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Free movement vs. social rights in an enlarged Union – the *Laval* and *Viking* cases before the ECJ•

Abstract
The paper discusses two references before the ECJ concerning the right of social action of labour unions in "old" Member countries (Sweden and Finland) against posting of workers from a company of a "new" Member state (Laval from Latvia) respectively re-flagging a ferry ("Rosella" owned by Viking-Finland) to a "new" Member country (Estonia). The free movement provisions of Art. 49 and 43 EC are in principle applicable against collective action, unless justified by proportionate social policy reasons. This is denied in Laval *because of discriminatory elements in Swedish labour law (Lex Britannia) and non-applicability of the posted workers directive 96/71, but confirmed in* Viking *which concerns a "normal" and proportional industrial conflict justified on social policy grounds.*

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• The author was involved for the Latvian government in preparing the Laval litigation. His doctoral students Carri Ginter and SeppMarek/Tartu helped with research on the Viking case. Obviously, the opinions expressed in this paper are only my own.

I. The Swedish *Laval* case and the English/Finnish *Viking* case as starting points

The two references concern the compatibility with EU law of industrial disputes and collective actions against EU companies exercising their free movement rights. The Swedish case, under a reference of the the Arbetsdomstolen (Swedish Labour Court) of 15 September 2005 in a litigation between *Laval un Partneri Ltd* (in the following: *Laval) v Svenska Byggnadsarbetareförbundet, Avdelning 1 of the Svenska Byggnadsarbetareförbundet, Svenska Elektrikerförbundet* (in the following: *Bygnadd*s)[1] concerns the question whether industrial action of Swedish labour unions against a Latvian company which wanted to perform a work contract under Swedish procurement rules by posted Latvian workers comes under the freedom to provide service rules of Art. 49 EC and if this is the case whether this action can be justified either under the posted worker's directive 96/71/EEC[2] or under a specific Swedish law exempting labour unions from liability taking action against foreign based companies (the so-called Lex Britannia, see below V 1).

The reference from the English Court of Appeal of 23 Nov. 2005 in the litigation between 1) *The International Transport Workers' Federation (ITWF) 2) The Finnish Seamen's Union (FSU) versus 1) Viking Line ABP 2) OU Viking Line Eesti* (in the following: the *Viking* case[3]) concerns the question in how far labour unions can take social action against a re-flagging of a shipping company from a "high-wage"-country (Finland) to a "low wage country" (Estonia); the ECJ was also asked to decide on the applicability of Art. 43 EC as well as Regulation 4055/86[4] on the litigation, including possible justifications. In more general terms, the case concerns the so-called "FOC" (flag of convenience) policy of ITWF aiming at eliminating FOCs by establishing a genuine link between the flag of the ship and the nationality of the owner, and by protecting and enhancing the conditions of seafarers serving on FOC ships.

Both references concern delicate matters of how to balance social policy objectives with economic freedoms which have become apparent in the EU after the accession of 10 (now 12)

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[1] Case C-341/05; the order for reference was published in OJ C 281/10 of 12.11.2005; the author could make use of a provisional English translation of 18.10.2005. The order is based on a prior judgment 49/05 case A 268/04 of 29 April 2005.

[2] Directive 97/71/EC of the EP and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18/1 of 21.1.1997.

[3] Case C-438/05, OJ C 60/16 of 11.3.2006: The High Court established jurisdiction because the headquarters of ITWF were London and therefore jurisdiction was conferred to the English Court under Art. 2 Reg. 44/2001, without being able to raise the "forum non convenience" objections, see ECJ case C-281/02 Andrew Owusu v N.B.Jackson et al [2005] ECR I-1383. The High Court granted an injunction against ITWF and FSU which was squashed by the Court of Appeal in its judgment to refer the case to the ECJ, [2005] EWCA 1299, per Waller LJ.

[4] Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, OJ L 378 of 31.12.1986.

new Member countries. Most of these new member countries still have much lower wages which give them a competitive advantage in the internal market but which may easily be challenged (and have been challenged by social action in the host countries) as provoking a "social dumping" on the more elaborate wage policies in old, in particular Scandinavian member countries. Both the *Laval* and – maybe to a somewhat lesser extent – the *Viking* case have raised strong political reactions in the Member States concerned which will however not be treated here. The aim of this paper is more modest: it wants to give a legal analysis under existing EU law on how to solve these conflicts. It takes as a starting point the existing case law of the ECJ which however has not yet really solved the new types of conflict which arose in *Laval* and *Viking*. Therefore, in deciding on the references, the Court will have to give a truly constitutional answer on how to solve the existing –and possible future - conflicts between existing social structures in Member States which belong still to their own competence, and the dynamics of EC law seemingly favouring the liberal spirit of free movement against the existing social arrangements in particular in Scandinavian countries with a strong welfarist tradition, based upon the central role played by autonomous labour unions enjoying far reaching actions rights.

The analysis starts from the premise that the particular type of conflict which is before the ECJ in the *Laval* and *Viking*-cases has not been regulated by the rather elaborate transitory arrangements in the accession treaties. It must also be remembered that the actions are not directed against a Member State – which is the usual setting in free movement cases, but against labour unions which are governed by private, not public law and which enjoy, in the traditions of all Member States – whether old or new - a substantial amount of autonomy guaranteed by national and European constitutional provisions. Therefore, it must be first be analysed how far this constitutional autonomy goes within the system of the EC free movement rules (section II). Only then should the question be answered whether the relevant free movement provisions – namely on services, Art.49 EC, regarding *Laval,* and on establishment, Art. 43/48 EC in *Viking* -, can be applied to social action by labour unions restricting free movement of posted workers resp. re-flagging of shipping companies (III/IV). Should the answer be positive, one has to look for possible justifications which will be different in *Laval* due to the existence of the posted worker's Directive 96/71 (V) which is however not applicable in *Viking* (VI).

II. Social rights as fundamental rights exempted from EC free movement rules?

1. Possible exemptions of labour unions from Art. 49/43 EC

a. Art. 137 (5) EC?

