Briefing Note

Understanding Viking and Laval:
An IER Briefing Note

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Introduction

1. In December 2007, the European Union's highest judicial body, the Court of Justice, issued two decisions on the extent to which EU internal market law may impose restrictions on collective action by trade unions. The cases have given rise to considerable debate, not least amongst trade unionists, academics and lawyers. In part, this can be attributed to the legal complexity of the cases and uncertainty regarding their long-term effects. This briefing note seeks to provide an accessible explanation of the key points of law in the cases and some of the subsequent debate. As the two cases raise distinct issues, each will be considered separately.

The facts of the Viking case[1]

2. Viking is a Finnish passenger ferry operator. One of its vessels, the Rosella, operates the route between Helsinki and Tallinn (in Estonia). It sails under the Finnish flag and it is therefore obliged to pay the crew in accordance with the terms of the relevant Finnish collective agreement. The crew are members of the Finnish Seamen's Union (FSU).

3. The Rosella was operating at a loss. Other ferries operate the same route under the Estonian flag, with their crews receiving lower wages. As a consequence, in 2003, Viking decided that it would reflag the Rosella by registering it in Estonia. It intended to enter into a collective agreement with an Estonian union, which would permit lower wages for the crew.

4. In response, the FSU gave notice that it intended to start industrial action. Viking settled the dispute and agreed to continue operating the Rosella under the Finnish flag. Its intention remained to reflag the ship at some stage in the future.

5. Prior to the settlement of the dispute, the FSB had alerted the International Transport Workers' Federation (ITF), of which it is an affiliate. ITF opposes the use of flags of convenience and it coordinates international solidarity action in response. Accordingly, it issued a circular to its members requesting them not to enter into negotiations with Viking. In practice, this was designed to ensure that the relevant Estonian union would refuse to form a new collective agreement with Viking as part of their attempt to reflag the ship.

6. ITF is based on London, so Viking brought legal proceedings in the English courts seeking an injunction requiring ITF to withdraw the circular and for the FSB to refrain from action which interfered with its economic freedoms under the EC Treaty. This was granted by the Commercial Court. On appeal, the Court of Appeal referred several questions to the Court of Justice concerning the application of EC law to the dispute.

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[1] Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti*, judgment 11 December 2007.

The judgment in Viking

7. Article 43 of the EC Treaty prohibits restrictions on the freedom of establishment within the EU. Amongst other things, this entails the freedom of businesses to relocate their activities to another EU Member State. The main obligations which flow from Article 43 relate to *states*; laws must not be enacted which have the effect of restricting the freedom of establishment (eg unjustified bureaucratic requirements linked to setting up a business in another EU state). The first question considered by the Court was therefore whether Article 43 had any application in relation to the actions of a trade union.

8. The Danish and Swedish governments argued that the right to take collective action was a fundamental right and, as such, it should not be subject to the freedom of establishment. On the one hand, the Court accepted that 'the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law'.[2] It based this conclusion on a survey of a range of instruments, including the European Social Charter, ILO Convention 87 and the EU Charter of Fundamental Rights. On the other hand, the Court confirmed earlier case-law which held that fundamental rights had to be balanced against the protection of the economic freedoms found in the EC Treaty. The Court emphasised that the right to take collective action was not an absolute right and it could lawfully be subject to restriction in certain circumstances.

9. The Court held that collective action by a trade union was subject to Article 43. It based this decision on earlier cases where it had held that rules which collectively regulate employment, even if not state rules, could nonetheless infringe the rights to free movement within the EU internal market (eg UEFA's transfer regime for professional footballers was successfully challenged in the famous *Bosman* case[3]). By analogy, the Court decided that Article 43 would apply to collective agreements and this extended to collective action which was 'inextricably linked' to a particular collective agreement.[4] Consequently, insofar as the collective action constituted a restriction on the freedom of establishment, it was potentially in breach of EC law. Where, as in *Viking*, collective action was designed to induce a business not to exercise its freedom of establishment, ie not to relocate to another Member State, it was such a restriction.[5]

