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The Freedom to Provide
Services and the Right to
Establishment
-V-
The Right to Strike

An analysis of the Laval and Viking cases

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Summary

The purpose of this thesis is to describe and analyse the problems surrounding the conflict between fundamental rights and common market freedoms, as they appear in the Laval and Viking judgements. The overall question that this work intends to answer is when a collective action undertaken by trade unions of a Member State for curbing the freedom of an undertaking to enter the market of another Member State is legitimate or illegitimate under Community law. The Laval and Viking cases raise a number of legal questions regarding the scope of Article 43 and 49 EC as well as the Posted Workers Directive.

This thesis starts with a background of the fundamental rights as general principle of EC law. It is shown how the ECJ developed the concept of fundamental rights in its case law, even though there were no provisions of fundamental rights enshrined in the founding European Community Treaties. Since the recognition of a particular right ultimately comes from the fact that it has been invoked before the Court, it is thus the accident of litigation that has decided the rights, which have been expressly recognised by the ECJ thus far. The ECJ derives the fundamental rights from the national constitutions of the Member States and international treaties to which the Member States are parties. In Viking and Laval, the ECJ also referred to the Charter of fundamental rights of the European Union. This is the first time that the ECJ has used the Charter for confirming a right not previously elevated to a fundamental right, which in turn implies that it is no longer the accident of litigation that decides which rights that are fundamental, but rather the Charter itself. On the other hand, the constitutional analysis in this thesis clearly shows that the right to strike does not enjoy constitutional protection in all the Member States, which could explain why the ECJ referred to the Charter in the first place.

The question of direct horizontal effect concerns the extent to which the provisions of the Treaty are binding for private subjects, acting either as individuals or in a group. In that regard, the ECJ established the horizontal direct effect of Articles 43 and 49 EC. There are however also certain differences between the right to establishment and the freedom to provide services. The right to establishment has, for instance, more in common with the freedom of workers in Article 39 EC than it has with the freedom to provide services. This comes from the fact that when the individual leaves the home state in order to establish himself in another state, the home state loses regulatory control to the new host state. Reversely, the service provider continues to be based in the home state, which has primary regulatory control, while providing services in the host state. In this respect, the freedom to provide services has more in common with the free movement of goods than with the right to establishment, because both services and goods are primarily subject to home state control. The freedom to provide services, the right to establishment and the free movement of

workers have all strong points of similarity, as the principle of equal treatment lay behind all three. However, even though the ECJ initially interpreted Articles 43 and 49 EC in line with those suggestions, it gradually moved away from its emphasis on unequal treatment. The discrimination model was thus to a large extent replaced by an emphasis on market access. The market access approach means that a restriction will fall within the scope of Community law and require objective justification, if the effect on an individual's access to the market of a Member State can be shown. This holds true regardless of the equally restrictive marketing effect on situations internal to a Member State.

The case law of the ECJ allows for exceptions to the common market freedoms on grounds of public interest. This is motivated by the idea that there are certain national interests worthy of protection that should take precedent over the free movement. The protection of workers and the prevention of social dumping are recognised as public interest exceptions, albeit the early case law of the ECJ referred only to the individual interest of the posted workers and not the collective or individual interest of the workers in the host Member States. The prevention of social dumping is, however, by definition the extension of certain national interests to posted workers, but for the benefit of the workers of the host Member State. National labour laws that are, in the words of the Court, "liable to hinder or make less attractive" the exercise of rights enshrined in the Treaty have to fulfil certain conditions in order not to breach the Treaty, in that they must:

- be applied in non-discriminatory manner;
- be justified by imperative requirements in the general interest;
- be proportional. The provision of services in Article 49 EC has an additional requirement to those listed, for account must also be taken of the extent to which the imperative requirement in the general interest is already protected in the home state of the service provider. This is thus a reflection of home state control. Although the right to establishment has played a relatively small role in relation to national employment laws, that cannot be said regarding the right to provide services, where the case law is quite well developed.

In respect of the extension of national host state laws to posted workers, the case law on the provisions of services can be summed up in three general rules concerning administrative requirements, minimum remuneration and social security charges respectively. First, the scope of the provisions of services naturally presupposes that service providers may depart from the home state with their own personnel in order to temporarily pursue the providing of services in a host state without being subject to supplementary administrative requirements concerning either immigration or labour market regulations. Second, there are legislative requirements in the host state, concerning minimum remuneration and other working conditions, with which service providers may have to comply. This is equally true for national measures that are appropriate for monitoring such requirements. Third, service providers do not have to comply with all the social security obligations for workers who are already insured in their home state, except

when they add up for the protection of workers. The same holds true regarding other formalities linked to social security obligations.

The case law concerning minimum remuneration is in many ways codified in the Posted Workers Directive. Article 3(1) of the Directive obliges the Member States to ensure certain protective rules from their own labour systems to posted workers. If a Member State has provisions on minimum wage, it is in fact mandatory that it extend those rules to posted workers as well. This is in contrast to Article 3(8), which makes it optional for Member States to extend terms and conditions from generally applicable collective agreements. Furthermore, Article 4.3 PWD specifically stipulates that the terms and conditions of employment referred to in Article 3 PWD must be generally available. The importance of Article 4.3 EC can be seen in *Laval*, where the Court ruled out the case-by-case negotiations inherent in the Swedish system in favour of pre-existing collective agreements with minimum wages.

The special characteristic of the provision of services necessarily implies that it will be difficult to persuade the Court that national laws do in fact confer benefits on the posted workers, if the home state already provides essentially similar protection. As a rule, this means that the national authorities have to check the rules of the home state before extending national legislation. This is in part in contrast with the PWD, because Article 3(7) PWD seems to provide for this solution only when the home state rules are more favourable to the workers. This means that trade unions cannot undertake a collective action without first making sure whether the terms and conditions in the home state are more favourable. The broad list of justifications based on the overriding public interest is in turn a response to the equally broad scope of the market access approach. The term comes from the Court's gradual departure from an emphasis on unequal treatment, i.e. discrimination, towards an emphasis on whether an individual's access to the market of another Member State is restricted.

The *Laval* and *Viking* judgements make it clear that a restrictive collective action can be justified if it pursues a legitimate objective compatible with the Treaty, it is justified by overriding reasons of public interest and it is proportional in the sense that it is suitable for securing the attainment of the objective which it pursues and it does not go beyond what is necessary in order to attain it. The conclusion made in this thesis is that it is lawful for a trade union to take industrial actions for the protection of workers from the consequences of the relocation of an undertaking that intends to move from one Member State to another, if it can be determined that the interests of the workers are, as the Court puts it, "jeopardised or under serious threat" from the relocation. Furthermore, an industrial action with the specific aim of preventing social dumping cannot seek terms and conditions for the workers concerned that go beyond those provided for by Posted Workers Directive. In practical terms, the PWD requires that there must be a law implementing its results. The general case law on labour law restrictions is however problematic in this regard, as there are situations in which a breach of the PWD can be justified with reference to Article 49 EC, and other situations

where measures implemented in accordance with the PWD can be in breach of Article 49 EC. However, even if pursuing a legitimate aim, the collective action would still have to be proportional in order to be legitimate under Community law. The proportionality assessment is in itself problematic in especially two respects. First, the application of the principle of proportionality presupposes that the more effective the industrial action restricts the relevant common market freedom, the harder it will be to justify. Second, there is an inherent risk in allowing national courts to assess whether there are less restrictive means to end the collective negotiation successfully, as it can create uncertainty regarding the outcome of collective disputes. Moreover, the Viking judgement seems to indicate that the suitability of a collective action needs to be assessed in a marginal way, whereas the necessity assessment presupposes a strong review with regard to other less restrictive possibilities for resolving the conflict, which seems to indicate that collective action is accepted only as the last resort in an industrial confrontation.

Preface

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Abbreviations

AG	Advocate General
CMLR	Common Market Law Reports
CMLRev.	Common Market Law Review
EC	Economic Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ECR	European Court Reports
EIRR	European Industrial Relations Review
EJIL	European Journal of International Law
ELJ	European Law Journal
ELRev.	European Law Review
EU	European Union
ICLQ	International and Comparative Law Quarterly
ILJ	Industrial Law Journal
LIEI	Legal Issue of European Integration
LJIL	Leiden Journal of International Law
OJ	Official Journal of the EC
OUP	Oxford University Press
PWD	Posted Workers Directive

1 INTRODUCTION

“Themes lurking below the surface of the internal market have broke into the Light”¹

In the wake of the European enlargement and the consequent accession of the East European countries to the European Union, the protection of the European social model has been a long-running issue facing the EU. This has resulted in a conflict of interest between companies, on the one hand, who strive to exploit the competitive advantages resulting from differences in labour costs, and Member States and trade unions, on the other, who strive to defend their social protection systems.² In this instance, the right to strike is widely held as “one of the essential means through which workers and their organisations may promote and defend their economic and social interests”.³ The two reference cases concern the compatibility with EU law of industrial disputes and collective actions against EU companies exercising their free movement rights. More precisely, the cases deal with the relationship between fundamental rights and common market freedoms, namely between the fundamental right to strike and the freedom to provide services and the right to establishment respectively.

The Swedish Laval case⁴ concerns foremost the question of whether an industrial action from Swedish labour unions against a Latvian service provider can be justified, while the Finnish Viking case⁵ concerns foremost how far labour unions can take social actions against the re-flagging of a ship. The common denominators between the two cases are that the proceedings are directed against labour unions and not the Member states in question and that the grounds of justification are based on the exercise of fundamental rights. Even though both cases concerned the right to strike in a Community context and the ECJ followed the same approach in both cases, the judgements were, in many ways, different, as the legal and factual backgrounds were different. . It is important to remember that the Laval ruling took place within the framework of the Posted Workers Directive⁶, which was not applicable in the Viking case. The analysis starts from the

¹ Brian Bercusson, professor of European Social and Labour Law, King’s college London. Citation taken from: Bercusson, *Trade Union Movement and the European Union: Judgement Day*, European Law Journal, Vol. 13, No. 3, May 2007, pp. 279–308, at p. 279.

² Giovanni Orlandini, *Trade union rights and market freedoms: The European Court of justice sets out the rules*, at http://www.law.uiuc.edu/publications/CLL&PJ/archive/vol_29/issue_4/OrlandiniLavalArticle29-4.pdf (visited 29 November 2008), p. 573.

³ ILO citation, taken from: Germanotta and Novitz, *Globalisation and the right to strike: The Case for European-Level Protection of Secondary Action*, The International Journal of Comparative Labour Law and Industrial Relations, Vol. 18, issue 1, 2002, p. 68.

⁴ Case C-341/05 Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and others (2007) ECR I-000.

⁵ Case C-438/05 The International Transport Workers’ Federation & the Finnish Seaman’s Union v. Viking line APB (2007) ECR I-000.

⁶ Hereinafter referred to as the PWD

premise that the legal and factual background of the two cases differs, which will in turn enable broader conclusions to be drawn regarding the right to strike as a fundamental right.

1.1 Purpose and delimitation

The purpose of this thesis is to describe and analyse the problems surrounding the conflict between fundamental rights and common market freedoms. The thesis will thus analyse the relevant case law regarding Articles 43 and 49 EC. More particularly, the analysis will deal with the horizontal direct effect of the right to establishment and the freedom to provide services respectively, the market access model and the justification of indistinctly applicable labour law restrictions. The thesis will also consider the broader fundamental rights background and, more specifically, the right to strike as fundamental right, i.e. how the ECJ has derived this particular right and how it has balanced it vis-à-vis the right to establishment and the freedom to provide services. The overall question that this thesis intends to answer is when a collective action undertaken by trade unions of a Member State for curbing the freedom of an undertaking to enter the market of another Member State is legitimate or illegitimate under Community law. Although the cases raise a number of important issues regarding a wide range of legal questions, it is, nevertheless, beyond the scope of this thesis to examine every aspect of the two judgements. Therefore, the submissions regarding the exemptions of industrial actions from the provisions of the Treaty as well as the question of the Swedish *Lex Britannia* legislation fall outside the scope of this thesis, as it is outside of the scope of this thesis to present a full picture of the different aspects of national and Community law.

1.2 Definitions

Although the right strike is considered as being an important “specius of the genus collective actions”,⁷ the actions undertaken by trade unions in the present cases will be termed “strike” and “collective action” as well as “industrial action”. According to Black’s Law Dictionary, the right to strike is defined as “organised cessation or slowdown of work by employees to compel the employer to meet the employees demands; a concerted refusal by employees to work for their employer, or to work at their customary rate of speed, until the employer grants the concessions that they seek”.⁸

⁷ Even, *Transnational Collective Bargaining in Europe: A proposal for a European regulation on transnational collective bargaining*, J.H. Even/Boom Juridische uitgevers, 2008, p. 310.

⁸ Garner(ed), *Black’s Law Dictionary*, 8th edition, 2004.

1.3 Disposition

The thesis' first chapter starts with a general introduction, which intends to further the framing of the questions. In the second chapter, a brief factual background of the two cases is given. The third chapter consists of general fundamental rights background, where the previous rulings of the ECJ concerning conflicts between fundamental rights and common market freedoms are presented. In this instance, the test of proportionality is also presented. The fourth chapter takes a closer look at the market access model in relation to the freedom to provide services and the right to establishment. The delicate question of direct effect is also presented here. In the fifth chapter, the grounds justification regarding indistinctly applicable labour law restrictions will be analysed in detail, especially with respect to posted workers. In chapter six, the legal sources of the right to strike, as well as the method used by the ECJ for deriving that particular right, are presented. In chapter seven, the conflict between the fundamental right to strike and the common market freedoms is analysed in respect of the framing of questions presented above. The eighth chapter consists of a conclusion, in which the answers to the framing of questions are summarized.

2 BACKGROUND: THE CASES BEFORE THE EC

The action goes against our understanding of why we joined the EU⁹

2.1 The facts of the Laval case

Laval un Partneri is a Latvian firm, whose Swedish subsidiary, L & P Baltic Bygg, was awarded a construction contract from the municipal of Vaxholm in Sweden. For the purpose of completing the construction, Laval posted some thirty Latvian workers to Sweden. The majority of the posted workers were trade union members in Latvia, where Laval had signed a collective agreement with the Latvian building sector's trade union.¹⁰ In accordance with the custom of the Swedish labour market, negotiations between Laval and the Swedish trade union representing the construction sector took place in June 2004. The Swedish trade union wanted Laval to sign a collective agreement for the construction sector, which included a process for negotiating salaries and "fallback minimum" wage, if the parties were unable to agree on the wage level.¹¹

However, the negotiations over the collective agreement were not successful, which prompted the Swedish trade union to commence industrial action against Laval in November 2004. The collective action took the form of a blockade directed against the construction site, which consisted of "preventing the delivery of goods onto the site, placing pickets and prohibiting Latvian workers and vehicles from entering the site".¹² Soon other unions began solidarity actions, e.g. the Swedish electricians' trade union stopped all electrical work on the site. In January 2005, the collective actions were further escalated by solidarity actions from even more trade unions, which blocked all of Laval's sites in Sweden. The town of Vaxholm eventually requested that the contract be terminated and Baltic Bygg filed for Bankruptcy in March 2005.¹³ On 7 December 2004, Laval commenced legal proceedings against the Swedish trade unions, thereby seeking compensation for the damage caused to its business. The Swedish court then asked for a preliminary ruling from the ECJ.¹⁴

⁹ Artis Pabrik, Latvian foreign minister. Citation taken from: James, 2006 06 27, *Sweden: Lessons of the Vaxholm Builders' Dispute*, World Socialist Web Site, at <http://www.wsws.org/articles/2006/jun2006/swed-j27.shtml> (Visited on 29 November 2008).

¹⁰ Laval paras. 27-28.

¹¹ Laval para. 26.

¹² Laval para. 34.

¹³ Laval paras. 37-38.

¹⁴ Laval para. 39.

2.1.1 The judgement in Laval

The first issue of the Laval case was whether the Posted Workers Directive could justify the industrial action in question. In general terms, the PWD was created to tackle the employment law situation for workers who resided in one Member State, but who were temporarily posted to work in another Member State “for the purpose of providing services”.¹⁵ The PWD stipulates that the laws of the Member States must be coordinated “in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers there”,¹⁶ albeit the material content of the mandatory rules is not harmonised per se.¹⁷ The Court observes that Sweden had in fact implemented the mandatory rules of PWD correctly, in that it had laid down the terms and conditions of employment listed in Article 3(1) PWD by law, “save for minimum rates of pay”.¹⁸

The Swedish law must however be understood in its proper context, as it does not provide for minimum wages, and the collective agreement to which the Swedish trade unions wanted Laval to accede, included conditions not referred to in the PWD. The Court states that the rates of pay demanded by the trade unions do not constitute “minimum wages and are not, moreover, laid down in accordance with the means set out in that regard in Article 3(1) and (8) of the directive”.¹⁹ Consequently, the Court states that the referred provisions of the PWD “cannot not be relied on to justify an obligation on such service providers to comply with rates of pay such as those which the trade unions seek in this case to impose in the framework of the Swedish system”.²⁰ That said, the PWD does in fact allow states either to declare certain collective agreements universally applicable or generally applicable in a given sector, thereby allowing the extension of those agreements to posted workers.

Since the Swedish model emphasis the autonomy of management and labour in regards to setting wages and other issues by means of collective bargaining, the Swedish government had not declared specific agreements universally applicable.²¹ Furthermore, the ECJ states that Article 3(7) PWD “cannot be interpreted as allowing the host Member State to make the 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”.²² In accordance with Article 3(10) PWD, “Member States may apply terms and conditions of employment on matters other than those referred to in Article 3(1) PWD”.²³ However, since the relevant

¹⁵ Laval para. 58.

¹⁶ Laval para. 59.

¹⁷ Laval para. 60.

¹⁸ Laval para. 67.

¹⁹ Laval para. 70.

²⁰ Laval para. 70.

²¹ Laval paras. 68-69.

²² Laval para. 80.

²³ Laval para. 82.

obligations were imposed without the national authorities' having had recourse to Article 3(10) PWD, the trade unions could not invoke public policy, as they were not "bodies governed by public law".²⁴

The second legal question in the Laval case was whether the industrial action was in breach of Article 49 EC. The Court held that the actions of trade unions fell within the scope of Article 49 EC, which application was not limited to only public rules, but also to obstacles to free movement caused by individuals. Since the collective action was considered likely to make it more difficult for firms from other Member States to exercise the freedom to provide services, the Court considered it a restriction to Article 49 EC, in that it "is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden".²⁵

The next question considered was whether restriction could be justified. Although the ECJ recognises the right to take collective action as a fundamental right, the exercise of that right "may none the less be subject to certain restrictions".²⁶ Collective actions can be justified if it pursues a legitimate aim compatible with the Treaty, it is justified by overriding reasons of public interests, and it is proportional.²⁷ The ECJ accepted that the prevention of social dumping would have been a legitimate overriding reason in the public interest, had the Swedish trade unions pursued it.²⁸ The obligations "linked to the signature of the collective agreement for the building sector" could not be justified with regard to the aim of preventing social dumping.²⁹ Nor could "the negotiations on pay which the trade unions sought to seek to impose",³⁰ as they "form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible of excessively difficult in practice for such an undertaking to determine the obligations with which it is to comply as regards minimum pay".³¹

The ECJ also rejected parts of the Swedish Lex Britannia legislation, as it prohibits collective action for the purpose of amending or setting aside Swedish collective agreements whereas it allows for industrial action against foreign service providers even if there is non-Swedish collective agreement in place. Since Laval could not oppose the industrial action on the basis that it was already party to a collective agreement, it was thus subject to direct discrimination.³²

²⁴ Laval para. 84.

²⁵ Laval para. 99.

²⁶ Laval para. 91.

²⁷ Laval para. 101.

²⁸ Laval para. 103.

²⁹ Laval para. 108.

³⁰ Laval para. 109.

³¹ Laval para. 110.

³² Laval para. 116.

2.2 The facts of the Viking case

Viking Line is a large Finnish ferry operator, which owns the Rosella, a large passenger ferry, which plies the route between Tallinn and Helsinki.³³ Since the ferry sails under the Finnish Flag, its crew is paid in accordance with the terms of the relevant Finnish collective agreement, and the Finnish Seamen's union (FSU) is representing the crew. The problem for Viking Line was that their competitors on the same route were operating under the Estonian flag, which enabled them to pay their crews lower remuneration at the same time as Rosella was operating at a loss. This prompted Viking Line to reach the decision that it would reflag the Rosella by registering it in Estonia.³⁴ In accordance with Finnish law, Viking gave notice of its plans to the FSU and the crew of Rosella. The FSU made it clear that it opposed such plans.³⁵ Moreover, the FSU contacted the international federation of transport workers (ITF), which prompted them to issue a circular "to its affiliates asking them to refrain from entering into negotiations with Viking".³⁶

The conflict was further escalated on 17 November 2003, when the collective agreement between Viking and FSU expired, as the FSU gave notice that it would commence industrial action, if Viking did not increase the manning of the Rosella and change the plans to re-flag her.³⁷ The threat of collective actions forced Viking Line to settle the dispute. Under the agreement, Viking Line was to continue operating the Rosella under Finnish flag, but its intentions to reflag sometime in the future remained.³⁸

Due to the fact that the Rosella continued to operate at a loss, Viking decided to pursue its intention to re-flag the ship once more, but the circular of the ITF remained in effect.³⁹ More specifically, the circular was aimed at preventing the relevant Estonian union from entering into a collective agreement with Viking Line as a part of their attempt to reflag the Rosella.⁴⁰ Since ITF is based in London,⁴¹ Viking Line commenced legal proceedings in England, where it sought an injunction requiring ITF to withdraw the circular and for the FSU to refrain from action, which interfered with its economic freedoms under the EC Treaty.⁴² The request was granted in the English Court of First Instance, but the Court of Appeal asked for a preliminary ruling from the ECJ.⁴³

³³ Viking para. 6.

