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## The *Viking* and *Laval* Cases in the Context of European Enlargement

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### Summary

In the recent *Viking* and *Laval* cases the ECJ was asked to clarify the extent to which collective action may be used to resist social dumping within the EU. The cases arose in the midst of an increasing fear amongst trade unions and workers in old Member States that their economic and social position was being threatened by new Member State workers and enterprises availing themselves of their free movement rights under the EC Treaty in order to engage in social dumping. The recent European enlargements have enhanced social diversity within the EU thereby increasing societal and economic challenges for the trade unions in the old Member States. Moreover, due to the lack of effective industrial relations structures in the majority of new Member States the EU is faced with the difficult task of creating an integrated system of industrial relations within the European Social Model. The *Viking* and *Laval* cases exemplify the difficult road ahead. Therefore, this paper proposes to place *Viking* and *Laval* into the context of an enlarged European Union in order to assess the significance and implications of the cases for the future of trade unions and the European social model.

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### Introduction

In the recent C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [11/12/2007] (hereinafter 'Viking') and C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [18/12/2007] (hereinafter 'Laval') cases the European Court of Justice (hereinafter 'ECJ') was asked to clarify the extent to which collective action may be used to resist social dumping within the European Union. Social dumping has been defined (Hepple 1997, p. 355) as "the export of products that owe their competitiveness to low labour standards." However, the occurrence of the phenomenon has long been a matter of controversy in the context of the EU. Barnard (2000, p. 59), for example, argues that "despite the perception that companies are engaging in social dumping in the European Union, there is little evidence of it in practice." Whether Barnard is right or not, the absence of evidence to the contrary does little to alleviate the fear of unfair competition. The Viking and Laval cases arose in the midst of this fear amongst trade unions and workers in old Member States that their economic and social position was being threatened by new Member State workers and enterprises availing themselves of their free movement rights under the EC Treaty in order to engage in social dumping.

Historically, the European Union has sought to counter fears of social dumping by 'europeanising' certain aspects of national legal systems in order to alleviate competition. 'Europeanisation' has been defined in a number of ways. One of the earliest conceptualisations of the term was given by Ladrech (1994, p. 69) who defined it as

"an incremental process of re-orienting the direction and shape of politics to the extent that EC political and economic dynamics become part of the organisational logic of national politics and policy making."

However, the 'europeanisation' of different labour law systems has always posed problems due to the socio-cultural context within which national labour laws have developed. Moreover, the European Community only has limited competence in the field of labour law. Apart from the provisions contained in the Treaty which enable the Community to act in order to facilitate the free movement of workers, article 137 EC allows for the introduction of directives on working conditions, information and consultation of workers, and equality at work between men and women. Limitations on legislative competence operate in other areas of labour law and, as an alternative, soft law techniques must be used. There is also the option for rule-making on employment-law related matters through the 'social dialogue'. Introduced by the Treaty of Maastricht, the social dialogue consists of representatives of the two sides of industry, management and labour. The agreements concluded between the two sides may be given force of law through Council decision.

Following the recent European enlargements the debate on the role of the EU in 'europeanising' national social and legal practices has been revived, particularly, as

the absence of strong labour protection in the new Member States has exacerbated the problems facing old Member States. European enlargement has thrown up changed regulatory and opportunity structures especially for the social partners. These structural changes at a European level have occurred primarily as a consequence of an increase in the free movement of workers, services and establishment. However, traditional mechanisms such as collective action to protect workers must not only be in accordance with national laws, but also with rights and freedoms contained in EC law. *Viking* and *Laval* illustrate that this has given rise to a difficult interface between EC free movement law and national labour regulation. Whether the EU's policy of 'europeanisation' may be one possible way of solving these issues remains to be seen.

This paper reviews the *Viking* and *Laval* cases and places the issues raised by them within the debate surrounding the 'europeanisation' of national social and legal practices. The cases are then analysed within the context of the changes in opportunity and regulatory structures for the social partners at a European and national level following European enlargement. Finally, the significance of the cases and their ramifications for the future of trade unions and the European Social Model are assessed.

### The Viking case

In the *Viking* case, the English Court of Appeal referred a number of questions to the ECJ regarding the extent to which trade unions are able to use industrial action to resist social dumping in the EU. The facts of the case are relatively straightforward. Viking Line ABP (hereinafter: 'Viking'), a ferry operator incorporated under Finnish law and running regular services on the route between Tallinn and Helsinki, sought in 2003 to reflag its vessel by registering it in Estonia. This was due to the higher wages applicable under a collective bargaining agreement, governed by Finnish law, with the Finnish Seaman's Union (hereinafter: 'the FSU'). This caused Viking to run its services at a loss on the above-mentioned route. In accordance with Finnish law, Viking gave notice of its intentions to reflag to the FSU who opposed the plans. Based on the 'Flag of Convenience' policy of the International Transport Workers' Federation (hereinafter: 'the ITF'), the FSU requested that the ITF, whose headquarters was in London, send out a circular asking its affiliates to refrain from entering into negotiations with Viking which it duly did. Following the expiry of the manning agreement in November 2003, the FSU threatened strike action against Viking, which was legal under Finnish law, in order to deter Viking from its plans to reflag its vessel. As a compromise, the FSU indicated that it would refrain from strike action in the case, provided first that Viking gave an undertaking that it would continue to follow Finnish law and the collective bargaining agreements governed thereby. Secondly, the FSU required Viking to guarantee that the reflagging would not lead to any changes in the terms and conditions of employment without the consent of the employees, thereby essentially rendering a reflagging pointless. In December 2003 Viking put an end to the dispute by accepting the trade union's demands and by giving an undertaking that reflagging would not commence prior to February 2005. The ITF's above-mentioned circular, however, remained in force.

