TRADE UNION RIGHTS AND MARKET FREEDOMS: THE EUROPEAN COURT OF JUSTICE SETS OUT THE RULES

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I. INTRODUCTION

Unsurprisingly, the accession of East European countries to the European Union (EU) has created competition among companies based on the lowest cost of labor. The possibility of exploiting so called social dumping is one of the reasons (and not one of the least important) that have made access to the single European market attractive for those countries. Hence, in the wake of EU enlargement, a conflict has emerged between the interests of the companies to exploit the competitive advantages resulting from labor cost differentials and the States' and the Unions' interests to defend their own social protection systems.

In both *Viking* and *Laval* cases, the question referred to the Court of Justice may be summarized as follows: is a collective action undertaken by trade unions of a Member State for the purpose of curbing the freedom of an undertaking to enter the market of another Member State legitimate under Community law? In *Viking* the question was raised with regard to an industrial action undertaken by the Finnish seamen's union with the support of the International Transport Workers Federation Union (ITWF) whose aim was to prevent a Finnish shipping company from sailing one of its vessels on the Helsinki-Tallin route under an Estonian flag and from applying to its crew the less favorable working conditions laid down by the Estonian legislation. In *Laval* the Court was asked to rule on the legitimacy of a collective action undertaken by Swedish trade unions against a Latvian building company that was performing a contract in Sweden. The Swedish trade unions' aim was to have the foreign company sign the national collective agreement that, in the Swedish

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construction sector, is the pre-condition to open a negotiation on the minimum wages that must be applied in a firm.

From both cases there emerges the picture of a Europe divided into two, as testified by the pleadings that the Member States lodged with the Court of Justice during the proceedings:[1] those of the Eastern countries and the United Kingdom (always reluctant to accept constraints on internal market dynamics) supported the companies, while those of the West European countries supported the trade unions.

The Court held in the formers' favor, thus provoking a chorus of criticism from those who were under the illusion that the EU enlargement would have not entailed social costs for "Old Europe." The aim of this paper is, first, to translate the rulings of the Court of Justice into general rules so as to define the areas granted to the exercise of autonomous collective action within the EU internal market, and, second, to find whether the "criticism" leveled against the judgments is justified by Community law principles or whether those principles can be construed differently from the Court of Justice.

The outcome of the two judgments was considerably different under many aspects, as the cases and the underlying legislation were different. *Viking* concerns the freedom of establishment of undertakings under EC Treaty art. 43, while *Laval* concerns the free provision of services under EC Treaty art. 49. However, in both judgments the Court follows the same approach and grounds its decision on common principles that it infers from its previous case law. Those principles will be decisive for the future evolution of the Community market integration, as they clarify aspects of its rules of operation that have remained uncertain so far. It is therefore appropriate to briefly list them before tackling the merits of the rulings and assessing their impact.

1. The Court clarifies the meaning of EC Treaty art. 137(5) that explicitly excludes the EU's competence over the "right to strike" (beside the right to a wage, freedom of union association and lock-out). This provision prevents Community institutions from passing laws on these matters (by adopting directives), but this does not mean that it is lawful to regulate and exercise the right to strike in a way that infringes Community law principles, which

1. For analyses on the submission in the Viking case, see Brian Bercusson, *The Trade Union Movement and the European Union: Judgment Day*, 13 EUR. L.J. 279 (2007).

the States always have to comply with when exercising their national sovereignty. In other words, EC Treaty art. 137(5) does not grant any "immunity" from Community law of the right to strike as it is regulated at the national level.

2. The fundamental economic freedoms sanctioned by the EC Treaty (including the freedom of establishment and to provide services) must be complied with not only by the States and national bodies entrusted with public powers, but also by private subjects, and can thus be relied on in regulating the relations between private entities, such as those between a company and a trade union. The Treaty rules on the functioning of the internal market therefore have both a "horizontal" as well as a "vertical" direct effect.
3. The EU recognizes the right to industrial action, including strike, as a fundamental right of European workers, yet this right also finds its limits in other rights, freedoms, and fundamental principles enshrined in Community law.
4. In the presence of an obstacle to a company's economic freedom, the Court of Justice and the competent national courts have to assess the validity of any justification put forward by the (public or private) entities that have put up the obstacle. The need to protect workers falls within the justifications admitted under Community law, as it responds to a "general interest" deserving protection. It must be assessed case by case as to whether the constraint on the undertaking's freedom is indeed necessary to pursue such an interest (the so-called necessity or adequacy test), and whether such freedom is not excessively compressed, i.e., whether there exist any other means that could achieve similar results by better guaranteeing its exercise (the so-called proportionality test).

It follows therefore that the rules for the exercise of industrial action outlined by the Court in the mentioned judgments and that describe the "case law" approach to collective autonomy in the Community internal market have to be written in compliance with those principles.

II. INTERNAL MARKET, RELOCATION, AND COLLECTIVE ACTION: THE *VIKING* JUDGMENT

The principles laid down in *Viking* define some Community rules on relocation from the perspective of collective autonomy and trade union action. The reasoning adopted by the Court was based solely on EC Treaty art. 43. In this way, the Court receded from pronouncing a decision on the second stage that naturally follows outsourcing, i.e., recovering the outsourced business by a commercial agreement. This stage calls into question EC Treaty art. 49 that is the "exclusive" subject matter of the *Laval* judgment.

If we translate the Court's *dicta* into rules of general nature, we may say that under Community law it is lawful for a trade union to take action aiming at protecting the workers from the consequences of an undertaking that intends to move to another Member State, if the interests of these workers are "jeopardised or under serious threat" by the relocation.[2] This means that this undertaking can be legitimately induced, by way of industrial dispute, to commit not to dismiss the workers and to apply the same conditions of employment to them after relocation. This seems to be the meaning of the section of the judgment in which the Court recognizes that whether the strike is lawful or not depends on the national court ascertaining that the company that relocates in the case has not undertaken any legally "binding" commitment not to affect the jobs or conditions of employment of its employees.[3] Further restrictions to trade union action can only arise from national legislation, since the examination of whether there are "other means which" are "less restrictive of freedom of establishment" must be carried out respecting the proportionality principle, with reference to "national rules" and "collective agreement law applicable to that action."[4] Transnational action organized and implemented by ITWF is not justified when no threat to the workers' rights arises from the change of nationality of the enterprise (the vessel, in this case), as is the case when the enterprise relocates to a State "which guarantees workers a higher level of social protection than they would enjoy in the first State."[5]

This regulation rule shaped by the Court may seem reassuring for European trade unions and workers, and (in their eyes) it seems to correct for the better Advocate General (AG) Maduro's Opinion. In

2. Case C-438/05, Int'l Transp. Workers' Fed'n v. Viking Line ABP, 2007 ECR I-00000.
3. *Id.* ¶ 83.
4. *Id.* ¶ 87.
5. *Id.* ¶ 89.

fact, the AG had correctly read the case through both EC Treaty arts. 43 and 49, since the issue of the conditions of employment to be granted to Viking's seamen calls into question the freedom to provide the service after the transfer (the re-flagging of the vessel).[6] For this reason, the AG had distinguished between action aimed at preventing the relocation (which is lawful, provided that is subject to the same rules applicable to "internal" relocations within domestic borders) and collective action aimed at imposing compliance with the provisions laid down by law or agreements in the State of origin on the undertaking, once it has relocated to a Member State. The latter action should be considered irremediably reprehensible under EC Treaty art. 49, since it implies a "discriminatory" partitioning of the internal market.[7]

Unlike Maduro, the ECJ limits itself to read the case in its "static" phase (manifestation of the freedom of establishment) and not in a dynamic phase that might take place at a later stage (expression of the freedom to provide services). Even from the perspective of the freedom of establishment alone, the conclusions reached by the Court could have been more restrictive of the exercise of trade union action. As the Court expressly recognized, trade union action taken against Viking envisages a "future" discriminatory treatment, insomuch as it prevents Viking from enjoying the same treatment as other economic operators established in that State.[8] From here the claim that only grounds of "public policy" could justify this violation of the enterprise's freedom is only a matter of time.[9] However, the Court did not make that claim and it developed its argument within the scope of non-discriminatory obstacles and justifications grounded on "general interest." In this way, trade unions in the State of origin of the undertaking are allowed what legislators in the State of destination are not.

6. An instrumental use of the freedom of establishment only to continue to provide the same services at a cheaper labor cost leads Umberto Carabelli, *Una sfida determinante per il futuro dei diritti sociali in Europa: la tutela dei lavoratori di fronte alla libertà di prestazione dei servizi nella CE*, 58 RIVISTA GIURIDICA DEL LAVORO 33. 102 (2007), and Maria V. Ballestrero, *Le sentenze Viking e Laval: la Corte di giustizia "bilancia" il diritto di sciopero*, 22 LAVORO E DIRITTO (forthcoming 2008) to consider the case in question as an hypothesis of Community law "abuse."