³⁴ Viking para. 9.

³⁵ Viking para. 10.

³⁶ Viking para. 12.

³⁷ Viking para. 13.

³⁸ Viking para. 15.

³⁹ Viking para. 21.

⁴⁰ Viking para. 11.

⁴¹ Viking para. 7.

⁴² Viking para. 22.

⁴³ Viking paras. 23-27.

2.2.1 The judgement in Viking

The first question in the Viking case was whether Article 43 EC could be applied to collective action. In this instance, The Danish and Swedish governments argued that the right to take collective actions was a fundamental right and, as such, Article 43 EC was not applicable.⁴⁴

The ECJ recognised that the right to strike was a fundamental right, but the Court did not accept that this fact precluded the application of Article 43 EC.⁴⁵ Instead, the ECJ held that the right to strike had to be “reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality”.⁴⁶ The Court also points out that Article 43 EC prohibits the Member States of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation”.⁴⁷ Furthermore, the ECJ recognises the direct effect of Article 43 EC, as “it may be relied on by a private undertaking against a trade union or an association of trade unions”.⁴⁸

Regarding the specific question, whether the actions of the FSU constituted a restriction, the comportment was in fact found to have the effect of “making less attractive, or even pointless...Viking’s exercise of its right to freedom of establishment”,⁴⁹ whereas “the collective action taken in order to implement ITF’s policy of combating the use of flags of convenience...must be considered to be at least liable to restrict Viking’s exercise of its right to establishment”.⁵⁰ A restriction on the freedom of establishment can be justified, “if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest”. Moreover, it must also be proportional, in that it must be “suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it”.⁵¹

The Court considers a collective action for the protection of workers as a legitimate interest, “which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty”.⁵² This is in part motivated by the fact that “the activities of the Community are to include not only an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital, but also a policy in the social sphere”.⁵³ Regarding the collective action taken by the FSU, the Court held that even if the action could be considered to fall within the protection of workers, “such a view would no longer be tenable if

⁴⁴ Viking para. 42.

⁴⁵ Viking para. 44.

⁴⁶ Viking para. 46.

⁴⁷ Viking para. 69.

⁴⁸ Viking para. 61.

⁴⁹ Viking para. 72.

⁵⁰ Viking para. 73.

⁵¹ Viking para. 75.

⁵² Viking para. 77.

⁵³ Viking para. 78.

it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat”.⁵⁴ The latter matter was left for the national court to decide.⁵⁵ The collective action seeking to ensure the implementation of the policy of the ITF could on the other hand not be objectively justified, as it “results in ship owners being prevented from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals”,⁵⁶ which thus fails to take into account the extent to which the relocation would be detrimental to the workers.⁵⁷

⁵⁴ Viking para. 81.

⁵⁵ Viking para. 84.

⁵⁶ Viking para. 88.

⁵⁷ Viking para. 89.

3 HUMAN RIGHTS AS GENERAL PRINCIPLES OF EC LAW

“Principles don’t fall from heaven”⁵⁸

3.1 An introductory background

The European Community treaties that were signed in the 1950s had no provisions on human rights and in a series of early cases, the ECJ refused to recognise human rights as such. The court’s initial reluctance to acknowledge general principles and rights stemming from national constitutional law, has been interpreted as a reaction to the danger of subordinating EC law to national constitutional law.⁵⁹ In other words, the ECJ was perhaps more against the source of these general principles than the principles themselves. Since most Member States had written constitutions, which served to protect human rights and which, more importantly, limited the authority of the state, this eventually created conflicts between the ECJ and national courts. More precisely, the ECJ had to ensure a unified application of EC law, whereas the national courts had to protect the right of their citizens.⁶⁰

In the *Stork* judgement, it was claimed that the High Authority had “wrongly failed to take account of the fact that the decision in question had to be assessed from the point of view of German law”, to which the ECJ responded that the High Authority only had to apply EC law.⁶¹ The same line of reasoning continued in *Geitling*, where the ECJ went further by concluding that “community law, as it arises under the ECSC treaty, does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights”.⁶² In *Sgarlata*, the Court held that the express provisions of the Treaty could not be set aside by a plea founded on other principles, even if those were fundamental principles common to the legal systems of all the Member States.⁶³

The real change came in the *Stauder* judgement, where the ECJ for the first time held that “fundamental rights were enshrined in the general principles

⁵⁸ Tim Koopmans, former Judge at the European Court of Justice. Citation taken from: Groussot, Creation, *Development and Impact of the General Principles of Community Law: towards a jus commune europaeu?*, Groussot 2005, p. 46.

⁵⁹ Craig & de Búrca, *EU Law: Text, cases and materials*, Third edition, Oxford University Press, 2003, p. 320.

⁶⁰ Melin & Schäder, *EU:s Konstitution: Maktfördelningen mellan den Europeiska Unionen, medlemsstaterna och medborgarna*, Fourth edition, Nordstedts Juridik, 2001, p. 113

⁶¹ C-1/58, *Stork v. High Authority* (1959) ECR 17.

⁶² Joined cases 36,37,38 & 40/59 *Geitling v. High Authority* (1960) ECR 423.

⁶³ C-40/64, *Sgarlata and others v. Commission* (1965) ECR 215, (1966) CMLR 314.

of Community law and protected by the Court”.⁶⁴ Thus, in a period of ten years, between the Stork judgement in 1959 and the Stauder judgement in 1969, the ECJ went from denying the very existence of fundamental rights to establishing that fundamental rights were in fact enshrined in the general principles of EC law. In respect of the interpretation that the ECJ feared the source of the principles more than the principles themselves, it was actually first when the ECJ was explicitly asked if an action was compatible with “the general principles of EC law” and not with national constitutional law, that it included the fundamental rights among its general principles. This prompted some commentators to suggest that the issue may have been presented wrongly before the ECJ in the previous rulings, for the ECJ normally responds to the way questions are referred.⁶⁵ In this respect, the previous rulings may have been perceived as attempts to challenge the supremacy of Community law. Moreover, since the Stauder judgement only concerned the interpretation of a provision in conformity with the fundamental human rights enshrined in the general principle of Community law, it was far from obvious that the same principles could be relied on to have an act of Community law declared void. In fact, the Stauder judgement did little to qualify the methodology later used by the Court for the development of general principles of EC law.⁶⁶ The ECJ had also recognised other fundamental principles than those in the Treaty, such as the fundamental rights of the law of procedure in Van Eick⁶⁷, but never in the context of overriding specific Treaty provisions.

These steps were first taken in *Internationale Handelsgesellschaft*, where the Court declared that fundamental rights could be relied on to have an act of Community law declared void and that the fundamental rights were inspired by the constitutional traditions common to the Member states.⁶⁸ The ECJ also refined “the Stauder formula”, in that it held that fundamental rights were “forming an integral part of the general principles of law” rather than merely being “enshrined in the general principles of Community law”.⁶⁹ The different wording makes it clear that fundamental rights are general principles per se.⁷⁰ The subsequent case law further increased the sources of inspiration for the fundamental rights. In *Nold*, for example, the Court held “that international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law”.⁷¹

⁶⁴ C-29/69, *Stauder v. City of Ulm* (1969) ECR 419

⁶⁵ Brown & Kennedy, *The Court of Justice of the European Communities*, fifth ed., Sweet and Maxwell, 2000, p.357.

⁶⁶ Groussot, *Creation, Development and Impact of the General Principles of Community Law: towards a jus commune europaeu?*, Groussot 2005, p.71.

⁶⁷ C-35/67 *Van Eick v. Commission* (1968) ECR 342.

⁶⁸ C-11/70 *Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle für Getreide und Futtermittel* ECR 1125.

⁶⁹ Groussot p. 74.

⁷⁰ Groussot p. 74-75.

⁷¹ Case 4/73 *Nold* (1974) ECR 491, para. 13.

The subsequent case law can be summarised as being completely reliant on the national provisions in the early cases, while making increase use of international legal standards as the development progressed. There was, for example, a new feature at the end of the 1990's when the Court started referring to the case law of the ECtHR.⁷² In this regard, it should be noted that the constitutional traditions of the Member States seem to have the same importance as the international provisions, at least in respect of the ECHR.⁷³ The particular importance of the ECHR comes from the “presumption of consensus”, which it automatically entails vis-à-vis other rights. It is thus not necessary for the Court to analyse common constitutional provisions in detail, if it can be determined that the relevant right exists in the ECHR, for the existence of a particular right in the ECHR presupposes the necessary commonality.⁷⁴ In the course of time, the fundamental rights received codified insurance, as it was incorporated in Article 6(2) of the Treaty of Amsterdam, which specifically states: “The union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights for the protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1959 and as they result from the constitutional traditions common to the Member States, as general principles of Community law”.

3.2 The concept of fundamental rights

The previous section makes it clear that the ECJ has committed itself to protect rights recognised in the national constitutions of the Member States as well as in international law and international treaties to which the Member States are parties, albeit this happened gradually and within the framing of the of the general scheme of the Treaty. Since the Treaty does not provide an answer to which rights that are considered fundamental within the meaning of Community law, specific human rights must first be invoked before the Court in order to be recognised as fundamental rights. It is thus “the accident of litigation” that has decided the rights, which have been expressly recognised by the ECJ thus far.⁷⁵ The terminology of “fundamental rights” comes from the fact that these rights do not just contain fundamental human rights but also fundamental freedoms, such as “civil, cultural, economic, social, and political human rights”.⁷⁶

Tridimas classifies the recognised fundamental rights into three broad categories, namely “economic and property rights, civil and political

⁷² Groussot p. 109.

⁷³ Groussot p. 109.

⁷⁴ Groussot p. 111.

⁷⁵ Tridimas. *The General Principles of EC Law*, second edition, Oxford University Press, 2006, p. 307.

⁷⁶ Morijn, *Balancing Fundamental rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution*, *European Law Journal*, Vol. 12, No. 1, Januari 2006, pp. 15-40, at p. 16.

liberties, and rights of defence”.⁷⁷ The fact that a specific right is recognised does not say much about the level of protection this right is given in a particular situation, nor its legal value in respect to other competing rights and interests. That said, the mere fact that a specific right is considered “fundamental” within the meaning of EC law necessarily implies that the Community legal order ascribes it some importance. It is thus necessary for both public authorities and the Community judiciary itself to justify limitations placed upon fundamental rights.⁷⁸ To give an example, in *Scaramuzza*, the ECJ held that the CFI should have had provided a full reasoning when it rejected a plea based on the breach of fundamental rights.⁷⁹ Although Tridimas compares fundamental rights to a Dworkinian “trump card”,⁸⁰ these rights are nevertheless subject to appropriate limitations set by the objectives and the scheme of the Treaty.⁸¹ In this regard, there is clear difference between social and economic rights, in that social rights are clearly positive rights in the sense that the ECJ has cleared the way for solutions stretching beyond written law. This is in stark contrast to economic rights, which “seems to serve a prophylactic function”. If, for example, the right to property or the freedom of trade are being encroached upon, the Court merely recognises a core element of such rights, beyond which the freedom of the individual may have to give way to the public interest, thereby only recognising a limit to public action.⁸²

3.2.1 Fundamental rights as an independent ground of justification: The Schmidberger judgement

The question of whether a fundamental right could override a common market freedom was the most prominent element in the *Schmidberger* and *Omega* cases, where the ECJ developed a Community law approach to Member States’ references to fundamental rights enshrined in their national constitutions for the purpose of derogating from freedoms enshrined in the Treaty. In *Schmidberger*, the freedom of expression and assembly stood in conflict with the free movement of goods. More specifically, the case concerned the extent of a Member States obligation to keep an important road opened in order to ensure the free movement of goods while at the same time prohibiting an environmental demonstration. When confronted with a situation, where a national right is in conflict with the Treaty, the ECJ will first conclude whether the invoked right is a fundamental right within the meaning of EC law. This is being done with reference to national constitutional provisions and international treaties for the protection of human rights to which the Member states are parties. The rationale for this approach is that the human rights protection is one of the main objectives

⁷⁷ Tridimas. *The General Principles of EC Law*, second edition, Oxford University Press, 2006, p. 307.

⁷⁸ Tridimas p.310.

⁷⁹ Case C-76/93 P *Scaramuzza v Commission* 1994 ECR I-5173, para. 30.

⁸⁰ Tridimas p. 310

⁸¹ Tridimas p. 307.

⁸² Tridimas p. 310.

that the Community pursues, thereby not only the concern of the Member states.⁸³ Furthermore, the common market freedoms as well as the freedom of assembly and expression in the ECHR are subject to restrictions. Regarding the free movement of goods, the ECJ remarked that it was subject to limitations, either through mandatory requirements relating to public interests or through reasons stipulated in article 30 EC. The ECJ then drew an interpretational parallel with the freedom of assembly and expression in articles 10 and 11 ECHR, as they were equally subject to certain limitation.⁸⁴ Although the ECJ accepts fundamental rights as an independent ground of justification, the exercise of the fundamental right in question must nevertheless be proportional.⁸⁵ The evaluation of fundamental rights as an independent ground of justification thus includes three investigatory steps. First, whether the invoked right is a fundamental right within the meaning of EC law, and, second, whether the exercise of that particular right is subject to certain restrictions. Third, whether the exercise of the relevant fundamental right is proportional.

3.2.2 Fundamental rights as public policy exceptions: The Omega judgement

There are of course national constitutional rights that do not pass the comparative analysis of the ECJ, for they can neither be considered to be a part of the constitutional traditions of the Member states nor a part of international treaties to which a number of Member states are parties. The Omega judgement is interesting in this regard, as it deals with the clash of the freedom to provide services and human dignity, which is an uncommon constitutional tradition. More particularly, the case deals with the question of whether the authority of a Member state to restrict common market freedoms because of public policy is conditioned upon the existence of general legal conception shared by all the Member states.⁸⁶ The Advocate General held that it was “impossible for the Court immediately to equate the substance of the guarantee of human dignity under the German Basic Law with that of the guarantee of human dignity as recognised in the Community law”.⁸⁷ Furthermore, the Advocate General points out that human dignity appear “primarily as a general article of faith”.⁸⁸ In doctrine, the legal value of the human dignity has been described with the following words: “the Community right of human dignity is hardly less mysterious than a distant star in the night sky; it exists, but few of us know much else about it”.⁸⁹ Although the ECJ based its reasoning on the fact that human dignity was a fundamental right and thus a part of the general principles of EC law, it

⁸³ Schmidberger para. 74.

⁸⁴ Schmidberger paras 79-80.

⁸⁵ Schmidberger paras 81-82.

⁸⁶ Omega para. 15.

⁸⁷ Opinion of the Advocate General in Omega, para. 93.

⁸⁸ Opinion of the Advocate General in Omega paras 82 and 84.

⁸⁹ Smith and Fetzer, *The uncertain limits of the European Court of Justice's authority: economic freedom versus human dignity*, (2004) 10 Columbia Journal of European Law p. 445 et seq., p. 458.

nevertheless left the substantive application test to the discretion of the national court.⁹⁰ This methodology differs considerably from the one used in Schmidberger.⁹¹ As a ground of justification, the ECJ placed it as a public policy derogation under Article 46 EC.⁹² This was very much in line with what Advocate General Jacobs had argued in Schmidberger, namely that human rights should be seen as public policy objectives, which can justify exceptions to the free movement of goods.⁹³ It is, however, hard to assess how the analysis of the ECJ would differ depending on whether a justification is based a public policy objective or an independent human rights exception.⁹⁴ The choice between human rights as an independent ground of justification or as public policy derogation, will thus depend on whether it is possible to equate the substance of the right in question on the national and European level. This means that the ECJ has de facto rejected the idea that national restrictions on free movement imposed on grounds of public policy must correspond to a legal conception shared by all the Member States, and that the ECJ has embraced an integration model based on value diversity.⁹⁵

3.3 The balance between fundamental rights and common market freedoms

In abstract terms, the principal of proportionality is the requirement that actions carried out should be proportionate to its objectives. It has been seen as the judiciary's response to the growth of administrative powers and discretion.⁹⁶ The principle of proportionality is not only a well established general principle of EC law. It is also enshrined in Article 5 EC, which stipulates that actions by the Community shall not go beyond what is necessary to achieve the objections of the Treaty. This provision does not only govern the exercise of the Community's law making competence, but is also used for reviewing Community measures and national measures affecting freedoms enshrined in the Treaty.⁹⁷ As will be shown below, the principal of proportionality is a distinctive feature for adjusting different incompatible interests, e.g. between national interests and those of the Community. It is thus a double-edged sword, in the sense that it equates national interests worthy of protection with those of those of the Community. That said, one must also acknowledge that more often than not

⁹⁰ Morijn, *Balancing fundamental rights and common market freedoms in Union law: Schmidberger and Omega in the Light of the European Constitution*, European Law Journal, vol. 12, no. 1, 2006, p. 33-34.

⁹¹ Morijn p. 38.

⁹² Omega para. 30.

⁹³ Opinion of Advocate General Jacobs in Schmidberger, para. 95.

⁹⁴ Avbelj, *European Court of Justice and the question of value choices: Fundamental human rights as an exception to the freedom of movement of goods*, Jean Monnet Working Paper 06/04, at <http://www.jeanmonnetprogram.org/papers/04/040601.pdf> (visited 29 November 2008), p. 60-61.

⁹⁵ Tridimas p. 341.

⁹⁶ Tridimas p. 136.

⁹⁷ Tridimas p. 137.

national interests correspond with those of the Community, as the interests of the Community ultimately are those of the Member State. The principle of proportionality is sometimes a third alternative between two mutually exclusive interests, such as the supremacy of Community law and pressing national interests.

3.3.1 General remarks on the principle of proportionality

In any proportionality analysis, it is first necessary to identify the relevant interest, as it is a necessary condition precedent to any balancing option. The pertinent interest will then be ascribed a certain weight or value. The actual proportionality assessment involves the evaluation of three factors.⁹⁸ First, it must be established whether the measure is suitable to achieve the desired end.⁹⁹ The suitability test entails that the objective must be a legitimate interest in its own right and that there must be a causal relationship between the measure and its objective.¹⁰⁰ Since this part of the test directly refers to the relationship between the means and the end, it thus signifies that the means must be reasonably likely to achieve the desired end.¹⁰¹ Second, it must be established whether the measure is necessary to achieve the desired end. The necessity test consequently implies that there must be no adequate measures available, which can achieve the desired end in a less restrictive way for the person involved. If, for example, there are possible alternative instruments, which can protect the legitimate interest equally effective, it must thus be assessed which of the instruments that would have the least negative impact.¹⁰²

Since the necessity test refers to the weighing of opposite interests, the assessment of the Court is thus twofold, in that it first assesses the adverse consequences that the relevant measure has on the interest in question and then ascertains whether the outcome is justified in relation to the importance of the object pursued.¹⁰³ Third, it must be established whether the measure imposes burdens that have an excessive effect on the individual in the relation to the sought objective. This is the so-called proportionality *stricto sensu*, which implies that a measure will be considered disproportionate when the restriction it causes is out of proportion to the sought objective.¹⁰⁴ In practice, the ECJ sometimes applies all three steps of the inquiry, but more often than not, it articulates and applies the suitability and the necessity tests, whereas the proportionality test *stricto sensu* is either omitted or incorporated in the necessity assessment.¹⁰⁵

⁹⁸ Craig and De Búrca p. 372.

⁹⁹ Craig and De Búrca p. 372.

¹⁰⁰ Jans, Lange, Prechal and Widdershoven, *Europeanisation of Public Law*, Groningen, 2007, p. 149.

¹⁰¹ Tridimas p. 139.

¹⁰² Jans, Lange, Prechal and Widdershoven p. 149.

¹⁰³ Tridimas p. 139.

¹⁰⁴ Jans, Lange, Prechal and Widdershoven p. 149.

¹⁰⁵ Craig and De Búrca p. 372.

The most essential feature of the proportionality test is thus that the ECJ performs a balancing exercise between the objective sought by the measure in question, on the one hand, and its adverse effect on the individual freedom, on the other. Therefore, the ECJ sometimes accepts that a particular measure is in accordance with the principle of proportionality without first looking for the less restrictive alternative.¹⁰⁶ Suitability and necessity enables the ECJ to review the legality of legislative and administrative measures, but in some ways also their merits. This makes the principle of proportionality one of the most powerful weapons in a public law judge's arsenal. That said, the effectiveness of the principle depends on how strictly the court applies the test, and the extent to which it is prepared to comply with the choices made by the public authority, which has enacted the measure in question.

