ITF campaigns against flags of convenience vessels - inconsistent with EC law?

Expert's report

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A. The issues

I. The phenomenon of the so-called "flag of convenience vessels"

Numerous shipping companies, in particular such from Europe, the USA and Japan, operate their vessels under the flags of states which, whilst having established a register of vessels, are not concerned as to whether the vessels flying their flags comply with international minimum levels with regard to safety and social standards. Usually, the vessel concerned is transferred to a subsidiary which has been established specifically for this purpose in the state in question. The seamen normally are provided by foreign manning agencies, and in general are paid in accordance with that which is common in developing countries. As a rule, there is no accident, health, unemployment or old age insurance. The seamen who had been working on the vessel up until such transfer, and had been employed in accordance with the terms and conditions customary in Europe or in the USA, were previously moved to other vessels or were laid off. In some cases, temporary employment contracts were not renewed. However, nowadays, the majority of newly constructed ships are being launched under flags of convenience from the outset.

II. The counter-actions taken by the ITF

For over 50 years, there has been a campaign, organised by the International Transport Workers' Federation (ITF), against the migration to flags of convenience. The campaign's political objective is to only allow vessels to operate under the flag of the state of residence of their beneficial owners. Correspondingly, there are publicity campaigns against flags of convenience, and, in individual cases, there may even be combat measures in order to prevent such actions by a shipowner. However, ITF's secondary objective, which is to substantially improve working conditions on the vessels sailing under a flag of convenience, in practice is very much in the foreground. For this purpose, ITF has developed standard collective agreements which - generally speaking - determine a level of social protection which lies between that of the industrial countries and that of the developing countries. Also, the ITF Standard Collective Agreement provides for crews serving on flag of convenience vessels not being allowed to be deployed in docking work. Furthermore, a world-wide association of employers, the Joint Ne-

gotiation Group (JNG), has now formed, with which ITF has negotiated a collective agreement for vessels sailing under flags of convenience.

Shipowners who accept the general ITF collective agreements are issued a so-called Blue Certificate; shipowners who are members of JNG are issued a so-called Green Certificate. Both types of certificates protect them against boycott measures in ports. Shipowners refusing to cooperate run the risk, in particular in certain Scandinavian and German ports, of their vessels not being unloaded by the dockers, and thus of incurring extremely high costs.

In 2007, 9.105 flag of convenience vessels were operating under ITF collective agreements, corresponding to approx. one third of the world-wide fleet of flag of convenience ships.

> According to the ITF-Seafarers´ Bulletin No. 22/2008, p. 12; for detailed information on the situation in the mid-1990s, see Däubler, Der Kampf um einen weltweiten Tarifvertrag, Baden-Baden 1999

III. The ECJ‘s Viking judgment of 11 December 2007

The Finnish ferry company Viking operated a total of seven vessels, including the “Rosella” which plied the route between Helsinki and Tallinn. The employees working on the Rosella were members of the Finnish Seamen’s Union (FSU), which, in turn, is an ITF affiliate.

The route between Helsinki and Tallinn is also operated by vessels with Estonian crews, whose wages are considerably lower. This led to substantial losses for the “Rosella”. The owner company therefore, in October 2003, sought to sell the vessel to an Estonian subsidiary, and to operate it with Estonian seamen in the future.

The Finnish Seamen’s Union informed the ITF of these plans in an e-mail dated 4 November 2003, and stressed that only the FSU had the right to conduct negotiations with regard to this vessel. In accordance with its statutes, the ITF therefore, in a circular, requested all its affiliates to refrain from entering into negotiations with Viking or with its Estonian subsidiary. Failure to comply with such request may in extreme cases lead to an exclusion from the ITF.

On 17 November 2003, the collective agreement with the Finnish Seamen's Union expired, so that the Union was no longer under an obligation of industrial peace. The Union declared that a new collective agreement would only be acceptable if, in spite of a potential change of flag, the terms and conditions applicable on the vessel up until that time continued to be valid, and if no workers were laid off.

Viking was of the opinion that the Union's activities presented a violation of the company's freedom of establishment as defined in Art. 43 of the EC Treaty. In August 2004, Viking therefore brought an action before the High Court of Justice in London, the location of ITF's headquarters. In June 2005, the Court granted the sought order. The appeal brought against this decision led to the Court of Appeal calling on the European Court of Justice, and referring a number of questions for a preliminary ruling by the ECJ.

In its judgment dated 11 Dec. 2007 (printed, inter alia, in AuR 2008, 55 et seq. and in NZA 2008, 124 et seq.) the ECJ argued as follows: that the freedom of establishment laid down in Art. 43 of the EC Treaty not only provides protection against interference by the state, but also confers upon a private undertaking the right to rely upon this freedom against a trade union or an association of trade unions, and the right to defend itself against collective measures; that, while the right to take collective action, including a strike, has been recognised as a fundamental freedom under community law, its utilisation depends upon such action not presenting a disproportional interference with the freedom of establishment; that, as the "protection of workers" is among the overriding reasons of public interest which may justify a restriction on the freedom of establishment, it must be asked whether the objective "protection of workers" actually was pursued in the specific case; that it is for the national court to examine in detail whether all these preconditions are fulfilled; that this is not be the case if it were established that the jobs were not jeopardised or under serious threat because of an undertaking issued by the employer; that, following this examination, the national court will then have to ascertain whether the (threatened) collective action is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective; that, while in this specific case suitability is not a problem, it is for the national court to examine whether the trade union does not have other means at its disposal which are less restrictive of the freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with Viking.

