

# EU Law and Workers' Rights: The Legal Significance of Viking, Laval, Rüffert and Luxembourg

Gavin Barrett

DEI Policy Paper 09-1



UCD Dublin European Institute

DEI Policy Paper: © Gavin Barrett 2009

This paper should be cited as follows: Gavin Barrett, EU Law and Workers' Rights: The Legal Significance of Viking, Laval, Rüffert and Luxembourg, UCD Dublin European Institute Policy Paper 09-1, September 2009.

All opinions expressed are the sole responsibility of the author. They do not represent the opinions of the Dublin European Institute or University College Dublin.

Cover Photo: © European Community

#### About the Author

Dr. Gavin Barrett is Senior Lecturer specializing in the law of the European Union in the School of Law at University College Dublin. Contact: [Gavin.Barrett@ucd.ie](mailto:Gavin.Barrett@ucd.ie)

#### About the Dublin European Institute

The Dublin European Institute (DEI) supports scholarly research and debate on the sources, processes and implications of European integration and governance. Based within the School of Politics and International Relations at University College Dublin, the DEI is the oldest and largest university centre for research on European affairs in the Republic of Ireland.

For more information, see: <http://www.ucd.ie/dei> or contact: Dublin European Institute, UCD School of Politics and International Relations, University College Dublin, Belfield, Dublin 4, IRELAND.

**EU Law and Workers' Rights:  
The Legal Significance of Viking, Laval, Rüffert and Luxembourg**

Dr. Gavin Barrett <sup>1</sup>

**Abstract**

The vote of sectors of the population which would describe themselves as working class is tending not to go in favour of European Union Treaties, when these are put directly to the electorate. Whether or not the European Union is *actually* bad for workers, many now seem to have come to believe that it is, which in itself is obviously a very serious problem for the European Union. Lawyers can shed useful light on whether reality corresponds with this perception. For example, they may address the question of whether the European Union legislature (or any element of it, such as the Commission) is *systematically* taking the side of employers against workers, for instance in relation to the adoption of legislation, or whether the European Court of Justice is doing so. The conclusion is reached in this article that neither the legislature nor the Court of Justice is systematically singling out workers for poor treatment. There have been some recent controversial cases of the Court of Justice in the employment area, which are examined here - *Viking*, *Laval*, *Rüffert* and *Luxembourg*. But any such examination is not for the purposes of determining whether the European Court of Justice is anti-worker. This is clearly not the case, and the evidence for that in the case-law of the Court is overwhelming. Nor do these cases have anything at all to do with the Treaty of Lisbon, notwithstanding the constant reference made to them in the course of both Lisbon Treaty ratification debates in Ireland. The examination of these cases in this article is thus of less significance. They are examined for the lesser purpose of seeing if they were good decisions or poor decisions, and if they were poor decisions, what if anything is to be done about them.

*Introduction*

Something of a trend may be emerging in referendums in member states concerning the ratification of European Union Treaties. Difficulty has been encountered in more than one state in convincing less financially well-off sectors of national electorates to vote in favour of continuing European integration. Hence, for example, it was reported in relation to the May 2005 referendum which blocked French ratification of the Treaty Establishing a Constitution for Europe that

“just as in the previous vote on the Maastricht treaty, French farmers and workers voted overwhelmingly against with 70 per cent and 69 per cent respectively for No, while professionals and senior managers cast their poll in favour of the document (65 per cent)...

---

<sup>1</sup> Senior lecturer specialising in the law of the European Union, School of Law, University College Dublin.



Just as in 1992, unemployed French voters reached the highest proportion of the no vote (71 per cent), while students (54 per cent) and pensioners (56 per cent) voted in favour.”<sup>2</sup>

Somewhat similar-looking statistics concerning blue collar workers (although somewhat less pronounced in its extent than in France) emerged in the wake of in the wake of the June 2008 rejection by Ireland’s electorate of a constitutional amendment to facilitate the ratification of the Treaty of Lisbon, the comprehensive. Here, according to the extremely comprehensive September 2008 Millward Browne IMS survey commissioned by the Irish Government, it was noted that

“the key demographic groups in terms of opposition to the Treaty were 25-34 year olds (59%), *the C2* [skilled working class] *and DE* [unskilled working class] *socio economic groups* (63% and 65%) and women (56%).”<sup>3</sup>

The subsequent UCD Geary Institute report commissioned by Department of Foreign Affairs concluded that there had been a “strong correlation between social class and how a person voted in the Lisbon referendum.”<sup>4</sup>

It is of course important not to oversimplify the issues or factors which affected voter behaviour. The same report also concluded that

*“the defeat by referendum of the proposal to ratify the Treaty of Lisbon in Ireland in June 2008 was the product of a complex combination of factors. These included attitudes to Ireland’s membership of the European Union, to Irish-only versus Irish-and-European identity and to neutrality. The defeat was heavily influenced by low levels of knowledge and by specific misperceptions in the areas of abortion, corporate taxation and conscription. Concerns about policy issues (the scope of European Union decision-making and a belief in the importance of the country having a permanent commissioner) also contributed significantly and substantially to the treaty’s downfall, as did the perception that the European*

---

<sup>2</sup> L. Kubosova, “Farmers and Working Classes Top the No Vote” EU Observer, 30 May 2005.

<sup>3</sup> Emphasis added. See Millward Browne IMS, *Post Lisbon Treaty Referendum Research Findings* (Dublin, September, 2008) available at the time of writing at [http://www.dfa.ie/uploads/documents/Publications/Post%20Lisbon%20Treaty%20Referendum%20Research%20Findings/post%20lisbon%20treaty%20referendum%20research%20findings\\_sept08.pdf](http://www.dfa.ie/uploads/documents/Publications/Post%20Lisbon%20Treaty%20Referendum%20Research%20Findings/post%20lisbon%20treaty%20referendum%20research%20findings_sept08.pdf) at p. 3 thereof. Detracting from the overall impact of this however was the fact that not only were less well-off socio-economic groups less likely to vote ‘yes’ if they voted in the Lisbon Treaty referendum: they were also less likely to vote in the first place. According to the same Millward Browne IMS, “socio-economic group [was]...a determinant of likelihood to vote, with white collar workers at 57%, well ahead of blue collar workers at 48%.”

<sup>4</sup> R. Sinnott, J. Elkind, K. O’Rourke, J. McBride, *Attitudes and Behaviour in the Referendum on the Treaty of Lisbon* (UCD Geary Institute, University College Dublin, March, 2009) at p. 26 thereof. At the time of writing the latest poll available in advance of the second Lisbon referendum paints a somewhat similar picture. In the Irish Time TNS MRBI poll, the results of which were published on 25 September, 2009, the general level of popular support for the Treaty of Lisbon stood at 48 per cent, opposition at 33 per cent with voters who had not decided which way to vote standing at 19 per cent. However, in the DE category of voters these figures were reversed: opposition stood at 48 per cent, support at 33 per cent with voters who had not decided which way to vote again standing at 19 per cent. (See S. Collins, “Support for Lisbon Steady but No Side Makes Ground”, Irish Times, 25 September, 2009 and by the same writer, “Relief for Yes Side but Opponents Can Take Heart Too”, Irish Times, 25 September, 2009

*Union means low wage rates. Social class and more specific socioeconomic interests also played a role, the latter being shown by the differential effects of certain variables conditional on participation/non-participation in the labour force.”*

What might be termed issues of particular concern to working-class voters therefore appear to have been but one factor among several in the halting of the ratification process in Ireland in 2008 - but they were clearly a significant one.

The emergence of such statistics came as little surprise for many observers of the public debate which preceded the 2008 Lisbon Treaty referendum. In this campaign, the trade union movement, although it in general supported the Lisbon Treaty, was far from united in its support. Some of the dissent, it is important to note, stemmed not from any view that the European Union was bad for workers but rather from an unsuccessful attempt to use the Treaty of Lisbon as a bargaining chip in the domestic dispute over whether Irish law should include a right on the part of a workforce to compel its employer to recognise a Union.<sup>5</sup> In this, such dissent was very similar to the successful (at least in a Pyrrhic sense) tactic of major farmers' organisations in using the Lisbon Treaty referendum as a bargaining chip to obtain the adoption of a particular negotiation stance by Ireland in the WTO talks which were ongoing at the time.<sup>6</sup> Undoubtedly, however, some trade union opposition did also come from a belief that further integration would be bad for workers' interests.<sup>7</sup> Interestingly for labour lawyers used to their subject being of interest to specialists only, the judgments of the European Court of Justice in *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and another*,<sup>8</sup> *Laval and partners v. Svenska Byggnadsarbetareförbundet and others*<sup>9</sup> and *Rüffert v. Land Niedersachsen*<sup>10</sup> were repeatedly publicly invoked by 'no' side in the run-up to the June 2008 referendum in order to convince the electorate that further European integration was bad for workers and should not be supported.<sup>11</sup> In the debate leading up to the second

---

<sup>5</sup> See in this regard e.g., M. Wall, "No Side's Belief That Workers Could Get Better Deal 'Naïve'", Irish Times, 4 June, 2008

<sup>6</sup> In a widely-criticised stance, the main farming organisation at first publicly and prominently advocated a 'no' vote in order to pursue this aim. (See S. MacConnell and T. O'Brien, "IFA Outlines 10 Reasons for Not Backing Treaty", Irish Times, 27 May, 2008). Having forced the Government to concede its main demands, it then very belatedly changed tack. (See H. McGee and M. O'Regan, "Farming Body Lends Support to Yes Vote on Lisbon", Irish Times, 2 June, 2008, S. Collins, "Days of Serious Negotiations Brought About Carefully Worded Statement", Irish Times, 4 June, 2008 and M. Hennessy, "IFA President Urges Members to Vote Yes", Irish Times, 11 June, 2008). The same organisation has advocated a 'yes' vote in the second referendum (S. Collins "IFA Urges Farmers to Vote Yes", Irish Times, 28 August, 2009) although a small farmers' splinter group advocated a 'no' vote, making a series of bizarre claims about the Treaty. (See D. de Bréadún, "Lobby Group Says Yes Vote Would Jeopardise Farm Succession Rights" Irish Times, 21 August, 2009).