It could be argued that labour unions taking social action in industrial disputes are exempted from the application of Community law in general and particularly of Art. 49/43 EC which is directed against states only. A collective action by labour unions is, according to such an opinion, not meant to restrict freedom to provide services, but to ensure adequate conditions of work and pay. Under Art. 137 (5) EC, the EU does not have jurisdiction in matters of strike, lock-out and pay. In more general terms, it could be (and was) argued that Title XI on social policy leaves this area to Member states and allows only a very limited intervention of the EU. This seems to imply the non-applicability of the fundamental freedoms to industrial actions, arguments in particular put forward by the labour unions in both cases and by the supporting Swedish and Finnish governments, indeed by most governments from "old member countries" which had submitted observations to the Court.

Against such an argument it should be made clear that the exclusion of Community legislation in the field of industrial action on the other hand does however not preclude that the general principles of Community law must always be respected, as the Court has frequently held with other prerogatives of Member States, eg with regard to direct taxation,[5] health provision,[6] social security,[7] higher education stipends and loans,[8] war pensions[9] or the property regime.[10] There is no reason to exclude *a priori* social policy matters from the application of free movement principles. Art. 137 (5) only excludes Community legislation in the area of strikes and lock-outs, but not the effects of primary law on industrial action.

b. "Non-statutory-exemption" for trade unions derived from competition law?

One could also refer to the limited application of Community competition rules to collective bargaining and industrial action, which should be taken over by analogy to the EU freedoms. With regard to competition law, it is debated, under the influence of US-American anti-trust-law, whether there is an inherent "non-statutory exemption" for collective action in industrial relations.[11] The ECJ, in its *Albany*-judgment, took a somewhat more restrictive view:

> "Under an interpretation of the Treaty as a whole which is both effective and consistent ... agreements concluded in the context of collective negotiation between management and labour in pursuit of such (i.e. social policy, NR) objectives must, by

[5] Case C-544 + 545/03 Mobistar & Belgacom v al [2005] ECR I-(8.9.2005)
[6] CaseC-372/04 Yvonne Watts v Bedford Primary Care Trust et al [2006] I-4325 para 92.
[7] Case C-158/96 Kohll v Union des Caisses de Maladie [1998] ECR I- 1931 para 20.
[8] Case C-209/03 The Queen (on application of Dany Bider) v London Borough of Ealing [2005] ECR I- 2119 para 42.
[9] Case C-192/05 K. Tas Hagen, R.A. Tas v Raadskamer WUBO [2006] ECR I-(26.10.2006)
[10] Case C-350/92 Spain v Council [1995] ECR I-1985
[11] See the detailed comparative discussion of AG Jacobs in his opinion of 9.1.1999 in case C-67/96 Albany International v Stichting Bedrijfspensioenenfonds Textielindustrie [1999] ECR I-5751 paras 98-107 with regard to US law.

virtue of their nature and purpose, be regarded as falling outside the scope of Art. 81..."[12].

This argument must however be limited to competition law where business and labour organisations were negotiating for a pension fund for the employees of a particular sector, as in the *Albany* case. The case did not concern industrial action as such, and therefore is not a precedent for the limitation of actions by labour unions with regard to fundamental freedoms. Where collective action by labour unions is confronting individual businesses from other Member countries by rendering their market access or business restructuring impossible or more difficult, there is no "non-statutory-exemption" from the application of the EU free movement rules.

2. The importance of the Gustavsson- *and* Rasmussen-*judgments of the ECtHR*

An important argument in proposing to exempt collective action by labour unions from the applicability of the fundamental freedoms could be based on Art. 11 of the European Human Rights Convention (EHRC). Since the EU, according to its Art. 6 (2) has to "respect" fundamental rights, and since the ECJ, in its case-law concerning fundamental freedoms, refers to judgments of the European Court of Human Rights (ECtHR),[13] it is helpful for the *Laval* and *Viking* cases to look at precedents from the Strasbourg Court. The ECJ is of course not formally bound by the case-law of the ECtHR, but will usually pay tribute to it if questions of fundamental rights in the sphere of application of EU-law, in particular with regard to the exercise of fundamental freedoms, are at stake. This is the more true in areas where no consistent case-law of the ECJ exists, as with regard to the conflict between industrial action and fundamental freedoms.

Art. 11 (1) ECHR guarantees the freedom of association, subject to limitations spelled out in para 2. This right can be invoked by labour unions in collective bargaining and action. It contains a positive element allowing social action including strikes for the improvement of working conditions, and therefore it may conflict with the fundamental freedoms of the EC if such actions necessarily restrict free movement of goods or services.

On the other hand, this "positive right of association" which can be invoked by Bygnadds in the *Laval* case and by ITWF/ the Finnish Seaman's Union in *Viking* is not without limits. It must respect the rights of other individuals to freely associate or *not to associate*. This problem was raised before the European Court of Human Rights in the case *Gustavsson/Sweden.* In its judgment of 25.4.1996,[14] the Court faced the question of how far

[12] Note 11 at para 60.
[13] See case C-112/00 Eugen Schmidberger v Austria [2003] ECR I-5659 at para 79.
[14] Recueil 1996, 637 paras 44-45.

industrial actions against an entrepreneur who did not want to join a collective bargaining agreement was permitted or, vice versa, limited by Art. 11 EHRC.

This judgment recognised that "freedom of association" also has a "negative side" which Sudre calls "droit d'assocation négatif"[15], namely the right of an employer not to be forced into a collective bargaining agreement if he does not belong to the relevant trade association. This right is also enjoyed by *Laval* resp. *Viking* in offering its services in Sweden resp. Finland/Estonia. It is made impossible or severely restricted by the industrial action of labour unions. Art. 11 of the ECHR therefore does not exclude the application of 49 EC, but on the contrary it must be read together with Art. 11 in protecting both the free movement and the negative right to association.

This case law was confirmed by the recent *Sorensen/Rasmussen* judgment handed down against Denmark[16] where it was clearly stated that the requirement to join a certain trade union violates Art.11 ECHR as such requirement has an effect on the very freedom of assembly and association. Therefore, the state must avoid measures violating this "negative right of coalition", even though it enjoys a certain margin of appreciation. Obviously, the primary adressees of such an obligation are the unions themselves which must avoid an infringement of the "negative right to coalition". Their actions will have to be balanced against the two components of Art. 11 ECHR, namely their "positive right" to association and the "negative right" of social partners who do not want to adhere to a system of collective bargaining. In the EC context, this balancing must be accomplished within the free movement provisions of the Treaty which will be analysed in Sections III and IV, subject to justification under the proportionality principle outlined in sections V. and VI.

