such action. Given the position taken by the UK Labour Government on the Trade Union Freedom Bill endorsed by the Trades Union Congress (TUC), such a policy shift remains at present highly unlikely.¹⁹¹

More significant is the way in which the Court, in *Laval*, has restricted the scope of legitimate objectives in the context of a dispute over recognition of a union in respect of posted workers. In this setting, the Court treated as illegitimate industrial action aimed at establishing workplace bargaining, which would then lead to negotiations over minimum pay. This was seen as

188. Cf. *Viking*, at paras. 80 - 82.

189. *Laval*, at para. 107.

190. *Viking*, at para 89.

191. See <http://www.unitedcampaign.org.uk/tradeunionfreedombill.html>; and Hendy, J., G. Gall (2006) ‘British Trade Union Rights Today and the Trade Union Freedom Bill’ in K.D. Ewing (ed.), *The Right to Strike: From the Trade Disputes Act 1906 to a Trade Union Freedom Bill 2006*, London: Institute of Employment Rights

being too uncertain and therefore too onerous for the provider of services,¹⁹² in breach of the Posted Workers Directive 96/71/EC.¹⁹³ This approach would seem to have since been affirmed by subsequent judgments delivered in the *Rüffert* and *Luxembourg* cases.¹⁹⁴

This, then, constitutes a key exception to the basis on which UK legislation establishes the existence of a lawful ‘trade dispute’, which determines the legitimacy of objectives of industrial action. The relevant UK statutory provisions make specific reference to an entitlement to take industrial action which relates wholly or mainly to ‘the recognition by employers or employers’ associations of the right of a trade union to represent workers’ in negotiation or consultation or other procedures relating to terms and conditions of employment.¹⁹⁵

The employers of posted workers will, it seems, be exempt from this fundamental tenet of UK labour law, in that it would seem that the Posted Workers Directive prevents a trade union from seeking to place pressure on them to ‘recognise’ the union and enter into collective bargaining. The foreign service provider which hires posted workers may voluntarily enter into an agreement with a trade union, but cannot be subjected to industrial action pushing for negotiations towards such a collective agreement. This will make it almost impossible for the terms and conditions of posted workers to be governed by UK collective agreements, given that there is no mechanism under UK law to declare collective agreements or arbitration awards ‘universally applicable’ or to require that terms and conditions are set for posted workers under ‘generally applicable’ collective agreements or those concluded with the ‘most representative’ employer.¹⁹⁶ It is an approach which seems likely to thwart the campaign, particularly by unions in the construction industry, for more effective UK implementation of the Posted Workers’ Directive, particularly preventing UK collective agreements in the sector being undermined by the import of low-wage labour to carry out specific tasks.¹⁹⁷ The UK Government may also now be called upon to

192. *Viking*, para 110. One would expect the Court to take the same view of any attempt to impose compulsory statutory recognition on the employer of posted workers, seeking to supply services abroad. Cf. TULRCA, Schedule A1.

193. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] O.J. L18/1.

194. Case C-346/06 *Dirk Rüffert v Land Niedersachsen*, judgment of 3 April 2008 (hereinafter *Rüffert*) and Case C-319/06 *Commission v Luxembourg*, judgment of 19 June 2008 (hereinafter *Luxembourg*). See also P. Davies, ‘Case C-346/06 *Rüffert v Land Niedersachsen* [2008] IRLR 467 (ECJ)’ (2008) 37 *Industrial Law Journal* 293.

195. TULRCA, section 244(1), especially para. (g).

196. see Hall, M. (2003) ‘Posted Workers’ available on <http://www.eurofound.europa.eu/eiro/2003/06/tfeature/uko306106t.htm>.

197. Note the role of the National Engineering Construction Committee (NECC) and discussion of NECC objectives at Warwick in 2004. See, for example, <http://www.amicustheunion.org/pdf/NECC-Posted%20Workers%20Directive%20campaign%20bulletin%20Nov%202004.pdf>. See further below.

reconsider its piecemeal legislative implementation of the Directive, in the light of the Court's recent jurisprudence.¹⁹⁸

In addition, it is worth noting that, as the BALPA submissions to the ILO CEACR point out, it was not part of BA written pleadings that the proposed strike by BALPA was unlawful or other than in accordance with the extensive regulatory requirements of UK legislation.¹⁹⁹ Nevertheless, the legitimacy of BALPA aims came under scrutiny because it could always be argued that it was disproportionate', which raises particular difficulties in the context of UK labour law.

1.2.2 The proportionality test

It has been observed that the European Court of Justice in *Viking*, having acknowledged the importance of the right to strike, then proceeded to apply its strictest form of the proportionality test, 'unmitigated by any references to "margin of appreciation",²⁰⁰ which we find in the case of *Schmidberger*.²⁰¹ The Court in *Viking* held that it is for the national court to examine, in particular, on the one hand, whether, under the national rules and collective agreement law applicable to that action, [the union] did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with *Viking*, and, on the other, whether that trade union had exhausted those means before initiating such action."²⁰²

It would seem to be indicated, thereby, that it is not sufficient that such action would otherwise be lawful under national labour law.

It might have been relatively easy to defend the actions of the UK Government in a case like BALPA, on the basis that UK labour law relating to collective action is proportionate, given the account taken of employer interests through

198. Note that most UK labour legislation concerned with the subject-matter listed in Article 3 of the Posted Workers' Directive already applied to workers permanently or temporarily in the UK, such as the Working Time Regulations 1998 and the National Minimum Wage Act 1998. Minor consequential amendments have been made by virtue of the Employment Relations Act 1999 and the Equal Opportunities (Employment Legislation) (Territorial Limits) Regulations 1999. There has been no single statute dealing specifically with posted workers and it may be that the scope of protection offered in the UK goes beyond the list in Article 3. See C. Barnard, 'The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law' (2009) 38(1) *Industrial Law Journal* 122 at 125 – 127 and 132.

199. See *Application by the British Air Line Pilots Association to the International Labour Organisation* above n.18, at para. 63. It might, however, have been possible to argue a point regarding future terms and conditions, in reliance on *University College London Hospital NHS Trust v Unison* [1999] IRLR 31 (Court of Appeal); found not to be in violation of Article 11 of the European Convention on Human Rights in *Unison v UK* [2002] IRLR 497 (European Court of Human Rights).

200. Barnard, C. (2008) 'Social Dumping or Dumping Socialism?' *The Cambridge Law Journal* 262 at 264; Hos n.184 above at 11-12.

201. Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republic of Austria* [2003] ECR I-5659 (hereinafter '*Schmidberger*').

202. *Viking*, at para. 87.

the strict demarcation of legitimate aims of industrial action and the extensive balloting and notice requirements set out in TULRCA. That said, it is notable that the UK has not been called upon to do so in any court proceedings and whether it would elect to do so is a matter for speculation. Nevertheless, it is evident that it is more difficult to defend the actions of a trade union under a proportionality test. Indeed, the finding that free movement rights regarding establishment and services have horizontal application, which apply to trade unions, would seem to require unions to consider taking additional measures beyond those contemplated by statute, such as reference to conciliation and arbitration, or providing periods of notice over and above the statutory procedural minima.²⁰³

The problem has been most succinctly put by Brian Bercusson:

It is in the very nature of negotiations that both parties set demands at their highest and through negotiation over time seek a compromise... At what stage of this process and against what criteria is the test of proportionality to be applied? Any test based on proportionality in assessing the legitimacy of collective action is generally avoided in the industrial relations models of Member States for the very reason that it is essential to maintain the impartiality of the state in economic conflicts.²⁰⁴

Concern has also been voiced, albeit in different ways, by Davies²⁰⁵ and Reich,²⁰⁶ that in cases where free movement rights arise, the ECJ seems to contemplate under its proportionality test only 'defensive' collective action, which will defend workers' interests from harm by an employer. This would be an alarming curtailment of those already limited aims of collective action treated as legitimate under UK statute, by virtue of section 244(1) of TULRCA. Moreover, there are indications that the judgments mean that industrial action could only be taken as a last resort, an approach which would be in violation of the findings of the European Committee on Social Rights, responsible for supervision of compliance with the European Social Charter 1961,²⁰⁷ to which the UK is a party.

The over-arching difficulty is that to take the approach endorsed in *Viking* requires national courts to engage in assessing proportionality every time that industrial action is threatened which would have some impact on free

203. Syrpis and Novitz n.181 above at 425.

204. Bercusson, B. (2007) 'The Trade Union Movement and the European Union: Judgment Day' 13 *European Law Journal* 279, at 304.

205. Davies, A.C.L. (2008) 'One Step Forward, Two Steps Back? The *Viking* and *Laval* cases in the ECJ' 37 *ILJ* 126 at 139.

206. Reich, N. (2008) 'Free Movement v Social Rights in an Enlarged Union: The *Laval* and *Viking* Cases before the European Court of Justice – Part II' 9 *German Law Journal* at 4 and 9.

207. Jaspers, T. (forthcoming) 'The Right to Collective Action in the Netherlands' in E. Ales and T. Novitz (eds), *Collective Action and Fundamental Freedoms in Europe. Striking the balance*, Intersentia

movement of goods, establishment, services or workers. As noted above, this is a role with which UK Courts are unfamiliar. It is the ‘great uncertainty around the application of the proportionality principle’²⁰⁸ which is likely to have a deterrent effect for trade unions contemplating collective action, such as BALPA, which do not want to risk the costs of litigation.

In the BALPA case, BA argued that the action planned by BALPA was disproportionate. BA cited in support of this argument its estimate that the cost of a one day strike would be £100 million and its projection that the subsidiary ‘Open Skies’ was not projected to be profit-making for the next three years. It was also said that the strike would affect bonuses for BA staff and injure BA’s reputation, as well as upsetting the travel plans of tens of thousands of passengers. As the BALPA submissions to the ILO CEACR observe, these seemingly harsh consequences of industrial action fall to be weighed against the apparently ‘modest demands of the BA pilots for protection against what was merely the anticipation of a possible threat to terms, conditions and security’. This would seem to place the balance overwhelmingly in BA’s favour.²⁰⁹ Against this, BALPA asks how is it to be measured that the parent company (as opposed to the subsidiary) was well-positioned to bear the cost of the strike, or that there would be a cost to workers in taking such action?²¹⁰ In the UK at present, since this litigation was not pursued, we have no answer to these (if not other) questions and there is concern about the answers that the courts might give.