Since Viking was still running its vessels at a loss, it pursued its intention of reflagging. This was hindered by the ITF's circular. Following Estonia's accession to the European Union in 2004, Viking brought an action before the High Court of Justice of England and Wales, Queen's Bench Division (Commercial Court),

requesting it to declare the action taken by the ITF and the FSU contrary to article 43 EC, to order the withdrawal of the ITF's circular, and to order the FSU not to infringe the rights which Viking enjoys under Community law. The Court granted the order on 16 June 2005 on the grounds that the actual and threatened collective action constituted a restriction on freedom of establishment contrary to art. 43 EC. However, this was appealed on 30 June 2005 by the ITF and the FSU who claimed, *inter alia*, that the right of trade unions to take collective action to preserve jobs is a fundamental right recognised by Title XI of the EC Treaty. In deciding the case before it, the Court of Appeal referred a number of questions to the ECJ pertaining to, *inter alia*, the horizontal effect of the Treaty provisions on freedom of movement (in particular, article 43), and on the relationship between social rights such as the right to take collective action, and the rights guaranteed by the Treaty on freedom of movement. Advocate-General Maduro's opinion was published in May 2007 and the ECJ, subsequently, gave its ruling in December 2007.

By its first question, the Court of Appeal was trying to ascertain whether collective action taken by trade unions which is liable to impinge on the exercise of an undertaking's right to freedom of establishment falls within or outside the scope of article 43 EC. In response, the FSU and the ITF argued that collective action taken by trade unions, which promotes the objectives of the Community's social policy, falls outside the scope of article 43 EC. If this were not the case, the right of workers to bargain collectively and to strike with a view to achieving a collective agreement, would be undermined. The ITF and the FSU further argued that, as the right of association and the right to strike are constitutional traditions common to the Member States, they therefore represent general principles of Community law. Moreover, by analogy to the ECJ's reasoning in *Albany*<sup>1</sup>, the social provisions in Title XI of the Treaty effectively exclude the application of article 43 EC in the field of labour disputes.

Neither the ECJ, nor Advocate General Maduro in his Opinion, accepted these arguments. In rejecting the claims by the FSU and the ITF which were endorsed by a number of Member States in their submissions, the ECJ firstly established that collective action such as that at issue which is inextricably linked to the collective agreement being sought by the FSU falls within the scope of article 43 EC. As working conditions in Member States can be governed by provisions laid down by law as well as by collective agreements, drawing a distinction between the two would create inequality in the application of article 43 EC.

While the ECJ accepted that the right to take collective action must be regarded as a fundamental right which forms an integral part of Community law, this right may be subject to restrictions. In addition, by reference to previous case law<sup>2</sup>, the ECJ held that the nature of collective action as a fundamental right did not justify it falling outside the scope of article 43 EC. The exercise of a fundamental right must be reconciled with the requirements of the Treaty. In doing so, regard must be had to the principle of proportionality. In this context, the ECJ ruled out the application of the

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<sup>1</sup> C-67/96 [1999] ECR I-5751: The ECJ acknowledged that collective agreements concluded in the context of collective negotiations between management and labour which aim to improve conditions of work and employment must, by virtue of their nature and purpose, be regarded as falling outside the scope of the competition provisions contained in the EC Treaty.

<sup>2</sup> C-112/00 *Schimdburger* [2003] ECR I-5659; C-36/02 *Omega* [2004] ECR I-9609.

reasoning applied in *Albany* to the present case. The main reason given was that (para. 52) “it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced.”

Turning to the second question relating to the horizontal direct effect of article 43 EC, the ECJ, did not provide a detailed reply. The ECJ, firstly, reiterated its familiar arguments that non-state bodies which neither exercise a regulatory task nor possess quasi-legislative powers, may also by their actions create barriers to the exercise of Community rights. Following on from this, and in reliance on the decision in Case 43/75 *Defrenne* [1976] ECR 455 as well as the case law on the free movement of goods<sup>3</sup>, the ECJ concluded (para. 61) that article 43 EC “must be interpreted as meaning that [...] it may be relied on by a private undertaking against a trade union.”

Advocate General Maduro, while coming to the same conclusion, argued that, in principle, all free movement provisions are capable of having horizontal direct effect subject to a *de minimis* rule which must be applied in a sensitive manner by the ECJ. However, this principle arguably establishes legal uncertainty and may lead to a flood of litigation on the matter.

The third to tenth questions referred by the Court of Appeal were examined together by the ECJ. The answer is split into two sections: firstly, whether the collective action at issue constitutes a restriction within the meaning of article 43 EC; and, secondly, whether such a restriction may be justified.