3. The Werhof-judgment of the ECJ

In its *Werhof* judgment[17] the Court derived from Art. 11 of the EHRC as interpreted by the ECtHR the principle that „(f)reedom of association... includes the right not to join an association or union..." This „negative right to association" must be respected when interpreting secondary Community law, eg in the case before it the directives on transfer of undertakings. The Court expressly referred to the *Gustavsson* judgment of the ECtHR, thus indicating that it takes the same view on the limitations of the right to collective action. This demonstrates clearly the concerns of the ECJ that social action rights of labour unions are not "outside" EC law (whether primary or – as in the *Werhof* case – secondary law), but must be balanced in particular against existing free movement rights. This will be analysed in the next sections regarding the freedom to provide services (III), and the right to establishment (IV).

[15] Sudre et al, Les grands arrêts de la Cour Européenne des droits de l'homme, 2003, p.482
[16] Judgment of 11 January 2006, para 58, applications 52656 + 52620/99.
[17] Case C-499/04, [2006] ECR I-2397 para 33

4. Constitutional traditions of Member States concerning social action

According to Art. 6 (2) EU, the Union will also the respect fundamental rights as they are common to the constitutional traditions of the Member States. There is agreement that one of these traditions concerns the rights of social partners – labour union and business organisations – to take social action to defend their legitimate interests in industrial disputes; but this right is not without limits. This right has been recognised in the Charter of Fundamental Rights in the EU, namely its Art. 28 (now Art. II-88 of the Draft Constitution of 29.10.2004) with the following words:

> Workers and employers, or their representative organisations, have, *in accordance with Community law and national laws and practices (italics NR)*, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflict of interest, to take collective action to defend their interests, including strike actions.

In particular the Scandinavian states defend their specific social model which is based on a large autonomy granted to social partners by their constitutions without the state necessarily interfering into social action.[18] It is feared that this autonomy of the "Scandinavian social model" is endangered if EC law interferes into its working by imposing its specific rules on free movement or – as had been discussed in *Albany*[19] - on competition onto social action.

In the context of this discussion it suffices to remember that even in the Scandinavian model of industrial relations there are certain inherent limits of social action which are spelt out by law. The most important and common one is the so-called "peace obligation" (Friedenspflicht) which forbids industrial actions once a valid collective agreement has been concluded between social partners. Of course the extent of this "Friedenspflicht" and the consequences of its breach may be very different, but they are in any case determined by law, not by the social partners themselves, as can be shown very clearly in the Swedish case of the "Lex Britannia" which will be discussed below (V 1). In Finland, Art. 13 of the Constitution protects freedom of association of social partners, including the right to strike which is subject to three limitations, namely where the right to strike is ousted by a Finnish statute, where the strike is contra *bonos mores*, or where the strike is in breach of EC law directly applicable between the parties.[20]

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[18] For a discussion see N. Bruun et al, The Nordic Labour Relations Model, 1994 at 250-252; Fahlbeck, Labour and Employment Law in Sweden, 1999, pp. 26-33; Ahlberg/Bruun in 56 (2005) Bulletin of Comparative Labour Relations (ed. Blanpain), 117-124

[19] See supra note 11

[20] See the CA supra note 3 at par 26 citing the judgment of the Finnish Supreme Court in Rakvere (KKO:2000:94).

This is exactly what is said in Art. 28 of the Charter of Fundamental Rights whose indirect legal importance was recently recognised by the Court.[21]

The text of Art. 28 makes it very clear that the right to industrial actions only exists within the limits of the law, including EC law. Of course, these limitations must respect the principle of proportionality, as is spelled out in Art. 52 (1) of the Charter. But it cannot be said that industrial action as recognised by Member State law is completely outside the cope of Community law. This has also indirectly been recognised by the Court in *Albany* where it defined on the one hand the existence of an exemption of social partners from the competition rules in order to attain legitimate social policy objectives, but implicitly rejected any extension of this exemption beyond matters of social policy. It is therefore a matter of balancing the different objectives of the EC Treaty on the one hand – free movement – and of social action on the other, namely adequate social protection of workers as mentioned in Art. 136 EC. Exactly this balancing is now before the Court in the *Laval a*nd *Viking* cases. Any one-sided approach to solve this question must be rejected – either by giving absolute precedence to social rights, or by formally insisting on the supremacy of free movement without taking account of legitimate social policy objectives pursued by the Member States, even when delegated to social partners as in Sweden and Finland. The following sections will attempt such a balancing approach.

III. The applicability of Art. 49 EC to social actions against the posting of workers in *Laval*

1. Posting of workers by Laval in Sweden as exercise of the freedom to provide services

With regard to applicable Community law ever since *Rush Portuguesa*[22], it is without doubt that the posting of workers of a company established in one EU country is a (cross border) service to which Art. 49 EC is applicable. The workers employed by Laval are not seeking access to the Swedish labour market but will be removed once the construction work as contracted is finished[23]. In principle they remain under Latvian jurisdiction. Therefore, the provisions on free movement of workers (Art. 39) and on non-discrimination (Art. 12 EC) can be disregarded in this context.

It should also be mentioned that Sweden did not make use of the possibility to invoke a transitory regime against the posting of workers, as had been conceded to Germany and Austria during the accession negotiations with the new Member countries, including Latvia.[24]

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[21] Case C-540/03 EP v Council [2006] ECR I-(13.7.2006) para 38.
[22] Case C-113/89 Rush Portuguesa v Office National d'immigration [1990] ECR I-1417; C-369 + 376/98 Criminal proceedings against Arblade [1999] ECR I-8454.
[23] Case C-445/03 Commission v Luxembourg [2004] ECR I-10191 para38.
[24] Reich, Understanding EU Law, 2nd edition, p. 84-85.

2. Restrictions of the provision of services

As the case shows, the boycott by Bygnadds is the strongest form of a restriction; it made indeed impossible the rendering of services by Laval in Sweden and caused great harm both to Laval and to the Latvian workers it had posted while relying on its freedom to provide services. Art. 49 EC is directed both against "discriminations" and against "restrictions".[25] For a preliminary examination of the legality of the boycott under EU-law, it is sufficient that there is a restriction which is forbidden unless it can be justified. The question of discrimination will be discussed within the possible justifications (V 1c).