<sup>7</sup> P. Cullen, "Craft Union Calls for Rejection of EU Treaty", Irish Times, 6 May, 2008.

<sup>8</sup> Case C-438/05 [2007] ECR I-10779.

<sup>9</sup> Case C-341/05 [2007] ECR I-11767

<sup>10</sup> Case C-346/06 [2008] ECR I-1989

<sup>11</sup> For some examples of the citation of these cases in the debate leading up to the 2008 referendum, M. Wall, "Ictu to Urge 600,000 Union Members to Vote Yes", Irish Times, 5 May, 2008, P. Cullen, "Craft Union Calls for Rejection of EU Treaty", Irish Times, 6 May, 2008, M. Wall, J. Logue, P. Michael, "ICTU Votes to Support Lisbon Treaty Yes Vote", Irish Times, 21 May, 2008, G. FitzGerald, "Main Criticisms by No Side Lack All Credibility", Irish Times, 31 May 2008, J. Downes, "Call to Reject 'Neo-Liberal' Lisbon Bias", Irish Times, 10 June, 2008 and R. Cole, "If You Want to Support Arms Trade Vote Yes", Irish Times, 17 May, 2008.

referendum, *Commission v. Luxembourg*<sup>12</sup> has now been added to this canon.<sup>13</sup> In other words, the tendency is now to cite all four of the above cases as examples of the supposed anti-worker approach of the European Court of Justice, which in turn is supposedly representative of a similar objectionable tendency in the institutions of the European Union generally. Whether or not the European Union is *actually* bad for workers, many now seem to have come to believe that it is, which in itself is obviously a very serious problem for the European Union. It seems worthwhile returning to the root question and attempting to shed whatever light is possible on the issue of whether the European Union's activities are, on balance, good or bad for workers. Given the economic and political questions involved in arriving at an answer to such a question, however, a more fundamental issue must first be addressed: is this question one which lawyers can play any useful part in answering?

*The Role of Lawyers in Shedding Light on the Issue of Whether the European Union is Good for Workers*

For this writer, lawyers seem, on the one hand, capable of shedding *some* light on this question, but, on the other, no more qualified than anyone else to answer the question *definitively*. One reason for that is that its answer requires a wider range of skills than lawyers possess. It involves for example an assessment of the economic questions of whether each and all of a European-wide (a) free trade area, (b) customs union (c) common market and (d) economic and monetary union is better than a lesser level of economic integration or indeed no integration at all, or for that matter, protectionism. (The European Union involves all of these states of integration – to a somewhat geographically limited extent in the case of the economic and monetary union and additionally to a normative extent in the case of an economic union.) Lawyers can and do have their own views on such issues, of course, but they do not derive from their legal expertise. Ultimately, they seem to be empirical questions for economists. Moreover, the question being addressed is whether the European Union is good for workers, not for society as a whole, which may be harder to judge, because (a) one is not merely judging whether there is an overall gain in societal wealth, but whether one particular sector of society gains; and (b) that sector of society is a rather nebulously defined one.<sup>14</sup>

This warning borne in mind, it seems worthwhile mentioning some economic data in passing - if only for the purposes of noting the perhaps rather obvious point that in material terms, the idea of the EU having been bad for Irish workers seems an unlikely proposition. On entering the EEC in 1973, 1,067,000 workers were employed in Ireland.<sup>15</sup> The latest figure at the time of writing is 1,965,600.<sup>16</sup> Average industrial

---

<sup>12</sup> Case C-319/06 [2008] ECR I-4323

<sup>13</sup> See for an example of this, “*Cox and Higgins Cross Swords Over Lisbon in E-mail Duel*”, Irish Times, 29 August, 2009

<sup>14</sup> Some interesting reflections on the impact of globalisation on workers are to be found by one former law professor in B. Obama, *The Audacity of Hope* (Canongate, 2007) at pp. 171-176.

<sup>15</sup> See *Ireland and the EU 1973-2003 - Economic and Social Change*” from Central Statistics Office, *Statistical Yearbook 2004*, at xiv, available at the time of writing at <http://www.cso.ie/releasespublications/documents/statisticalyearbook/2004/ireland&theeu.pdf>

<sup>16</sup> See Central Statistics Office, Quarterly National Household Survey, Table 1, available at the time of writing at [http://www.cso.ie/qnhs/calendar\\_quarters\\_qnhs.htm](http://www.cso.ie/qnhs/calendar_quarters_qnhs.htm)

earnings in 1973 were under €2,000.<sup>17</sup> The latest Central Statistics Office statistics show them at just under €42,000.<sup>18</sup> Even allowing for inflation, such seem to show no ‘race to the bottom’ in working conditions. Arguably, belonging to a competitive single European market has vindicated Irish workers’ interests far better than Ireland’s previous economically disastrous experiment with protectionism.<sup>19</sup>

Political views also come into the equation, however. In order to believe that the European Union is good for workers’ rights, one first of all has to accept that a free market economy is capable of being good for workers’ rights. The political views of some, rightly or wrongly, do not permit this.

In *Metro v. Commission*,<sup>20</sup> the European Court of Justice referred to the aim of the common market provisions in the Treaty of Rome as being “the creation of a single market, achieving conditions similar to those in a domestic market”. As regards what kind of market is envisaged, Article 4 of the EC Treaty speaks of “the principle of an open market economy with free competition”. Given the extensive social legislation which has been adopted by what is now the European Community in the last forty years in particular, that very free-market-sounding description has not accurately reflected the reality of matters for quite some time.<sup>21</sup> In fact, what we have right now seems more accurately reflected in the new Article 3 of the Treaty on European Union proposed by the Treaty of Lisbon which speaks in terms of “a highly competitive *social* market economy, aiming at full employment and social progress”.

But whatever the kind of market the European Union represents, obviously if one does not believe in *some* kind of market economy, one is not going to believe that European Union can be good for workers. During the debates which preceded the 2008 Lisbon Treaty, Marxist campaigners, using cases like *Viking*, *Laval* and *Rüffert* as evidence - repeatedly condemned the European Union as a “neo-liberal” entity.<sup>22</sup> (Although the point tends to be little mentioned in referendum campaigns in which criticisms are directed at the European Union alone, for a Marxist, *any* market

---

<sup>17</sup> See *Ireland and the EU 1973-2003 - Economic and Social Change* from Central Statistics Office, *Statistical Yearbook 2004*, at xvii, available at the time of writing at <http://www.cso.ie/releasespublications/documents/statisticalyearbook/2004/ireland&theeu.pdf>

<sup>18</sup> Central Statistics Office, *Earnings and Labour Costs*, 7 August 2009, at p. 1 thereof, available at the time of writing at <http://www.cso.ie/releasespublications/documents/earnings/current/earnlabcosts.pdf>

<sup>19</sup> As to which see e.g., J. Lee, *Ireland, 1912-1985: Politics and Society* (Cambridge University Press, Cambridge, 1989) esp. at chapters 3 to 5 thereof.

<sup>20</sup> Case 26/76 [1977] ECR 1875.

<sup>21</sup> See for an overview, C. Barnard, *EC Employment Law* (Oxford University Press, Oxford, 2006) and J. Kenner, *EU Employment Law: From Rome to Amsterdam and Beyond* (Hart Publishing, Oxford, 2002).

<sup>22</sup> See for example the column published by J. Higgins (prior to his election to the European Parliament in 2009) in the January 2008 edition of *The Socialist* (available at <http://www.socialistparty.net/pub/pages/socialist031jan08/3.html>). Marxist hostility to European integration in its present form. has a long pedigree - the French Communist party was the one political grouping in France which Jean Monnet was unable to work with in constructing what has evolved into the European Union. See J. Monnet, *Memoirs* (Collins, London, 1978). Cf. the rather bizarre assertion by the Czech President Vaclav Klaus in a recent speech to the European Parliament (during the Czech Presidency of the Council) that “the present economic system of the EU is a system of a repressed market, a system of a permanently strengthening centrally controlled economy.” The full text of this speech is available at [http://www.europarl.europa.eu/eplive/expert/multimedia/20090126MLT47169/media\\_20090126MLT47169.pdf](http://www.europarl.europa.eu/eplive/expert/multimedia/20090126MLT47169/media_20090126MLT47169.pdf)

economy – including all European national economies in their current form – is in effect, an organised arrangement to exploit workers and undermine their rights.)

