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THE MANY (MIS)READINGS OF THE *LAVAL* CASE

Angelica Ericsson*

‘Let us try to interpret the *Laval* case leaving aside a purely emotional defence of national collective bargaining, even though such a strenuous defence constitutes the core issue of this case’.¹

1. HOW TO REVISIT THE REVISITED

To commemorate the fact that Sweden had been a Member State of the EU for 20 years, the Swedish Network for European Legal Studies hosted a conference in Stockholm in February of 2015. Ulf Bernitz, founder of and driving force within this network, was duly present at this conference, both in person and in the praise expressed by various speakers. For me, and probably also for many others, this man has been a constant source of encouragement and a delightful presence in an academic context which can sometimes seem intimidating.

One of the seminars organised during the abovementioned conference was dedicated to the, by then more than seven years old, *Laval* case.² Somewhat to my surprise, the seminar was packed with people. This case is apparently still a hot topic, at least in Sweden.³ During the seminar, one could not help but notice that *Laval* still provokes a lot of emotion and criticism. I, however, could not set aside the feeling that certain specific features of the Court’s reasoning have received most the attention, and to the exclusion of others. According to this largely held perception, the Court undervalued collective bargaining in

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¹ S. Sciarra, ‘Viking and Laval: Collective Labour Rights and Market Freedoms in the Enlarged EU’ (2007–2008) 10 CYELS, p. 576.

² Judgment in case C-341/05, *Laval*, EU:C:2007:809. This article will not provide a summary of this judgment, as the reader is presumed to already have a basic familiarity with the case.

³ The debate about the adaptation of the Swedish system in the light of this case has since gotten additional fuel with the publishing of the parliamentary report by The Inquiry on the posting of foreign workers to Sweden (SOU 2015:83) in September 2015.

general and the Swedish model in particular. The question of the lack of transparency and foreseeability in the Swedish system, which I had always perceived to be the deciding factor in the case, did not seem to have been emphasised in the prevailing discourse. I therefore felt compelled to revisit the *Laval* judgment and my own and others' perception of it.

The resulting study is not a piece about the judgment in the *Laval* case, at least not primarily. Instead, the focus of my article lies on the many writings about this judgment. If law is, at least in part, a matter of perception, then the way in which the *Laval* case has been described in legal literature certainly deserves to be critically analysed. While section 2 of this article constitutes an attempt at a discourse analysis of the existing legal writing, its section 3 suggests a shift in focus and aims to provide a possible explanation of the position taken by the Court in the *Laval* case, drawing from the developing theory about structural guarantees against national arbitrariness.⁴

For the purpose of the discourse analysis, I have tried to cast the inquisitorial net broadly to capture writings from a wide range of authors of different nationalities and academic backgrounds. The aim has been to map out legal writings that have addressed the *Laval* case and their tone, using concrete samples of normative judgments about the Court's judgment. However, I will focus on statements about the Court's treatment of the exercise of the right to strike's compatibility with the fundamental freedom to provide services. Hence, I will not examine in detail comments in the literature concerning the Court's interpretation of the Posting of Workers Directive⁵ or its treatment of the so called *Lex Britannia*.⁶ In addition, the relatively rich body of comments concerning the issue of private liability and the issue of legislative consequences in Sweden (concretised by the introduction of the *Lex Laval*) and other Member States has been completely left out of the study.

⁴ This theory was first elaborated in A. Ericsson, 'Structural Guarantees – the Union's Last Best Hope against National Arbitrariness', ERT 2010(2), p. 237, where the *Laval* case was mentioned as an example of the perceived phenomenon of judicial demands for such structural guarantees. Other scholars have also highlighted the jurisprudential phenomenon that this theory focuses on. In this regard, see J. Hettne, *EU-rättslig metod*, Nordstedts Juridik (2011), p. 104, S. Prechal, 'Free Movement and Procedural Requirements: Proportionality Reconsidered', Legal Issues of Economic Integration 35 (2008), p. 201, C. Barnard, *The Substantive Law of the EU, The Four Freedoms*, Oxford University Press (2007), pp. 85 ff., and T. Tridimas, *The General Principles of EC Law*, Oxford University Press (2006), p. 194.