Under EU-law, this action is the very negation of the freedom to provide services. In its effects, the restriction forced upon Laval by the action of Bygnadds is to some extent similar to the re-incorporation requirement imposed by German law on foreign companies. In its *Überseering*-judgment[26], the Court wrote with regard to establishment – an argument which can also be used with regard to freedom to provide services:

> "The requirement of re-incorporation of the same company is therefore tantamount to outright negation of the freedom of establishment…"

This restriction can lead to a double consequence under the case-law of the Court: an obligation of the (Swedish) state under Art. 10 EC to make sure that freedom to provide services is guaranteed not to be discussed here, or against the Swedish labour unions themselves under the "horizontal direct effect"-theory of Art. 49 EC.

The main legal question of the case concerns the effects of Art. 49 EC against the action of Swedish labour unions. Case law of the ECJ is evolving, it is not yet clear with regard to the position of labour unions in industrial action infringing free movement.

The traditional approach to the freedoms enshrined in the EC Treaty has been concerned exclusively with *state action*. This seems to be suggested by their very place within the EC-Treaty, namely Art. 3 (1) c) and 14 (2) concerning the establishment of an internal market without frontiers among the Member States. Restrictions of market access by private persons are usually caught by the provisions on competition, per Art. 81/82 EC. This seems to exclude the applicability of Art. 49 and the other Community freedoms to privately imposed restrictions.

[25] Case C-76/90 Säger [1991] ECR I-4221 para 12 and later cases.
[26] Case C-208/00 [2002] ECR I-9919 para 81

Such a narrow interpretation is however not required from the very wording and system of the Treaty.[27] Art. 49 (1) EC itself takes a somewhat broader view as it aims at the abolition of restrictions on the freedom to provide services, wherever they come from. The Court, in a series of cases, had therefore extended the applicability of Art. 49 (and other freedoms, namely Art. 39 and 43) to privately imposed restrictions. This case law started with *Walrave*[28] already in 1974 concerning restrictions on free movement imposed by by-laws of sporting associations. This case-law which takes a functional, not a formal approach at interpreting the fundamental freedoms, has been continued in the well known *Bosman* case. [29] This case was concerned with free movement of workers, even though the Court also referred to services. This case law was confirmed and justified in *Angonese*[30]. In the later *Wouters*-case[31] the Court summarised and confirmed its case law with regard to collective regulation by private entities.

In the case at hand, the boycott of Bygnadds against Laval was intended to achieve a "regulation", namely the conclusion of a collective bargaining agreement or a supplement according to Swedish law. This would have resulted in Laval having to pay Swedish wages and benefits, thereby loosing its competitive advantage which allowed it in the first instance to win the Vaxholm contract. At the same time, it would have set aside the agreement which Laval had concluded with LCWA in summer 2004.

4. Preliminary results of the discussion

As a preliminary result of this discussion, it can be clearly stated that the boycott by Bygnadds violated Laval's right to freely provide services. Labour union actions are not exempted from a *prima facie* application of the free movement rules. Since Art. 49 EC is applicable in this context, other EC provisions need not be discussed in detail. Bygnadds may be liable for breach of Community law if its action cannot be justified but this will not be discussed here.

IV. Art. 43 and social action against free movement of companies in Viking

The right of establishment of Art. 43/48 EC can also be invoked horizontally against collective actions as defined above. The arguments presented there need not be repeated. Insofar the *Laval* and *Viking* cases concern similar legal questions.[32]

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[27] Müller-Graff in: Streinz, EUV/EGV, Kommentar, 2003, Art. 49 paras 65-69.
[28] Case 36/74 Walrave v Union Cycliste internationale [1974] ECR 1405 paras 15-19.
[29] C-415/93 ASBL v Bosman [1995] ECR I-4921 para 83-85
[30] C.-281/98 R. Angonese v Casa di Risparmio de Bolzano [2000] ECR I-4139 paras31-36.
[31] C-309/99 J.C.J. Wouters et al/Algemene Raad von de Nederlandse Ordre van Advocaaten [2002] ECR I-1577 para 120; for a discussion see Reich, Understanding EU law, 2nd ed. 2005, pp.18-19.
[32] See Hatzopoulos/Do, The case law of the ECJ concerning the free provision of services, CMLRev 2006, 923 at 978.

The origin of the social conflict is however somewhat different because it concerns the general FOC policy of ITWF (supra I). When in 2003 FSU was confronted with the request of Viking Finland to reflag its ferry "Rosella" which serves the Helsinki-Tallinn line in order to avoid losses due to higher wages paid under Finnish law and be allowed to pay wages according to lower (Estonian) standards, it contacted ITWF which sent a circular to all affiliated organisations asking them to refrain from negotiating with Viking. Since the collective bargaining agreement with Viking concerning the manning of "Rosella" ended in November 2003, FSU threatened with social action against the intended reflagging. Viking asked for an injunction in the Finnish labour court which was refused. The mediation under Finnish law ended in Viking giving in to the demands of FSU. It concluded a new collective agreement ending on 28 Feb. 2005 which renewed the old agreement; it had to give up its plans to reflag the ship. Since the "Rosella" continued to make losses and since the ITWF circular remained in force Viking decided to bring proceedings before the English High Court in August 2004 seeking declaratory and injunctive relief which required withdrawal of the ITWF circular and requiring FSU not to interfere with Viking's free movement rights in relation to reflagging of "Rosella". The High Court granted the injunction in favour of Viking in June 2005. This judgment was appealed by Viking before the Court of Appeal which squashed the judgment for an injunction and decided to make the above mentioned reference.

The specific problem caused by the threatened social action in *Viking* concerned restrictions on a company wanting to partly move out of one jurisdiction to another by the intended re-flagging. According to question 6 of the referring Court of Appeal, this is done by the

> "parent company established in Member State A (Finland) … intend(ing) to undertake an act of establishment by re-flagging a vessel to Member State B (Estonia) to be operated by an existing wholly owned subsidiary in Member State B which is subject to the direction and control of the parent company".

In our opinion, it must be argued that the social action taken against the re-flagging of Viking must be regarded as a restriction of its freedom of establishment which would be illegal unless it can be justified by – proportionate - social policy reasons (VI).

V. Justifications (I – *Laval*)

The main problems of the case are concerned with the question of justification, as the Swedish Labour Court seems to imply itself. The examination will have to undergo certain steps which are suggested by the questions of the referring court, namely

- the Swedish Lex Britannia (1)
- the importance of Dir. 96/71 (2)
- general principles of Community law (3).