At the other end of the political spectrum are those, who, even though they believe in markets, will almost of necessity believe that a great deal of what the European Community currently engages in will also not be good for workers. What Krugman terms ‘free-market fundamentalists’ take the view that the European Union is bad for workers because many of the regulations it introduces interfere to some extent – even a limited extent - with the free play of market forces, and these are the very forces which are capable of guaranteeing wealth –including for workers.<sup>23</sup> Hence Milton Friedman famously took the view that the minimum wage was a disaster for poor people, leading to greater unemployment and hurting exactly the people it was meant to help.<sup>24</sup> All it did, according to Friedman, was to ensure that people whose skills did not justify the payment of the minimum wage, would be unemployed, instead of being workers. For free marketeers like Friedman, an European Union which takes part in creating minimum employment standards simply prices workers out of the market. Somewhat like Marxists, therefore free marketeers believe that the European Union is ultimately going to be bad for workers – certainly insofar as it involves the legal imposition of improved labour standards.

For those who lie somewhere on the continuum between Marxists and market fundamentalists, subscribing to the view that the market is the best way in which to generate wealth, but that it nonetheless needs to be supplemented by mechanisms which will lead to that wealth being more fairly distributed, some regulation, at least, will be welcome. The problem is however, in determining *at what point* regulation becomes excessive, *at what point* does it turn into a burden for economic life in general and thus become bad for workers. Lawyers have no special claim to expertise in determining definitively the answer to that question. Providing the answer involves (a) pronouncements on economic issues and (b) taking a stance in relation to political questions. What lawyers can do however, is something very valuable – they can enhance the listener’s ability to make a call him- or herself in relation to that issue by providing some information about what the law is.

And lawyers of course are not limited to stating what the law is. They are also well placed to answer questions as to whether the European Union legislature (or any element of it, such as the Commission) is *systematically* taking the side of employers against workers, for instance in relation to the adoption of legislation, or whether the European Court of Justice is doing so. Both allegations were repeatedly made implicitly or explicitly during the 2008 Lisbon referendum in Ireland, in particular by groups coming from the hard left of the political spectrum.

Providing the answer to these questions is something which employment and Community lawyers can do. Three questions suggest themselves (1) Does the Community legislature systematically take the side of employers against workers? (2) Does, as is sometimes alleged, the Commission systematically take the side of employers against workers? (3) Does the European Court of Justice systematically take the side of employers against workers?

---

<sup>23</sup> See P. Krugman, *The Conscience of a Liberal* (Penguin, 2007) at pp. 115 to 120.

<sup>24</sup> His views are elaborated upon at <http://www.theintellectualdevotional.com/blog/?p=238>



(1) Does the Community legislature systematically take the side of employers against workers?

Over the years, a large number of very significant laws specifically directed at protecting the position of employees have been adopted. Thus for example (i) employment equality legislation (for many years, in the gender equality field but more recently to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation<sup>25</sup>), (ii) legislation protecting the rights of workers in situations of business upheaval and changes, (iii) health and safety legislation, (iv) legislation protecting the position of atypical workers such as part-time, fixed-term and temporary workers and (v) legislation protecting migrant workers has been adopted at European level. Without even counting the reams of workplace health and safety legislation, at least thirty major items of employment protection legislation have been adopted over the years. The Directory of Community legislation in force actually lists no less than 440 acts under the heading 'Freedom of movement for workers and social policy',<sup>26</sup> although the significance of these would obviously vary quite considerably. Be that as it may, any idea that the Community legislature's interventions have taken place exclusively on the employer side of the industrial divide is clearly historically inaccurate.

Historically, further back towards the origins of the Community, when the prevailing philosophy was ordoliberalism,<sup>27</sup> a better case for bias might have been made out for a failure on the part of the Community to consider employment protection legislation – but not now. By the time of Paris Summit in October 1972 – *i.e.*, just prior to the accession of Ireland to the EEC in 1973 – the member states were prepared to declare that they attached as much importance to vigorous action in the social field as to the achievement of the economic and monetary union. Even if that overstated the commitment which was subsequently to be shown to employment rights, and even if it took time for Treaty reform to give the Union the capacity to match such grand-sounding words with some action, there is nonetheless no doubt whatsoever, that over time the Community has made a major contribution to the code of rules which constitute Irish employment protection legislation and that Irish workers are far better protected legislatively than they would have been were we not in the European Union.

Some pro-Lisbon Treaty advocates during or just after the 2008 Lisbon referendum campaign went so far as to assert that the European Community has been responsible for all of the employment legislation adopted by Ireland in the last three and a half decades. This is not correct. Irish unfair dismissals legislation and individual redundancy legislation, for example, are not European in origin. But it is perfectly true to say that the vast overwhelming bulk of employment protection legislation adopted by Ireland since entry to the Community in 1973 is European in origin. Employee protection legislation has greatly augmented in both quantity and quality

---

<sup>25</sup> Most prominently, via the adoption of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and subsequently (and more generally) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

<sup>26</sup> Figure correct as of 13 May, 2009.

<sup>27</sup> As to which see G. More, *"The Principle of Equal Treatment: From Market Unifier to Fundamental Right"* in P. Craig and G. de Búrca, *The Evolution of EU Law* at 518 to 520.

through our membership of the European Union. Somewhat ironically, political agreement within the Council of Ministers on a common position on the temporary agency workers directive – a significant step forward temporary workers - was reached by the Council just three days before the June 2008 referendum.<sup>28</sup> In a sadly typical example of credit not going where credit is due, however, few paid the slightest amount of attention to this minor triumph for employee protection, and Irish voters went to the polls having been treated to a barrage of allegations that the European Union was an organisation with a neo-liberal organisation undermining workers' rights.

(2) Does the Commission systematically take the side of employers against workers?

Since the Commission proposes the legislation which is adopted at European Community level, it follows that it too has obviously played a crucial role in securing whatever employment protection measures have been adopted. But the Commission has of course had a far greater role than that of merely proposing legislation. For years, it has driven the social agenda by drafting the Social Action Programmes which are adopted by the Council. The Delors Commission in particular played a crucial role in both securing the adoption of the Community Charter of the Fundamental Social Rights of Workers in Strasbourg in 1989, and in the Action Programme which followed it, which formed a basis of much of the social legislation adopted for many years. It also played a key role in securing a place for the social dialogue in the Community legal order, with all of the enhanced drive for effective employment regulation which that led to. The Commission also plays a key role in the Open Method of Coordination, one methods used in more recent for advancing Community social policy and is key to the Lisbon strategy for growth and jobs.

Looking at the Commission's work programme for 2009 does not give one the impression of a body systematically trying to undermine workers' rights. It is, for example, guiding proposals on anti-discrimination, works councils and reconciliation of work and family life through the European Parliament.<sup>29</sup> If it has the aim frequently ascribed to it of siding with employers against workers, it is certainly disguising its intentions very well.

(3) Does the European Court of Justice systematically take the side of employers against workers?

---

<sup>28</sup> Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work OJ L 327, 5.12.2008, p. 9–14. See in relation to this COD/2002/0072.

<sup>29</sup> See *Commission Legislative and Work Programme 2009 - Acting now for a better Europe – Vol. 1* (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (COM(2008) 712 final) Brussels, 5 November, 2008) at p. 4 in which it is noted that

“at a time of economic distress and social pressure, it is more than ever important to advance the Social Agenda for Opportunities, Access and Solidarity. The Commission will be renewing its youth strategy to better respond to the problems faced by youth – such as disproportionately high unemployment, and early school leaving. An important part of this effort to provide opportunities is the New Skills for New Jobs initiative to promote the integration of young people in the labour market. The Commission will also make particular efforts to help the European Parliament and the Council move forward on its proposals on.”

Anyone who is remotely familiar with the case-law of the European Court of Justice, the idea that the Court has an anti-worker bias seems fanciful in the extreme.

There has been a seemingly unending stream of cases in fields such as equality law, transfer of undertakings law, insolvency law and free movement of workers law in which the Court has leaned in favour of giving as extensive an interpretation as possible to workers rights.<sup>30</sup> The notion that it has a neo-liberal agenda is simply not reflected in reality. Instead a commitment to interpret workers rights in a broad and generous fashion –sometimes to the discomfort of the Community legislature<sup>31</sup> – has been very much in evidence.

A caveat to the foregoing must, however be entered, in that the European Court of Justice has until now considered very few employer-worker disputes involving collective employment law rights. This is because the European Community has little if any competence in terms of establishing such rights. Indeed paragraph 5 of Article 137 - the EC Treaty article giving the Community power to legislate in the field of employment rights – specifically provides that “the provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.” Disputes in the collective employment field that do come before the Court of Justice, thus do so not because the Community legislature has intervened in the collective employment law field, but rather because some kind of collective labour law right offends against some Community norm enacted for another purpose.

Prior to the most recent cases, the Court had actually done well in steering Community law clear of a politically difficult collision with national collective employment law rights.

The main case was Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751. In this case a company called Albany sought to use European Community competition rules in order to escape paying compulsory contributions to a pension fund which had been set up by a collective agreement. Albany alleged that the collective agreement was an anti-competitive agreement under what is now Article 81 of the EC Treaty. Thus the Court of Justice found itself confronted with an attempt to classify a collective agreement between organisations representing employers and workers as an anti-competitive agreement violating what is now Article 81.

The Court – wisely, it is submitted – avoided making any such finding. It acknowledged frankly that it was “beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers.”<sup>32</sup> But it immediately recognised the importance of such agreements, stating its view that “the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.”

---

<sup>30</sup> See Barnard, *op. cit.*. In the field of equality law, see in general E. Ellis, *EU Anti-Discrimination Law* (Oxford University Press, Oxford, 2005).

<sup>31</sup> See, for example, Case C-262/88 *Barber v. Guardian Royal Exchange* [1990] ECR I-1889.