⁵ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

⁶ A specific Swedish legislative amendment, which allowed collective action against a foreign employer carrying out temporary activities in Sweden when the Swedish labour law was not directly applicable to the terms and conditions of employment in question, deemed to be discriminatory by the ECJ.

2. CAPTURING THE TONE OF THE CRITIQUE CONCERNING THE *LAVAL* CASE

This section will, firstly, present a selection of the normatively loaded descriptive terminology that has appeared in the various pieces of literature concerning the *Laval* case. Subsequently, it will deal more specifically and substantially with comments relating to the Court's proclaimed judicial balancing and the structural problems in the Swedish system which the Court identified in its judgment. These elements, taken together, should provide a fair idea of the dominant perception of the Court's treatment of the conflict between the fundamental right to take collective action and the fundamental freedom to provide services.

2.1 Choices of descriptive terminology

Aiming to provide a cross-section of the general terminology used to describe the *Laval* case, I have chosen to highlight those terms which go beyond mere description and betray a normative stance of the author. As will become evident, the majority of normative statements about the *Laval* judgment from the authors I have studied express outrage over what is perceived as an unjustifiable nail in the coffin for national collective bargaining.

The most positive account of the Court's judgement in the *Laval* case could possibly be found in an article by Rosas,⁷ who incidentally was one of the judges presiding in the case. He claims that the *Laval* judgment is **in line with the idea of Social Europe** and adds that this idea always has to relate to the rights and interests of all workers, not only of workers from the richest Member States.⁸ In this regard, he concludes that the Court, in the *Laval* case, **favoured a social Europe instead of national protectionism**.⁹ Sciarra also emphasises the benefits of a transnational rather than a traditional, almost protectionist, approach for trade unions. However, she concludes that the *Laval* ruling **raises a significant challenge** to trade unions' role and functioning, as their actions to protect their members will have to be adjusted to the economic freedoms of the EU.¹⁰

Some authors claim that although the *Laval* judgment is **not surprising**, it is, nevertheless, **disappointing**.¹¹ Notably, Nic Shuibhne suggests that the Court

⁷ A. Rosas, 'Les Travailleurs Détachés dans l'Espace Social Européen – la Jurisprudence Récente' in *De Rome à Lisbonne : les juridictions de l'Union européenne à la croisée des chemins : mélanges en l'honneur de Paolo Mengozzi*, Bruylant (2013).

⁸ *Ibid.*, p. 393.

⁹ *Ibid.*, p. 394.

¹⁰ S. Sciarra, 'Viking and Laval: Collective Labour Rights and Market Freedoms in the Enlarged EU', p. 564.

¹¹ E.g. A.C.L. Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) *Ind Law J* 37(2), p. 147.

missed an opportunity to mould a more nuanced approach to free movement challenges, referring especially to the Court's **heavy-handed determination of justification and proportionality**.¹² Davies finds it **worrying** that, in the *Laval* case, the Court decided the proportionality issue, which requires a detailed understanding of the legal and factual background of a given dispute, on a **simplistic understanding** of the industrial relations background.¹³

One can conclude that the language used by the authors cited so far expresses a general acceptance of the *Laval* judgment as being a natural development of EU law, albeit raising certain doubts about the appropriateness of this development.

Other authors further develop such doubts, claiming that the ruling in the *Laval* case shows that the Court has an **economic bias**, or rather a **bias towards deregulation**.¹⁴ Barnard concludes that the ECJ seems **unwilling to protect the right to strike** in the same way that it protects collective bargaining and its result.¹⁵ She argues that the classic market access test employed in the *Laval* case **put the 'social' argument on the back foot**, as collective action was presumptively unlawful unless the trade unions could justify it and show that the action taken was proportionate.¹⁶ In a similar vein, Novitz concludes that the ECJ did not formulate a right to collective action in a manner likely to provide effective legal protection of its exercise and that some aspects of the *Laval* judgment **rendered the judicial recognition of such a right negligible in terms of its practical effects**. She sees this as **part of a systemic problem** arising from the nature of human rights protection within the EU, where human rights are always the exception and never the rule.¹⁷ According to her, the Court's imposition of horizontal effect in the *Laval* case arguably reveals **suspicion of collective action** as a constraint on individual liberty.¹⁸ Furthermore, she considers the sympathy of the Court for the employer – which is placed under pressure to enter into exclusive negotiations with a trade union without knowing what the outcome of collective bargaining will be – to be **troubling**.¹⁹ Likewise, Dorssemont finds **highly questionable** the idea that collective action in order

¹² N. Nic Shuibhne, 'Settling Dust? Reflections on the Judgments in Viking and Laval' (2010) EBLR, p. 682.