10. Not all restrictions on freedom of establishment are unlawful. The Court has a well-established body of case-law that a restriction is justified if:

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[2] Para 44.
[3] Case C-415/93 [1995] ECR I-4921.
[4] *Viking*, para. 36.
[5] Para 74.

a. it pursues a legitimate aim compatible with the EC Treaty and it is justified by overriding reasons of public interest;
b. it is suitable for securing the objective pursued;
c. it does not go beyond what it necessary to achieve that objective.[6]

11. The Court accepted that 'the right to take collective action for the protection of workers' constituted a legitimate interest which could justify a restriction on the freedom of establishment.[7] Importantly, it stated that the economic objectives of the EU 'must be balanced against the objectives pursued by social policy'.[8] The Court was not, though, willing to accept that collective action by a trade union was always designed to ensure the protection of workers. Instead, it said that this was a question of fact for the national court (ie the English Court of Appeal) to decide. Specifically, it held that collective action would not pursue a legitimate aim 'if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat'.[9]

12. The Court of Justice further specified that, even if the Court of Appeal held that the collective action was for the protection of workers, it would also need to consider whether it satisfied points (b) and (c) above. It would have to be shown that there were no alternative means through which the FSB could have pursued its opposition to the reflagging and, if such alternatives were available, that it had exhausted these prior to resorting to collective action.

13. In relation to ITF's circular requesting solidarity action against Viking, the Court of Justice provides a strong hint that it views this as in breach of Article 43. The Court emphasises that a policy of opposing the registration of ships in a state other than that of which the ship's owners are nationals is not capable of justification under Article 43.[10] It argues that such a policy automatically opposes business relocation without regard to whether such relocation would actually be detrimental to the workforce.[11]

Observations on the Viking case

14. From a trade union perspective, perhaps the most positive element of *Viking* is the Court's unequivocal recognition that the right to take collective action, including the right to strike, is a fundamental right. Although this is already recognised in many EU Member States, collective action in the workplace has not been regarded as a fundamental right within UK law.[12] Consequently, *Viking* may provide a useful point of reference when disputes arise surrounding the scope for

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[6] Para. 75.
[7] Para. 77.
[8] Para. 79.
[9] Para. 81.
[10] Para. 88.
[11] Para. 89.
[12] For a contemporary example, see *Ministry of Justice v Prison Officers' Association* [2008] EWHC 239 QB.

industrial action in the UK. It could be used to strength the argument that restrictions on industrial action should be interpreted narrowly, given the fundamental nature of the right to strike. At a political level, this clear statement by the Court of Justice can be deployed as a counter-argument to the hostile outlook on strike action which is often voiced by the government.

15. A prime example of the British government's reluctance to accept the fundamental status of the right to strike is its partial derogation from the EU Charter of Fundamental Rights, as part of the Treaty of Lisbon (which is presently being considered by Parliament). In brief, the UK has concluded a Protocol to the Treaty which seeks to restrict the possibility for UK or EU courts to rely on the provisions of the Charter in cases involving the UK. Article 28 on the right to take collective action, including the right to strike, was a central motivation for this Protocol. Nevertheless, the fact that the Court of Justice has now recognised that the right to strike is a fundamental right and general principle of EC law, prior to the ratification of the Treaty of Lisbon, suggests that the Protocol limiting the application of the Charter may be of little legal value. The Court of Justice is unlikely to take the view that the UK can subsequently opt-out of a fundamental right which it has already recognised.

16. The central consequence of *Viking* is to make it clear that where a trade union takes collective action which seeks to obstruct the relocation of a business to elsewhere in the EU, then this will be potentially in breach of Article 43. For example, a strike to oppose part of a production line being moved from Coventry to Bucharest would now require justification under the EC Treaty. This undoubtedly introduces an additional level of judicial scrutiny to strike action, on top of the myriad of restrictions on industrial action which are already found within UK law.