The statements with regard to the compliance of ITF's policy with the freedom of establishment are less explicit. The ECJ in this context argues as follows (par. 88 - 90):

> "88 Secondly, in relation to the collective action seeking to ensure the implementation of the policy in question pursued by ITF, it must be emphasised that, to the extent that that policy results in shipowners being prevented from registering their vessels in a state other than that of which the beneficial owners of those vessels are nationals, the restrictions on freedom of establishment resulting from such action cannot be objectively justified. Nevertheless, as the national court points out, the objective of that policy is also to protect and improve seafarers' terms and conditions of employment.
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> 89 However, as is apparent from the file submitted to the Court, in the context of its policy of combating the use of flags of convenience, ITF is required, when asked by one of its members, to initiate solidarity action against the beneficial owner of a vessel which is registered in a state other than that of which that owner is a national, irrespective of whether or not that owner's exercise of its right of freedom of establishment is liable to have a harmful effect on the work or conditions of employment of its employees. Therefore, as Viking argued during the hearing without being contradicted by ITF in that regard, the policy of reserving the right of collective negotiations to trade unions of the state of which the beneficial owner of a vessel is a national is also applicable where the vessel is registered in a state which guarantees workers a higher level of social protection than they would enjoy in the first state.
>
> 90 In the light of those considerations, the answer to the third to tenth questions must be that Art. 43 EC is to be interpreted to the effect that collective action such as that at issue in the main proceedings, which seeks to induce an undertaking whose registered office is in a given member state to enter into a collective work agreement with a trade union established in that state and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another member state, constitutes a restriction within the meaning of that article. That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective."

IV. The questions in detail

The principles developed by the European Court of Justice concern the conflict of the right to take collective action with the fundamental freedoms provided for in the EC Treaty. In consideration of the "flag of convenience states", usually located outside the EU, the first question thus must be whether subsidiaries of EU companies established in such countries can rely on the fundamental freedoms of EC law within the framework of their activities. This in particular concerns the freedom to provide services, in addition to the freedom of establishment. A further question in this context is whether the principles laid down in the Viking judgment apply even if a company established in the EC intends to "reflag" a vessel, i.e. transfer it to a subsidiary established in a country outside the EU. For details, see part B I below.

In as far as the matter concerns the "more convenient flag" of an EU member state, as in the Viking case, there are numerous questions which the ECJ has only answered in part. Is a national trade union in which the workers concerned are organised entitled to prevent reflagging by taking collective action? Is it entitled to render this reflagging de facto impossible, or economically uninteresting? Is the case to be assessed differently with regard to the ITF policy which intends to systematically prevent reflagging? Before being able to answer these questions, we shall initially not only follow the Court's line of argumentation, but shall also examine it with regard to its inner consistency and the compliance with previous case law. See, to that effect, part B II below.

Finally, we shall attend to the question as to whether the "normal form" of collective actions taken by ITF, i.e. strikes and boycotts by dockers, is subject to concerns relating to EC law. The ECJ judgment did not mention any such concerns, however, indirect consequences may result from individual statements made by the Court. See part B III below.

B. Legal opinion

I. Applicability of the ECJ principles to vessels sailing under the flag of third countries?

1. Foreign companies as subjects of the freedom of establishment?

Art. 43 par. 1 of the EC Treaty confers the freedom of establishment on all "nationals of a member state" with regard to the territories of the other member states. Art. 48 par. 1 of the EC Treaty provides for companies or firms formed in accordance with the law of a member state and having "their registered office, central administration or principal place of business" within the Community, to be treated in the same way as "Community citizens". The nationality of the company's owners is irrelevant in this context.

> The wording of this provision, which does not exclusively refer to the location of the central administration of a company, was devised to accommodate the fact that certain states within the EU followed the incorporation doctrine, while others followed the seat doctrine. See, to that effect, Müller-Graff, in: Streinz (editor), EUV/EGV, Kommentar, München 2003, Art. 48 EGV par. 10

Natural persons, who are nationals of a third country, cannot be the subjects of the freedom of establishment. This is completely undisputed, and supported by the wording and purpose of Art. 43 par. 1.

> See: Troberg-Tiedje, in: Von der Groeben-Schwarze (editor), Kommentar zum Vertrag über die Europäische Union und zur Gründung der EG, vol. 1, 6th edition, Baden-Baden 2003, Art. 48 par. 35

Even permanent abode or a place of residence in the EU cannot change this. This is an indirect conclusion from Art. 43 par. 1 sentence 2 of the EC Treaty, which exclusively refers to EC nationals who are "established" in a member state. Also, a provision corresponding to Art. 49 par. 2 of the EC Treaty - which permits the Council, acting by a qualified majority on a pro-

posal from the Commission, to extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community - does not exist in the area of the freedom of establishment.

The same applies to companies and firms. According to Art. 48 par. 1, they must have been formed in accordance with the law of a member state. Even if - which is highly unlikely under the circumstances - the company statutes provided for a seat within the Community, this would not have any consequences with regard to the right of establishment, as Art. 48 par. 1 cumulatively requires the formation in accordance with the law of a member state, and a seat within the Community.

> See, to that effect: Troberg-Tiedje, op. cit., Art. 48 EG-Vertrag, par. 6, 34; Scheuer, in: Lenz-Borchardt (editor), EU- und EG-Vertrag, 4th edition, Köln 2006, Art. 48 par. 2

The only issue to be evaluated under these circumstances is whether this conclusion might be different if the foreign subsidiary is controlled by nationals of a member state, or by a company established here. However, a "control doctrine" such as this is generally rejected as well.

> See for all: Bröhmer, in: Calliess-Ruffert, EG-Vertrag, 3rd ediciton, München 2007, Art. 48 par. 6; Troberg-Tiedje, op. cit., Art. 48 par. 38; Scheuer, op. cit., Art. 48 par. 2

The national legislature is even prohibited from "piercing" a company's nationality by basing a decision (e.g. regarding the registration of a vessel) on the nationality of the beneficial owner.

> ECJ, 25 Jul. 1991 – case C-221/89 – Factortame – EuZW 1991, 764

It is therefore not necessary to decide the difficult question as to when nationals of a member state are to be considered to have effective control.

It can therefore be stated as an initial conclusion that subsidiaries and branch offices in third countries cannot rely on the freedom of establishment under Art. 43 et seq. of the EC Treaty. This is particularly important in cases where, for instance, a US or Japanese company intends to "reflag" in a similar way as in the Viking case, without having a subsidiary within the EU.

2. Foreign companies as the subjects of the freedom to provide services?

The second question is whether it may be contrary to the freedom to provide services under Community law if flag of convenience vessels, for instance from Antigua, Honduras or Panama, are not cleared in European ports, and therefore are unable to provide their services.

