Dalila Ghailani

How can trade union rights and economic freedoms be reconciled in the EU? The *Laval* and *Viking* cases

Introduction

The growing mobility of services and the increased posting of workers between the new and the old Member States following enlargement in May 2004 has thrown up many questions about the impact of that enlargement on regulation of the labour market and working conditions in Europe. From a group of countries with well-developed employment legislation and social protection systems, the European Union has become 'an arena for globalisation in one continent' (Dølvik and Eldring, 2006: 137), upsetting the prevailing conditions for governance of national labour markets. Given the wage differentials within the enlarged Europe, the mobility of service providers and the posting of workers have given rise to merciless competition and jeopardised the principle of fair competition. How, then, can freedom of movement for workers within the European Union be reconciled with the struggle against social competition? That was the underlying question which the Court of Justice of the European Communities (ECJ) had to answer in the *Viking* and *Laval* cases, in which judgments were delivered on 11 and 18 December 2007. Those cases posed the question as to whether trade unions have a right to take action (strike, blockade or boycott) against undertakings which use the economic freedoms guaranteed by the EC Treaty to lower wages or working conditions. Essentially, the Court found in favour of business, arousing concern and disappointment on the part of the trade unions.

1. The International Transport Workers' Federation & The Finnish Seamen's Union v Viking Line ABP & OÜ Viking Line Eesti, 11 December 2007 ([1])

The International Transport Workers' Federation (ITF), an international federation bringing together 600 trade unions of transport sector workers in 140 countries, seeks to combat flags of convenience. In line with that policy of struggle and with a view to improving the working conditions of crews employed on vessels, only unions established in the country where the beneficial ownership of a vessel is situated are entitled to conclude collective agreements irrespective of the flag under which the vessel is registered.

Viking Line, a Finnish ferry operator, owns the Rosella, a ferry registered under the Finnish flag which plies the route between Tallinn and Helsinki. Its crew are members of the Finnish Seamen's Union (FSU), affiliated to the ITF. In October 2003 Viking Line informed the FSU of its intention to reflag the Rosella and to register it in Estonia, where it had a subsidiary, so that it could employ an Estonian crew paid lower wages than those in Finland. In November 2003, at the request of the FSU, the ITF sent a circular to all its affiliates requiring them, on pain of sanction, not to enter into negotiations with Viking Line, and so preventing the Estonian unions from commencing negotiations with Viking Line. At the same time, the FSU imposed conditions on renewal of the manning agreement and announced its intention to strike in support of, on the one hand, increasing the manning on the Rosella and, on the other, conclusion of a collective agreement providing that, on any reflagging, Viking Line would continue to comply with Finnish employment law and would not lay off the crew. In August 2004, after Estonia had joined the European Union, Viking Line, determined to register the loss-making ship under an Estonian flag, brought proceedings before the courts of the United Kingdom where the ITF has

[1] ECJ, Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti,* 11 December 2007.

its registered office. Viking Line applied for an order that the ITF withdraw its circular and the FSU refrain from impeding its right of establishment in relation to the reflagging of the Rosella.

The Court of Appeal, in proceedings brought by the FSU and the ITF, referred to the Court of Justice of the European Communities for a preliminary ruling ten questions on the application to the case of the Treaty rules on freedom of establishment and on whether the actions of the FSU and the ITF amounted to an unjustified restriction on freedom of movement. Those issues go to the very heart of the process of European integration, the key question being whether the overriding interest of guaranteed freedom of movement within the EU can be limited, and if so, how (Blanke, 2006).

The judgment of the European Court of Justice

The Court held that neither the fact that the right to strike and the right to take trade union action fall outside Community competence, nor the fact that they are fundamental rights forming part and parcel of the general principles of Community law whose compliance is enforced by the Court, means that their exercise is exempt from compliance with Community law. The Treaty rules on freedom of establishment therefore do apply to collective action initiated by a trade union or a group of trade unions against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising that freedom. The Court found that, in the context of an agreement intended to regulate paid work collectively, the provisions on freedom of establishment confer rights on a private enterprise which can be relied on against a trade union or an association of trade unions exercising the autonomous power they enjoy by virtue of their trade union right to negotiate with employers or professional organisations the conditions of employment and pay of workers.