17. If it is clear that the collective action is because jobs or working conditions are 'jeopardised or under serious threat' (para. 81), then it should remain lawful. If, therefore, the transfer of part of the production line from Coventry to Bucharest will jeopardise jobs in Coventry, then the taking of collective action can still be justified. It is, though, problematic that it will be for the courts (rather than trade unions) to determine when and if recourse to collective action was justified. In particular, the Court of Justice's requirement that unions exhaust all alternative options before engaging in collective action threatens the autonomy of unions to make their own decision on what is the appropriate strategy to defend their members' interests.

18. Doubts over how judicial scrutiny will be exercised are underlined by the Court of Justice's approach to the ITF solidarity action. Its formalistic objection that the policy of opposing flags of convenience was not limited to cases where this resulted in a deterioration in the protection of workers ignores the patent reality that reflagging will typically be motivated by a desire to evade social obligations, such as those found in employment law.

19. As indicated above, the Court's decision in *Viking* was only an interpretation of the law in order to assist the Court of Appeal, not a final judgment on the facts of the dispute. Normally, there would have been a subsequent judgment from the Court of Appeal deciding whether or not to maintain the original injunction granted against the FSB and ITF in the light of the judgment from the Court of Justice. The case was, however, settled out of court by the parties before it returned to the Court of Appeal. At the time of writing, no details on the terms of the settlement were available.

The facts of the Laval case

20. This case concerned a contract from the municipal administration of the town of Vaxholm in Sweden to renovate and extend some school premises (it is sometimes referred to as the Vaxholm case). The contract was awarded to the firm 'L & P Baltic Bygg'. This company was a Swedish subsidiary of a Latvian firm, 'Laval un Partneri'. In order to complete the building contract, Laval posted around 35 Latvian workers to Sweden. The majority of these workers were trade union members in Latvia and Laval had signed collective agreements with the Latvian building sector's trade union.

21. In June 2004, negotiations began between Laval and the Swedish trade union representing workers in the construction sector. The trade union wanted Laval to accede to the collective agreement for the building sector, which includes a process for negotiating salaries. If agreement cannot be reached, there is a 'fall-back' minimum wage provided under the collective agreement of SEK 109 (approximately £9 per hour).

22. Negotiations on the collective agreement were not successful, so, in November 2004, the Swedish building trade union began collective action against Laval. This took the form of a blockade of the building site which prevented workers or goods from entering. In December 2004, the Swedish electricians' trade union commenced solidarity action which stopped all electrical work on the site. This was further escalated in January 2005 by solidarity action from other trade unions boycotting all of Laval's sites in Sweden. In March 2005, the Swedish subsidiary of Laval was declared bankrupt.

23. In the light of the trade unions' collective action, Laval brought a case against the construction and electricians' unions seeking a declaration that their actions were unlawful and compensation for the damage caused to its business. The Swedish court decided to refer the issue to the Court of Justice for an interpretation of EC law.

The judgment in Laval

24. Two distinct legal issues were posed by this case. The first related to the Posted Workers Directive and whether this could offer a legal basis to justify the collective action.[13] In brief, this Directive was designed to address the employment law situation of workers who are temporarily posted to work in another Member State (such as the Latvian workers posted by Laval to Sweden). The Directive requires that posted workers are granted the same level of employment protection as workers in the host state in relation to a list of issues, such as minimum rates of pay or maximum working periods. Two difficulties arose in relation to Laval's workers. First, Swedish law did not provide for any minimum rate of pay and, secondly, the building sector collective agreement covered topics which were not specifically mentioned in the Posted Workers Directive.

25. In relation to the minimum rate of pay, the Posted Workers Directive does allow states to declare that certain collective agreements are 'universally applicable',[14] in which case their terms and conditions must be applied also to posted workers. Alternatively, the state can rely on the collective agreements which are 'generally applicable' in a given sector.[15] The Swedish system of industrial relations places considerable emphasis on the autonomy of the social partners to regulate pay rates through collective bargaining. Accordingly, Sweden had neither designated specific collective agreements as universally applicable, nor had it decided to rely on those which were generally applicable.[16] As a result, the Court of Justice held that the facts of the dispute in Laval did not fall within the terms of the Directive and therefore it did not provide a justification for collective action to enforce adherence to a collective agreement (including minimum rates of pay).