1. The Lex Britannia

The Swedish *Lex Britannia* amended the Medbestämmandelagen (MBL – law on worker's participation in decisions) in 1991[33] and allows Swedish labour unions to start industrial action against an undertaking which has not (yet) concluded a bargaining agreement with a representative labour union of its employees. Vice versa, there is a "Friedenspflicht", that is a duty to abstain form industrial action only in those cases where already a binding collective agreement exists. The 1991 amendment limited this "Friedenspflicht" to those agreements to which Swedish law "*directly*" applies, thus excluding collective bargaining agreements concluded with non-Swedish labour unions. Industrial action is therefore not prohibited when a foreign employer carries out temporary activities in Sweden and an overall assessment of the situation leads to the conclusion that the connection to Sweden is so weak that the MBL cannot directly apply to industrial relations. The 1991 amendment wanted to combat so called "wage dumping" by foreign service providers made possible by the prior case law of the Arbetsdomstolen, whereby Swedish labour unions had to recognise foreign collective bargaining agreements in the sense of the "Friedenspflicht" even if the wages negotiated were below Swedish standards. According to the *travaux préparatoires*, the Lex Britannia is intended to allow trade unions to act to ensure that all employers active in the Swedish market pay salaries and grant other conditions of employment in line with those usual in Sweden and to create conditions of fair competition on an equal basis, between Swedish undertakings and entrepreneurs from other countries. However, its potential discriminatory effects against undertakings established in other EU member who want to post workers in Sweden must be examined.

a. Industrial action against an undertaking established in the EU

The Lex Britannia does not contain a specific exemption concerning industrial action against undertakings established in an EU Member State. This "omission" by the Swedish legislator had been criticised by several Swedish experts when Sweden acceded to the EU[34], but it has not been taken up by the Swedish legislator during the ratification proceedings of the Treaties with the new Member States. There is no exclusion in Swedish law concerning the continued application of the Lex Britannia vis-à-vis undertakings from new Member countries. Swedish law wants to apply the Lex Britannia also against service providers established in the EU. Vice versa, the general provisions of the freedom to provide services apply in full as has been demonstrated above against industrial action (III). Only when there is a specific justification

[33] For detailed description see the reference order of the Arbetsdomstolen of 15.9.2005, p. 4 of the provisional English translation.
[34] Supra note 18.

for a restriction to provide services, then the enabling provisions of the Lex Britannia continue to be applicable and may be invoked to justify industrial action of Bygnadds.

The case law of the ECJ with regard to allowed restrictions of Art. 49 EC is relatively well developed and quite clear in its main principles:

- Restrictions may be justified to protect posted workers.
- Even if allowed these restrictions must be proportionate and non-discriminatory.
- Restrictions are not allowed to close the national construction market and to shield national businesses from competition by service providers established in the EU.

Already in case *Rush-Portuguesa*[35] the Court said:

> "…. Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both ides of industry, to any person who is employed, even temporarily, with their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means" (para 18).

Obviously, this exemption does not apply in the Laval case. The Lex Britannia is, as we have argued, an enabling legislation, not a protective one as in the *Rush-Portuguesa* case.

Later cases impose certain limits on protective legislation of workers. In *Finalarte et al v Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* et al.[36] the Court insisted that it may serve the protection of workers, but "cannot be justified by economic aims, such as the protection of national businesses…" The yardstick for legitimate restrictions on the freedom to provide services is always the protection of posted workers, not the prevention of competition on the construction market.[37]

The neutrality of the Swedish state is in reality a delegation of power to labour unions to restrict the EU freedoms, if the undertaking providing services from another EU country has not complied with Swedish labour standards. Labour unions are of course not forced to take such action, they are only enabled to do so by the privilege of being exempted from civil liability. But as practice shows, they will usually take action if a home business (like in the *Gustavsson* case) or an EU-undertaking (like in *Laval)* do not comply to Swedish labour standards. Since the Swedish state has given them power to restrict the fundamental freedoms, they can therefore be held liable for violations of Community law and cannot escape their responsibility by relying on the Lex Britannia which by its very wording allows them to impose such restrictions (sub 3).

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[35] See note 23.
[36] Joined cases C-49/98 et al [2001] ECR I-7831 para 39
[37] Case C-164/99, Portugaia Construcoes [2002] ECR I-787, confirmed by case C-445/00, Commission v Luxembourg [2004] ECR I-10191 paras 38-39.

b. The discriminatory element of action inherent in the Lex Britannia

Since the Lex Britannia is an enabling law, its discriminatory elements can only be seen once it is put to action. The *Laval* case gives striking evidence in this direction. Bygnadds used he exemption from "Friedenspflicht" allowed by the Lex Britannia to start industrial actions against Laval which in the end made impossible the rendering of cross-border services in Sweden. Laval sought an injunction against this action to be able to continue providing its services as agreed under the construction contract with the city of Vaxholm which was refused by the first judgment of the Arbetsdomstolen. The combined working of the Lex Britannia as an enabling law for Bygnadds and as an exemption from liability prevented the provision of services. The Lex Britannia is therefore the relevant and decisive cause for an unjustified restriction of Art. 49 EC.

Compared to the situation of a Swedish undertaking, Laval was clearly treated in a discriminatory way. Under the existing practice of the Lex Britannia, it could not invoke its collective bargaining agreement with LACW as an element of the "Friedenspflicht" which would not allow industrial action of Bygnadds and could therefore be prevented by an injunction before the Swedish labour court.

It cannot be argued that Bygnadds merely wanted Laval to offer its services on the same terms as Swedish construction companies, and that they therefore were treated on equal terms. Such an argument disregards the difference between Swedish and Latvian undertakings in providing services. By forcing upon them "equal conditions", in reality existing differences are levelled down. This is the opposite of non-discriminatory treatment: Laval is deprived of its competitive advantage and insofar discriminated against. Bygnadds is using the instruments of the Lex Britannia to impose restrictions on the freedom to provide services for economic grounds which cannot be justified. Since the Lex Britannia does not prohibit such type of industrial action, this omission by the Swedish legislator clearly violated Community law; such violations cannot justify action by Bygnadds.