1.2.3 The potential absence of a cap on damages

The other chilling factor of the BALPA litigation was the argument made by BA that the cap on damages, which usually applies to the civil liability of UK trade unions under section 22 of TULRCA, would not apply to industrial action which was in breach of EU law. BA put forward this argument, firstly, on the basis that a claim based on breach of the EC Treaty was not a claim in tort. In the alternative, BA argued that the cap on damages was incompatible with the principle of effective remedies under EU law.²¹¹ Just as the UK cap for compensation for sex discrimination had to be set aside, so too would the cap on trade union liability.²¹²

BALPA has observed that: ‘If that proposition is correct, then trade unions in the UK (and presumably elsewhere in the EU) could be bankrupted by a claim for damages upheld in accordance with *Viking* and *Laval*. The risk that the proposition is correct is itself a severe inhibition on strike action.’²¹³ Indeed, both he and Katherine Apps raise the prospect of litigation of this type brought,

²⁰⁸ Hos, n.184 above, at 32.

²⁰⁹ See *Application by the British Air Line Pilots Association to the International Labour Organisation* above n.185, at para. 173.

²¹⁰ *Ibid.*, at paras. 174-5.

²¹¹ *Ibid.*, at para. 31.

²¹² C 271/91 *Marshall v Southampton and SW Hants AHA (No. 2)* [1993] ECR I-4367.

²¹³ See *Application by the British Air Line Pilots Association to the International Labour Organisation* above n.185, at para. 189.

not only by employers, but others whose business interests are detrimentally affected by collective action. As Apps recognises: ‘It is easy to think of examples of such potential claimants... A strike in, for instance, the transport sector, is most unlikely only to affect the employer’s business; it will affect those of the customers and those with whom those customers have contracts. Currently, the standing of such parties is governed by whether they can fit within the scope of one or more of the indirect economic torts within English private law. However, post *Viking*, it is quite possible that large commercial parties would be more likely to be able to establish the threshold for an interim injunction application if such industrial action was threatened.’²¹⁴

Apps is however critical of the notion that the cap on damages should readily be lifted to achieve compliance with EU law. Her reasoning stems from the basis given for horizontal direct effect of Article 49 and 56 TFEU (ex Articles 43 and 49 EC) in *Viking* and *Laval* respectively. She rightly observes that this is done by the ECJ in reliance on extension of free movement requirements to cover quasi public regulatory bodies,²¹⁵ which she sees as ‘a species of vertical direct effect’.²¹⁶ She therefore considers that, in order to establish liability, it is arguably that there will have to be demonstrated a ‘sufficiently serious breach’, namely there must be consideration of ‘the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission and the adoption or retention of national measures or practices contrary to Community law’.²¹⁷

She suggests that, by reference to the requirement of a ‘sufficiently serious breach’, an additional safeguard could be provided for trade unions’ Article 11 rights under the European Convention on Human Rights (ECHR), an argument to which the recent judgment of the European Court of Human Rights in *Enerji Yapi-Yol Sen v Turkey* would seem to add force.²¹⁸ While only a Chamber, as opposed to a Grand Chamber judgment,²¹⁹ in *Enerji Yapi-Yol Sen* a clear link is made between freedom of association and industrial action, such that the latter cannot be restricted other than in accordance with a ‘pressing social need’, that is, in narrowly defined circumstances which must be provided for by law, have a legitimate aim and be necessary in a democratic society.

²¹⁴. Apps n.181 above, at 151.

²¹⁵. See also broadly in support of this view, Syrpis and Novitz, n.181 above at 420; and see A. Dashwood, ‘*Viking* and *Laval*: Issues of Horizontal Direct Effect’ in C. Barnard (ed.), (2007-8) *The Cambridge Yearbook of European Legal Studies* 463 at 536.

²¹⁶. Apps n.181 above, at 147.

²¹⁷. C-46/93 and C-48/93 *Brasserie du Pecheur SA v Germany* [1996] ECR I-1029 at para. 56, cited by Apps n.14 above, at 145.

²¹⁸. Application No. 68959/01, *Enerji Yapi-Yol Sen v Turkey*, judgment of 21 April 2009.

²¹⁹. Note however, that this follows from the 2008 judgment of the Grand Chamber delivered in Application No. 34503/97 *Demir and Baykara v Turkey*.

Moreover, it would be curious were principles established regarding competition law damages imported into free movement cases regarding trade unions' liability to an employer, given the policy decision made by the European Court of Justice to exclude collective agreements from coverage by competition law provisions under the EC Treaty. 'Although the ECJ in *Viking* rejected the argument advanced before it that the *Albany* principle should apply to remove trade unions from the scope of Art. 43, this does not mean that the *Albany* rationale is not relevant when considering the separate question of whether there is private law damages liability.'²²⁰

Apps also argues that account could be taken of a union's compliance with the complex UK procedural requirements for balloting and notice to an employer. Moreover, she considers that there are 'powerful (although of course far from watertight) arguments' which could be used to justify the UK legislative cap on damages, in that it recognises an inherent asymmetry in the relationship between the parties. 'It protects a trade union's ability to protect the fundamental rights of its members to associate, and protects the trade union's ability to collectively bargain without the threat of a damages award which is likely to be wholly beyond the reach of its membership.'²²¹ Further, the level of the cap is not arbitrary insofar as its level is linked to the number of members, and hence the union's capacity to pay.²²² Moreover, it should be remembered that the employer still has the potential to claim against the UK, as the relevant Member State, for damages for breach of any positive obligations under free movement provisions of the EC Treaty, even if it cannot recover the full losses suffered from a trade union.²²³

1.2.4 Injunctions

The way in which an employer can rely on free movement rights to pre-empt industrial action is to seek an interim injunction in UK courts. It is common for employers in the UK to assert that, when calling a strike, unions are not entitled to claim statutory immunity. The reason given may be that the aims of the industrial action do not come within the compass of a lawful 'trade dispute' or that the union has not complied with the statutory requirements relating to balloting and notice. A further reason could well be violation of EC law; indeed it was on this basis that an injunction was sought in the *Viking* litigation before UK courts.

Specific statutory provision is also made for ordinary members of the public to seek an order to prevent industrial action taking place which is unlawful under UK legislation (that is, does not satisfy the requirements of a 'trade dispute' or the procedural requirements for collective action set out below). An individual may do so where:

²²⁰. Apps, n.181 above, at 147-8.

²²¹. Apps n.181 above, at 152; and *Application by the British Air Line Pilots Association to the International Labour Organisation* above n.185, at para. 32.

²²². Apps, n.181 above, at 152.

²²³. *Ibid.*, at 154.

- an effect, or a likely effect, of the industrial action is or will be to –
 - (i) prevent or delay the supply of goods or services, or
 - (ii) reduce the quality of the goods or services supplied, to the individual making the claim.²²⁴

Once again, a member of the public who considers that his rights to free movement of goods, services, or establishment are affected by industrial action (or his free movement as workers) could seek an injunction.

There is statutory provision for ‘restrictions on grant of injunctions and interdicts’ in respect of industrial action, which states that all efforts should be given to those affected to be heard and that the courts should ‘in exercising its discretion whether or not to grant the injunction, have regard to the likelihood of that party’s succeeding at the trial of the action in establishing any matter which would afford a defence to the action under section 219 (protection from certain tort liabilities) or section 220 (peaceful picketing)’.²²⁵ Nevertheless, Bob Simpson, who has examined in detail the effect of injunctive relief on UK industrial action,²²⁶ has observed that UK courts frequently grant such relief, for they do so where the employer has made out a *prima facie* case and on the basis of a ‘balance of convenience’ test.²²⁷ Given that it is the employer who is likely to suffer economic loss by virtue of a strike, UK courts almost invariably grant interim injunctive relief to the employer, a state of affairs that has been criticised by the ILO CEACR and the Council of Europe’s Social Rights Committee.²²⁸

Breach of an interim injunction or, indeed any injunction, can lead to a finding of ‘contempt of court’ which has consequences under criminal law. A trade union which defies an injunction faces significant fines (as do their officials) and there may even be ordered ‘sequestration’ (confiscation) of a union’s assets.²²⁹ It was not therefore surprising that the proposed Trade Union Freedoms Bill proposed reform of this aspect of UK labour law.²³⁰

In this way, the ready availability of interim injunctive relief poses particular problems for trade unions which wish to call industrial action which may have a European transnational aspect. As Davies has observed, it will be enough for an employer to demonstrate a *prima facie* breach of EU law²³¹; then the UK courts will determine the matter according to the balance of convenience. This is likely to inhibit unions calling industrial action.

224. TULRCA, s.235A.

225. TULRCA, s.221.

226. Simpson, B. (1984) ‘Trade Disputes and the Labour Injunction after the Employment Acts of 1980 and 1982’ *The Modern Law Review* 577; and Simpson, B. (1987) ‘The Labour Injunction, Unlawful Means and the Right to Strike’ *The Modern Law Review* 506

227. Cite *American Cyanamid Ltd v Ethicon Ltd* [1975] AC 396 at 407.

228. See Hendy and Gall n.191 above, at 276.

229. TULRCA 1992, ss.16. See also Deakin and Morris n.182 above, 1028 – 1030.

230. See Hendy and Gall n.191 above, 262-3.

231. Davies n.205 above.

1.2.5 Exposure to dismissal

The BALPA submissions to the ILO CEACR make brief reference to the notion that British workers ‘will be deprived of all protection against unfair dismissal for taking industrial action rendered unlawful by *Viking* and *Laval*’.²³² However, this complete removal of protection seems unlikely to follow necessarily as a direct consequence of the application of that case law in UK courts. As Apps indicates, there is nothing to suggest that workers themselves are bound directly as private parties by Article 49 and 56 TFEU (ex Articles 43 and 49 EC).²³³ Moreover, section 238A of TULRCA, which allows employees to claim protection from unfair dismissal when they take industrial action for which a trade union would not be liable in tort, by virtue of section 219 of TULRCA, would not seem to fall into abeyance just because there is a breach of EU law. The latter must lie beyond the scope of the statute. Nor is there a necessary inconsistency between continued protection for the individual from dismissal and the trade union’s obligations under EU law.