On the normative level, there is a particularity in that Art. 51 par 1 of the EC Treaty refers to the title relating to transport, which means that the freedom to provide services under Art. 49 does not automatically apply. Art. 80 par. 2 of the EC Treaty entitles the Council to lay down appropriate provisions for maritime transport. On the basis of the (identical) preceding provision in Art. 84 par. 2 of the EC Treaty, former version, the Council made use of this right by, inter alia, the passing of Council Regulation No. 4055/86 dated 22 December 1986.

> Exact title: 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 31 Dec. 1986, No. L 378/1 et seq.

This Regulation is the decisive legal basis for the provision of services in maritime transport. Since 01 Jan. 1987, complete freedom to provide services has been implemented in this area as well.

> Jung, in: Calliess-Ruffert, op. cit., Art. 80 par. 11 with further references. The ECJ's Viking decision also was given on this assumption (AuR 2008, 55, 56 = NZA 2008, 124, 126 – Tz 29 and 30).

The Regulation's scope of application is defined in Art. 1. Following this, the principles applicable to natural persons are laid down in paragraphs 1 and 2, while paragraph 3 refers, inter alia, to Art. 58 of the EC Treaty, former version, the wording of which is identical to the currently valid Art. 48 of the EC Treaty. This provision - as has been described in No. 1 above - states that companies and firms shall be treated in the same way as natural persons.

Art. 1 par.1 of the Regulation provides as follows:

> "Freedom to provide maritime transport services between member states and between member states and third countries shall apply in respect to nationals of member states who are established in a member state other than that of the person for whom the services are intended."

While par. 1, just as the regulations in the area of the freedom of establishment, is linked to the nationality of a member state and the establishment within the Community, par. 2 goes beyond this. It states:

> "The provisions of this Regulation shall also apply to nationals of the member states established outside the Community and to shipping companies established outside the Community and controlled by nationals of a member state, if their vessels are registered in that member state in accordance with its legislation."

This means an extension to nationals of a member state established in third countries, and to companies established in third countries, however, only if the vessels are registered in a member state. The provision does not encompass the case that nationals of a third country register their vessels in an EU country. This is particularly important if such vessels are then let to a subsidiary in a flag of convenience state for two years, by way of bare boat charter.

The so-called flag of convenience vessels lack just this precondition: They often are registered in third countries such as Antigua, Liberia or Panama, in order to benefit from the advantages connected with a registration in those countries. Regulation No. 4055/86 of 22 Dec. 1986 therefore is not applicable to such vessels. The same applies if a foreign shipowner transfers a vessel registered in the EU to a subsidiary in a flag of convenience state for a certain period of time. In either case they can, from the outset, not rely on the freedom to provide services under Community law should dockers within the Community boycott the vessel in order to force the shipowner to accept the ITF collective agreements.

3. Reflagging as the exercise of the freedom of establishment?

Finally, it must be asked whether a company established within the community can rely on the freedom of establishment if it intends to found a branch office in a third country (e.g. in Antigua), and transfer a vessel to this branch.

The wording of Art. 43 par. 1 of the EC Treaty insofar is unambiguous: It relates to the free establishment "in the territory of another member state". An establishment outside the Community is not embraced by the provision, in particular as this "freedom of emigration" could not be justified with the Community's objectives under Art. 2 and Art. 3 of the EC Treaty. An exception only applies, based on a specific agreement, for the European Economic Area, i.e. for Norway, Iceland and Liechtenstein. The same position is taken in legal literature;

see, for example: Tiedje-Troberg, in: von der Groeben-Schwarze, op. cit, Art. 43 par. 145.

Opposing opinions are not evident.

This means that a company cannot rely on the freedom of establishment if it founds a subsidiary in a third country. Collective measures directed against these activities can therefore not founder on the basis of Art. 43 of the EC Treaty. The same applies if a company established in the EU transfers a vessel to a company in a flag of convenience state by means of bare boat charter.

II. The conflict between collective action and the freedom of establishment

1. The questions

The Viking case was different insofar as it related to "intra-community" facts: The employing company intended to found an Estonian subsidiary, and to transfer the "Rosella" to this subsidiary; in this respect, it intended to make use of its freedom of establishment. Therefore, the relationship between "collective action" and the fundamental freedoms under Art. 43 and Art. 48 was the issue in dispute, at first sight.

However, the conflict of a fundamental right with a fundamental freedom laid down in the EC Treaty was not unavoidable from the outset. This problem only occurs if "collective action" falls under the scope of application of the Treaty. Assuming this to be the case, the next question is whether the freedom of establishment can be relied on against other private parties, in particular a trade union, i.e. whether it has "horizontal effect". Only if this question also is answered in the affirmative will it become necessary to examine in a third step how to define the relationship between the freedom of establishment and a strike, or, putting it more generally: between fundamental freedoms and a (potential) fundamental right to take collective action.

2. Exclusion of "collective action" from Community law?

a) Art. 137 par. 5 of the EC Treaty

Art. 137 par. 5 of the EC Treaty provides that the legislative competences bestowed upon the Community in the previous paragraphs 1 to 4 of the provision, in the area of labour and social law, shall "not apply to pay, the right of association, the right to strike or the right to impose lock-outs". Therefore, the Community is not competent to pass Regulations or Directives for these sectors. The member states have maintained competence in this respect.

While the ECJ acknowledged this fact in its Viking judgment, the Court at the same time stressed that the member states are obliged to observe Community law when exercising their powers.

ECJ NZA 2008, 124, 127 = AuR 2008, 57 No. 40

The exclusion of strikes and lock-outs was therefore held to not be able to exempt collective action such as the one threatened in the Viking case from the application of Art. 43 of the EC Treaty (op. cit., No. 41).

Restricting oneself to this irrefutable statement, and at the same time granting direct horizontal effect to the freedom of establishment and to other fundamental freedoms, this would have the consequence of the Community nevertheless acting as a law-maker in the mentioned fields. As a result, this role is, however, not exercised by the legislator (Parliament, Council, Commission), but by the judiciary: By interpreting the fundamental freedoms, and determining their limitations, the European Court of Justice has developed a network of rules, in particular in the present case, which are to be observed in case of strikes with cross-border implications. This obviously misses the objective of Art. 137 par. 5 of the EC Treaty, which intended to exclude the Community's competence altogether, not only with regard to the EC legislator.