¹³ A.C.L. Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ', pp. 145 and 148.

¹⁴ See D. Leczykiewicz, 'Conceptualising Conflict between Economic & Social in EU Law after Viking and Laval' in *Viking, Laval and Beyond*, Hart (2014), p. 315, as well as C. Joerges and F. Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval' (2009) ELJ, pp. 18 f.

¹⁵ C. Barnard, 'Viking and Laval: An Introduction' (2007–2008) 10 CYELS, pp. 469 and 470.

¹⁶ *Ibid.*, p. 486.

¹⁷ T. Novitz, 'A Human Rights Analysis of the Viking and Laval Judgments' (2007–2008) 10 CYELS, p. 542.

¹⁸ *Ibid.*, p. 551.

¹⁹ *Ibid.*, p. 557.

to 'force' a service provider to conclude a collective agreement constitutes a restriction on his freedom, as these agreements should be viewed as self-imposed or autonomous restrictions.²⁰ He argues that this kind of reasoning seems to **degenerate collective bargaining to collective begging**, when it is carried out with a foreign service provider in a Host Member State (to which workers from another Member State are posted).²¹

The critical comments dealt with so far have primarily concerned a value-bias against a substantive recognition of the right to collective bargaining. Such critique concerns the end-result of the judicial balancing. However, one can also find critical statements concerning the appropriateness of conducting such a judicial balancing at all.

A highly critical Deakin concludes that the approach taken in the *Laval* case has a **strongly deregulatory effect** which, in non-harmonised areas, would be liable to **induce defensive regulatory competition** or a **race to the bottom**.²² Furthermore, he finds the test for the existence of a restriction to be **overly inclusive** and that **too much turns on the application of the proportionality test** which invites courts to engage in *ad hoc*, subjective judgments on the appropriateness of regulatory action.²³ In this regard, Robin-Olivier and Pataut note that by allocating to EU and national jurisdictions the prerogative to determine if collective action effectively protects workers' rights, the Court has **deprived trade unions of an essential part of their task**.²⁴ Evju agrees and concludes that, from a Nordic perspective, the introduction of a proportionality principle in collective action law is **more than alien: it is anathema**. Thus, the Court's ruling **cuts into the sphere of autonomy** of labour market parties and **fundamentally changes the ground rules** applicable in the field.²⁵ He adds that the mere notion of collective actions being barred, if they aim to attain more favourable terms and conditions than the statutory minima, is **so alien it is absurd**. Thus, the Court's approach lends itself to be criticised for a **flawed understanding of the industrial relations context and reality**.²⁶

Critical voices have also been raised concerning the *Laval* ruling in its relation to the *Viking* case.²⁷ According to labour law lawyer Boggs, the legal answers provided for in the *Laval* case are **contradictory and irreconcilable**

²⁰ Dorsemont, 'The Right to Take Collective Action v. Fundamental Freedoms in the Aftermath of Laval and Viking' in *European Union Internal Market and Labour Law: Friends or Foes?*, Intersentia (2009), p. 87.

²¹ *Ibid.*, pp. 87 f.

²² S. Deakin, 'Regulatory Competition after Laval' (2007–2008) 10 CYELS, pp. 605 and 607.

²³ *ibid.*

²⁴ S. Robin-Olivier and E. Pataut, 'Europe sociale ou Europe économique (à propos des affaires Viking et Laval)' in *Le Droit du Travail à l'épreuve de la globalisation*, Dalloz (2008), p. 116.

²⁵ S. Evju, 'Laval and Viking at First Glance', JFT 4/2008, p. 463.

²⁶ *Ibid.*, p. 464.