In the first section, the ECJ reiterated its settled case law (e.g. C-221/89 *Factortame and Others* [1991] ECR I-3905) on the definition and scope of freedom of establishment. Using this as a basis the ECJ concluded that (para. 72):

“collective action such as that envisaged by FSU 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 Viking from enjoying the same treatment in the host Member State as other economic operators established in that State.”

This is thus the logical conclusion from the preceding answer on the horizontal direct effect of article 43 EC as between a private undertaking and a trade union or association of trade unions. Furthermore, the ECJ confirmed that the action taken by the ITF in the present case “must be considered to be at least liable to restrict Viking’s exercise of its right of freedom of establishment.” The ECJ did not, therefore, distinguish between primary and secondary action.

Leading on from this, the ECJ considered whether the restriction on freedom of establishment by the trade unions could be justified. The ECJ elaborated on the balance to be struck between the right to collective action and freedom of establishment. The collective action must pursue a legitimate aim compatible with the Treaty and be justified by overriding reasons of public interest. Furthermore, according to settled case law, the restriction would have to be proportionate to the

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<sup>3</sup> C-265/95 *Commission v France* [1997] ECR I-6959; C-112/00 *Schmidberger* [2003] ECR I-5659.

objectives being pursued. Both the ECJ and the Advocate-General discussed the issues at length and came to similar conclusions, albeit by taking different approaches. It is thus proposed to summarise the arguments given by both.

Advocate-General Maduro leaves it up to the national court to determine whether collective action, such as that taken by the FSU, which has the effect of restricting the right contained in article 43 EC is lawful in light of the applicable domestic laws regarding the right to collective action. However, in placing the present case in the broader social context of fears over social dumping, Maduro (para. 62-71) sets out a number of considerations that the national court should take into account when deciding upon the balance to be struck. Collective action in a case where relocation is at issue such as in the present case is lawful if it takes place before the act of relocating abroad. This is justified on the basis that workers should be entitled to take collective action, as in a situation of purely domestic relocation, in order to protect their wages and working conditions. On the other hand, action taken to block an undertaking established in one Member State from providing its services in another Member State would have the effect of partitioning the labour market and would thus “strike at the heart of the principle of non-discrimination on which the common market is founded.”

Regarding the action initiated by the ITF a different picture emerges. Again, by placing the action taken in the context of social dumping, Maduro recognises that coordinated collective action may be permissible as a “reasonable method of counterbalancing the actions of undertakings who seek to lower their labour costs by exercising their rights to freedom of movement.” This is supported by the fundamental nature of the right as recognised by the Charter of Fundamental Rights of the European Union. Furthermore, Maduro suggests that “the recognition of their right to act collectively on a European level simply transposes the logic of national collective action to the European stage.” However, the action taken by ITF in this respect can only be lawful if it is not “abused in a discriminatory manner.” The value judgment in this matter is, again, left to national courts.

The ECJ approached the question of justification in a slightly different manner. It accepted that (para. 77)

“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 Treaty.”

The ECJ thus followed the precedents set out in cases such as C-112/00 *Schmidberger* [2003] ECR I-5659 and, furthermore, cited (para. 86) the European Court of Human Rights to emphasize that the competing rights must be balanced against each other. However, the ECJ again left it to the national courts to consider whether the objectives of the action taken by the FSU concerned the protection of workers. The ECJ, thus, did not draw a distinction between the timing of the action and the relocation, but rather gave the national courts rather strict guidance as to the objectives that the action must pursue in order for it to be justified. Factors to be considered are the seriousness of the threat to the jobs or conditions of employment at issue, the proportionality of the collective action, and the exhaustion of other possible means before the initiation of collective action by the FSU.

Regarding the action pursued by the ITF, the ECJ clearly states that the restrictions on freedom of establishment in this case cannot be objectively justified. However, it leaves it up to the national courts to decide the matter on a case by case basis in situations where this type of secondary action is justified on pressing public policy grounds.

The *Viking* case raises a number of issues which are discussed in more depth and placed in the context of the debate on 'europeanisation' following a summary of the *Laval* case.

## The Laval case

The *Laval* case seems to raise similar issues to those discussed in *Viking* and indeed, the ECJ in its judgment refers to the *Viking* case. However, on closer inspection the cases deal with two separate problems. As a result, the dispute in the proceedings is slightly different.

Laval un Partneri (hereinafter 'Laval'), a Riga-based company incorporated under Latvian law, posted workers to Sweden in May 2004 to work on building sites operated by a Swedish company. The applicable Directive 96/71 EC concerning the posting of workers was adopted in order to ensure that Member States establish a nucleus of mandatory rules for minimum protection of posted workers in order to avoid discrimination as between posted and national workers and to alleviate unfair competition between undertakings. The Directive required Member States to determine the terms and conditions of employment, including minimum rates of pay of posted workers either by law, regulation or administrative provision, or by collective agreements which have been declared universally applicable. In Sweden, all terms and conditions of employment, save for minimum rates of pay, are laid down by law. Minimum rates of pay are determined by collective agreements which are not declared universally applicable by accompanying legislation as they are negotiated on a case by case basis between management and labour. Therefore, none of the methods expressly provided for by the Directive were used to implement the provisions on minimum rates of pay.