26. In addition, the building sector collective agreement in Sweden included obligations which are not mentioned in the Posted Workers Directive. For example, had Laval joined the collective agreement, it would have been required to make payments to an insurance fund for building workers. Although there is a possibility within the Posted Workers Directive for states to extend its application to other terms and conditions of employment, Sweden had not done this. Therefore, the Directive could not be a justification in relation to the unions' actions to compel Laval to accept these elements of the collective agreement.

27. The second legal issue posed by this case was whether the collective action was in breach of Article 49 of the EC Treaty. This states that 'restrictions on freedom to provide services within the Community shall be prohibited …'. As with the *Viking* case, a preliminary issue was whether the actions of *trade unions* fell within the scope of Article 49 (as opposed to restrictions imposed by *states*). In similar terms to the *Viking* judgment, the Court held that Article 49 was not limited in its application to public (ie state) rules; it also covered obstacles to free

[13] Directive 96/71 [1997] OJ L18/1.
[14] Art 3(1).
[15] Art 3(8).
[16] *Laval*, para. 67.

movement caused by non-state actors. In the Court's view, the collective action of the unions was likely to make it more difficult for firms from other Member States to carry out construction work in Sweden and therefore it was a restriction contrary to Article 49.

28. Nevertheless, there remains the possibility to justify a restriction on the free movement of services if:

    a. it pursues a legitimate aim compatible with the EC Treaty and it is justified by overriding reasons of public interest;
    b. it is suitable for securing the objective pursued;
    c. it does not go beyond what it necessary to achieve that objective.[17]

29. The Court accepted that the protection of workers against 'social dumping' was a legitimate aim,[18] however, it reached the surprising conclusion that the collective action of the Swedish unions could not be justified by that objective. Here, it focused on the fact that the collective action sought to compel Laval to adhere to a collective agreement, which would then provide the framework for pay negotiations. The Court felt that this would result in uncertainty for the service-provider who could not predict in advance exactly what obligations it would have to assume.[19]

30. Finally, another part of the judgment in Laval concerned a prohibition in Swedish law on collective action which was designed to compel parties to a collective agreement to have that amended or set aside.[20] For example, it would be unlawful for one trade union to take collective action with a view to getting an employer to terminate an existing collective agreement with a different trade union. This rule did not, though, apply where the collective agreement in question was not subject to Swedish law. In other words, Laval could not oppose the unions' collective action on the basis that it already was party to a collective agreement in Latvia.

31. The Court held that this was a form of nationality discrimination because collective agreements formed in other Member States were not treated in the same way as Swedish collective agreements. It was not possible to justify such discrimination, which was consequently unlawful.

Observations on the Laval case

32. The first message that emerges from this case is the Court's desire for Member States to work within the framework of the Posted Workers Directive. It emphasises that Member States *can* impose minimum rates of pay on posted workers, either via legislation or collective agreement, but this must take place in

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[17] Para. 101.
[18] Para. 103.
[19] Para 110.
[20] Para 112.

accordance with the terms of the Directive in order to be lawful.[21] This is clearly problematic for those states which rely upon autonomous collective bargaining by the social partners for the regulation of pay and working conditions. In relation to the UK, this aspect of the judgment is perhaps less alarming. There is a statutory framework on core aspects of the employment relationship, such as the minimum wage and working time rules, so these can be enforced against employers of workers temporarily posted to the UK.

33. By placing considerable weight on the Posted Workers Directive, the Court reduces the issue to the imposition of *minimum* wages. Trade unions are naturally not only concerned with ensuring that workers receive the minimum wage, but also with securing an overall improvement in wage levels. There is an obvious danger that firms rely upon posted workers (receiving only the minimum wage) as a means of circumventing the national workforce, which may enjoy better wage rates. Yet, following the Court's judgment, it would seem that collective action designed to (a) oppose the introduction of cheaper temporary labour from other Member States, or (b) ensure that such posted workers can enjoy the same terms and conditions as national workers (where these are above the statutory minimum), will be contrary to Article 49.[22]