2. Directive 96/71

a. Objectives of the directive

Directive 96/71 was adopted under the internal market jurisdiction concerning provision of (cross-border) services. It therefore wants to implement the basic principle of Art. 49 EC as it had been developed by the case law of the ECJ, in particular since *Rush-Portuguesa*. This starting point must be kept in mind when interpreting it. Therefore, the Directive should not be applied in such a way as to make cross-border provision of services via posted workers

impossible or unreasonably risky or costly. The host-Member State must guarantee that posting remains possible within the framework of the Directive. It should not be used for mere economic grounds in order to protect national businesses or close markets from competition.

At the same time, the Directive, according to recital 5, wants to promote a "climate of fair competition and measures guaranteeing respect for the rights of workers."[38] Therefore, a "'hard core' of clearly defined protective rules should be observed by the provider of services notwithstanding the duration of the worker's posting", recital 14. The second objective of the Directive is the protection of posted workers, not of workers of the host country.[39] These rules are contained in Art. 3. They imply also a conflict rule, namely that not only the law of the home country of the service provider, but also in certain aspects the law of the host country is applicable, that is the law of the country where the posted workers perform the work according to the service contract which the provider hat concluded in the host country. Insofar it amends the rules of applicable law under Art. 6 of the Rome Convention to protect posted workers and to make possible their equal protection under the law of the host Member state.[40]

b. Art. 3 (1) of the Directive 96/71

As far as the *Laval*–case is concerned, it seems to us that only the question of "*minimum rates of pay*" in the sense of para 1, second indent, lit.c) is controversial.[41]

The Directive sets out a number of requirements that must be observed in order to "overrule" the rates of pay which have been agreed upon by the provider with "his" workers, or which are applicable according to a collective agreement concluded in the home country, as in the *Laval*-case. The conditions which are listed in the two indents of para 1 of Art. 3, namely minimum wages imposed either by law (or regulation), or by collective agreements or arbitration awards declared universally applicable, are not relevant here. Sweden does not have system of state minimum pay (as in France), nor one of declaring collective agreements universally applicable within the meaning of para 8 (as in Germany). Sweden deliberately refrained from implementing lit. c) because of its "social model" which means that the state

[38] Langenfeld in Grabitz/Hilf, Das Recht der EU – Kommentar, Art. 137 EGV Rdnr. 52: „Vermeidung von sog. ‚Sozialdumping' – avoidance of social dumping"; Davies, Posted Workers: Single Market or Protection of National Labour Law Systems? 34 CMLRev (1997) 571 at 572-575, referring to the ambiguities of the directive; somewhat broader Däubler, Die Entsenderichtlinie und ihre Umsetzung ins deutsche Recht, EuZW 1997, 613 at 615: „zwingende Gründe lägen in der Vermeidung der Arbeitslosigkeit, in der Erhaltung der Tarifautonomie in den betroffenen Branchen sowie in deren Schutz gegen Wettbewerbsverfälschung"

[39] There had been some critique, in particular in German legal literature, whether the Directive could be based on the internal market jurisdiction of the EC, a critique however not taken up by the ECJ; Däubler, note 50 at 614-615.

[40] Barnard, EC Employment Law, 2n ed. 2000 at pp. 177-178; Franzen, Die EG-Entsende-Richtlinie, ZEuP 1997, 1095 at 1064-1070.

[41] For a recent clarification see case C-341/02 Commission v Germany [2005] ECR I-2733 para 24.

takes a neutral position with regard to industrial relations and leaves it to the social partners to find adequate pay rates in collective bargaining proceedings which are enforced by the mechanisms available under the Medbestämmandslagen, as amended by the "Lex Britannia".

c. The option for collective agreements under Art. 3 (8)

Para 8 of Art. 3 extends the effects of collective agreements with regard to pay rates which may also be imposed to posted workers under certain conditions which so far have not yet been interpreted by the ECJ. They therefore need careful scrutiny.

(1) The first condition requires a *decision* of the host Member States, namely

> "In the absence of a system for declaring collective agreements or arbitration awards to be of universal application … , Member States, may, *if they so decide* (italics, NR), base themselves on…."

As has been correctly observed by Davies[42]

> "… in determining whether collectively agreed standards apply for the purposes of the Directive, Member States may substitute for the test of obligation the test of applicability in fact…"

The Arbetsdomstolen, in its order for reference, explains that "the responsibility for deciding what is an acceptable standard for terms and conditions of employment has thus been transferred to the organisations in the Swedish employment market".[43] It is not clear how this has been accomplished, particularly vis-à-vis foreign service providers who may not know the specifics of the Swedish labour market. The Directive is silent as to the form and requirements of such a decision. By an *argumentum e contrario*, it need not be a legally binding instrument. On the other hand, from the very purpose of the Directive, namely not to serve as a basis for preventing competition and at the same time to protect posted workers, it must be required that such a decision be expressly taken and be rendered transparent for the industries listed in the Annex, which is applicable to the *Laval-c*ase concerned with construction work. Both the foreign service provider and the posted workers must know under what conditions they perform work in the host state, as expressly spelled out in Art. 4 (3) of Dir. 96/71. It should be remembered that a similar *requirement of transparency* been developed by the ECJ in public procurement resp. state aid matters if Member States want to enforce certain justified protective objectives.[44] It is not known whether Sweden has taken

[42] Note 37 at p. 580.
[43] Note 33 at p. 10.
[44] Cf. case C 513/99 Concordia Bus Finland Oy AB v Helsingin jaupunki [2002] ECR I-7213 paras 62, 67 for environmental standards; C-280/00 Altmark Trans et al v Nahverkehrsgesellschaft Altmark, [2003] ECR I-7747 para 90 for public transportation

such an express decision, and whether is was transparent to Laval when tendering for the construction contract in Vaxholm.

(2) Even if there is no doubt concerning the (express and transparent) "decision" of the Swedish state, as a second requirement the collective agreement must either "be applicable to all similar undertakings in the geographical area and in the profession or industry concerned", or has been "concluded by the most representative employer's and labour organisations at national level and which apply throughout the national territory." According to the Commission, this means that the Member States can include agreements or awards which are complied with by the great majority of "national-level undertakings". The key factor is the extent to which the national level undertakings are real or potential competitors to the service provider.[45] Obviously this is a question of fact which cannot be answered by the ECJ. There are however serious doubts that these requirements are fulfilled in the *Laval*-case:

- it is not sure that the wage level agreed in a collective agreement in the construction business in the Vaxholm (Stockholm) area amounts to the originally required 145 Kr.;
- even if Bygnadds has concluded a collective agreement with the relevant Swedish employer's association as the most representative organisation, it is not evident that this agreement is applied "throughout national territory" and not only regionally.

