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Trade Union Rights in the European Internal Market: the Laval and Viking Cases

Prof. Frank Hendrickx ^{*)}

Viking case and Laval case are two recent European Court cases regarding the right to strike. In both cases, the Court concluded that the concerned strike action were in violation of EU law. This article discusses the Viking and Laval Cases by putting them into perspective on how European Social Policy stands in contrast with the provision and directive on international market on the free movement of services in the European Union.

Keywords: *European Court, Labor Law*

Introduction

Two recent European Court cases regarding the right to strike have placed the European social model in renewed attention. In the cases of Viking¹ and Laval² the Court needed to address trade union action in light of the free movement of services and the freedom of establishment, guaranteed under the EC Treaty. In both cases, the Court came to the conclusion that the concerned strike actions were in violation of the EU law.

In this contribution, the Viking and Laval cases will be discussed. They will put into perspective by indicating them as examples on how European social policy stands in contrast with the international market provision (and the Directive on) the free movement of services in the European Union. It will be questioned whether the European free services provisions may lead to social dumping.

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¹ C-438/05, ECJ 11 December 2007 (not yet published in ECR).

² C-341/05, ECJ 18 December 2007 (not yet published in ECR).

Context and Background of the Cases

One of the intrinsic problems of the EU is that it has strong competences to de-regulate markets, but remains relatively weak in re-regulating them.

In a better Europe, so can be argued, territorial coincidence would not matter. Regardless of the territory of the state, individuals and companies would be subject to the same – or equivalent – standards. There would not be an environment based on competition between states. Most likely, higher levels of mutual trust between member states would be reached.

However, the European Union is not a state in the classical sense of the word. The Union structure as it presently stands and as established by the Treaty establishing the European Union (TEU) can be seen as a provisional structure.³ This is made clear by the TEU, which states that the Union in its present form is ‘a new stage in the process of creating an ever closer union among the peoples of Europe’.⁴ We may call this process European integration.⁵ It implies that policies, such as social policy, must be seen in their dynamic character. In the present situation – i.e. the European Union hosts the European Communities and the supplementary policies and forms of cooperation of the Member States (in three pillars) – social policy, including labour law, belongs mainly to the European Communities (first pillar), which may be considered to constitute the strongest structure of the European Union.

It may also – in a rather controversial way given the current timeframe – be argued that the four freedoms (persons, goods, capital, services) of the EC Treaty trigger at harmonizing national systems of social protection. But the actual construct is strongly different: country territory matters; legal conditions for business are

³ P.J.G. KAPTEYN and P. VERLOREN VAN THEMAAT, *Introduction to the law of the European Communities. From Maastricht to Amsterdam*, The Hague, Kluwer Law International, 1998, 54.

⁴ Article A, para 2 TEU.

⁵ Although it is not clear what the ultimate and future result will be.

quite different; labour protection is strongly dependent on national law; welfare systems are far from harmonized.

It would therefore appear that the upward transfer of competences in the social field, or the sharing of competences in labour law matters, originates from the very nature of the European Union taken as a political project. More precisely, in the European Community, social policy issues might be addressed for other purposes or with other ideologies than in a given State where they have deep roots. Furthermore, essential aspects of labour law and social policy are excluded from the social chapter of the EC Treaty.⁶ Some authors would therefore classify EU social policy merely as 'social regulation with the aim to level the conditions of the market'.⁷

Regulatory differences also bring the issue of social dumping in to the debate, as the discussion on the European Services Directive 2006/123 has shown. It caused broad public pressure on the early proposals. It is also known that public demands brought the European Commission to a substantially modified proposal, issued on 4 April 2006. This laid the basis for the final draft. A central issue is, indeed, whether the EU favour the development of laws and systems that allow for social dumping scenario's.

Clearly, the issue of social dumping stood central in the debate on the Services Directive. Evelyne Gebhardt, rapporteur of the EP's Internal Market Commission, noted: "We are dealing with the most important piece of EU legislation apart from the Constitution".⁸ This proposition, although somewhat overdone, indeed went to the essence of European integration. Indeed, Europe is not a state, let alone a federal state, understood in the classical sense of the word. What happens is a co-existence of countries that show, although ever integrating, differences and divergence in their legal systems.