7. See the Opinion of Advocate General Maduro, Case C-438/05, Int'l Transp. Workers' Fed'n v. Vikin Line ABP, 2007 E.C.R. I-00000, ¶¶ 65, 69.

8. *Id.* ¶ 72.

9. The application of discriminatory measures to foreign undertakings exercising free movement within the EU is admissible only "on grounds of public policy, public security or public health," EC Treaty art. 46, § 1, whereas the ECJ justifies the presence of non-discriminatory obstacle also "on overriding grounds of general interest." *See* CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EU 378 (Catherine Barnard ed., 2d ed. 2007).

We will come back to the possible reasons for such a bias in favor of collective action carried out within the scope of EC Treaty art. 43, which the Court does not confirm when applying EC Treaty art. 49. For the time being, it should be pointed out that even the principles worked out in *Viking*, which are apparently reassuring for European workers, are only partially successful due to their limited scope and their being liable of being used in a way limiting the practicability of collective action.

For instance, when it is up to the national court to examine whether there are means other than industrial actions to "bring to a successful conclusion the collective negotiations,"[10] the consequences are uncertain. And this examination seems to allow for considerable discretion when applied to the specific case. The use of the proportionality test can justify an interference of the judicial authority on the merits of the dispute whose outcome cannot be easily predicted and may induce the judicial authority to turn what the law delegates to industrial relations into a legal obligation. In other words, there is the risk that through the proportionality principle, a reformulation of the right to strike is imposed as a last resort for settling collective disputes, even in those legal systems in which such a principle does not exist, such as in the Italian one (at least in the private sector).[11]

Even the way in which the Court applies the so-called necessity test to this particular case does not rule out scenarios restricting the exercise of trade union action. The assumption justifying the resort to action is that "jobs or conditions of employment" are "jeopardized or under serious threat" by the re-flagging. "Simple" threat or the "possibility" that conditions of employment may be jeopardized is not enough, and the national court is called to establish if the "fears" inducing trade union to carry out collective action were sufficiently grounded. The judgment, here again, paves the way for a questionable judicial interference in trade unions' strategic choices.

The second problem raised by the principles laid down by the Court in *Viking* has to do with the meaning these principles acquire outside the particular context (maritime transport) in which they were laid down. In this instance, relocation takes place through a merely legal, and not physical, relocation of the work place (the vessel);[12]

10. Case C-438/05, Int'l Transp. Workers' Fed'n v. Viking Line, ABP, 2007 E.C.R. I-00000, ¶ 87.

11. *See*, *e.g.*, Ballestrero, *supra* note 6.

12. As observed by Teun Jaspers, *The Right to Collective Action in European Law*, *in* CROSS-BORDER COLLECTIVE ACTIONS IN EUROPE: A LEGAL CHALLENGE 23, 64 (Filip Dorssemont, T. Jaspers & A. van Hoek eds., 2007), for a naval enterprise that adopts a flag of convenience, "outsourcing is . . . primarily more of a legal than a physical operation." As

which is not typically the case in relocations. This makes the relocation of the business easier, but it also allows the implementation of trade union strategies aimed at thwarting its effects. In a "typical" case of relocation, the trade union's strategy is much more complex, and more radical methods of pressure may be adopted instead of a strike (such as blockades, occupation of the enterprise, or threats of boycotting).[13] Trade unions need to prevent the shut-down of the business and then the opening of a new one in another country, or to induce the enterprise to guarantee jobs and the placement of workers in the country of origin. By contrast, the strategy adopted by the Finnish trade unions, aimed at keeping the terms of the agreement after the relocation, does not seem usually viable, because the physical relocation of the company in most cases does not imply a relocation of workers.

This question mingles with Community law on the transfer of an undertaking. The events in the *Viking* judgment could abstractly constitute a transfer of an enterprise, consisting in the transfer of the vessel ownership from the Finnish to the Estonian employer. If the issue of applying Council Directive 2001/23 (EC)[14] does not arise, it is because its application to seagoing vessels is expressly excluded (Article 1). Hence, seagoing vessels are granted full freedom to adopt re-flagging strategies without risking them being pointless due to the (legal) safeguarding of employment relationships provided for in the directive.[15] Essentially, the Court seems to admit that what is imposed

regards the strategies employed by the international trade union of seamen to fight re-flagging operations, see Fitzpatrick, *id.* at 85. *See also* Valeria Filì, *Il lavoro marittimo alla ricerca del difficile equilibrio tra tutele della concorrenza e diritti dei lavoratori*, 17 DIRITTO DELLE RELAZIONI INDUSTRIALI 773 (2007) (analyzing the recent ILO Convention No 186/2006 (Maritime Labour Convention) aimed at setting international functional standards to stem social dumping). The Convention seems bound to be translated into Community legal source, if, as requested by European sectoral social partners, the agreement reached by them on November 12, 2007 is transposed into a directive. This agreement followed an initiative taken by the Commission (see COM(2006) 287). It is undoubtedly an interesting example of dialogue between ILO sources and Community players. *See* Silvana Sciarra, *Viking e Laval: Diritti Collettivi e Mercato nel Recente Dibattito Europeo*, 22 LAVORO E DIRITTO (forthcoming 2008). Even if it can hardly stem social dumping in the internal market in a serious fashion, given the very general nature of the protection standards defined by the ILO Convention and transposed into the European Agreement.

13. For a comparative analysis of national rules in connection with similar forms of trade union action, see Filip Dorssemont, *Labour law Issues of Transnational Collective Action*, *in* CROSS-BORDER COLLECTIVE ACTIONS IN EUROPE: A LEGAL CHALLENGE 264 (Filip Dorssemont, T. Jaspers & A. van Hoek eds., 2007).

14. Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

15. Not only does not Community law precludes the full power of seagoing vessels to re-flag, but it makes its exercise easier, with the only constraint of complying with international safety and environmental protection standards (see Commission Regulation 789/2004, 2004

by Council Directive 2001/23 (EC) can be pursued by trade union action in the event of change of vessel ownership. The enterprise's right to change ownership and headquarters is not denied, but workers can take action not to suffer the detrimental effects of this decision.

The situation changes dramatically in a "typical" case of relocation (i.e., not concerning a vessel), that is when a business is closed and a new one is started in another Member State. Typically, this would not constitute a transfer of an enterprise under Council Directive 2001/23 (EC), even if, in abstract terms, the directive could be applicable if this case were to come about.[16] And since, typically, there is no transfer of goods or workers, not even the trade union strategy implemented in the *Viking* case could be adopted.

This leads to a conclusion: outside the maritime context, the principles laid down by the Court do not seem to be greatly useful for workers and trade unions in Member States. In the overwhelming majority of cases, in fact, relocation occurs in a way that rendered trade union action pointless if pursued in ways and with aims similar to the action implemented in the *Viking* case (i.e., to safeguard jobs and contractual terms as they were before the transfer). When it is not so, and the case may constitute a transfer of enterprise (that is when there is a "significant" transfer of workers), Council Directive 2001/23 (EC) is applicable. And since the directive safeguards the jobs and conditions of employment for the workers transferred, collective action aiming at the same goals becomes pointless, and any collective action aimed at obtaining further protection would be disproportionate.

One principle remains important: it is lawful to try preventing a transfer of enterprise headquarters to another country by way of industrial dispute. However, it is important to understand what that means when applied to specific cases of action, other than the action implemented in the *Viking* case, which might restrict the undertaking's freedom of establishment even more severely. It cannot be taken for granted that trade union action aimed at preventing a transfer and not at "regulating" its effect is lawful from a

(EC), on the transfer of cargo and passenger ships between registers within the Community and repealing Council Regulation 613/91 (EC)).

16. Nothing prevents the application of the directive in the event of an inter-state transfer, as pointed out by BOB HEPPLE, LABOR LAW AND GLOBAL TRADE 175 (2005). However, the transfer must concern an "economic entity which retains its identity" (art. 1, §1(b)), or it should involve such a group of workers to be considered as an organized body of assets of the enterprise transferred due to the kind of activity they perform (see Case C-172/99, Oy Liikenne, 2001 ECR I-00745).

Community law perspective; or at least this conclusion is not obvious from what is stated by the Court of Justice. Likewise, the lawfulness of trade union action cannot be taken for granted when pursuing aims other than the "protection of workers" employed by the undertaking that intends to relocate. The Court's reasoning was shaped by the concrete case, and developed in close relation with the "contractual" aim of the strike.[17] It is therefore doubtful that grounds of justification can be invoked in the presence of protest or political strikes, or in strikes in which "direct" functionality with the protection of employment conditions is not evident. The *Viking* judgment's dicta jeopardize the possibility of providing grounds for the lawfulness of action of this kind (provided it exists in national law) in light of the proportionality test.[18]

III. COLLECTIVE ACTIONS IN THE "SECOND PHASE" OF RELOCATION: THE *LAVAL* JUDGMENT

With the *Laval* judgment, the Court completes the picture of rules on intra-Community relocation. It specifies to what extent social partners can affect the phase following the relocation of the enterprise, when the enterprise goes back to operate on the domestic market of origin by a transnational provision of services. The strategy adopted by Laval un Partneri Ltd. is paradigmatic. It represents the typical course of action of undertakings aiming at benefiting from the proximity to the markets that are the most advantageous in terms of social legislation and labor cost.[19] The headquarters are established in a country with lower social standards, while branches are set up in countries in which the undertakings intend to operate, and then they post workers there for the provision of services. The first "phase" of this strategy (the subject of the *Viking* judgment), if implemented within the Community market, finds its grounds and protection in EC Treaty art. 43; and the second in EC Treaty art. 49 and Council Directive 96/71 (EC) regulating the employment relationship of posted workers within a transnational provision of services, setting

17. As observed by Ballestrero, *supra* note 6, a "functionalized" reading of trade union action in *Viking* was undoubtedly favored by Finnish legislation on strikes and strike restrictions (and the Finnish Supreme Court also includes restrictions arising from the EU legal system).

