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**Collective agreements and collective bargaining:
analyses of the impact of the European Court of
Justice rulings on Laval & Viking**

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Collective agreements and collective bargaining: analyses of the impact of the European Court of Justice rulings on Laval & Viking

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1. Introduction

During the post war period labour law in many countries, not least in the Nordic countries, grew into a relatively idyllically protected discipline. Once it had established a basis of its own, it was able to build on this without being disturbed and to develop a functioning system of protection for employees in various problematic situations. Labour law had a more or less well-defined territory of its own which was not called into question. Nowadays, this state of affairs has been radically altered. In the shadow of the internal market a territorial struggle is in progress over where labour law ends and economic rules take over. The Laval and Viking cases are a clear illustration of this struggle.¹

The first clarification of the judgements is that the right to collective actions is not excluded from the scope of application of Article 49 EC (on free movement of services) or Article 43 EC (on the freedom of establishment). Further, Articles 43 and 49 EC are capable of conferring rights on a private undertaking which may be relied on against a trade union or an association of trade unions. I will not go into the arguments put forward by the court for these solutions. According to the Court, the right to take collective action, including the right to strike, must be recognised as a fundamental right which forms an integral part of the general principles of Community law. Although this does not mean that collective actions are exempted from Article 43 and 49, the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty. The consequence is that the right to collective action must be balanced against the free movement of services and freedom of establishment.

Thus, a first question is if a collective action causes a restriction of the free movement of services or freedom of establishment. Even if the collective action constitutes a restriction, it may – as a point of departure – be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest. Further it has to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it.

¹ Case C-438/05 *International Transport Workers' Federation* [2007] ECR 000 and C-341/05 *Laval un Partneri* [2007] ECR 000.

The task put forward to me today is to discuss the impact of the Laval and Viking Judgements on the national systems of collective agreements and collective bargaining. My perspective today will mainly be a Nordic one. I will not address the special questions related to the Swedish Lex Britannia.

2. Restriction

In the Laval and Viking cases the Court has found that exercise of the right to collective action in two situations falls within in the ambit of free movement of services and freedom of establishment, respectively. The Viking case concerned a collective action which induced a private undertaking to enter into a collective agreement with a trade union and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State. In the Laval-case, the collective action aimed at forcing a foreign service provider to enter into negotiations with a trade union on the rates of pay for posted workers and to sign a collective agreement. Both cases concern collective actions which directly aim at regulating employment conditions of undertakings established in another Member State than the trade union. In such situations, the ECJ found, EU law does pose certain restrictions to the right to collective action enjoyed at national level.

One obvious question is whether the ECJ would be prepared to apply the same kind of reasoning to other kinds of situations which have cross-border implications, albeit of a less direct character (for instance, a strike regarding wages in an international transport sector or a telemarketing company operating cross border). Probably such industrial actions would not be considered to have “cross-border-effect”.

3. Justification

3.1 Different aims of trade union activities

When it comes to discussing the impact of Laval and Viking on the national systems of collective agreements and collective bargaining it could be worth distinguishing between three different aims or functions of trade union activities.

(1) The first and most important aim of trade union activities, including signing of collective agreements, is of course to *directly regulate employment as well as working and employment conditions of their members*. This is the very essence of the (positive) right of association, guaranteed for instance in Article 11 of the European Convention of Human Rights (ECHR).

(2) Trade unions also have an interest of *regulating the level of wages and employment conditions more generally for all undertakings operating in the same sector or “market”*, even when it comes to employees not member of the union in question (and not primarily directly to regulate the employment conditions of its members). In the case law of the European Court of Human Rights (ECtHR) this has been regarded as a legitimate aim for trade unions.

In the Gustavsson case collective actions against an employer, not member of an employer's organisation was accepted in a purely national situation, as long as the demand of the trade union did not go beyond establishing a situation of equal treatment between organised and non organised employers.²

Protection of the workers constitutes an overriding reason of public interest which may justify restrictions of the free movement of services and the freedom of establishment. In relation to free movement of services this relates in the first place to the protection of the posted workers. But also the interest of preventing unfair competition by undertakings whose workers are paid less than the minimum rate of pay has been acknowledged as an overriding requirement justifying a restriction on freedom to provide services.

(3) A third aim of the trade unions is *the monitoring of application of wages and employment conditions at the workplaces*. It could be noticed that the ECtHR in the Ewaldsson case actually did regard this as a legitimate aim of trade unions.³ The Viking and Laval cases do not touch upon this interest.