⁶ Article 137, 6° of the EC Treaty provides that the provisions of Article 137 shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

⁷ Montanari's argument in M. KARI, *Meeting with EU social policy. The experience of a new Member State*, Antwerp, Maklu, 1998, 27.

⁸ Press note of the EP, N° 20060210/IPR05172.

It can be argued, whatever the phase of (European) integration is in, conditions should be met to effectively respond to business and labour in a globalised environment.

There are various options to be dealt with in the economic market, the market of services and the market of labour. Given the variety of member state approaches, and given the absence of a minimum level of harmonisation at European level, the EU can probably not proceed otherwise but with second best solutions.

Do the European Services Provisions Organise Social Dumping?

In order to deal with this question, attention has to be paid to the development of the first draft proposals of the Services Directive (2004) and the context in which they were made. They represent a certain debate on how the European internal market principles need to be reconciled with a 'social' Europe.

Genesis of the Services Directive

Origin

It is well-known that the European Council of Lisbon agreed in March 2000 on a programme for economic reform, in order to turn the European Union, by 2010, into the most competitive and dynamic knowledge economy in the world.

A core element of this programme is the completion of an internal market of services. The European Council of Lisbon, therefore, called on the European Commission to set up an all inclusive market strategy in order to terminate as much as possible limitations to the movement of services in Europe. In response to this, the European Commission came with an internal market strategy for the service sector, encompassing two phases.⁹ In the first place, in 2001, the Commission would pay attention to specific problem areas and would examine and analyse so-called continuous cross-

⁹ Communication of 29 December 2000, COM (2000) 888 final.

border service problems and obstacles.¹⁰ In a second phase, in 2002, the Commission would, on the basis of the acquired results, come with initiatives, including proposals of legislation. This actually led to the proposal of a directive on services in the internal market.¹¹ This proposal became known as the “Bolkestein-proposal”, referring to the initiating European Commissioner for Internal Market Frits Bolkestein.

Broad focus

An important feature of the Services Directive, already from its origin, is the horizontal approach. This means that the Services Directive provides for a legal framework that, besides certain exceptions, will apply to all forms of economic service activities. This approach has been justified by the Commission on the argument that legal constraints to an internal market of services often refer to various kinds of activities while showing common characteristics.¹² A horizontal approach is quite new and, according to some commentators, to be considered revolutionary.¹³ It implies that, in principle, there is little room to escape from the scope or application of the directive, but for explicit exclusions and derogations provided by the instrument itself.

This also implies that there is, in principle, nothing against labour law phenomena being caught by the Services Directive. This idea is also reflected in the 2002 Commission report concerning the state of the internal market for services, on which the first proposal of the Services Directive broadly relied.¹⁴ In this report, the European Commission gives an analysis of the problems that may occur in the context of the provision of services between two or more member states. From this, it becomes clear that the Commission applies a

¹⁰ Cf. Report of 30 July 2002, COM (2002) 441 final.

¹¹ COM (2004) 2 final.

¹² Idem.

¹³ W. Ghekiere, ‘The proposal of the European Commission for a directive on services in the internal market: an overview of its main features and critical reflections’, *Bulletin of Comparative Labour Relations* 2006, Vol. 58, 10.

¹⁴ COM (2002) 441 final.

broad interpretation of the notion of barriers to the free movement of services. According to the report, a measure that makes the provision of services between member states illegal, impossible or less attractive, should be considered as a barrier. This means that it does not only concern discriminatory measures, but also all kinds of limitations that occur in the case of cross-border services. The Commission, therefore, concludes that such obstacles may not only derive from practical or administrative, but also from legal constraints, such as, in the case of posting of workers, national measures of labour law.

Proposed measures

The obstacles mentioned in the Commission report, mentioned above, merely represent a grasp from the wide collection of problems that the Commission perceived and indicated. In order to deal with these obstacles, and to secure the free movement of services, the Commission provided for the following measures:¹⁵

- the application of the country of origin principle: according to this principle, a service provider should be subject only to the law of the country in which he is established and Member States may not restrict services from a provider established in another Member State;
- in the case of posting of workers in the context of the provision of services, the allocation of tasks between the Member State of origin and the Member State of destination and the supervision procedures applicable.