In the view of the Court, the conditions imposed on the registration of vessels must not impede freedom of establishment. Collective action such as that envisaged by the FSU, then, prevents Viking Line from exercising its right to freedom of establishment, depriving it in the host Member State of the same treatment as other economic operators established in

that State. Furthermore, collective action taken with a view to implementing the policy pursued by the ITF of combating flags of convenience – which seeks primarily to prevent ship owners from registering their vessels in a State other than that of which the beneficial owners of those ships are nationals – must be found to be such as to restrict exercise by Viking Line of its right to freedom of establishment. Such restrictions can be justified only by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective. The referring court therefore had to examine whether the jobs of the Finnish seafarers were seriously threatened by Viking's decision to reflag the Rosella and whether the action of the unions went beyond what was necessary to achieve the objective of protecting the jobs and working conditions of their members. It was therefore necessary to ascertain whether, under national legislation and the law on collective agreements applicable to its action, other means, less restrictive of freedom of establishment, were available to the FSU to bring to a successful conclusion the collective negotiation entered into with Viking Line and whether that union had exhausted those means before embarking on the action in question.

As regards as the principle applied by the ITF, the Court hints that it is perhaps a little too rigid where, in the context of its policy of combating the use of flags of convenience, 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. Therefore, as Viking argued during the hearing without being contradicted by ITF in that regard, the policy of reserving the right of collective negotiations to trade unions of the State of which the beneficial owner of a vessel is a national is also applicable where the vessel is registered in a State which guarantees workers a higher level of social protection than they would enjoy in the first State. It will also fall to the national court to ascertain

whether the action taken by the ITF does not therefore go beyond that which is necessary to achieve its objective.

2. Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, 18 December 2007 ([2])

In May 2004 the Latvian company Laval posted workers to sites in Sweden. The work to renovate and extend a school in the town of Vaxholm had been contracted to a subsidiary, L&P Baltic Bygg AB. In June 2004 Laval and Baltic Bygg and the Swedish building and public works trade union, *Svenska Byggnadsarbetareförbundet*, commenced negotiations on the wage rates for posted workers and on signature by Laval of the collective agreement for the construction sector. The negotiations were unsuccessful but, in September and in October, Laval entered into collective agreements with the Latvian building trade union, of which 65% of the posted workers were members. On 2 November 2004 the Swedish building union initiated collective action in the form of a blockade of all Laval's worksites in Sweden, which was joined in sympathy by the Swedish electricians' union, preventing electricians from providing services to Laval. Those unions had none of their members amongst the personnel of Laval. As a result of the lengthy interruption of the work, Baltic Bygg was declared bankrupt and the posted workers returned to Latvia.

The *Arbetsdomstolen*, hearing an appeal brought by Laval on the legality of the collective action and damages for the loss incurred, referred two preliminary questions to the European Court of Justice: do the provisions of the EC Treaty on the freedom to provide services and of Directive 96/71 (Council of the European Union, 1997) allow trade unions to engage in collective action in the form of a strike to force a foreign temporary provider of services to sign a collective agreement in respect of terms and conditions of employment where the legislation transposing the Directive in the host country contains no express provision on

[2] ECJ, Case C-341/05, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet*, 18 December 2007, not yet published.

application of the terms and conditions of employment in the collective agreement? Do those provisions preclude application of the *Lex Britannia* ([3]) to collective action initiated by Swedish trade unions against a foreign temporary provider of services?

The judgement of the European Court of Justice

The Court not only confirmed that the right to take collective action must be upheld as a fundamental right forming an integral part of the general principles of Community law whose compliance is enforced by the Court, a right whose exercise may be subject to certain restrictions. As it had done in the *Viking* judgment, the Court pointed out that under Article 3 of the Treaty of Rome the activities of the Community are to include not only an internal market characterised by the abolition, as between Member States, of obstacles to the free movement but also a policy in the social sphere. Since the Community has not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, *inter alia*, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour. The Court stated in terms identical to the *Viking* judgment that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest justifying a restriction of one of the fundamental freedoms

[3] The Law on workers' participation in negotiated decisions lays down rules applicable to, *inter alia*, the right to bargaining, collective agreements, arbitration in collective labour disputes and the obligation of social peace, and contains provisions restricting the right of employees' organisations to take collective action. Article 42 prohibits collective action taken in order to have a collective agreement concluded between third parties set aside or amended. The *Lex Britannia* removes that prohibition from collective action against employers operating temporarily in Sweden.

guaranteed by the Treaty. It broke new ground by holding that a blockade of sites by a trade union in the host Member State, intended to safeguard terms and conditions of employment set at a particular level for workers posted in the context of a cross-border provision of services, does fall within the objective of the protection of workers.