The work on the building sites in this case was carried out by a subsidiary of Laval: L&P Baltic Bygg AB (hereinafter 'Baltic Bygg'). In June 2004, Laval, on the one hand, and the Swedish building and public works trade union, Svenska Byggnadsarbetareförbundet (hereinafter 'Byggnadsarbetareförbundet'), on the other, began negotiations to determine the rates of pay for the posted workers contained in a collective agreement for the building sector. However, negotiations failed and Laval signed collective agreements with the Latvian building sector trade union, to which a large majority of the posted workers were affiliated. As a result, the Byggnadsarbetareförbundet established a blockade, legal under Swedish law, of all sites that Laval was working on in Sweden. In addition, the Swedish Electricians' Union gave notice of sympathy action directed against electrical installation work at all the construction sites of the company in Sweden. This led to Baltic Bygg being declared bankrupt and the posted workers being sent back to Latvia.

Laval brought an action before the Swedish Labour Court ('Arbetsdomstolen') against the unions for, *inter alia*, a declaration as to the unlawfulness of the collective action

and for compensation for the loss suffered. The unions contested all of the claims. In the course of the proceedings, the Arbetsdomstolen decided to refer a number of questions to the ECJ for a preliminary ruling in order to ascertain whether Community law precludes trade unions from taking collective action in the circumstances of the case. In particular, the Arbetsdomstolen considered that the content of Articles 12 and 49 of the EC Treaty as well as the Directive concerning the posting of workers were not clear enough for the Court to be able to decide the case (Eklund 2006, p. 202). Advocate General Mengozzi issued his opinion in May 2007 and the ECJ published its judgment in December 2007.

At the outset, it must be highlighted that the ECJ, in considering the direct effect of Article 49EC, used the familiar arguments set out in case law<sup>4</sup> to establish the horizontal direct effect of that article. The judgment does not deal with the direct effect of the Directive despite it being considered an issue by the Advocate General and some of the parties. However, as the issue of horizontal direct effect of the Directive did not arise on the facts of the case at issue the approach taken by the ECJ seems to have been correct.

In response to the first question the ECJ considered whether the collective action in the form of a blockade taken by trade unions in this case is compatible with the EC rules on the freedom to provide services and the prohibition of discrimination on the grounds of nationality. One aspect that the ECJ discussed at length was the characteristic of the host country that the legislation to implement the Directive concerning the posting of workers had no express provision concerning the application of terms and conditions of employment in collective agreements. The relevant collective agreement in this case provided for more favourable conditions than those envisaged by the Directive. The ECJ, therefore, considered whether the collective action taken was justifiable in light of its objective, namely, to force a service provider to grant more favourable conditions to its workers than those prescribed by EC law.

In response the ECJ, firstly, reiterated its settled case law on articles 49 and 50 EC mentioned above which does not allow a Member State to prohibit the free movement of a service provider established in another Member State on its own territory. In addition, the host Member State may not make the movement of the service provider subject to more restrictive conditions than national service providers. A Member State may thus apply its legislation or collective agreements to the service provider as long as the application of these rules is appropriate for securing the protection of workers and does not go beyond what is necessary for the attainment of the objective. As mentioned above, the Directive concerning the posting of workers therefore lays down a level of minimum protection the exact content of which may be defined by the individual Member States. However, the ECJ did not accept the method of implementation of the Directive in Sweden where the applicable rates of pay were negotiated on a case by case through the social partners without being supplemented by legislation providing for universal applicability as this leads to a climate of unfair competition as between national and posted service providers. Furthermore, the ECJ pointed out that the Directive does not allow the host Member State to make the

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<sup>4</sup> Case 36/74 *Walrave & Koch* [1974] ECR I-1405; C-415/93 *Bosman* [1995] ECR I-4921; Joined Cases C-51/96 and C-191/97 *Deliege* [2000] ECR I-2549; C-281/98 *Angonese* [2000] ECR I-4139 .

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

On this basis, the ECJ then turned to an assessment of the collective action at issue within article 49 EC. Neither the Advocate General nor the ECJ accepted the *Albany* argument, i.e. that the right to take collective action falls outside the scope of article 49 EC. This argument was espoused by a number of Member States as well as the trade unions. In rejecting it the ECJ followed the opinion of Advocate General Mengozzi who opined that, while the EC has no power to legislate on the right to strike, the right still falls within the scope of the Treaty and may be dealt with by the EC through other means.

However, the ECJ did recognise the fundamental nature of the right to strike and confirmed it to be an integral part of the general principles of EC law in citing, *inter alia*, the Charter of Fundamental Rights, thereby again following the opinion put forward by Mengozzi. Yet, the exercise of the right must be reconciled, in line with cases such as *Schmidberger*, with the requirements of other rights protected under the Treaty in accordance with the principle of proportionality. The ECJ thus adopted the same approach as that in the *Viking* case: it examined whether the collective action in question constituted a restriction on the freedom to provide services, and, if so, whether it could be justified.

The ECJ pointed out that the right of collective action which may be used to force foreign service providers to sign collective agreements is liable to make the provision of services by those providers more difficult and less attractive in the host member state. The action thus constituted a restriction on the freedom to provide services within the meaning of article 49 EC. This is particularly pertinent, according to the ECJ, in the present case where the collective bargaining is of unspecified duration.