Bygnadds seems to take the view that Art. 3 (8) must be understood in such a way that it also allows it to take industrial action to *extend* the application of collective agreement to foreign service providers. It refers to recital 12 of the Directive which reads:

> "Whereas Community law does not preclude Member States from applying their legislation or collective agreements entered into by employers and labour, to any person who is employed, even temporarily, within their territory, although his employer is established in another Member States; whereas Community law does not forbid Member States to guarantee the observance of those rules by the appropriate means."

As can be seen from the very wording of the recital, it only reiterates what has been already said in paras 1 and 8 of Art. 3 of Dir. 96/71. It says nothing about corresponding rights of trade unions, but only of Member States. The argument that in the case of Sweden the state, by virtue of the Lex Britannia, has delegated this power to trade unions is irrelevant because the Lex Britannia itself violates Community law (supra V 1c) and therefore cannot serve to justify the action of Bygnadds to extend its collective agreements to EU service providers.

[45] Cited by Barnard, supra note 39 at p. 175 note 399

The same is true of recital 22 of the Directive to which the order for reference of the Arbetsdomstolen refers. It reads that the Directive is without prejudice to Member States' legislation governing the right to take industrial action. It does not say anything – and cannot do so – about the limits of industrial action under *primary Community law*, as has been set out above.

(3) It should be remembered that para 8 of Art. 3 refers to para 1, including lit c) which only talks of "*minimum rates of pay*", not of "normal pay" as agreed in collective bargaining. There is some doubt that the Swedish system allows such a distinction to be made between "minimum" and "normal" rates of pay. Such a distinction is however necessary in order not to take away from foreign service providers their competitive advantage which they may have by paying lower wages to their workforce under the jurisdiction of their home country, but may still incur higher costs because of offering work in a different country where they need to provide the costs for transportation, shelter and living of the posted workers. The application of the normal wage rates in the host country may be disproportionate in special circumstances, as the Court spelt out in *Portugaia Construcoes*[46].

(4) Finally, a fourth and decisive requirement, namely "equality of treatment" must be guaranteed. This "equality" principle is violated when the collective agreement allows or at least tolerates an undercutting of the agreed pay rates, while such practice is not tolerated vis-à-vis foreign service providers. This principle had been developed by the ECJ in *Portugeaia Construcucoes* with regard to collective agreements which have been declared universally applicable, as in Germany.[47] *A fortiori* it must also be applied to collective agreements which are *de facto* universally applicable.[48]

d. Enforcement of eventual minimum pay obligations?

Even if we take the view (which we do not share) that the requirements of Art. 3 para 8 are met in the *Laval* case, and that therefore the posted Latvian workers should have been paid at hourly wage rates around 145 Kroner, a refusal to do so by Laval does not automatically mean that industrial action by Bygnadds would be justified by imposing a collective bargaining agreement upon Laval. Art. 5 (2) of the Directive requires that Member States "shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under the Directive". Art. 6 makes it possible to institute proceedings in the courts of the host Member States, even if this would not have been possible under the then applicable rules of Art. 5 (1) of the Brussels Convention.[49]

[46] C-164/99 Portugeaia Construcoes, [2002] ECR I-787 para 30; see Hatzopoulos/Do, supra note 32 at 974-975
[47] at para 34
[48] Davies supra note 37 at 581.
[49] Davies at 578; Barnard supra note 39 at 176-177; Franzen supra note 39 at 1071.

In the *Laval*-case, the protective ambit of Art. 5/6 is turned upside down by the boycott of Bygnadds. The posted Latvian workers are not allowed to enter the building site and perform the contract. They are sent home and laid off from employment. A claim against their employer is theoretically possible but de facto frustrated by the industrial action of Bygnadds. Instead of protecting posted workers, is does exactly the opposite: it deprives them of their chance to work and eventually to claim Swedish wages (should they be applicable under Art. 3 (8) of Dir. 96/71) by using the mechanisms of Art. 5/6. This is in clear violation of the *Wolff*-judgment of the ECJ[50] where the Court insisted that

> "… Member States must ensure, in particular, that workers have available to them adequate procedures in order actually to obtain minimum rates of pay"

The boycott is made possible by the Lex Britannia which, as we have said, in itself violates EU-law insofar as it allows discriminatory and selective action against service providers from EU countries, and deprives posted workers of their rights to which they are entitled under Dir. 96/71. In reality, the boycott aims at closing the Swedish construction market to EU service providers and their posted workers. This is not justified under Community law.

3. Public policy exceptions under Art. 3 (10) in conjunction with constitutional law

As a subsidiary argument, Bygnadds may want to rely on Art. 3 (10) of Dir. 96/71 which allows the host Member State to apply to posted workers provisions of its laws, regulations and administrative provisions governing matters additional to those set out in Art. 3 (1), provided that these additional rules fall within the category of "public policy provisions".[51] Bygnadds and the Swedish government argue that the *Medbestämmandelagen* with the special rules of the *Lex Britannia* must be characterised as such "public policy provisions" because they enshrine the Swedish "social model" in order to avoid "social dumping"

Such an interpretation could possibly be also based on constitutional considerations which had been discussed *supra* (II 4). In *Omega*[52], the Court linked the "public policy" concept to fundamental rights protection, in this case the right to human dignity. The same should be true with the relevance for public policy of the defence of social rights by collective action of trade unions which are, as we have shown, guaranteed under Art. 28 of the Charter of Fundamental Rights and indirectly in Art. 136 (1) EC/ Art. 11 ECHR.

[50] Case C-60/03 Wolff & Müller GmbH v Jose Filipe Pereira Félix, [2004] ECR I-9553 at 29
[51] Davies at 582.
[52] Case C-3602 Omega Spielhallen und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Stadt Bonn [2004] ECR I-9609 para 35.

But even under such an interpretation of the public policy provisions it must be in conformity with the requirements of equal treatment and in compliance with the Treaty[53]. This is not the case with the Lex Britannia because of its discriminatory effect towards EU based enterprises by discarding the collective bargaining agreements concluded with their home trade unions. Second, public policy provisions must be construed strictly as an exception from the freedom to provide services under primary Community law to which, as is shown by the legal basis of the Directive, namely the internal market provisions, it should contribute to improving competitive conditions and not create new obstacles; therefore, national provisions invoking public policy reasons may not serve merely to protect economic goals, namely the national construction market against alleged "social dumping ".