However, application of those general principles to the case in hand proved less favourable to the unions' case. According to the Court, the blockade in question was unjustified, not because it was not aimed at protecting workers, but because it was intended to force a foreign provider of services to comply with a sectoral collective agreement not satisfying the requirements laid down by Directive 96/71 on the posting of workers (Council of the European Union, 1997) in order to be relied on against foreign undertakings. This Directive lays down a nucleus of mandatory rules for minimum protection to be observed by employers who post workers to another Member State to perform temporary work in that State. Those rules include minimum rates of pay. Under Article 3, the terms and conditions of employment guaranteed for workers posted in the host Member State are determined by law, regulation or administrative provision and/or, in the building sector, by collective agreements or arbitration awards which have been declared universally applicable. The Swedish collective agreement with which Laval would have to comply did not satisfy the requirements under Article 3(8) which define what must be understood by 'collective agreements or arbitration awards which have been declared universally applicable'. The Swedish law on the posting of workers, the *lag om utstationering av arbetstagare,* lays down the terms and conditions of employment in respect of the matters listed in Directive 96/71/EC, with the exception of minimum rates of pay. The law is silent as regards remuneration. In Sweden the setting of wages has traditionally been left to the social partners by means of collective bargaining and the resulting collective agreements, which are not declared to be of universal application.

That difficulty could have been averted had Sweden availed itself of the option which Article 3(8) of the Directive gives Member States to base themselves on collective agreements which are generally applicable to all

similar undertakings in the industry concerned or those concluded by the most representative employers' and labour organisations at national level and which are applied throughout the national territory. Since Sweden had not done this, the collective agreement invoked by the trade unions, whose terms go beyond the minimal protection afforded by Directive 96/71/EC, cannot be taken into account because, the Court notes, bargaining in the construction sector takes place on a case-by-case basis, at the place of work, having regard to the qualifications and tasks of the employees concerned. This gives rise to uncertainty for the service provider as to the extent of its obligations because it forms part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible to ensure that it is not impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay. The union's action cannot therefore justify a restriction on the freedom to provide services.

The Court went further, taking the view that national rules which fail to take into account collective agreements to which undertakings that post workers to Sweden are already bound in the Member State in which they are established, discriminate against such undertakings, in so far as those rules treat them in the same way as national undertakings which have not concluded a collective agreement. Such discriminatory rules can be justified only on grounds of law and order, public safety or public health. The application of those rules to foreign undertakings which are bound by collective agreements to which Swedish law does not directly apply is intended, first, to allow trade unions to take action to ensure that all employers operating on the Swedish labour market pay wages and apply other terms and conditions of employment in line with those usual in Sweden, and, secondly, to create a climate of fair competition, on an equal basis, between Swedish employers and entrepreneurs from other Member States. Since those considerations are not motivated by law and order, public safety or public health, such discrimination cannot be justified.

Comments

In the *Viking* case, the issue raised was that of the legality of collective action to dissuade a company from relocating within the European Union to take advantage of employment legislation which was more advantageous to employers because it was less protective to workers. In the *Laval* case, the question was whether the Swedish trade unions could oblige a Latvian company which posted workers to Sweden to comply with pay conditions resulting from a sectoral collective agreement. In both cases, the exercise of trade union rights within the EU came into conflict with the freedom to provide services and freedom of establishment, cornerstones of the internal market. In both cases, the companies sought to make use of the freedoms guaranteed by the Treaty purely and simply to replace workers in the 'Group of 15' with workers from the new Member States (Donaghey and Teague, 2006).

The judgments delivered failed to live up to the unions' expectations. The Court did not however say that economic freedoms must in all circumstances prevail over trade union action taking the form of strikes or blockades. On the contrary, it underscored the social dimension of the European Union and acknowledged the right to take collective action as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures ([4]). Nevertheless, according to the European Trade Union Confederation (ETUC), the decision in *Viking* could fail to give sufficient protection to the rights of organised labour in a modern transnational economy. In the words of John Monks, General Secretary of the ETUC, 'this judgement clearly gives protection to unions acting at local and national level when challenging the freedom of establishment of companies. However, it is less clear about transnational trade union rights. In the run up to the solemn proclamation of the Charter of Fundamental Rights and the

[4] Brian Bercusson put forward other possible solutions for the *Laval* and *Viking* cases based on the Opinions of Advocates General Maduro and Mengozzi (see Bercusson, 2007).

adoption of the Reform Treaty, we would have welcomed a more clear and unambiguous recognition of the rights of unions to maintain and defend workers' rights and equal treatment and to cooperate cross-border, to counterbalance the power of organised business that is increasingly going global' (ETUC, 2007a).

