The judicial treatment of the conflicts between trade union rights and economic freedoms in EU legal order: a critical analysis of the ECJ rulings in *Laval* and *Viking* cases

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1. Introduction

The judgments of the European Court of Justice (ECJ) in *Laval*[1] and *Viking*[2] cases have attracted and they still attract perhaps the widest interest that a Labour Law issue has ever held. Scholars coming from different scientific disciplines have dealt with the rulings handed down by the Court with the majority of their responses being critical to many of the judicial assumptions. Inasmuch as numerous legal practitioners have covered the various aspects raised by the rulings, one should wonder what another legal study on the landmark cases does have to offer.

This study attempts to examine the decisions in *Laval* and *Viking* from both a Labour Law and a Constitutional Law perspective. After a brief presentation of the facts of the cases (section 2.1), I will first try to summarize the basic arguments and detect fallacies and inconsistencies in the Court's reasoning, elucidating on some further points which have not intensively been discussed (sections 2.2 and 2.3). In a following section (section 3), I will try to reconstruct the judicial reasoning on premises common in the theory of constitutional law, in an attempt to approach the ruling handed down by the Court from a broader perspective. At that point, my focus will be on the methodology that was followed by the Court, as well as on the more general legal-theoretical presumptions that underlay its decisions. It will be argued that in both judgments the binary logic of "rule – exception" prevailed, where the fundamental economic freedom was considered to be the rule. This organising principle, though latent in the judicial syllogism, comes to the fore as the connective tissue of the main

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[1] ECJ 18 Dec. 2007, C- 341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and* Other, Rec. 2007, p.I-11767.

[2] ECJ 11 Dec. 2007, C- 438/05, *International Transport Workers Federation, Finnish Seamen's Union v. Viking Line APB and OÜ Viking Line Eesti*, Rec. 2007, p.I-10779.

points of the Court's reasoning and explains to a certain extent the contradictions detected at the previous section of the essay. Against this organising principle I shall support justified reasons of objection. It will finally be shown that the judicial syllogism has been formed according to a formal approach, which is not only argued to be inappropriate to the resolution of the relevant judicial conflicts, but which also reveals the Court's implicit adoption of a beforehand immutable hierarchical order of the values involved.

2. Freedom of services and establishment v. right to take collective action

2.1. The facts of Laval and Viking cases

Laval case

Before presenting the facts of the case, a digression is necessary in order to shed some light on the legal background of the case discussed. The posting of workers Directive 96/71/EC defines the system of rules which apply to workers who are posted from one Member State to another in the framework of the provision of services. Article 3(1) of the Directive provides that posted workers must be guaranteed the terms and conditions of employment covering a series of matters (referred to in article 3(1), subparagraph 1, such as the minimum rates of pay, maximum work periods and minimum rest periods, minimum paid annual holidays etc.) and which in the Member State where the work is carried out are laid down either by law or by collective agreements declared universally applicable. Directive 96/71 was transposed in Sweden by the Law on the posting of workers (1999:678). This Law contains the terms and conditions of employment related to the matters cited in article 3(1), subparagraph 1, of the Directive, which are to be applied to workers posted to Sweden. The Swedish legislation does not provide, however, for minimum rates of pay. This "omission" is explained by the fact that in Sweden the wage rates, which national undertakings are to pay their workers, are set by collective negotiations carried out at the place of work. Neither any piece of legislation nor any collective agreement provide for minimum rates of pay. Furthermore, Sweden does not have a system for declaring collective agreements universally applicable. Finally, the Swedish Law (1976:580) on workers' participation in decisions reached by way of collective negotiations contains provisions which, among others, prohibit both employers' and workers' unions bound by a collective agreement from taking collective action with the aim of obtaining amendments to the agreement. However, the Swedish Law

does not prohibit trade unions from taking collective action against a foreign employer carrying out temporary activities in Sweden when the link of that employer with Sweden is very tenuous[3].

Regarding the facts of *Laval* case[4], a Latvian construction firm "Laval and Partners Baltic" won a government contract to renovate school premises in Sweden. Laval entrusted the construction work to its subsidiary, a Swedish firm named 'Baltic'. The firm did not use any local Swedish workers, but recruited its own Latvian workers who were paid far lower wages than comparable Swedish workers. The local branch (Byggettan) of the Swedish builders' union (Byggnads), opened negotiations with both Baltic and Laval in order to extend the relevant Swedish sectoral collective agreement to posted workers. The collective agreement discussed contains provisions regarding working time, annual holidays, protection from dismissals, but it does not contain any provision regarding wage rates, since in Sweden, as it has been already cited, the wage rates are set by way of collective negotiations carried out at the place of work. Therefore, apart from the extension of the sectoral collective agreement, Byggetan opened negotiations with Laval in order to ascertain the wages to be paid to posted workers. The negotiations failed and Byggnads announced and undertook industrial action that consisted of a blockade of Laval's worksite. In the meantime, the Swedish electricians' trade union (Elektrikerna) took sympathy action which had the effect of preventing Swedish undertakings belonging to the organisation of electricians' employers from providing services to Laval. After a short period of time the posted workers returned to Latvia. Other trade unions also announced sympathy actions, consisting of a boycott of all Laval's sites in Sweden. In February 2005, the town of Vaxholm requested that the contract between it and Baltic be terminated, and in March the latter was declared bankrupt.

Laval brought proceedings before the Swedish Labour Court (Arbetsdomstolen) against Byggnads, Byggettan and Elektrikerna, claiming that both the blockading and the sympathy action were illegal and that such action should therefore cease. It also sought an order that the trade unions pay compensation for the damage suffered. The Arbetsdomstolen made a reference to the ECJ for a preliminary ruling on the following questions:

[3] This regulation, known as "lex Britannia" resulted from the Swedish Labour Court's (Arbetsdomstolen) interpretation of article 42 of the Swedish Law (1976:580) on workers' participation in decisions reached by way of collective negotiations. See the Labour Court's judgment, known as "Britannia", in International Labour Law Report, vol. 10 (Dodrecht, 1992), p. 432-440.