²⁷ Judgment in case C-438/05, *Viking*, EU:C:2007:772. The judgment in this case was handed down by the ECJ one week before the judgment in the *Laval* case and has often been called

with those that would have been advocated by an international labour law lawyer like himself.²⁸ Moreover, he adduces that, in many ways, the **incursion into trade union autonomy** countenanced by the *Laval* judgment is **even more spectacular than the incursion** countenanced by the ECJ in the *Viking* case.²⁹

Weatherill agrees with the orthodox criticism of the ruling in *Laval*, according to which the Court has applied EU internal market law in such a way as to generate a **serious risk that the established patterns of collective labour organisation at national level will be undermined**. However, he argues that the primary problem with the *Laval* case is not that it subjects labour law to the insensitively cold logic of legally enforced market deregulation (as would be claimed in orthodox criticism), but rather that it is itself **insensitive to** (even a **corruption of**) the established receptivity of internal market law to legitimate interests expressed through national law.³⁰ According to him, EU law has become a legal order infused with respect for legitimate national claims to authority, because the Court has embraced a flexible and creative approach to justification – but that this **approach is lacking** in the *Laval* case.³¹ Thus, he finds the ruling in the *Laval* case to have an **anachronistic feel** to it and that it results in free movement law being **atypically biased in favour of market freedom** when it collides with obstacles caused by the taking of industrial action.³² The *Laval* ruling can thus be criticised for **carrying an illegitimate deregulatory force**.³³

Hence, this review of the discourse concerning the judgment in the *Laval* case reveals that this judgment has generally been portrayed as being too detrimental to national collective bargaining and that these effects are unjustified, since they stem from an ill-informed and inappropriate act of judicial balancing which is stacked against labour rights.

2.2 Different perceptions of the judicial balancing

The ECJ explicitly held, in its *Laval* judgment, that ‘the rights under the provisions of the [TFEU] on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy’.³⁴ However,

its ‘twin case’. The *Viking* case also dealt with the judicial balancing between the right to take collective action and an EU fundamental freedom, albeit within a different factual context.

²⁸ A. Bogg, ‘Viking and Laval: The International Labour Law Perspective’ in *Viking, Laval and Beyond*, p. 41.

²⁹ *Ibid.*, p. 52.

³⁰ S. Weatherill, ‘Viking and Laval: The EU Internal Market Perspective’ in *Viking, Laval and Beyond*, p. 24.

³¹ *Ibid.*, p. 34.

³² *Ibid.*, pp. 36 and 39.

³³ *Ibid.*, p. 39.

³⁴ Judgment in case C-341/05, *Laval*, EU:C:2007:809, para. 105.

there are many different takes on whether and how such a judicial balancing was actually performed in this case, which will be showcased in the following.

Many voices have been raised to proclaim that the Court did not conduct true judicial balancing, but rather stuck to an (inappropriately) rigid proportionality test. Tans, for one, claims that the Court in the *Laval* case evaded the actual balancing of the fundamental right to take collective action and the fundamental freedom at hand.³⁵ Similarly, Barnard concludes that the reference to balance in this case is largely rhetorical and had no substantive influence on the outcome in this case.³⁶ She finds it remarkable that in an area of such sensitivity – national social policy and collective action – the ECJ still insisted on applying a strict proportionality test to the trade unions, with no reference to any margin of appreciation which appears to be confined to Member States.³⁷ According to Weatherill, this is the main problem with the *Laval* ruling. He claims that a sensitivity to the nature of the justification advanced and an accompanying readiness to grant the national regulator a margin of appreciation, found in other ECJ rulings, is missing in this one.³⁸

Among the authors describing the perverse effects of the judicial balancing in the *Laval* case, we find Davies and Bogg. The former argues that the way in which the ECJ uses proportionality in the setting of the *Laval* case substantially undermines the significance of its recognition of the right to strike as a fundamental right. In fact, this recognition is conditional on the satisfaction of the proportionality test.³⁹ He adds that the most obvious problem with the application of the proportionality test to industrial actions is that the more the strike restricts the employer's free movement rights – and thus the more effective it is from the union's perspective – the harder it will be to justify.⁴⁰ Bogg, in turn, claims that the proportionality test developed by the ECJ in the *Laval* case for scrutinising the legitimacy of strike action under EU law is impossible to justify when measured against standards of the International Labour Organisation (ILO).⁴¹ In fact, according to these standards, there is no warrant for any balancing of the right to strike against free movement provisions, however sensitive that balancing exercise might be.⁴² Bogg takes the view that, if the EU takes ILO standards seriously, the only proper response to the *Laval* case is to implement an immunity that removes the exercise of collective rights from any

³⁵ S. Tans, 'Case Report on Laval, 18 December 2007 (Case C-341/05) and Viking, 1 December 2007 (Case-438/05)' (2008) EJML, p. 272.