Nevertheless, it may well be that exposure of employees to dismissal will arise indirectly, as a consequence of the application of the principles established in *Viking* and *Laval*. A trade union which is aware that it is likely to be liable under EU law (especially for an unlimited sum), or which is the subject of an injunction issued by UK courts in reliance on EU law, is unlikely to authorise or endorse any industrial action which has a European transborder dimension. This means that if a group of workers take such action regardless, and if there is a trade union member amongst them, the action will be ‘unofficial’. As a result, they will be unable to claim protection from dismissal under sections 238 of TULRCA (which relates to selective dismissal) or section 238A of TULRCA (which provides more generous protection for a period of industrial action lasting at least twelve weeks). In this way, the judgments in *Viking* and *Laval* do have potential palpable effects on the protection of striking workers from dismissal under UK law.

In these ways, when combined with the peculiarities of UK legislation and common law governing access to collective action, EU law would seem to significantly limit the collective bargaining power of workers and their organisations and the UK Government has done nothing to address this. What is needed, given the doctrine of supremacy of EU law, is that the legal principles established by the European Court of Justice in *Viking* and *Laval* are revisited and substantially altered.

It might seem that the judgment of the European Court of Human Rights in *Enerji Yapi-Yol Sen* could provide grounds for doing so, on the basis that the Human Rights Act 1998 incorporated ‘Convention rights’ into UK law. Whereas *Viking* and *Laval* place the onus on the union to justify collective action where it can have an effect on an employer’s rights to free movement,

²³². *Application by the British Air Line Pilots Association to the International Labour Organisation* n.185 above at para. 62.

²³³. See Apps n.181 above at 147.

Enerji Yapi-Yol Sen would appear to reverse that burden.²³⁴ Such a change to the jurisprudence of the ECJ would not make it easy to organise or participate in lawful collective action in the UK, but could at least ensure that recourse to lawful collective action is possible in European transborder situations.

The problem is that the UK courts have been unwilling, as yet, to recognise this facet of ECHR jurisprudence. As Lord Justice Maurice Kay commented in the *Metrobus v Unite the Union* case in 2009, '[i]n this country, the right to strike has never been much more than a slogan or a legal metaphor.'²³⁵ Even though counsel, once again John Hendy QC, referred the Court of Appeal to the findings of the *Enerji Yapi-Yol Sen*, Mr Justice Lloyd indicated that he would not regard the judgment of the Chamber in that case as influential:

The contrast between the full and explicit judgment of the Grand Chamber in *Demir and Baykara* on the one hand, and the more summary discussion of the point in *Enerji Yapi-Yol Sen* on the other hand is quite noticeable. It does not seem to me that it would be prudent to proceed on the basis that the less fully articulated judgment in the later case has developed the Court's case-law by the discrete further stage of recognising a right to take industrial action as an essential element in the rights afforded by article 11.²³⁶

He did accept that he was obliged to consider, albeit in more general terms, whether the constraints on the right to strike at issue in that case, were defensible under Article 11(2). However, he concluded, on balance, that they were not too onerous.²³⁷ This determination is open to criticism, but may still be indicative of reluctance on the part of UK courts to rely upon ECHR jurisprudence in order to mitigate the effect of EU law.

2. UK implementation of the Posted Workers Directive

The second issue which arises is whether the UK is in compliance with the Posted Workers Directive (PWD) in respect of its legislation and provision for public procurement.

The UK Government denounced ILO Convention No. 94 on 20 September 1982 and New Labour has not sought to ratify this instrument again. It is notable that, at the time that the PWD was adopted, '[a]mong the three main construction unions in the UK, the Union of Construction, Allied Trades and Technicians argued that the Directive should give all employees the right to the

²³⁴. See Syrpis, P. (2008) 'The Treaty of Lisbon: Much Ado... But About What?' *ILJ* 219 at 234.

²³⁵. *Metrobus Ltd v Unite the Union* (2009, IRCR851 (CA)).

²³⁶. *Ibid.*, para. 35.

²³⁷. *Ibid.*, paras 101 – 113.

terms of sectoral collective agreements in preference to any national legal minimum wage, regardless of the legal status of the agreement, and that it should cover the self-employed',²³⁸ but this was never done. There has been a campaign for public procurement to be utilised to ensure fair wages for building contractors in connection with the Olympic Games, and the use of British workers, rather than agency workers.²³⁹ However, the current UK Government has yet to agree to the imposition of these terms and such measures would go beyond those principles formally agreed in 2008 between the UK Trades Union Congress (TUC) and the London 2012 Organising Committee (LOCOG).²⁴⁰ Moreover, as noted above, the National Engineering Construction Committee (NECC) has yet to be successful in its campaign to ensure that UK collective agreements in the sector are not undermined by the import of low-wage labour to carry out specific tasks.²⁴¹ If this is to be done, one would assume that this would have to be achieved by new UK legislation, making a central construction sector agreement universally applicable, and this seems highly unlikely to happen. For these reasons, the case of *Rüffert*, insofar as it concerns public procurement, despite standing in stark contravention of ILO Convention No. 94, would seem to have little effect in the UK.

The judgment in *Luxembourg* seems likely to pose greater problems for the UK. In this respect, the analysis provided by Catherine Barnard is of particular assistance.²⁴² As she observes, the UK did not adopt particular legislation designed to implement the PWD. This is because UK labour law applies to all those persons who fall within its territorial scope. It is evident that, prior to December 2008, the UK like many other EC Member States, regarded Article 3(1) of the PWD as a minimum obligation as opposed to a maximum and was confident that it complied with its terms. What the UK did over this period was to repeal legislative provisions which would otherwise have denied protection to posted workers. For example, section 196 of the Employment Rights Act 1996 (ERA) was repealed in 1999 so that territorial limitations no longer applied in respect of rights listed in the ERA. As a result, these rights apply to any employee or worker otherwise eligible to claim these entitlements, subject to conflicts of laws provisions. Similarly, the territorial limitations applicable to anti-discrimination law provisions were also removed.²⁴³

238. 'Thematic feature – posted workers' available at:

<http://www.eurofound.europa.eu/eiro/2003/06/tfeature/uko306106t.htm>.

239. 'Construction Workers Protest Over Jobs At 2012 Olympic Site', 6 May 2009, available at: http://www.build.co.uk/construction_news.asp?newsid=93200

240. 'London 2012 and UK unions agree to work together for 'inspirational' Games' available at: <http://www.london2012.com/news/media-releases/2008-09/london-2012-and-uk-unions-agree-to-work-together-for-inspirational-games.php>.

241. Note the role of the National Engineering Construction Committee (NECC) and discussion of NECC objectives at Warwick in 2004. See, for example, <http://www.amicustheunion.org/pdf/NECC-Posted%20Workers%20Directive%20campaign%20bulletin%20Nov%202004.pdf>.

242. Barnard n.198 above.

243. See The Equal Opportunities (Employment Legislation) (Territorial Limits) Regulations 1999 SI 1999/3163; and Employment Equality (Sex Discrimination) Regulations 2005 SI 2005/2467.

The list of statutory employment law provisions which apply to posted workers listed on the Department for Business, Innovation and Skills (BIS) website is as follows:²⁴⁴

- Working Time Regulations 1998
- National Minimum Wage Act and Regulations 1998
- Sex Discrimination Act 1975
- Race Relations Act 1976
- Disability Discrimination Act 1995
- Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000
- Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002
- Employment Equality (Sexual Orientation) Regulations 2003
- Employment Equality (Religion or Belief) Regulations 2003
- Health and safety legislation (primarily the Health and Safety at Work etc Act 1974 and the Management of Health and Safety at Work Regulations 1999)
- legislation regarding employment of children

Additionally, the UK may be regarded as being particularly generous in its treatment of posted workers, in that it does not impose licensing and authorisation requirements which are imposed by other EU Member States.²⁴⁵

As Barnard observes, current UK legislative protection for posted workers thereby goes beyond the ‘nucleus of mandatory rules’ in Article 3(1) of the PWD. This would seem to be in breach of the interpretation adopted in respect of Article 3(7) of the PWD in *Laval*. While that provision states that paragraphs (1) to (6) of Article 3 ‘shall not prevent application of terms and conditions more favourable to workers’, the ECJ has indicated that it is only to apply:

- (i) to the situation where service providers from another EU Member State voluntarily sign a collective agreement in the host state which offers superior terms and conditions to employees; and
- (ii) to the situation where the home state laws or collective agreements are more favourable to workers.²⁴⁶

Nor does it seem that the UK rely on the ‘public policy’ exception in Article 3(10), which the ECJ considers can be ‘relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society’, to which end

244. <http://www.berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page19313.html>.

245. House of Commons European Scrutiny Committee, 30th Report of Session 2006-7, para. 3.18, cited by Barnard (2009) n.198 above, 132.

246. Barnard (2009) n.30 above, 127.

the EU Member State relying on the provision must present ‘appropriate’ and ‘precise’ evidence, indicative of the expediency and proportionality of the measure taken.²⁴⁷ The decision in *Luxembourg* certainly casts doubt on whether current UK legislation, which enables posted workers to make a claim in respect of a ‘written statement’ and to challenge discrimination on grounds of part time and fixed term work. Since this protection has to be regarded as being adequately implemented in the home state, there are no grounds to provide additional protection in the host state.²⁴⁸ Nor does it seem that a conflict of laws approach, based on the terms of the Brussels Regulation,²⁴⁹ necessarily assists posted workers, given that Article 19 indicates that an employer originating from an EU Member may be sued either in the courts in which the employer is domiciled or where the employee habitually carried out work. Again, this provision can only be overcome by consent of the employer to an agreement on jurisdiction, which may be difficult to obtain.²⁵⁰ Her conclusion is that ‘it is very unlikely that the UK will be able to continue applying all of its labour laws to posted workers as a general rule’.²⁵¹ Her prognosis is that, after the politically sensitive Irish referendum on the Lisbon Treaty, both Irish and UK implementation of the PWD may well be called into question by the European Commission. Needless to say, there has been no litigation on this issue as yet in the UK and no sign that the UK Government will take any anticipatory legislative action on this issue.