<sup>32</sup> Parag. 59 of the judgment of the Court

The Court found a way out of applying Community competition law to collective agreements by using the doctrine of consistent interpretation of Treaty provisions, finding that it followed

“from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that [collective] agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.”<sup>33</sup>

It was perhaps naïve to expect that the Court would resist the temptation to bring Community law to bear indefinitely, however. The history of collective labour legislation in both Ireland and the United Kingdom contains a considerable amount of evidence in favour of the view that Courts are not the ideal bodies to determine the appropriate balance to be reached between (a) a diffuse interest such as one individual’s enjoyment of a vital collective right such as the right to engage in industrial action and (b) an individual right, such as an employer’s right to conduct his or her business. Thus for example, guaranteeing an appropriate level of protection for trade union rights required the intervention of the legislature (in the form of the Trade Disputes Act 1906) after many years of judgments by the United Kingdom and Irish Courts. The effects of industrial action on individual employers can be extreme – including as the *Laval* case shows us, bankruptcy for the employer. The effects of denying the workers rights tend not to be so immediately visible. It can be hard for Courts to raise their gaze above that contrast in the case before them and to see that the collective impact of rulings against employees can be very extreme indeed, even if the individual impact is not.

There have been some recent controversial cases of the Court of Justice in the employment area, which it is proposed to examine briefly. But any such examination is not for the purposes of determining whether the European Court of Justice is anti-worker. This is simply not the case, and the evidence for that in the case-law of the Court is overwhelming. Nor do these cases have anything at all to do with the Treaty of Lisbon, notwithstanding the constant reference made to them in the course of Lisbon Treaty ratification debates in Ireland. Our examination of these cases is of less significance. We examine them for the lesser purpose of seeing if they were good decisions or poor decisions, and if they were poor decisions, what if anything is to be done about them. And we examine them too, to see if – even if the Court cannot fairly be categorised as anti-worker – it is getting its approach to (a) collective employment law rights and (b) the Posted Workers Directive badly wrong.

Of the cases which it is proposed to examine, one – *Viking*<sup>34</sup> - relates to the area of freedom of establishment and its interaction with collective trade union rights. Another – *Laval*<sup>35</sup> - relates to free movement of services and its interaction with

---

<sup>33</sup> Parag. 60 of the judgment of the Court.

<sup>34</sup> Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v. Viking Line ABP and another* [2007] ECR I-10779

<sup>35</sup> Case C-341/05 *Laval and partners v. Svenska Byggnadsarbetareförbundet and others* [2007] ECR I-11767

collective trade union rights, and also the Posted Workers Directive. The other two - *Rüffert*<sup>36</sup> and *Luxembourg*<sup>37</sup> - relate to the Posted Workers Directive.

1. Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779

*Viking Line* was a ruling of a 13-judge Grand Chamber delivered on 11 December 2007. This was a reference by the Court of Appeal of England and Wales, the dispute like many commercial disputes from all over Europe having been litigated in England (although its facts had little or no connection with that jurisdiction).

Viking was a large ferry operator. It sought to reflag a ship which plied the route between Tallinn in Estonia and Finland. This ship (the 'Rosella') sailed under the Finnish flag. Because of this Viking was consequently obliged under Finnish law and the terms of a collective bargaining agreement to pay the crew wages at the Finnish level. This meant the *Rosella* was running at a loss because of direct competition from Estonian vessels operating on the same route with lower wage costs. As an alternative to selling the vessel, Viking sought to reflag it by registering it in Estonia.<sup>38</sup>

The Finnish Seamen's Union objected and the International Transport Workers' Federation – which had an anti-flag of convenience policy - sent around a circular attempting to ensure its affiliates did not negotiate with Viking.

Subsequently, Estonia joined the European Union, and Viking who had not given up on their reflagging plan, now brought an action before the Courts in the United Kingdom, requesting it to declare that the action taken by Federation and the Union was contrary to Article 43 of the EC Treaty (which guarantees freedom of establishment), to order the withdrawal of the Federation circular and to order the Finnish Seamen's Union not to infringe the rights which Viking enjoyed under Community law. The order was granted but on appeal, the Court of Appeal referred a series of questions to the European Court of Justice.

The first issue was whether collective action would violate Article 43, in the event that it was liable to deter an undertaking from exercising freedom of establishment. On this point, the Court held that collective action in principle fell within Article 43.<sup>39</sup> The application of Article 43 could not be confined to acts of public authorities, as this would create risks of inequality in its application.

The Danish Government submitted that the right of association, the right to strike and the right to impose lock-outs fell outside Article 43 of the EC Treaty since, in accordance with Article 137(5) of the EC Treaty the Community does not have competence to regulate those rights.<sup>40</sup> The Court however rejected this contention, pointing out that in areas which fall outside the scope of Community competence, the

---

<sup>36</sup> Case C-346/06 *Rüffert v. Land Niedersachsen* [2008] ECR I-1989

<sup>37</sup> Case C-319/06 *Commission v. Luxembourg* [2008] ECR I-4323

<sup>38</sup> Para. 9 of the ruling.

<sup>39</sup> Para. 37 of the ruling.

<sup>40</sup> Para. 39 of the ruling.



member states were free, in principle, to lay down the conditions governing the existence and exercise of rights, but when exercising that competence, the member states still had to comply with Community law – as in the direct taxation and social security areas.<sup>41</sup>

This conclusion, while it seems appropriate, does perhaps merit the comment that it nonetheless seems strongly arguable that if the European Community can not legislate in a particular field, the impact of free market provisions on the national law in that field should be interpreted restrictively so as not to disrupt particular national compromises between different social and economic interests arrived at national level where such a balance is incapable of being recreated in any form at European level.

The European Court of Justice offered a kind of consolation prize, however. It noted that the right to take collective action, including the right to strike, is recognised both by various international instruments which the member states have signed or cooperated in, such as the European Social Charter 1961 and ILO Convention No 87 concerning Freedom of Association and Protection of the Right to Organise, and instruments developed in a Community context such as the Community Charter of the Fundamental Social Rights of Workers and the Charter of Fundamental Rights of the European Union.<sup>42</sup>

It held 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 the observance of which the Court ensures.<sup>43</sup>

The Court nonetheless held that the exercise of that right could nonetheless be subject to certain restrictions.<sup>44</sup> It noted that it had already held that the protection of fundamental rights was a legitimate interest which, in principle, justified a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods.<sup>45</sup> A balance thus had to be reached: the exercise of fundamental rights had to be reconciled with rights protected under the Treaty and in accordance with the principle of proportionality.<sup>46</sup> The Court specifically declined to apply its *Albany* approach in this context, arguing that its reasoning there was inapplicable here.<sup>47</sup> Its conclusion was that collective action was capable of breaching Article 43.

Secondly, the Court was asked the related question of whether Article 43 could be deployed against trade unions. The Court held that it could.<sup>48</sup>

Its basic reasoning was that the abolition, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of

---

<sup>41</sup> Para. 40 of the judgment.

<sup>42</sup> Para 43 of the judgment.

<sup>43</sup> Para 44 of the judgment.

<sup>44</sup> Para 44 of the judgment.

<sup>45</sup> Para. 45 of the Court's ruling, referring to its own previous rulings in Case C-112/00 *Schmidberger* [2003] ECR I-5659, and Case C-36/02 *Omega* [2004] ECR I-9609.

<sup>46</sup> Para. 46 of the judgment.

<sup>47</sup> Paras. 48 to 54 of the judgment.

<sup>48</sup> Para. 61 of the judgment.

*State* barriers could be compensated for by obstacles created by associations or organisations not governed by public law.<sup>49</sup>

The Court looked at possible justifications and indeed gave them a broad interpretation but the trade union lost out ultimately.

The European Court of Justice did confirm that the right to take collective action for the protection of workers was a legitimate interest which, in principle, justified a restriction of one of the fundamental freedoms guaranteed by the Treaty and that the protection of workers was one of the overriding reasons of public interest recognised by the Court.<sup>50</sup>

It added a further balancing factor: since the Community had not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy.<sup>51</sup> And it was up to the national court to carry out that balancing exercise.

The Court looked at the action in this case and held that collective action would not be justified in circumstances like this if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat.<sup>52</sup> Again it was up to the national court to determine if that was really the case.

The national court also had to determine if the collective action were proportionate *i.e.*, suitable for ensuring the achievement of the objective pursued and not going beyond what is necessary to attain that objective.<sup>53</sup>

The Court of Justice was unable to resist the temptation to provide guidance to the national court however.<sup>54</sup> Its view was that there was no problem as regards the suitability of collective action. However the court took the view that there *was* a problem regarding whether what happened went beyond what was necessary. It noted that the International Transport Workers' Federation anti-reflagging policy applied even to reflaggings in states with better social protection than the original state. In other words, what had happened here was not a proportionate interference with freedom of establishment rights.

A few comments may be added before moving on to the next case. The first (already raised above) is that given that Article 137 of the EC Treaty keeps the European Community out of regulating in this area (and thus correcting legislatively any mistakes that its Courts might make), it is difficult to refrain from asking if wouldn't have been wiser for the Court if not to keep out of this whole policy area in *Albany*-like fashion, at least to tread with a very light touch.

---

<sup>49</sup> Para. 57 of the judgment.

<sup>50</sup> Para. 77 of the judgment.

<sup>51</sup> Para. 78 of the judgment.