There are within Community law countless standards for the test of proportionality, which makes it a very flexible principle, in that it can be applied in different contexts to protect different interests with varying results.¹⁰⁷ The ECJ applies a standard of intense review in situations where proportionality is invoked as a ground for review of a Community vis-à-vis a national interest, for, in this regard, the principle is applied as an instrument of market integration. If, for example, proportionality is invoked in order to balance a national measure affecting a common market freedom, this usually means that the review is based on the notion of "necessity", which is the defining feature of the "less restrictive alternative test". The less restrictive alternative test means that a national measure affecting a common market freedom is incompatible with Community law, unless the relevant measure is necessary to achieve the legitimate aim in question and provided that the particular aim cannot be achieved by measures, which are less restrictive to intra-Community trade.¹⁰⁸

Depending on whether the ECJ has all the relevant facts at its disposal, the Court should either make the assessment itself or leave it for the national court to decide.¹⁰⁹ The latter alternative is however based on the notion that the ECJ will provide the national court with the criteria and conditions necessary for it to make the actual assessment. If, on the other hand, the third step of the proportionality assessment is to be carried out, it should be left to the ECJ, for the proportionality *stricto sensu* ultimately determines what level of protection that should apply within the Community, which is not for a "random nation court" to decide.¹¹⁰

¹⁰⁶ Tridimas p. 139.

¹⁰⁷ Tridimas p. 140.

¹⁰⁸ Tridimas p. 138.

¹⁰⁹ Jans, Lange, Prechal and Widdershoven p. 162.

¹¹⁰ Jans, Lange, Prechal and Widdershoven p. 163.

3.3.2 Proportionality and fundamental rights

The principle of proportionality is an important aspect of reviewing restrictions on the common market freedoms.¹¹¹ In *Germany v European Parliament and Council*¹¹², Advocate General Fennelly stated that the proportionality test “can be employed to determine whether the Advertising Directive complies with the general principle of proportionality under Community law...and to assess whether it permissibly limits the exercise of fundamental rights such as freedom of expression. However, this test will not necessarily lead to identical results in the two contexts because of the different factors placed in the balance”.¹¹³

It is therefore possible to conceptualise the principle of proportionality partly as a freestanding administrative principle, which sets a limit to legislation, fines and penalties, i.e. direct proportionality, partly as a tool for balancing fundamental rights and other competing interests, i.e. indirect proportionality. This characteristic makes it possible to define the principle of proportionality according to the grounds on which a challenge is based, which leads to a clear distinction between direct and indirect proportionality. If, for example, a challenge is expressly based on the breach of the principle of proportionality itself, it is thus based on direct proportionality. If, on the other hand, the challenge is not based on the proportionality per se, but rather, for example, on a fundamental right, in which case the principle of proportionality is used to interpret the invoked right, it is thus based on indirect proportionality.¹¹⁴

Since the underlying interests which proportionality seeks to protect in the above-mentioned situations are different, the intensity of the review exercised by the ECJ varies noticeably. In situations where proportionality is being invoked for balancing a fundamental right vis-à-vis a common market freedom, the ECJ has concluded that the common market freedoms and the fundamental rights have equal constitutional ranking, but that neither of the competing values are absolute. Therefore, the ECJ has to weigh the interests involved in order to determine whether a fair balance has been struck, but the assessment leaves a wide discretion to the Member State in question.¹¹⁵ The discretion of the Member States in these situations can thus be said to correspond to the same standard of scrutiny applied to the Community institutions themselves.¹¹⁶ Having said that, the Member States do not have a *carte blanche* for restricting the common market freedoms by using human rights, which became apparent in the *Schmidberger* judgement, where the ECJ clearly examined all the

¹¹¹ Jans, Lange, Prechal and Widdershoven p. 151-152.

¹¹² Case C-376/98 *Germany v. European Parliament and Council* (2000) ECR I-8419

¹¹³ Opinion of Advocate General Fennelly in Case C-376/98 *Germany v Parliament and Council*, para. 148.

¹¹⁴ Groussot p. 53.

¹¹⁵ Tridimas p. 338.

¹¹⁶ Tridimas p. 340.

alternatives available to the Austrian government.¹¹⁷ The Court thus applied the “less restrictive alternative test” for deciding the legality of the actions of the Austrian authorities.¹¹⁸

¹¹⁷ Case C-112/00 Schmidberger, *Internationale Transporte und Planzüge v. Austria*, (2003) ECR I-5659, paras. 84-93.

¹¹⁸ Schmidberger para. 92-93.

4 MARKET ACCESS

“Latvian trade union members are entitled to have their interests defended as much as Swedish trade union members...The real issue to me is what we mean by an internal market”¹¹⁹

4.1 Horizontal direct effect and collective action

In order to clarify the relationship between the right to strike and Articles 43 and 49 EC respectively, it is first important to analyse why Article 43 and 49 EC have direct horizontal effect, i.e. why they can be relied on in industrial action disputes between private parties. Given that an industrial action is not a regulatory measure in itself and that it in these two particular cases only strives to achieve collective regulation, it could be argued that industrial actions should escape the direct effect of the Treaty on that basis alone. However, since this line of argumentation completely separates the action from its purpose, it is thus not a realistic justification.¹²⁰ The question of horizontal direct effect concerns the extent to which the Treaty provisions are binding for private subjects, acting either as individuals or in a group, or more exactly to which extent people “have to abide by those rules when exercising their private autonomy”.¹²¹

This line of reasoning implies that the horizontal direct effect applies to private actions to the extent that they are capable of restricting others from exercising their right to free movement.¹²² In respect of horizontal direct effect, the case law of the ECJ points to a single approach between the four freedoms, albeit there are differences between the different freedoms, which prevent a simple transfer of principles. Unlike the free movement of persons and businesses, Article 28 EC specifically mentions “restrictions between Member States”.¹²³ Therefore, it is natural to apply a more restrictive approach regarding the free movement of goods, at least in sense that the main question is whether the relevant measure can be ascribed to the state in

¹¹⁹ Charles McCreevy, Commissioner of the Internal Market and Services. Citation taken from: EurActiv.com, 2005-10-26, *McCreevy Defends Stance in Social Model Row*, at <http://www.euractiv.com/en/socialeurope/mccreevy-defends-stance-social-model-row/article-146475> (visited 29 November 2008).

¹²⁰ Hellsten, *On the social dimension in posting workers*, Labour Policy Studies No. 301, Ministry of Labour (Finland), 2004, at <https://oa.doria.fi/bitstream/handle/10024/29178/frominte.pdf?sequence=1> (visited 29 November 2008), p. 78.

¹²¹ Orlandini, *Right to Strike, Transnational Collective Action and European Law: Time to Move on?*, Jean Monnet Working Paper, 8/2007, at <http://www.jeanmonnetprogram.org/papers/07/070801.pdf> (visited 29 November 2008), p. 7.

¹²² Opinion of the Advocate General in Viking, para. 43.

¹²³ Orlandini (2007) p. 8-9

question, albeit a private subject is, in fact, implementing it.¹²⁴ The difference between Article 28 EC, on the one hand, and Articles 39, 43 and 49 EC, on the other, is that the latter applies to private subjects, which have no relationship whatsoever with the state, but instead exercise their own regulatory power, which flows from the autonomy accorded to them from the national legal order.

Reversely, the free movement of workers presupposes a direct horizontal effect, in that Article 39 EC specifically stipulates that the prohibition to discriminate on the grounds of nationality must apply to employment contracts, which thus directly affects the relationship between private subjects.¹²⁵ In *Walrave and Koch*, the ECJ used the free movement of workers to expand the horizontal direct effect to the domain of services by arguing that the mere fact that services are performed outside of a contract employment could not justify a more restrictive interpretation.¹²⁶ There are a number of cases in which the horizontal direct effect of Article 49 are emphasized, mostly dealing with sporting organisations having private collective regulatory powers, but the same principles should also apply to other kinds of private bodies. In this regard, the ECJ seems to have a functional rather than a formal approach vis-à-vis the fundamental freedoms.¹²⁷

In *Deliège*, the ECJ held that “the Community provisions on the free movement of persons and services not only apply to the action of public authorities but extend also to rules of any other nature aimed at regulating gainful employment and the provision of services in a collective manner”.¹²⁸ However, the subsequent cases dealt only with actions taken by public authorities or professional regulatory bodies, prompting some commentators to suggest an extended form of vertical direct effect only.¹²⁹ In *Angonese*, the ECJ stated that since working conditions sometimes are regulated by law and sometimes by agreements and other acts concluded or adopted by private persons, it would not be possible to limit the application to only acts of public authority, because that would risk creating inequality of the application of the prohibition of discrimination based on nationality.¹³⁰

From the perspective of a common market, it is obviously incoherent to distinguish between different ways of enacting rules, or to be more precise,

¹²⁴ Orlandini (2007) p. 9.

¹²⁵ Orlandini (2007) p. 9.

¹²⁶ Case 36/74 B.N.O. *Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo* para. 23-24

¹²⁷ Norbert Reich, *Free Movement v. Social Rights in an Enlarged Union – the Laval and Viking cases before the ECJ*, German Law Journal, Vol. 09, No. 02, 2008, p. 135.

¹²⁸ Joined cases C-51/96 and C-191/97, *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union europenné de judo* (C-51/96) and *Francois Pacquée* (C-191/97) (2000) ECR I-2549, para. 47.

¹²⁹ Barnard, *The substantive law of the EU: the four freedoms*, Oxford University Press, 2007, p. 284.

¹³⁰ Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, para. 33.

whether certain Member States allow private parties the autonomy to regulate themselves. If, for example, Member States A and B have the same set of restrictive rules, a uniform application of EC law must mean that both countries are treated the same way. Therefore, the ECJ held that the prohibition of discrimination on grounds of nationality laid down in Article 39 of the Treaty must be regarded as applying to private persons as well.¹³¹

Given the Court's position in *Walrave and Koch*, where the free movement of services and workers were considered identical, one could theoretically also apply this principle to individual contracts within the field of services and establishment. However, this ought to be a situation, where the differences between Article 39 EC and Articles 43 and 49 EC appears to be considerable. This comes from the fact that the Community legislator has stipulated the binding nature of the prohibition to discriminate on the grounds of nationality with reference to labour conditions, which is thus particularly relevant in the relationship between private parties. Since the workers are seen as the weak party to the contract of employment, the interpretation of this provision is in fact less based on market logic. Moreover, the ECJ has used Article 39 EC to guarantee a full integration of Community citizens in the host country.¹³²

The cases presented thus far have all dealt with the horizontal direct effect of discriminatory measures, which naturally raises the question of its applicability in the context of non-discrimination. This issue first emerged in the famous *Bosman* ruling, which dealt with the transfer rules of national and transnational football associations. The ECJ concluded that the rules directly affected the players' access to the employment market in other Member States, which in turn made them capable of impeding the freedom of movement for workers. Even though the transfer system was neutral in terms of nationality, the rules were nevertheless considered as an obstacle to the free movement.¹³³

The question of extending the horizontal direct effect to non-discriminatory measures in the field of establishment and services was considered by the ECJ in the *Wouters* judgement, where it held that the compliance of the Treaty "is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, self-employment and the provision of services". The rationale for this approach was that "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".¹³⁴

¹³¹ *Angonese* para. 36.

¹³² *Orlandini* (2007) p. 11-12

¹³³ Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, paras 103-104.

¹³⁴ Case C-309/99, *Wouters v. Algemene Raad van der Nederlandse Orde van Advocaten* (2002) ECR I-nyr., para. 120.

It is thus not important who or what enforces the measure in question, but instead that it is being done through collective measures, which in the language of the Court turns into “rules”. However, the ECJ appears to avoid a more formalistic approach concerning these “rules”, as it emphasises the effects in the form of a breach of Article 49 EC rather than how this is being done. Collective measures should therefore fall within the scope of Article 49 EC only to the extent that they produce significant effects on the functioning of the internal market. Moreover, the effects should be similar to those produced by a law or a public act.¹³⁵ The same logic should hold equally true for the right to establishment.¹³⁶

4.1.1 The horizontal direct effect and collective actions in the Laval and Viking cases

In accordance with the analysis so far, the ECJ extended the horizontal direct effect of Articles 43 and 49 EC to collective actions, in the sense that they were applicable to “obstacles resulting from the exercise...of their legal autonomy”¹³⁷ and “rules which are not public in nature but which are designed to regulate, collectively”.¹³⁸ Although this line of reasoning corresponds fairly well to other cases concerning private bodies with a regulatory control, the judgement actually makes a “quality leap” in the relevant case law, which is not acknowledged by resorting to past case law involving private regulation sources. The Court thus seems to avoid the theoretical problem involved, which primarily stems from the fact that it was individuals who carried out the action, thereby expressing their private autonomy.¹³⁹

In view of the fact that the ECJ puts private actors on an equal footing with public law bodies, it fails to distinguish between the exercise of regulatory functions and the exercise of the right to take collective action. More particularly, the difference is tied to the difference between legal acts and purely material acts.¹⁴⁰ Since the Court specifically states that there is nothing in its previous case law that suggests that the common market freedoms would apply only to organisations exercising regulatory tasks,¹⁴¹ it therefore distinguishes the conclusion of private law agreements from the exercise of a regulatory task.¹⁴² This does not mean that all and any obstacles stemming from an organisation or an association can be invoked between private parties, as the obstacle has to be interpreted as “legal autonomy” conferred by the state in order to have that effect. This seems to

¹³⁵ Orlandini (2007) p. 9-10

¹³⁶ Opinion of the Advocate General in Viking, para. 43.

¹³⁷ Viking para. 57.

¹³⁸ Laval, para. 98.

¹³⁹ Orlandini (2008) p. 590.

¹⁴⁰ Dorssement, *The right to take collective action versus fundamental economic freedoms in the aftermath of Laval and Viking*, at http://www.dirittoprivato.unisi.it/pontignano/file_download/11/fdorssement.doc (visited 29 November 2008). p. 29.

¹⁴¹ Viking para. 65.

¹⁴² Dorssement p. 29.

be problematic in the sense that collective actions are ultimately an exercise of economic power, which is different from the exercising of legal autonomy. The position that collective bargaining is an example of “legal autonomy” conferred by the state has been criticised, because it indicates a view of collective bargaining as the outcome of a process of delegation by the state, when it instead is a recognised fundamental right.¹⁴³

It is also important to distinguish between trade unions and professional associations. In this respect, trade unions have a rather unique role, which primarily includes conducting negotiations with the employer for the terms and conditions relating to the collective agreement, whereas the role of professional associations is to regulate their own activity and to enforce rules of their own choice on those who voluntarily wants to take part in the relevant activity. Although both trade unions and professional associations are supported by the state in their respective activities, that does not mean that it is possible to put the two activities on an equal footing, as the nature of the support received from the state differs considerably. This comes from the fact that professional associations are given competence to regulate a particular area of economic activity, whereas the collective action of either the trade unions or of their counterpart should be seen as the means to an end, in that it particularly serves to support the negotiating activity of either side.¹⁴⁴

The analogy between trade unions and regulatory bodies seems to come from the fact that the collective actions were so successful that it gave the impression that the trade unions could dictate terms and conditions on their employers, which fails to take into account that the bargaining powers varies noticeably from case to case.¹⁴⁵ Regarding the specific question of placing a strike action on an equal footing with a regulatory measure, the Court seems to be of the opinion that an action of private nature becomes an obstacle to free movement when it aims at giving rise to a rule, which hinders the market.¹⁴⁶ It is in fact coherent to put a collective action aimed at imposing a rule, which creates an obstacle to the internal market, on an equal footing with the obstacle itself.¹⁴⁷

4.2 Differences and commonalities: Services and establishment

The freedom to provide services, the right to establishment and the free movement of workers have all strong points of similarity. Indeed, as emphasized by AG Mayras in the Van Binsbergen judgement, the principle

¹⁴³ Dorssement p. 30.

¹⁴⁴ A.C.L. Davies, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, *Industrial Law Journal*, Vol. 37, No. 2, 2008, p. 136.

¹⁴⁵ A.C.L. Davies p. 137.

¹⁴⁶ Orlandini (2008) p. 590-591.

¹⁴⁷ Orlandini (2008) p. 591.

of equal treatment lays behind all three.¹⁴⁸ Adduced as an instance, the free movement of workers in Article 39 EC and the right to establishment in Article 43 EC are often compared in that both provisions require equal treatment of persons who are settled in a Member State, while they are separated in that the former concerns persons who are employed and the latter persons who are self-employed.¹⁴⁹ In this regard, the right to establishment has more in common with the freedom of workers in Article 39 EC than it has with the freedom to provide services. This comes from the fact that when the individual establish himself in another Member State, the home state loses regulatory control to the new host state.¹⁵⁰

There is on the other hand a potential overlap between workers and posted service providers, but the ECJ has distinguished the two by stating that “workers employed by a business established in one Member State who are temporarily sent to another Member State to provide services do not, in any way, seek access to the labour market in that second State if they return to their country of origin or residence after completion of their work”.¹⁵¹ The difference between services and establishment can, in fact, be measured, in the sense that there is a stage when a service provider may be sufficiently connected with the Member State, where the services are being provided, to be established, instead of merely providing services there.¹⁵² The essential characteristic of establishment is in part that there is an established professional base in the Member State concerned, in part the “stable and continuous basis” on which the economic activity is being carried on.¹⁵³

Reversely, the temporary nature of the freedom to provide services can be determined “in the light, not only of the duration of the provision of service, but also of its periodicity, continuity and regularity”, and the temporary nature of a service does not prevent the service provider from equipping himself with some sort for infrastructure in the host state.¹⁵⁴ To refer back to the host state control, applicable to the free movement of workers and the right to establishment, the freedom to provide services is somewhat different in that the service provider continues to be based in the home state, which has primary regulatory control, while providing services in the host state. In this respect, the freedom to provide services has more in common with the free movement of goods than with the right to establishment, because both services and goods are primarily subject to home state control.¹⁵⁵

¹⁴⁸ Case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* (1974) ECR 1299.

¹⁴⁹ *Craig and De Búrca*, p. 766.

¹⁵⁰ *Barnard* (2007) p. 253.

¹⁵¹ Case C-49/98, *Finalarte Sociedade Constrcao Civil v. Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* (2001) ECR I-7831, paras. 22-23.

¹⁵² Case 205/84, *Commission v. Germany* (1986) ECR 3755, para. 22.

¹⁵³ Case C-55/94, *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* (1995) ECR I-4165, para. 25.

¹⁵⁴ *Gebhard* para. 27.

¹⁵⁵ *Barnard* (2007) p. 253.

4.3 Establishment

The wording of Article 43 EC seems to suggest that the equal treatment of nationals and non-nationals is the only requirement, in that it refers to the right to establishment in a host Member State “under the conditions laid down for its own nationals”. In turn, this implies that as long as nationals and non-nationals are treated the same way, the requirements of Article 43 EC are satisfied.¹⁵⁶ However, even though the ECJ initially interpreted Article 43 EC in line with those suggestions, it gradually moved away from the emphasis on unequal treatment. This was very much in accordance with its case law on the free movement of goods, services and workers.¹⁵⁷ In the Gebhard judgement, the ECJ scrutinized Italian rules that did not allow a German lawyer to become a member of the Milan bar, regardless of his training, qualifications and experience. Rather than examining whether the rules in question are directly or indirectly discriminatory, the Court focused its analysis on whether the national measures were “liable to hinder or make less attractive the exercise of fundamental freedoms”.¹⁵⁸ It is however clear that rules in question can be considered as indirectly discriminatory as well, in that they weigh more heavily on non-nationals than on nationals.¹⁵⁹

The importance of the Gebhard judgement is that the ECJ moved beyond indirect discrimination, when it declared that rules, which were sufficiently obstructive, could constitute a hindrance to the right of establishment. This puts the relevant national rule under the scope of Article 43 EC and its grounds of justifications.¹⁶⁰ The Court tends to confirm its approach in the Gebhard judgement, in that it focuses on whether national measures are liable to prohibit, impede or render less attractive the exercise of the right to establishment or the access to that particular right and not on whether measures discriminate on grounds of nationality.¹⁶¹ This can be seen, for example, in *Commission v. Greece*, where the Court held that a Greek law, which prohibited qualified opticians from operating more than one optician’s shop, “effectively amounts to a restriction... notwithstanding the alleged absence of discrimination on grounds of nationality of the professional concerned”.¹⁶² There are nevertheless certain cases in which the Court has stated that a measure does not substantially impede the exercise of the freedom to provide services, that the impediment is too remote or that the measure is genuinely non-discriminatory. In these cases, the Court seems to consider that the effect on inter-state trade is so small that the relevant measures do not breach Article 43 EC.¹⁶³

¹⁵⁶ *Craig and de Búrca* p. 772.

¹⁵⁷ *Craig and de Búrca* p. 783.

¹⁵⁸ Gebhard para. 37.

¹⁵⁹ *Craig and de Búrca* p. 785.

¹⁶⁰ *Craig and de Búrca* p. 786.

¹⁶¹ Barnard (2007) p. 313.

¹⁶² Case C-140/03 *Commission v. Greece* (2005) ECR I-000 para. 28.

¹⁶³ Barnard (2007) p. 314-315.