These two points are to be considered relevant for the discussion here.

How does social dumping become an issue in the Services Directive?

The proposals of the Services Directive triggered a kind of 'social dumping alarm'. But there was more. A more general existential

¹⁵ COM (2004) 2, final.2.

labour law concern came up, as to whether the Services Directive would ultimately increase other kinds of pressure on national labour protection. In order to clarify whether social dumping was really a relevant point of debate, the issue needs to be defined.

Defining social dumping

Social dumping mostly has a negative connotation. It is sometimes indicated as a 'race to the bottom'. For a better understanding of the criticism on the Services Directive, the notion of 'social dumping' needs to be explained. It is useful to distinguish three different types of social dumping:¹⁶

- a. Dismantlement: lowering of labour standards, such as the provision of inferior wages or an anti-union labour market strategy, in order to attract foreign investment.
- b. Replacement: creating a competitive advantage through the replacement of high-cost producers by low-cost producers from countries in which wages, social benefits, and direct and indirect costs entailed by protective legislation are lower;
- c. Delocalisation: exercising the possibility of business relocation, or merely putting pressure on local levels of bargaining, given the fact that other countries might allow cheaper labour standards.

It is likely that the European economic market would not be able to escape from either of these three mechanisms.¹⁷ Firstly, it can be argued that a form of regulatory competition exists between the member states of the European Union.¹⁸ This may be translated into tax measures or incentive schemes, or through specific labour cost

¹⁶ Cf. also H. Mosely, 'The social dimension of European integration', *International Labour Review* 1990, Vol. 129, N° 2, 160.

¹⁷ Although some argue that only replacement and delocalisation are most probable to occur: cf. C. Erickson and S. Kuruvilla, 'Labor costs and social dumping in the EU', *Industrial and Labor Relations Review* 1994, Vol. 48, N° 1, 29-30.

¹⁸ Cf. C. Barnard, 'Social dumping and the race to the bottom: some lessons for the European Union from Delaware', *European Law Review* 2000, Vol. 25 (1), 64-65.

instruments. Secondly, the discussion on the Services Directive shows that free movement of services creates the possibility to call on cheaper service providers from other EU jurisdictions. Thirdly, the move to the East (either European or Asian) would also allow businesses to produce with lower labour costs.

All these factors seem to have laid a burden on national labour law in one way or another. Besides that, the context of the Services Directive would also seem to have added another form of pressure. This is strengthened by the Commission's conclusion that obstacles to the free movement of services may also derive from national measures of labour law. The changes brought to the original proposals, and ultimately leading to the final text of the Services Directive, were therefore serving a double aim: avoiding competition between member states on the basis of labour standards, i.e. social dumping, for reasons of which the country of origin principle would be removed; and finding a manner to preserve, in some way, national labour law measures against the operation of the Services Directive.

The country of origin principle

The country of origin principle was fully in line with the original Commission philosophy: cross-border services transactions should run as smoothly as internal transactions within a given member state. A true internal market requires services to be available, regardless of state-borders. It should not be so, in the Commission's idea, that cross-border services providers should adapt themselves to unjustified legal and administrative requirements of the host state. The Commission concluded that it should be as easy to deliver a service from Amsterdam to Athens as from Amsterdam to Rotterdam.¹⁹

This, of course, raises the question what would happen with the different national labour law measures with which a cross-border service provider is repeatedly confronted in exercising his free movement of services. The country of origin principle would

¹⁹ COM (2000) 388 final.

suggest that such a service provider should not repeatedly adapt himself to the local rules and regulations, but can continuously rely on the law of the country of origin.