A restriction on the freedom to provide services can, as mentioned above, only be justified if the action does not go beyond what is necessary and suitable to secure the attainment of a legitimate objective and is furthermore justified by overriding reasons of public interest. By citing, *inter alia*, the *Viking* case the ECJ recognised that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding public interest. In this context, a blockade such as that in question falls, in principle, within the objective of protecting workers. However, the employer in the present case is only required to observe the minimum standards laid down by the Directive. The nature of the blockade which aims to force the signature of a collective agreement going beyond the minimum standards cannot, therefore, be justified with regard to such an objective due to the type of obstacle that it poses to the freedom to provide services. Furthermore, the lack of national provisions on minimum rates of pay make the negotiations excessively difficult if not impossible in practice for an undertaking and the resulting collective action cannot therefore be justified.

Finally, in relation to the second question, the ECJ (para. 116) made it clear that the national rules prevalent in Sweden which

“fail to take into account [...] collective agreements to which undertakings that post workers to Sweden are already bound in the Member State in which they are established, gave rise to discrimination against such undertakings.”

This kind of discrimination is only justifiable on grounds of public policy, public security or public health. However, as none of these considerations are raised by the present case, it is evident that the discrimination is not justifiable.

It thus seems clear that the *Viking* and *Laval* cases are based on different issues. *Viking* seems to fall much more comfortably within the ECJ's settled case law as illustrated by *Omega* and *Schmidberger* on the balancing of the economic freedoms contained in the EC Treaty with fundamental rights. However, the *Laval* case illustrates to a greater extent the difficulties of interaction between national regulation, or lack thereof, which attempts to implement European legislation and national systems of industrial relations and collective bargaining within an enlarged Europe.

As in the *Viking* case, the judgment and opinion in *Laval* raise important issues which will be further discussed below.

### Analysis of the cases

The *Viking* and *Laval* cases were referred to the ECJ amidst a climate of fear amongst workers in “old” Member States that new Member State workers and enterprises availing themselves of their free movement rights would lead to a race to the bottom of labour standards. The social policy of the European Community has traditionally aimed to establish a floor of rights for workers in the hope of broadly approximating labour standards across the Member States and, in turn, eliminating unfair competition. One example of a legislative measure produced by the EC is the Directive concerning the posting of workers, at issue in the *Laval* case. However, more recently (Davies 2006, p. 85), the “commitment to harmonisation is in decline and there has been a growing emphasis on promoting a European social model by softer means.” The opinions and judgments in the *Viking* and *Laval* cases illustrate the difficult balance that the ECJ had to strike between trade union rights and the free movement provisions. Moreover, the cases illustrate the problems facing trade unions due to the changes in opportunity and regulatory structures as a consequence of ‘europeanisation’.

In order to be able to understand the resulting judgments and opinions, they need to be seen within the context of the above-mentioned tendency towards soft law mechanisms in the development of the European social model. Moreover, the recent enlargements of the European Union and the challenges and pressures raised by them play a pivotal role in this regard and are a key factor in the changing structures facing trade unions.

Both of the judgments of the ECJ in the *Viking* and *Laval* cases are difficult to evaluate due to the sensitive political nature of the subject matter. Much of the language used in the judgments is familiar due to the standard formulations and terminology employed. Moreover, the ECJ frequently relied on its settled case law. Essentially, the ECJ left it up to the national courts to decide similar issues arising in the future on a case by case basis. However, some of the arguments and aspects of the judgments merit closer scrutiny.

At the outset it must be noted that the ECJ in both judgments emphasised the fundamental nature of the right to take collective action and, as authority, cited the Charter of Fundamental Rights. This thus allows trade unions in future to rely on a fundamental rights argument in cases where their right to take collective action is doubted. This may be of particular significance in countries where the right to strike is not legally recognised, such as the UK. In both cases the ECJ also recognised the legitimacy of collective action in order to combat the practice of social dumping. This illustrates not only the social side of the European Community but also a realisation of the threat that relocation of enterprises and lower wage demands by new Member State workers pose to both the 'old' European labour market as well as to the well-established structures of trade unions in these countries.

However, the balance struck by the ECJ is unclear. Both judgments recognise limits to the type of action available to trade unions. In particular, by rejecting the *Albany* solution and, instead, establishing the horizontal direct effect of the free movement provisions which led to the recognition of the collective action as a restriction that may be justifiable, the ECJ introduced a judicial dimension to labour relations. By choosing to balance the right to strike with the economic freedoms at issue the ECJ in effect expects national courts to get involved in the autonomous bargaining structures of collective relations. This conflict of norms which has not been adequately resolved by the ECJ thus leads to legal uncertainty for trade unions and employers and, effectively, constitutes a limitation on the right to industrial action enjoyed by trade unions.