For its part, the *Laval* case highlighted a feature of the Scandinavian model : the importance of tradition and practice, sometimes formalised by agreements between the social partners but not legally binding, and the low level of legal regulation of industrial relations (Bruun, 2007). The ETUC has moreover expressed particular concern at the implications of the *Laval* judgment for the Swedish system of collective agreements (along with those of the other Nordic countries). It believes that although the ruling reinforces the *Viking* decision as regards recognition in Community law of the right to strike as a fundamental right and the right of trade unions to take strike action against social dumping, it lays down a real challenge to the Swedish system of collective bargaining (Laitner and Anderson, 2007). A decision like this will necessitate a review of how the directive on posted workers is implemented in those countries. A narrow interpretation of the 'posting' directive, adds the ETUC, could have negative implications for other countries' systems, and repercussions on the trade unions' ability to encourage equal treatment and the protection of workers irrespective of their nationality (ETUC, 2007b).

We would add that both Advocates General took a different approach from that of the Court and sided with the arguments of the trade unions (Blanke, 2007). In *Laval*, Advocate General Mengozzi took the view that Community law does not preclude 'trade unions from attempting, by means of collective action in the form of a blockade and solidarity action, to compel a service provider of another Member State to subscribe to the rate of pay determined in accordance with a collective agreement which is applicable in practice to domestic undertakings in the same sector that are in a similar situation and was concluded in the first Member State, to whose territory workers of the other Member State are temporarily

posted, provided that the collective action is motivated by public interest objectives, such as the protection of workers and the fight against social dumping, and is not carried out in a manner that is disproportionate to the attainment of those objectives' ([5]). Similarly, Advocate General Maduro held in *Viking* that 'Article 43 EC does not preclude a trade union or an association of trade unions from taking collective action which has the effect of restricting the right of establishment of an undertaking that intends to relocate to another Member State, in order to protect the workers of that undertaking' ([6]). Matters are different where collective action prevents a company established in one Member State from lawfully providing its services in another Member State, once relocation has taken place (Blanke, 2006).

[5] Opinion of Advocate General Mengozzi in Case C-341/05, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet* and Others, delivered on 23 May 2007.

[6] Opinion of Advocate General Maduro in Case C-438/05, *The International Transport Workers' Federation & The Finnish Seamen's Union* v *Viking Line ABP & OÜ Viking Line Eesti*, delivered on 23 May 2007.

References

Bercusson, B. (2007), *Collective action and economic freedoms before the European Court of Justice. Assessment of the Opinions of the Advocates General in Laval and Viking and six alternative solutions*, ETUI-REHS, Brussels.

Blanke, T. (2006), 'The Viking case', *Transfer*, Vol.12, No.2, pp.251-266.

Blanke, T. (2007), 'Observations on the Opinions of Advocates General Maduro and Mengozzi delivered on 23 May in the Viking and Laval', *Transfer*, Vol.13, No.3, pp.497-504.

Bruun, N. (2007), 'The Vaxholm Case and its "solidarity lessons" from a Swedish and European perspective' in Magnusson, L. and Stråth, B. (eds.), *European solidarities. Tensions and contentions of a concept*, PIE-Peter Lang, Brussels, pp.121-134.

Council of the European Union (1997), 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, OJ L 18 of 21 January 1997, pp.1-6.

Dølvik, J.E. and Eldring, L. (2006), 'Editorial – Mobility of services and posting of workers in the enlarged Europe – challenges for labour market regultion', *Transfer*, Vol.12, No.2, pp. 137-141.

Donaghey, J. and Teague, P. (2006), 'The free movement of workers and social Europe: maintaining the European ideal', *Industrial Relations Journal*, Vol.37, No.6, November 2006, pp.652-666.

ETUC (2007a), 'ECJ judgement on Viking case recognises fundamental right to collective action as integral part of EU Community law', *Press Release*, 11 December 2007 (http://www.etuc.org/a/4376).

ETUC (2007b), 'Laval case: disappointment of the ETUC', *Press Release*, 18 December 2007 (http://www.etuc.org/a/4401).

Laitner, S. and Anderson, R. (2007), 'Swedish labour model at risk after ruling', *Financial Times*, 19 December 2007.