The country of origin principle was seen as putting strong pressure of the high-level social protection systems present in various countries in the European Union. And there was further criticism. The text of the preamble, read together with article 17 of the original proposal, which laid down the country of origin principle, excluding matters covered by Directive 96/71/EC ("the Posting Directive), was even announced as a radical change in community labour law.²⁰ This could be based on a double argument. In the first place, the original proposal showed an underlying assumption that the country of origin principle would be a vested labour law principle, which is clearly not the case. Furthermore, the original proposal would seem to turn the Posting Directive from a minimum into a maximum provision of worker protection.²¹

The classical view of labour law is to apply at cross-border employment on the basis of the place of employment and not from the country of origin. Deeply rooted remains the member states' wish to keep control over their respective territories with regard to the application of labour law, even if it concerns workers coming from another member state. It is sufficient to look at various examples at the international level, such as the Rome Convention of 1980 on the law applicable to contractual obligations as well as to the Posting Directive.²²

A conflict between two concepts of equal treatment

The idea of the country of origin principle should not be automatically rejected at the conceptual level. It pursues legitimate aims, such as the realisation of the internal market and the lifting of barriers in the European Union. But there is a problem of respective

²⁰ N. Bruun, 'The proposed directive on services and labour law', *Bulletin of Comparative Labour Relations* 2006, Vol. 58, 24.

²¹ *Idem*, 25.

²² C. Passchier, 'The point of view of the ETUC', *Bulletin of Comparative Labour Relations* 2006, Vol. 58, 145.

angles. Central in the free market stands the fact that services are provided by people. In practice, this often means that the provision of services goes hand in hand with the movement of people, workers, and with cross-border employment. In this sense, the free movement of services shows similar characteristics with the free movement of workers. But still, there are significant differences. The Court of Justice applies a rather strict analytical distinction between the two freedoms when cross-border employment is concerned: "The Court has held that workers employed by a business established in one Member State who are temporarily sent to another Member State to provide services do not, in any way, seek access to the labour market in that second State if they return to their country of origin or residence after completion of their work".²³ The employee, who is, in this context, temporarily employed in another member state uses, therefore, the free movement of services instead of the free movement of workers. It would appear that, under the free movement of services, workers only possess an ancillary position.

The distinction between the free movement of services and the free movement of workers leads, to some extent, to a differential treatment. A worker employed in another country on the basis of the free movement of workers has the right to be treated equally as the other non-migrant workers employed in that country.²⁴ A worker employed in another country on the basis of the free movement of services would not have such right to equal treatment, as his situation would be governed by the rules of the country of origin of his employer.²⁵ This could be subject to criticism. Nevertheless, the country of origin could be defended to protect the position of the service provider.

It should therefore not be concluded that the country of origin would necessarily be an illogical or unfair principle. But the question is whether it could be used as a system to define the

²³ Finalarte, Cases C-49/98, C-50/98, C-52/98 tot C-54/98 and C-68/98 to C-71/98, ECJ 25 October 2001, ECR 2001, I-07831, para 22 (with reference to *Rush Portuguesa*).

²⁴ Article 39, para 2, EC-Treaty.

²⁵ *N. Bruun, I.c.*, 21.

applicable working conditions in case of cross-border employment. It may lead to competition on the basis of working conditions. It is precisely this idea that motivated the adoption of the Posting Directive.

The country of employment principle and avoidance of social dumping

It appears that the country of employment principle, is deeply rooted in the classic view on labour law. It is supported in the context of article 39 of the EC Treaty, in the Rome Convention on applicable law of 1980 and in the Posting Directive. It remains the norm in European labour law.

This country of employment principle seems to serve a triple purpose:

1. The protection of national sovereignty with regard to the application of labour law, of which it is often argued that this is closely connected with national legal, institutional and cultural tradition;
2. The protection of equal treatment of workers on the territory in which they are employed, regardless of whether they are working permanently or temporarily in the country concerned;
3. The avoidance of competition on the basis of working conditions, which would not only threaten national social development, but could also run contrary to the principle of fair competition.

So it is clear that the avoidance of any form of regulatory competition, leading to a race-to-the-bottom in the social area, underlies the *lex loci laboris*. In the context of article 39 of the EC Treaty, the Court clearly referred not only to the fact that this article entails the abolition of discrimination based on nationality, but also to the nature of this prohibition having "the effect of not only allowing in each state equal access to employment to the nationals of other Member States, but also (...) of guaranteeing to the state's own nationals that they shall not suffer the unfavourable consequences which could result from the offer or acceptance by

nationals of other member states of conditions of employment or remuneration less advantageous than those obtaining under national law, since such acceptance is prohibited".²⁶

Also in posting issues, the Court has accepted that Community law would not hinder member states to apply their own legislation or collective bargaining agreements, even for workers who are temporarily employed on their territory.²⁷ But still, the Court would only accept this conditionally.