18. *See also* Norbert Reich, *Free Movement v. Social Rights in an Enlarged Union- the Laval and Viking cases before the ECJ*, 13 GERMAN L.J. 125, 159–60 (2008).

19. Charles Woolfson, *Labour Standards and Migration in the New Europe: Post-Communist Legacies and Perspectives*, 13 EUR. J. INDUS. REL. 199 (2007), effectively reports labor market characteristics in former communist countries (and in Latvia in particular). These characteristics account for their "appeal" for Western European undertakings.

applicable protection standards.[20] Council Directive 96/71 (EC) turned out to be key in leading the Court to conclusions that are considerably different from those in *Viking* with respect to the practicability of collective action that may affect the exercise of market freedoms. This proves that the directive is more instrumental in favoring the integration of the service market than in protecting the workers employed in that market.[21]

The *Laval* judgment suggests that the scope of collective autonomy as an instrument regulating the free transnational provision of services is decidedly more limited than that afforded for the right of establishment. If, in the abstract, workers and trade unions can carry out collective action that can hinder the free provision of services of a foreign undertaking, in practice, this option is precluded by an obligation to take into account the provisions contained in Council Directive 96/71 (EC). It is this directive that establishes what can be imposed on foreign undertakings exercising their freedom to provide services, thus translating the principles protecting this freedom laid down in Article 49 into rules of secondary legislation.

The Court recognizes that, in the case of provision of services, "workers' protection" is added to the "overriding reasons of public interest," which can justify restrictions to economic freedom. However, it affirms that these reasons are already catered for in Community legislation.[22] Protection standards applicable to posted workers are not the same as those set by Community "social" directives and are freely established by Member States.[23] They should, however, be identified according to the terms and conditions provided for in Council Directive 96/71 art. 3 (EC) in order not to create disproportionate obstacles to the free provision of services. When the law provides for minimum standards, they should be complied with.[24] In the absence of legislative requirements (as might be the case with minimum pay), it is possible to refer to collective agreements, if so established by the national law transposing the directive and if these collective agreements are binding for national

20. Council Directive 96/71 (EC) (concerning the posting of workers in the framework of the provision of services).

21. The "free reading of Directive 96/71" by the Court of Justice is pointed out, and rightly so, by Reich, *supra* note 18, at 156.

22. Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareforbundet, 2007 ECR I-00000, ¶ 108.

23. *Id.* ¶ 68, in line with previous case law (see Joined Cases C-49/98 & C-50/98 & C-52/98 to C-54/98 & C-68/98 to C-71/98, Finalarte sociedade de construcao civil lda v. urlaubs-und lohnausgleichkasse der bauwirtschaft, 2001 E.C.R. I-7831, ¶ 59)

24. *Id.* ¶¶ 70, 78–80

enterprises, as provided by Council Directive 96/71 art. 3(8) (EC).[25] It is always for the transposition law to identify any provisions of public policy that Council Directive 96/71 art. 3(10) (EC) allows for application to foreign enterprises, in addition to the matters listed in Article 3(1).[26] In fact, a system leaving the definition of protection standards to the outcome of collective bargaining, which is uncertain in terms of time and amounts, would be irremediably detrimental to the need of certainty and "predictability" guaranteed to those who want to provide a service in a State other than their own under Article 49.[27]

The effects of this reading of Council Directive 96/71 (EC) are shown at their fullest on collective autonomy, which is in fact deprived of any scope in the absence of a law "implementing" its results.[28] The Court gives a narrow reading to Article 3(7),[29] thus making it problematic to use collective agreements in their traditional regulatory function aimed at improving the protections set by law. The "terms and conditions of employment which are more favorable" mentioned in the norm should be intended only as those (if any) established in the rules of posted workers' country of origin, and not those that might be provided for in conventional sources applicable to

25. Under art. 3(8), in the legal systems on which collective agreements are not universally applicable, States can impose compliance with them on foreign undertakings if these agreements "are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or" if they "have been concluded by the most representative employers' and labor organizations at national level and are applied throughout national territory", provided that equal treatment is ensured with national enterprises.

26. Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareforbundet, 2007 E.C.R. I-00000, ¶ 84. In essence the Directive "requires" to Member States to apply to posted workers certain key labor law rules, in particular relating to minimum wages, working time and equal treatment (art. 3.1) and it "permits" Member States to apply to them other national labor rules relating to "other" matters, provided that these rules fall into the category of "public policy provisions" (art. 3.10). The Court clarifies that the notion of "public policy" under Council Directive 96/71 art. 3.10 is not the same as that of "public interest," used in its case law on the justifications given by States for restricting fundamental economic freedoms. It confirms that the directive restricts States' discretion in fighting social dumping compared to the principles that can be drawn from the EC Treaty. A critical—and shareable—consideration is made by Carabelli, *supra* note 6, at 88. On the "restrictive" notion of "public policy provisions" referred to in the directive and its problematic interpretation, in particular concerning the rules on the protection of fundamental rights and on dismissals, see Sylvain Nadalet, *L'attuazione della direttiva 96/71 sul distacco*, 22 LAVORO E DIRITTO 37, 39–43 (2008).

27. *Id.* ¶ 110.

28. The fact that collective agreements are inapplicable to foreign undertakings in the absence of an express reference in the legislation that implements Directive 96/71 was already stated by the European Commission in Communication COM(2003) 458 (2003): "In these countries, therefore, only the terms and conditions of employment laid down in legislative provisions apply to workers posted on their territory."

29. Article 3(7) of the directive states that "Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers."

the employment relationships of workers in the host country.[30] Nor is it admissible, in the absence of standards of law, to impose on foreign undertaking a bargaining process aimed at establishing the treatment to apply "from time to time." This irremediably penalizes flexible bargaining systems that have no minimum pay at a national level, as in Sweden, and the minimum pay is bargained with the company in the individual production context at a local level.

If the directive's objective, imposed by internal market constraints, is to guarantee the certainty of rules applicable to foreign undertakings, these rules cannot be depend on the evolution of industrial relations, that is on negotiations whose outcome and duration are uncertain.[31] This important statement means that in the internal service market, the scope for collective autonomy is "upstream," that is at an early stage of the transnational provision of services. It should be possible to know the contractual standards that might be binding for foreign undertakings "before" the service is provided. Moreover, it should be possible to deduce them from the existing collective agreements that are already applied and complied with by national enterprises operating in the same industry.

Some uncertainty remains over the practicability of bargaining (and industrial actions) to impose the minimum pay set by national collective agreements (which do not exist in the Swedish construction industry) on a foreign undertaking. The uncertainty derives from the ambiguity of the Court's argument, which assesses the lawfulness of industrial actions from two perspectives: first with Council Directive 96/71 (EC), and then under EC Treaty art. 49 (only). The constraints enacted by the directive intended to exclude that it is lawful to impose the respect of collective agreements on a foreign undertaking in ways other than those provided for by Community law. However, the principles deduced by EC Treaty art. 49 seem to allow trade union

30. This reading of art. 3(7) was confirmed by the Court in Case C-346/06, Ruffert v. Land Niedersachsen, 20008 ECR 00000, ¶ 33, which disregarded what Advocate General Bot stated in his opinion, ¶ 73, that art. 3(7) would admit the possibility for the State in which the service is provided to "improve, for the matters referred to in Article 3(1) the level of social protection" with respect to mandatory minimum standards, provided that this "enhanced protection" is implemented "in accordance with what is permitted under Article 49 TEC." The contrast between the two interpretative options is therefore stark, and it implies a basic disagreement in assessing the aims pursued by the directive. For Advocate General Bot, it sets the minimum protection standards that are applicable to posted workers (¶ 79), whereas for ECJ judges it sets the maximum standards allowed.

31. Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareforbundet, 2007 E.C.R. I-00000, ¶¶ 71, 110; the Court recalls what was stated in Case C-369/96 and C-76/96, Arblade, 1999 ECR I-08453, ¶ 43, on pay obligations that are "sufficiently precise and accessible," yet referred to a different case of obligations, which are not imposed by law but by bargaining.

action to impose on a foreign undertaking the respect of national minimum pay, that is the application of what is established in the existing collective agreement (owing to the fact that the general principles of Community law recognize the right to strike). In the first case, the practicability of industrial disputes is basically nil, since the constraints for foreign undertakings can only come from State legislation implementing the directive. In the second case, there would be some, admittedly residual, scope for collective action, though limited in practice because of its economic aims.[32]

IV. TRANSNATIONAL COLLECTIVE ACTIONS: POSSIBILE SCENARIOS OF COMMUNITY REGULATION

The *Viking* and *Laval* judgments show different views on the legal scope for collective action, depending on whether the obstacle to free movement is posed by workers from the undertaking's State of origin or host Country. In "trade union" terms, one could say that the views depend on whether the strike has to do with a contract or with solidarity, or rather whether the workers who go on strike are employed or not by the undertaking whose economic freedom is at issue.

The two cases should be analyzed through the origin of the disputes, in order to understand the markedly different solutions proposed by the Court. Only in *Viking* does the trade union take action against the employer of its members, who in turn defend their jobs and conditions of employment. Holders of the right, trade unions and workers involved, the effects of collective action, and the adverse party are all situated in national territory. The undertaking and "foreign" workers are only "potential" players and would come into play only after the freedom "jeopardized" by trade union action has been exercised.[33] In *Laval,* trade union action is taken against a "foreign" employer, through blockades, occupation of the site and picketing staged by trade unions that have no members among the workers of the employer. The strike implemented by the electricians'

32. Suffice it to think of the Italian case, in which minimum standards in the matters referred to in Article3(1) of Directive 96/71/EC other than pay are set by law. Therefore, trade union action aiming at imposing the respect of "additional" protection provided for in collective agreements becomes "disproportionate." As regards other matters of "public policy" under Article 3(10), the Court expressly rules out that they can be grounds for trade union action, since their identification is the responsibility of public powers. Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareforbundet, 2007 E.C.R. I-00000, ¶ 84.

33. *See also* Tonia Novitz, *The Right to Strike and Re-flagging in the European Union*, 33 LLOYD'S MAR. & COM. L.Q. 242, 244 (2006).

trade union to hinder the performance of the contract cannot be actually defined as a solidarity strike, lacking the "main" action that should be supported by it.[34] As a matter of fact, "Swedish" electricians go on strike in solidarity with "Swedish" construction workers, hence also their trade union action is in fact a dispute between national workers and a foreign undertaking.

Therefore, the joint reading of the two judgments under examination seems to suggest that according to the Court of Justice it might be lawful to go on strike for one's own interests, even if this affects a freedom provided for in the EC Treaty, whereas this is not the case if the aim of the strike is to protect workers employed by a foreign undertaking. A similar conclusion might be surprising, since the Court comes to it by applying the same principles that regulate the internal market. Both the *Viking* and *Laval* decisions are based on the assumption that there is an obstacle to a market freedom: that of leaving one's country of origin to settle in another in the first case,[35] and of providing services in another Member State in the second. In both cases the lawfulness of the strike depends on the judgment on the lawfulness of the aim of protecting workers, which are the grounds of the action. In fact, if a collective agreement can hinder the freedom of establishment or of providing services, it can do so irrespective of who induced the undertaking to sign it by means of an industrial dispute.

The Court did not say it explicitly, but the reason for such a different approach in the two cases of strike is based on the fact that the Swedish action aimed at defending the national labor market, and the effect of protecting foreign workers was merely indirect, which was not the case with the Finnish strike.[36] The Court did not need to say this because it found the basis of these conclusions in Council Directive 96/71 (EC). Because of these grounds, in fact, the Court could claim that the needs of protecting posted workers were already safeguarded by what is prescribed in the directive and therefore collective action should be considered disproportionate.

34. *See*, *e.g.*, Dorssemont, *supra* note 13, at 260.

35. Case C-438/05, Int'l Transp. Workers' Fed'n v. Viking Line ABP, 2007 ECR I-00000, ¶ 69. The Court seems to envisage full equivalence between the right to leave one's State and the right to access another one, under Article 43, thus denying what affirmed in Case C-81/87, Daily Mail, 1988 E.C.R. 5487, even if the case is cited in *Viking*. Barnard, *supra* note 9, at 310 points out that the case-law on this point is by no means clear.

36. As regards the "protectionist" nature of collective action in *Laval,* which is not the case in *Viking,* see generally Reich, *supra* note 18, at 149, 160. This is the reason of the Author's remarks in favor of the *Laval* judgment and against the apparently "more lenient" *Viking* judgment.

The same attention in distinguishing trade union actions depending on the parties involved emerges from a passage in the *Laval* judgment, which reads states that "the right of undertakings established in other Member States to sign of 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 unaffected.[37] By this the Court suggests that the restrictions that might be posed to the collective action of Swedish trade unions would not limit the collective action that might be taken by Latvian workers.[38] It would have been useful to delve more deeply into this aspect, which is key to the topic of transnational action that can hinder free movement in the internal market. By affirming that a collective agreement, which is unlawful when imposed by Swedish trade unions, would have been lawful if concluded with Latvian workers and trade unions, does the Court mean that a strike undertaken by the latter would enjoy full immunity from market rules? Or, more likely, does it mean that the Latvians' strike is lawful if respecting the principles on trade union action worked out in *Viking*, that is if action is taken against "their employer"? By admitting this second solution, the Court would deny the possibility of using what is provided for in Council Directive 96/71 (EC) to contrast trade union action undertaken by posted workers independently of the law that is deemed applicable to the action.[39]

37. Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareforbundet, 2007 E.C.R. I-00000, ¶ 81.

38. The same passage is referred to by the Court in Case C-346/06, Ruffert v. Land Niedersachsen, 2008 E.C.R. I-0000, ¶ 34. Even this passage is not free from ambiguity though, since it is not clear what the Court intends by commitment taken by employers "of their own accord," and doubts remain on the fact that a commitment taken under the threat or pressure of industrial disputes can be considered as such.

39. On applicability of the host country's legislation to posted workers' strike under Article 3(10) of Directive 96/71, see Nadalet, *supra* note 26, at 51. On application of the country of origin's law, see Carabelli, *supra* note 6, at 124, in light of the Rome Convention. Identifying applicable law on collective action with international elements within private international law is extremely complex; its solution is conditioned by the nature of the liabilities to which the parties involved are exposed. On this topic, see the second part of CROSS-BORDER COLLECTIVE ACTIONS IN EUROPE: A LEGAL CHALLENGE 245 (Filip Dorssemont, T. Jaspers & A. van Hoek eds., 2007). For a comparative picture, see A. van Hoeck, *Private International Law Aspect of Collective Actions- Comparative Report*, CROSS-BORDER COLLECTIVE ACTIONS IN EUROPE: A LEGAL CHALLENGE 425 (F. Dorssemont, T. Jaspers & A. van Hoek eds., 2007); and for Italian law, see P. Venturi, *Italian Private International Law report*, CROSS-BORDER COLLECTIVE ACTIONS IN EUROPE: A LEGAL CHALLENGE 311 (F. Dorssemont, T. Jaspers & A. van Hoek eds., 2007). If the action gives rise to non-contractual liabilities, Commission Regulation 864/2007, 2007 (EC), on the law applicable to non-contractual obligations ("Rome II") provides for the application of the law of the country where "the action is to be, or has been, taken" (EC Treaty art. 9), without prejudice to the case in which "the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs" (EC Treaty art. 4.2). This criterion usually results in ruling out the

In the light of the principles on the internal service market, this results in a distinctive make-up of Community legislation on transnational action, i.e., on action undertaken by workers and trade unions from different Member States. Within the framework of provisions of services, action undertaken against one's employer by posted workers have a different relevance (or justification), since the restrictions arising from Directive 96/71 do not apply to them, and their action is only exposed to the appropriateness and proportionality examination carried by the Court in *Viking*. If the actions of posted workers are not subject to the restrictions contained in *Laval,* the actions undertaken by national workers in the country in which the posting is carried out raise the problem of the relationship between the two collective actions, with the practicability of the transnational action depending on the simultaneous implementation of the two. Does the lawfulness of the first action make the second lawful? In other words, if in the *Laval* case the Latvians had also engaged in the strike, would that have changed the Court's judgment? There is some scope for a positive answer, since there would have been a different judgment about the collective agreement that the action intended to impose. If an agreement signed with Latvian trade unions improving the conditions of posted workers is "lawful" (irrespective of the constraints set by Directive 96/71), the same should apply to an action that might be undertaken by the Swedish, which here again might constitute a solidarity action.

A similar conclusion has its rationale, because collective action would no longer be (only) "protectionist." Moreover, the lawfulness of the action would also be imposed by standards from supranational sources (ILO Conventions and European Social Charter "Revised"), which the Court should refer to and under which the lawfulness of the so-called secondary action depends on that of the primary one.[40]

And AG Maduro's opinion on the *Viking* case seems to be along the same lines. Unlike the Court, the AG tackled the issue of collective action that might (also) hinder the freedom to provide services. Maduro should be credited with entering *in medias res* and trying to suggest criteria for solving the issue of the practicability of

applicability of the law of the host country to the workers who are temporarily present in a State other than that of their employer.