³⁶ C. Barnard, 'Viking and Laval: An Introduction', p. 482.

³⁷ *Ibid.*, p. 486.

³⁸ S. Weatherill, 'Viking and Laval: The EU Internal Market Perspective', p. 35.

³⁹ A.C.L. Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ', p. 141.

⁴⁰ *Ibid.*, pp. 142 f.

⁴¹ A. Bogg, 'Viking and Laval: The International Labour Law Perspective', p. 42.

⁴² *Ibid.*, p. 70.

form of proportionality balancing against free movement provisions.⁴³ He is of the opinion that labour law is too important to be left to the judges, especially where those judges are given licence to weigh workers' fundamental social rights against fundamental economic freedoms.⁴⁴ Dorssemont agrees with Bogg that an immunity should have been granted to collective action in relation to the free movement rights and that trade unions and workers should be autonomous in defining their interests and assessing whether it is appropriate to defend these interests through collective action – without any second guessing by judges.⁴⁵

Complementing the discussion on whether a judicial balancing did or even should have taken place in the *Laval* case, one can also find some comments on the responsibility for carrying out such a balancing. Rönmar notes that the assessment of the justification and proportionality was (in contrast to *Laval*) left to the national court in the *Viking* case.⁴⁶ Accordingly, the judgment in *Laval* came as a surprise to many in Sweden, not only because of its content but also because of its clarity – in the sense that the ECJ settled the issue without leaving a margin of appreciation to the national court.⁴⁷ Dorssemont remarks on the difference in the Court's willingness to engage itself with the proportionality assessment in the two cases by stating that the Court had some difficulty in defining its role and that this is puzzling, given that both cases were based on preliminary rulings.⁴⁸ Leczykiewicz argues that the explanation for why the ECJ so clearly deemed the action unjustified is grounded in considerations of legal certainty demanding adequate *a priori* determination of the content of financial obligations of economic operators.⁴⁹

2.3 Portrayal of the structural problems in the Swedish system

In what might be considered the decisive paragraph of the *Laval* case, the ECJ stated that “collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective [at hand], where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context

⁴³ *Ibid.*, p. 71.

⁴⁴ *Ibid.*, p. 73.

⁴⁵ F. Dorssemont, ‘The Right to Take Collective Action v. Fundamental Freedoms in the Aftermath of *Laval* and *Viking*’, pp. 77 ff. and 101.

⁴⁶ M. Rönmar, ‘Free Movement of Services versus National Labour Law and Industrial Relations Systems: Understanding the *Laval* Case from a Swedish and Nordic Perspective’ (2007–2008) 10 CYELS, p. 517.

⁴⁷ *Ibid.*, p. 518.

⁴⁸ F. Dorssemont, ‘The Right to Take Collective Action v. Fundamental Freedoms in the Aftermath of *Laval* and *Viking*’, p. 102.

⁴⁹ D. Leczykiewicz, ‘Conceptualising Conflict between Economic & Social in EU Law after *Viking* and *Laval*’, p. 313.

characterised by a 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 required to comply as regards minimum pay (see, to that effect, *Arblade and Others*^[50], paragraph 43)⁵¹.

In this regard, Barnard notes that the ECJ clearly took against a number of aspects in the Swedish system, in particular its lack of transparency in respect of pay and the Swedish government's failure to take advantage of the possibilities provided in the Posting of Workers Directive for addressing the problem.⁵² In a similar vein, Rönmar concludes that the lack of transparency and the case-by-case negotiation on wages implied in the Swedish system, at least in the building line of business, were not acceptable to the ECJ, and notes that this position was different from the one reached by the Advocate General.⁵³ She argues that the ECJ's emphasis on state intervention and transparency as regards minimum wages and other terms and conditions of employment disadvantages the Nordic model.⁵⁴ Barnard adds that the ECJ appeared to be telling Sweden to 'fix' the problem by using a more regulatory, less Swedish approach, which could destabilise this highly successful model.⁵⁵