4.4 Services

Article 50 EC prohibits discrimination on the grounds of nationality against those wishing to provide or receive services, in that it stipulates that “the person providing the service may ... temporarily pursue his activity in the state where the service is provided, under the same conditions as are imposed by the state on its own nationals”. However, since the provision aims at situations, where the obvious candidate is a person already established in the host state, providing equivalent services as the service provider established in his home state, the principal of non-discrimination is problematic in two respects. First, the right to establishment means more permanence than the provision of services. Second, the service provider has already a place of establishment, namely in his home state.¹⁶⁴

These problems were dealt with in *Säger*, where the ECJ concluded that the freedom to provide services would lose all its practical effectiveness if Member States were allowed to make the provision of services subject to all the conditions required for establishment.¹⁶⁵ In line with the *Gebhard* judgement, the ECJ concluded that Article 49 EC required not only the elimination of all discrimination against a service provider, but also the abolition of any restriction, even if it applies without distinction to national service providers, when it is liable to prohibit or otherwise impede the activities of the service provider in question.¹⁶⁶ This formulation avoids the inherent problems involved in deciding whether national measures are indistinctly applicable or non-discriminatory.¹⁶⁷ However, a restrictive measure, which is non-discriminatory but whose effect on the market access is only minor, does not breach Article 49 EC.¹⁶⁸

This can be seen, for example, in *Viacom II*, where the Court stated that a tax on outdoor advertising was “modest in relation to the value of the services provided” and did not breach Article 49 EC as “the levying of such a tax is not on any view liable to prohibit, impede or otherwise make less attractive the provision of advertising services to be carried out in the territory of the municipalities concerned”.¹⁶⁹ Notwithstanding the close points of similarity between the freedom to provide services and the free movement of goods, the market access criteria for services are incompatible with “certain selling arrangements” within the meaning of the provisions on free movement of goods. In *Alpine Investments*, the ECJ dismissed any analogy with selling arrangement, in that the prohibition in question did not fall outside the scope of the Treaty.¹⁷⁰ The Court held that “certain selling arrangements” were acceptable exceptions for the free movement of goods, because the application of such provisions is not such as to prevent access

¹⁶⁴ Barnard (2007) p. 371

¹⁶⁵ Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd* (1991) ECR I-4221, para. 13.

¹⁶⁶ *Säger*, para. 12.

¹⁶⁷ Barnard (2007) p. 376.

¹⁶⁸ Barnard (2007) p. 374.

¹⁶⁹ Case C-134/03 *Viacom II* (2005) ECR I-1167 paras. 37-38.

¹⁷⁰ *Alpine Investments*, para. 36.

by the products from other Member States to the market of the Member State of importations or to impede such access more than it impedes access by domestic products.¹⁷¹ In *Omega*, the Advocate General emphasized this difference by stating “a rule on arrangements for the provisions of any service -irrespective of location- must constitute a restriction of relevance to Community law simply because of the incorporeal nature of services, without any distinction at all being permissible in this respect between rules must be understood in the special context of services relating to arrangements for the provisions of services and rules that relate directly to the services themselves”.¹⁷²

Translated into a general rule, a restriction will fall within the scope of Community law and require objective justification if the effect on the individual’s access to the market of Member States can be shown. This holds true regardless of the equally restrictive marketing effect on situations wholly internal to a Member State.¹⁷³ Yet, the ECJ normally avoids classifying national rules as indistinctly applicable or non-discriminatory, in that it merely decides on whether the rule in question is a restriction of Article 49 EC, “thereby reflecting the language of Article 49 EC itself”. If the answer is in the affirmative, the ECJ moves on to possible grounds of justifications and proportionality.¹⁷⁴ In the cases following *Säger* and *Gebhard*, the ECJ has simplified the language, in that the deciding question is whether the national measure restricts or creates an obstacle to the free movement.¹⁷⁵

4.5 The market access model and national employment laws

The traditional view that employment laws apply to all those who worked within the territory of the relevant Member State, the *lex loci laboris* principle, was enshrined in the Rome convention of 1980 on rules concerning the law applicable to contractual obligations, and to a certain extent in the PWD.¹⁷⁶ The rationale behind these rules is in part that they protect the right of the individual Member State to regulate employment laws on its own territory, in part that they ensure equal treatment between national and non-national workers.¹⁷⁷ This approach is also well suited for the discrimination model and its emphasis on equal treatment. In accordance with this model, national employment laws, which apply equally to

¹⁷¹ *Alpine Investments*, para. 37.

¹⁷² Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt, Bonn* Opinion of the Advocate General, para. 36.

¹⁷³ *Craig and de Búrca* p. 822.

¹⁷⁴ *Barnard* (2007) pp. 376-377

¹⁷⁵ *Barnard, Employment rights, Free Movement Under the EC Treaty and the Service Directive*, Mitchell Working Paper Series, 5/2008, at

http://www.law.ed.ac.uk/file_download/series/44_employmentrightsfreemovementundertheectreatyandtheservicesdirective.pdf (visited 29 November 2008), p. 5.

¹⁷⁶ *Barnard* (2008) p. 3.

¹⁷⁷ *Barnard* (2008) p. 3-4.

nationals and non-nationals, would not contravene the common market freedoms since they do not discriminate on the ground of nationality. Furthermore, direct or indirect discrimination does not necessarily change the substance of the law in question, since only its discriminatory element would have to be removed.¹⁷⁸ The transition from the discrimination model to the market access model was in no way helped by the famous *Rush Portuguesa* judgement, where the ECJ made an error by answering a question, which was not necessary for its decision but which gave the impression that the Member States were given a green light to enact or strengthen their domestic labour laws.¹⁷⁹ More precisely, the Court held that “Community law does not preclude Member States from extending their legislation, or collective agreements entered into by both sides of the industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established”.¹⁸⁰

Nevertheless, the gradual change in the Court’s case law, from an emphasis on discrimination to an emphasis on market access, decreased the regulatory autonomy of the Member States in favour of a faster creation of the single market.¹⁸¹ Since the freedom to provide services and the right to establishment operate under different regulatory control, the former being under home state control and the latter being under host state control, it would seem only natural to apply the non-discrimination model to the right to establishment and the market access model to the freedom to provide services.¹⁸² However, as demonstrated in *Gebhard*, the case law of the ECJ has made it clear that the market access approach is not confined to the provision of services, and this holds equally true for national employment laws. In fact, the market access approach is so broadly defined that it would be possible to argue that the mere fact that a self-employed person or a commercial undertaking have to comply with the employment laws of the host state when employing personnel in that state is enough for the employment laws to be considered liable to restrict their willingness to establish themselves in accordance with Article 43 EC.¹⁸³

4.6 Market access and collective action in the *Laval* and *Viking* cases

The *Laval* and *Viking* cases cannot be said to broaden the scope of Articles 43 and 49 EC, because the ECJ held on to its usual formulation of what constitutes a restriction to the common market freedoms by referring to anything, which hinders or renders less attractive the exercise of the right to establishment and the freedom to provide services respectively. It is

¹⁷⁸ Barnard (2008) p. 4.

¹⁷⁹ Paul Davies, *The Posted Workers Directive and the EC Treaty*, ILJ, Vol. 31, No. 3, 2002, p. 300.

¹⁸⁰ Case C-113/89 *Rush Portuguesa* (1990) ECR I-1417, para. 18.

¹⁸¹ Barnard (2008) p. 4-5.

¹⁸² Barnard (2008) p.5.

¹⁸³ Barnard (2008) p. 7.

however hard to think of a meaningful collective action that would not be considered a restriction to the free movement under the market access model, for collective actions are by their nature intended to inflict economic damages on employers, which in turn makes them an incarnation of what constitutes rendering a particular course of action “less attractive”.¹⁸⁴ The inherent link between collective action and economic damage was also reiterated by AG Mengozzi in *Laval*, who specifically noted that the collective action gave rise to significant costs for *Laval*.¹⁸⁵ The systematic nature of the mechanism with which the unions forced foreign service providers, “either to subscribe to the conditions of the collective agreement or to abandon its operation”, was also considered restrictive.¹⁸⁶ Moreover, the AG pointed out that the restrictive nature of the imposed conditions was not changed by the fact that the undertaking could have continued its economic activity, had it signed the collective agreement.¹⁸⁷

The Court concluded that the collective actions in question were liable to make it less attractive or more difficult to carry out construction work in Sweden. Moreover, the Court scolded the whole process of entering into negotiations with the trade unions for an unspecified duration in order to ascertain the rate of minimum wage.¹⁸⁸ However, the Court also noticed that the relevant collective agreement entailed terms that were not referred to in the PWD and terms that departed from the national legislative provisions and established more favourable terms and conditions of employment than those in Article 3(1), first paragraph, (a) to (g), of the PWD.¹⁸⁹ This naturally begs the question to which extent a breach of the PWD also constitutes a breach of Article 49 EC. In this respect, AG Mengozzi specifically held that “a measure that is incompatible with Directive 96/71 will, a fortiori, be contrary to Article 49 TEC, because the directive is intended, within its specific scope, to implement the terms of that Article”.¹⁹⁰

The Court followed the same *modus operandi* in the *Viking* judgement, in that it reiterated the market access approach from its previous case law. Although the Court acknowledged that the right to establishment was primarily aimed at ensuring that persons who exercise that right were treated in the same way as nationals from the host state, it also concluded that Article 43 EC prohibits the home state from hindering the establishment in other Member States.¹⁹¹ It also defined establishment as an actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period of time, and since the registration of the vessel met these prerequisites, the conditions laid down for the registration must not form an obstacle to the freedom of establishment. Given the broadly defined

¹⁸⁴ A.C.L. Davies p. 140.

¹⁸⁵ Opinion of the Advocate General in *Laval*, paras. 230-233.

¹⁸⁶ Opinion of the Advocate General in *Laval*, para. 234.

¹⁸⁷ Opinion of the Advocate General in *Laval*, para. 239.

¹⁸⁸ *Laval*, para. 100.

¹⁸⁹ *Laval*, para. 99.

¹⁹⁰ Opinion of AG Mengozzi in *Laval*, para. 149.

¹⁹¹ *Viking*, para. 69.

market access approach, it should come as no surprise that the collective actions of the FSU and the ITF were considered as having the effect of making the exercise of the right to establishment less attractive¹⁹² and liable to restrict¹⁹³ the exercise of that right respectively.

What is more, the ECJ specifically states that not only is the action taken by the FSU making the right to establishment less attractive, it also prevents Viking line and its subsidiary from “enjoying the same treatment in the host Member State as other economic operators established in that State”.¹⁹⁴

This clearly implies that the eventual establishment in question would have been discriminatory,¹⁹⁵ even though the ECJ clearly stuck to the market access approach and its more available grounds of justification.¹⁹⁶ There are, however, certain discrepancies between the opinion of the Advocate General and the judgement, as the ECJ rules out the application of Article 49 EC in the present situation.¹⁹⁷ Reversely, Advocate General Maduro distinguishes between actions aimed at preventing the relocation and actions aimed at imposing compliance with the provisions laid down by law or collective agreements after the relocation had taken place.¹⁹⁸ The question of the applicability of Article 49 EC was considered “hypothetical” by the ECJ, since the vessel had not yet been re-flagged.¹⁹⁹ In doctrine, it has been argued that the position of the Advocate General is more in line with the previous case law, and that measures, which aim to impose compliance with the laws and collective agreements of the home state, should be considered unjustifiable under Article 49 EC, for this “implies a discriminatory partitioning of the internal market”.²⁰⁰

¹⁹² Viking, para. 72.

¹⁹³ Viking, para. 73.

¹⁹⁴ Viking, para. 72.

¹⁹⁵ Orlandini (2008) p. 577.

¹⁹⁶ Viking, para. 75.

¹⁹⁷ Viking, para. 30.

¹⁹⁸ Opinion of the Advocate General in Viking, para. 67.

¹⁹⁹ Viking, para. 30.

²⁰⁰ Orlandini (2008) p. 577.

5 JUSTIFICATIONS FOR LABOUR LAW RESTRICTION

The Viking and Laval judgements are the fruits of the poisoned tree of Rush Portuguesa²⁰¹

National labour law provisions that are considered “liable to hinder or make less attractive” the exercise of the common market freedoms have to fulfil certain conditions in order not to breach the Treaty. Regarding Article 43 EC, the Gebhard judgement makes it clear that potential restrictions have to fulfil three conditions in order not to breach the Treaty, in that they must:

- be indistinctly applicable;
- be justified by overriding requirements in the general interest;
- be proportional in the sense that they are suitable for securing the attainment of the objective which they pursue and that they do not go beyond what is necessary in order to attain it.²⁰²

Since the Court specifically referred to “the exercise of fundamental freedoms guaranteed by the Treaty”, it thereby suggested that the rules were applicable to all four freedoms.²⁰³

The scope of the freedom to provide services can however only be limited by imperative reasons in the general interest “in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established”.²⁰⁴ This means that measures, which are liable to hinder or make less attractive the providing of services, must fulfil an additional requirement to those listed in Gebhard. The addition requirement is a reflection of the principle of home state control, which makes it necessary to take account also of the extent to which the general interest is already protected in the service provider’s country of origin.²⁰⁵ This principle must be understood in the special context of services. In Gouda, the ECJ held that unjustified indistinctly applicable measures were also contrary to Article 49 EC, in that they impose an additional burden on non-national service providers.²⁰⁶ The so-called dual burden measures cannot be justified by overriding reasons relating to public interest because the requirement sought justified is already being satisfied

²⁰¹ Antonio Lo Faro, Italian scholar. Citation take from: Ales, Transnational Wage Setting as a Key Feature of a Socially Orientated European Integration: Role of and (Questionable) Limits on Collective Action, p. 9-10 at http://www.lex.unict.it/eurolabor/ricerca/wp/int/ales_n63-2008int.pdf (visited 29 November 2008).

²⁰² Gebhard para. 37.

²⁰³ Gebhard para. 37.

²⁰⁴ Säger para. 15.

²⁰⁵ Barnard, *EC Employment law*, third edition, OXFORD UNIVERSITY PRESS, 2006, p. 267.

²⁰⁶ Case C-288/89, Stichting Colectieve Antennevoorziening Gouda and others v Commissariaat voor de Media, para. 12.

by the rules imposed on the service provider in the Member State of origin.²⁰⁷

5.1 Overriding requirements in the general interest

The case law of the ECJ allows for exceptions to the common market freedoms on grounds of public interest. This is motivated by the idea that there are certain national interests worthy of protection that should take precedent over the free movement.²⁰⁸ The protection of workers and the prevention of social dumping are both recognised as public interest exceptions, albeit the early case law of the ECJ referred only to the individual interest of the posted workers and not necessarily to the collective or individual interest of the workers in the host Member States.²⁰⁹ The prevention of social dumping should, however, be perceived as the extension of certain national interests to posted workers, but for the benefit of the workers of the host state.²¹⁰ In *Commission v. Germany*, the ECJ held that a justification based on the prevention of social dumping allowed the Member States to extend their legislation or collective agreements relating to minimum wages to any person who is employed, even temporarily, within their territory.²¹¹ It is also possible to interpret the distinction between the prevention of social dumping, on the one side, and the protection of workers, on the other, as being interconnected in the sense that the former is permissible only to the extent that it also protects the posted workers. In *Finalarte*, for example, the Court held that it was up to the national court to decide whether “the rules in question in the main proceedings promote the protection of posted workers”, though the aim of the relevant measure was first and foremost the prevention of social dumping.²¹²

Although there is a connection between the broad scope of the market access model and the equally broad list of justifications, that does not mean that the list of justifications is endless or that the Court will accept justifications motivated by economic protectionism.²¹³ In *SETTG*, the ECJ scrutinised a Greek law that required all tourist guides to have a particular employment relationship. The Greek government argued that the law was justified on the grounds of “maintaining industrial peace as a means of bringing a collective dispute to an end and thereby keeping any adverse

²⁰⁷ Gouda para. 13.

²⁰⁸ Barnard (2006) p. 267.

²⁰⁹ See Case C-164/99 *Portugaia Construções* (2002) ECR I-787, paras. 12, 20 and 22.

²¹⁰ Taco van Peijpe, *If Vaxholm were in Holland: Interest Conflicts and Labour Law in a Comparative Perspective*, “EU Industrial Relations v. National Industrial Relations”, ed. Mia Rönnmar, p. 203.

²¹¹ Case C-244/04 *Commission v Germany*, para. 61

²¹² Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte Sociedade Constrcao Civil v. Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* (2001) ECR I-7831, paras. 38 and 41.

²¹³ Barnard (2006) p. 269.

effects on an economic sector and consequently on the economy of the state”. However, in light of the fact that the measure effectively prevented self-employed tourist guides from other Member States from providing their services, the Court considered it an economic aim, “which could not constitute a reason relating to the general interest that justified a restriction on the freedom of establishment”.²¹⁴ The actual motive behind national legislations can nevertheless be hard to determine. This is actually problematic in the sense that the reason behind a law makes a difference. If, for example, a law pursues an economic aim, such as the protection of national businesses, it does not meet the prerequisite related to workers’ protection or prevention of social dumping; nor can it be considered as an overriding requirement in the general interest.²¹⁵ Interestingly, even in *Finalarte*, where the German legislator had expressed the aim to protect German businesses in an explanatory memorandum to the law in question, the Court deemed the statements as non-conclusive.²¹⁶ Since the ECJ did not declare the German law incapable of being justified, this seems to support the notion that the Court normally does not pursue this step of the analysis to any significant extent.²¹⁷ This also means that the Court looks objectively at the expressed aim to see if it is genuinely economic or whether the rules actually serves a more legitimate aim. Having said that, the Court has allowed certain economic grounds of justification to be successfully invoked by the Member States.²¹⁸

The reason why the “preservation of industrial peace” is an unjustifiable economic aim, whereas others, like the maintenance of the financial balance of a social security scheme, are not, is difficult to explain. In doctrine, it has been argued that the Court defines the scope of economic aims in accordance with the extent of control it wants to exercise over the objectives put forward by the Member States as being overriding reasons in the general interest. A different suggestion is that the Court accepts overriding reasons of public interest, which pursue economic aims, when the economic aims are of a structural but not of a circumstantial nature. A third explanation is that the Court allows economic aims if they are pursued overtly by economic measures, whereas it resists economic aims if they are pursued by “fantasy measures”. The rationale for this approach is that overt economic aims are easier to monitor.²¹⁹

There are also other limiting factors relating to the reason of public interest. If, for example, the measure sought justified is incompatible with the fundamental rights protection, the Member State cannot invoke reason of public interest. In *Carpenter*, the Court stated that a Member could invoke reasons of public interest to justify a national measure likely to obstruct the

²¹⁴ Case C-398/95 *SETTG v. Ypourgos Ergasias* (1997) ECR I-3091, para. 23.

²¹⁵ *Finalarte* para. 39.

²¹⁶ *Finalarte* para. 40.

²¹⁷ Paul Davies p. 301.

²¹⁸ Barnard (2006) p. 269.

²¹⁹ Hatzopoulos, *Recent developments of the case law of the ECJ in the field of services*, *Common Market Law Review* 37: 43-82, 2000, p. 79.

exercise of the freedom to provide services, “only if that measure is compatible with the fundamental rights whose observance the Court ensures”.²²⁰

5.2 Justifications for restricting the right to establishment

It is clear that Article 43 EC not only prohibits the host country from restricting the establishment of non-national undertakings, but also the Member States of origin from preventing its nationals and undertakings from establishing themselves in another Member State.²²¹ In the past, the right to establishment has played a marginal role in relation to employment law. For instance, an Italian law stipulating that only private security firms holding Italian nationality were allowed to carry out private security work in respect of movable property and buildings was held to also violate Article 43 EC.²²² The specific overriding reason of public interest relating to workers protection has been invoked in a handful of case concerning establishment. It was invoked, for example, to justify a German law stipulating that a German branch of a construction undertaking established in another Member State was not belonging to that sector unless 50 per cent of total staff working time was spent by workers on construction sites.²²³

In respect of relocations, laws stipulating that workers keep existing terms and conditions are normally out of the question, because the actual relocation precludes the relocation of the workers in question. Furthermore, a physical relocation of the work place could potentially fall under Council Directive 2001/23 EC, which specifically guarantees the safeguarding of the jobs and conditions of employment for the transferred workers.²²⁴ Since home state control is a special characteristic of the freedom to provide services, the lion share of the case law on posted workers is not necessarily relevant in the field of establishment, in that they reflect that particular characteristic. Yet, the protection of workers, which is the relevant requirement in the public interest in the Viking judgement, is relevant also in the field of establishment.

5.3 Justifications for restricting the freedom to provide services

The ECJ has outlined a four-fold method of analysis for assessing the legality of national labour laws in respect of the Article 49 EC. The first step assesses whether the national law has a restrictive effect on the provision of

²²⁰ Case C-60/00 *Mary Carpenter v. Secretary of State for the home department* (2002) ECR I-3689, para. 40.

²²¹ Case 81/87 *The Queen / Treasury and Commissioners of Inland Revenue* para. 16.

²²² Case C-283/99 *Commission v. Italy*

²²³ Case C-493/99 *Commission v. Germany* para. 35.