Third, in our opinion para 10 of Dir. 96/71 only concerns provisions beyond the list of Art. 3 (1), that is other matters than minimum rates of pay. Insofar as the *Lex Britannia* enables Swedish labour unions to impose their national standards of wage bargaining on EU-based service providers, this is possible only under the criteria of Art. 3 (1) lit c) resp. para 8 which have already been discarded. The "public policy proviso" is not meant to give additional rights to Member States or their trade unions concerning pay rates beyond paras 1 and 8 of Art. 3.

VI. Justifications (II – Viking)

The *Viking* case is different to *Laval* insofar as Directive 96/71 is not applicable here, Art. 1(2). Finland had not adopted specific legislation similar to the Swedish Lex Britannia which could be invoked to justify or condemn industrial action. Finnish law does not seem to contain any discriminatory element but protects the right to strike under non-discriminatory conditions and limitations, including respect for directly applicable EC provisions (supra IV).

With regard to the justification of the social action by ITWF and FSU against Viking, some support can be found in the *Übersee*-judgment[54]. Here, the ECJ allowed certain restrictions against companies moving into one jurisdiction on social policy reasons. The case concerned a somewhat surprising consequence of the German seat theory. Here, a company formed according to the law of one state (NL) and whose ownership was transferred to another (Germany) had to be re-established in the country of residence of its owners in order to have standing in civil litigation matters. It was a debated question under German law whether this consequence of the seat theory is really imposed by German law or not.[55] In a carefully-worded decision, the ECJ repeated its insistence on the country-of-origin-principle, whereby

[53] Omega at para 36
[54] Case C-208/00 Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC) [2002] ECR I-9919.
[55] Roth, ICLQ 2003 at 198, 207 concerning *Statutenwechsel*. The Bundesgerichtshof has meanwhile modified its restrictive case law by judgment of 13.3.2003.

the company did not cease to be validly incorporated under Dutch law. On the other hand, it allowed certain limits under public policy criteria. Therefore, the Court aptly stated:

> "It is not inconceivable that overriding requirements relating to the general interest, such as the protection of the interests of creditors, minority shareholders, employees and even the taxation authorities may, in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment..." (para 93).

The crucial question here is in how far "overriding requirements ….as the protection of employees" justified social action taken by ITWF and the Finnish Seaman's Union, and whether their action was proportionate. In its reference, the English Court of Appeal wants to know whether the public policy proviso of Art. 46 EC can be applied in this case.

It should not be forgotten that the strike originated from the FOC policy of ITWF which contains a social objective by protecting seafarers against the practice of flags of convenience which may lead – as the Viking case clearly shows – to an eventual "negative competition about wages". The reference of EC law to several documents protecting social rights of workers included in Art. 136 (1) EC suggests that this is a legitimate objective which can – and eventually must – be enforced by social action including strikes, in order to be effective. Whether this action is violating the principle of proportionality should be answered by reference to the balancing test spelled out in *Schmidberger*[56].

In this judgment, the Court weighed the right to free movement on the Austrian Brenner Autobahn of the transportation company against the right of environmental organizations to peaceful demonstrations by blocking the Autobahn for a limited time. Fundamental rights as enshrined in Art. 10 and 11 ECHR , eg freedom of expression and assembly, may justify restrictions of free movement, being „fundamental pillars of a democratic society" to which the EC and Member States adhere, Art. 6 (2) EU. Fundamental rights may be limited by public policy reasons and must be viewed in relation to their „social purpose", but these limitations in themselves must be proportionate. The ECJ used a balancing test in the case before it: the demonstration was limited in time, scope and intensity – it cannot be compared to the situation in the case *Commission v France*[57] where violence was used by wild-cat demonstrators against Spanish fruit transports which was even to some extent supported by the non-action of the French authorities. In *Schmidberger*, the demonstration was authorised by the regional government; the impediment to the business of the transportation company was not serious enough to give rise to state liability**.**

In *Viking* the social action of the Finnish Seaman's Union was in conformity with EU and Finnish law, as the Finnish labour court in the first litigation implicitly held by refusing an

[56] Supra note 13 para 79.
[57] Case C-265/95 [1997] ECR I-6959.

injunction against FSU. This is in contrast to *Laval*, where the boycott was not in conformity with primary or secondary EC law and could not be justified by the Swedish *Lex Britannia* which itself violated EC law. The action of FSU and the boycott of ITWF was directed only against one part of the business of Viking – the re-flagging of "Rosella", while the action against Laval made the provision of services by posted workers impossible. The Finnish action was covered by legitimate social policy goals as recognised in Art. 136 (1) EC and in conformity with the wide discretion allowed to Member States under the case law of the ECtHR to Art. 11 ECHR[58]. The policy of ITWF as mentioned in question 8 of the referring court, namely

> "that vessels should be flagged in the registry of the country in which the beneficial ownership and control of the vessel is situated so that the trade union of the country of beneficial ownership of a vessel have the right to conclude collective bargaining agreements in respect of that vessel"

therefore seems to be justified by social objectives and by the right to collective action as recognised in Art. 28 of the Charter. It does not carry any discriminatory element but applies to all vessels under a FOC. Strike action as such cannot be regarded as not being proportionate to attain these legitimate objectives even if it may provoke losses of a company which is hit by such action – otherwise labour unions would not have an efficient instrument to fight for their legitimate aims such a social protection of workers. ITWF and FSU are therefore allowed to use the threat of and eventual action by a strike to implement their FOC policy. This must even be true if the strike prevents a reflagging of "Rosella" as in the Viking case which might eventually lead to substantial losses of the company forcing it to abandon this part of the business. But this the consequence of any social action and nothing particular to Viking. The proportionality criteria cannot be used to undermine the very substance of the right to strike. EC law is not qualified to solve this conflict by referring to a somewhat vague "proportionality" proviso, unless the social action is directed against the "nationality" of the ship owner or serves merely to protect workers with Finnish citizenship which, as the English Court of Appeal correctly held[59], cannot be said to be the case here.

[58] See the Sorensen/Rasmussen judgment, supra note 16.
[59] Supra note 3 at para 47-50.