This has become very apparent in two cases of the European Court of Justice concerning industrial action in the member states, involving a cross-border of service provision, i.e. the cases of Viking and Laval.

The amendment of the Services Directive

The Commission's modified proposal of the Services Directive of 2006,²⁸ drafted under the pressure of the public opinion, the trade union movement and the amendments proposed by the European Parliament, showed major changes compared to the initial draft. The country of origin principle was removed, and in return came a general principle of free movement of services. Furthermore, attempts were made to preserve labour law measures from the operation of the Directive. As indicated before, national labour law could come under strain because of the operation of the principle of free movement of services.

²⁶ Commission v. French Republic, Case C167/73, ECJ 4 April 1974, ECR 1974, 359, para. 44-45.

²⁷ Rush Portuguesa, para 18.

²⁸ COM (2006) 160 final.

The cases of Viking and Laval

The Viking case

1. The Viking case concerns a large ferry operator, Viking, incorporated under Finnish law. It operates seven vessels, including the Rosella which, under the Finnish flag, plies the route between Tallinn (Estonia) and Helsinki (Finland). The crew of the Rosella are members of the FSU, a Finnish union of seamen which has about 10 000 members. FSU is affiliated to the ITF, an international federation of transport workers' unions with its headquarters in London (United Kingdom). The ITF groups together 600 unions in 140 different States.

So long as the Rosella is under the Finnish flag, Viking is obliged under Finnish law and the terms of a collective bargaining agreement to pay the crew wages at the same level as those applicable in Finland. Estonian crew wages are lower than Finnish crew wages. The Rosella was running at a loss as a result of direct competition from Estonian vessels operating on the same route with lower wage costs. As an alternative to selling the vessel, Viking sought in October 2003 to reflag it by registering it in either Estonia or Norway, in order to be able to enter into a new collective agreement with a trade union established in one of those States.²⁹

The manning agreement for the Rosella expired on 17 November 2003 and therefore FSU was, as from that date, no longer under an obligation of industrial peace under Finnish law. Consequently, it gave notice of a strike requiring Viking, on the one hand, to increase the manning on the Rosella by eight and, on the other, to give up its plans to reflag the Rosella³⁰ or to conclude a collective bargaining agreement whereby Viking would continue to comply with Finnish labour law.

The Court of Appeal, before which an appeal was lodged by FSU and ITF, referred to the European Court of Justice a number of

²⁹ Paragraph 9.

³⁰ Paragraph 13.

questions for a preliminary ruling on the application to the present case of the rules of the EC Treaty on freedom of establishment and on whether the action of FSU and ITF constituted an unjustified restriction on the freedom of establishment.

2. A first question for the Court relates to the extent to which article 43 of the EC Treaty could be applied to a collective action, such as that in the case. The Court was asked to assess whether a sort of immunity could be granted along the lines and in analogy of the Albany-case law, referred to above.

This is obviously an important question. An exclusion from article 43 of the EC Treaty was argued before the Court, as certain restrictions on the freedom of establishment and the freedom to provide services are inherent in collective action taken in the context of collective negotiations. However, the Court takes the view that collective action such as that in the case, falls, in principle, within the scope of article 43 of the EC Treaty.³¹ The fact that article 137 of the EC Treaty does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action from the application of article 43 EC.³² In this, the Court follows the opinion of Advocate-General Maduro.³³ This also seems to confirm the Court's viewpoint expressed in *Meca Medina* (referred to above). At the same time, the Albany-approach, although not used in this case, seems to remain upheld.

The Court then further assesses whether there is a restriction on the freedom of movement. It first notes that the collective action in question has the effect of making less attractive, or even pointless, Viking's exercise of its right to freedom of establishment, inasmuch as such action prevents both Viking and its subsidiary, from enjoying the same treatment in the host Member State as other economic operators established in that State.³⁴ Secondly, the Court takes the view that collective action taken in order to implement a

³¹ Paragraph 37.