The introduction of 'proportionality' in order to balance the opposing rights in both cases is a difficult concept to reconcile with the process of collective relations. While the concept may be sufficiently broad and flexible to satisfy both employers and trade unions in some situations, it also leaves a lot of room for interpretation by national courts and influence by national political sentiments. This may potentially create wide disparities in the protection of collective action across the Member States of the European Union and was thus not welcomed by trade unions.<sup>5</sup> As Bercusson (2007, p. 304) points out:

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

In addition, the judgment in *Viking* has been criticised as creating potential obstacles to the exercise of the right to collective action in cross-border situations as it does not explicitly deal with the question of the right to strike in the case of relocation across

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<sup>5</sup> European Trade Union Confederation, *Press release on the Viking case*, 11/12/2007 available at <<http://www.etuc.org/a/4376>>.

borders.<sup>6</sup> While this was addressed by Advocate General Maduro, his line of reasoning is unsatisfactory. Maduro proposed a different solution to that of proportionality. The Advocate General suggested assessing the lawfulness of collective action on the basis of the timing of the action. However, this raises both conceptual and practical problems.<sup>7</sup> At a conceptual level the timing of the action draws a distinction between collective action directed against European and non-European relocations. A strict interpretation of Maduro's criteria would mean that collective action against non-European relocations would always be lawful whereas action directed at European relocations would have to fulfil the requirements of timing. In practice this creates, *inter alia*, problems of definition and ignores the practicalities of cross-border transfers. The requirements for the lawfulness of cross-border collective action are thus not clear following the *Viking* case. As the issues surrounding social dumping and the resulting cross-border collective action following the European enlargements have become increasingly topical the failure of the ECJ to clarify the lawfulness of collective action in these types of scenarios is regrettable.

A final remark must be made regarding the judgment in *Laval* on the Directive concerning the posting of workers. The ECJ objected to the lack of legislation in Sweden implementing the Directive. In requiring the collective agreement to be 'universally applicable' the ECJ applied a strict interpretation of its case law as set out in Case 143/83 *Commission of the European Communities v Kingdom of Denmark* [1985] ECR 427. However, it also failed to take into account the successful and flexible system of collective bargaining prevalent in Sweden. Ironically, the bargaining system established in Sweden and other Nordic countries is often described as the model for 'flexicurity' currently being promoted by the European Commission. By requiring 'universally applicable' legislation the ECJ's judicial activism may be seen as threatening not only autonomous collective bargaining structures in the Member States, but also the flexibility inherent in the European Social Model and, in particular, the Open Method of Coordination (hereinafter 'OMC').

Moreover, the ECJ interpreted the Directive narrowly as a minimum level of protection for posted workers which may not be improved through the type collective action at issue in the present case. In effect, this creates an inequality in protection between domestic and posted workers, the very problem that the Directive was meant to resolve. The obstacles to collective action in these cases pose a problem for the trade union structures in old Member States *vis-à-vis* new Member State workers as it effectively renders the tool of collective action to force higher wages meaningless. Moreover, the defeat for the Swedish trade unions in *Laval* illustrates the problems that national regulatory mechanisms experience in adapting to EU requirements. In essence, the difficulties in *Laval* stem not from the actions of the social partners but from an inadequate 'europeanisation' of the industrial relations system by the Swedish government. Recognising these difficulties, the ECJ in the *Laval* judgment thus oscillates between two positions: on the one hand, it does not endorse the flexicurity approach as practised in Sweden and endorsed by the European

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<sup>6</sup> European Trade Union Confederation, *Press release on the Viking case*, 11/12/2007 available at <<http://www.etuc.org/a/4376>>.

<sup>7</sup> B. Bercusson, *Assessment of the Opinions of the Advocates General in Laval and Viking and Six Alternative Solutions: Advice to the ETUC*, October 2007 available at <<http://www.etuc.org/a/4295>>.

Commission as part of its soft law mechanism for harmonisation; on the other hand, the ECJ does not take the opportunity of regarding the Directive concerning the posting of workers as a minimum floor of rights which the social partners can improve upon to create the best conditions possible for posted workers. Rather, by applying this narrow interpretation of the Directive, the ECJ makes it very clear that the unions' ability to promote and guarantee the protection of workers is limited by the free movement provisions contained in the Treaty.

In order to assess the significance and implications of the *Viking* and *Laval* cases for the future of trade unions and the European social model they need to be placed in the context of the debate on the 'europeanisation' of national social and legal practices.

Due to demographic and economic changes and challenges within 'old' Member States and the European Union as a whole, the traditional welfare state of which trade unions were an integral part has come under increasing pressure to adapt to the individualisation of social protection rights (Vos 2005, p. 355). According to Hyman (2001, p. 280), national industrial relations regimes are challenged by key features of 'globalisation', like the intensification of cross-national competition, the internationalisation of product chains, and the volatility of finance capital flows. In this context it is, however, necessary to briefly differentiate between 'europeanisation' and 'globalisation' to avoid confusion. As Ladrech (1994, p. 71) points out,

“what makes europeanisation different [...] is first of all the geographic delimitation and, secondly, the distinct nature of the pre-existing national framework which mediates this process [...] in both formal and informal ways.”

This paper thus only examines the way in which trade unions are affected by 'europeanisation' and not 'globalisation', despite there being scope for overlap in this area. Finally, Ladrech's distinction may be in need of clarification in relation to the most recent enlargements as the national frameworks in the new Member States may be existent but not always in the same sense as used by Ladrech in relation to the frameworks of the old Member States. This is further discussed below.

In the context of the EU (Vos 2005, p. 365),

“political support for flexibility and deregulation as a recipe for competitiveness comes together with societal trends like individualisation, decreasing unionisation, Information and Communications Technology-induced (hereinafter 'ICT-induced') changes in work and work organisation, decentralisation of collective bargaining, and the gradual replacement of collective industrial relations by individual employment relations.”