[4] For a thorough analysis of the facts of the cases and the legal arguments put forward during the proceedings, see Bercusson (2007) as well as Davies (2006).

1. Is it compatible with the rules of the EC Treaty on the freedom to provide services (article 56 TFEU[5], ex article 49 TEC), and the prohibition of any discrimination on the grounds of nationality (article 18 TFEU, ex article 12 TEC) as well as with the provisions of Directive 96/71/EC, collective action taken by trade unions aiming at forcing a foreign service provider to sign a collective agreement in the host country?

2. Is it compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of any discrimination on the grounds of nationality as well as with the provisions of Directive 96/71/EC, national rule which prohibits trade unions from taking collective action with the intention of circumventing a collective agreement concluded by other parties only when collective action is related to conditions of work to which the national rule is directly applicable? [6]

Viking case

The *Viking* dispute arose when in 2003 Viking Line Apb, a large shipping company, announced that it wished to reflag its vessel "Rosella" to Estonia. The Rosella had operated until then under the Finnish flag with mainly Finnish crew plying the route between Tallinn (Estonia) and Helsinki (Finland). The firm had decided to reflag its vessel because of the direct competition from Estonian vessels operating on the same route with lower wage costs. Consequently, the main objective of the reflagging was to replace the Finnish crew by an Estonian crew on lower wages and terms of employment as well as to sign a collective agreement with a trade union established in Estonia. Viking announced its plan to the Finnish Seamen's Union (FSU) as well as to the crew of the Rosella. FSU opposed to these plans and threatened strike action by its members. FSU then informed the International Transport Workers' Federation (ITF), a global federation of transport unions with its headquarters in London, a member of which is also FSU. It must be noted at this point that ITF has a well-known campaign against the use of "flag of convenience". ITF sent a circular to its affiliates asking them to refrain from entering into negotiations with Viking or Viking Eesti (Viking's subsidiary in Estonia).

On the date that FSU was no longer under an obligation of industrial peace according to the Finnish law, it gave notice of a strike requiring Viking to give up its plans to reflag the Rosella. Viking refused to give up its plan. FSU then asked Viking to commit itself that regardless of a possible reflagging of the Rosella, it would first continue to follow Finnish

[5] Treaty on the Functioning of the European Union (former EC Treaty).
[6] *Laval* para 40.

law, the collective bargaining agreement, as well as the agreement on wages and terms of employment of the crew of the Rosella and, second, that the possible change of flag would not lead to any laying-off of employees on any Finnish flag vessel belonging to Viking, or to changes to the terms and conditions of employment. Viking gave up its plan until 1 May 2004, when the Republic of Estonia became a member of the European Union and the firm pursued its intention to reflag the vessel to Estonia on the basis of the freedom of establishment. Given the fact that the ITF circular remained in force, Viking applied to the High Court in London for an injunction against ITF and FSU on the grounds that their actions infringed article 49 TFEU (ex article 43 TEC) on freedom of establishment. After the Court of First Instance ruled in Viking's favour, the Court of Appeal decided that the issue should be referred to the ECJ for a preliminary ruling on the following questions:

1. Where a trade union takes collective action against an undertaking so as to require that undertaking to enter into a collective bargaining agreement which has the effect of restraining that undertaking from reflagging a vessel in another Member State, does that action fall outside the scope of article 49 TFEU (ex article 43 TEC)? Reversely, does article 49 TFEU have horizontal direct effect so as to confer rights on an undertaking which may be relied on against a trade union in respect of collective action taken by that union?

2. Do collective actions, such as the ones referred to above, constitute a restriction on the freedom of establishment and if so to what extent can such a restriction be justified?[7]

As far as the Court judgments are concerned, I shall first analyze separately some points of the *Laval* judgment which are special due to the specific legal background of the case (Directive 96/71) and then I will comment on the main part of the judgment that is common, to a large extent, to both cases.

2.2. Analysis of the Court's interpretation and application of the Directive 96/71 in Laval judgment: detecting inconsistencies and paradoxes

In *Laval* the Court started its reasoning with the interpretation of the Directive 96/71 concerning the posting of workers in the framework of the provision of services and its application in the context of the present case. First of all the Court held that Community law does not preclude Member States from applying their legislation, or collective labour agreements relating to minimum wages, to any person who is employed, even temporarily,

[7] *Viking* para 27.

within their territory, no matter in which country the employer is established, as long as the rules are appropriate for securing the objective pursued, namely, the protection of posted workers, and do not go beyond what is necessary in order to attain that objective[8]. Then the Court clarified that the aim of the Directive 96/71 is to guarantee a minimum level of protection for the posting workers. That is to engage the regulative mechanisms of the Member States "*in laying down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers there*"[9].

Furthermore, collective agreements were in principal considered an acceptable method for achieving the goal set by the Directive. In Sweden, in particular, the wage rates, which undertakings of the construction sector are to pay their workers, are set through collective negotiations. The Court held that "*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*"[10]. Such a means, namely collective negotiations, was considered not to be in accordance with the means set out in article 3(1) and (8) of the Directive[11], although the Court had previously stated that "*the Member States are free to choose a system at the national level which is not expressly mentioned among those provided for in the Directive"*[12].