³² Paragraph 41.

³³ Opinion of 23 May 2007.

³⁴ Paragraph 72.

policy of combating the use of flags of convenience, which seeks, primarily to prevent shipowners from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, must be considered to be at least liable to restrict Viking's exercise of its right of freedom of establishment.³⁵ The conclusion is, for the Court, that the collective action such as present in the case, constitutes a restriction on freedom of establishment within the meaning of article 43 of the EC Treaty.³⁶

At this point, the Court is able to revert to its *Schmidberger* case law, referred to above. This is the path that the Court seems to follow. There is, in other words, no neglect, in principle, of the fundamental character of the involved trade union right. According to the Court, the right to take collective action, including the right to strike, must be recognised as a fundamental right, which forms an integral part of the general principles of Community law the observance of which the Court ensures. Along the lines of *Schmidberger*, the Court points out that the exercise of the right to collective action may be subject to certain restrictions.³⁷ However, with reference to *Schmidberger*, the Court accepts that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty. Still referring to the same case law, the Court takes the view that the exercise of the fundamental rights at issue, must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality.³⁸

In its assessment, the Court affirms that the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty³⁹. The Court expressly refers to the role that social policy plays in the European Community. It would

³⁵ Paragraph 73.

³⁶ Paragraph 74.

³⁷ Paragraph 44.

³⁸ Paragraph 46.

³⁹ Paragraph 77.

appear, therefore, that the Court does not rule out a co-existence of trade union activities with the free movement provisions of Community law, if purposes of worker protection can be found. The Court is of the opinion, in this case, that it is for the national court to ascertain whether the objectives pursued by the trade unions involved, by means of the collective action, concerned the protection of workers.⁴⁰ But the Court seems to refer to the national judge only in so far as there is clearly, or reasonably, an issue of worker protection. The Court states that, even if the collective action – aimed at protecting the jobs and conditions of employment of the involved union members liable to be adversely affected by the reflagging of the *Rosella* – could reasonably be considered to fall, at first sight, within the objective of protecting workers, such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat.⁴¹ Furthermore, the Court is also of the opinion that the national judge would need to ascertain whether the collective action is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective.⁴² The Court is of the opinion that it is allowed to give further guidance with regard to the appropriateness of the collective action. Analysing the policy of combating the use of flags of convenience, the Court notes that this policy is pursued irrespective of whether or not the 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.⁴³

2. The Laval case

1. In May 2004, Laval un Partneri Ltd, a Latvian company, posted workers from Latvia to work on building sites in Sweden. The work was carried out by a subsidiary, L&P Baltic Bygg AB, and included the renovation and extension of school premises in the town of Vaxholm. In June 2004, Laval and Baltic Bygg, on the one hand,

⁴⁰ Paragraph 80.

⁴¹ Paragraph 81.

⁴² Paragraph 84.

⁴³ Paragraph 89.

and the Swedish building and public works trade union, Svenska Byggnadsarbetareförbundet, on the other, began negotiations with a view to determining the rates of pay for the posted workers and to Laval's signing the collective agreement for the building sector. However, the parties were unable to reach an agreement. If the collective agreement for the building sector had been signed, Laval would have been bound, in principle, by all its terms, including those relating to the pecuniary obligations to the sector organisation and its pension arrangement.⁴⁴

On 2 November 2004, Byggnadsarbetareförbundet began collective action in the form of a blockade of Laval's sites in Sweden. The blockading of the Vaxholm building site consisted, *inter alia*, of preventing the delivery of goods onto the site, placing pickets and prohibiting Latvian workers and vehicles from entering the site. Laval asked the police for assistance but they explained that since the collective action was lawful under national law they were not allowed to intervene or to remove physical obstacles blocking access to the site.⁴⁵ In January 2005, other trade unions announced sympathy actions, consisting of a boycott of all Laval's sites in Sweden, with the result that the undertaking was no longer able to carry out its activities in that Member State.⁴⁶

2. Whereas the Viking-case related to the freedom of establishment, the Laval-case is concerned with the free movement of services. More in particular, the Court was asked to examine whether it is compatible with the rules of the EC Treaty on the freedom to provide services and the prohibition of any discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC, for trade unions to attempt, by means of collective action in the form of a blockade, to force a foreign provider of services to sign a collective agreement in the host country in respect of terms and conditions of employment, such as the collective agreement for the building sector, if the situation in the host country is characterised by the fact that the legislation to implement that

⁴⁴ Paragraph 32.