There has thus been a need to counter the fears of traditional workers over, *inter alia*, social dumping and job insecurity. Due to the change and decline in the traditional employment structures, and the increasing trend towards deregulation by governments, trade unions at a national level are faced with difficult regulatory changes. Moreover, the role played by the European Union in recent decades in providing for minimum labour standards has opened up new opportunities of involvement and cooperation for national trade unions. Adaptation has proved to be

difficult especially due to the increasing individualisation of national economies and labour markets and the decline in unionisation, developments that trade unions have been slow to react to.

The recent enlargements have enhanced social diversity within the EU thereby exacerbating the above-mentioned societal and economic changes and challenges for the trade unions in the old Member States. In addition, there are suggestions (e.g. Vos 2005, p. 365) that social cohesion seems to be in decline across all Member States. Due to the lack of effective industrial relations structures in the majority of new Member States the EU is faced with the difficult task of creating an integrated system of industrial relations within the European Social Model. While defending statutory social protection systems European trade unions are slowly recognising the need to adapt the social protection and regulatory systems to the challenges and pressures facing them in order to safeguard the financial viability of social security systems (Hutsebaut 2003, p. 53). Initiatives taken by, for example, the European Metalworkers' Federation<sup>8</sup> or the European Trade Union Confederation coordinating national systems of collective bargaining are a first step in this direction. Moreover, as pointed out by the ETUC in *Viking*:

“Trade unions are in favour of European economic integration. But labour is not a commodity. Competition over labour standards threatens economic integration and undermines support for the European project. Collective industrial action is not protectionism. Community law on free movement, if interpreted consistently with the legal recognition of collective action in national law, Member States' constitutions, and international law, will encourage support for European integration by trade unions and their representative at EU level, the ETUC.”<sup>9</sup>

However, national trade unions are often slower to react than their European counterparts. Despite efforts by the European representatives to coordinate a European response on behalf of national trade unions, initiatives at the national level between individual affiliates have been slow to develop.

On a European level, the social dialogue within the European Social Model provided European trade unions with an opportunity to coordinate national responses to the changing opportunity and regulatory structures of which the Directives on fixed-term<sup>10</sup> and part-time work<sup>11</sup> are an example. For this reason, the social dialogue has often been described (Bercusson & Bruun 2005, pp. 4-11) as the “backbone” of the European Social Model. However, as a result of the very different industrial relations systems prevalent in the new Member States and in response to the above-mentioned societal, political and economic changes, the norms and values underpinning the

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<sup>8</sup> For a description of the initiatives see Weiss, M. (2004) 'Enlargement and Industrial Relations: Building a New Social Partnership' 20 *International Journal of Comparative Labour Law and Industrial Relations* 5; Visser, J. (2004-2005) 'More Holes in the Bucket: Twenty Years of European Integration and Organised Labour' 26 *Comparative Labour Law and Policy* 477.

<sup>9</sup> ETUC's letter attached to the submission of the ITF, *Viking* case, para 23-27.

<sup>10</sup> Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

<sup>11</sup> Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by ETUC, UNICE and CEEP.

legislative aspects of the European social dialogue have slowly been eroded (Hyman 2001, p. 289). There has thus been a movement towards soft law mechanisms like the OMC. While the OMC has the potential to increase the exchange of ideas and policies amongst Member States and the social partners on a trans-national level and thereby to gradually 'europeanise' labour market and employment policies across the EU, the results thus far have fallen short of this goal. In particular, national institutions have been slow to react to this form of integration (Adnett & Hardy 2005).

Historically, the difficulty in 'europeanising' different labour law systems across the EU lies in the individual cultures of industrial relations which are deeply rooted in the traditions as well as the political, economic and cultural developments of the respective countries. A straightforward harmonisation as has been the case in the area of, for example, competition law, is thus near impossible. This is illustrated by the difficulty encountered in 'top-down' and 'bottom-up' approaches to harmonisation in the past. As Weiss (2000, p. 738) points out, "at best there is a chance to approximate the systems in a functional sense, thereby eliminating distortions of competition arising from existing differences." The underlying rationale for the European social policy has hitherto been the demand for broad equivalence in labour standards (Adnett & Hardy 2005). This was equally driven by a desire to combat social dumping within the European Union. As stated in the introduction to the Commission's White Paper on social policy,

"the establishment of a framework of basic minimum standards, which the Commission started some years ago, provides a bulwark against using low social standards as an instrument of unfair economic competition and protection against reducing social standards to gain competitiveness, and is also an expression of the political will to maintain the momentum of social progress."

Following the European enlargements and the accession of twelve new States with their differing labour relations systems, this task has become increasingly difficult. As Vaughan-Whitehead (2003) comments, two common features of the labour markets of the new Member States of Central and Eastern Europe are their relatively low levels of employment and productivity. They are thus prime targets of enterprises from old Member States seeking to outsource or relocate labour-intensive stages of production. Furthermore, most of the new Member States of Central and Eastern Europe have adopted the liberal-individualist approach to social and welfare policies. This has progressed without a development of adequate social dialogue and worker representation. Yet (Adnett & Hardy 2005, p. 201),

"from the perspective of the new Member States of Central and Eastern Europe this process [of relocation by enterprises], and that of the related migration of some of their workers to the old Member States, are the means by which convergence on Western European levels of productivity and per capita income are achieved."