²²⁴ *Orlandini* (2008) p. 579.

cross-border services, though it appears to apply equally to both home and host state service providers.²²⁵ Given the broad definition of the market access approach, this stage does not detain the ECJ to any significant extent. In *Mazzolini*, the ECJ stated that the application of the host state rules “is liable to prohibit, impede or render less attractive the provision of services to the extent that it involves expenses and additional administrative and economic burdens”.²²⁶ That said, the service provider does not have to demonstrate that this is actually the case.²²⁷ The second step assesses the extent to which the restrictive effect can be justified. Since the provision of services is one of the common market freedoms, the relevant restriction has to be justified on grounds of overriding requirements relating to the public interest.²²⁸ Based on the broad nature of the market access model, the ECJ has adapted the number of justifications accordingly.²²⁹ For labour law restrictions, the usual ground of justification is either the protection of workers or the prevention of social dumping. From the case law of the ECJ, two types of measures stand out as being particularly hard to justify, namely national legislation that does not even remotely pass off as treating home and host state service providers equally, and rules with which the host state service provider has a great deal of problems complying.²³⁰

The third investigatory step looks at the terms and condition of employment of the posted workers in order to assess whether they are actually improved by the extension of the host state’s rules.²³¹ In cases where the legislation of home state already provides the posted workers with a similar protection as the rules in the host state, the ECJ will not be easily persuaded that the rules of host state actually confer real benefits on the posted workers. As a rule, this means that the national authorities have to check the rules of the home state before extending national legislation.²³² This is in part in contrast with the PWD, because Article 3(7) PWD seems to provide for this solution only when the home state rules are more favourable to the workers. If the home state rules are more favourable, these rules apply to posted workers. However, even where there is no equivalent protection in the home state, the laws of the host state must actually confer a benefit on the posted workers.²³³ This step thus underlines the above-made distinction between the prevention of social dumping and the protection of workers because, irrespective of the aim in question, the extension of the rules of the host state must nevertheless improve the working conditions of the posted workers. The fourth step is the assessment of whether the identified benefit is proportional for the attainment of the sought aim. National legislation that confers genuine benefits on the posted workers, are still required to pass the proportionality test, i.e. whether those benefits could be supplied with less

²²⁵ Arblade para. 39.

²²⁶ Case C-165/98 *Mazzoleni* (2001) ECR I-2189, para. 24.

²²⁷ Davies p. 301.

²²⁸ Arblade paras 33 and 34.

²²⁹ Barnard (2006) p. 269.

²³⁰ Davies p. 303.

²³¹ Davies p. 302.

²³² Davies p. 303.

²³³ Davies p. 305.

impact on the service provider.²³⁴ The Court tends to focus on step three and four.²³⁵

5.4 The case law on posted workers

In *Arblade*, the ECJ examined a set of Belgian rules that imposed minimum remuneration, made the drawing up, keeping and retaining of social documents for the posted workers necessary and required the payment of supplementary social security contributions.²³⁶ The Court accepted the minimum remuneration, but rejected the extra administrative requirements²³⁷ and the supplementary payment of social security contributions²³⁸. The Court noted that the French companies were subject to similar administrative obligations in their home state. The Court stated thereto, “the mere fact that there are certain differences of form or content cannot justify the keeping of two sets of documents”.²³⁹ In general terms, this case confirms three principles regarding the extension of national host state labour law to posted workers, which will be presented in the following subparagraphs.²⁴⁰ These basic principles are to a certain extent codified in the PWD, especially regarding minimum wage.²⁴¹

5.4.1 Administrative requirements

The scope of the provisions of services presupposes that service providers may depart from the home state with their own personnel in order to pursue the providing of services in a host state, without being subject to supplementary administrative requirements concerning either immigration or labour market regulations.²⁴² In *Rush Portuguesa*, it also became clear that the same principle applies regardless if the personnel are third country nationals.²⁴³ In *Corsten*, the ECJ ruled out certain labour market regulations concerning compulsory memberships and membership fees in the “Chamber of the Skilled Trades”, as the rules in question could be justified in the case of establishment, but not for the providing of services “on an occasional basis”.²⁴⁴ The Court held thereto that an authorisation procedure “should neither delay nor complicate” the exercise of the freedom to provide services in order to be justified.²⁴⁵ This reasoning was reiterated in the *Schnitzer* judgment, where the ECJ held that the obligatory membership of trade register “cannot be other than automatic, and that requirement cannot

²³⁴ Davies p. 305.

²³⁵ Davies p. 302.

²³⁶ *Arblade* para. 40.

²³⁷ *Arblade* para. 64.

²³⁸ *Arblade* para. 52.

²³⁹ *Arblade* para. 64.

²⁴⁰ Hatzopoulos and Do, *The case law of the ECJ concerning the Free Provisions of Services: 2002-2005*, CMLRev., 2006, p. 973 et seq.

²⁴¹ Hatzopoulos and Do p. 972.

²⁴² Hatzopoulos and Do p. 972

²⁴³ Case C-113/89 *Rush Portuguesa Ld^a v Office national d'immigration*

²⁴⁴ Case C-58/98 *Corsten* (2000) ECR I-7919, para. 45.

²⁴⁵ *Corsten* para. 47.

constitute a condition precedent for the provision of services, result in administrative expense for the person providing them or give rise to an obligation to pay subscriptions to the chamber of trades”. If failing to meet these requirements, the entry was to be considered unjustifiable.²⁴⁶ Work permits for third country nationals or even collective working permits delivered under exceptional circumstances was thus not accepted by the ECJ in *Commission v. Luxembourg*, in that it “involves formalities and periods which are liable to discourage the provision of services through the medium of workers who are nationals of non-member countries”.²⁴⁷ This can be contrasted with the *Wolff & Müller* case, where the ECJ accepted certain procedural arrangements in a German law linked to the joined liability between construction undertakings and subcontractors. More particularly, the Court held that “if entitlement to minimum rates of pay constitutes a feature of worker protection, the procedural arrangements ensuring observance of that right, such as the liability of the guarantor in the main proceedings must likewise be regarded as being such as to ensure that protection”.²⁴⁸

5.4.2 Minimum remuneration

There are legislative requirements in the host state, concerning minimum remuneration and other working conditions, with which service providers may have to comply. This is equally true for national measures that are appropriate for monitoring such requirements.²⁴⁹ A potential problem regarding minimum wage is wage comparison in cross border situations. This can be seen in *Mazzoleni*, where a French company provided security guards for brief periods at a shopping mall in Belgium. During an inspection by the Belgian labour law inspectorate, it was found that the monthly wage of the French personnel was less than the minimum wage in Belgium, even though their remuneration package was similar to, if not more favourable than, the remuneration under Belgian law.²⁵⁰ The Court held that the service provider should abide by the minimum wage requirements applicable in the host state,²⁵¹ but then suggested that the relevant measure was disproportional to the objective pursued.²⁵² The objective of ensuring the same level of welfare protection would be attained, “if all the workers concerned enjoy an equivalent position overall in relation to remuneration, taxation and social security contributions in the host Member State and in the Member State of establishment”.²⁵³

The host state can also be justified in requiring that the service provider pay its workforce minimum wage laid down in collective agreements, if the

²⁴⁶ Case C-215/01 *Schnitzer* (2003) ECR I-14847, para. 37

²⁴⁷ Case C-445/03 *Commission v Luxembourg* (2004) ECR I-10191, para. 30.

²⁴⁸ Case C-60/03 *Wolff & Müller* (2004) ECR I-9553, para. 37.

²⁴⁹ *Hatzopoulos and Do* p. 972.

²⁵⁰ Case C-165/98 *Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL* (2001) ECR I-2189, para. 33.

²⁵¹ *Mazzoleni* para. 28.

²⁵² *Mazzoleni* para. 30.

²⁵³ *Mazzoleni* para. 35.

provisions of the collective agreements are sufficiently precise and accessible and do not render it impossible or excessively difficult in practice for the employer to determine his obligations.²⁵⁴ However, the *Mazzoleni* judgement also contained parts that questioned the extension of minimum wage in general, at least to the extent that it concerned an undertaking established in a frontier region.²⁵⁵ This statement was later reiterated in *Portugaia Construcoes*, where the Court held that the extension of minimum wage by a collective agreement could violate Article 49 EC, in particular if it did not significantly augment the social protection of the workers.²⁵⁶ This means that minimum wages are not automatically and necessarily applicable to posted workers, albeit the meaning of the term “significantly” is unclear in this context.²⁵⁷

5.4.3 Social security obligations and other charges

Service providers do not have to comply with all the social security obligations for workers who are already insured in their home state, except when they add up for the protection of workers. The same holds true regarding other formalities linked to social security obligations.²⁵⁸

In the *Finalarte* judgement, the ECJ dealt with the question of whether employers established in other Member States with posted personnel in Germany should participate in a paid-leave scheme for the protection of workers who frequently changed employers. The Court accepted that the host Member State could extend the rules in question, provided that “those rules confer a genuine benefit on the workers concerned, which significantly adds to their social protection”.²⁵⁹ However, even if the rules were shown to actually benefit the workers, they would still have to be proportional. This means that the protection of workers has to be weighed against the economic freedom of their employer, which could potentially open up a gap in the protection of workers. It is thus important to recognise that measures beneficial for the posted workers are not immune as such, in that they are subject to this qualification.²⁶⁰

5.5 The Posted Workers Directive

The Posted Workers Directive was adopted in the context of the provisions of services and it has been in force since the end of 1999. The PWD is basically an incarnation of the Article 50(3) EC, in that it can be said to realise its aim, which is to further the temporary providing of services in one Member State under the same conditions as those applicable to providers

²⁵⁴ *Arblade* paras 41 and 43.

²⁵⁵ *Mazzoleni* para. 36.

²⁵⁶ Case C-164/99 *Portugaia Construções Lda* (2002) ECR I-787, para. 29.

²⁵⁷ *Hatzopoulos and Do* p. 975.

²⁵⁸ *Hatzopoulos and Do* p. 973.

²⁵⁹ *Finalarte* para. 42.

²⁶⁰ *Hatzopoulos and Do* p. 976.

established in that particular Member State.²⁶¹ The rationale behind the directive is that a service provider who has to adjust his employment conditions every time that he posts workers in another Member State is being put at a competitive disadvantage in comparison with service providers of the host state, especially since differences in labour standards could reflect the higher productivity of the host state workers.²⁶²

The content of the directive can be divided into three parts, namely “the definition of “posting”, the applicable standard, and exemptions”.²⁶³ The directive uses the term “posting” for situations where service providers send employees to work in other Member States than the service providers’ state of origin for a limited period of time.²⁶⁴ The Directive sets out from Article 1(3) PWD, which stipulates that there must be an employment relationship between the posted workers and an undertaking established in the home Member State. This excludes workers who on their own accord take up employment relationships with undertakings of the host Member State. Moreover, this also implies a contractual link between the employer of the home state who sends workers to the host state and the undertaking of the host state for whom the rendering of services are being carried out.²⁶⁵ If, for example, the workers are sent to another Member State in order to provide services on behalf of employer of the home state, the directive is thus not applicable.²⁶⁶ In accordance with the host country principle, the directive stipulates that, regarding certain working conditions, there should be no difference between workers.²⁶⁷

The applicable standard of protection is stipulated in Article 3 PWD. Article 3(1) PWD stipulates a set of core rules regarding working hours, paid holidays, minimum remuneration, and health, safety and hygiene at work etcetera. These rules are mandatory, though the extension of minimum remuneration depends on the existence of provisions of that nature in the relevant Member State. Moreover, Article 3(1) PWD provides that the provisions listed in the Article must either be laid down by law, regulation or administrative provision and/or by collective agreements or arbitration awards that have been declared universally applicable in accordance with Article 3(8) PWD. In accordance with Article 3(8) and (10) PWD, the host Member State is allowed to apply three other sets of rules to its posted workers.²⁶⁸ First, core rules may be applied in the construction industry when they are stipulated in generally applicable collective agreements or

²⁶¹ Hellsten p. 7.

²⁶² Davies p. 300.

²⁶³ Davies, *Posted Workers: Single market or protection of national labour law systems?*, *Common Market Law Review* 34: 571-602, 1997, p. 575.

²⁶⁴ Cremers, Dolvik & Bosch, *Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU*, *Industrial Relations Journal* 38:6, p. 527.

²⁶⁵ Davies (1997) p. 576.

²⁶⁶ Davies (1997) p. 576.

²⁶⁷ Cremers, Dolvik & Bosch, *Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU*, *Industrial Relations Journal* 38:6, p. 527.

²⁶⁸ Davies 298-299.

made by most representative organisations. This applies even when such collective agreements have not been declared legally enforceable. Second, when these core rules fall in the category of public policy provisions, they may be applied to posted workers in all industries. Third, rules relating to matters outside the core standard, which can be found in collective agreements, may be applied to posted workers in all industries as long as the rules does not create inequality of treatment between enterprises established in the host State and those in the home State. This holds true irrespective of whether the collective agreement has been declared universally applicable or not, but the public policy derogation does not apply to collective agreements that have not been declared universally applicable.²⁶⁹ The case law of the ECJ has already established that Community law does not preclude Member States from extending some of their labour law legislation to service providers within their territory, though the question of collective agreements not having an erga omnes effect is less clear. What is new with the PWD is that its Article 3 obliges Member States to ensure certain protective rules from their own labour law systems applies to posted workers. This is in contrast with Article 3(8), which makes it optional for Member States to extend terms and conditions from collective agreements with an erga omnes effect.²⁷⁰ Furthermore, Article 4.3 PWD specifically stipulates that the terms and conditions of employment referred to in Article 3 PWD must be generally available.

5.6 Post-PWD case law

The first case before the ECJ on minimum wage, after the coming into force of the PWD, was *Commission v. Germany*²⁷¹. The case concerned the German hourly minimum wage, which was agreed upon by management and labour, and which the German government had declared generally binding in accordance with Article 3(1) PWD. This case offers some important insights regarding the relationship between the PWD and the previous case law of the ECJ. The case specifically dealt with the interpretation of the second subparagraph of Article 3(1) PWD, which states that the concept of minimum rates of pay is defined by the national law or practice of the Member to whose territory the workers are posted.

Concerning the relationship between previous case law of the ECJ and the PWD, the Court declared that the previous case law was enshrined in Article 3(1c) PWD.²⁷² More importantly, the ECJ declared that step four of the analysis created in *Arblade* also applied to that case, meaning that the ECJ has extended the proportionality test from its pre-directive case law on minimum wage to the post-PWD rulings.²⁷³ It is, however, important to understand the context in which the proportionality assessment is being

²⁶⁹ Davies p. 299.

²⁷⁰ Ahlberg, Bruun and Malmberg, *The Vaxholm case from a Swedish and European perspective*, Transfer 2/06, p. 164.

²⁷¹ Case C-341/02, *Commission v. Germany*.

²⁷² *Commission v. Germany* para. 25.

²⁷³ *Commission v. Germany* para. 24.

applied. There is no such thing as a general test of proportionality in this regard, because the method applied is the indirect proportionality, which specifically balances competing interests. The Court thus analysis whether the minimum wage in question is appropriate for securing the attainment of the objective and whether the objective is necessary for the attainment of the same objective.²⁷⁴

Therefore, it is not just the proportionality per se, which is important, but also that the objective sought is within the relevant public interest criterion.²⁷⁵ Hence, the test is still relevant, unless the PWD includes precise provisions or indisputable interpretations regarding the relevant labour restriction.²⁷⁶ There are also indications that overriding reasons of public interests, such as the protection of workers, can justify exceptions to the PWD.²⁷⁷ In *Rüffert*, the ECJ suggested that a restrictive measure could be justified on grounds of overriding reasons of public interests in view of Article 49 EC, even though it breached the PWD.²⁷⁸ Given that Member States must extend existent provisions on minimum wage to posted workers, it thus seems necessary to distinguish between rules extended in accordance with Article 3(1) PWD and rules extended in accordance with 3(8) and 3(10) PWD respectively, for the previous case law regarding Article 49 EC seems to apply to the latter, whereas the former is subject only to the proportionality test.

5.7 The PWD in the Laval ruling

Regarding the specifics of the Swedish model, Sweden had actually implemented all of the mandatory minimum terms and conditions through legislation but specifically left the question of minimum wage for posted workers to be determined by collective bargaining. The question before the ECJ was whether this particular combination of legislative measures and collective bargaining was acceptable under the PWD. More precisely, the question was whether the “core” rules in Article 3(1) PWD were exclusive in the sense that other labour rules than those specifically mentioned in the Article could not be extended to posted workers.²⁷⁹ It should be noted that collective agreements are in principle a permitted mechanism for implementing the PWD. Having said that, the Swedish approach fit neither into the category of collective agreements that have been declared universally applicable, nor into the category of generally applicable collective agreements, to which Articles 3(1) and 3(8) specifically refer. The Court noted that the PWD was not intended to “harmonise systems for establishing terms and conditions of employment in the Member States”. Nevertheless, the Court ruled out the case-by-case negotiations inherent in

²⁷⁴ *Commission v. Germany* para. 24.

²⁷⁵ *Hellsten*, p. 62.

²⁷⁶ *Hellsten*, p. 16.

²⁷⁷ *Dorssemont* p. 31-32.

²⁷⁸ *Case C-346/06 Dirk Rüffert v Land Niedersachsen* para. 38.

²⁷⁹ *Ahlberg, Bruun and Malmberg* p. 165.

the Swedish system in favour of pre-existing collective agreements with minimum wages.²⁸⁰

The content of the collective agreement presented two problems, in that it in part went beyond the minimum terms and conditions envisioned in Article 3(1) PWD²⁸¹ and in that it laid down provisions of working time and annual leave, which were more favourable than the terms stipulated in the relevant legislation.²⁸² Since the purpose of the directive was to set minimum terms and conditions, the Court held that the use of collective agreements containing more favourable terms and conditions was not an acceptable implementation of the PWD. Furthermore, the relevant collective agreement also contained various provisions requiring undertakings to make payments to insurance schemes, which was not mentioned in Article 3(1) PWD and thus not permitted.²⁸³ Even though Article 3(10) PWD made it possible to impose requirements relating to matters outside of Article 3(1) PWD, the Court nevertheless ruled out extending that option to trade unions, as they were not bodies governed by public law.²⁸⁴

²⁸⁰ Laval para. 71.

²⁸¹ Laval para. 70.

²⁸² Laval para. 78.

²⁸³ Laval para. 83.

²⁸⁴ Laval para. 84.

6 THE “FUNDAMENTAL” RIGHT TO STRIKE

“People who have never been on a picket line tend to think all industrial action is disproportionate if not indecent”²⁸⁵

6.1 The method used for deriving the right to strike

In the *Laval* and *Viking* judgement, the Court starts by pointing out that the right to take collective action is recognised in various international instruments, which the Member States have signed, as well as in instruments developed by the Member States at Community level or in the context of the European Union.²⁸⁶ Based on those findings, the Court then expressively recognises the right to collective action as a fundamental right, “which forms an integral part of the general principles of Community law the observance of which the Court ensures”.²⁸⁷ This is followed by another statement, namely that the right to collective action is not absolute in the sense that the exercise of that particular right may be subject to certain restrictions.²⁸⁸ In accordance with the *Schmidberger* judgement, the method for deriving a fundamental right consists of two inquiring steps. First, whether the invoked right is a fundamental right in the sense that it can be derived from the national and international law acts that serves as sources of inspiration to the general principles of law, and, second, if that is the case, whether the exercise of that particular right may be subject to certain restrictions. It is, however, normal that legislations protecting human rights also allow for their restrictions. This is in fact necessary in a democratic society because the protection of the rights and freedoms of others, as well as the protection of public interests, require it.²⁸⁹

6.2 The legal basis of the right to strike

Community law and national law interact in a number of ways. This especially true in the field of human rights, where the ECJ “borrows” national principles only to “return” them as general principles of the EC law.²⁹⁰ There are a number of different sources of law, which the Court has used to create its catalogue of human rights. These include the common constitutional traditions of the Member States, international treaties to

²⁸⁵ Lord Wedderburn, *Labour Law: 40 Years on*, ILJ, Vol. 36:4, 2007, pp. 397-424.

²⁸⁶ *Laval* para. 90 and *Viking* para. 43

²⁸⁷ *Laval* para. 91 and *Viking* para. 44.

²⁸⁸ *Laval* para. 91 and *Viking* para. 44.

²⁸⁹ Eklund, *A Swedish perspective on Laval*, *Comparative Labour Law & Policy Journal*, Vol. 29, No. 4, 2008, p. 567.

²⁹⁰ Jans, de Lange, Prechal and Widderhoven p. 116.

which the Member States are parties, general international law and sometimes the Treaty itself.²⁹¹

6.2.1 International treaties and Community law

The Laval and Viking judgements contain references to a number of international treaties, to which the Member States are parties, as well as instruments developed by the Member States at the Community level. The international treaties, to which the Court referred, are the European Social Charter, to which Article 136 EC specifically refers, and Convention No 87 concerning Freedom of Association and Protection of the Right to Organise. At Community level, the Court referred to the Community Charter of the Fundamental Social Rights of Workers, and the Charter of Fundamental Rights of the European Union.²⁹²

The ECJ specifically directs to Article 28 of the Charter of Fundamental Rights in the context of restricting the exercise of the right to strike, which states that rights must be protected in accordance Community and national law.²⁹³ It is, however, doubtful whether the international instruments, to which the Court refers, would allow for an economic defence by the employer, i.e. that it takes time to negotiate, which was the case in Laval.²⁹⁴ Since the Court has been reluctant make use of the Charter of fundamental rights in its previous judgements and even struck down one case, where the Court of First Instance had referred to it, one of the more significant aspects of the judgements is the direct and express use of the Charter as a source for the right to strike.²⁹⁵

This implies that it is not only the “accident of litigation”, which defines the list of recognised fundamental rights, but perhaps also the Charter itself. It is nevertheless questionable whether the explicit use of the Charter is a sea-change in the relevant case law, for it is still not a legally binding document within Community law. If, for example, the Charter had been ratified, it is thus more likely that the citizens of the EU would have been empowered to invoke their rights with regard to the European institutions and the Member States implementing EC law, thereby forcing the Court to address the issue of fundamental rights more overtly as well.²⁹⁶

The ECJ has tended to refer to the Charter in its previous case law in only two types of cases. First, when the Charter is directly cited in legislative instruments and, second, where the Charter could be seen as confirming rights that were already established in its case law or in the ECHR. The Laval and Viking judgements are thus important because it is the first time that the ECJ relies on the Charter for confirming a right not previously

²⁹¹ Groussot p. 40.