40. On the protection, still weak, that is recognized to solidarity strikes by international sources, see, e.g., PAUL GERMANOTTA, PROTECTING WORKER SOLIDARITY ACTION: A CRITIQUE OF INTERNATIONAL LABOUR LAW (2002). The most recent case law of ILO and ESC committees of experts seems to show a trend toward a broader recognition of this form of trade union action, in view of the role it plays in big multinational groups. *See* Jaspers, *supra* note 12, at 45.

transnational action. His reasoning stems from an extremely relevant principle: transnational actions are lawful in the Community legal system even in the absence of a legal ground and despite the "negative constraint" set by EC Treaty art. 137(5).[41] The issue of the lawfulness of trade union actions aimed at protecting the conditions of employment of workers in the event of transfer of an undertaking is tackled in light of the non-discrimination principle. It is because of this principle—the mainstay of the entire Community system—that the lawfulness of the action depends on the free participation of national trade unions involved, and that a strike "imposed" on them by a supranational trade union becomes unlawful.[42] This distinguishing criterion confirms that industrial disputes are regulated differently by Community law according to the actors involved: it is lawful to strike to defend one's interests, but not if the restriction to the free movement of an enterprise is caused by an action that is not supported by the trade unions to which the enterprise's workers belong. This would in fact partition the labor market, which would be unjustified and incompatible with the principles of the Treaty.

The solution proposed by AG Maduro is not necessarily satisfactory for the trade union side. In fact, denying that national trade unions may have obligations with their supranational organizations does not consider the important coordination and management role that the "higher" level of a trade union organization is called to play with lower levels.[43] However, this is better than the "silence" of the Court. And it is perhaps the best that can be asked of Community judges, if one accepts what seems to be the theoretical assumption on which both judgments are based: trade union action is referable to the scope of the internal market, in which the principles and rules allowing for its functioning can be enforced against private parties.

41. *See* AG Maduro's opinion in Case C-438/05, Int'l Transp. Workers' Fed'n v. Viking Line ABP, 2007 E.C.R. I-00000, ¶ 70: "The recognition of their right to act collectively on a European level thus simply transposes the logic of national collective action to the European stage." This statement cannot be taken for granted considering that in the Explanations by the Presidium on the Charter of Fundamental Rights (that, under express provision of Article 53 of the same Charter and of art. 6(3) TEU "reformed" by Lisbon Treaty, Dec. 13, 2007, provide its "true" interpretation), it is pointed out that "collective action . . . comes under national laws and practices, including the question of whether it may be carried out in parallel in several Member States."

42. *Id.* ¶¶ 71–72

43. In brief, Maduro's approach does not seem to envisage a possible evolution of European trade unionism, which would change ETUC and industry-wide federations into truly "supranational" trade unions, i.e., something more that a union of national trade unions. On the evolution of European trade union players see TRADE UNIONS IN EUROPE: MEETING THE CHALLENGE (Deborah Foster & Peter Scott eds., 2001).

V. COLLECTIVE AGREEMENTS AS AN OBSTACLE TO THE EXERCISE OF FREE MOVEMENT AND THE BIAS OF THE COURT AGAINST INDUSTRIAL CONFLICT

The assumption of the line of argument followed by the Court is the recognition that the provisions of the EC Treaty on free circulation are binding for private actors as well as for public authorities. Hence, it is possible to invoke the compliance with such provision not only when it comes to measures undertaken by the latter, but also in relationships between private parties. For this reason, the so-called horizontal direct effect of the Treaty's provisions on fundamental economic freedoms is the most important theoretical thorny question tackled by the Court, and the judgments make a qualitative leap in relevant case law.

In view of this, the way in which the Court faced this delicate step cannot but come as a disappointment. In both judgments reference is made to the well-known case law on free movement,[44] from which the statement is taken that the rules of the EC Treaty afford individuals rights that can be "directly" appealed before national courts,[45] and impose the abolition of obstacles "resulting from the exercise of their legal autonomy by associations or organisations not governed by public law,"[46] as it is certainly the case for "agreements intended to regulate paid labour collectively."[47]

Resorting to past case law on private regulation "sources," that, as such, can be treated as a sources of public law, the Court avoided tackling the real theoretical crux of the matter, which in the cases under examination have totally new characteristics. Here, the obstacle was created by an action carried out by private individuals, expressing their private autonomy (of collective nature, in this case).[48] The question to be answered was whether actions, behavior, and facts can constitute an obstacle, and not rules and sources of legal regulation.

On this the Court seemed to hold the view that an action of "private" nature (trade union in this case) becomes an obstacle to free movement when it aims at giving rise to a rule (of private nature)

44. *Cf.* among others Case C-33/74, Van Binsberger v. Bestuur van de Bedrijfsverengiging voor de Metaalnijverheid, 1974 E.C.R. 1299, ¶ 26; at last Case C-208/05, Innovative Tech. Ctr. GmbH v. Bundesagentur fur Arbeit, 2007 E.C.R. I-181, ¶ 67.

45. Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareforbundet, 2007 E.C.R. I-00000, ¶ 97.

46. *Id.* ¶ 98.

47. Case C-438/05, Int'l Transp. Workers' Fed'n v. Viking Line ABP, 2007 E.C.R. I-0000, ¶ 58.

48. For a discussion of "bypassing," see Ballestrero, *supra* note 6.

hindering the market: it is the aim of the private parties that determines the attraction within internal market rules.[49] If the content of a rule creates obstacles in the internal market, then the action aiming at imposing its respect should be considered as an obstacle too. This part of the argument is very relevant; it is, in fact, because of the blameworthiness of the aim of the private action that it is possible to dramatically affect trade unions' collective autonomy and private parties' freedom of self-determination.

While shifting the focus of the reasoning from "facts" to "rules," the Court, however, omitted to take into account that there are several types of rules that originate from private bodies. The point is to establish what regulatory power is exercised by the private body in this particular case, since not all "private rules" have the same nature and affect market functioning in the same way.

A private organization can take self-regulation actions, which bind its members, or can engage in negotiations with other private parties (individuals or organizations). The first type of "rules of private law" was examined by the Court in several cases (and are mentioned in the judgments under examination), since they can restrict or prevent the cross-border mobility of workers or service providers in a Member State.[50] The "restriction" is that compliance with a rule of private law—originated from the self-regulation power a group—is imposed on the holders of the right to market freedom just as with a rule of public law. In other words, the compliance with that rule by no means depend on the manifestation of the private actor's "will," but is a pre-requisite for performing a given activity.

The same is true with conventional legal sources (such as collective agreements), or with the result of negotiations between private organizations, when they become binding also for "third" parties. Here again, the Court recognized, and correctly so, the equivalence between private and "public" rules in terms of effect on

49. Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareforbundet, 2007 E.C.R. I-99999, ¶ 99. The possibility that article 43 can be invoked "directly" by a private party (the enterprise) against another private party (the trade union) is contained in Case C-438/05, Int'l Transp. Workers' Fed'n v. Viking Line ABP, 2007 E.C.R. I-00000, ¶ 60, expressly deduced by the fact that "the collective action taken by FSU and ITF is aimed at the conclusion of an agreement which is meant to regulate the work of Viking's employees collectively."

50. *Cf.* Case C-36/74, B.N.O. Walrave & L.J.N. Koch v. Ass'n Union Cycliste Int'l, 1974 E.C.R 1405; Case C-13/76, Donà v. Mantero, 1976 E.C.R. 1333; Joined Cases C-51/96 & 191/97, Deliège v. Ligue Francophone de Judo, 2000 E.C.R. I-2549; Case C-176/96, Lehtonen v. Fed'n Royale Belge des Societes de Basket-ball ASBL, 2000 E.C.R. I-2681; Case C-309/99, J.C.J. Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten, 2002 E.C.R. I-1577; Case C-313/02, Meca-Medina v. Comm'n, 2004 E.C.R. II-3291; all concerning professional regulatory bodies.

the legal sphere of the holders of the right to economic freedom. These effects, in fact, are produced irrespective of their accepting or not accepting the "rules" set by private organizations, to which they do not even belong.[51] The functioning of the market is certainly hindered since market players are not free to exercise their full autonomy. They have to comply with rules that although they are set by private parties, are imposed on them just like "heteronomous" legal sources, since they have not been voluntarily accepted. In this case, the outcomes of bargaining autonomy is qualified as "obstacles" because a private organization operates toward a "third" party (a party that did not participate in the negotiation) as a "private authority," and not as a market player.