<sup>52</sup> Para. 81 of the judgment.

<sup>53</sup> Para. 84 of the judgment.

<sup>54</sup> Para. 85 of the judgment.

A second observation which can be made is that the proportionality test applied in this case is a vague, uncertain standard: a measure which is as long as the proverbial piece of string. Its application in the free movement of goods area in the famed Sunday Trading cases saga caused chaos until the European Court of Justice finally backed away from its application by holding that all Sunday trading rules were proportionate.<sup>55</sup> In this writer's view, the Court should tread very cautiously before holding trade union action disproportionate. Ultimately, as in the Sunday Trading cases, there is an air of the inevitable about its eventually being compelled to adopt this position.

This is a case which may create some difficulties for trade unions, albeit only, it should be recalled, in cases which have an international element to them, and a European element at that. Much, however, depends on how the Court's approach is applied in future case-law. It should not be forgotten that the case has actually created at least one benefit for trade unions – the recognition of the right to strike as a general principle.

If the case-law is deployed in such a way as to create problems for trade unions, it will lead to increased political pressure either for European Union level regulation of trade union activity to be permitted, or (more likely) for a Treaty amendment keeping European Union law interference with national trade union rights at a minimum. But it might be that the Court would relent in its stance rather than push matters to such a crisis point.

## 2. Case C-341/05 *Laval and partners v. Svenska Byggnadsarbetareförbundet and others* [2007] ECR I-11767

*Laval* was a judgment of a 13-judge Grand Chamber delivered on 18 December 2007 (i.e., one week after the *Viking* case)

The facts of the case were that Laval, a company incorporated under Latvian law, posted 35 workers in 2004 to work on sites in Sweden being built on by a Swedish company called Baltic – principally one in a town called Vaxholm in which a school was being built. The Swedish element in this arrangement was rather negligible. Baltic was entirely owned by Laval, and in economic terms, Baltic's constituted a front for an entirely Latvian operation.

Laval, rather unsurprisingly, given that it employed no Swedish workers, had signed collective agreements with Latvian, not Swedish trade unions. Negotiations were begun with (and at the initiative of) the local branch of a Swedish union, with a view to Laval signing the (Swedish) collective agreement for the building sector. The Swedish union also wanted Laval to guarantee that they would pay the normal sectoral hourly wage. These negotiations broke down. In November 2004, the Vaxholm site was blockaded, with pickets preventing Latvian workers and vehicles from entering the site and goods from being delivered. Mediation attempts failed – a proposal that action stop if Laval signed the collective agreement and begin negotiations on wages was rejected by Laval. Collective action subsequently

---

<sup>55</sup> See P. Craig and G. de Búrca, *EU Law* (fourth edition, 2008, Oxford University Press, Oxford) at pp. 682 to 683.

intensified. The electricians union initiated sympathy action. Laval's workers went back to Latvia at Christmas and did not come back.

Laval sought a declaration from the Swedish courts that the blockading of its sites and sympathy action were illegal, an order that such action should cease and an order that trade unions pay compensation for the damage suffered. It also sought compensation from the trade unions for damage suffered. The national court however dismissed the application insofar as it consisted of an application for an interim order to stop the collective action.

Other trade unions announced sympathy action, and Laval ceased to be able to operate in Sweden. The town of Vaxholm requested the contract between it and Baltic be terminated, and in March 2005 Baltic was declared bankrupt. The Swedish Labour Court (Arbetsdomstolen) referred questions to the European Court of Justice for a preliminary ruling.

The first question was whether it was whether it was compatible with the free movement of services provisions of the EC Treaty and with the Posted Workers Directive for trade unions to attempt to force a foreign service provider to sign a collective agreement in the host country.

The Court first turned its attention to the Treaty rules here. The European Court of Justice noted the settled case-law of the Court that Articles 49 of the EC Treaty and 50 of the EC Treaty precluded a member state from prohibiting a person providing services established in another member state from moving freely on its territory with all his staff and also precluded that member state from making the movement of staff in question subject to more restrictive conditions than applied to host country staff. It cited *Rush Portuguesa* in this regard.<sup>56</sup>

The Court also noted that Community law does not preclude member states from applying their legislation, or collective labour agreements relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established. The Court observed, however, (citing its own previous rulings in *Arblade* and *Commission v Germany*) that the application of such rules must, however, be proportionate or as the Court itself put it, (a) had to be appropriate for securing the aim of protecting posted workers, and (b) could not go beyond what is necessary in order to attain that objective.<sup>57</sup>

The Court of Justice then turned its attention to the Posted Workers Directive. The Court noted that Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services<sup>58</sup> (the 'Posted Workers Directive') laid down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers there. Nevertheless, Directive 96/71 did not harmonise the material content of those mandatory rules for minimum protection. The Court noted that that content could accordingly be freely defined by the member states.

---

<sup>56</sup> Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417 See para. 56 of the judgment of the Court.

<sup>57</sup> Para. 57 of the ruling of the Court. See Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453 and Case C-341/02 *Commission v Germany* [2005] ECR I-2733.

<sup>58</sup> OJ 1997 L 18, p. 1

The Court then drew attention to two particular facts underlying the dispute in this particular case:

- i) minimum rates of pay were the only term of employment which, in Sweden, was not laid down in accordance with one of the means provided for in Directive 96/71 – *i.e.*, legislation or universally applicable collective agreements; and (linked to this)
- ii) the requirement which was being imposed on Laval to negotiate with trade unions in order to ascertain the wages to be paid to its workers and to sign the collective agreement for the building sector.<sup>59</sup>

The Court noted that Article 3(1) of Directive 96/71 relates only to *minimum* rates of pay. Therefore, it could not be relied on to justify an obligation on such service providers to comply with rates of pay such as those which the trade unions sought to impose in this case, which (a) did not constitute *minimum* wages and (b) were not, moreover, laid down in accordance with the means set out in Article 3(1) and (8) of the directive (*i.e.*, legislation or universally applicable collective agreements).<sup>60</sup>

So far, this was a relatively straightforward interpretation of the Directive, indicating that if Sweden had implemented a minimum rate of pay for the workers in question and the case had involved a requirement to comply with this, then the problem would not have arisen, because the Posted Workers Directive would have covered the situation.

The Court then had a closer look at the Directive. It noted what we might call its conflicting aims – that it sought to ensure a climate of fair competition between national undertakings and service providers from other member states (which is a protectionist aim, protecting member states from ‘unfair competition’) but also its protective aim – its aim of protecting posted workers.

What of the provision in Article 3(7) of the Directive that the provisions of Article 3 paras. 1 to 6 were not to prevent the application of terms and conditions of employment which were more favourable to workers? The Court appeared to give this provision a very narrow construction, holding that

“Article 3(7) of Directive 96/71 cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection. As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 expressly lays down the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe. Moreover, such an interpretation would amount to depriving the directive of its effectiveness.”<sup>61</sup>

---

<sup>59</sup> Para. 63 of the ruling.

<sup>60</sup> See para. 70 of the ruling.

<sup>61</sup> Para. 80 of the judgment of the Court.



In other words, Article 3(7) allowed a foreign service provider to give more favourable terms and conditions to its own workers – but it did not allow host member states to impose such terms. More favourable terms may be applied to posted workers – but they may not be applied by the host state.

This makes it crystal clear (to whatever extent it was not clear before) that the rules found in Article 3 are the maximum requirements that host member states are allowed to require of service providers. It demonstrates the protection which the Directive gives to foreign service providers. It shows the limited nature of the protection given to working conditions in the host state.

There is a kind of escape clause for host member states' public policy provisions in Article 3(10) of the Directive as well. But the Court held that this could not be relied upon to defend a wage established in negotiations with a trade union. Instead, the Court noted that

“the terms of the collective agreement for the building sector...were ... established through negotiation between management and labour; not being bodies governed by public law, they cannot avail themselves of that provision by citing grounds of public policy in order to maintain that collective action such as that at issue in the main proceedings complies with Community law.”<sup>62</sup>

All this was a valuable and revealing interpretation of the Posted Workers Directive.

The next thing the Court did was to examine the application of European Community law to collective action. The intervening Danish and Swedish Governments had submitted that collective worker action against an employer fell entirely outside the scope of Article 49 of the EC Treaty (the main provision on free movement of services) as, under Article 137(5) of the EC Treaty, the provisions of Article 137 (governing European Union intervention in the labour law field) do not apply to *inter alia* “the right to strike or the right to impose lock-outs”.

The European Court of Justice were unwilling to adopt such an exclusionary approach, however. It stuck to its long-established position that even in areas in which the Community did not have competence [and thus the member states were in principle, free to lay down the conditions for the existence and exercise of rights] the member states had to exercise that competence consistently with Community law.<sup>63</sup>

In other words, the free movement of services Treaty provisions were not automatically irrelevant.

The Danish and Swedish Governments had another argument, however. They argued that the right to take collective action constituted a fundamental right and that as such, it fell outside the scope of Article 49 of the EC Treaty (and also, for that matter, the

---

<sup>62</sup> Para. 84 of the judgment.

<sup>63</sup> The Court pointed, by way of analogy, to its case-law as regards social security (instancing Case C-120/95 *Decker* [1998] ECR I-1831, paragraphs 22 and 23, and Case C-158/96 *Kohll* [1998] ECR I-1931, paragraphs 18 and 19) and as regards direct taxation (instancing Case C-334/02 *Commission v France* [2004] ECR I-2229, paragraph 21, and Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29). See para. 87 of the Court's judgment.