²⁹² Laval para. 90 and Viking para. 43.

²⁹³ Laval para. 91 and Viking para. 44.

²⁹⁴ Eklund p. 567.

²⁹⁵ A.C.L. Davies p. 138.

²⁹⁶ Morijn p. 16.

elevated to a fundamental right.²⁹⁷ Given that the opinions of the Advocate Generals normally are “much more meticulous than the ECJ rulings”,²⁹⁸ it is also striking that the AG in Viking refers to the Charter as the sole legal basis for the right to strike.²⁹⁹ This can be contrasted with the AG in Laval who analysis a number of international treaty provisions in order to derive the right to strike.³⁰⁰

The Court seems to perceive the right to strike as an accessory to the freedom of association,³⁰¹ for it emphasizes that “the organisation of collective action by trade unions must be regarded as covered by the legal autonomy which those organisations, which are not public law entities, enjoy pursuant to the trade unions rights accorded to them, inter alia by national law”.³⁰² The reference to ILO Convention No. 87 is interesting, since it does not contain any explicit references to the right to strike, which seems to imply that the Court confirms the importance of the jurisprudence developed by the supervisory bodies of the ILO, at least implicitly. This has some importance concerning the Court’s definition of collective action because the right to strike is defined as an accessory to the freedom of association in the case law of the ILO.³⁰³

In its case law, the ECJ has pointed out that the ECHR has a special significance as a source of inspiration for the fundamental rights³⁰⁴ and all the 27 Member States have ratified the convention. The European Convention of Human Rights can thus be said to be *primus inter pares* among the treaties from which the ECJ draws its inspiration. In this regard, the ECHR is the very essence of a constitutional tradition. However, in respect of industrial action, it is in fact disputable whether the freedom of association and joining a trade union in Article 11 ECHR also include the right to strike. The Article certainly does not spell it out, but it seems possible to interpret the wording of Article 11 ECHR as having a particular application to trade unions and their activities. This seems to stem from the fact that the protection of the freedom of associations was viewed as a civil and a political right rather than a social right during the creation of the ECHR.³⁰⁵ The other dimension, the economic, social and cultural rights, was instead included in another covenant, i.e. the European Social Charter.³⁰⁶ The ESC specifically recognises the right to strike in connection with collective bargaining.³⁰⁷ Although the Court also cited the relevant ILO convention as well as other human rights sources, the use of these sources naturally begs the question to which extent the ECJ is deriving

²⁹⁷ A.C.L. Davies p. 138.

²⁹⁸ Groussot p. 81.

²⁹⁹ Opinion of the AG in Viking para. 60.

³⁰⁰ See the opinion of the AG in Laval paras. 63-78.

³⁰¹ Dorssemont p. 34.

³⁰² Viking para. 35.

³⁰³ Dorssemont p. 35.

³⁰⁴ Case 222/84 Johnston (1986) ECR 165, para. 18

³⁰⁵ Novitz p. 135

³⁰⁶ Novitz p. 135-136.

³⁰⁷ Novitz p. 143

substance from this material, as opposed to only citing it. In this regard, it should be noted that the international treaties cited in the judgement have different underlying rationales for recognising the right to strike as well as for the restrictions that they allow states to impose on that particular right. This can be exemplified by the fact that the right to strike is clearly recognised in the ESC, whereas it has a less clear status in the ECHR.³⁰⁸

It is also noticeable that those sources attract no attention when the Court considers how the right to strike might be legally restricted.³⁰⁹ It can in fact be argued that the ECJ only recognised the right to strike in a negative context, in that the trade unions were allowed to invoke the right to collective action in order to defend themselves against actions based on the right to establishment and the freedom to provide services respectively. The notion of “negative context” thus stems from the fact that the right to strike is used primarily as a defence against the free movement. This reasoning can in part be explained by the fact that Article 137(5) EC specifically excludes the right to strike from the competence of the Community. This puts the right to strike in contrast with fundamental rights that are positively protected by the Community, such as, for example, the right to equal pay for men and women.³¹⁰

6.2.2 National constitutional provisions

It is of utmost importance how the ECJ compares and analyses national constitutional provisions when it derives fundamental rights. The ECJ prefers in most of the cases to generally observe that the invoked right is “common to the constitutional traditions of the Member States”. This can be contrasted with the Advocate Generals who more often embark on an in-depth constitutional analysis, on which the Court, in turn, generally relies.³¹¹ The fact that the Court rarely refers explicitly to national constitutional provisions does not necessarily mean that it disregards them.³¹² There are, however, instances where the ECJ has embarked on a more in-depth analysis of different national constitutional provisions.³¹³ This can be exemplified by the *Hauer* judgement, where the ECJ held that the provisions of the ECHR were not precise enough to allow the recognition of a general principle of Community law regarding the right to property.³¹⁴ In order to answer the question referred, the Court then found it necessary “to consider also the indications provided by the constitutional rules and practices on the nine Member States”.³¹⁵ In other words, this method of analysis consists of two steps, where the Court first looks into the ECHR, and from the lack of answers provided there, then proceeds to specific national constitutional

³⁰⁸ A.C.L. Davies p. 139.

³⁰⁹ A.C.L. Davies p. 139. (*Laval* paras. 91-92 and *Viking* para. 44.)

³¹⁰ A.C.L. Davies p. 139.

³¹¹ Groussot p. 76.

³¹² Wouter, *National constitutions and the European Union*, LIEI 2000, p. 49.

³¹³ Groussot p. 76.

³¹⁴ Case 44/79 *Hauer* (1979) ECR 3237, para. 19.

³¹⁵ *Hauer* para. 20.

provisions.³¹⁶ Given the status of the ECHR in the case law of the ECJ and the unclear status it confers on the right to strike, it would seem only natural for the Court to turn to the methodology used in *Hauer*.

However, neither the ECHR nor the constitutions of the Member States were a part of the analysis of the Court. In fact, neither in the *Laval* ruling nor in the *Viking* ruling does the ECJ even state that the right to strike was a part of the common constitutional traditions of the Member States, and it did not explicitly derive any substance from those sources. The only Member of the Court that actually referred to the constitutional traditions of the Member States was the AG in *Laval*, who pointed out that “the constitutional instruments of numerous Member States explicitly protect the right to establish trade unions and the defence of their interests by collective actions, the right to strike being, in that connection, the method most regularly referred to”.³¹⁷ His conclusions seems to find some support in doctrine, where it has been stated that the right to strike is protected in the constitutions of the Member States to the extent that it could be considered a fundamental right within the meaning of EC law on that basis alone.³¹⁸

This legal doctrine is however contradictory in this regard, for it has also been argued that the right to take collective action is not legally recognised in the majority of the constitutions of the Member States, but rather comes from interventions by the supreme courts.³¹⁹ A recent comprehensive comparative overview presents a rather complicated picture of the right to strike within the EU. It is clear that a majority of the Member States have some kind of reference to the right to collective action³²⁰, which corresponds with the conclusions of the AG in *Laval*. That said, nine Member States have no constitutional provisions concerning the right to strike³²¹ and the content of that right is hard to define, as it has different substance in different Member States. Furthermore, it is considered as an individual right in some Member States, whereas it must to be exercised by trade unions in others, and, to make things more complicated, it should also be noted that some types of collective action are legal in some legal systems but prohibited in others.³²²

The AG in *Laval* noticed these divergences and made a distinction between the right to resort to collective action and the means of exercising it. In this context, the AG points out that the exercise of the right to strike “may differ from one Member State to another and do not automatically enjoy the protection of that right itself”. In fact, the blockade action and the solidarity

³¹⁶ Groussot p. 77.

³¹⁷ The opinion of the AG in *Laval* para. 77.

³¹⁸ Hellsten p. 95.

³¹⁹ Dorssemont p. 35.

³²⁰ W. Warneck, *Strike rules in the EU 27 and beyond*, European Trade Union Institute, Brussels, 2007, at http://www.etuc.org/IMG/pdf/Strike_rules_in_the_EU27.pdf, p. 7.

³²¹ Austria, Belgium, Czech Rep., Finland, Germany, Ireland, Luxembourg, Malta and the UK.

³²² Warneck p. 8.

strike must be considered as “less common” forms of action.³²³ The recognition of the exercise of the right to take collective action in a less universally accepted way as a general principle of EC law is, however, unlikely to urge the Member States to adapt their regulation of the right to industrial action.³²⁴ The only time that the Court referred to national constitutional provisions was in the second step of the analysis, where it examined whether exercising of the right to strike could be restricted. In this context, both the Finnish and Swedish constitutions opened up for restricting the exercise of this particular right.³²⁵

6.3 Conclusions on the legal basis of the right to strike in EC law

In *Albany*, Advocate General Jacobs stated that the recognition of general principles requires a “sufficient convergence of national legal orders and international orders and international legal instruments”.³²⁶ In the light of these prerequisites, it has actually been questioned whether a comparative overview of the regulation of the right to strike would provide evidence of a sufficient convergence.³²⁷ Having said that, it is also clear that even though the right to strike is protected differently in different Member States, there is sufficient support from the various international treaties cited in the judgements. In fact, it could even be argued that the right to strike takes precedent over the EC Treaty, in that ILO Convention No 87 has remained in force in EC law by Article 307 EC, which stipulates that rights and agreements prior to the Treaty shall not be affected by the provisions of the Treaty.³²⁸ Furthermore, in its external relationships, the EU promotes and rewards countries that apply these rules, which would create a moral dilemma if they did not apply within the union.³²⁹

³²³ AG Laval para. 80.

³²⁴ Dorssemont p. 36.

³²⁵ Laval para. 92 and Viking para. 44.

³²⁶ Opinion of AG Jacobs in Case C-67/96 *Albany International* para. 160.

³²⁷ Dorssemont p. 35-36.

³²⁸ Hellsten p. 101.

³²⁹ Hellsten p. 96-97.

7 THE RIGHT TO STRIKE -V- FREE MOVEMENT

“Neither the Treaty rules on freedom of movement, nor the right to associate and the right to strike are absolute”³³⁰

The Laval and Viking judgements make it clear that a restrictive collective action can be justified if (I) it pursues a legitimate objective compatible with the Treaty, (II) it is justified by overriding reasons of public interest and (III) it is proportional in the sense that it is suitable for securing the attainment of the objective which it pursues and it does not go beyond what is necessary in order to attain it.³³¹ This section will look closer at the individual steps followed in the Laval and Viking judgements. Therefore, this section starts with a closer look at the public interest criteria, namely the protection of workers and the prevention of social dumping. The proportionality test will then be examined with regard to collective action. Although the two cases concern different common market freedoms and different overriding reason of public interests, they will, nevertheless, be analysed together, for it is by using a method of comparison that the status of collective action in EC law can be defined.

7.1 Overriding reasons of public interest

The overriding reasons of public interest derive from the notion that there are certain national interests that must be protected at Community level. It is clear from the Schmidberger judgement that “since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest”.³³² However, there is a clear difference between the Schmidberger judgement, on the one hand, and the Laval and Viking judgement, on the other, as the Schmidberger judgement seems to be based on the assumption that the freedom of assembly and expression were capable in themselves of limiting the free movement of goods.³³³ In this context, it is important to remember that the Schmidberger judgement was a state liability case and that the ECJ referred to the fact that the national authorities had authorised the demonstration³³⁴, albeit the actual demonstration was the work of individuals. This is why the ECJ examined the aim pursued by the authorities of the Member State in question and not the aim of the protesters.³³⁵ Reversely, the aim pursued by the collective action undertaken by the trade unions in Laval and Viking is decisive in the

³³⁰ Opinion of Advocate General Maduro in Viking para. 23.

³³¹ Laval para. 101 and Viking para. 75.

³³² Schmidberger para. 74.

³³³ Schmidberger para. 74.

³³⁴ Schmidberger paras. 2 and 68

³³⁵ Opinion of the Advocate General in Laval para. 244.

context of a dispute between private persons.³³⁶ The requirement that collective action must be justified with reference to the end that it serves is consistent with the Court's case law regarding labour law restrictions in general.³³⁷ The legality of the exercise of a fundamental right is a balancing act between the completion of the internal market on the one hand and "a policy in the social sphere" on the other.³³⁸

7.1.1 The protection of workers

In *Viking*, the Court starts its analysis by pointing out that "the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty...and that the protection of workers is one of the overriding reasons of public interest recognised by the Court"³³⁹. The Court then proceeded to scrutinise the self-proclaimed aim of the FSU and the ITF, to see if their objectives pursued by means of industrial action really concerned the protection of workers.³⁴⁰ Although the Court held that the actual assessment was the task of the Member State, that did not prevent it from giving strong directions as to how the national court should make the actual assessment. Since the collective actions undertaken by the ITF deal with the broader question of the status of solidarity action in Community law, the public interest criterion for that particular action is examined in the following subparagraph.

Concerning the industrial action taken by the FSU, the ECJ points out that even if the aim of the industrial action in question corresponds with the overriding reasons of public interest, this position could not be defended if it would turn out that "the jobs or conditions of employment at issue were not jeopardised or under serious threat".³⁴¹ This means that a collective action can be taken only to protect jobs and employment conditions, which are liable to be negatively affected.³⁴² It has been pointed out that the presupposition that the justification has to be based on the conception that "jobs or conditions of employment" are "jeopardised or under serious threat" can lead to questionable judicial interference with regard to the relative autonomy of management and labour, as it is up to the national court to make the actual assessment. The use of the public interest criterion as the point of reference forces the national courts to establish whether the fears leading up to the industrial action were sufficiently grounded. This supposedly leaves out degrees of "fear", which are less strong, meaning that a simple "fear" is perhaps not enough.³⁴³ It is in any case problematic for the national court to make such an assessment, in that it presupposes that

³³⁶ Opinion in *Laval* para. 245.

³³⁷ Syrpis and Novitz, *Economic and social rights in conflict: Political and judicial approaches to their reconciliation*, *European Law Review*, Issue 3, 2008, p. 422.

³³⁸ *Viking* para. 78 and *Laval* para. 104.

³³⁹ *Viking* para. 77.

³⁴⁰ *Viking* para. 80.

³⁴¹ *Viking* para. 81.

³⁴² Barnard (2008) p. 13.

³⁴³ Orlandini (2008) p. 578.

there is spectrum of fears from which it must choose. The admissibility of an industrial action is thus to large extent defined according to its aim. However, if having passed the criteria relating to the overriding reasons of public interest, the same industrial action would still have to pass the proportionality test applied either by the national court or by the ECJ itself in order to be lawful.³⁴⁴

7.1.2 The protection of workers and solidarity action

The most striking feature of the Court's approach to solidarity action is that it is being tested the same way as the primary action. More particularly, the ECJ held that the solidarity action taken by the ITF were illegal under Community law "where the FOC policy resulted in ship owners being prevented from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, the restrictions on freedom of establishment resulting from such action cannot be justified"³⁴⁵. This seems to mean that the actual lawfulness of the primary action is irrelevant in Community law. The actions taken by the ITF are thus being scrutinised the same way as the actions taken by the FSU, although the lawfulness of the latter seems to have passed the initial scrutiny by the ECJ. Since the ITF was required to initiate solidarity actions irrespective of whether the relocation would have harmful effects on the work or conditions of employment, its action did not meet the public interests criteria.³⁴⁶

In fact, what the Court is saying is that a policy, which does not take into account, whether the jobs and conditions of employment concerned are jeopardised or under serious threat, cannot be justified as an overriding reasons of public interests relating to the protection of workers. Having failed to meet the public interest criterion, the Court did not have to assess the proportionality of the taken actions. Since the Court did not try to examine the policy of the ITF in any another potential capacity of promoting aims compatible with the Treaty, i.e. another overriding reason of public interest, it also seems that solidarity actions must have the same aim as the primary action. On the other hand, the Court may simply have interpreted FOC-policy as an extension of the protection of workers, which in fact failed to meet the prerequisite of that particular aim. That said, the trade unions did actually try argue that the FOC-policy was pursuing the protection of workers in the national courts.³⁴⁷ In any case, it is clear that the FOC-policy does not qualify as an overriding reason of public interest. The solidarity action, which resulted in a collectively organised exercise not to engage in collective bargaining, is best defined as an exercise of the negative freedom of collective bargaining. In Albany, the Advocate General Jacobs held that there was no such thing as a fundamental right to collective

³⁴⁴ Barnard (2008) p. 13.

³⁴⁵ Viking para. 88.

³⁴⁶ Viking para. 89.

³⁴⁷ Viking para. 24.

bargaining.³⁴⁸ Yet, the negative freedom of collective bargaining is somehow restricted in Community law, even though this de facto grants the relevant undertaking the right to enter into collective bargaining with the relevant trade unions. In this instance, it is equally perplexing that the primary action is legitimate when a single national union undertakes it, but the secondary action is illegal, because it is taken in a coordinated way at Community level.³⁴⁹

7.2 The prevention of social dumping

In the Laval judgement, the ECJ concluded that “the right to take collective action for the protection of the workers of the host state against possible social dumping may constitute an overriding reason of public interest, which, in principle, can justify a restriction of one of the fundamental freedoms”.³⁵⁰ This separates the collective actions in this case from those in the Viking judgement, in that the protection of workers in the Laval judgement includes the prevention of social dumping. Based on the previous case law of the ECJ, it is, however, clear that justifications based on the protection of workers specifically refers to the individual interests of the posted workers and not to the collective rights of the workers in the host Member States.³⁵¹

Consequently, there can be no justification for collective actions taken by the workers in the host Member State, providing this line of reasoning were to be followed. However, the implication that the workers of the host state cannot pursue their own goals and that they therefore should restrict themselves to goals, which falls within the scope of the Community concept of public policy, is problematic because it implies that they do not have a legitimate interest in pursuing their own interests. It should thus be acknowledged that workers of the host state who have reached an agreement with domestic employers also have an interest in defending the agreed terms from being undermined by employers established in other Member States. This is more apparent when considering that trade unions in general and Swedish trade unions in particular have an interest in upholding their position within the national system of collective bargaining, as it guarantees their influence over the decision-making concerning employment.³⁵² That said, this line of reasoning lies relatively close to accepting an economic aim. There is of course a theoretical difference between protecting national businesses and the prevention of social dumping but in practice, such measures can have the same effect. This was clearly the essence of the

³⁴⁸ Opinion the AG Jacobs in Case C-67/96 Albany International (1999) ECR I-5751 para. 160.

³⁴⁹ Dorsemont p. 37.

³⁵⁰ Laval para. 103.

³⁵¹ For examples, see the Finalarte, Arblade and Säger, cited in section 4.

³⁵² Taco van Peijpe, *If Vaxholm were in Holland: Interest Conflicts and Labour Law in a Comparative Perspective*, “EU Industrial Relations v. National Industrial Relations: comparative and interdisciplinary perspectives”, ed. Rönmar, Kluwer Law International, 2008, p. 203.

Finalarte judgement, where the ECJ had to decide the legality of a measure with the explicit aim of protecting workers of the host state as well as national businesses.³⁵³ The real difference between the two types of measures is perhaps not factual, but rather theoretical in the sense that even if both aims qualify as economic protectionism, that does not mean that both aims are considered economic.

Moreover, the Court specifically states that “blocking action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers”.³⁵⁴ However, the Court then suggested that using an industrial action to secure the Laval’s entering into the collective agreement could not be justified nor could it be justified for a national system to be so blurred as to what is required of the foreign service provider in terms of remuneration.³⁵⁵ This seems to be in line with the Arblade judgement, where the Court ruled that for a minimum wage stipulated in a collective agreement to be justified, the provisions of the collective agreement had to be sufficiently precise and accessible and that provisions do not make it impossible or excessively difficult in practice for the employer to determine his obligations.³⁵⁶ The same principle is also enshrined in Article 4(3) PWD, which stipulates that the Member States must take appropriate measures to make the information regarding terms and conditions of employment referred to in Article 3 generally available. The Court’s insistence on sufficiently precise and accessible restrictions resembles a discourse concerning human rights restrictions, which, in turn, implies that the Court is trying to upgrade the common market freedoms to the status of human rights.³⁵⁷

The attitude of the Court towards collective bargaining as a mean to implement minimum remuneration is to a certain extent problematic, for it sees collective bargaining as an unacceptable way to implement the PWD because it is too uncertain and burdensome for the employer. This line of argumentation has its limits because an application of the host state standard across the board or a Community-set minimum standard would achieve an even better clarity.³⁵⁸ In line with that reasoning, it seems as if the Swedish trade unions should have dictated the terms rather than engaging in a collective bargaining process, as this would have spared its counterpart an uncertain bargaining process. There are also potential benefits with the collective bargaining process. It could, for instance, be beneficial for an employer to build up relationships with local trade unions, because it would give the employer some influence over the terms and conditions that it must apply to its posted workers, especially regarding the level of minimum

³⁵³ Finalarte para. 38 of the judgement and para. 32 of the opinion.

³⁵⁴ Laval para. 107.

³⁵⁵ Laval paras 108 and 110 respectively.

³⁵⁶ Arblade, para. 43.