34. The Court's argument that seeking to compel Laval to enter into pay negotiations under the aegis of the building sector collective agreement resulted in too much uncertainty for the service-provider is particularly vulnerable to criticism. In its own presentation of the facts, it is acknowledged that the collective agreement clarified that in the event of pay bargaining failing, then a fall-back rate of minimum pay would be applied.[23] More generally, the Court's objection that the outcome of collective bargaining would not be clear from the outset seems to negate the very purpose of the negotiation process. Indeed, the Court's approach seems to convey a degree of scepticism about the appropriateness of collective bargaining in relation to temporary service-providers. This attitude is difficult to reconcile with international labour standards, such as Article 4 of ILO Convention 98 or Article 6 of the European Social Charter which exhort states to encourage and promote collective bargaining.

35. In the final element of its judgment, the Court provides a terse rejection of Swedish law insofar as it did not treat firms who were party to collective agreements in other Member States in the same way as firms who were party to

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[21] Para 109.

[22] The latter point is reinforced by the Court of Justice's subsequent decision in Case C-346/06 *Rüffert*, 3 April 2008. That case concerned a law in the German state of Lower Saxony stipulating that contracts for public building works should only be awarded to firms who agreed to pay their workers at least the rate included in local collective agreements. A dispute arose following the termination of a contract to build a prison when it was discovered that the contractor was using Polish labour at rates below that in the local collective agreement. The Court of Justice held that the requirement to pay the remuneration prescribed by the local collective agreement was contrary to the Posted Workers Directive and not justified by any over-riding objective of the protection of workers.

[23] Para. 26.

Swedish collective agreements. On the face of it, this can be construed as an instance of nationality discrimination. On further scrutiny, however, it can be queried whether such firms are really in a comparable situation. Although collective agreements may be a common feature of European systems of labour law, their legal status and effects differ greatly. The Swedish industrial relations system clearly attached great weight to the role of collective agreements and hence it is understandable that such agreements are subject to protection from collective action by third parties. Collective agreements in other Member States may be much weaker instruments meaning that the firm with a collective agreement in another Member State is not subject to obligations comparable to those of a firm with a Swedish collective agreement. In this respect, it is notable that Laval only signed its Latvian collective agreements in September and October 2004,[24] *after* it had commenced negotiations with the Swedish builders' union. Although it is impossible to know from the bare facts why Laval took this action, one interpretation is that it was trying to pre-empt a Swedish collective agreement with a higher standard of labour protection.

Conclusions

36. Trade unions can find some points of encouragement within these judgments. The Court of Justice has explicitly affirmed that the right to strike is a fundamental right; this recognition should be a valuable point of reference within the UK. Moreover, it has clearly indicated that the minimum standards of employment protection laid down in UK legislation can be imposed on the employers of workers temporarily posted to the UK. Nevertheless, the overall tenor of the judgments is to place greater weight on securing economic freedoms within the internal market than the protection of social rights. The judgments usher in a new set of legal restrictions on when collective action can be taken, if this in some way hinders the movement of businesses or labour within the internal market. Given that industrial disputes with a transnational dimension are one by-product of the internal market, the limits of these new legal principles are likely to be tested in the future by employers seeking to resist collective action.

37. POSTSCRIPT: An early example of these principles being invoked by employers has recently been provided. The British Airlines Pilots' Association (BALPA) had intended to take industrial action in spring 2008 in order to object to British Airway's plans to open a separate entity (OpenSkies). This company would be based in other EU Member States, flying routes to the USA. OpenSkies would use BA airplanes, but its pilots would not enjoy the same terms and conditions as BA pilots. BA threatened legal proceedings if BALPA proceeded with the industrial action, invoking Article 43 EC and the principles established in the *Viking* case. BALPA subsequently suspended the industrial action, but it has started legal proceedings at the High Court seeking a declaration on whether such industrial action would be lawful.[25]

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[24] Opinion of Advocate-General Mengozzi, *Laval*, para. 39.

[25] http://www.baplane-bapilot.org/News/Court-Grants-Pilots-Request.aspx