Posted Workers Directive). The European Court of Justice agreed – repeating the conclusion that it had reached eight days before in the *Viking* case<sup>64</sup> that the right to take collective action must be recognised as “a fundamental right which forms an integral part of the general principles of Community law.”<sup>65</sup> As evidence for this, it cited the facts that

“the right to take collective action is recognised both by various international instruments which the member states have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC – and Convention No 87 of the International Labour Organisation concerning Freedom of Association and Protection of the Right to Organise of 9 July 1948 – and by instruments developed by those member states at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000.”<sup>66</sup>

Nonetheless, the Court held, the fundamental nature of the right to take collective action was not (as the Danish and Swedish governments had claimed) such as to render Community law *inapplicable* to such action.<sup>67</sup> It had a somewhat less dramatic (two-fold) impact:

(a) the protection of fundamental rights was a legitimate interest which, in principle, could justify a restriction even of a fundamental freedom guaranteed by the Treaty, such as the freedom to provide services;<sup>68</sup> and

(b) the exercise of fundamental rights had to be reconciled with the requirements relating to Treaty rights and in accordance with the principle of proportionality.<sup>69</sup>

This approach may be open to criticism. (Why not, after all, ask if the incursion on the fundamental right could be justified rather than the incursion on the fundamental Treaty free movement?) However, it *did* fit with the previous case-law of the Court.<sup>70</sup>

In the light of all this, the Court of Justice went on to examine whether the fact that a member state’s trade unions could take collective action in circumstances such as

---

<sup>64</sup> Case C-438/05 *International Transport Workers’ Federation, Finnish Seamen’s Union v. Viking Line* judgment of the Court (Grand Chamber) of 11 December 2007.

<sup>65</sup> Para 91 of the judgment of the Court.

<sup>66</sup> Para 90 of the judgment of the Court.

<sup>67</sup> Para. 95 of the judgment of the Court.

<sup>68</sup> Or, the Court noted, the free movement of goods (citing Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 74). See generally, para. 93 of the judgment of the Court (in which it cited in relation to the services point, Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 35).

<sup>69</sup> Para. 94 of the judgment of the Court (citing *Schmidberger*, paragraph 77, and *Omega*, paragraph 36).

<sup>70</sup> See for example in this regard Case C-112/00 *Schmidberger* [2003] ECR I-5659.

those occurring in *Laval* constituted a restriction on the freedom to provide services, and, if so, whether such a restriction could be justified.<sup>71</sup>

It noted – perfectly accurately – that the right of Swedish trade unions to take collective action by which undertakings established in other member states might be forced to sign the collective agreement for the building sector was liable to make it less attractive, or more difficult, for such undertakings to carry out construction there, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 of the EC Treaty.<sup>72</sup>

It continued – uncontroversially, if one goes by the Court’s previous case-law – that freedom to provide services was one of the fundamental principles of the Community, and that a restriction was warranted only if (a) it pursued a legitimate objective compatible with the Treaty and (b) it was justified by overriding reasons of public interest.<sup>73</sup> According to the Court, the right to take collective action for the protection of workers of the host State against possible social dumping could constitute an overriding reason of public interest.<sup>74</sup>

All of this, of course was good news for the unions involved in this case. The Court went further and held that in principle, blockading action by a trade union fell within the objective of protecting workers.

However, the court went on to conclude - apparently throwing caution to the winds and applying the law to the facts before them – that collective action of the kind at issue in this case could *not* be justified with regard to such an objective insofar as it sought to impose obligations on undertakings going beyond the requirements of the Posted Workers Directive.<sup>75</sup>

This is interesting as it seems to import the standards of the Posted Workers Directive into the interpretation of Article 49 itself. In other words, it involves the Court deferring to the legislature in interpreting the scope of Article 49. (This is not particularly unusual at Community level, however. The concepts used in the Treaty of public policy, public security and public health were for long left to the Community legislature to elaborate upon, which they did, first by the adoption of Directive 64/221/EEC,<sup>76</sup> and subsequently with that of Directive 2004/38/EC.<sup>77</sup> One might expect a national court to be similarly deferential in analogous circumstances *e.g.*,

---

<sup>71</sup> Para. 96 of the judgment of the Court.

<sup>72</sup> Para. 99 of the judgment of the Court.

<sup>73</sup> Para. 101 of the judgment of the Court.

<sup>74</sup> Para. 103 of the judgment of the Court. The Court cited a number of its own previous cases here, *viz.*, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453 at para. 36; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189 at para. 27; Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831 at para. 33, and Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union* Judgment of the Court (Grand Chamber) of 11 December 2007 at para. 77.

<sup>75</sup> Para. 108 of the judgment of the Court.

<sup>76</sup> Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. (OJ 56 (4 April 1964) pp. 850-857).

<sup>77</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L 158 (30 April 2004) pp. 77–123).

leaving the precise balance to be achieved between constitutional rights to one's good name on the one hand, and freedom of speech on the other to be settled *via* the adoption of *e.g.*, defamation legislation by the legislature.)

While Community law, the Court went on, "certainly does not prohibit member states from requiring such undertakings to comply with their rules on *minimum* pay by appropriate means",<sup>78</sup> collective action such as that at issue in this case could not be justified in a national context lacking provisions, of any kind which were sufficiently precise and accessible so as not to render it impossible or excessively difficult in practice for a service-providing undertaking to determine the obligations it was required to comply with as regards minimum pay.<sup>79</sup>

This part of the Court's ruling seems very specific and seems to indicate that part of the problem here was the lack of certainty regarding what constituted minimum pay in Sweden. That is only half the problem, however. The logic deployed by the Court would also make illegal collective action aimed at forcing the payment of *more* than the legal minimum wage by a posting undertaking. This leads us on the second question posed by the national court.

The second question was (in effect): whether a national law immunising only collective agreements agreed in one country could be upheld. To some extent, the answer given to this question was predictable, and not one that need delay us for long for present purposes, although that isn't to say the answer given to it hasn't had a significant impact in Sweden.

The question concerned the application of the provisions of the Swedish law on workers' participation in decisions (the *Medbestämmandelagen*) Under this law, a service provider established outside Sweden was not entitled to have any account taken of collectively agreed obligations binding it in its home member state. The effect of this was that collective action in Sweden against an undertaking from another EU member state bound by a collective agreement there was (unlike undertakings bound by Swedish agreements) just as permissible as if the undertaking was not bound by any collective agreement at all.

This was discrimination by Sweden against foreign collective agreements – and deliberate discrimination at that. The idea of the Swedish was to stop so-called 'social dumping'<sup>80</sup> (unacceptable competition in employment conditions) - and more particularly, the risk of inferior foreign collective agreements being immunised against industrial action in Sweden. What then did European Community law make of this?

The Court noted that (i) it was clear that free movement of services implied (in particular) the abolition of any discrimination against a service provider either on account of (a) its nationality or (b) the fact that it was established in a member state

---

<sup>78</sup> Emphasis added. The Court cited Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223 at para. 14; Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, at para. 18, and Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453 at para. 41 as authority for this proposition.

<sup>79</sup> Para. 110, citing *Arblade and Others* at para. 43.

<sup>80</sup> See generally para. 113 of the judgment of the Court.

other than the one in which the service was provided.<sup>81</sup> Discriminatory rules, under Article 46 of the EC Treaty, could be justified only on grounds of public policy, public security or public health. No such consideration applied here. Thus it had to be held that discrimination such as that in this case could not be justified.<sup>82</sup>

Overall, the Court concluded first, that Article 49 of the EC Treaty and Article 3 of the Posted Workers Directive<sup>83</sup> were to be interpreted as precluding a trade union from attempting (by means of collective action in the form of a blockade of sites) to force a service provider which was established in another EU member state (i) to enter into negotiations with the union on pay rates for posted workers and (ii) to sign a collective agreement with terms (a) laying down *more* favourable conditions regarding some matters than those which would result from national legislation, or (b) relating to matters not referred to in Article 3 of the Directive.

The Court, in its conclusions, referred only to a member state in which minimum rates of pay were not covered by legislation - but it is clear that its findings have implications outside this context.

Secondly, and perhaps less surprisingly, that Court held that where there is a prohibition in the law of a member state (*e.g.*, Sweden) against trade unions undertaking collective action for the purposes of having a collective agreement between other parties set aside/amended, Articles 49 and 50 of the EC Treaty preclude that prohibition being discriminatory *i.e.*, from being limited to prohibiting action concerning *host* state collective agreements.

### 3. Case C-346/06 *Rüffert v. Land Niedersachsen* [2008] ECR I-1989

The third case of interest for present purposes, *Rüffert*, was a judgment of the five-judge Second Chamber of the European Court of Justice, delivered on 3 April 2008. Once more, like *Laval*, it was a reference for a preliminary ruling concerning the interpretation of Article 49 of the European Community Treaty.

The reference was made in the context of proceedings between Mr Rüffert, who was the liquidator of the assets of a company called Objekt & Bauregie GmbH ('Objekt & Bauregie'), and the German state of Niedersachsen (Lower Saxony), concerning the termination of a works contract which had been concluded between Lower Saxony and the company

The facts were that following a public invitation to tender, the state of Lower Saxony awarded Objekt & Bauregie a contract for the structural work in building a prison. The contract contained a declaration regarding compliance with the collective agreements and, more specifically, with the minimum wage which was in force pursuant to a collective agreement.

---

<sup>81</sup> Para. 114 of the judgment.