The perceived threat that the new Member States present to old Member State economies and social welfare systems is a significant challenge to not only the traditional trade union structures in the old Member States but also the European Social Model itself. This has prompted the European Commission to promote the

OMC. In the same way as the Council Resolution on Certain Aspects for a European Union Social Policy (1994) OJ C368/6 recognised the practical problems relating to the unification of national labour law systems, the OMC allows for the development of minimum standards across the EU without disadvantaging certain countries. Thus, as laid down in the Resolution (para. 18), “unification of national systems in general by means of rigorous approximation of laws [is considered] an unsuitable direction to follow as it would also reduce the chances of the disadvantaged regions in the competition for location.” Similarly, following enlargement, a rigorous approximation of social standards through legislative measures may prevent new Member States from benefiting from their economic advantages in the form of lower production and labour costs. The interpretation of the Directive on the posting of workers in the *Laval* case as a minimum floor of rights which cannot be improved upon in the manner used by the trade unions demonstrates such an approach.

In particular, the approach of the OMC seems to rest more easily with the economic goals of, *inter alia*, deregulation and flexibility as favoured by a majority of Member State governments. This does not rest so easily with national trade unions who still strongly support the statutory social protection systems. According to the European trade union movement (Hutsebaut 2003, p. 66),

“social protection policies should be looked upon as a positive social and economic factor which promotes social cohesion, avoids social exclusion and poverty, facilitates structural change and supports consumption, economic growth and employment.”

However, in the age of economic deregulation and European enlargement these statements seem to represent unattainable policies. The breakdown of the traditional social protection systems, which constituted an essential pillar of the European Social Model and in which the trade unions played an important role, has led to an increasing change in the regulatory and opportunity structures facing trade unions. Coupled with competition from new Member State workers and enterprises which lack collective representative structures, trade unions in old Member States recognise the need to adapt albeit slowly to the changing environment within which they operate. However, often trade unions have reacted, *inter alia*, with blockades and strikes in the face of competition as illustrated by the *Viking* and *Laval* cases. These scenarios are thus prime examples of the types of problems facing trade unions in an enlarged Europe.

## Conclusion

The decisions by the ECJ in the *Viking* and *Laval* cases exemplify the delicate balancing act between economic freedoms and social rights. The resultant blockade and strike action by the trade unions illustrate how the traditional national social protection systems as well as the European Social Model are failing to address problems of competition in the labour markets of old and new Member States. As Bercusson (2007, p. 305) points out, “what is unavoidably centre stage in *Viking* are the consequences of the disparity in wage costs and labour standards between the old Member States and the new accession states.” The fears that Advocate General Maduro expressed regarding the potential of strike action to partition the labour market is but one example of the effects of enlargement on national labour relations.

Furthermore, enlargement has been seen as pitting old and new Member States and their institutions against each other. In the *Viking* case (Bercusson 2007, p. 305)

“the new Member States making submissions were unanimous on one side of the arguments on issues of fundamental legal doctrine (horizontal direct effect, discrimination, proportionality) and the old Member States virtually unanimous on the other.”

Similarly, in the *Laval* case, the Swedish trade unions refused to recognise the adequacy of the collective agreement reached in Latvia. This raises the issue as to whether a doctrine of mutual recognition of collective agreements, similar to that already firmly established in the case law on the free movement of goods<sup>12</sup>, should be developed. Due to the very specific socio-cultural contexts within which national labour law systems operate, it would be difficult, and not necessarily appropriate, to establish such a mutual recognition principle. Moreover, it is doubtful as to whether mutual recognition of collective agreements would facilitate the free movement of labour and services from ‘new’ Member States while maintaining social norms set out in ‘old’ host Member States.

In its decisions the ECJ tried to balance the competing positions of old and new Member States by essentially leaving decisions as to the justifiability of collective action when it conflicts with the free movement provisions up to the national courts. However, as mentioned above, these judgments are problematic. By involving national judiciaries the autonomy of labour relations is potentially disrupted. Moreover, this may lead to an uncontrollable deluge of cases on the justifiability of collective action. As the ECJ also recognised the fundamental nature of the right to take collective action in both *Laval* and *Viking* the balance struck by national courts may vary widely from country to country and case to case. Rather than clarifying the position of trade unions in combating attempts at social dumping by enterprises, the ECJ has issued vague yet stringent criteria which may or may not work in the trade unions’ favour depending on the political and economic context in which they are applied. Legal certainty regarding the right to strike in a European context and the extent of the European Social model has, in any case, not been enhanced.

Finally, the implications of the judgments within the context of the ‘europeanisation’ of labour and collective relations and the European Social Model are equally unclear. The Nordic systems of collective bargaining which served as examples for the approach to ‘flexicurity’ taken by the European Commission must now find ways of implementing legislation to comply with the criticisms raised by the judgments. This may threaten the autonomous and flexible labour law systems not only in these countries but also the goals of the OMC and the European Social Model which may have an effect on labour relations across the European Union as a whole.

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