It is worth bearing in mind how the UK Government responded, prior to the decision in *Luxembourg*, to a pre-infraction letter from the Commission, which is reported by Barnard.²⁵² The UK has noted that the rights set out in the ERA and elsewhere are usually subject to a qualifying period and therefore truly ‘temporary’ posted workers. This explanation must be understood in the light of Article 2(1) of the PWD, which states that a ‘posted worker’ means ‘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’. As we have no clarity from case law of the ECJ as to what will constitute ‘a limited period’, the UK’s argument may have some weight.

Moreover, it is interesting that all the litigation to date has been led by the employers claiming free movement rights or by the Commission. One might wonder whether the sympathies of the ECJ may shift in future years where a claim is brought by a ‘temporary agency worker’, seeking enforcement of an entitlement to non-discrimination in terms and conditions of employment by virtue of Article 5 of the Temporary Agency Work Directive.²⁵³ This might

²⁴⁷. *Luxembourg*, paras. 50 - 51.

²⁴⁸. *Luxembourg*, paras 57 - 58.

²⁴⁹. Brussels Regulation 44/2001 (OJ [2001] L12/1)

²⁵⁰. Barnard (2009) n.198 above, at 131-2.

²⁵¹. *Ibid.*, 132.

²⁵². *Ibid.*

²⁵³. Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on Temporary Agency Work [2008] O.J. L327/9.

arise in the UK, for example, where the agreed qualification period of 12 weeks has elapsed.²⁵⁴ The entitlement of the posted temporary agency worker to equal, as opposed to minimum pay, as well as access to a host of other benefits encompassing access to employment, collective facilities and vocational training would be at issue. Would their claim somehow be regarded differently by virtue of their status as a ‘posted worker’? The Commission may have to do further thinking in terms of the compatibility of these two instruments before infraction proceedings commence.

What is also important to note is that the current UK Government has not taken any initiative to utilise Article 3(8) of the Posted Workers’ Directive so as to ‘extend’ collective agreements to all workers within a sector. Ewing and Hendy have argued that this is an option for the UK in the construction sector, to make provision for the legal effect of collective agreements which:

- are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned; and/or
- have been concluded by the most representative employers’ organisations and trade unions at national level and which are applied throughout the country.²⁵⁵

This seems to be also the concern of Brendan Barber when he observed in relation to the Lindsey Oil Refinery dispute, discussed above, that:

The EU’s Posted Workers Directive has been implemented in the UK in a way that fails to guarantee UK agreements, and recent court judgments have raised even more worries that the law favours employers that try to undermine existing standards.²⁵⁶

What British unions have done is to complain vociferously about the impact of *Viking* and *Laval*. They argue that the cases set a precedent which gives employers a licence for social dumping. On this basis they have called for amendment of the EU Treaty and the Posted Workers’ Directive.²⁵⁷

254. On the agreement between the CBI and TUC as to the twelve week period, see Consultation Paper: Employment Agencies, May 2009, p. 11 available at: <http://www.berr.gov.uk/files/file51197.pdf>.

255. Ewing, K.D., J. Hendy (2009) ‘The ECJ Decisions and Trade Union Freedom: Lessons from the United Kingdom’ in K.D. Ewing and J. Hendy (eds.), *The New Spectre Haunting Europe – The ECJ, Trade Union Rights and the British Government*, London: Institute of Employment Rights, 74.

256. See http://www.tuc.org.uk/law/tuc-15979_fo.cfm, cited by Barnard, C. (2009) ‘“British Jobs for British Workers”: The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market’ *Industrial Law Journal* 245 at 259.

257. See <http://www.amicustheunion.org/LavalVikingruffert/> and <http://www.gmb.org.uk/Templates/Internal.asp?NodeID=98166>, cited in Barnard (2009) n. 83 above, at 259 - 260.

3. Conclusion

It is clear that the ECJ decisions are having an impact in the UK, in that the threat of potential litigation by employers based on these decisions is having a chilling effect on trade unions' ability to call lawful industrial action. The danger lies in the possibility that unions be exposed to unlimited liability for industrial action which has potential transborder effects, and the uncertainty as to when such legal liability will arise. The current state of EU law seems to allow courts to issue interim injunctions preventing industrial action from taking place on the basis of the balance of convenience, which favours the employer. The employer in the BALPA dispute was aware of the legal weaponry at its disposal and indicated to the union that it was prepared to deploy it.

Nevertheless, the UK Government has barely reacted to recent EU jurisprudence. The legislator has not been active, either in seeking to provide protection of industrial action or revising substantially the ways in which the UK implements the Posted Workers Directive. A Bill seeking to introduce legislation 'overriding the rulings of the European Court of Justice', supported by a Conservative MP in Opposition, was entirely ineffectual and did not lead to any debate in House of Commons.²⁵⁸ Trade unions have also been determined to promote a change in policy, but do not seem to have had Government's ear. Trade unions have sought assistance from the International Labour Organisation, following the BALPA litigation, in an attempt to place pressure on UK and EU political institutions to reconsider current policy.

The *Viking* case was settled out of court, so there was never any determination of the merits of that case before the UK courts. Similarly, although BALPA initially sought a declaration concerning the entitlement of its members to take industrial action, that litigation was also discontinued, due to the union's appreciation that even a ruling in their favour would continue to be taken on appeal and the findings subject to being overturned by the ECJ. It is therefore impossible to say, at present, whether UK courts will follow the European Court of Justice or whether they will look for alternative solutions. One would hope that UK courts would be responsive to recent judgments delivered by the European Court of Human Rights, so as to temper the effect of EU case law, but the *Metrobus* judgment suggests that they may be reluctant to do so.

In the meantime, the trade unions have found themselves frustrated in their attempts to call lawful industrial action which has a transborder dimension, and in their attempts to engage service providers from another EU Member State to engage in collective bargaining which covers posted workers. Employers seem to be willing to exploit EU jurisprudence to prevent industrial action from taking place and to resist engagement in collective

²⁵⁸ Barnard (2009) n. 255 above, at 261.

bargaining. This allows posted workers to potentially undercut UK wages significantly in certain sectors of industry. While UK unions find themselves unable to respond by calling industrial action, we have witnessed the spontaneous expression of protest by workers accompanied, in some instances, by a measure of xenophobic sentiment, as was evident in the Lindsey Oil Refinery dispute. This is surely an unwelcome side-effect of the *Viking* and *Laval* jurisprudence, which might suggest that the ECJ should reconsider its findings and that the EU political institutions must address these issues.

G. EU level

What are the reactions to the jurisdiction at European level?

Wiebke Warneck

Abstract

This article analyses the impact of the court judgments at European level. The reactions of the EU Commission, the Parliament and the Council are set out as well as the reactions of the social partners on EU level.

The article gives insight into the conflicting positions of the EU institutions.

The author comes to the conclusion that the door for legislative changes as a reaction to the ECJ jurisdiction has been opened but it is unlikely that a consensus about such changes can be reached. However it remains to be seen whether the new European Commission may handle the issue differently in future.

When analysing the impact of the ECJ decisions in the European Union it is of course just as important to look at developments on the European level, as it is to look at them from a national perspective. The European Court of Justice – an EU institution – has interpreted Art. 49 and Art. 56 of the Treaty, as well as the PWD, but also trade unions' rights of collective bargaining and the right to strike. These interpretations, giving rise to a great amount of criticism, have of course been discussed in the other European institutions (the Commission, the Parliament and the Council). This part of the report will describe the reactions of those institutions but as well the reactions of the European social partners to the decisions announced by the ECJ.

1. European Commission

Throughout the reactions of the European Commission towards the ECJ decisions it is evident that the Commission sees no need for legislative changes on an EU level. Its view is that all problems occurring as a result of the decisions can be handled through better implementation of the PWD and improved cooperation between individual Member States. All sorts of instruments, statements, high-level groups, studies, etc. are being used by the Commission to illustrate its reaction to the judgments. But is this the way to find real solutions for the European and national levels?

The European Commission's first official statement was announced in April 2008, when recommendations on PWD implementation were released. With regard to the ECJ decisions it states:

“(...) the Commission would like to underline the fact that there is no contradiction between the principles of the internal market and defending workers' rights. Workers' rights are not subordinated to internal market rules. In any event, the Commission will continue to fight against any form of social dumping or disrespect of workers' rights. The Commission also wants to underline that the recent ECJ judgments such as *Viking* and *Laval* do not jeopardise Member States' choice of organisation of industrial relations, including the Nordic social model.”²⁵⁹

On 9 October 2008 the Commission organised a Forum on “Workers Rights and Economic Freedoms” to discuss the consequences of the rulings of the European Court of Justice, with a large participation of ministers, social partners and other main stakeholders.²⁶⁰ It should contribute to the necessary clarification of the application of the Community framework as regards the free provision of services and legislation on posting of workers, and on the exercise of social rights against the background of increasing labour mobility. The Commission hoped that an open debate could lead to a more shared vision of the issues at stake, helping to find solutions that avoid contradictions between fundamental economic freedoms and the protection of fundamental rights.

In December 2008 the Commission established a “High-Level Committee whose role and tasks will be to enhance administrative cooperation between national administrations through the exchange of appropriate information”.²⁶¹

The European Commission reacted in January 2009 to the European Parliament's resolution adopted in October 2008 on the challenges for collective agreements in the EU. The Commission stated that “the current PWD provides a sufficient and appropriate framework within which the issues raised can be appropriately addressed.” The Commission does not see any need at this stage for a legislative proposal.

259. Statement by President J.M. Barroso and Commissioner Vladimir Spidla on the adoption of the Recommendation on posting of workers:

http://ec.europa.eu/commission_barroso/president/pdf/statement_20080403_en.pdf
(last accessed 25/11/2009).

260. SPEECH/08/516 Discours de clôture du Forum “Droits des travailleurs et libertés économiques” <http://ec.europa.eu/social/main.jsp?catId=88&langId=fr&eventsId=117>
(last accessed 25/11/2009).