<sup>82</sup> See paras. 114 to 119 of the judgment.

<sup>83</sup> It should be recalled that the court considered these co-extensive.



Objekt & Bauregie used as a subcontractor an undertaking which was established in Poland. This undertaking came under suspicion of having employed workers on the building site at a wage below that provided for in the collective agreement. After investigations had commenced, both Objekt & Bauregie on the one hand and Lower Saxony on the other hand terminated the contract they had concluded with one another. Lower Saxony based the termination on *inter alia* the fact that Objekt & Bauregie had failed to fulfil its contractual obligation to comply with the collective agreement. Objekt & Bauregie sued.

At first instance, the *Landgericht* (Regional Court) *Hannover* held that Objekt & Bauregie's outstanding claim under the contract for work was offset in full by the contractual penalty due to Land Lower Saxony. It dismissed Objekt & Bauregie's action.

On appeal, the *Oberlandesgericht* (Higher Regional Court) felt that the dispute turned on whether or not Lower Saxony's *Landesvergabegesetz* (State Tendering Law) was compatible with Article 49 of the EC Treaty free movement of services.

It noted that the obligation to comply with the collective agreements meant that construction undertakings from other member states had to adapt the remuneration they paid to their workers to the higher level in force in the place in Germany where the contract was to be performed – causing them to lose the competitive advantage they enjoyed with their lower wage costs.<sup>84</sup>

The national court was uncertain as to whether the requirement to comply with the collective agreements was justified by overriding reasons related to the public interest, or went beyond what was necessary for the protection of workers.<sup>85</sup>

It therefore referred one question to the Court of Justice: whether Article 49 of the EC Treaty precluded a member state authority from requiring contracting authorities to award public works contracts only to contractors who agreed to pay their employees at least the wage stipulated in the local collective agreement.<sup>86</sup>

As in *Laval*, the Court found it necessary to take into consideration the provisions of the Posted Workers Directive – here, “in order to give a useful answer to the national court”.<sup>87</sup>

First, the Court held that a law like the *Landesvergabegesetz* (the State Tendering Law) which didn't *itself* fix any minimum rates of pay – but effectively fixed one by reference - could not be considered a law fixing a minimum rate of pay within the meaning of Article 3(1) of the Directive.

---

<sup>84</sup> Thus the obligation to comply with the collective agreements was an impediment to market access for persons or undertakings from member states other than Germany. (See para. 14 of the ruling of the Court of Justice).

<sup>85</sup> The argument being that, in the case of foreign workers, the obligation to comply with the collective agreements did not enable them to achieve genuine equality of treatment with German workers but rather prevented workers from other member states from being employed in Germany because their employer was unable to exploit his cost advantage with regard to the competition. (See para. 15 of the ruling of the Court of Justice).

<sup>86</sup> See para. 17 of the ruling of the Court.

<sup>87</sup> Para. 18 of the ruling of the Court.

This, it may be noted, is a fairly narrow, literal approach. The Court *could*, if it wanted to, have reached the opposite conclusion *i.e.*, have held that rates of pay imposed as a result of this law *had* been imposed by a law fixing a minimum rate of pay.

Secondly, the Court held the relevant - ‘buildings and works’ - local collective agreement was not of universal applicability. In fact, a German law existed making it possible to declare collective agreements of universal applicability. But, as the Court noted, that hadn’t been done to this agreement.

Further, Article 3(8) of the Directive (which provides for member states enforcing in relation to posted workers merely *generally* applicable agreements or agreements merely *concluded by the most representative organizations*) was, on its own terms, not applicable in a German case – because it only applied where there was no system for collective agreements or arbitration awards to be of universal application and there *is* such a system in Germany.

Also, Article 3(8) applied only to agreements ‘generally applicable to all *similar* undertakings in the geographical area and in the profession or industry concerned’. And that, held the Court, was not the case here – for the German law applied only to public contracts and not to private contracts.<sup>88</sup>

Again, it may be observed in passing that that is arguably a narrow view. It would have been legitimate for the court to say that this was an agreement applicable all ‘similar’ undertakings – *viz.*, undertakings engaged in work relating to public contracts.

In any case, the Court held as a result of all of this that the rate of pay fixed by this collective agreement could not be considered a minimum rate of pay which member states were entitled to impose under the Posted Workers Directive.

For good measure, the Court added that nor could such a rate of pay be considered “a term and condition of employment which is more favourable to workers” within the meaning of Article 3(7) of the Posted Workers Directive.<sup>89</sup> Continuing the narrow approach it had taken to that in *Laval* (and indeed specifically relying upon it) to the meaning of this provision (effectively limiting it to the situation in which the employer him or herself agrees with the employee to terms of employment which are more favourable than those in the Directive) the Court held that Article 3(7)

“cannot be interpreted as allowing the host member state to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection. As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), *Directive 96/71 expressly lays down the degree of protection for workers of undertakings established in other member states who are posted to the territory of the host member state which the latter State is entitled to require those*

---

<sup>88</sup> Para. 29 of the judgment.

<sup>89</sup> Para. 32 of the judgment.

*undertakings to observe.* Moreover, such an interpretation would amount to depriving the directive of its effectiveness (see *Laval un Partneri*, paragraph 80).

Therefore – without prejudice to 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 posted staff, the terms of which might be more favourable – *the level of protection which must be guaranteed to workers posted to the territory of the host member state is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g), of Directive 96/71...as regards the matters referred to in that provision (Laval un Partneri, paragraph 81).*<sup>90</sup>

Having arrived at the point of considering Lower Saxony's rule to constitute *prima facie* a restriction of the free movement of services, protected by Article 49 of the EC Treaty, the Court then turned to considering whether there could be any possible justification for it. It concluded that such a measure could not be justified by the objective of ensuring the protection of workers.<sup>91</sup>

The rate of pay required by the Landesvergabegesetz, the Court noted, applied only to a part of the construction sector falling within the geographical area of that agreement as that legislation applied only public contracts.<sup>92</sup> The Court somewhat sardonically observed

“The case-file submitted to the Court contains no evidence to support the conclusion that the protection resulting from such a rate of pay – which, moreover...exceeds the minimum rate of pay applicable pursuant to the [relevant Germany minimum wage law] – is necessary for a construction sector worker only when he is employed in the context of a public works contract but not when he is employed in the context of a private contract.”<sup>93</sup>

The Court's reasoning leaves open the possibility of a more generalised requirement being regarded as justified by reference to Community law. However, such general applicable approach had not been taken here, and the Court's conclusion was that Directive 96/71, interpreted in the light of Article 49 of the EC Treaty, precluded a member state authority from adopting a law stipulating that public contracts could only be awarded to those undertakings which, agreed to pay their employees at least the remuneration prescribed by the local collective agreement in force in the place of performance.

---

<sup>90</sup> Para. 34 of the judgment. (Emphasis added.) This was unless, the Court added, pursuant to the law or collective agreements in the member state of origin, the workers already enjoyed more favourable terms and conditions of employment. However, this, the Court noted, did not appear to be the case in the main proceedings. (*Ibid.*)

<sup>91</sup> Para. 38 of the Court's judgment.

<sup>92</sup> Para. 39 of the Court's judgment.

<sup>93</sup> Paras. 40 of the Court's judgment. For the same reasons the Court rejected the justification proffered by the German Government of ensuring protection for independence in the organisation of working life by trade unions. (Para. 41 of the ruling.) Nor was the Court prepared to accept the further rather far-fetched argument that a measure such as this was necessary in order to avoid the risk of seriously undermining the financial balance of the social security system, because the effectiveness of the social security system depended on the level of workers' salaries. (Para 42 of the Court's ruling).

#### 4. Case C-319/06 *Commission v. Luxembourg* [2008] ECR I-4323

Unlike the other cases *Commission v. Luxembourg* postdates the first (June 2008) Irish Lisbon Treaty referendum. This was an Article 226 prosecution of Luxembourg for failure to fulfil its obligations under the Treaty. The facts were Luxembourg had provided in a law of 2002 that all (i) laws, regulations and policy provisions, (ii) provisions resulting from collective agreements which had been declared universally applicable, as well as (iii) arbitration decisions with a scope similar to that of universally applicable collective agreements concerning a very wide range of working conditions were to constitute mandatory provisions and to be “applicable to all workers performing an activity in the territory of the Grand Duchy of Luxembourg, including those temporarily posted to Luxembourg, regardless of the duration or purpose of the posting.”

The Commission brought proceedings under Article 226 against Luxembourg, taking the view, that the measures contravened Community law, *inter alia*, because in several respects they went beyond what was permitted by Article 3 of the Posted Workers Directive. The Commission also took the view that the Luxembourgish enforcement rules lacked clarity, and restricted the free movement of services.

In its judgment the Court noted both that Article 3(1) of the Posted Workers Directive set out an exhaustive list of the matters in respect of which the Member States were permitted to give priority to the rules in force in the host Member State, and that, under Article 3(10) of the Directive it was nevertheless open to member states to apply, in a non-discriminatory manner, to undertakings which posted workers to their territory terms and conditions on matters other than those referred to in Article 3(1), in the case of public policy provisions.<sup>94</sup>

The Court opined that the public policy exception in Article 3(10) should be determined narrowly. The Court’s reasoning was that this constituted “a derogation from the fundamental principle of freedom to provide services which must be interpreted strictly, [and] the scope of which cannot be determined unilaterally by the Member States.”<sup>95</sup> (Later in its judgment, the Court observed that public policy may be relied on “only if there is a genuine and sufficiently serious threat to a fundamental interest of society”.<sup>96</sup>

The Court then declined to see the public policy provision used by Luxembourg to apply Luxembourgish standards relating to the requirement of a written contract or document. Such a requirement was already required in home states in the Community by virtue of another Community measure.<sup>97</sup> It was therefore redundant. A very similar conclusion was reached in relation to requirements relating to rules on part-time and fixed-term work laid down in Luxembourg’s 2002 law.<sup>98</sup>

---

<sup>94</sup> Paras. 26-27 of the Court’s judgment.