3.2 Directly regulate conditions of members of trade unions

In the Viking case, the aim of the collective action taken on by the Finnish Seamen's Union was, according to the Court, to protect the jobs and conditions of employment of the members of the trade union. Such an aim does *prima facie* fall within the objective of protecting workers. The Court indicates that collective actions shall be subject to a kind of *ultima ratio* principle. According to the ECJ the national court shall examine, in particular, on the one hand, whether, under the national rules and collective agreement law applicable to that action, the trade union did not have other means at its disposal which were less restrictive of freedom of establishment, and, on the other, whether that trade union had exhausted those means before initiating such action.

In this connection the Court discusses the relevance of an undertaking made by Viking before the English court to the workers that their working relationship would be maintained. This part of the judgement seems somewhat hard to follow, from the point of view of a Nordic labour lawyer. Finnish labour law contains only one legal instrument for collectively creating legally binding guarantees to the workers, and that is the collective agreement. If a collective agreement is concluded the parties will be bound by the peace obligation.

It seems as though the Article 43 would not affect the right to collective actions as regards actions aiming at directly regulating the wages and working conditions of the members of the acting trade union.

² Gustafsson v. Sweden (Application no 15573/89, judgement 1996-04-25)

³ Ewaldsson and Others v. Sweden (Application No. 75252/01, judgment 2007-02-13)

3.3 Regulating employment conditions for all undertakings operating in the same sector

The ‘Flag of Convenience’ (‘FOC’) policy pursued by the International Transport Federation (ITF) might, as it was understood by the Court, be viewed as an example of a collective action aiming at regulating employment conditions for all undertakings operating in the same sector. The objectives of this policy are, on the one hand, to establish a genuine link between the flag of the ship and the nationality of the owner and, on the other, to protect and enhance the conditions of seafarers on FOC ships. In accordance with the ITF policy, only unions established in the State of beneficial ownership have the right to conclude collective agreements covering the vessel concerned.

The Court's review of collective actions with such aims seems to be more intrusive (compared with the FSU action). The Court states that to the extent that the policy results in ship owners being prevented from registering their vessels in a State other than that of which the owners of those vessels are nationals, the restrictions on freedom of establishment resulting from such action cannot be objectively justified. On the other hand the Court does acknowledge that the objective of the policy is also to protect and improve seafarers’ terms and conditions of employment. The question is left somewhat open for the national court.

Also collective actions aiming at regulation wages and employment conditions of posted workers, like in the Laval case, could be an example of collective actions of this kind. The reasoning here is somewhat more complex and needs a separate heading.

4. Posting of Workers Directive

The scope for justifying industrial actions aiming at regulating employment conditions concerning posted workers was in the Laval-case interpreted in the light of the Posting of Workers Directive. Here, we must look a little closer at the reasoning of the Court.

According to the Court, the aim of the collective actions in the Laval case was to force the foreign provider of services (1) to enter into negotiations with the trade union on the rates of pay for posted workers, and (2) to sign a collective agreement, the terms of which (a) some provisions which laid down more favourable conditions than the nucleus of mandatory rules for minimum protection according to Swedish statutes and (b) other terms relate to matters not covered by the nucleus of mandatory rules.

The Court finds that such a collective action, which is aimed at ensuring that posted workers have their terms and conditions of employment fixed at a certain level, falls in principle within the objective of protecting workers.

However, as far as the collective actions aim at forcing Laval to conclude a collective agreement, the actions cannot be justified. The Court recalls that the collective agreement contained some provisions which laid down more favourable conditions than the nucleus of mandatory rules for minimum protection according to Swedish statutes.

According to interpretation of the Court, the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited to the nucleus of mandatory rules (unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision). The Court also points to the fact that other terms in the collective agreement relate to matters not covered by the nucleus of mandatory rules. Thus, since the employer of the posted worker is required, as a result of the coordination achieved by the Posting of Workers Directive (Directive 96/71/EC), to observe a nucleus of mandatory rules for minimum protection in the host Member State.

As regards the negotiations on pay which the trade unions seek to impose, the Court emphasised that Community law certainly does not prohibit Member States from requiring that foreign undertakings comply with their rules on minimum pay by appropriate means. However, the negotiations on pay in the Laval case form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay.