The Court determined two problems regarding the application of the Directive. First, the collective agreement that the union pursued to be signed concerned rates of pay which went beyond the minimum. However, the first subparagraph of article 3(1) of Directive 96/71 relates only to minimum rates of pay. Therefore, trade unions could not rely on this provision to justify obligation of the service provider to comply with rates of pay which do not constitute minimum wages[13] (***Kilpatrick***, 2009). A remark here is more than necessary: article 3(7) of the Directive provides that its provisions should not prevent the application of terms and conditions of employment which are more favourable to workers. The Court acknowledged this; however, the interpretation made was that the actual provision of services on the ground of a Member State should not depend on the "*observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection"*[14]. Nevertheless, the Court maintained that it is permitted that the employer continues to be bound by the collective agreement signed in the state of origin when this contains more

[8] *Laval* para 57.
[9] *Laval* para 59.
[10] *Laval* para 69.
[11] *Laval* para 70.
[12] *Laval* para 68.
[13] *Laval* para 70.
[14] *Laval* para 80.

favourable working terms than those of the law of the host state, as regards the matters referred to in article 3(1), first subparagraph, of the Directive[15].

The Court also acknowledged that article 3(10) of the Directive provides that Member States may apply terms and conditions of employment on matters other than those specifically referred to the first subparagraph of article 3(1), in the case of public policy provisions[16]**.** However, it held that trade unions are not "*bodies governed by public law, (so) they cannot avail themselves of that provision by citing grounds of public policy*" in order to justify the collective action undertaken[17].

The second problem determined by the Court was that the means that would lead to a regulation of the rates of pay, that is collective negotiations, was unacceptable as it was considered to be too uncertain a procedure for the undertakings concerned in order "*to ascertain the wages which they are to pay their posted workers*". In particular, the Court held that a Member State "*is not entitled (...) 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*" [18].

The following remarks can be made up to this point of the judgment. Firstly, while the Court seemed to accept that an employer posting workers might be required to sign a pre-existing collective agreement regarding the minimum rates of pay, it did not accept that an employer could be required to come to negotiations with a trade union regarding the wage (***Davies***, 2008). This thought seems rather problematic, since it fences the employer against the procedure of negotiations, but it does not fence him/her against collective agreements that have been signed without his/her participation. The negotiations are thus considered to be more "detrimental" for a service provider, than a collective agreement already concluded, despite the fact that through collective bargaining each party can claim for more favourable terms. At the same time the Court held that the employer should continue to be bound by a possibly existing collective agreement in the state of origin, which contains more favourable working terms. This statement is not as "workers' friendly" as it seems. In fact workers are posted from countries with lower standards, in terms and conditions of employment, to countries with a higher level of employment protection, in order for the service provider to be

[15] *Laval* para 81.
[16] *Laval* para 82.
[17] *Laval* para 84.
[18] *Laval* para 71 (see also para 110).

more competitive. Thus, the case described by the Court seems to be of minimum practical importance.

As far as the workers' protection is concerned, the ECJ held that it is unacceptable to use the means of collective negotiations and collective actions, in order to reach terms and conditions of employment that go beyond what the Directive's provisions require; that is, terms "up to the level domestically acknowledged as a mandatory minimum standard" (***Schlachter***, 2009). This interpretation of the Directive made by the Court requires further analysis. The Court pointed to the fact that, according to the Directive, the foreign service provider must respect the nucleus of mandatory rules for minimum protection. However, as far as more favourable conditions are concerned, the Court held that neither could they justify collective negotiations, nor could the provision of services be conditional on their respect[19]. It seems thus that the Court interpreted the Directive as establishing not only a "floor" but also a "ceiling" of terms of employment that the host states should extend to posted workers (***Malmberg & Sigeman***, 2008; ***Kilpatrick***, 2009). In other words, the Directive was perceived as determining not only the minimum, but also the maximum level of protection that should apply to posted workers. But if the Directive is to be read like this, it is in fact regarded as a means to promote the freedom to provide services and not as a means to both protect posted workers and prevent unfair competition caused due to lower labour standards (***Malmberg & Sigeman***, 2008; ***Schlachter***, 2009). However, such a perception lies in contradistinction with the purposes of the Directive as they were detected by the Court itself at another point of the judgment. Indeed, the Court had stated that the Directive's provision on the observance of the nucleus of mandatory rules for minimum protection seeks firstly to ensure fair competition between national undertakings and undertakings, which provide services transnationally and secondly to protect posted workers[20]. It seems though that this statement has been merely rhetorical, since the Court could not support the consequences that its application in the present case would entail.

Moreover, by adopting such an approach, namely that the Directive does not permit trade unions to have recourse to collective negotiations in order to reach terms and conditions of employment beyond the minimum, the Court appears to have supported the view that such terms can only be realised if the employer is voluntarily disposed towards offering them (***Davies***, 2008). "But as they rarely find undertakings ready to voluntarily go beyond what

[19] See above on *Laval* para 80.
[20] Laval paras 74-76.

they are statutorily bound to" (***Schlachter***, 2009), this assessment lies far from the reality of industrial relations.

Another paradox that emerges by the Court's interpretation of the Directive is the following: since neither collective bargaining nor collective action are allowed to be carried out against a foreign service provider in order to reach conditions of employment better that the minimum standard, a foreign service provider should enjoy better protection than a national service provider and even better protection than he/she would enjoy if he/she were to provide services in his/her country of origin (***Schlachter***, 2009). Indeed, against a national service provider, trade unions are legitimised to use the mechanism of collective negotiations and/or to exercise their right to collective action so as to achieve better terms of employment. However, this kind of "pressure" should be precluded from being exercised against a foreign service provider, according to the Court's reasoning.

Furthermore, within the same part of the judgment, trade unions were considered incapable of invoking reasons of public interest in order to justify their actions and avail themselves of the exception included in article 3(10) of the Directive; this, due to the fact that they are not bodies governed by public law. However, as it has been cited above, the Court regarded social partners as being the appropriate actors to implement the Directive, through collective agreements, without any intervention on the part of a public authority to be needed. Consequently, social partners were considered to be capable of implementing the Directive, but incapable of invoking exceptions included in the Directive, as a public authority could do (***Davies***, 2008). They were found appropriate for enforcing a piece of legislation, but inappropriate for claiming reasons of public interest. The inconsistency that lies in this part of the Court's reasoning is, I believe, obvious.