Likewise: Ballestrero, Le sentenze *Viking* e *Laval*: La Corte di giustizia "bilancia" il diritto di sciopero, Lavoro e Diritto XXII (2008) 371, 379

Neither the EC Treaty nor corresponding national regulations mention judge-made law, which does not have the status of a formal source of law.

This does not mean that legal literature generally excludes the law-making function. See, for instance, Wedderburn, Labour Law 2008: 40 Years on, ILJ 36 (2007) 397, 417, 421

To deduce requirements regarding collective action from the fundamental freedoms is even less acceptable, as primary law can only be corrected by means of a modification of the Treaty. Such modifications require a unanimous vote by all 27 member states - a prerequisite

which is far more difficult to fulfil than the qualified majority necessary under national law for a modification of the constitution. The problems incurred during the adoption of the EU Constitution and the Lisbon Reform Treaty provide sufficient illustration in this respect. One may question this under aspects of the theory of democracy. However, assuming nevertheless that this is the case, the European Court of Justice at least is obliged, in view of the potentially "eternal character" of its decisions, to make very restricted use of its competences. This means that, in addition to the limitation laid down in Art. 137 par. 5 of the EC Treaty, there is an obligation of self-restriction, which is difficult to reconcile with the Court's practice, starting with the Viking decision, of setting specific prerequisites to the legitimacy of a strike.

> In the Viking case, the ECJ, for instance, analysed in detail the suitability and necessity of the threatened collective action, and then set detailed conditions for the national courts' decision in the case.

One cannot contend that the fundamental freedoms and the prohibition of discrimination are applied in areas where the Community does not have explicit law-making competence.

> See, for instance the "Tanja Kreil" case, dealing with women's access to activities in the Bundeswehr (German military forces - see ECJ 11.01.2000 – C-285/98 – ECR 2000 I-69); further examples in Reich, Free Movement v. Social Rights in an Enlarged Union – the Laval and Viking Cases before the ECJ, German Law Journal 09 (2008) 125, 128

In contrast to this, Art. 137 par. 5 relates to an explicit exclusion from the Community's competence, the background of which is the motive of maintaining the diversity of labour relations which exist in the member states. In view of the fact that only the first signs of "European labour relations" are discernable at present, this is a necessary prerequisite to ensure the functioning of the Community, which up to now has continued to leave the social correction of the markets to the member states. To change this is a matter requiring a decision in constitutional policy, which the ECJ is not authorised to make.

> For further information, see Joerges-Rödl, Von der Entformalisierung europäischer Politik und dem Formalismus europäischer Rechtsprechung im Umgang mit dem „so-

zialen Defizit“ des Integrationsprojekts. An article in light of the ECJ judgments in cases *Viking* and *Laval,* ZERP-Diskussionspapier 2/2008, p. 13 et seq.

The decision of the Treaty to exclude the law of collective action from the Community's competences has also had implications on secondary Community law. With regard to the free movement of goods, Art. 2 of Regulation 2679/98 of 7. December 1998 (the so-called Monti Regulation) provides as follows:

> "This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in member states, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in member states."

This is consistent with Recital No. 4 of the Regulation, which says:

> "Whereas such measures (i.e. measures to ensure the free movement of goods) must not affect the exercise of fundamental rights, including the right or freedom to strike."

Measures intended to ensure the free movement of goods may therefore not result in a restriction on the right to strike. The ECJ at least would have had to consider whether the protection of the freedom of establishment is subject to similar restrictions under Community law.

The so-called "Services Directive" of 12 December 2006 (Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market, OJ 27 Dec. 2006, No. L 376/36) which substantiates the freedom to provide services and the freedom of establishment, also in principle does not affect national labour law, including collective agreements and "industrial action". Art. 1 par. 6 and 7 provide as follows:

> "(6) This Directive does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which member states apply in accordance with national law which respects Community law. Equally, this Directive does not affect the social security legislation of the member states.

(7) This Directive does not affect the exercise of fundamental rights as recognised in the member states and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law."

This corresponds to Recital No. 14, which states:

"This Directive does not affect terms and conditions of employment, including maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay as well as health, safety and hygiene at work, which member states apply in compliance with Community law, nor does it affect relations between social partners, including the right to negotiate and conclude collective agreements, the right to strike and to take industrial action in accordance with national law and practices which respect Community law, nor does it apply to services provided by temporary work agencies. This Directive does not affect member states' social security legislation."

This also describes an autonomous area which obviously is not intended to be regulated by Community law. However, Art. 1 par. 6 determines that Community law must be respected, i.e. material provisions may not undermine or even negate Community law. This would be the case if, for instance, a provision stipulated lower wages for workers from other (EC) countries, in comparison to domestic workers.

For further details, see Körner, EU-Dienstleistungsrichtlinie und Arbeitsrecht, NZA 2007, 233, 237

The negotiation systems as such, however, remain unaffected by Community law. The question as to the extent of the reservation of Community law, in detail, and specifically in the case on hand, does not need to be addressed in detail here. Rather, the only issue of interest is that both the Monti Regulation and the Services Directive confirm the principle worked out above, i.e. that the Community does not assume law-making competence for the law of collective action.

This is also decisive for the European Court of Justice. It therefore instead defied the restrictions set for the Community in the Viking judgment and in the identical statements in the Laval judgment (ECJ 18 Dec. 2007 - C-341/05 - AuR 2008, 59 et seq.). Insofar, the Court acted "ultra vires".

> Critical with regard to the extension of the ECJ's competence on the basis of the Opinions by the Advocates General in cases Viking and Laval, see: Schiek, Europäisches Arbeitsrecht, 3rd ed., Baden-Baden 2007, Part 1 D 70 et seq.; Thüsing, Europäisches Arbeitsrecht § 10 par. 12; Rebhahn, Grundfreiheit vor Arbeitskampf – der Fall Viking, ZESAR 2008, 109, 113

b.) Priority of collective action, similar to competition law?