When the rule of private law is defined by the same parties to which it is applied, the situation is totally different. There is no "restriction" to economic freedom because the holder of the right disposes of it within the framework of a free negotiation and defines and accepts the rule that might create an obstacle by an agreement. Treating those on whom the rules defined by others are imposed as those who establish those rules, as the Court did in *Viking* and *Laval*, is clearly straining the principles of internal market, even more than the principles on which the collective autonomy of social actors is based.[52]

This conclusion is not invalidated by the fact that trade union action in *Laval* was implemented by organizations not representing the workers to be covered by the agreement.[53] We might think that in this case the collective agreement might "re-acquire" the nature of "private" law, with legal force to be imposed on a party without its consent. This argument applies to workers, and, at the most, to the trade unions of the country of origin,[54] if they want to question the

51. This is the case with collective agreement submitted to the examination of the Court in Case C-67/96, Albany Int'l BV v. Stichting Bedrijfspensioenfonds Textielindustrie, 1999 E.C.R. I-5791, expressly referred to in *Viking*, ¶¶ 49–53, to exclude the similarities between competition rules and rules protecting fundamental economic freedoms.

52. See the accurate observations by Umberto Carabelli, *Note critiche a margine della Corte di giustizia nei casi Viking e Laval*, 30 GIORNALE DI DIRITTO DEL LAVORO E DI RELAZIONI INDUSTRIALI (forthcoming 2008) (who recalls the "elementary and general principle *pacta sunt servanda*" to point out the groundlessness of treating agreements "imposed by other parties" the same as agreements that are "voluntary signed" by employers, and to which they have "spontaneously agreed to.").

53. The workers employed by Laval were, for the most part (65%), members of the Latvian trade union that signed the collective agreement bound to cease to be applied.

54. This is what is suggested by Advocate General Maduro in the Opinion in Case C-438/05, Int'l Transp. Workers' Fed'n v. Viking Line ABP, 2007 E.C.R. I-00000, ¶ 71, when he affirms that the criterion to follow in order to establish the legality of a transnational strike is whether the national trade union called to support the action by the supranational organization does so more or less freely. *See supra* note 42.

agreement applied to them and resulting from collective action carried out by "others." But it does not apply to the enterprise, since neither its individual autonomy nor its economic freedom would have been restricted in another way if the strike had been carried out by its employees, or if the agreement had been signed with their trade unions. For the enterprise, the collective agreement constitutes an act of disposition, the expression and exercise of its bargaining autonomy, either when it is negotiated with the trade unions of the country of origin or with those of the host country.

Therefore, an agreement arising from bargaining between a foreign undertaking and national trade unions cannot be considered as an agreement between undertakings that restricts competition, or as a collective agreement hindering the access to national market, because, in this case, the undertaking whose economic and market freedom is restricted is a party to the same agreement. Stating that the agreement is unlawful, because of its "restricting" a market freedom, is equivalent to arguing that this freedom cannot be restricted, not even by a voluntary act of disposition of the undertaking entitled to that freedom. Hence, the rule of the Treaty would not only have a horizontal direct effect, but it would also acquire the value of a "mandatory rule," thus giving rise to rights that could be waived. Mandatory rules only are imposed on the parties to a contract, making contractual clauses against them lose their effectiveness, as labor law scholars are well aware. This is, in fact, a typical characteristic of labor law rules, which is also shared by other rules aimed at protecting the weaker party in a contract.

If the approach taken by the Court of Justice in the cases in question brought about the recognition of the mandatory nature of rules protecting the freedom to conduct businesses, the reading of relationships between economic freedoms and workers' rights would change dramatically. In fact, it would follow that undertakings would be considered as the weaker party in industrial relations, and, as such, would need to be protected from their own acts of disposition.

However, this is not the perspective that can be deduced from internal market rules, as confirmed by the fact that the sanction of invalidity of the acts of private disposition that are in contrast with free movement is expressly provided for only for protecting workers (Commission Regulation 1612/68 art. 7(4) (EC)), in view of their bargaining weakness. This suggests that the free movement of employed workers cannot be reduced to the other economic freedoms afforded by the EC Treaty.

The Court abstained itself from explicitly affirming that the market freedom to which undertakings are entitled is non-disposable. What it seemed to claim, instead, was that the collective agreement was not valid since it was signed under the threat of a strike. If this is true, it was the collective action that "invalidated" the will of the undertaking signing the agreement, which was no longer "free." However, this statement implies another defect in the argument, or rather, an "ideological" bias against industrial conflict.

It is obvious that bargaining involves "acts" by a party aimed at inducing the other to accept given contractual terms. This is intrinsic in any act of private autonomy and any market "transaction." These acts take the form of "collective action" when the actors are "trade unions," also implying the implementation of a strike. This is the essence of exercising collective autonomy as a legitimate expression of the private power of collective entities operating in a market framework. These remarks may seem obvious, but they are not redundant, since the Court of Justice seemed to leave them out of consideration.[55]

An agreement resulting from collective bargaining can be claimed to be null and void only if a strike is considered "unlawful." If a strike is lawful, any content in the ensuing contract is lawful, (unless it is prejudicial to rights that the bargaining party cannot waive), since the will expressed by the employer signing the agreement is valid and "free" by definition. If the Court arrived at different conclusions, it was because it moved from the "assumption" that a strike was unlawful and considered it as "violence" that could coerce the will of the employer and make the consent expressed by the act of concluding the agreement non-genuine.

If one does not want to affirm that the freedoms afforded by the EC Treaty are such that not even the holder of these rights may dispose of them, it cannot be argued that a strike is unlawful since the agreement produces effects that are prejudicial to the undertaking's economic freedom. There is prejudice if the strike is not lawful, that is if the act whereby an undertaking disposes of its right arising from Community law was coerced by "illegal" means, i.e., was extorted by violence. By contrast, if a strike is lawful, there cannot be any prejudice: in this case the act that induced the signature of the act

55. Carabelli, *supra* note 52, evokes the "masters" of European collective labor law, to conclude that the "big river of European collective labour law . . . has arrived only to lap on the territory of Community law cultivated by European judges, without going deep down."

disposing of the economic freedom cannot be considered as a violation of the employer's free will.

It follows that the unlawfulness of the strike in the cases in question is a logical premise with respect to the unlawfulness of the agreement. If it is so, whether the strike is lawful or not should be sought elsewhere than in the principles regulating the internal market. There is national legislation applicable to strikes elsewhere, since Community provisions do not cover this matter (EC Treaty art. 137(5)). Only if a strike is implemented in forms that are not allowed in the State whose legislation is applied to the case in question, arguably, is the employers' freedom violated by the ensuing agreement. Only in this case is it possible to claim that the consent manifested by the employer is not an expression of his/her autonomy as a private market player.

In *Viking* and *Laval,* the Court of Justice made a major "exception" not only to national principles on private autonomy, but also to internal market rules. A similar "exception" cannot be justified by the restrictions that are present in all legal systems of the right to strike. It contradicts the principles regulating the exercise of individual and collective autonomy in any legal system—and these are the very principles on which, after all, "an open market and free competition" are based.

VI. A FUNDAMENTAL RIGHT DEPRIVED OF CONTENT?

Another critical view of the *Viking* and *Laval* judgments that deserves attention is the theme of the recognition of strikes and collective action as fundamental rights in the EU.

These judgments clarify the role that fundamental rights play in the Court of Justice's case law about internal market and competition: the role of restricting market rules, and of possibly justifying an exception to their full application. Like any other exception, this exception—based on the need to protect a fundamental right—does not escape the Court's scrutiny in the light of the proportionality test. This translates in a sort of balancing of this fundamental right against the other economic market freedoms, with the purpose of safeguarding the "essential content" of the one and of the others.[56] This is why the recognition of a fundamental right by the Court of Justice is not in itself a reassurance for protecting that right. Instead,

56. *See* Giovanni Orlandini, *Right to Strike and Transnational Collective Actions and European Union: Time to Move on?* 22 (Jean Monnet Working Paper 08/07, 2007).

it may mean that the right is susceptible to restrictions that are not provided for under national law. Full protection of a fundamental right, as laid down in a national legal system, is given not by the Court's recognition of that right, but by the Court not arriving at that recognition due to the exercise of the right escaping the application of the Treaty rules.

The *Viking* and *Laval* cases strikingly confirm this argument: full protection of the right to trade union action needs the recognition that internal market rules cannot restrict its exercise. Otherwise, despite the new and unexpected statement that the right to strike fully belongs to the fundamental rights recognized by the EU legal system,[57] this right will be considerably downgraded compared to national protection standards.

The strength of the Court's argument lies in a correct claim that apparently cannot be contested: trade union action, as a fundamental right, is restricted, as any other right, by the need that its exercise should take into account other fundamental rights and freedoms recognized by the Community legal system. Here again, however, the comparison between market freedom and trade union rights may produce an outcome other than that of the Court of Justice.