2.3. Analysis of the common aspects of the Court's reasoning in Laval and Viking judgments: detecting further judicial fallacies

2.3.1. On the recognition of collective action as a fundamental right

In both judgments, the main part of the reasoning begins with a statement which constitutes an undoubted evolution for both social and collective labour rights in the Community's legal order: the Court's explicit recognition of the right to take collective action, including the right to strike, as a fundamental right "*which forms an integral part of*

the general principles of Community law"[21]**.** Indeed, this recognition is of high importance since to that moment, the Court of Justice had been relatively circumspect in establishing the scope of a right to strike and defining its content (***Novitz***, 2003, p. 245-246). In fact the Court had been "very reluctant to recognize any social rights as general principles, much less as fundamental rights" (***Katrougalos***, 2007, p. 27). Multiple texts were provided as sources of the right, namely the European Social Charter, the Convention No 87 of the International Labour Organisation (ILO), the Community Charter of the Fundamental Social Rights of Workers as well as the Charter of Fundamental Rights of the European Union[22]. A further significant step was made at this point since the Court had been again very reluctant in the past to place any reliance on the EU Charter (***Davies***, 2008; ***Morijn***, 2006). However, as will be shown below, the Court did not resort to these sources at any other stage of the judgment in order to define the permissible restrictions on the rights. Nor did it take into account the interpretations that have been made by the expert committees of the respective international and European institutions. The Court's reference to these sources was then not accompanied by a thorough elaboration on them while arguing on the matter of the cases. This indicates that the above mentioned sources were simply referred to in terms of their symbolic significance.

Furthermore, the Court's recognition of the right to take collective action was provided in addition to the statement that the right is not absolute and its exercise could be subjected to restrictions[23]. Moreover, the Court stated that although the exercise of fundamental rights is a legitimate interest that, in principle, justifies a restriction on a fundamental freedom, such as the freedom to provide services[24], it cannot reach up to the extent to make the freedom inapplicable[25].

Accordingly, the exercise of a fundamental right must be reconciled with the requirements of the Treaty and in respect with the principle of proportionality[26]. At this point the Court referred also to the previous case law of *Schmidberger*[27] and *Omega*[28]. Another comment is necessary to be made here: the analogy drown between the two cases concerned

[21] *Laval* para 91, *Viking* para 44.
[22] *Laval* para 90, *Viking* para 43.
[23] *Laval* para 91, *Viking* para 44.
[24] *Laval* para 93, *Viking* para 45.
[25] *Laval* para 95, *Viking* para 47.
[26] *Laval* para 94, *Viking* para 46.
[27] ECJ 12 Jun. 2003, C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich.* Rec. 2003, p. I-5659.
[28] ECJ 14 Oct. 2004, C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn,* Rec. 2004, p. I-9609.

with the *Schmidberger* case is in fact not so obvious. *Schmidberger* concerned a protest which had restricted a firm's freedom to transport its goods across the borders of another Member State. However, in *Schmidberger*, the Court was called upon to examine whether the authorities of the Member State, where the protest took place, had regulated properly the exercise of the protesters' right to freedom of expression (***Morijn***, 2006). In other words, it was not the protesters themselves to be judged whether they had exercised their right in accordance with the principle of proportionality, but the Member State. It was the latter which was responsible to strike a balance between the competitive interests and thus to regulate the protest in order to restrict its effects on free movement of goods (***Davies***, 2008). In this regard ***Schlachter*** (2009) underlined that "rather than enforcing fundamental Treaty provisions against private entities, the ECJ held that the State concerned liable for allowing a situation to occur in which any individual can cause restrictions to fundamental freedoms". This case is completely different from the cases discussed here, where the trade unions were expected to exercise their fundamental right in respect with the requirements of the Treaty and the principle of proportionality (***Davies***, 2008). Consequently, through such an interpretation of the Court, the burden of compliance with the market freedoms was transposed from the Member States to the trade unions (***Azoulai***, 2008).

2.3.2. On the horizontal direct effect

The Court went on maintaining that both articles 49 TEC (now 56 TFEU) and 43 TEC (now 49 TFEU), guaranteeing respectively the freedom to provide services and the freedom of establishment, have a horizontal direct effect; that is, they are directly applied also to trade unions. In order for the Court to justify this statement it was held that "the *abolition, as between Member States, of obstacles to freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law*"[29]. At this part of the judgment in *Laval*, many authors have underlined a contradiction; while the Court at a previous point had stated that trade unions are not bodies governed by public law so as to avail themselves of the provision of article 3(10) of the Directive 96/71[30], in a following thought the Court extended the application of EC provisions, which in principle address to

[29] *Laval* para 98, *Viking* para 57.
[30] *Laval* para 84.

public authorities, to trade unions as well, attributing to the latter characteristics of quasi-public bodies (***Azoulai***, 2008; ***Davies***, 2008; ***Skandalis***, 2009).

However, in *Viking*, the Court rejected ITF's claims according to which the interpretation made, regarding the direct horizontal effect, applies only to quasi-public organisations or to associations exercising a regulatory task and having quasi-legislative powers[31]. Nevertheless this rejection seems not convincing for another reason: while forming its reasoning on that point and in order to support its view, the Court referred to cases concerning restrictions on free movement provisions imposed by private bodies with a regulatory power, that is, mainly by professional associations, such as the Union of European Football Association (UEFA) in *Bosman* case[32]. Within the context of this case the ECJ held that free movement provisions "*apply also to rules laid down by sporting associations which determine the terms on which professional sportsmen can engage in gainful employment*"[33].