The ECJ judgment of 21 Sep. 1999 (C-67/96 - Albany, DB 2000, 826) concerned a case where a Dutch sectoral collective agreement created a supplementary company pension scheme, controlled by an insurance company specified in the collective agreement. All companies operating within the area of application of the collective agreement were bound to this agreement, based on a decree issued by the Minister for Employment. An affiliated company contended that the system of compulsory affiliation, and thus the allocation to a defined insurance company, was contrary to the prohibition of anti-competitive agreements as laid down in Art. 81 of the EC Treaty. The Court on the one hand stressed that the EC Treaty prohibits all agreements which may affect trade between member states and which have, as their object or effect, the prevention, restriction or distortion of competition within the common market. It stated that the importance of that rule had prompted the authors of the Treaty to provide expressly in Art. 81 par. 2 of the Treaty that any agreements prohibited pursuant to that article are to be automatically void (ECJ loc. cit., par. 53). On the other hand, the Community's activities, according to Art. 3 par. 1 letters g and j of the EC Treaty also comprise "a social policy" which is reflected in numerous provisions (described in detail in the judgment, see par. 55 - 58). In conclusion, par. 59 says:

> "It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if

> management and labour were subject to Art. 81 par. 1 of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment."

This leads to the following conclusion in par. 60:

> "It therefore follows from an interpretation of the provisions of the Treaty as a whole, which is both effective and consistent, that 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 Art. 81 par. 1 of the Treaty."

Collective agreements are therefore exempt from the prohibition of anti-competitive agreements.

It may be obvious to transfer this to the freedom of establishment and the freedom to provide services; however, the ECJ, in the Viking judgment, opposed such steps. In doing so, it relied on three considerations.

(1) In par. 52 of the judgment, the Court states that "it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced to a certain degree".

This is surprising, in particular as the Court fails to provide any material substantiation for this argument.

> Also criticised by A.C.L. Davies, One Step Forward, Two Steps Back? The *Viking* and *Laval* cases in the ECJ, Industrial Law Journal (ILJ) 37 (2008) 126, 134

As soon as there are cross-border implications, it is not only the competition rules in Art. 81 et seq. that are affected under certain preconditions. Rather, the freedom of establishment and, in particular, the freedom to provide services, come into play at least to the same extent. This can already be seen in the Albany case, which gave rise to the problem that an insurance company established in another member state intended to take over the supplementary pension scheme.

In the abstract of the reasons for this judgment in DB 2000, 826, the summary of facts explicitly refers to the fact that the company in question had also contended a violation of Art. 43 and 49 of the EC Treaty (also quoted in ECJ, ECR 1999, I-5751), but the ECJ did obviously not pursue this line of argumentation.

Furthermore, if collective agreements make the relocation of a company more difficult, this can be regarded as a restriction on the freedom of establishment; the costs which may be caused by a social compensation plan make the exercise of the fundamental freedom "less attractive". Vice versa: Particularly low wages fixed in collective agreements in one country - a case which is hardly ever mentioned - may jeopardise the freedom to provide services for companies from member states with a particularly high wage level. Although there may be doubt as to where to draw the line in each individual case - it cannot be doubted however, that there is a potential conflict, just as in the area of competition law.

A subordination under competition law would by no means automatically lead to a general inadmissibility of collective agreements. This can, for instance, be seen in the Court's judgment in the Pavlov case (ECR 2000, I-6497), where a pension system for medical specialists similar to the one established in the Albany case was measured at Art. 81 of the EC Treaty, and was held to be lawful.

However, where there are no cross-border implications, for instance on a purely local market, Art. 81 et seq. of the EC Treaty are not applicable, as trade between the member states cannot be adversely affected. Likewise, the freedom to provide services and the freedom of establishment would be meaningless as the parties involved are operating outside the scope of application of Community law.

On this issue, also see Rebhahn, loc. cit., ZESAR 2008, 109, 113

(2) In par. 53, the ECJ contends its second argument:

"Furthermore, the fact that an agreement or an activity is excluded from the scope of the provisions of the Treaty on competition does not mean that that agreement or activity also falls outside the scope of the Treaty provisions on the free movement of

> persons or services since those two sets of provisions are to be applied in different circumstances (see, to that effect, the judgment of 18 July 2006, Meca-Medina …)."

These statements do not have independent justifying value. Nobody has ever contended that the preconditions for the application of Art. 81 et seq. and of the fundamental freedoms must be identical in all respects, even if both cases concern entrepreneurial activities. The decisive issue in the Albany judgment was that collective agreements cannot fulfil their social policy objectives if they are made subject to competition law. The same applies for the examination against the standards of the freedom of establishment and the freedom to provide services, so that it is obvious that a decision in this respect cannot depend on whether the two groups of legal norms may potentially have different application prerequisites in other contexts.

> The other decision referred to by the ECJ, of 18 July 2006 (Meca-Medina and Majcen/ Commission, C-519/04 P, ECR 2006, I-6991) does not provide any further considerations.

(3) As a third point, the ECJ in par. 54 of the Viking judgment repeats a previous decision in which it held that the terms of collective agreements are not excluded from the scope of the Treaty provisions on freedom of movement for persons. This is correct, but does not take into consideration that compliance with the freedom of movement for employees at the most requires minor modifications to collective agreements. In contrast to this, invoking the freedom of establishment and the freedom to provide services may render a compromise in relation to a collective agreement impossible from the outset, as entrepreneurial freedom does not allow the intervention which would be necessary to this effect: Regarding the question of whether or not a system of collective agreements works in practice, there is a fundamental difference between a provision determining that certain groups of employees may not be discriminated, or hindered in their chances of employment, and a provision which grants the opponent comprehensive rights of liberty.

> See, to that effect, Davies, op. cit., ILJ 37 (2008) 136

Under these circumstances, the non-application of the Albany case law is a breach in the Court's jurisdiction which has not been supported by sufficient arguments.

3. Scope of protection and horizontal effect of the freedom of establishment

a) Scope of protection

Art. 43 par. 1 of the EC Treaty is directly applicable, and grants the individual nationals of the Union the right of establishment in another member state; restrictions are only admissible in accordance with Art. 45 et seq. of the EC-Treaty.

This fundamental freedom was initially designed as a prohibition of discrimination, i.e. it only excluded provisions by the state of establishment which made greater demands for the nationals of another EC member state intending to take up an activity, than for its own nationals.

> See ECJ, 4 Apr. 1974 - C-167/73, EuGHE 1974, 359 par. 44 et seq.

In the course of the decades, the fundamental freedoms were developed into "restriction prohibitions"; for the area of the freedom of establishment, this happened in the ECJ's Gebhard judgment.