261. Commission Decision of 19 December 2008 setting up the Committee of Experts on Posting of Workers (2009/17/EC) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:008:0026:0028:EN:PDF> (last accessed 25/11/2009).

Furthermore on the initiative of the European Parliament which voted a considerable budget for this activity, a wide-ranging series of studies on the application of the PWD in all Member States will be conducted, including the legal aspects, focusing on those sectors with a higher number of posted workers.

In his September speech to the European Parliament at the beginning of his second term of office as President of the European Commission José Barroso had to make some concessions with regard to social Europe. With regard to the topics of the ECJ rulings he stated the following: “I have clearly stated my attachment to the respect of fundamental social rights and to the principle of free movement of workers. The interpretation and the implementation of the PWD falls short in both respects. That is why I commit to propose as soon as possible a Regulation to resolve the problems that have arisen. This Regulation will be co-decided by the EP and the Council. A Regulation has the advantage of giving much more legal certainty than the revision of the Directive itself, which would still leave too much room for diverging transposition, and take longer to produce real effects on the ground. If we discover during the preparation of the Regulation that there are areas where we need to revisit the Directive itself, I will not hesitate to do so. And let me be clear: I am committed to fighting social dumping in Europe, whatever form it takes.”²⁶²

It seems clear that Barroso does not want a revision of the PWD. But was he really thinking of a Regulation alongside Directive 96/71/EC knowing what the 27 Member States think about the subject, or was he instead referring to another kind of regulation. The future will show what he and his staff really had in mind. It is easy to propose undesired changes (from the Commission’s perspective) when knowing that the Council will not agree in any case.

2. Council

At the December 2008 Employment and Social Affairs Summit “the Member States discussed the consequences of the cases. They reiterated the need to ensure an appropriate balance between the protection of the posted workers’ rights and fundamental economic freedoms. They also considered that amending or reviewing existing EU legislation was not appropriate at this stage and that, instead, effective measures should be taken to improve its implementation.”²⁶³

262. José Manuel Durão Barroso President of the European Commission Passion and responsibility: Strengthening Europe in a Time of Change European Parliament Plenary Strasbourg, 15 September 2009
<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/391> (last accessed 25/11/2009)

263. SP(2008)7292/4
[http://www.lavalvikingruffert.eu/docs/Letter%20from%20Commission%20to%20EP%20after%20andersson%20motion%20for%20resolution%20SP\(2008\)7292-4.doc](http://www.lavalvikingruffert.eu/docs/Letter%20from%20Commission%20to%20EP%20after%20andersson%20motion%20for%20resolution%20SP(2008)7292-4.doc)

3. European Parliament

In October 2008 the European Parliament adopted a resolution²⁶⁴ (474 votes to 106 with 93 abstentions) on challenges to collective agreements in the EU, thereby reacting to the ECJ decisions and balancing the freedom to provide services and the fundamental rights and social objectives set out in the Treaties. The MEPs emphasise “that this freedom does not contradict and is not superior to the fundamental right of social partners to promote social dialogue and to take industrial action”. With regard to the PWD it is stressed that it “allows public authorities and social partners to lay down terms and conditions of employment which are more favourable to workers” and that any interpretations which may invite unfair competition between undertakings is incompatible with the Directive. The EP is of the opinion that the legal basis of the PWD could be broadened to include a reference to the free movement of workers. Furthermore they wish to safeguard equal treatment and equal pay for equal work in the same workplace by stressing that the nationality of an employer or an employee cannot make a difference.

The EP calls on the Commission to prepare the necessary legislative proposals which would assist in preventing any future conflicting interpretation. Any partial review of the PWD should not be excluded, aimed at clarifying its relationship to ILO Convention 94, laying down clear rules to combat pseudo “P.O. Box companies” in its code of conduct for companies under the Services Directive and putting forward the long awaited Communication on transnational collective bargaining. The Member States are asked to enforce the PWD in a proper manner.

4. Social partners

4.1 Trade union side

ETUC quickly reacted to the ECJ decisions, demanding from March 2008 onwards a “Social Progress Clause” (see Annex)²⁶⁵. This clause should address the general implications of the *Laval* and *Viking* cases, making it absolutely clear that the free movement provisions must be interpreted in such a way as to respect fundamental rights, embedding this in the broader concept of social progress. This demand is based on such examples as the *Monti* clause or the clause in the Services Directive safeguarding the exercise of fundamental rights, including the right to strike. In the year following this resolution the ETUC has worked on concrete demands to restore the balance between economic freedoms and fundamental social rights. Further demands decided upon in March 2009²⁶⁶ include the revision of the PWD, the

264. EP resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI))

265. <http://www.etuc.org/a/5175> (last accessed 25/11/2009); <http://www.etuc.org/a/4704> (last accessed 25/11/2009);

266. <http://www.etuc.org/a/6212> (last accessed 25/11/2009)

clarification of the legal framework governing the free movement of services, as well as the so-called “Information Directive” and the need for changes with respect to public procurement.

With regard to the revision of the PWD, ETUC wants to strengthen it with an aim to better achieving its goals of guaranteeing fair competition and the respect for workers’ rights. In its view the following points need to be addressed. The PWD objectives must be stated more clearly in the Directive’s body. A broader legal basis is needed, i.e. Art. 153 TFEU (ex Article 137 EC). A definition of the meaning of free movement of workers should be covered by Treaty provisions written explicitly for this purpose, with a special focus on Article 45 TFEU (ex Article 39 EC) with its strong equal treatment requirement based on the host country principle. A clear time limit for defining a posted worker should be introduced into the Directive. It is also seen as important to provide a more precise definition of what is or is not meant by ‘transnational provision of services’, thereby preventing companies from manipulating applicable legislation and standards by the use of pseudo P.O. Box companies. The PWD’s minimum directive status must be restored.

“When it comes to Member States in their role as legislator, this means that the very restrictive interpretation of the notion of ‘public policy provisions’ must be revised, to include social objectives and the protection of workers. Member States in their role of public authorities contracting out public works (public procurement) should be allowed via social clauses to demand observance of locally applicable collective wages and working conditions by any company, local or foreign, tendering for the contract. The Directive should more clearly respect the different industrial relations models in Member States as well as the instrument of collective bargaining as a flexible and dynamic process, which – in the interest of both sides of industry as well as of society at large - cannot and should not be treated as just another form of regulation. The fundamental right to collective bargaining and collective action should be understood as allowing trade unions to approach and put pressure equally on local and foreign companies to improve living and working conditions of workers and to demand equal treatment of workers performing similar work on the same territory, regardless of their nationality or the place of establishment of their employer.”

As a reaction in practical terms to the ECJ decisions ETUC established an “early warning system” network of lawyers in the national federations in order to be able to be proactive in upcoming cases of concern to trade unions in Europe.

An ETUC expert group consisting of trade union experts and academics is currently working on the legal and technical aspects of a revision of the PWD, intending to submit a memorandum with proposals and recommendations to the ETUC Executive Committee in spring 2010.

4.2 Employer organisations

It is interesting to see that there is no written reaction from Business Europe on the matter. The organisation has only given oral statements making it clear that they can live with the ECJ decisions and that no legislative revision is needed. The only reaction coming from the employers' side on a European level comes from the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP). This organisation is also concerned about the *Rüffert* outcome "as, on the one hand, public authorities and public enterprises are increasingly losing their freedom to integrate social considerations into public procurement and, on the other hand, social partners' collective bargaining autonomy is becoming increasingly restricted.²⁶⁷" The CEEP Secretary General fears that "the freedom to provide services, meant to contribute to economic growth, to create more employment and to increase public welfare, is becoming a *backdoor* problem for public authorities and enterprises as contracting entities and social partners aiming exactly at these goals. In many service sectors it is of vital importance to work with a motivated, well-trained and reliable workforce. Decent wage levels for employees, agreed upon by autonomous social partners on a national level, are a key factor in getting high-quality services. It is sometimes good to remind ourselves of basic rules"²⁶⁸.

5. Social partner talks

One of the outcomes of the above-mentioned Forum in October 2008 was the idea of Commissioner Spidla and the French Presidency to put the ball in the hands of the European social partners. This was accepted by all of them, though not without hesitation and with very low expectations on the trade union side. There was a deliberate decision not to use the term "negotiations" for this exercise but instead to use "talks", in order not to give the impression that the social partners might come up with an agreement on this topic. At first it was planned to make this a very quick exercise, but the talks have been carried on over one year. They will come to an end in February, with a progress report being issued detailing certain points of agreement but mostly the different points of view on several topics concerning the ECJ decisions.

²⁶⁷. <http://www.ceep.eu/images/stories/pdf/Press/2008/08Press06EN-ECJ%20judgment.pdf> (last accessed 25/11/2009).

²⁶⁸. <http://www.ceep.eu/images/stories/pdf/Press/2008/08Press06EN-ECJ%20judgment.pdf> (last accessed 25/11/2009).

6. Conclusion

Whereas the EP is opening the door for legislative changes on a European level with regard to the PWD and EC Treaty, the Council and the Commission have not seen any need for such action. The same divide is evident between the European trade unions (demanding changes) and the employer organisations (refusing them). Talks between the social partners will without doubt not have any effect on this divide. It remains to be seen how the new European Commission will handle the dossier, given Barosso's indication in his opening speech to the European Parliament.

III. Analysis and outlook

In search of a new relationship between market integration and social embedding

Andreas Bückler and Wiebke Warneck

When conducting this (pre) study we often heard from the partners we have spoken with that an evaluation is not yet possible as the ECJ decisions have not as yet been fully digested by national institutions. Even though the harmonisation of European and national legislation is still ongoing we are attempting an initial evaluation of the decisions and their consequences on national industrial relations systems and the consequences on a European level. The studies and findings presented in the different country reports demonstrate that a process has been initiated which compels changes in national industrial relations systems. This process raises a number of questions needing adequate answers.

To identify the most relevant questions is no easy task. Although the *Viking*, *Laval* and *Rüffert* cases are related to the question whether national industrial relations systems are consistent with Community legislation, each of these decisions deals with specific issues such as the right to collective action, the transposition of the PWD or public procurement.