There is though a major difference between professional associations and trade unions, as the ones concerned in *Laval* and *Viking*; while professional associations can impose rules on those who wish to participate in an economic activity, trade unions do not have this power. Trade unions are far from being bodies that regulate the access to labour market. They can only negotiate with an employer on the terms of employment and even undertake collective action in order to put pressure towards the fulfilment of their demands, but they need the consent of the other party -namely the employer- for reaching a collective agreement (***Azoulai***, 2008; ***Davies***, 2008). Consequently, as ***Schlachter*** (2009) noted, trade unions can participate in setting rules for a labour market, thereby influencing fundamental freedoms of service providers, but they cannot regulate totally, on their own, the labour market.

As far as the horizontal direct effect is still concerned, a further remark is important to be made; a remark that is connected with the very core of the theoretical background upon which collective Labour Law is based: a basic premise of the theory on trade union rights is that industrial action is intended to cause damage. The aim of any collective action is to cause harm to the economic sphere of the employer, to restrict, in other words, the exercise of his/her economic freedoms. This premise is valid since collective action has been conquered by the labour movement and has been recognised as a fundamental right in national legal orders so as to form a counterbalance to the employer's advantageous position in the field of

[31] *Viking* para 64.
[32] ECJ 15 Dec. 1995, C- 415/93, *Union royale belge des sociétés de Football association ASBL v Jean-Marc Bosman,* Rec. 1995, p. I-4921.
[33] *Bosman* para 87.

industrial relations. Thanks to the exercise (or the threat of exercising) of the right to collective action, trade unions are able to overcome the inherent inequality that characterises the relation between workers and employers and reflects also in the procedure of collective bargaining (see ***Kazakos***, 2009, p.44-45, 318, 427-428) . Thanks to the exercise of the right in question trade unions cannot only oppose effectively to potential deterioration of working conditions, but also achieve better terms and conditions of employment. This is all the more so the case with the right to strike. In fact many scholars have long ago maintained that harmfulness should be regarded as inherent in the exercise of the right to strike (***Flour & Aubert***, 1981, p. 134; ***Rivero***, 1983, p. 394; ***Sinay & Javillier***, 1984, p. 367; ***Kazakos***, 2009, p.315-318).

Based on the above theoretical presumption, a major contradiction could be detected in the Court's reasoning: the ECJ recognised the right to strike as a fundamental right to be exercised by the trade unions and, at the same time, it forwarded the direct application of the Treaty provisions on economic freedoms to trade unions. That is, it acknowledged as an obligation of trade unions to act in accordance with the economic freedoms. It is although impossible to exercise the right to collective action without restricting the employer's economic freedom to a certain degree, unless the action is completely ineffective (***Kazakos***, 2009, p. 37, 427; ***Azoulai***, 2008). The Court yet rejected similar claims of FSU and ITF in *Viking* judgment maintaining that "*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*"[34]. However, no further explanation was provided to support the above statement.

2.3.3. On the permissible restrictions of the fundamental freedoms

The Court continued its reasoning as follows: given that the Treaty's provisions on economic freedoms apply directly to trade unions, these freedoms have been in both cases infringed by the unions' collective actions (***Barnard***, 2008b), since these actions made "*it less attractive or more difficult***"** for the undertakings to exercise their rights to freedom to provide services (*Laval*) and freedom of establishment (*Viking*)[35]. It was thus maintained that an infringement of the fundamental freedoms is conduced when their exercise is rendered

[34] *Viking* para 52.
[35] *Laval* para 99, *Viking* para 72.

"less attractive or more difficult"[36]. Using these terms the Court actually annulled its previous recognition of the fundamental right to collective action. It is obvious that a collective action will always make the exercise of an economic freedom "less attractive" or that it will always render its realisation "more difficult" than before the enactment of the action; for collective action is aimed, as already cited, at forcing the employer into assigning better terms and conditions of employment or into not proceeding with lowering the level of working terms in order to gain competitive advantage in the market. ***Novitz*** (2009) maintained in this regard that "industrial action is intended to cause sufficient disruption to extract concessions from an employer". Then the effectiveness of a collective action and thus the consequential extent of the restriction on an employer's economic freedom depends on the dynamic of the trade union that undertakes the action. Accordingly it is meaningless to recognise a right as fundamental and at the same time to exclude the possibility of it being effective (***Skandalis***, 2009). By narrowing the scope of the legitimate exercise of the right to take collective action to such extent, the ECJ actually deprived the right of its real content. Ergo the recognition of the right in question appears to have been nominal (***Barnard***, 2008a).

Thereafter the Court maintained that the restriction of the fundamental freedoms could be justified only if the collective action pursued a legitimate objective and was justified by overriding reasons of public interest[37]. It is at this point apparent that the Court was mainly interested in drawing the borderlines of restriction of the economic freedoms and not in confronting the collision of a fundamental right with a fundamental freedom. In other words, the Court "did not frame the issue as a case confronting two opposed rights, but rather as an issue where an economic freedom has to be balanced against the public interest of a Member State" (***Aliprantis & Katrougalos***, 2009). But I will return to this point later on.

2.3.4. On the application of the proportionality principle

The Court continued its reasoning arguing that in order for the restriction on fundamental freedoms to be justified, the collective action should have been suitable for

[36] See further ***Barnard*** (2008a) who maintains that the Säger case (C-76/90) signaled a change in the Court's approach to the provisions on free movement; namely, a shift from the "non-discrimination" approach to the so called "market access" approach, which is more damaging to regulatory autonomy.

[37] On the approach to fundamental rights as public interest ground, which can justify derogation from common market freedoms, see ***Morijn*** (2006, p. 38-39) who also supports the inclusion of fundamental rights protection as an unwritten public interest ground in ex articles 30 and 46 TEC (now articles 36 and 52 TFEU respectively). However, such an approach implies the binary logic of "rule-exception", against which there are justified reasons of objection. See section 3 below.

securing the attainment of the objective which it pursued and should not have gone beyond what was necessary in order to attain it[38]**.** It is obvious that at this very point the Court referred to the observance of the proportionality principle. Note particularly that the recourse to the proportionality test was accompanied by the statement that the protection of workers against social dumping constitutes in principle a legitimate objective which could also be regarded as an overriding reason of public interest[39].