> ECJ, 30 Nov. 1995 – C-55/94 – ECR 1995, I-4165 = JZ 1996, 465, 467 with comments by Ehlers-Lackhoff

Even if domestic and foreign companies are affected in the same way, this is contrary to the fundamental freedom in question. This is meant to provide all companies established in the Community with identical market access chances.

Furthermore, the freedom of establishment not only prohibits measures which are liable to make impossible, or substantially impede establishment. Rather, it is sufficient if it is made "less advantageous".

> ECJ, 03 Oct. 2000 – C-58/98 – ECR 2000, I-7919 – Corsten par. 33

Another question which has not been posed is whether there are limitations to the exercise of the freedom of establishment in case of an abuse, which limitations may be overstepped if an

offshore company is established with the objective of employing seamen at wages which would qualify as immoral in the country concerned. Considerations such as this may not imperatively have arisen in the Viking case, as the intended Estonian subsidiary was also meant to recruit personnel in Estonia, i.e. would not merely have served as an empty shell - however, in other cases, which are very common in maritime traffic, this is exactly the problem which may arise.

Ballestrero, in: Le sentenze *Viking* e *Laval*: La Corte di giustizia "bilancia" il diritto di sciopero, Lavoro e Diritto XXII (2008) 371, 374, refers to this problem.

The other fundamental freedom rights have taken the same development towards a restriction prohibition.

For details, see Schiek, Europäisches Arbeitsrecht, op. cit., Part I C par. 81 et seq.; see, for instance, ECJ 27 Jan. 2000 – C-190/98 – ECR 2000, I-493 = NZA 2000, 413 – Graf, who, in par. 18, explicitly stresses that the issue at stake was not merely indirect or direct discrimination (on grounds of nationality).

b.) Horizontal effect

According to ECJ judgments, the fundamental freedoms have a horizontal effect at least insofar as they apply to rules set by private parties. This has been elaborated in the Bosman judgment for the area of the freedom of movement of workers,

ECJ 15 Dec. 1995, C-415/93, ECR 1995, I-4921 = AuR 1996, 196

however, the same applies to the other freedom rights. Therefore, the ECJ in the Viking decision was able to restrict itself to the statement that it is settled case law that Art. 39, 43 and 49 of the EC Treaty do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services.

ECJ, loc. cit., AuR 2008, 56 par. 33

Since working conditions in the different member states are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, limiting application of the prohibitions laid down by these articles to acts of a public authority would risk creating inequality in its application (loc. cit. par. 34).

This has substantial consequences, also with regard to collective action. In the case in hand, such action was held to be inextricably linked to a collective agreement, so that it also had to be examined against the standard set in Art. 43 of the EC Treaty (loc. cit. par. 37), and thus required special justification.

> However, it is by no means imperative to draw a conclusion from the collective agreement as the set of rules to be controlled, to collective action as such. The first refers to binding rules, the second to procedures by which to achieve them. See, Ballestrero, Lavoro e Diritto XXII (2008) 371, 376. There also are numerous member states where strikes are by no means limited to the objective of concluding collective agreements.

The ECJ's decisions in this context result in the freedom of establishment and the freedom to provide services obtaining outstanding quality as fundamental rights. Even though this has up to now not been expressed clearly enough in legal literature, the development of the fundamental freedoms into restriction prohibitions has had the consequence of creating a guarantee of free entrepreneurial activities under Community law. Whenever companies feel that they are made subject to restrictions of their freedom of action, whether by a state or collective action, they are able to invoke the freedom of establishment or the freedom to provide services. Purely domestic cases, which fall outside the scope of Community law, only exist in local markets without any cross-border dimensions. The standard case is, that foreign group affiliates and other economic entities are present in the market, which can fight regulations imposed by the national economic supervisory bodies, or collective standards etc., by invoking their fundamental freedoms. In Germany, it becomes superfluous to invoke Art. 12 par. 1 or Art. 14 par. 1 GG (German Constitution), and the social obligations entailed with property, as set out in Art. 14 par. 2 GG is superseded by Community law.

> See, to that effect, Davies ILJ 37 (2008) 137, who points out that consumer initiatives may be regarded as (illegal) interference with the freedom to provide services.

The consequences for the conclusion of collective agreements are particularly far-reaching. The indirect link to the employer's freedom rights, which up to now has been supposed to exist under German law,

> on the current state of court decisions, see references in: Däubler, Das Arbeitsrecht 1, 16th edition, Reinbek 2006 par. 241; Schiek, in: Däubler (editor), Tarifvertragsgesetz mit Arbeitnehmerentsendegesetz, 2nd edition, Baden-Baden 2006, Einl. (introduction) par. 204 et seq.

is replaced by a direct link. This means that the possibilities of action for the workers has been drastically restricted: Collective compromise, and collective action taken to achieve it, are admissible only to the extent to which the opponents' freedom of action allows exceptions. The negotiations system based on equality as defined in Art. 9 par. 3 GG is replaced by an unequal system, where one position is "fixed", while the other has become an exception requiring justification.

> On the different approach in tax law, where the decisive issue is a discriminating effect, see Barnard, Employment Rights, Free Movement under the EC-Treaty and the Services Directive, Edinburgh Europa Institute, Mitchell Working Paper Series No. 5/2008, p. 7 with further references.

The prerequisites under Community law for autonomy in collective bargaining and for collective action are not the ones defined by the German Constitution; however, their structure does not correspond to the legal situation in other member states either.

> See Davies ILJ 37 (2008) 141; Ballestrero Lavoro e Diritto XXII (2008) 371, 375

4. Justified collective action

In the Viking judgment, the ECJ reaffirms 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" (ECJ NZA 2008, 124, 127 = AuR 2008, 57 par. 44). Par. 43 states with regard to the legal basis for this:

> "In that regard, it must be recalled 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, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC – and Convention No 87 concerning Freedom of Association and Protection of the Right to Organise, adopted on 9 July 1948 by the International Labour Organisation – 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 (? – question mark added by the author) on 9 December 1989, which is also referred to in Art. 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C-364, p. 1)"

Following this, the Court stresses that it previously decided that the protection of fundamental rights was a justified interest which in principle is capable of justifying restrictions to the fundamental freedoms such as the free movement of goods and the freedom to provide services. For the former area, reference is made to the Schmidberger judgment (of 12 June 2003 – C-112/00 – ECR 2003, I-5659, par. 74), for the latter to the Omega judgment (of 14 October 2004 – C-36/02, ECR 2004, I-9609, par. 35). This "capability to justify a restriction" is further explained in par. 46. It says:

> "However, in Schmidberger and Omega, the Court held that the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity respectively, does not fall outside the scope of the provisions of the Treaty and considered that such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the prin-

ciple of proportionality (see, to that effect, Schmidberger, par. 77, and Omega, par. 36)."