³⁵⁷ Dorssemont p. 40

³⁵⁸ A.C.L. Davies p. 144.

wage.³⁵⁹ However, this type of arguments disregards the fundamentals of the Swedish model, i.e. that the terms of the collective agreements are practically non-negotiable for a company in Laval's position and that the relevant collective agreement is a hundred page plus document available only in Swedish. It is equally doubtful whether the mechanism of collective bargaining backed up by industrial action is a neutral way of implementing the PWD. Even if it is true that the Swedish trade unions have a legitimate interest in preventing their own terms and conditions from being undermined by foreign service providers, the ceasing of the work at the construction site in Vaxholm is also beneficial for the Swedish unions, as it will, in all likelihood, require Swedish organized labour for its completion. In other words, from the perspective of the Swedish trade unions, it is a win-win situation, in the sense that either the foreign service provider subscribes to the conditions of the collective agreement, in which case they have protected their interests, or the service provider abandon its operation, in which case the job openings accrue to members of the relevant Swedish trade union.

In contrast to the ECJ, the AG found that the whole process of entering into collective bargaining with the threat of industrial action did not breach EC law. Instead, the AG focused on certain terms and conditions in the imposed collective agreement, which he considered unlawful, while accepting the process as a whole.³⁶⁰ In respect of the proportionality test, the AG made an interesting observation by pointing out that the financing of the monitoring of wages system had been considered in breach of the right to property by the ECtHR. In light of Carpenter case, where the ECJ conditioned the invoking of reasons of public interest to measures compatible with the fundamental rights, that particular clause of the collective agreement is most likely unjustifiable under EC law, notwithstanding the proportionality test.³⁶¹ Whether the systematic nature of the mechanism with which the Swedish unions forced foreign service providers, either to subscribe to the conditions of the collective agreement or to abandon its operation, also played its part in convincing the Court to refute the existence of a justifiable aim appears to be less clear. There is, however, a floodgate argument to be made here, in that the Court would have opened up for a variety of different national exceptions to EC law, if it had allowed industrial actions such as those taken by the Swedish unions.

7.2.1 The right to strike outside of a contractual relationship

The main factual difference between the Laval and Viking judgements is that the former deals with a situation, where the workers, who took part in the collective action, had no employment relationship with the company

³⁵⁹ A.C.L. Davies p. 145.

³⁶⁰ Opinion of the AG in Laval para. 307.

³⁶¹ Case C-60/00 Mary Carpenter v. Secretary of State for the home department (2002) ECR I-3689, para. 40.

whose economic freedom was being restricted. Reversely, the actions of the Swedish trade unions were directed against an employer established in another Member State whose workers were not members of the trade union behind the carrying out of the collective action.³⁶² This factual difference has been interpreted as the main reason why the Court reached markedly different conclusions in the two cases.³⁶³ From this thus follows an absolute distinction between taking industrial action for one's own interest and taking industrial action for the interests of the posted workers. This line of reasoning further suggests that the former is legal even if the action restricts a common market freedom, whereas the latter is illegal if the aim of the strike is to protect workers employed by a company from another Member State.³⁶⁴

What is more, since both cases are based on the notion that there is an obstacle to a common market freedom and that the lawfulness of the strike depended on the lawfulness of the aim of the action, the difference in approach can only be explained by the fact that the action in *Laval* was aimed at defending the national labour market, rather than the protection of workers, which was only indirect. Reversely, the industrial action in *Viking* was primarily aimed at the protection of workers. The Court did not have to articulate this difference in *Laval*, because the PWD provided the Court with a ready answer.³⁶⁵ The judgement offers some support of this reasoning in that the Court specifically states that "the right of undertakings established in other Member States to sign their own accord a collective labour agreement in the host Member State, in particular in the context of a commitment made to their own post staff, the terms of which might be more favourable" is without prejudice.³⁶⁶

This statement can in part be said support the argument that the Court distinguishes trade union action depending on the parties involved. The wording thus essentially suggests that any eventual restriction posed to the industrial action taken by the Swedish trade unions will in any case not limit the right of the Latvian workers to resort to collective action.³⁶⁷ In other words, given that this reasoning holds true, Latvian workers could, in the present situation, impose a collective agreement on their employer containing terms and conditions, which would be considered unlawful when imposed by the Swedish trade unions.³⁶⁸ If, for example, one were to consider the hypothetical case of an Latvian participation in the strike, it is thus quite possible that the outcome would have been different, in that the actions of the Swedish trade unions would have been considered as a true solidarity action.³⁶⁹ Although the legality of a solidarity actions are judged independently from the primary action in Community law, the hypothetical

³⁶² *Laval*, para. 28.

³⁶³ Orlandini p. 585.

³⁶⁴ Orlandini p. 586.

³⁶⁵ Orlandini p. 586

³⁶⁶ *Laval* para. 81.

³⁶⁷ Orlandini p. 587.

³⁶⁸ Orlandini p. 587.

³⁶⁹ Orlandini (2008) p. 588.

action of the Latvian trade union could be interpreted as either being immune from the provisions of the Treaty or merely restricted the same way as in Viking.³⁷⁰ Since the actions would be assessed independently, the same insistence on the entering into collective bargaining does not necessarily correspond well with the protection of workers.

However, this analysis seems to be based on the assumption that the public interest criterion is the same in the two cases, which is not obvious or, in fact, is simply not the case. Closely read, the operative part of the Laval judgement, which specifically mentions the protection of workers is in the part where the Court quotes the submissions of the Swedish government and the defendant trade unions.³⁷¹ This paragraph is however followed by an elucidation, where the Court states, “The right to take industrial action for the protection of the workers of the host against possible social dumping may constitute an overriding reason of public interest”³⁷². This thus means the Court is in fact qualifying the statement of the Swedish government and trade unions. This could in turn mean that the protection of workers rates higher than the prevention of social dumping, in the sense that the chances of success are higher when invoking that particular ground of justification.

A closer look at the case law of the ECJ makes it clear that the protection of workers is an acceptable aim in terms of justifying labour restrictions. It is equally true that the Swedish collective agreement contained conditions that were favourable for the Latvian workers. That said, the accounted interpretation of the aim of the Swedish trade unions is nevertheless that they are “defending the national labour market” rather than protecting the posted workers, which “was merely indirect”.³⁷³ Although this part of the analysis touches upon a crucial distinction, that does not prevent it from falling short of making an important distinction between the different public interest criteria. It is thus not necessary to look at the semantics of the Laval judgement in order to deduce that the right to collective action is more limited in situations where the collective action is directed at an employer with which the trade union’s members have no employment relationship. In fact, it seems clear that the aim of preventing social dumping necessarily implies that there is no contractual relationship between the parties.

The hypothetical question of the Latvian workers participating in the strike, which was considered above, would in any imaginable situation have been defined as the protection of workers and not the prevention of social dumping. Though perhaps theoretically possible, it is in fact hard to imagine a situation where posted workers would or could take collective action on the basis that their terms and conditions undermine those of the workers of the host state. In this regard, actions for the furtherance of the overall position of the workers of the host state in their collective bargaining process seems to go against their own interests, for their own interests are

³⁷⁰ Orlandini (2008) p. 587.

³⁷¹ Laval para. 102.

³⁷² Laval para. 103.

³⁷³ Orlandini (2008) p. 586.

more closely associated with the success of the company for which they work than with the trade unions of the host state. The distinction between collective action against one's own employer, on the one side, and collective action against somebody else's employer, on the other, is thus important, but only to the extent that account is taken of the relevant aim in the general interest. If, for example, the relevant collective action has support from both the trade union of the posted workers and the trade unions of the host state, the collective actions are nevertheless judged independently and it is by no means certain that two different aims are compatible in EC law. This conceptual starting point seems to be supported by the fact that the actions of the ITF are judged according to the definition of workers protection and not by the lack of employment relationship. The point is thus that it is not the contractual relationship per se, which matters, but rather the aim of the relevant collective action, albeit, as already stated, the prevention of social dumping necessarily implies that there is no contractual relationship.

7.2.2 The PWD as a limit to collective action

The Laval judgement starts with an analysis of the Swedish implementation of the PWD. Since it is settled case law that a directive cannot have direct effect, it is perplexing that the ECJ would have that particular law act as its starting point. Advocate General Mengozzi seems to be of the opinion that the relationship between Article 49 EC and the PWD is interconnected in the sense that "a measure that is incompatible with Directive 96/71 will, a fortiori, be contrary to Article 49 TEC, because the directive is intended, within its specific scope, to implement the terms of that Article".³⁷⁴ It is, however, unclear whether the ECJ accepts the conclusion of the Advocate General in this regard, because the Court considered it necessary to assess the collective action from "the point of view of Article 49 EC" as well.³⁷⁵ This seems to mean that a breach of the PWD is not, "a fortiori", a breach of Article 49 EC.³⁷⁶ That said, the Advocate General also states that even if the relevant collective action should be considered in accordance with the PWD, its conformity with Article 49 EC is not automatic, which thus ultimately also implies two reviews.³⁷⁷

However, the ECJ recognised that the interpretation of the PWD could have some relevance to the dispute in the national court because it would further the interpretation of Article 49 EC.³⁷⁸ It is thus important to recognise that the Laval judgement seems to indicate that the scope of collective autonomy as regulatory tool for the provision of services is more limited than the one for the right of establishment.³⁷⁹ Although the ECJ assess the collective action in view of both the PWD and Article 49 EC independently, it nevertheless refers back to the PWD in the operative part of its

³⁷⁴ Opinion of AG Mengozzi in Laval, para. 149.

³⁷⁵ Laval para. 85.

³⁷⁶ Dorssemont p. 31.

³⁷⁷ Opinion of AG Mengozzi in Laval para. 150.

³⁷⁸ Laval para. 48. (See also A.C.L. Davies p. 128)

³⁷⁹ Orlandini p. 582.

judgement.³⁸⁰ Moreover, the ECJ also emphasizes that the Swedish collective bargaining system is “characterised by lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is to comply as regards to minimum pay”.³⁸¹ This remark is in fact a reiteration of Article 4(3) PWD, albeit not explicitly. It thus seems as if a breach of the PWD necessarily implies a breach of Article 49 EC. In this regard, it is hard to see how workers or trade unions can commence industrial action, which restricts the freedom to provide services, without first consulting the PWD, for it is the directive that determines which demands that can be forced upon service providers. Though it is theoretically possible to limit the economic freedom to provide services by means of an industrial action, this is in practice followed by an obligation to respect the provisions of the PWD. The terms and conditions of the PWD must therefore be followed, including minimum standards, for any deviation can give rise to disproportional obstacles to the freedom to provide services.³⁸²

Collective agreements can nonetheless be relied upon in abstain of legislative requirements, but only if the agreements meet the requirements in Article 3(8) PWD, i.e. that the collective agreements are binding for all national enterprises.³⁸³ The Court hence explicitly rules out a system, in which the actual determination of the protection standards is in the hands of management and labour, in contrast to a regime that meets the requirements of predictability and of certainty, which the provisions of the PWD are supposed to ensure the service provider. The collective anatomy is thus deprived of any scope unless there is a law implementing its results,³⁸⁴ which in turn implies that the Court puts the prevention of social dumping on a par with the *raison d’être* of the PWD. Therefore, derogations from the PWD cannot be justified with reference to the prevention of social dumping, because the risk of social dumping is adequately precluded by the application of the mandatory rules for minimum protection in the PWD.³⁸⁵ Interpreted in this way, the judgement seems to indicate that a breach of the PWD can be justified with reference to overriding reasons of public interest under Article 49 EC.³⁸⁶ The question of whether EC secondary legislation should be interpreted as being able to restrict Member States’ sovereignty to invoke overriding reasons of public interests is on the other hand problematic in two respects. First, it disregards the principle of subsidiary. Second, the Treaty has legal superiority over secondary EC legislation, which should rule out an application of *Lex specialis derogat generali*, for the principles presupposes that it is applied to laws of identical nature. It could thus be argued that the relationship between the Treaty and its

³⁸⁰ Laval para. 108.

³⁸¹ Laval para. 110.

³⁸² Orlandini p. 582.

³⁸³ Orlandini p. 582-583.

³⁸⁴ Orlandini p. 583.

³⁸⁵ Dorssemont p. 39.

³⁸⁶ Dorssemont p. 31-32.

secondary legislation is unconstitutional, because it does not respect the principle of subsidiary and nor does it respect the inherent logic of superiority.³⁸⁷ Although most legal scholars emphasize the importance of the PWD for the outcome of this judgement,³⁸⁸ Barnard seems to be of the opinion that the requirements stipulated by the Court can be derived from its previous case law. More particularly, Barnard derives the requirements that the provisions of collective agreements must be sufficiently precise and accessible for the employer to determine his obligations from the *Arblade* judgement.³⁸⁹ This is important because Article 4(3) PWD seems to be a codification of the *Arblade* judgement, which implies that the relevant measures in the *Laval* case are in breach of both the Treaty and the Directive, in that the former is reflected in the latter and vice versa. Moreover, Syrpis and Novitz argue that the scope for justification of measures that go beyond the mandatory protection of the PWD is limited under Article 49 EC.³⁹⁰

7.3 Proportionality and collective action

It is important to recognise that the proportionality test is completely dependent on the facts of the case in which it is being applied. This means that the facts of this specific case may not allow for a generalisation to other cases with dissimilar facts and vice versa, as proportionality must be understood in its proper context. It is thus, as A.C.L Davies puts it, “a highly context-sensitive test”.³⁹¹ Nevertheless, the *Viking* judgement highlights a number of practical difficulties with the application of the proportionality test to industrial actions. The most obvious problem with the proportionality test in regard to industrial action is that the more effective the trade union restricts the employer’s economic freedom, “the harder it will be to justify”.³⁹² This is especially complicated with regard to the connection between the harm that a collective action causes and the willingness of the employer to yield to the demands of the trade union.³⁹³

Moreover, the fact that it is up to the national court to assess whether there are other less restrictive means to end the collective negotiations successfully, may create some uncertainty, especially since the assessment seems to allow a wide discretion for the national court when applied to the specific case. In fact, the autonomy of management and labour, which can be described as an autonomy delegated by the legislator, can be circumvented by the national court. In this context, the proportionality test could actually create problems concerning the role of the national court and the scope of the right to strike. First, if the proportionality assessment were to justify interference from the judicial branch into the autonomy of

³⁸⁷ Dorsemont p. 32.

³⁸⁸ See Orlandini p. 582 et seq., Dorsemont p. 39 and A.C.L. Davies p. 128 et seq.

³⁸⁹ Barnard (2008) p. 10-11.

³⁹⁰ Syrpis and Novitz p. 416.

³⁹¹ A.C.L. Davies p. 142.

³⁹² A.C.L. Davis p. 142-143.

³⁹³ A.C.L: Davies p. 143

management and labour, it would create uncertainty regarding the outcome of the dispute and it would mean that the national court has moved into a field of law, which is traditionally self-regulated and intended to be just that. The consequences of the assessment of the national courts are thus uncertain, especially since the examination by the court seems to allow a considerable discretion when applied to the specific case. In other words, the proportionality assessment could induce the national court to turn the delegated autonomy of labour and management into a legal obligation. Second, even if the right to strike is enshrined in a large majority of the national constitutions, the same cannot be said regarding the proportionality test as the limit of that right.³⁹⁴

The indirect proportionality test applied by the Court should also be distinguished from the proportionality test applied by the Member States, which does not deal with the expressed goals of the collective action, but rather with the relation between goals and damages of the collective action. The proportionality test applied by the ECJ is not about balancing the economic damages of the employer in relation to the expressed goals of the trade unions, but rather about tackling a conflict between legal principles. This can be exemplified by the fact that the AG in *Laval* took a much more favourable attitude vis-à-vis collective actions than his counterpart in *Viking*, even though the damages were much more harshly felt in *Laval* than in *Viking*, which, in contrast, dealt only with the threat of a collective action.³⁹⁵

In respect to suitability, the first step of the proportionality test, the ECJ states that “it should be borne in mind that it is common ground that collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interest of their members”.³⁹⁶ This suggests that the suitability test needs to be assessed in a marginal way,³⁹⁷ which is in stark contrast to its necessity assessment. The more rigorous approach is evident vis-à-vis necessity, for the Court states that “it is for the national court to examine, in particular, on the one hand, whether, under the national rules and collective agreement law applicable to that action, FSU did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with *Viking*, and, on the other, whether that trade union had exhausted those means before initiating such actions”.³⁹⁸ In fact, the ECJ seems to indicate that the industrial action should be the last resort in an industrial confrontation, meaning that the British court will have to verify whether FSU has exhausted all other possibilities under Finnish law before finding the industrial action proportionate.³⁹⁹ Since an industrial

³⁹⁴ Orlandini (2008) p. 578.

³⁹⁵ Dorssemont p. 43.

³⁹⁶ *Viking* para. 86.

³⁹⁷ Dorssemont p. 43.

³⁹⁸ *Viking* para. 87.

³⁹⁹ Barnard (2008) p. 13.

action is intended to cause harm to the employer, the application of the “least restrictive alternative” version of the proportionality test is problematic in itself, in that there is a risk that the national courts will recognize alternatives to the relevant collective action without considering their effectiveness in the overall collective bargaining process.⁴⁰⁰ The Court seems to have ignored this inherent link between collective bargaining and collective action in the Laval judgement, where it concluded that better terms and conditions could only be included in the collective agreement if it was signed voluntarily.⁴⁰¹ In sum, all of the justifications, which the trade unions put forward, were closely scrutinised by the ECJ.

The Court also applied the strictest form of the proportionality assessment, “unmitigated in any way by reference to margin of appreciation”.⁴⁰² Though Dorssemont considers that the proportionality assessment is being applied in accordance with the Schmidberger formula,⁴⁰³ Vigneau has argued that the Court emphasises the submission of the collective action vis-à-vis the common market freedoms more explicitly than regarding the freedom of assembly and expression.⁴⁰⁴ Since the proportionality test is a highly context sensitive test, it is perhaps not even possible to compare the Schmidberger judgement with the present case, as the facts are dissimilar in ways, which, in a literal sense, make the judgements incomparable. It should, however, be noted that any deviation from the common market freedoms will automatically be subjected to a strong review. It is thus in this sense that the real similarities between the Schmidberger and the Viking judgements ought to be described, in that both cases were subject to a strict application of the “less restrictive alternative test”.

7.4 The scope of the right to strike

The Court’s reasoning in the Viking judgement makes it clear that it is lawful for a trade union to take industrial actions for the protection of workers from the consequences of the relocation of an undertaking that intends to move from one Member State to another, if it can be determined that the interests of the workers are, as the Court puts it, “jeopardised or under serious threat”⁴⁰⁵ from the relocation.⁴⁰⁶ The notion of “protecting workers” is hence based on the fact that the employment conditions are being jeopardised by the relocation. This rule must nevertheless be qualified in three respects. First, if the national court can determine that the relocating company has undertaken a legally binding commitment not to affect the jobs or conditions of employment, it is consequently unlawful for trade unions to

⁴⁰⁰ A.C.L. Davies p. 143.

⁴⁰¹ Laval para. 81.

⁴⁰² Barnard (2008) p. 14.

⁴⁰³ Dorssemont p. 38.

⁴⁰⁴ Vigneau, *Encadrement par la Cour de l'action collective au regard du Traité de Rome*, La Semaine Juridique - édition générale, II 10060, 2008, p.33-36, p. 34.

⁴⁰⁵ Viking para. 83.

⁴⁰⁶ Orlandini (2008) p. 576.

resort to collective action.⁴⁰⁷ This also seems to mean that it is lawful for a trade union to force the relocating company to make legally binding commitments of that nature.⁴⁰⁸ Second, since the “less restrictive alternative test” is based on the assessment of whether there are other less restrictive means, it seems as if further restrictions to industrial actions can arise only from national legislation.⁴⁰⁹ This conclusion is based on the fact that the assessment refers to “national rules” and “collective agreement law applicable to that action”.⁴¹⁰ Third, when the establishment takes place in a Member State, “which guarantees workers a higher level of social protection than they would enjoy in the first State”, it follows that a collective action would be unlawful.⁴¹¹

The reasoning of the Court in the *Laval* case is perhaps harder to translate into rules of general nature without some qualifications, as the reasoning of the Court is somewhat unclear. In doctrine, it has been described as “truncated and opaque”,⁴¹² which opens up for different interpretations. It is, in fact, hard to give a positive rule, as most of the activities of the trade unions were considered out of pace with the prevention of social dumping, but with this specific aim in mind, it seems as if trade unions cannot reinforce demands that go beyond those provided for by PWD. This means that there has to be a law implementing the terms and conditions that the collective action tries to implement.⁴¹³ Since the broader context of services poses certain problems, this rule must nevertheless be qualified in two respects. First, the case law of the ECJ suggests that national measures, which are extended to posted workers in accordance with the PWD, are nevertheless subject to the proportionality test.⁴¹⁴ Thus, this alone does not guarantee the legality of a collective action. Second, the *Rüffert* case suggests that a restrictive measure can be justified on grounds of overriding reasons of public interests in view of Article 49 EC, even if it breaches the PWD.⁴¹⁵

Given the close points of similarity between justifications of indistinctly applicable labour law restrictions and justifications based on fundamental rights, it seems as if these principles should apply also to fundamental rights. These rules are nonetheless limited, in that few employment laws will apply to self-employed service providers.⁴¹⁶ There are also certain facts in the *Viking* case that raises questions regarding just how applicable the principles laid down in the judgement are outside the maritime context. This is because the actual relocation is not a physical relocation of the work

⁴⁰⁷ *Viking* para. 82.

⁴⁰⁸ Orlandini (2008) p. 576.

⁴⁰⁹ Orlandini (2008) p. 576.

⁴¹⁰ *Viking* para. 87.