Our approach will be inductive, meaning that we will first define a state of play of the impact of the three cases on a national level (1. Impact – state of play). We will then go on to analyse the observations and findings of the country reports, searching for questions or conclusions that are of basic and general relevance (2. Conclusions). We are aware of the fact that for different reasons such an inductive approach has its shortcomings and cannot be used as a sufficient basis for any decision-making. The advantage of this approach is that it reduces complexity, focussing on those issues that have practical relevance. In a second step we will place our questions and conclusions into the legal and political context of the current debate about the relationship between economic freedoms and the autonomy of diverse modes of national industrial relations (3. Outlook and Project design).

1. Impact – State of play

The national reports give an overview on the state of play regarding the impact on a national level two years after the three decisions. The intention was to collect information on the reaction of the legislator, social partners and academia in the respective countries, as well as on developments in case law (see questionnaire in the annex).

Concerning case law the time period between the ECJ judgments and our (pre-) study is only about one and a half years. This is of course very short, given that cases need to be introduced and given the time needed to resolve them on a national level. But the reports do illustrate certain cases (for example in Finland, Germany and the UK), where the ECJ reasoning has been taken up explicitly, influencing the decisions of national judges. This shows that potential national-level cases do/will exist and that a number of national judges are ready to argue along the lines set down by the ECJ.

With regard to academia, a major debate has taken place around these court cases, with most academics very critical of various aspects of the decisions. Extensive literature can be found, for example in Germany, Italy and the UK. But it is also interesting to note that in countries like Poland academic debate is practically unperceivable. Any references found on the cases involve changes on a European level, with no evaluation of the potential impact on Polish labour legislation.

In most European Member States the social partners reacted at least with press statements on the decisions, with more reactions coming from the trade unions than from employers. The most vehement reactions seem to come from Swedish trade unions, stating their concerns regarding their system of autonomous collective bargaining, expressing their increasing difficulty in accepting that EC legislation diminishes the scope of their collective bargaining autonomy and engendering strong negative attitudes within the trade union movement towards the EU and increased cooperation.

As yet, national legislators have only reacted in countries directly concerned by the cases i.e. Germany and Sweden, though Denmark, where the problems caused by the *Viking* and *Laval* judgment are very similar to those in Sweden, has followed suit. Parliamentary debate has been reported for example from Germany and the European Parliament. Legislators in other countries reported upon have not as yet made any amendments to their legislation. However the country reports do show that discrepancies between EU and national legislation have been identified, causing a certain uncertainty on the need to change national law.

Amendments were made to Danish legislation as early as 2008 when the social partners and the national legislators changed the Posting of Workers Act with respect of the right to take collective action against foreign employers. Following a lengthy process in Sweden, a special regulation on the same topic as in Denmark could come into force in 2010. In Germany, changes to the public procurement laws took place on a Federal State level (due to Germany's federal structure) throughout 2008 and 2009. Reference to wage levels set down in collective agreements (*Tarifverträge*) only remains possible in the public procurement procedures in Berlin, Hamburg, Bremen and Niedersachsen. It is important to underline that the effect of the amendments made in Denmark and Sweden only concern situations involving foreign employers, while the changes in Germany imply changes to all (including purely national) public procurement procedures. This leads to

the situation that in Sweden foreign posted and Swedish workers can no longer be treated equally. Under German law equal treatment is ensured by public procurement regulations though the changes have been taken to the detriment of all (posted and German) workers.

The EU conformity of national legislation might be questioned in Belgium (*Loi aux marches publics et certains marché de travaux, de fournitures et de services*), as the notion of “public policy” foreseen in this law might be considered too broad. The Italian report questions the PWD’s applicability in Italy following the ECJ decisions, highlighting problems with regard to collective agreements since in Italy no distinction is made between generally applicable clauses and clauses that are only binding for the signatories of a collective agreement (Art. 3(1), Legislative Decree 72/00).

All countries, with the exception of Belgium and Poland, see or fear the impact of the ECJ decisions on their national industrial relations systems. The Belgian report does qualify the cases as not being Belgium issues, with only the risk of any improper use of the given interpretation being seen as a threat.

Concerning the right to take collective action, an impact is seen in Sweden and Italy. In Sweden it is obvious that the scope of wage and employment conditions against which the trade unions can take collective action in cross-border situations has diminished. This is a source of concern for Swedish trade unions, being used to autonomy with regard to their demands. The Italian report raises questions about the legality of any strike taken to oppose relocation. In cross-border situations strike action is only seen as being possible with respect to minimum rates of pay established by national collective agreements. The author goes as far as to say that, in the light of the ECJ’s interpretation, collective action in Italy would no longer be protected by the Constitution, as Community law has supremacy.

2. Conclusions

2.1 Diversity of national industrial relations systems and the notion of freedom of association

The country reports demonstrate very clearly the diversity of national industrial relations systems within Europe. There are substantial differences in the understanding, the concept and the notion of what constitutes freedom of association, the right to collective bargaining and the right to take collective action. Against such a background it is no surprise that the impact of the ECJ decisions differs from one country to another. Industrial relations systems such as found in the Nordics, which are characterised by a high degree of autonomy and self-regulation of the social partners, are influenced to a much greater extent by the recent ECJ decisions than other systems with a greater statutory footing.

Although this observation is simple we can draw important conclusions from it with regard to the development of the freedom of association and the right to take collective actions as elements of Community law. Within the *Viking* decision for example we read about the fundamental right to take collective action.²⁶⁹ But we do find no information about the concept and the notion of this fundamental right even though there are substantial differences in national systems and national understandings. The acceptance of collective bargaining and collective action as fundamental social rights remains symbolic. Catherine Barnard speaks about “little more than rhetorical value²⁷⁰” with regard to the recognition of the right to strike as a fundamental right. If one were to delete the paragraphs in the ECJ decisions in which the Court speaks about this fundamental right, nothing would change with regard to the arguments exposed and the decision found in the judgments²⁷¹.

Where the ECJ does provide an answer to the question concerning the justification of the restriction on freedom of establishment it does not infer its position from any clearly defined fundamental right. The Court makes reference to the protection of workers, while merely taking the individual interest into consideration. We miss any reflection or argument about the freedom of association as an institution.²⁷²

With regard to companies the Court observes that a company is free to make use of its freedom of establishment. With regard to trade unions however it is not deemed sufficient that a trade union should want to use its fundamental right to take collective action. Here the Court requires national judges to assess whether any initiated collective action is really justified for protecting workers. The right to take collective action is not used as a conflicting right having an own aim, but only as tool and instrument for workers’ protection.²⁷³

Any future approach taken by the ECJ, other European institutions or academia that is to react to this shortcoming by developing the notion and the concept of the right to take collective action needs to take into account that the notion and the concepts differ substantially throughout Member States. And these differences need to be seen against the background of different national industrial relations systems expecting to be respected.

269. ECJ, CaseC-438/05 *Viking* [2007] ECR I-10779, paragraph 44.

270. Barnard, C. (2008) *Employment rights, Free Movement under the EC Treaty and the Services Directive*, Edinburgh Europa Institute, Mitchell Working Paper Series, 05/2008, p.14.

271. Rebhahn, R., *Grundrechte und Grundfreiheiten im Kollektiven Arbeitsrecht vor dem Hintergrund der neuen EuGH-Rechtsprechung*, BMAS.

272. ECJ, CaseC-438/05 *Viking* [2007] ECR I-10779, paragraph 75 et seq.; Wißmann, (Fn. 29) *Arbeit und Recht* 2009, 149; Zwanziger, B. (2009) „Nationale Koalitionsfreiheit vs. europäische Grundfreiheiten - aus deutscher Sicht“ Vortrag auf dem europarechtlichen Symposium des Bundesarbeitsgerichts 2009, p. 19.

273. Kocher E. (2008), *Kollektivverhandlungen und Tarifautonomie – welche Rolle spielt das europäische Recht? Arbeit und Recht* 1-2/2008, 13-18, p.15; Rebhahn, R., BMAS

2.2 The need to change national industrial relations systems and the concept of supremacy

The ECJ decisions demanded changes in long-established elements of national industrial relations systems. The *Laval* decision in particular forced Nordic countries to adjust their labour market models to European requirements. In Sweden the *Laval* Committee proposed a special rule concerning the right to take collective action against an employer from another member country of the European Economic Area. This rule contains three components, all of which must be satisfied in order to legalise industrial action aiming at regulating conditions for posted workers. The policy consequences of this development have been described by Bruun / Jonsson (see p. 15 et seq.). The Danish situation is very similar. The only difference is in the willingness of the social partners to accept the changes and their sense of solidarity and their consensus to preserve their traditional autonomy. In Germany the stipulation in public procurement legislation “that collective agreements are to be complied with”, used to reinforce the relevance of collective agreements and the system of industrial relations, has been almost completely abolished (see Walter, p. 43 et seq.). Other countries such as Belgium (see page 65) and Italy (see p. 90 et seq.) face similar challenges.

In each of these cases the ECJ decisions put a question-mark over national traditions and industrial relations systems. The issue that needs to be addressed in this respect is the question of the applicability and supremacy of EU legislation. Can Community legislation really claim supremacy over national legislation when no responsibility with regard to the subject of the national law has been transferred to an EU level and when national legislation provides for a fundamental right?²⁷⁴ In such a case special attention needs to be paid to the aspect that national fundamental rights characterise different national industrial relations systems. Can these different systems be harmonised or put into question by a simple reference to a stipulation that Member States still must comply with Community legislation even in areas falling outside the scope of the Community’s competence?²⁷⁵

2.3 The chilling effect and the lack of policy awareness

There is evidence that the ECJ decisions have a chilling effect on the ability of trade unions to organise industrial action. Trade unions will have to act in a uncertain legal environment with regard to the legality of their collective action. The example of the BALPA case set out in the UK report highlights this effect. The risk of trade unions being exposed to liability might prevent them from taking industrial action (see p. 103 et seq.). The current situation made BALPA apply to the High Court in advance and to refrain from any collective

²⁷⁴. Wißmann, H. (2009) « Zwischenruf : Viking und Laval : Grundfreiheiten über alles ? », *Arbeit und Recht* 57 (5), 149, 151.