However, the Court, in par. 47 only draws the conclusion that the right to take collective action, in spite of its fundamental nature, does not change anything with regard to the applicability of Art. 43 of the EC Treaty. The process of reconciliation of interests is carried out without any reference to the right to take collective action, which is held to be so "fundamental":

Initially, the Court states that the measures violate the freedom of establishment, as the envisaged collective action has the effect of "making less attractive, or even pointless the establishment in Estonia" (par. 72). Also, collective action taken in order to implement ITF's policy of combating the use of flags of convenience must be considered to be at least liable to restrict Viking's exercise of its right of freedom of establishment.

Restrictions of this kind must be 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 (loc. cit., par. 75).

The protection of workers is among the "overriding reasons of public interest". This is reaffirmed by a reference to Art. 3 par. 1 letters c and j of the EC Treaty which provide that the Community's activities comprise "a policy in the social field"; furthermore, the Court quotes Art. 2 of the EC Treaty which states that the Community is to have as its task "the promotion of a harmonious, balanced and sustainable development of economic activities and a high level of employment and of social protection". It is therefore necessary to balance the fundamental freedoms against "the objectives pursued by social policy", which include improved living and working conditions (par. 79). It is therefore for the national court to examine whether the measures at issue concerned the protection of workers. Such a view would, for instance, not be tenable if it were established that the jobs or conditions of employment were not under serious threat. Also, it is for the national court to examine whether there were other means which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with Viking (par. 87).

Various points in these statements must be challenged.

First of all, the guarantee of the fundamental right to take collective action, including the right to strike, is practically irrelevant as far as the standards are concerned against which the national court is to examine the lawfulness of the threatened strike. The fundamental right is replaced by the Community's objectives in the field of social policy, the pursuit of which is subject to specific control by the courts.

> Critical comment by Bayreuther, Das Verhältnis zwischen dem nationalen Streikrecht und der EU-Wirtschaftsverfassung, EuZA 2008, 395, 401

This means that the Court of Justice has taken a different approach in comparison to the Schmidberger case: In Schmidberger, the Court balanced the fundamental right of the freedom of assembly against the free movement of goods, while here, the conflicting issues were not the right to strike and the freedom of establishment, but specific objectives of social policy and the freedom of establishment, which objectives may only be pursued within the framework of what is suitable and necessary.

> To that effect, see Davies ILJ 37 (2008) 142

While the exercise of a fundamental right is not subject to comprehensive control under the principle of proportionality, this seems more plausible for mere objectives of social policy.

> Critical comments also by Lo Faro, Diritti sociali e libertà economiche del mercato interno: considerazioni minime in margine ai casi *Laval* e *Viking*, Lavoro e Diritto XXII (2008), 63, 93

Nothing is left of the social partners' autonomy to decide for themselves on the objectives pursued and on the means to apply - comparable to a right to demonstrate which is recognised only if the pursued ("good") objectives, in a process of balancing against the fundamental freedom concerned, prove to be more important.

> Ballestrero Lavoro e Diritto XXII (2008) 371, 383 also refers to this; further details in: Kocher, Kollektivverhandlungen und Tarifautonomie – welche Rolle spielt das europäi-

sche Recht? AuR 2008, 13, 16. Also see the comments by Sciarra, *Viking* e *Laval*: diritti collettivi e mercato nel recente dibattito europeo, Lavoro e Diritto XXII (2008) 245, 267

As a consequence, the fundamental right to take collective action becomes an empty declaration, which in legal literature has led to the assumption that the intention is to "rhetorically cushion the submission of collective action under the fundamental freedoms."

Rebhahn, ZESAR 2008, 109, 111

Even on the level of official statements, the protection of fundamental rights is put into perspective in an unacceptable manner. According to the statements in par. 46, it is not only the freedom of expression and the freedom of assembly which must be reconciled with the requirements of the rights protected under the Treaty, but also the respect for human dignity; all this is subject to the principle of proportionality. The idea that the respect for human dignity no longer is protected absolutely, but only within the framework of a balancing process with market freedoms, is far removed from the protection of fundamental rights as it has developed, inter alia, in Germany or in France.

The Schmidberger judgment, in contrast to this, still made a differentiation between restrictable and non-restrictable fundamental rights; the Court (correctly) held that only the latter could be weighed against the fundamental freedoms.

ECJ 12 Jun. 2003 – C-112/00 – EuZW 2003, 592, 596, par. 80

No reference has been made to this in the Viking judgment, which only refers to par. 77 of the Schmidberger judgment which exclusively relates to the fundamental rights of expression and assembly.

In view of these circumstances, it is highly doubtful as to whether the conditions are still fulfilled under which the Bundesverfassungsgericht (German Federal Constitutional Court) abstains from examining against the standard of the fundamental rights as set out in the German Constitution the legal acts issued by the Community. This "condition" has been set out in the so-called "Solange II" judgment

BVerfGE 73, 339 et seq. = JZ 1987, 236 et seq.

and was maintained in the so-called Maastricht judgment.

BVerfG JZ 1993, 1100 et seq. = EuZW 1993, 667 et seq.

According to this, the following applies:

> "As long as the European Communities, in particular the decisions of the Community's Court of Justice, generally provide an effective level of protection of the fundamental rights against the Community's sovereign power, which, in its essence, is to be considered equal to the protection of the fundamental rights provided for as indispensable in the German Constitution, and which in general ensures the essential content of the fundamental rights, the Bundesverfassungsgericht will no longer exercise its jurisdiction with regard to the applicability of derived Community law which is used as a legal basis for acts by German courts or authorities within the territory of the Federal Republic of Germany, and will therefore not examine such law against the standards set by the fundamental rights of the German Constitution; corresponding submissions under Art. 100 par. 1 GG are therefore inadmissible." (headnote 2 of the Solange II judgment).