According to Robin-Olivier and Pataut, this is the part of the *Laval* judgment that deserves the most criticism. They find that the Court's lapidary conclusion in this regard endangers the survival of a system for organising industrial relations which is based on freely concluded collective agreements. Such a system relies on collective negotiation, the result of which necessarily is hard to predict. In fact, to impose that rules should be 'sufficiently precise and accessible' in advance amounts to a prohibition on open negotiations which are adaptable to each employer.⁵⁶ Adding to this line of critique, Novitz claims that the test developed in the *Arblade* case, concerning the necessity for legislation or relevant collective agreements to be 'sufficiently precise and accessible', was taken out of context when it was applied by the Court in the *Laval* case. To support this claim, she argues that it is surely more important that an employer knows the scope of their criminal liability (which was at stake in the *Arblade*

⁵⁰ Judgment in joined cases C-369 & 376/96, *Arblade*, EU:C:1999:575.

⁵¹ Judgment in case C-341/05, *Laval*, EU:C:2007:809, para. 110.

⁵² C. Barnard, 'Viking and Laval: An Introduction', p. 491.

⁵³ *Ibid.*, p. 512, making reference to Advocate General Mengozzi's Opinion in case C-341/05, *Laval*, EU:C:2007:291.

⁵⁴ M. Rönmar, 'Free Movement of Services versus National Labour Law and Industrial Relations Systems: Understanding the Laval Case from a Swedish and Nordic Perspective', pp. 522 f.

⁵⁵ C. Barnard, 'Viking and Laval: An Introduction', p. 488.

⁵⁶ S. Robin-Olivier and E. Pataut, 'Europe sociale ou Europe économique (à propos des affaires Viking et Laval)', p. 115.

case) when acting as a foreign service provider than that they know what will be the outcome of collective bargaining.⁵⁷

As for the effects of the Court's statement in the paragraph 110 cited above, Novitz declares that the filter of proportionality was not applicable in the *Laval* case, as the initial threshold of justification was not met.⁵⁸ Barnard explains that, because the Swedish system lacked transparency, the ECJ considered that the collective action could not be justified in this case and that there was, thus, no need to consider the question of proportionality.⁵⁹

3. SWITCHING THE FOCUS

Nic Shuibhne has noted that trade union, employee and media reactions to the *Laval* case did not really reflect or embrace a shared commitment to market opening or to the wider (and even deeper) ambition of integration that market opening exemplifies.⁶⁰ As we have seen so far in this article, neither did the bulk of academic reactions to this case. Bobek raises the possibility that much of the massive criticism levied against the *Laval* case is of a primarily normative nature and that it has been driven by the ideological wishes of a certain community, namely labour law lawyers, mainly those from Member States who harbour certain value convictions, who were appalled by the ECJ not upholding the same values.⁶¹

In an effort to explain the outcome of the *Laval* case, detached from what can be called 'a purely emotional defence of national collective bargaining'⁶², Barnard argues that the possibility of collective action makes single market law lawyers uneasy because it represents a green light for trade unions to interfere with the operation of the single market for protectionist, economic reasons – something Member States are not allowed to do.⁶³ In a similar vein, Davies concludes that the Court, in the *Laval* case, may have been concerned that Sweden had not created any mechanism to protect employers against unreasonable behaviour on the part of the trade unions.⁶⁴ Adding to this line of thought, Novitz voices the idea that the Court's restrictive approach to what can

⁵⁷ T. Novitz, 'A Human Rights Analysis of the Viking and Laval Judgments', pp. 556 f.

⁵⁸ *Ibid.*, p. 559.

⁵⁹ C. Barnard, 'Viking and Laval: An Introduction', p. 485.

⁶⁰ N. Nic Shuibhne in 'Settling Dust? Reflections on the Judgments in Viking and Laval', p. 700.

⁶¹ M. Bobek, 'EU Law in National Courts: Viking, Laval and Beyond' in *Viking, Laval and Beyond*, pp. 335 f.

⁶² See introductory citation to this article.

⁶³ C. Barnard, 'Viking and Laval: An Introduction', p. 491.