²⁷⁵. ECJ, CaseC-438/05 *Viking* [2007] ECR I-10779, paragraph 40.

action, with the prospect of the case being referred to the ECJ. The unclear notion and concept of the right to take collective action and the missing general applicability of the ECJ decisions with regard to the justification of action therefore acts to limit unions' leeway to take action.

A similar phenomenon can be observed in Sweden. With regard to cross-border situations a general notion emerged that the social partners were no longer in control of the rules of the game, with employers calling on the state to intervene with a general legal minimum wage. It seems that Swedish employers are leveraging the ECJ decisions to opt out of the industrial relations system and achieve national wage policy objectives (see p. 30 et seq.).

These examples demonstrate that legal and policy issues are closely interrelated. The ECJ decisions do not seem to take the interrelation between the right to take collective action and policy issues into consideration. In the *Viking* case the decision refers to the protection of workers as a legitimate aim potentially restricting the freedom of establishment. The protection of workers is of course an important aspect to be considered. But such an approach is simplistic. Legal interventions involving industrial relations systems need to take into account how any such intervention influences social partners' policy options and how this influence contributes to the overall purpose of collective labour law. If Community legislation really claims supremacy over national industrial relations systems it should reflect on the policy consequences of its decisions.

2.4 Legal uncertainty and the scope of fundamental freedoms of the internal market

The ECJ decisions are the cause of major legal uncertainty among the Member States. Denmark and Sweden for example have tried to resolve the conflict between their autonomous collective bargaining system and the fundamental freedoms and the EC Treaty by certain legal restrictions on the right to collective action. However it remains open whether their strategy will prove to be compatible with the common market (see p. 18 et seq.). Several reports express the view that it is currently unpredictable what effect EC legislation will have on national systems. With respect to future policies it is not clear whether Swedish employers will try to opt out of the autonomous system altogether or whether they are just leveraging EC legislation to support their bargaining interests (see p. 27). Doubts about the legality of any strike in Italy with the aim to oppose company relocation are prominent. Concerns are also being expressed that in the middle or long term the ECJ decisions may damage national systems (see page 40). Trade union fears with regard to legal uncertainty on the legality of any collective action are described under 2.3.

One step towards more legal certainty would be to make a clear distinction between transnational and national situations. Though a difficult task, if this

distinction is not developed it will remain unclear to what degree the principles of the internal market's fundamental freedoms affect national industrial relations systems. If for example a national trade union negotiates with an employers' organisation a collective agreement giving employees protection against rationalisation measures (*Rationalisierungsschutzabkommen*) one could easily argue that such a collective agreement has a transnational nature. Such agreements typically include specific rights of workers in cases of rationalisation-related dismissal as a result for example of process changes or the introduction of new technologies. In many cases companies also consider off-shoring parts of their production to places where they can produce at lower cost. And it is very much within the hands of employers to argue that they want to offshore some of their production. Does any collective action need to be justified in any such case with regard to the fundamental freedoms and will the principle of proportionality limit trade unions' leeway for action in all such cases?

A clarification of the distinction between national and transnational cases could be a first step towards greater legal certainty.

2.5 Unofficial industrial action and the problem of homogeneous application

In the Lindsey oil case (page 100 et seq.) workers took unofficial action without union authorisation or endorsement. This leads to questionable consequences. According to Article 49 TFEU the freedom of establishment, like the other fundamental freedoms, can only be applied against states and institutions so powerful that they are treated like states ("quasi regulatory bodies", see page 102). Trade unions are seen as such powerful institutions so that fundamental freedoms are applied against them. However, individual workers involved in wildcat actions are not powerful institutions, meaning that Article 49 TFEU does not apply to them.

This issue might easily result in further complications. Will the fundamental freedoms be applicable if an industrial relations system allows workers to take collective action without trade union authorisation? The Italian definition of strike ("collective abstention from work decided by a group of workers and aimed at achieving a common goal", see page 74) might be an example for such an industrial relations system. The same issue becomes relevant with regard to the process of decentralisation. Can small trade unions representing only a small number of workers and focused on specific companies (or even workers councils) organising collective actions be seen as quasi-regulatory bodies?

Community law will have to address this topic. The Court and the Advocate General addressed the topic with respect to the logic of fundamental freedoms and the integration of markets.²⁷⁶ But they did not reflect upon the consequences of their decision with respect to industrial relations. Shall national systems be privileged that allow unauthorised strikes or does Community law really want to provide incentives for unauthorised strikes?

2.6 Reluctance of Member States to follow the ECJ decisions and the potential to integrate European markets

The reports demonstrate that there is a certain reluctance to follow the ECJ decisions in certain instances. For example the Nordic report states that there is a basic consensus amongst the Danish social partners to preserve their traditional autonomy and that the external pressure seems to have united the social partners and the government in finding a practical solution to protect their system. In Germany serious concerns have been brought to public attention by renowned labour lawyers who see a considerable discrepancy between the interpretation and application of the freedom of association by the ECJ and the level of protection of this fundamental right codified in the German Constitution.

The reluctance of Member States to follow the ECJ decisions constrains the ECJ's potential to act as a market integrator. When Member States express their reluctance to follow the Court these positions will reduce the potential to unite individual national markets into a single market.

In our specific case the reason behind Member States' reluctance is that they miss sufficient respect of their national autonomy and the protection of social rights. Historical and sociological evidence shows that any market needs a certain amount of social embedding.²⁷⁷ If the Community uses the fundamental freedoms as "hard" instruments of negative integration abolishing elements of national industrial relations systems seen as barriers to a single market, then one needs to ask what kind of instruments are foreseen for positive integration. As long as "hard" instruments targeting social embedding are not available, the legitimacy and acceptance of Community legislation will remain questioned.

²⁷⁶. ECJ, Case C-438/05 *Viking* [2007] ECR I-10779, paragraph 56 et seq.; Opinion of Advocate General POIARES MADURO in Case C-438/05 *Viking*, paragraph 31 et seq.

²⁷⁷. Joerges, C. and F. Rödl (2008) Von der Entformalisierung europäischer Politik und dem Formalismus europäischer Rechtsprechung im Umgang mit dem „sozialen Defizit“ des Integrationsprojekts - Ein Beitrag aus Anlass der Urteile des EuGH in den Rechtssachen *Viking* und *Laval*, ZERP-Diskussionspapier 2/2008, p. 7.

2.7 Can European institutions provide an answer to the social deficit?

When looking at the exceptional amount of reactions to the ECJ decisions²⁷⁸ and the bundle of questions and requests addressed to the Community with regard to them, one would expect a coherent reaction from the Community explaining their view and their vision as well as their concrete actions and their overall concept.

But what we see is a rather diffuse picture lacking clear lines or visions. While the European Parliament adopted a resolution on challenges to collective agreements in order to react and to balance fundamental freedoms and social objectives, the Council and the European Commission have seen no need for such actions. Neither is there any evidence of social partners' willingness to overcome their divide (see page 21 et seq.).

By using the fundamental freedoms as instruments of negative integration the ECJ has taken decisions opening access to national markets. At the same time the Court has restricted elements of national industrial relations systems based on social rights and serving social interests. Trade unions and those who would rather see the social embedding of the market strengthened should be aware of the limited political potential to respond to the current challenges.

2.8 The PWD: Can it limit national fundamental rights and the transposition of ILO convention 94?

There is uncertainty in several countries about the correct transposition of the PWD. Belgium for example is a country that has ratified ILO convention 94. The Belgium law transposing the ILO convention into Belgium law does not restrict the applicable collective agreements to those declared universally binding. Furthermore its application goes beyond the issues raised in PWD Art. 3.1. Does the PWD really want to limit Member States' freedom to transpose ILO convention 94?

Another concern affects the statutory implementation of PWD. The Belgium interpretation of the exception set down in Art. 3 (10) of the PWD (public policy exception) goes beyond the ECJ's restrictive interpretation (see page 61 et seq.). Another example involves Italy. Although Italian employers are obliged to pay wages in accordance with collective agreements the same might not apply for service providers posting workers to Italy, as collective agreements cannot be declared universally applicable.

The UK faces a similar problem. There is no mechanism under UK law to declare collective agreements universally applicable. The prerequisite for unions to enter into collective bargaining is their recognition by the employer.

²⁷⁸ <http://www.etui.org/en/Headline-issues/Viking-Laval-Rüffert-Luxembourg>

But the PWD seems to prevent trade unions from seeking to place pressure on them to recognise the union. From the perspective of fundamental rights, seeking recognition is part of the right of collective bargaining and the right to take collective action. Is there a case for the PWD restricting this freedom?

One issue that needs to be addressed is the relation between the PWD and fundamental rights. In the case of a British trade union seeking recognition (as in *Laval*) unions want to make use of a fundamental right. As set out above (see page 36) the question needs to be analysed whether the use of the fundamental right to take collective action is constrained by the limits of the PWD or whether the PWD has first to be checked on the basis of the fundamental rights.

The second issue that needs to be addressed concerns public procurement and the question whether national legislation needs to be changed or whether the PWD needs to be adjusted to ILO convention 94.

3. Outlook and project design

This paper is meant to open up further discussion. It is based on two workshops held in 2009 and intends to give an introduction into the next steps of an ongoing process. The paper is in no way destined to provide answers to all questions raised. It summarises preliminary considerations, hypotheses requiring further discussion and specification and further research questions. These will be addressed in 2010. Every reader is sincerely invited to comment and cooperate.

As demonstrated by the country reports contained in this paper we face a whole set of unresolved questions for which we need to find answers. The core problem reflected in this set of questions is the issue of social regulation within the internal market and the specific role of the freedom of association, the right of collective bargaining and the right to take collective action.

Just this simple observation allows us to draw a significant conclusion. It would be wrong to address all further questions to the ECJ and to expect the ECJ to change some of his views and start to develop new concepts and guidelines for the social embedding of the internal market. This would be wrong because the ECJ is not a constitutional court having a comprehensive competence embracing jurisdiction over economic and social integration.²⁷⁹ The ECJ's jurisdiction is limited to those issues covered by the EU Treaties. Only if these Treaties were to be seen as a coherent constitution covering the economic and social integration of Europe the ECJ could claim exclusive jurisdiction over social integration issues. As demonstrated by Article 153 (5) TFEU (ex Art. 137 (5) EC) this is not yet the case. As long as economic integration is not sufficiently complemented by social integration the ECJ

²⁷⁹. Joerges, C. and Rödl, F. (Fn. 276), p. 21.

cannot claim exclusive jurisdiction over national industrial relations systems, including the right of association, the right to strike and the right of collective bargaining. The focus will therefore be on developing a cooperative structure between European, international and national institutions.