From this point on, the judgments in the two cases concerned appear some differences, although they have finally reached similar conclusions. In particular, in *Laval* judgment the collective action undertaken in order to ensure the terms and conditions of employment of the posted workers was considered to fall within the legitimate objective of protecting workers[40]. In *Viking*, on the contrary, the Court cast doubt on the legitimacy of the collective action's objective, namely the protection of workers. This doubt was based on the fact that Viking had assured the workers that neither the crew would be reduced nor the conditions of employment would be lowered due to the ship's reflagging. Since the terms and conditions of employment of the current workers were not under immediate threat the Court had difficulty in understanding the objection of the strike[41].

Two main fallacies can be detected here. First, at an earlier point of the judgment the Court had stated that according to article 3(3) TEU (ex article 2 TEU) the Community shall work for the promotion not only of the internal market but also of "*a high level of employment and of social protection*"[42]. At the point discussed, the Court did not "realise" the decline that the reflagging of the Rosella would mean on the level of employment. However, even if the terms and conditions of employment of the current crew were to be protected, according to the firm's undertaking, it is certain that this would not be the case with the newly hired workers. Otherwise there would have been no reason for the reflagging of the ship. In general, the "flag of convenience" policy aims precisely at reducing the cost of employment through the reflagging of the ships to states in which lower standards of worker protection are applicable. Today over 20,000 ships are sailing under flags of convenience manned by crews from developing countries on terms far more advantageous to employers than the ones applying in the latter's country of origin (***Fitzpatrick***, 2007). This is exactly why Viking, a finish firm, wanted to re- register its ferry in Estonia.

[38] *Laval* para 101, *Viking* para75.
[39] *Laval* para 103, *Viking* para 77.
[40] *Laval* para 107.
[41] *Viking* paras 81-82.
[42] *Viking* para 78.

Based on *Viking* judgment, which doubted the objection of a strike against "flag of convenience", the ship owners could henceforth easily reregister their ships all around Europe in order to benefit from the lower level of workers' protection with a simple statement that the conditions of employment of the current workers would not be harmed. This policy could lead thus to a constant decline of labour standards; it implies an "ever evolving" degradation of the level of employment. This is the reason why such a policy is by definition contrary to "a high level of employment" that the Community seeks to promote, according to the very statement of the Court. By questioning the lawfulness of the objective of collective action against such a policy, while having previously declared the EU's goal for a high level of employment, the Court was caught in another contradiction. What is even more important, by not recognising the danger that the "flag of convenience" policy entails for the workers, the Court cleared the way for a race to the bottom in labour standards.

The second judicial fallacy: according to the Court's approach a strike can only be legitimate when there is a direct threat either for the employment positions or for the terms and conditions of employment of current workers (***Barnard***, 2008a). All the same, the right to strike can also be exercised in order to prevent a deterioration of the terms of employment for the future workers, as in this case there will be a workforce of two categories within the same undertaking. This situation would apparently deprive the trade union from the potential to promote workers' interests. Furthermore, the right to strike can be and is being exercised not only in order to prevent from the deterioration, but also in order to improve the terms and conditions of employment; this is the case of the so called "offensive" aspect of the right to strike (***Kazakos***, 2009, p. 380). It is thus once again evident that the Court conceptualises the right in question in a very narrow context.

The European Committee of Social Rights (ECSR) is also opposed to the "immediate threat" approach. It adopts a far broader concept of a collective action's lawful objectives, including any kind of issue that could affect the employment conditions in the future or the employment conditions of future workers (***Jaspers***, 2007; see ***Kazakos***, 2009, p. 378-381; ***Novitz***, 2003, p.290-294). It is noticeable at this point that the Court did not refer to the international or other European sources, on which it had based the recognition of the right to take collective action, when it considered how this right might legitimately be limited (***Davies***, 2008). This omission attests that the recourse to the above sources had been mainly rhetorical, although not without importance.

Despite its ascertainment, the Court held that it falls within the competence of the national court to determine whether the objectives pursued by the trade unions concerned the

protection of workers[43]. If the national court had come to the conclusion that the jobs or conditions of employment of the workers were in fact jeopardised, it would then have to examine whether the collective action was in accordance with the principle of proportionality[44]. Regarding the application of the principle to the present case; the ECJ gave a detailed guidance to be followed by the national court, while in *Laval* judgment, the ECJ decided itself on the issue.

As far as the application of proportionality principle in *Viking* is concerned, while the Court primarily held that collective action "*may be one of the main ways in which trade unions protect the interests of their members*"[45], it then called the national court to examine "*whether on the one hand FSU did not have other means at its disposal which were less restrictive of freedom of establishment*" in order to achieve its goal "*and, on the other, whether that trade union had exhausted those means before initiating such action*"[46]. Collective action was thus regarded by the Court as the "ultima ratio"; only when all other means have been exhausted, is a trade union legitimised to have recourse to collective action (see ***Kazakos***, 2009, p. 445-446). However both the ECSR and the ILO Committee reject such an approach, according to which only when all other mechanisms for the dispute's resolution have been used could a strike be called and be legal[47]. In line with the Committees, this conceptualisation of collective action, as a last resort (***Barnard***, 2008a; ***Barnard***, 2008b), limits essentially the substance of the right, by making it subject to previous compulsory resolution mechanisms or even to a possible mandatory conciliation[48] (***Jaspers***, 2007; see further on the issue ***Novitz***, 2003, p. 279-281). Once again the Court did not refer to the international or other European sources of the right to take collective action in order to base its judgment on how the right might legitimately be limited.