⁶⁴ A.C.L. Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ', p. 143.

be invoked as a legitimate objective of collective action may have been a way to stave off fears that workers would act in a discriminatory manner.⁶⁵

These ideas would actually fit neatly in with my own perception of the *Laval* case as a case where the judgment of the Court necessarily followed from the finding that the demands for structural guarantees were not met within the Swedish system.⁶⁶ Arguably, demands for structural guarantees come into play as standards of judicial review precisely when there is a danger that EU law rights, like the fundamental freedoms, will be set aside in an arbitrary manner within a particular national context. I would maintain that if the ECJ finds that, within such a context, there are no structural guarantees (transparent and available rules, independent administrative controlling bodies, appeal procedures etc.) to exclude that this kind of danger would become a reality, a restriction on the EU law right cannot be justified.

It should be recalled that both the *Viking* and the *Laval* judgment prescribed a balancing between the right to take collective action and an EU fundamental freedom. However, some of the authors, whose views on the *Laval* case have been presented in section 2 of this article, have noted a lack of a genuine judicial balancing and proportionality assessment in the *Laval* case. It has been submitted by several of them that the reason behind this omission was that the ECJ had already found that the Swedish system lacked transparency and foreseeability. Some of these authors have also noted that there was a difference between the discretion given to the national court in the *Laval* case (in reality, none) compared to the discretion given to the national court in the *Viking* case (where the final assessment of justification and proportionality was handed over). However, none of these authors seems to provide any deeper analysis of these particular features of the *Laval* judgment and how they distinguish it from the judgment in the *Viking* case.

I would argue that the decisive difference between the two cases was that the existence, or rather non-existence, of structural guarantees against arbitrariness only became an issue in the *Laval* case. In my view, this explains why the ECJ would feel the need to take it upon itself to declare the Swedish restriction incompatible with EU law, without entering into a proportionality assessment or handing over such an assessment to the national judge. The argument goes as follows: National restrictions on the EU fundamental freedoms can be justified (e.g. by the right to strike), but leaving the opportunity wide open for national

⁶⁵ T. Novitz, 'A Human Rights Analysis of the Viking and Laval Judgments', p. 555.

⁶⁶ What I call 'demands for structural guarantees' are particular standards for reviewing the compatibility of national measures with EU law. I define this particular group of standards in a functional manner, as safeguards against national arbitrariness. To put it in other words, the ECJ can be said to uphold demands for structural guarantees when it rules that a national measure under review can only be compatible with EU law if the national surrounding structures – e.g. procedural or administrative ones – are designed to preclude arbitrary mis- or non-application of EU law.

regulatory discretion (however legitimate) to warp into arbitrary discrimination of workers and service providers from other Member States would be unacceptable to the ECJ. Hence, if a national regulator designates regulatory powers regarding pay to trade unions without either the State or the trade unions themselves establishing any guarantees that would prevent discriminatory behaviour of foreign service providers, this situation would almost certainly be deemed incompatible with internal market law. The existence of such an unfettered opportunity to discriminate, if already established by the ECJ without the need for further verification by the national court, can simply not be justified in the light of EU law and a proportionality assessment would consequently not be called for.

Turning to Weatherill's critique, focusing on the perceived inconsistency of the *Laval* judgment with other politically and socially sensitive cases adjudicated under internal market law, I certainly agree that the *Laval* case would fit in with the cast of cases where a wide margin of discretion has been granted to the national regulator. However, I do not find the outcome of this particular case incompatible with this logic. As I have already claimed on previous occasions, the granting of such a wide margin of discretion almost inevitably shifts the focus of the Court from an in-depth proportionality analysis towards a more limited and targeted form of judicial review; identifying a possible lack of structural guarantees against an arbitrary exclusion of EU law.⁶⁷ Although the express language of 'wide margin of discretion' is missing in the *Laval* judgment, this judgment would not necessarily classify as anachronistic, as the ruling fits the general methodological approach of the justification assessment in sensitive cases such as *Dynamic Medien*,⁶⁸ *Bosman*⁶⁹ or *Schmidberger*,⁷⁰ all cited by Weatherill. I would argue that the Court's approach in the *Laval* case was not inconsistent with the one applied in these cases, considering that it would not be necessary to emphasise the large margin of discretion when it is obvious that the national context has no inbuilt guarantees against this discretion being used to arbitrarily disregard the fundamental EU freedoms.