The outcome of these judgments raises doubts on the way the Court balances the right to strike against economic freedoms. On full consideration, in fact, the Court did not reach a true balance in these cases, since the claim that the fundamental right to strike must be "reconciled with the requirements relating to rights protected under the Treaty"[58] was not followed by any points on the need to protect the exercise of this right. The decision on a possible justification of trade union action only tackles the nature of the aims pursued by the action. These are legitimate aims, but are subject to assessment in the light of the principle of necessity and proportionality.[59]

57. Case C-438/05, Int'l Transp. Workers' Fed'n v. Viking Line ABP, 2007 E.C.R. I-00000, ¶ 91.

58. Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareforbundet, 2007 E.C.R. I-99999, ¶ 94 and Case C-438/05, Int'l Transp. Workers' Fed'n v. Viking Line ABP, 2007 E.C.R. I-00000, ¶ 46.

59. In both judgments the Court recognizes the strike as a fundamental right, which is integral part of the general principles of Community law, when rejecting the exception by the trade union claiming the supposed incompetence of the Union on this right. By contrast, the issue of fundamental rights is unexpectedly not raised in reference to whether the restrictions posed to free circulation are justified. The judgment is only based on the aims pursued by the action, that is their connection with "general interest." The difference between a judgment grounded on a "fundamental right" and one grounded on the aim of the action is highlighted by ACL Davies, *The Right to Strike versus Freedom of Establishment in EC Law: The Battle Commences*, 35 INDUS. L.J. 75, 83 (2006).

The operation of balancing fundamental rights should instead involve a different application of the proportionality test, in line with what the same Court affirmed in *Schmidberger* and *Omega*.[60] The need to protect a fundamental right constitutes a general interest lawfully pursued in the legal system concerned. And any restrictions that may be added to the right must arise from aims of general interest and cannot constitute a "disproportionate and unacceptable interference, impairing the very substance of the rights."[61] As an effect of this balance, trade union action may be considered unlawful under Community law owing to the ways in which it is implemented, the behavior of those who implement it, the effects the action produces on third parties, and the possibility to resort to means that are less prejudicial to the freedom of the other party.[62] The aims of the action may be considered as well: however their being against Community principles is not in itself sufficient to rule out their lawfulness.[63] Further, the judgment on the protection to reserve to the "very substance" of the right (to use the same words of the Court) in the Community system, as envisaged in the system of the State concerned, should be grounded on the very characteristics that collective action acquired in the case under examination here.[64]

There is no doubt that an "effective" balancing judgment would expose the strike to the imposition of "additional" restrictions compared to national law. In particular, it would not avert the adoption of a principle of *extrema ratio* in the use of the dispute. This type of judgment is however substantially different from that proposed by the Court in *Viking* and *Laval*, which considered "exclusively" the legality of the aims pursued in the light of internal market rules, with no consideration of the need to preserve the "substance" of the right to strike.[65] Thus, the possibility was created

60. Case C-36/02, Omega Spielhallen v. Bundesstadt Bonn, 2004 E.C.R. I-09609 and Case C-112/00, Schmidberger v. Republic of Austria, 2003 E.C.R. I-05659.

61. *Id.* ¶ 80. On the accurate balance made by the Court, see Barnard, *supra* note 9, at 70.

62. *See* Jaspers, *supra* note 12, at 72.

63. John Morijn, *Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution*, 12 EUR. L.J. 15, 28 (2006) points out that a judgment on the aim of the action in *Schmidberger* "is immaterial for establishing Union state liability"; I don't fully agree on this point. The Court considered the aims of the collective action (a demonstration of an environmental group in this case) in the light of EU law, but the absence of merely protectionist aims was enough to consider them to be lawful pursued by protesters.

64. As Bercusson, *supra* note 1, at 303 observes, "in balancing the rights in this case the question is not whether fundamental rights justify restrictions on free movement, rather free movement must be interpreted to respect fundamental rights."

65. *See* Antonio Lo Faro, *Diritti sociali e libertà economiche del mercato interno: considerazioni minime in margine ai casi Viking e Laval*, 22 LAVORO E DIRITTO 63, 91 (2008)

for establishing the merits of trade union strategies, which is more prejudicial to the collective autonomy of social partners. In particular, a "judicial" scrutiny appears in sight on the "content" of a "future" negotiation, which would otherwise be impracticable.

In brief, the Court solved the problem of the lawfulness of collective action following the customary judgment on the "overriding reasons of public interest," applying it not to the State but "directly" to social actors. If the judgment of the Court on the possibility to compress economic freedoms remains unchanged even in the absence of the recognition of the right to strike, the consequence of such a recognizing in the Community legal system would therefore remain unclear. Perhaps it would be worthwhile to reread the judgments under examination "as if" the right in question did not exist, or rather as if its nature of fundamental right were not affirmed. If the behavior of private individuals is lawful under internal law, the issue would be of establishing whether it is also compatible with EU law and internal market rules in particular. The Court would apply the established principles whereby the obstacles put to free movement are judged to be justified, so it could only repeat the same judgment made in the two cases in question. Hence, recognizing a "fundamental right to strike" in the EU has not changed the judgment of the Court, nor has it envisaged a greater "compression" of market freedoms, as it should have.

Moreover, the irrelevance of recognizing the right to strike is deduced especially in *Laval*. The Court, in fact, did not seem to envisage any scope for industrial conflict in the internal service market. The recognition of the right to strike in the EU almost acquires the character of a travesty, if achieving this recognition means denying the possibility of exercising this right. ECJ judges call trade unions to a sort of *probatio diabolica*: their action is lawful only if it pursues the aim of protecting workers in a "proportionate" manner. This means that their action should not aim at imposing on foreign undertakings obligations greater than those the undertakings are already required to meet under the national law implementing Council Directive 96/71 (EC). It follows that any trade union action is to be considered automatically disproportionate, as its rationale is always that of trying to impose on undertakings something that they are not required to meet.[66]

and B. Veneziani, *La Corte di giustizia ed il trauma del cavallo di Troia*, 59 RIVISTA GIURIDICA DEL LAVORO (forthcoming 2008).

66. The situation does not change much if, as suggested above (section III), the focus is shifted on the part of the judgment referring to EC Treaty art. 49 and if the strike implemented

VII. FROM BALANCE TO IMMUNITY

For the acknowledgment of the right to industrial action to become again significant in the Community system it would be necessary to review the approach adopted in the two judgments in question. Since, as was mentioned previously, a different balance of the interests at stake would render industrial action more practicable, only the recognition of the full immunity of industrial action from market rules would completely ward off the chance that its dynamics be exposed to the assessment of (national and Community) courts on the basis of an uncertain and unpredictable proportionality test.

This is not a particularly new idea, as it inspired the Community legislature, at least until 1998, when the so-called Monti Regulation[67] was adopted. Article 2 of this Regulation states: "This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognized in Member States, including the right or freedom to strike." Council Directive 96/71 (EC) had a similar approach too: in fact, the rule laid down in recital 22 (oddly ignored in *Laval*) calls on States and Community institutions not to trespass into the field of industrial dispute.[68] Many have nonetheless thought to construe EC Treaty art. 137(5) as the expression of the intention to rescue the collective rights recognized by the single Member States from the invasiveness of Community law.[69] As the facts have then demonstrated, these indications by the Community legislature have not been sufficient to constrain the Court's cognitive powers. The Court, called upon to apply the market rules sanctioned by the EC Treaty, has decided the case pursuant to the principle whereby there exist no areas that are *a priori* exempt from the general Community market principles.

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to impose the national collective agreement on the foreign undertaking is considered lawful. Even in this case, in fact, one should reflect on what would change in the absence of a "Community right to strike," since it is not clear on what grounds the Court would find fault with trade union action that is lawful under internal law.

67. Council Regulation 2679/98 (EC) of Dec. 7, 1998, on the functioning of the internal market in relation to the free movement of goods among the Member States, that introduces a special regime for the exchange of information between Member State and Commission in the case of actions by private subjects that obstruct the free movement of goods.

68. Recital 22 of Council Directive 96/71 (EC) has the following text: "Whereas this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions."

69. In this sense, see Kerstin Alberg et al., *The Vaxholm case from a Swedish and European Perspective*, 12 TRANSFER 163 (2006); Carabelli, *supra* note 6, at 118–19; Massimo Pallini, *Il caso Laval-Vaxholm: il diritto del lavoro comunitario ha già la sua Bolkestein?*, 2 RIVISTA ITALIANA DI DIRITTO DEL LAVORO II 249 (2006) (who refers to an "incompressible national sovereignty on this matter.").

To accept the approach adopted by the Court does not, however, mean that the ensuing balances in the relations between market rules and union action should be regarded as inevitable. Moreover, the *Viking* and *Laval* judgments may also be read as a healthy warning by the ECJ for "politics" to take on its responsibility and make bold choices at the European level and not persist in its inaction while relying on the judicial power as its substitute.

With the mentioned judgments, the Court strongly affirms that against the background of the current Community primary and secondary law there are no grounds to secure the immunity of the national industrial relation systems and the collective rights on which and thanks to which those systems have developed since the end of the Second World War. If this is the intention of the Court's rulings, the *Viking* and *Laval* judgments call upon Community institutions to take action to give national and Community courts sound legal bases to guarantee union rights within the EU legal system.