⁴⁵ Paragraph 34.

⁴⁶ Paragraph 38.

directive has no express provision concerning the application of terms and conditions of employment in collective agreements.

The Court assesses the question from two angles, the Posting Directive as well as article 49 of the EC Treaty. In both instances, the Court comes to a conclusion implying an infringement of Community law.

3. As far as Directive 96/71 is concerned, it is relevant to note in the case that minimum rates of pay constitute the only term of employment, which, in Sweden, is not laid down in accordance with one of the means provided for in the Directive.⁴⁷ The national authorities in Sweden have entrusted management and labour with the task of setting, by way of collective negotiations, the wage rates which national undertakings are to pay their workers and that, as regards undertakings in the construction sector, such a system requires negotiation on a case-by-case basis, at the place of work, having regard to the qualifications and tasks of the employees concerned.⁴⁸ The Court concludes that a Member State in which the minimum rates of pay are not determined in accordance with one of the means provided for in Directive 96/71 is not entitled, pursuant to that directive, to impose on undertakings established in other Member States, in the framework of the transnational provision of services, negotiation at the place of work, on a case-by-case basis, having regard to the qualifications and tasks of the employees, so that the undertakings concerned may ascertain the wages which they are to pay their posted workers.⁴⁹

The Court notes that certain terms of the collective agreement for the building sector depart from the provisions of Swedish law which lay down the terms and conditions of employment applicable to posted workers, by establishing more favourable terms.⁵⁰ It nevertheless, holds that Article 3(7) of Directive 96/71 cannot be interpreted as allowing the host Member State to make the provision

⁴⁷ Paragraph 63.

⁴⁸ Paragraph 69.

⁴⁹ Paragraph 71.

⁵⁰ Paragraph 78.

of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection.⁵¹

4. With regard to the free movement of services, it is interesting to follow the Court's approach in light of the case law mentioned above. Like in the *Viking* case, it has been argued before the Court that article 49 of the EC Treaty is not applicable in the case at hand. This is based on the fact that a collective action, such as that in question, falls outside the scope of this Treaty article, since, pursuant to article 137(5) of the EC Treaty the Community has no power to regulate that right.⁵² However, the Court adopts the view that even in the areas in which the Community does not have competence and in which the Member States remain, in principle, free to lay down the conditions for the existence and exercise of the rights at issue, they must nevertheless exercise that competence consistently with Community law.⁵³ The Court, however, does not explicitly refer to *Albany* here, which must mean that this case law is not overruled but simply disregarded. Instead, the Court reverts to the *Schmidberger* approach.

The line of reasoning is very similar to that developed in the *Viking* case. The Court confirms that the right to take collective action constitutes a fundamental right,⁵⁴ and with reference to various international instruments, it states that the right to take collective action must be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures. At the same time, the Court takes the view that this right is not without limitations. With explicit reference to *Schmidberger*, the Court requires that the exercise of a fundamental right must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality.

⁵¹ Paragraph 80.

⁵² Paragraph 86.

⁵³ Paragraph 87.

⁵⁴ Paragraph 89.

It is then for the Court to find a restriction on the freedom of services. The Court takes the view that the exercise of the right to collective action "is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of article 49 of the EC Treaty."⁵⁵ The Court thereby holds that a restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest and, if that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it.⁵⁶

This proportionality test would seem to terminate the legitimacy of the collective action in question. According to the Court, 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.⁵⁷ In this context, the Court refers to the Community competences in the area of social policy, stressing the social dimension. However, in light of the proportionality principle, the Court concludes that the obstacle which the challenged collective action forms, cannot be justified with regard to such an objective.⁵⁸

Finally, as regards the negotiations on pay which the trade unions seek to impose, by way of collective action such as that at issue in the main proceedings, on undertakings, established in another Member State which post workers temporarily to their territory, the Court emphasises that Community law does not prohibit Member States from requiring such undertakings to comply with their rules on minimum pay by appropriate means.⁵⁹ However, the Court cannot find justification for the collective action in question that forms part of a national context characterised by a lack of

⁵⁵ Paragraph 99.