Bernitz has recently, in a publication casting light on the consequences of the *Laval* case, questioned whether it is at all possible for judges to strike a correct balance on objective grounds in tricky cases involving rights based arguments of a politically and socially sensitive nature.⁷¹ One might argue that the judicial restraint that he wholeheartedly recommends could be embodied in the trend of cases, highlighted by Weatherill, where a large margin of discretion for the

⁶⁷ A. Ericsson, 'Structural Guarantees – the Union's Last Best Hope against National Arbitrariness', mentioned *supra* in footnote 5.

⁶⁸ Judgment in case C-244/06, *Dynamic Medien*, EU:C:2008:85.

⁶⁹ Judgment in case C-415/93, *Bosman*, ECLI:EU:C:1995:463.

⁷⁰ Judgment in case C-112/00, *Schmidberger*, EU:C:2003:333.

⁷¹ U. Bernitz, 'Epilogue' in *Viking, Laval and Beyond*, p. 342.

national regulator is emphasised. The role of the judge in ensuring the *effet utile* of EU law in such cases could then be restricted to verifying the existence of structural guarantees against arbitrary sidestepping of EU law.

4. CONCLUDING REMARKS

Of course, one cannot disregard the global effects on the exercise of collective bargaining, brought about by the entire *Viking* and *Laval* quartet.⁷² These cases have undeniably deprived trade unions around the EU of part of their autonomy. However, since the *Laval* case has been portrayed as the most incursive of them all, I wanted to focus on shedding a different light on this case in particular. Throughout this article, I have aimed to provide concrete examples of how the ruling in this case has been portrayed, with regards to both the type of critique that has been voiced and the specific language used.

Concerning the language used when describing the judgment in the *Laval* case, one can conclude that it has – with a few exceptions – been portrayed as having been crafted by a very intrusive, insensitive jurisdiction which suffers from an economic bias and which is ignorant of the function of collective action. In her own efforts to ‘interpret the *Laval* case leaving aside a purely emotional defence of national collective bargaining’, Sciarra suggests that emphasis should be moved from the balance struck between fundamental principles of EU law, and towards the missing links in the institutional chain (she lifts the question of the underdeveloped role of the liaison office) which ultimately affects the Member States’ compliance with their obligations.⁷³ Maybe this shift in focus would have changed the language used to describe this case. Maybe the ECJ could then have been spared some of the criticism it received and been seen as primarily having sent strong signals to the national regulators to create transparent and foreseeable structures in which trade unions can exercise their right to collective action in a bid to raise overall worker protection.

Much of the criticism voiced against the choice of methodological approach made by the Court when it dealt with the *Laval* case, appreciating it in terms of restriction, justification and proportionality in relation to the freedom to provide services, can be countered with an explanation grounded in the orthodoxy of this approach, when viewed against the mandate of the Court and the EU as a whole.⁷⁴ As pointed out by Davies, this approach flows, at least to some extent, from the Member States’ decision to exclude the right to strike from

⁷² Also including the judgments in cases C-346/06, *Rüffert*, EU:C:2008:189, and C-319/06, *Commission v Luxembourg*, EU:C:2007:516.

⁷³ *Ibid.*, p. 578.

⁷⁴ As developed by N. Nic Shuibhne in ‘Settling Dust? Reflections on the Judgments in *Viking* and *Laval*’, pp. 685 ff. In particular, at p. 688, she provides the following conclusion: ‘[T]hat the Court engaged its three-stage restriction, justification and proportionality paradigm in

EU legislative competence. Even if this exclusion might have been thought to strengthen the Member States' ability to protect this right in domestic law, in fact the converse may turn out to be true because the ECJ is prevented from treating the right to strike as a positive goal of the EU.⁷⁵ In this light, the above-mentioned critique essentially boils down to normative statements about how the EU should function differently and have different objectives than it has actually been endowed with.

When it comes to the critique of the substantive result reached through the application of the orthodox internal market law approach, I hope that the theory of demands for structural guarantees might help to provide an explanation for the highly criticised outcome of the *Laval* case. As fleshed out in section 3 of this article, this theory, along with the Court's finding in paragraph 110 of the judgment in this case, should at least provide an explanation as to why there would have been no proportionality assessment to be handed over to the Swedish referring court.

[the *Laval* case] is a predictable and consistent application of the framework of free movement law'.

⁷⁵ A.C.L. Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ', p. 139.