A first opportunity to take action occurred but it passed in vain. The adoption in Lisbon, on December 13, 2007, of the new Treaty version does not seem to anticipate any radical changes to the Community legal system in the matters that concern us here. The novelty represented by indirectly giving the Nice Charted a binding nature among EU legal sources[70] is unlikely to make the Court review its approach, as Article 28 of the Charter (concerning the right to strike) has already been used both in *Viking* and in *Laval* to acknowledge the "fundamental right" of union action.

Only the express provision in the text of the Treaties of the full immunity attributed to that right would have opened up different possibilities, yet this road has not been taken. Nor was Article 137(5) questioned: its text is unchanged in the new EC Treaty. Considering the way in which the Article is interpreted by the Court, its presence neither prevents the market from "infiltrating" trade union logics, nor does it bar any prospect (albeit remote) of providing a "secondary" law foundation to the feasibility of cross-border actions.

70. Under the "new" Article 6 TEC "[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000 . . . which shall have the same legal value as the Treaties." This provision was adopted with the opting out of Poland and of the United Kingdom, to which the Nice Charter does not apply (Protocol No. 7). It is however difficult to imagine a full exclusion of the effects of the Charter in the two legal systems, since the Court of Justice will be compelled to refer to them at least in cases concerning a "fundamental right" of individuals who are neither Polish nor British but are active on the territory of those States (as is the case for proceedings concerning the functioning of the internal market).

The pending *Viking* and *Laval* cases gave rise to a lively debate during the troubled process of adoption of Directive 123/06 on services in the internal market,[71] even though that may have not been the appropriate forum to tackle the issues prompted by the two cases. This is because the so-called Bolkestein Directive does not (nor it did in its much disputed original version) concern labor conditions or even union rights: these matters are still governed by Council Directive 96/71 (EC).

Due to the concern that the Directive on services in the internal market might legitimize business strategies based on social dumping and erode the discretionary powers conferred to the States by the 1996 Directive,[72] some provisions were added that, though difficult to interpret from a strictly legal point of view, nonetheless provide significant insights into the issues that have been discussed in this paper.

The first indication concerns in particular the difficulty of reaching political consensus on a shared solution to these issues. This is demonstrated by Article 1(7), a provision that was clearly inspired by *Viking* and *Laval* and that, in the (rather naive) intention of the proponents should have banned any trespass upon union autonomy. The provision obviously missed its goal, also because it was not yet in force at the material time. It is highly unlikely that this provision might have been of any use to trade unions, first because it affirms that the Directive is without prejudice to "the right to negotiate, conclude and enforce collective agreements and to take industrial action," although it is stressed that this right must be exercised "in accordance with national law and practices which respect Community law." In short, Article 1(7) of Council Directive 123/06 (EC) just repeats what the Court ruled in *Viking* and *Laval*, i.e., that the recognition of a fundamental right does not entail its full immunity from internal market principles. Second, the legislation at issue, by affirming that "the Directive" does not affect the right to take industrial action, does not (nor could it) say anything about the impact that "other" rules of the Community legal system, based on the Treaty or laid down by different Community sources (and notably by Council Directive 96/71 (EC)), may have on that very right.

71. On the troubled process of adoption of Council Directive 2006/123 (EC), see Joanna Flower, *Negotiating the Service Directive*, 9 THE CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 2006–2007, 217 (2007).

72. In this sense, see Antonio Lo Faro, *"Turisti e vagabondi": riflessioni sulla mobilità dei lavoratori nell'impresa senza confini*, 19 LAVORO E DIRITTO 437, 467 (2005).

This critical remark applies to all the provisions of Council Directive 123/06 (EC) whose aim is to "reassure" trade unions,[73] notably Article 4(7) which may appear as a clear denial of the case law on the "obstacles" to free movement capable of repudiating all the arguments put forward in *Viking* and *Laval*.[74] Under this provision, "rules laid down in collective agreements negotiated by the social partners shall not as such be seen as requirements within the meaning of this Directive," i.e., collective agreements cannot be considered as obstacles to the free provision of services prohibited under the Directive. This final qualification clarifies the meaning of the provision and diminishes its legal scope by reducing the provision to another mere restatement of the fact that the Directive does not apply to working and employment conditions, and hence, not even to those laid down by collective agreements.

In conclusion, the new legal framework does not seem to offer significant opportunities to ground a *revirement* of the Court on the place that is to be given to the "fundamental" right to strike in the EU legal system. It remains to be seen whether new momentum to Community political action, possibly urged by trade unions, may emerge from the "shock" triggered by the *Viking* and *Laval* judgments; this momentum should be aimed at implementing an area of freedom for industrial action at the Community level, which can only be as such if free from internal market constraints.[75]

While we are waiting for such a (very difficult) scenario to develop, national unions are called upon to act at the transnational level to find common strategies against social dumping that are devoid

73. Silvia Borelli, *Un possibile equilibrio tra concorrenza leale e tutela dei lavoratori. I divieti di discriminazione*, 22 LAVORO E DIRITTO 125, 132 (2008) seems to value instead the safeguard clause under Directive 123/06 art. 16(3), whereby the State in which the service is provided shall not "be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements." However, in this case also the provision, read in the light of the scope of the "service" Directive, simply leaves the pre-existing framework for the posting of workers unchanged. More generally, for a "critically" liberal reading of Council Directive 123/06 (based *inter alia* on art. 16), see Gareth Davies, *The Service Directive: Extending the Country of Origin Principle and Reforming Public Administration*, 32 EUR. L. REV. 232, 232–45 (2007).

74. In this sense, see Bercusson, *supra* note 1, at 288–89 and Ballestrero, *supra* note 6, who criticize the Court of Justice for having ignored the provisions in question.

75. Christian Jeorges, *Democracy and European Integration: A Legacy of Tensions, a Re-conceptualization and Recent True Conflicts* 25, 28 (EUI Working Paper Law No. 2007/25, 2007), widens the prospect of an "immunity" from market rules and calls the Court to a due self restraint in all the cases in which "Community" economic freedoms have to be weighed against the values of European *Sozialstaatlichkeit*: "The ECJ is not a constitutional court with comprehensive competences. It is not legitimated to reorganise the interdependence of Europe's social and economic constitutions, let alone to replace the variety of European social models by a uniform Hayekian Rechtsstaat."

of any "suspicion" of protectionism;[76] in this regard, the European federations and ETUC should play a major role. The negative outcome of *Viking* and *Laval* may specifically provide new momentum to a renewal of industrial action that goes beyond national borders. There are indeed examples of "regional" cross-border agreements,[77] and cooperation between trade unions of neighboring countries grows fastest where the risk of social dumping associated with the integration of the service market is greatest.[78] Nor can it be forgotten that the entry to the Community market has raised the claims, especially for higher wages, of the new accession countries.[79]

Any signs suggesting the rise of a fully-fledged European and transnational union movement are indeed weak, yet it is in the relationships between unions across borders that will be a starting point for further developments, since any answer to the doubts and anxieties resulting from the integration process of the internal market may only come from there (rather than from courtrooms).

76. Sciarra, *supra* note 12

77. Referred to by Sciarra, *supra* note 12.

78. *See* Jon E. Dølvik & Line Eldring, *Industrial relations responses to migration and posting of workers after EU enlargement: Nordic trends and differences*, 12 TRANSFER 213 (2006), who analyzes the different strategies adopted by the unions of Scandinavian countries to try and "govern" the "temporary" migration of Baltic workers. Account is given of these "positive developments" also by Woolsfon, *supra* note 19, at 212–13 who, however, (rightly) stresses how they risk being jeopardized by the persistent weakness of the unions in Eastern (notably Baltic) countries.

79. It suffices to recall the recent strike in March 2008 of the workers of the Renault plant that produces Dacia-Logan in Romania, thanks to which an increase by 40% of the wages has been achieved. This is just an example of the wage growth trend that is concerning many East European countries, especially those that are characterized by strong migration outflows: in Romania the nominal wage growth rate in 2006 was 12.1% and almost 19% in the engineering industry, while in the Baltic countries the "average" growth is about 20% (data taken from the study of the European Foundation for the Improvement of Living and Working Conditions, 2007). The rapid wage growth is due to the "comparison" with the labor markets of Western Europe triggered by "temporary" migration and, more importantly, by the fall in unemployment rates (caused by the conjunction of delocalization and emigration to the West). Guglielmo Meardi, *More voice after more exit? Unstable industrial relations in Center Eastern Europe*, 38 INDUS. REL. J. 503, 510 (2007). On this point too, however, one should not yield to optimism, not only because of the dramatic "starting" conditions of East European workers, but also because, as Charles Woolfson & Jeff Sommers, *Labour Mobility in Construction: European Implications of the Laval un Partneri Dispute with Swedish Labour*, 12 EUR. J. INDUS. REL. 49, 67-68 (2006), observe, the outcome of the judgments at issue may just translate into a disincentive for the new Member States "to modify their industrial relations frameworks to ensure the active implementation of labour rights in line with international standards, adding yet a further twist to the downward spiral."