A further danger that lies beneath the conception of the right as the ultimate step is that national courts may identify less restrictive alternative means that could be used instead of collective action without considering the effectiveness of those means within the bargaining process (***Davies***, 2008). Indeed there are normally more than one means that a trade union may find at its disposal in order to react to a practice that harms the workers'

[43] *Viking* para 80.
[44] *Viking* para 84.
[45] *Viking* para 86.
[46] *Viking* para 87.
[47] In Greek Labour Law theory many scholars have expressed their strong disagreement with the "ultima ratio" approach to strike action. Among others, see ***Koukiadis***, 1981, p. 511 f.f..; ***Travlos-Tzanetatos***, 1980, p.181 f.f.; ***Kazakos***, 2009, p. 443-444.
[48] Conclusions XI-1, XII-1 and XIII-1.

interests. Some of these means may be less restrictive of the employer's economic freedom. However, the trade union should enjoy a margin of appreciation regarding the effectiveness of the means for achieving its goal (***Kazakos***, 2009, p. 56, 325-326). ***Schlachter*** (2009) noted in this regard that collective action would not be a fundamental right, if the courts and not the unions were competent to assess this effectiveness. Consequently, when the ECJ sets such a standard as "the least restrictive alternative" to be assessed by the national courts when judging the lawfulness of an industrial action, there should be a crucial prerequisite to be taken into account; these alternatives to have appeared equally effective for the trade union to achieve its goals. Only then should a trade union be held accountable for not having chosen them (***Schlachter***, 2009).

Finally, the Court stated that in any case the collective action undertaken cannot result in precluding ship owners from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals. A restriction on freedom of establishment that is extended to this point cannot be objectively justified[49]. Consequently, the Court reduced the possibility for a collective action to be lawful just to the case where the exercise of the employer's economic freedom has not been entirely precluded. All the same, as it has been already argued, industrial action is intended to be detrimental to the economic activities of an undertaking. Once again the Court applies the proportionality test without taking into consideration the particularity of the context of collective actions. Taking into consideration the fact that the more restrictive an industrial action for the employer's freedom, the more effective it should be, it could be defensibly argued that the Court "favoured" the exercise of fundamental economic freedoms on the employers' behalf against workers' protection. Nevertheless, such an approach appears, among others, to neglect that the employees participate on an equal footing to the construction and the function of the internal market (***Argyros***, 2009). Such an approach violates, thus, the social purpose of the Community to which the Court itself had referred at en earlier point of the judgment[50].

As regards *Laval*, applying the proportionality test to the premises of the particular case, the Court reached the following conclusion: the restriction on freedom to provide services resulting from the trade union's collective action was not justified with regard to its objective, namely the conduct of collective negotiations and the signature of the collective agreement for the building sector[51]. In addition, the means could not be justified with regard

[49] *Viking* para 88.
[50] *Viking* para 79.
[51] *Laval* para 10.

to the objective, since the content of the agreement to be signed concerned rules that went beyond the nucleus of mandatory rules for minimum protection[52].

It seems that the Court reached this conclusion based on the initial interpretation of the Directive 96/71. As already cited above, according to this interpretation the level of protection that must be guaranteed to posted workers should be limited to the hard nucleus of the host state's regulation. Nevertheless, the trade union of the case concerned had taken collective action aiming at the signature of a collective agreement which contained, among other provisions, some more favourable conditions than the hard nucleus established by Swedish statutes. Thus, according to the Court, "the demand put forward by the trade union went beyond what was appropriate and necessary" (***Malmberg & Sigeman***, 2008).

The final judgment seems therefore to have resulted from the application of proportionality test, which determined the outcome of the decision. However, past all objections cited above, the Court appears not to have actualised the test at hand taking into account all claims and all interests of the participants. It does not further seem that the final choice was made after a concrete balance of the colliding rights. At the following section I shall try to prove that this hypothesis is true.

3. The ECJ's formal reasoning: bringing to the fore the Court's latent hierarchical order of the values involved

Many partial comments can and have been made as regards *Viking* and *Laval* judgments, which dealt with issues lying at the core of industrial relations. However, apart from the partial comments, there is a very firm logic underlying the Court's reasoning and determining every statement that the Court had made. Therefore, I will now attempt to look into the judgments from a broader perspective defining the underlying logic upon which they were based and which could prove decisive, since it could have determined the outcome of the decisions from the beginning. Furthermore, I will try to show that this underlying logic reflects a hierarchical order upon which the Court's reasoning was based. In fact, it could be argued that the Court was caught to all these contradictions described above exactly because it tried to remain consistent to this organizing principle of hierarchical order. Nevertheless,

[52] Argument conversely seen from *Laval* para 108.

such an order has never been formally admitted by the Court in the reasoning of either *Laval* or *Viking* judgment.

The Court found itself before a dispute of constitutional nature; a fundamental freedom collided in both cases with a fundamental right. In an attempt to approach the Court's reasoning within this constitutional context, I will try to reconstruct it based on the premise that I believe prevailed in the Court's judgment, namely the binary logic of "rule – exception".

The rule is the fundamental economic freedom which can be exceptionally restricted. A restriction on the rule can be justified only if it aims at the protection of interests that constitute an overriding reason of public interest. Further requirements should be met in order for the restriction to be justified. The basic requirement is that the exception cannot extend to the point of rendering the rule inapplicable, while it should also be in accordance with the proportionality principle; that is, the exception should be suitable for the objective it seeks to achieve, should be necessary for its achievement and should be fair on a cost – benefit analysis, namely the cost which invokes should not override the pursued benefit.