With regard to the international institutions, the European Court of Human Rights (ECHR), the International Court of Justice and the ILO's dispute settlement procedures need to be taken into consideration. The relationship between the ECJ and the ECHR needs to be examined in greater detail as the ECJ often refers to ECHR case law.²⁸⁰ The ECHR recently took several decisions concerning Art. 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms that could have major relevance in this context.²⁸¹ In its *Enerji Yapi-Yol Sen* decision the ECHR acknowledged the right to strike as a collective human right. Furthermore, in its *Demir* decision the Court developed a systematic approach for interpreting Art. 11 of the Convention in the light of international law, meaning that ILO conventions also need to be taken into account.²⁸²

4. Hypothesis

Our hypothesis is that, due to the diversity of national industrial relations systems, the European Court of Justice and its instruments of negative integration (i.e. such economic freedoms as the freedom of establishment or the freedom to provide services) neither have the potential nor the competence to restructure the present division of economic integration and social regulation. Further developments are needed targeting a cooperative structure including international and national labour law.

In view of the missing competence and the limited political potential for such positive measures as the approximation of laws in the field of national-level industrial relations, any restructuring of the relationship between economic freedoms and social rights must not be determined exclusively on a supranational level but must also (and primarily) be embedded within national industrial relations systems. In order to guarantee sufficient autonomy for such systems, both primary and secondary European law cannot claim supremacy in the field of industrial relations and the corresponding legislative domains. New instruments and concepts need to be developed in order to achieve a co-operative structure in which the twin aims of market integration and the protection of national systems of labour regulation and fundamental social rights are respected.

²⁸⁰. See e.g. ECJ, Case C-45/08, *Spector Photo Group and Van Raemdonck*, paragraph 42.

²⁸¹. Eur. Court H. R., *Demir and Baykara*, decision of 12 November 2008; *Enerji Yapi-Yol Sen*, decision of 21 April 2009; *Barraco v France*, decision of 5 March 2009; *Danilenkov v Russia*, decision of 30 July 2009; all decisions can be found under <http://echr.coe.int/echr/en/hudoc>

²⁸². Lörcher, K. (2009) Das Menschenrecht auf Kollektivverhandlungen und Streik – auch für Beamte, Arbeit und Recht (AuR) 229-242.

5. Aims of the research project

First project aim

The first aim is to analyse and discuss the consequences of the ECJ decisions with regard to the different national industrial relations systems. The specific aims are:

- Documentation and analysis of the consequences with regard to legislative changes and changes of national-level jurisdiction.
- Documentation and analysis of the influence with regard to social partners' practices and their policy options.
- Analysis of the interaction between the legislative changes and policy issues.
- Documentation of different national methods of resolution.

Second project aim

The second aim of the project is to develop an approach with regard to the relationship between economic freedoms and fundamental social rights.

The study will therefore analyse and discuss the legal framework of the Lisbon Treaty and international labour law with the aim of shaping a cooperative structure in which the international, European and national levels are integrated and the twin aims of market integration and the protection of national modes of labour regulation and fundamental social rights are respected.

This structure should differentiate between situations clearly positioned on a supranational level - such as the International Transport Workers' Federation's coordinative actions in the *Viking* case - and situations more embedded in national industrial relations systems - such as the *Laval* and *Rüffert* cases. One argument for this subdivision is that the consequences of EU-level legal intervention regarding collective action can probably be better assessed on an EU level, whereas the consequences of national-level intervention can probably be assessed better on a national level. Awareness of the consequences of intervention in the field of industrial relations is essential due to the objective of collective labour law, which seeks to compensate structural disparities in order to achieve equal bargaining power, thus contributing to the social shaping and development of a country's economy.

With respect to EU-level collective action special attention will be paid to international sources of law and legal comparison. Special attention will also be paid to the latest ECHR rulings concerning Art. 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the

interpretation of this human right in the light of international law.²⁸³ With respect to collective action on national level the central issue for a new approach is the relationship between Community and national law. As shown by the initial and preliminary analysis of consequences on national systems the ECJ decisions have a constraining effect on national autonomy with the potential to damage national industrial relations models. Any unconfirmed implementation of the concept of supremacy - which the ECJ claims - seems questionable when taking into account the fact that legal competences have not been transferred in this sector and that the political willingness to answer the challenges is limited on European level. The study will therefore analyse opportunities provided by the Treaty (Lisbon) to allocate competences in this sector to Member States. One approach could be to interpret European fundamental rights in such a way that the competence to apply fundamental rights is on the national level in cases where the interpretation of fundamental rights differs greatly between individual Member States.

Third project aim

Specific issues related to the impact of the PWD on industrial relations will be addressed. The approach will be to compare new and innovative national interpretations of minimum standards as well as new and innovative ways to deal with the topic of universal applicability of collective agreements (PWD Article 3.8). Special attention will also be paid to the reconciliation of the Directive with ILO Convention 94 and the relation between the Directive and national fundamental rights.

283. See Fn. 20.

Annex 1

Proposal for a Social Progress Protocol by the ETUC

The following proposed text of a Social progress Protocol is based on the assumption of the entering into force of the Lisbon Treaty and therefore refers to the Articles of the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TF EU) in the consolidated version following the Lisbon Treaty (with cross references to the current Treaties where necessary for better understanding).

Protocol on the relation between economic freedoms and fundamental social rights in the light of social progress

THE HIGH CONTRACTING PARTIES,

HAVING REGARD to Article 3(3) of the Treaty on the European Union,

CONFIRMING their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers,

RECALLING that the Union shall work for a highly competitive social market economy, aiming at full employment and social progress, (*Article 3(3) sub par. 1 of the TEU*)

RECALLING that the single market is a fundamental aspect of Union construction but that it is not an end in itself, as it should be used to serve the welfare of all, in accordance with the tradition of social progress established in the history of Europe;

WHEREAS, in accordance with Article 6(1) of the Treaty on the European Union, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights and in particular the fundamental social rights enshrined in this Charter,

BEARING IN MIND that, according to Article 9 (*new horizontal social clause*) of the Treaty on the Functioning of the EU, in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health,

HAVING IN MIND that the Union and the Member States shall have as their objectives the improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained (*Article 136 (1) EC Treaty = Article 151(1) TF EU*),

RECALLING that the Union recognises and promotes the role of social partners, taking into account the diversity of national systems, and will facilitate dialogue between the social partners, respecting their autonomy (*Article 136a new = Article 152 TF EU*),

WISHING to emphasise the fundamental importance of social progress for obtaining and keeping the support of European citizens and workers for the European project,

DESIRING to lay down more precise provisions on the principle of social progress and its application;

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union:

Article 1 [Principles]

The European social model is characterised by the indissoluble link between economic performance and social progress, in which a highly competitive social market economy is not an end in itself, but should be used to serve the welfare of all, in accordance with the tradition of social progress rooted in the history of Europe and confirmed in the Treaties.

Article 2 [Definition of social progress and its application]

Social progress and its application means in particular:

The Union

improves the living and working conditions of its population as well as any other social condition,

ensures the effective exercise of the fundamental social rights and principles, and in particular the right to negotiate, conclude and enforce collective agreements and to take collective action,

in particular protects workers by recognizing the right of workers and trade unions to strive for the protection of existing standards as well as for the improvement of the living and working conditions of workers in the Union also beyond existing (minimum) standards, in particular to fight unfair competition on wages and working conditions, and to demand equal treatment of workers regardless of nationality or any other ground,

ensures that improvements are being maintained, and avoids any regression in respect of its already existing secondary legislation.

The Member States, and/or the Social Partners,

are not prevented from maintaining or introducing more stringent protective measures compatible with the Treaties,

when implementing Union secondary legislation, avoid any regression in respect of their national law, without prejudice to the right of Member States to develop, in the light of changing circumstances, different legislative, regulatory or contractual provisions that respect Union law and the aim of social progress.

Article 3 [The relation between fundamental rights and economic freedoms]

Nothing in the Treaties, and in particular neither economic freedoms nor competition rules shall have priority over fundamental social rights and social progress as defined in Article 2. In case of conflict fundamental social rights shall take precedence.

Economic freedoms cannot be interpreted as granting undertakings the right to exercise them for the purpose or with the effect of evading or circumventing national social and employment laws and practices or for social dumping.

Economic freedoms, as established in the Treaties, shall be interpreted in such a way as not infringing upon the exercise of fundamental social rights as recognised in the Member States and by Union law, including the right to negotiate, conclude and enforce collective agreements and to take collective action, and as not infringing upon the autonomy of social partners when exercising these fundamental rights in pursuit of social interests and the protection of workers.

Article 4 [Competences]

To the end of ensuring social progress, the Union shall, if necessary, take action under the provisions of the Treaties, including under (*Article 308 EC Treaty*=) Article 352 of the Treaty on the Functioning of the European Union.

(See a similar provision in the Protocol on the internal market and competition)

Annex 2

Questionnaire giving a basis for the discussions on 11 May 2009 and for the future publication

- 1) Can you estimate if the ECJ decisions have/will have impact in your national situation? If yes, on which points?
- 2) How did your country react to the European jurisdiction?
 - a. Is it the legislator getting active? On who's initiative?
 - b. Are the social partners implied and in which way?
 - c. What measures are taken? Are laws getting changed and/or are political decisions taken?
- 3) Have the social partners been influenced by the decisions?
 - a. Did they negotiate on the impact of the verdicts?
 - b. Can a change in the approach towards collective action already be seen?
- 4) Did the decisions already influence the jurisdiction of national courts?
 - a. Do national courts follow the European Court of Justice and do they apply the European principles or do they look for alternative solutions?
 - b. Are the European decisions used by employers and/or trade unions on national level and in which way?

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