⁵⁶ Paragraph 101.

⁵⁷ Paragraph 103.

⁵⁸ Paragraph 108.

⁵⁹ Paragraph 109.

provisions, of any kind, which are sufficiently precise and accessible that they do not render it 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.⁶⁰

Comments

Although a degree of hesitation is required when drawing general conclusions, the two cases seem to confirm the viewpoint that, in situations involving the freedom of movement, the Court is rather reluctant to give specific immunity to labour law issues, such as trade union rights, including the right to collective action.

It is important to note that the Court recognises the fundamental nature of trade union rights, such as the right to collective action involved in both cases. It adopts the view that the right to take collective action must be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures. The Court further recognises the legitimacy of the social objectives underlying trade union activity.

This, however, does not allow for an exclusion from the fundamental Treaty freedoms. The Court takes the view that trade union rights cannot be excluded from article 43 or 49 of the EC Treaty. This implies, as has been explained above, that if an exceptional position is under debate, it will be granted only within the scope of application of the Treaty itself.⁶¹ Although, technically, the Court could have reverted the Albany approach, this case law is in both cases disregarded, although at the same time upheld.

The question, then, what is the meaning of the recognition of the right to collective action as a fundamental right under Community law. It certainly means, for the Court, a facilitated adoption of a legitimate objective, justifying a restriction to the freedom of

⁶⁰ Paragraph 110.

⁶¹ Cf. Wouters-case, C-309/99, ECJ 19 February 2002, ECR 2002, I-1577; E. Szyszczak, Competition and sport, *European Law Review* 2006, 94-110.

movement. But does it also keep this right away from a proportionality test? Clearly not, since the Court requires the exercise of the right to be appropriate and proportional with regard to the limitation imposed on the free movement. In this sense, a preference of the Schmidberger approach would appear to come through. Does the fundamental character lead to an extensive interpretation of that right? This is not very clear. In *Viking*, the Court refers to the objective of protecting workers and it questions the relevance of the collective action where jobs or conditions of employment are not jeopardised or under serious threat.⁶² In *Laval*, the Court accepts the protection against social dumping as an overriding reason of public interest.⁶³ This may be a point of criticism to both of the judgments, but these findings also seem to be connected with the proportionality issue and with the limitations of the questions raised before the Court.

However, within the perspective of the Services Directive, it remains to be seen which added value would come from article 1, 7 of the Services Directive, providing that it does “not affect” the exercise of fundamental rights as recognised in the Member States and by Community law. Such as the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law.

This contribution raised the questions: whether the Services Directive organises social dumping? Clearly, the fear of social dumping stood central in the debate on the adoption of the Services Directive. However, it would appear that the Services Directive, in its final form, bears a rather modest impact on the issue of social dumping. The country of origin principle, which was the main drive of competition between member states, has been lifted since the EP’s plenary session in February 2006. On the other hand, the European Court of Justice seems to have introduced case law that puts national labour law, including practices of industrial action, under the principles of free services provision, including a

⁶² Paragraph 81.

⁶³ Paragraph 103.

proportionality test. So, the Treaty articles on the free movement of services would put national labour law measures in the balance, and therefore, to some extent, under strain.

The so-called question for a 'rescue' of the European social model that was advocated in the European Parliament and in the broad public debate, may therefore remain unresolved. Although it may not be very clear as to what this social model contains the EU is still directed towards a strong model of economic integration that goes along with a relative social policy status quo.⁶⁴ This means that this political compromise fits into a concept of strong national competences in the field of labour law, not excluding regulatory competition between member states.

⁶⁴ Cf. J. Donaghey and P. Teague, 'The free movement of workers and social Europe', *Industrial Relations Journal* 2006, Vol. 37, 665.