The type of reasoning just described and which has been adopted by the Court in *Viking* and *Laval* cases corresponds to a formal approach to legal reasoning (***Maduro***, 1998, p.16). In particular, following the formal approach, the Court organises its reasoning on the basis of the application of a legal rule. The function of legal rules is characterised by the binary logic of rule - exception (see ***Schlag***, 1985; ***Dworkin***, 1978, p. 22-28). Thus, the crucial question for a legal rule in the traditional sense is whether it permits exceptions in its scope of application, and, in case of a positive answer, what the judge must do is to testify whether the exceptional conditions actually took place. This formal type of assessment constituted a technique used by national courts when a fundamental right was restricted by a certain practice of public authorities; it was the common way in which the judicial reasoning was structured when addressing collisions between (individual or social) fundamental rights on the one hand and public objectives on the other. But even when used in such kind of disputes, the formal approach to reasoning is no longer considered to be the appropriate methodological pathway to follow. And it is inappropriate because it appears to correspond to a played out, self-centred, legal paradigm according to which any state intervention in the society is considered to be threatening in principle and thus it assesses the acceptance of the infringements on fundamental rights mainly on the grounds of the restriction's extension (***Manitakis***, 1994, p. 186). What is more, this type of reasoning cannot be considered appropriate for the treatment of cases where fundamental rights and/or freedoms, namely

elements of equal value, collide with one another, and in particular, when in such collisions "the open texture and the indeterminacy of the law" (***Maduro***, 1998, p. 16-17) are enhanced.

Indeed, in national legal orders, the formal reasoning has been called into question because of the extension of the rule of law to areas which traditionally fell outside its scope of action (***Maduro***, 1998, p. 17). The transition to a substantive conception of the rule of law signalled a new approach to the values enlightened in the constitutional texts, according to which the multiple constitutional values stand on an equal footing. Furthermore, the substantive conception of the rule of law suggested that any opposition of interests as well as any collision of values is not only possible and expected, but also accepted within a pluralistic democratic society (***Manitakis***, 1994, p. 183-193). Therefore, the judicial treatment of relevant disputes should aim at the harmonization of the colliding interests through standard procedures and not at the proclamation of the precedence of one element ("the rule") over all others ("the exceptions").

Correspondingly, it could be argued that in the case of Community law, the spill over of market integration rules into other social and political fields of different national legal systems (***Maduro***, 1999) brought into prominence the multiplicity of values dominating EU legal order as well. The EU Charter of Fundamental Rights has thus come to ascertain in EU level what national Constitutions have already ascertained in national legal orders, in the field of fundamental rights: namely that both economic and social rights are 'fundamental' for they correspond to generally accepted values of equal potency upon which the legal order is to be based. Consequently, in EU legal order as well, the disputes arising from the collision between fundamental rights and/or freedoms demand a more complex interpretation and application of the law than the one offered by the formal approach to legal reasoning. For the main consequence of the adoption of formal reasoning is that the final decision appears to be the result of the mere application of vigorous rules, while any conflicts of values are not taken into consideration by the Court (***Maduro***, 1998, p. 23). In fact, given that conflicts of values are inevitable in judgments where fundamental freedoms and/or rights collide with one another, the adoption of formal reasoning can only be explained by the implicit pre-adoption of a hierarchical order of the values involved, within which precedence is given to the value which then appears to be "the rule". In other words, the Court implicitly accepts the following maxim: conflicting interests can be ranked according to an abstract, hierarchical structure containing the whole set of constitutional rights, values and goods within the EU. In this set of values, economic freedoms lie over and above social rights. This hierarchy, which is in fact biased, subjective, as it is founded on a "pre – interpretational" and, thus,

ideological preference of the Court, obtains normative characteristics; through the judicial reasoning, it is transformed into a prescriptive supremacy.

To conclude, in both *Laval* and *Viking*, the ECJ structured its reasoning on the binary premise of "rule - exception"[53], where the economic freedom was each time considered to be "the rule". This choice cannot be regarded as random, quite the opposite; it corresponds to the implicit, though organising, principle of the syllogism, according to which economic freedoms take precedence over social rights[54]. Such a maxim is not only in conflict with the constitutional identity of EU Member States as social states (***Aliprantis & Katrougalos***, 2009; ***Katrougalos***, 2007), but it is also in contradiction of the social objectives of the EU, as these have been explicitly stated in the Treaty on European Union[55].

[53] Although the Court invoked an abstract balance between social objectives and economic freedoms (*Laval* para 105; *Viking* para 79), it did not proceed to a specific, "in concreto", so to speak, balancing of the interests at stake.

[54] The Court has never admitted the adoption of such a hierarchical order of the conflicting interests, quite the contrary. The President of the ECJ, professor ***Skouris*** (2010), has argued, with regard to the *Viking* judgment, that the order according to which the Court reviews the fundamental freedoms and rights should by no means be regarded as an indicator of the adoption of a hierarchical order or of the precedence of one element over the other. However, the hierarchy adopted by the Court according to this study's analysis is not founded on the order by which the Court reviewed the conflicting interests, but on the type of the judicial reasoning, namely its structure on the premise of "rule-exception". Furthermore, in order to prove that the Court had balanced the conflicting interests in *Laval* judgment, professor ***Skouris*** (2010), has also argued that fundamental rights are not to be placed among other grounds which can justify derogation from common market freedoms, but they are to be regarded as a separate and autonomous reason of public interest. However, the one and only fact that fundamental rights are regarded as an autonomous category of reasons which can justify restrictions on economic freedoms, confirms the Court's perception of fundamental rights as a restriction, as an exception to the rule of economic freedoms; a perception which is bound to lead to the subordination of the former to the latter.

[55]See for example article 3(3) TEU (ex article 2 TEU) enumerating among the tasks of the Community "a high level of employment and social protection", as well as the Title X on social policy in the Treaty (articles 151-164 TFEU, ex articles 136-150 TEC). On the social dimension of the EU, see further, among others, ***Stergiou*** (2011), p. 13 f.f.

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