<sup>95</sup> Para. 30 of the Court’s judgment.

<sup>96</sup> Para. 50 of the judgment.

<sup>97</sup> Council Directive 91/533/EEC of 14 October 1991 on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288, p. 32).

<sup>98</sup> Para. 60 of the judgment.

A Luxembourgish requirement relating to the automatic adjustment of rates of remuneration to the cost of living also fell outside Article 3(10).

The Court noted that Luxembourg had “merely cited in a general manner the objectives of protecting the purchasing power of workers and good labour relations, without adducing any evidence to enable the necessity for and proportionality of the measures adopted to be evaluated.”<sup>99</sup> Accordingly, the Grand Duchy of Luxembourg was held not to have shown to the required legal standard that the relevant provision of its 2002 law came within Article 3(10) of Directive 96/71.

The Court also declined to hold Article 3(10) broad enough to encompass a measure such as the Luxembourgish requirement applying as mandatory rules all national rules in respect of collective agreements. The Court noted, *inter alia*, that there was no reason why rules about collective agreements should fall under the definition of public policy.<sup>100</sup> Indeed

“such a finding must be made as regards the actual provisions of such collective agreements themselves, which in their entirety and for the simple reason that they derive from that type of measure, cannot fall under that definition either.”<sup>101</sup>

There were other aspects to *Commission v. Luxembourg* but the above findings are the main ones of importance for present purposes.

The judgment in *Commission v. Luxembourg* involved a strict interpretation of the Posted Workers Directive. Further, it made clear the view of the Court that the Directive is to allow the free movement of services at the price of foreign service providers adhering to minimum conditions of employment stipulated in the Directive. This seems an accurate interpretation of the intentions of the member states in drafting it, even if the point is not entirely free from ambiguity. Insofar as it is not, it is open to the member states to alter the Directive, but at present little or no desire to do so appears to have been evinced by a majority of the member states.

### *Some Observations Concerning the Foregoing Cases*

#### *Important Rulings – But Limits to Their Importance*

*Laval* and the other cases have give rise to a colossal amount of debate and writing. The cases are undoubtedly important – but their impact should not be exaggerated. They only apply in that limited number – and indeed relatively small minority of cases involving the *cross-border* provision of services (or *cross-border* establishment in the case of *Viking*.) Where a cross-border element is not present the cases have no application whatsoever. National law and practice concerning industrial relations, the right to strike *etc.* continues to reign supreme.

---

<sup>99</sup> Para. 53 of the Court’s ruling.

<sup>100</sup> Para. 65 of the judgment.

<sup>101</sup> Para. 66 of the judgment.



### *The Role of the Community Legislature*

It is legitimate to feel some sympathy for the Court of Justice. Not for the first time in its history, it was left to pick up the pieces of a legislative mess left for it by the member states, who could have made clearer from the outset whether the mandatory provisions in the Posted Workers Directive were a maximum standard or could be built upon by member state intervention, or whether the public policy defence in the Directive could be invoked by trade unions. They could even have better regulated the position of trade unions and collective action in the EC Treaty. Instead, the European Court of Justice were left resolving that which was deliberately, recklessly or negligently left unresolved by the member states themselves as Treaty drafters and Community legislators (in Council).

### *Not a Straightforward Worker-Employer Dispute*

It would be a mistake to regard *Laval* as a decision which is deplored by workers across Europe and welcomed by employers across Europe. In actual fact, from the standpoint of their own interests, workers in lower-paid – at present mainly, but not exclusively, Eastern European countries - have no self-interested reason to criticise *Laval*. *Laval* means more and better paid jobs for them. It demolishes barriers which would otherwise exist to the supply of services by their employers: that means more work for them. The real conflict of interests over *Laval* is therefore between workers in the older member states (where workers are relatively well paid) on the one hand and – on the other hand - employers *right across* Europe and workers in those member states where wages are lower.

### *Securing The Benefits of a Single Market*

There are grounds according to which someone who genuinely hopes for employee rights to rise to believe that *Laval* is a good decision. If one believes that a single European market is better than protectionism, there are grounds for supporting a *Laval*-type approach. It can be seen as the simple effect of competition in the market-place. It is possible to take the view – and many governments clearly do) - that an open market will give rise to greater prosperity, which will ultimately raise living standards for everyone. The creation of the Single Market involves a belief that the creation of a single European market with free movement of goods, persons, services and capital and free competition is ultimately better for society, and will give rise to more wealth than a society without such free movement and free competition.

On the other hand, the EC Treaty itself and the European Court of Justice have always recognised that free market principles can not always be applied in undiluted form. They must be balanced with other interests which society has an interest in protecting – including the protection of working conditions and collective labour law rights. It is possible to take the view that the greater economic good of all will be achieved by a balance between free market and such interests – and that the European Court of Justice simply got the balance wrong in the *Laval* and *Viking* cases.

One reason why the Court may be argued to have gotten the balance wrong is the following. The creation of a single European market has always been capable of sweeping away national employment law standards (This has been evident since *Commission v. France*) – just as it is capable of sweeping away national consumer protection rules (as seen in *Cassis de Dijon*<sup>102</sup> or *Rau v. de Smedt*<sup>103</sup>). This kind of sweeping away of national-level protections tends to be acceptable if similar standards are capable of being recreated at European level. (A roughly similar implicit bargain goes on in relation to national human rights standards. These can be rendered inapplicable thanks to the doctrine of supremacy. But this situation which is rendered acceptable because these standards are replicated at European level through the acceptance of respect for fundamental rights as a general principle of Union law.<sup>104</sup> However the kinds of national standards that are being swept away in *Viking* or *Laval* may not be capable of being replicated at European level (a) because of Article 137(5) of the EC Treaty - a provision which stipulates that Article 137 - which enables social legislation - does not apply to “the right of association, the right to strike or the right to impose lockouts”; (b) and more transiently, because there is no political support for such measures and (c) because trade unions would not want European level legislation on that point anyway – even if it were technically feasible which it might not be, since industrial relations systems are so differently restructured. Since European law in its present form appears incapable of recreating national-style protection, or at least recreating some form of bargain between the interests of capital and labour, the question begs itself of whether it should be doing away with it in the first place.

We should not leave trade unions entirely free to interfere with the free movement of services. This would permit egregious behaviour *e.g.*, striking so as to stop workers gaining employment merely because they are foreigners. So some inhibitions on trade union behaviour seem necessary to protect Treaty freedoms. But in a situation in which the national bargain can not be recreated at European level, it seems arguable that a light touch should be used.

### *Political/Constitutional Implications*

The fact that a majority of elected opinion is not dissatisfied with *Viking*, *Laval* or any of the other cases does not mean that Europe does not have a problem. Because there is no mechanism for ‘throwing the scoundrels out’ at European level, serious opposition to particular policy choices has much more of a tendency to convert into opposition to the political system itself than it does at national level. If western European opposition to *Viking* and *Laval* hardens into moderate left-wing opposition to the European Union, this is a serious problem for the European Union. The European Union is an elite-driven organisation in the sense that it depends for its survival on the consent of the democratically-elected governments across Europe, but those governments need the support of their electorates to give that consent. Alienating the electorate of moderate left-wing parties does not seem a wise step. What is now the European Union could not have been founded without the support of moderate left-wing parties, and it is extremely doubtful that the European Union has the capacity to survive in the long term without it. Even in the short term, these cases

<sup>102</sup> Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

<sup>103</sup> Case 261/81 [1982] ECR 3961.

<sup>104</sup> See Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125

present a problem. They have absolutely nothing to do with the Lisbon Treaty, but they have been used to sow distrust about the Community in the minds of many, in particular in the course of two referendum campaigns in Ireland.

### *The Prospects for Amendment of the Posted Workers Directive*

There is no prospect whatsoever of the Posted Workers Directive being amended in the immediate future in order to counter the effects of the *Laval* judgment. The Commission has already rejected the idea of even proposing amending legislation,<sup>105</sup> the main reason apparently being because it would stand no prospect whatsoever of being adopted, because the member states would not support it. Not only do Eastern European states not want it. Western European states with right of centre governments do not want it (The case, after all, ensures more competitive markets for them in acquiring services). It is incidentally not clear that either the Irish or the United Kingdom Government want to see the Directive amended.

In other words, one can think what one wills of the result of the *Laval* case, but it is difficult to say that the situation does not represent what the democratically-elected member states want.

Insofar as the resolution of the issues left by *Laval*, *Rüffert* or *Luxembourg* consists of the amendment of the Posted Workers Directive, any such resolution will have to wait until an adequate number of governments favourable to amending the Directive come into power across Europe in order to provide a qualified majority to amend it. On the other hand, it may well be that the Court of Justice will modulate its own pronouncements in the future concerning collective bargaining rights without further legislative intervention. Time alone will tell.

---

<sup>105</sup> See Industrial Relations News TK