⁴¹¹ *Viking* para. 89.

⁴¹² Barnard (2008) p. 14.

⁴¹³ Orlandini (2008) p. 583.

⁴¹⁴ *Commission v. Germany* para. 24.

⁴¹⁵ *Case C-346/06 Dirk Rüffert v Land Niedersachsen* para. 38.

⁴¹⁶ Barnard (2008) p. 5.

place, but instead a judicial form of relocation.⁴¹⁷ The reflagging of the Rosella arguably makes the relocation of the business easy, but it also makes the actions of the trade unions viable.⁴¹⁸ In fact, the aim of the trade unions, which is to keep the terms of the collective agreement after the relocation, is normally out of the question, because the actual relocation of the business precludes the relocation of the workers. The present situation is also interesting because it resembles what Council Regulation 2001/23 EC refers to as the transfer of an undertaking. The regulation was not relevant in the Viking case because seagoing vessels are excluded from its application, but the ECJ appears to accept that the provisions of the directive can be pursued through industrial action in a situation where the ownership of a Vessel changes.⁴¹⁹

The paradox of the judgement is therefore apparent, in that the nature of relocations normally rules out industrial action for the safeguarding of jobs and conditions of employment, because there are no jobs or conditions of employment to protect, whereas the directive makes industrial disputes unnecessary, as it safeguards the jobs and conditions of employment of the relocated workers. A further implication is that the collective autonomy under Article 43 EC seems to be limited in ways that are similar to the limitations placed on it under the PWD and Article 49 EC, because industrial actions aimed at obtaining higher protection than the one stipulated in Council Directive 2001/23 would probably be considered disproportionate.⁴²⁰ Notwithstanding the lack of applicability outside of the maritime context, the fact that it is lawful to try to prevent the relocation of enterprise headquarters remains an important principle, but the exact reach of this principle remains difficult to define. It cannot be assumed that the ECJ will accept trade union actions, which are aimed at preventing transfers rather than regulating their effects.⁴²¹ Mere protests or political strikes should therefore not automatically be considered legal under EC law. In fact, other aims than the protection of employment conditions is not obviously acceptable as grounds of justification, at least not from a legal point of view.⁴²²

⁴¹⁷ Orlandini (2008) p. 578.

⁴¹⁸ Orlandini (2008) p. 579.

⁴¹⁹ Orlandini (2008) p. 579-580.

⁴²⁰ Orlandini (2008) p. 580.

⁴²¹ Orlandini (2008) p. 580.

⁴²² Orlandini (2008) p. 581.

8 CONCLUSION

“The activities of the Community are to include not only an internal market...but also a policy in the social sphere”⁴²³

The overall question that this thesis intends to answer is when a collective action undertaken by trade unions of a Member State for curbing the freedom of an undertaking to enter the market of another Member State is legitimate or illegitimate under Community law. In this regard, the first aspect is that the right to strike cannot justify a restriction to a common market freedom in itself, but instead with regard to the end that it serves. The second aspect is that the aim must be proportional in relation to the pursued aim. More particularly, the relevant aim of the collective actions in question is the protection of workers in Viking and the prevention of social dumping in Laval. Although the collective action in Viking corresponded with the protection of workers, that does not mean that all collective actions can be justified with reference to an aim in the general interest, which became apparent in Laval, where the ECJ held that the relevant action could not be justified with reference to the prevention of social dumping.

The protection of workers corresponds to the carrying out of an industrial action with the aim of protecting existing terms and conditions of employment. This was the aim in the general interest in the Viking judgement, where the ECJ made it clear that such an action would be considered in accordance with that particular aim, if it could be determined that the interest of the workers were “jeopardised or under serious threat” from the relocation. Furthermore, the aim of protecting workers seems to be confined to situations, where there is an employment relationship between the striking workers and the employer whose economic freedom is being restricted. A defining feature of the Viking judgement is also that the ECJ ruled on the legality of solidarity action in Community law. Although the Court recognised the right to solidarity action as such, it judged its validity independently from the primary action. This is interesting, as it can produce results that are unfamiliar in many national legal systems. The solidarity action in the present case could not be justified with reference to the protection of workers, whereas the primary action was accepted with reference to the same aim.

The prevention of social dumping is the equivalent of forcing terms and conditions of employment on an employer for the benefit of the workers of the host state, which necessarily implies that there is no employment relationship between the parties. This aim corresponds to the notion that the workers of the host state have an interest in making sure that foreign employers who pay cheaper wage costs do not undermine their position in the overall collective bargaining process. In the Laval judgement, it seems as if prevention of social dumping is incarnated in the PWD, which leads to

⁴²³ Viking para. 78.

the conclusion that the results sought by the collective action cannot go further than what is provided for by the PWD. In practical terms, this means that there has to be a law implementing its results, for it is exactly these types of requirements that the PWD lays out. Having said that, the case law on labour law restrictions regarding posted workers seems to indicate that there are situations where a breach of the PWD can be justified with reference to Article 49 EC and that there are situations where measures implemented in accordance with the PWD can be in breach of Article 49 EC. However, more likely than not, a breach of the PWD will also breach Article 49 EC because the PWD is to a large extent a codification of the previous case law on the provision of services.

Even if the ECJ considers that the aim of the collective action corresponds to an overriding reason of public interest, it must nevertheless pass the test of proportionality. Since the proportionality test is applied in different contexts, Community law entails many different standards of proportionality. In this regard, the Viking judgement can be said to confirm the rule that deviations from the Treaty will be closely scrutinised, as the review is based on the notion of “necessity”, which is the defining feature of the “less restrictive alternative test”. This means that the relevant collective action must be suitable for securing the attainment of the legitimate aim in question and that the legitimate aim cannot be achieved by measures that are less restrictive to intra-Community trade. Although the Court suggests that the suitability of a collective action needs to be assessed in a marginal way, that did not prevent it from applying a strict form of the necessity assessment, which implies that a collective action will be legal in Community law only if it is the last resort in a collective dispute. This is in turn dependent on the available alternatives in the relevant national legislation. The Viking case can thus be said to highlight the inherent problem of applying the proportionality test to a collective action, because the more effective the collective action restricts the common market freedoms of the employer, the more difficult it will be to justify.

The Laval and Viking cases are also important because it is the first time that the right to strike is recognised as a fundamental right within the meaning of EC law. This is being done with reference to general principles of law, which bind the Member States together, but the legal instruments, from which the right to strike is derived, show that the right to strike has a weaker legal support than many other human rights. In fact, the common constitutional traditions of the Member States as well as the ECHR, which are the most important sources for deriving fundamental rights, were only partially conclusive in this instance, which is why the ECJ did not explicitly rely on those sources. Instead, the ECJ referred to the Charter of fundamental rights, which is the first time that the ECJ has used this legal instrument for the recognition of a new fundamental right. The ECJ followed the same approach for the right to strike that it had developed for fundamental rights in the Schmidberger and Omega judgements.

The case law of the ECJ also allows for exceptions to the common market freedoms on grounds of public interest. This is motivated by the idea that there are certain national interests that should take precedent over the free movement. Having said that, an economic aim cannot be considered as an overriding public interest and discriminatory measures can only be justified under the specific derogations provided for by the Treaty. A restrictive indistinctly applicable measure must also be justified by imperative requirements in the general interest as well as being proportional in the sense that it is suitable for securing the attainment of the objective which it pursues and that it does not go beyond what is necessary in order to attain it. There is also an additional requirement for the freedom to provide services, in that that account must be taken of whether the imperative reason of public interest is already protected in the home state. This is a reflection of the home state control. The relevance of this principle can be seen in the Laval ruling, where the fundamental right to strike is limited much like a national labour law provision. The right to establishment has played a relatively small role in relation to national employment laws, as the nature of relocations normally precludes the relocation of workers, which rules out a cross-border situation. This can be contrasted with the freedom to provide services, where the case law regarding the extension of host state labour laws to posted workers is relatively well developed.

The PWD presents a new feature, in that Article 3 obliges Member States to ensure certain protective rules from their own labour law systems applies to posted workers. This is in contrast with Article 3(8) that makes it optional for Member States to extend terms and conditions from collective agreements with an erga omnes effect. Furthermore, Article 4.3 PWD specifically stipulates that the terms and conditions of employment referred to in Article 3 PWD must be generally available. The importance of Article 4(3) PWD can be seen in Laval, where the Court ruled out the case-by-case negotiations inherent in the Swedish system in favour of pre-existing collective agreements with minimum wages. Based on the special characteristic of the provision of services, it will be difficult to persuade the Court that national laws do in fact confer benefits on the posted workers if the home state already provides essentially similar protection. As a rule, this means that the national authorities have to check the rules of the home state before extending national legislation. This is in part in contrast with the PWD, because Article 3(7) PWD seems to provide for this solution only when the home state rules are more favourable to the workers. This means that trade unions cannot undertake a collective action without first making sure whether the terms and conditions in the home state are more favourable. The broad list of justifications based on the overriding public interest is in turn a response to the equally broad scope of the market access approach. The term comes from the Court's gradual departure from an emphasis on unequal treatment, i.e. discrimination, towards an emphasis on whether an individual's access to the market of another Member State is restricted.

The reach of the market access model is dependent of the extent to which the provisions are binding for private subjects. In this regard, the ECJ established the horizontal direct effect of Articles 43 and 49 EC, in the sense that they are applicable to collective actions taken for the support of trade unions' negotiating activities. In the Laval judgement, the collective actions taken by the trade unions were considered liable make it less attractive or more difficult to carry out construction work in Sweden. Moreover, in the Viking judgement, the collective actions of the FSU and the ITF were considered as having the effect of making the exercise of the right to establishment less attractive and liable to restrict the exercise of that right respectively. In fact, it is hard to think of a meaningful collective action that would not be considered a restriction to the free movement, for collective actions are by their nature intended to inflict economic damages on employers, which in turn makes them an incarnation of what constitutes rendering a particular course of action "less attractive".

Although the market access approach applies equally to services as well as establishment, there are nevertheless certain differences between the two freedoms that are worth mentioning. First, when an individual leaves the home state for another Member State, the home state loses regulatory control to the new host state. Second, the service provider continues to be based in the home state, which has primarily regulatory control, while providing services in the host state. In Säger, the ECJ concluded that the freedom to provide services would lose all its practical effectiveness if the service provider has to follow all the requirements necessary for establishment.

There are nevertheless certain national labour law provisions that can be extended to posted workers and some of the provisions of the PWD are in fact mandatory. In the light of these facts, it seems as if it should be harder to justify an exception to the right to establishment than to the freedom to provide services because the home state cannot extend its legislation when a company relocates, as it loses its regulatory control to the new host state. However, as it turns out in the present cases, the trade union in the Viking judgement were allowed to make far-reaching demands by means of collective action, whereas the collective actions taken by the Swedish trade unions were in breach of the Treaty. This discrepancy can in part be explained by the different public interest criteria and in part by the fact that the PWD was applicable in the Laval case. It is also important to recognise that the situation in the Viking judgement resembles the transfer of an undertaking, which is covered by Council Directive 2001/23 EC. The directive was not applicable in the present situation, as it is not applicable to seagoing vessels, but the principles enshrined therein seem to be. It is thus true that the comportment of the FSU in Viking is legal also by analogy to EC secondary legislation, whereas the comportment of the Swedish trade union is illegal under the PWD.

Bibliography

BOOKS

Barnard, *EC Employment Law*, third edition, Oxford University Press, 2006.

Barnard, *The substantive law of the EU: the four freedoms*, Oxford University Press, 2007.

Brown & Kennedy, *The Court of Justice of the European Communities*, fifth ed, Sweet & Maxwell, 2000.

Craig & De Búrca, *EU Law: text, cases and materials*, Third edition, Oxford University Press, 2003.

Even, *Transnational Collective Bargaining in Europe: A proposal for a European regulation on transnational collective bargaining*, J.H. Even / Boom Juridische uitgevers, 2008.

Groussot, *Creation, Development and Impact of the General Principles of Community Law: towards jus commune europaeum?*, Groussot, 2005.

Jans, Lange, Prechal and Widdershoven, *Europeanisation of Public Law*, Groningen, 2007.

Melin & Schäder, *EU:s Konstitution: maktfördelningen mellan den Europeiska unionen, medlemsstaterna och medborgarna*, Nordstedts juridik, 2001.

Taco van Peijpe, *If Vaxholm were in Holland: Interest Conflicts and Labour Law in a Comparative Perspective*, "EU Industrial Relations v. National Industrial Relations: comparative and interdisciplinary perspectives", ed. Rönmar, Kluwer Law International, 2008.

Tridimas, *The General Principles of EC Law*, second edition, Oxford University Press, 2006.

Articles

Ahlberg, Bruun and Malmberg, *The Vaxholm case from a Swedish and European perspective*, Transfer 2/06.

Avbelj, *European Court of Justice and the question of value choices: Fundamental human rights as an exception to the freedom of movement of goods*, Jean Monnet Working Paper 06/04, at <http://www.jeanmonnetprogram.org/papers/04/040601.pdf> (visited 29 November 2008).

Barnard, *Employment rights, Free Movement Under the EC Treaty and the Service Directive*, Mitchell Working Paper Series, 5/2008, at http://www.law.ed.ac.uk/file_download/series/44_employmentrightsfreemovementundertheectreatyandtheservicesdirective.pdf (visited 29 November 2008).

Cremers, Dolvik & Bosch, *Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU*, *Industrial Relations Journal* 38:6, pp. 524-541.

Davies, A.C.L., *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, *Industrial Law Journal*, Vol. 37, No. 2, 2008.

Davies, *The Posted Workers Directive and the EC Treaty*, *Industrial Law Journal*, Vol. 31, No. 3, 2002.

Davies, *Posted Workers: Single market or protection of national labour law systems?*, *Common Market Law Review* 34: 571-602, 1997.

Dorssement, *The right to take collective action versus fundamental economic freedoms in the aftermath of Laval and Viking*, at http://www.dirittoprivato.unisi.it/pontignano/file_download/11/fdorssemont.doc (visited 29 November 2008).

Eklund, *A Swedish perspective on Laval*, *Comparative Labour Law & Policy Journal*, Vol. 29, No. 4, 2008, at http://www.law.uiuc.edu/publications/CLL&PJ/archive/vol_29/issue_4/EklundLavalArticle29-4%20--%20UPDATED.pdf (visited 29 November 2008).

Ewing, *The implications of Wilson and Palmer*, 32 *ILJ* 1, 2003.

Hatzopoulos, *Recent developments of the case law of the ECJ in the field of services*, *Common Market Law Review* 37: 43-82, 2000.

Hatzopoulos and Do, *The case law of the ECJ concerning the Free Provisions of Services: 2002-2005*, *CMLRev*, 2006.

Hellsten, *On the social dimension in posting workers*, *Labour Policy Studies* No. 301, Ministry of Labour (Finland), 2004, also at (third article in document) <https://oa.doria.fi/bitstream/handle/10024/29178/frominte.pdf?sequence=1> (visited 29 November 2008).

Hix and Goetz, *Introduction: European Integration and National Political Systems*, *West European Politics*, 23:4-5, 2000.

Morijn, *Balancing fundamental rights and common market freedoms in Union law: Schmidberger and Omega in the Light of the European Constitution*, *European Law Journal*, Vol. 12, No. 1, pp. 15-40, 2006.

Orlandini, *Right to Strike, Transnational Collective Action and European Law: Time to Move on?*, Jean Monnet Working Paper, 8/2007, at <http://www.jeanmonnetprogram.org/papers/07/070801.pdf> (visited 29 November 2008).

Orlandini, *Trade union rights and market freedoms: The European Court of justice sets out the rules*, Comparative Labour Law & Policy Journal, Vol. 29, No. 4, 2008, at http://www.law.uiuc.edu/publications/CLL&PJ/archive/vol_29/issue_4/OrlandiniLavalArticle29-4.pdf (visited 29 November 2008).

Reich, *Free Movement v. Social Rights in an Enlarged Union – the Laval and Viking cases before the ECJ*, German Law Journal, Vol. 09, No. 02, 2008.

Smith and Fetzer, *The uncertain limits of the European Court of Justice's authority: economic freedom versus human dignity*, (2004) 10 Columbia Journal of European Law p. 445 et seq.

Syrpis and Novitz, *Economic and social rights in conflict: Political and judicial approaches to their reconciliation*, European Law Review, issue 3, 2008.

Vigneau, *Encadrement par la Cour de l'action collective au regard du Traité de Rome*, La Semaine Juridique - édition générale, II 10060, 2008, p.33-36.

Warneck, *Strike rules in the EU 27 and beyond*, European Trade Union Institute, Brussels, 2007, at http://www.etuc.org/IMG/pdf_Strike_rules_in_the_EU27.pdf (visited 29 November 2008).

Weiler, *The jurisprudence of human rights in the European union: Integration and disintegration, Values and Processes*, at <http://www.jeanmonnetprogram.org/papers/96/9602.html> (visited 29 November 2008).

Wouter, *National constitutions and the European Union*, LIEI 2000.

Table of Cases

C-1/58, Stork v. High Authority (1959) ECR 17.
Joined cases 36,37,38 & 40/59 Geitling v. High Authority (1960) ECR 423.
C-40/64, Sgarlata and others v. Commission (1965) ECR 215, (1966)
CMLR 314.
C-35/67 Van Eick V. Commission (1968) ECR 342.
C-29/69, Stauder v. City of Ulm (1969) ECR 419.
C-11/70 Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle für
Getreide und Futtermittel (1970) ECR 1125.
Case 33/74, Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de
Metaalnijverheid (1974) ECR 1299.
Case 36/74 B.N.O. Walrave and L.J.N. Koch v Association Union cycliste
internationale, Koninklijke Nederlandsche Wielren Unie et Federación
Española Ciclismo (1974) ECR 1405.
Case 44/79 Hauer (1979) ECR 3237.
Case 205/84, Commission v. Germany (1986) ECR 3755.
Case 222/84 Johnston (1986) ECR 165.
Case 81/87 The Queen / Treasury and Commissioners of Inland Revenue
(1988) ECR 5483.
Case C-113/89 Rush Portuguesa Ld^a v Office national d'immigration (1990)
ECR I-1417.
Case C-288/89, Stichting Colectieve Antennevoorziening Gouda and others
v Commissariaat voor de Media (1991) ECR I-4007.
Case C-76/90 Manfred Säger v Dennemeyer & Co. Ltd (1991) ECR I-4221.
Case C-76/93 P Scaramuzza v Commission (1994) ECR I-5173.
Case C-384/93, Alpine Investments (1995) ECR I-1141.
Case C-415/93 Union royale belge des sociétés de football association
ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman
and others and Union des associations européennes de football (UEFA) v
Jean-Marc Bosman (1995) ECR I-4921.
Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e
Procuratori di Milano (1995) ECR I-4165.
Joined cases C-51/96 and C-191/97, Christelle Deliège v Ligue francophone
de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union
europenné de judo (C-51/96) and Francois Pacquée (C-191/97) (2000) ECR
I-2549.
Case 398/95 SETTG v. Ypourgos Ergasias (1997) ECR I-3091.
Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-
71/98, Finalarte Sociedade Constrcao Civil v. Urlaubs- und
Lohnausgleichskasse der Bauerwirtschaft (2001) ECR I-7831
Case C-165/98 Mazzoleni (2001) ECR I-2189.
Case C-281/98 Roman Angonese v Cassa di Risparmio di Bolzano SpA
(2000) ECR I-4139.
Case C-376/98 Germany v. European Parliament and Council (2000) ECR
I-8419.
Case C-283/99 Commission v. Italy (2001) ECR I-4363.

Case C-164/99 Portugaia Construções Lda (2002) ECR I-787.
Case C-309/99, Wouters v. Algemene Raad van der Nederlandse Orde van Advocaten (2002) ECR I-1577.
Case C-493/99 Commission v. Germany (2001) ECR I-8163.
Case C-60/00 Mary Carpenter v. Secretary of State for the home department (2002) ECR I-3689.
Case C-112/00 Schmidberger, Internationale Transporte und Planzüge v. Austria, (2003) ECR I-5659.
Case C-215/01 Schnitzer (2003) ECR I-14847
Case C-36/02 Omega Spielhallen- und Automatenaufstellungs v. Oberbürgermeisterin der Bundesstadt Bonn, (2004) ECR I-9609.
Case C-341/02, Commission v. Germany (2005) ECR I-2733.
Case C-60/03 Wolff & Müller (2004) ECR I-9553.
Case C-134/03 Viacom II (2005) ECR I-1167.
Case C-140/03 Commission v. Greece (2005) ECR I-000.
Case C-445/03 Commission v Luxembourg (2004) ECR I-10191
Case C-244/04 Commission v Germany (2006) ECR I-885
Case C-341/05 Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and others (2007) ECR I-000
Case C-438/05 The International Transport Workers' Federation & the Finnish Seaman's Union v. Viking line APB (2007) ECR I-000.
Case C-346/06 Dirk Ruffert v Land Niedersachsen (2008).

Opinions

AG Jacobs in Case C-67/96 Albany International (1999) ECR I-5751.
AG General Fennelly in Case C-376/98 Germany v Parliament and Council (2000) ECR I-2237.
AG Jacobs in Case C-112/00 Schmidberger (2003) ECR I-5659.
AG Stix-Hackl in Case C-36/02 Omega (2004) ECR I-09609.
AG Mengozzi in Case C-341/05 Laval (2007) ECR I-00000.
AG Maduro in Case C-438/05 Viking Line (2007) ECR I-00000.