5. The impact of the Laval judgement

The Directive alters the interpretation of Article 49

As seen, the Court interprets Article 49 EC in the light of the Posting of Workers Directive. As before the so called Gebhard-formula is applied, a restriction on free movement of services can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest. But even if that were the case, it would still have to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it (see, inter alia, Case C-55/94 Gebhard [1995] ECR I-4165). However, in the Laval Case, the proportionality test is applied in a different way. The Posting of Workers Directive is seen as a coordination of the aim of protecting workers in relation to posting (afforded as well by the state as by the social partners at national level). The aim of the Directive is, according to the ECJ, both to protect the posted workers and to prevent unfair competition from foreign service providers, i.e. the foreign service provider shall respect the nucleus of mandatory rules for minimum protection. In this sense, the directive does not only provide a floor of protection that the host states must apply to the posted workers. It also establishes a ceiling of employment conditions that the host states are allowed to extend to the posted workers.

This interpretation must appear as rather surprising for the European legislator. First, even if the intention was to coordinate legislative protection of posted workers, it seems obvious that the intention of the legislator was not to interfere with (or coordinate) national regulation of collective actions (compare recital 22). Further, the Court does indeed establish the state of law proposed by the Commission in its initial draft for the Services Directive, a proposal which was withdrawn in the democratic process leading to the final Directive.

A principle of minimum protection

A consequence of the judgement is that an idea of equal treatment of domestic and foreign service providers as regards wages and employment conditions, is put a side by *a principle of minimum protection*. The host state – the state or the social partners – may not require anything more than the nucleus of mandatory rules.

The state – but not the social partners – may also extend conditions of employment on matters other than the nucleus of mandatory rules if they concern *public policy provisions* (Article 3.10 Directive 96/71/EC). It should be noticed that the ECJ has not yet indicated how the concept ‘public policy provision’ according to Article 3.10 shall be interpreted.⁴

The limit of what may be required of the foreign provider seems to apply irrespectively if the extended conditions follow from statutes, generally applicable collective agreements or collective agreements of a Nordic type.

The Directive does not harmonise the material content of those mandatory rules for minimum protection. That content may accordingly be freely defined by the Member States, in compliance with the Treaty and the general principles of Community law. There seems to be a tendency to raise the minimum wages in some countries, like Germany and Sweden, in order to lower the risk for social dumping.

Impact on the Nordic autonomous collective agreements model

The system for collective agreements in Denmark and Sweden might be described as the autonomous collective agreements model. In this model, it is in fact the exclusive responsibility of the trade unions to safeguard a general level of wages and employment conditions. They do this by trying to force domestic or foreign employers who do not belong to any employers’ organisation to conclude “*application agreements*”, i.e. collective agreements in which the employer undertakes to apply the collective agreement covering the branch of activity in question. If the non-organised employer refuses to sign a collective agreement, the normal procedure is that the trade union declares a boycott against this employer. The meaning of the boycott is that the members of the trade union shall refuse to work for the outside employer. However, this is seldom enough, as the trade union may not have any members at the workplace and the employer does not want to employ any, particularly not if it is a foreign employer that posts workers temporarily in the country to perform work there. Therefore, the boycott is combined with sympathy (secondary) actions which make the primary boycott more effective. These actions may be taken by the trade union itself, or by other trade unions. The sympathy actions usually aim at stopping deliveries to and from the outside employer.

In my opinion the Laval judgement does not generally prohibit collective actions against foreign service providers, but rather restricts the demands which may the host trade union put forward. It is no longer possible to apply a principle of equal treatment

⁴ Compare the opinion of the Advocate General in case C-319/06 Commission v. Luxembourg

where a foreign service provider shall sign a collective agreement of the same content as the national collective agreement covering the branch of activity in question.

However, it seems as the trade unions still may require that the foreign service provider shall sign a collective agreement respecting the principle of minimum protection.

Such a 'collective agreement light' may include provisions on minimum rates of pay, if this rate is clearly indicated in the collective agreement covering the branch of activity in question. Further, it seems to be possible for host state trade unions to demand collective agreements containing duty to follow the nucleus of mandatory rules applicable in the host state. This could be motivated by the interest of monitoring of application of wages and employment conditions at the workplaces (see above). The Viking and Laval cases do not touch upon this interest. Neither is monitoring of employment conditions coordinated on a European level, which would mean that the scope for justification is wider than compared to regulation of substantive provisions concerning posted workers.