In this context, there is a cooperative division of work to the effect that the ECJ provides protection of the fundamental rights in the individual case, and that the BVerfG will only make use of its competence if the protection of the fundamental rights by the EC "in general" falls below the German level, in particular if it no longer ensures the essential content of the fundamental rights.

> See, to that effect, Götz, JZ 1991, 1081, 1083, making reference to Kirchhof EuR Beiheft (supplement) 1/1991, 11, 24 et seq.

Putting into perspective in the said manner the respect for human dignity, which is what the ECJ did in the Viking and Laval decisions (ECJ AuR 2008, 59, 62 par. 94), will probably call into question the general equality of the protection of fundamental rights under Community law. It may be a way out of this conflict situation to consider workers´ rights, including the

autonomy in collective bargaining, not as "imperative requirements" which allow a restriction of the freedom of establishment and the freedom to provide services, within the framework of the necessary. On the contrary, the solution would be - as has been justified under different considerations in 2 a and b above - to declare the organisation of the labour market to be an independent area, which means that, at least with regard to the workers' fundamental rights, a conflict with the fundamental freedoms could be avoided from the very beginning. The competition guaranteed by the latter would be restricted to a competition of performance, which would, however, as a matter of principle exclude competition of social costs.

III. Examination on the basis of the Viking judgment

1. Strikes against relocation

According to the ECJ's opinion, the strike threatened by the Finnish Seamen's Union "at first sight" meets the requirements for a restriction of the freedom of establishment, as it could "reasonably be considered to fall within the objective of protecting workers (par. 81). However, the ECJ holds that this shall only apply if "the jobs or conditions of employment at issue" are under serious threat. A promise by the employers to not lay off any employees would not hinder this; rather, the same level of commitment would be required as is provided by a collective agreement.

> ECJ AuR 2008, 55, 58 par. 82 ("from a legal point of view, as binding as the terms of a collective agreement"). Voß in: Europäischer Gerichtshof setzt der ITF Grenzen, Hansa Nr. 2/2008, p. 57, overlooks this fact.

According to experience, in practice a "danger" will practically always have to be considered to exist. The extension of fixed-term contracts could also be the objective of a strike, as it also relates to the preservation of the status quo. It is remarkable that the Finnish Seamen's Union initially demanded an abandonment of the project of reflagging (judgment, par. 13), while it subsequently only set the condition that Finnish law, and the valid collective agreements, should continue to be applicable, in spite of a potential reflagging (judgment, par. 15) - a differentiation which the Court of Justice did not consider to be meaningful. Insofar, the prevention of reflagging as such could be the objective of the strike, as long as the general preconditions have been fulfilled.

Further elements required to ensure lawfulness are the suitability and the necessity of the strike. Here, it is eventually for the national court to examine in detail whether less restrictive means were available in the specific case.

Similar: Zwanziger, Arbeitskampf- und Tarifrecht nach den EuGH-Entscheidungen „Laval“ und „Viking“, DB 2008, 297

However, on the level of Community law, the outlines of the principle of proportionality remain uncertain.

Accurately stated by Rebhahn, ZESAR 2008, 109, 116

However, the member state is not obliged to provide less restrictive means on its own accord. Should it be obvious that an agreement cannot be reached without a strike, such strike is admissible, even under the preconditions set by the ECJ. In this context, it will have to be regarded as legitimate that a trade union, as under German law, has the discretion to decide from which time onwards it considers “pressureless” negotiations to be fruitless.

See BAG NZA 1988, 846 = DB 1988, 1952; Details in: Däubler, Arbeitsrecht 1, op. cit., par. 523

The “collective actions”, the legal guarantee of which the ECJ reaffirms (judgment, par. 77 et seq.), are not limited to the strike. Rather, as in the Laval case (ECJ of 18 Dec. 2007 – C-341/05 – AuR 2008, 59) it also comprises solidarity campaigns and boycotts.

Likewise: Rebhahn, ZESAR 2008, 109, 116

Insofar, there is no difference whether - as in the Viking case - the seamen go on strike themselves, or whether - as in the Laval case - the collective action is taken by third parties. The boycott by the dockers is therefore justified under Community law, as long as it relates to the preservation of the existing working conditions.

2. Admissibility of the ITF campaign

In the Viking case, ITF had requested its affiliated trade unions to respect the exclusive negotiation rights of the Finnish union, and not to conclude collective agreements with this company or with its Estonian subsidiary. The statements made by the ECJ in this context (quoted under A III above), were interpreted in legal literature to mean that the Court had held that the campaign definitely violated Community law.

> Barnard, op. cit., p. 13; Rebhahn, ZESAR 2008, 109, 116; Wendeling-Schröder, Streikrecht und gemeinschaftsrechtliche Grundfreiheiten, AiB 2008, 179, 183

This generalising statement is not correct. It is true that par. 88 initially emphasises that, to the extent that a policy results in shipowners being prevented from registering their vessels in a state other than that of which the beneficial owners of those vessels are nationals, such policy cannot be objectively justified. In the following sentence, the Court stated, however, that "nevertheless", the objective of that policy is also to protect and improve seafarers' terms and conditions of employment. In the context of the argumentation this can only mean that the Court considers that in this respect there is a possibility of an objective justification. The next paragraph details that the policy of reserving the right of collective negotiations to trade unions of the state of which the beneficial owner of a vessel is a national is also applicable where the vessel is registered in a state which guarantees workers a higher level of social protection than they would enjoy in the first state; however, this could not be justified. Without being able to examine this in detail within the framework of this study, this may be the case if the ITF documents were interpreted in a formalistic manner; however, it has nothing to do with reality: Vessels have been reflagged for decades in order to save personnel costs, cases where vessels were reflagged into a "better" country have not become known, and would certainly not fail because of resistance by trade unions.

> Lo Faro, Diritti sociali e libertà economiche del mercato interno: considerazioni minime in margine ai casi *Laval* e *Viking*, Lavoro e Diritto XXII (2008) 63, 92 talks about "curiosa condizione". In the same way Bayreuther EuZA 2008, 395, 403

The ITF can easily comply with the ECJ's requirements by issuing a statement clarifying that the exclusive right of collective negotiations only applies if there is a threat of a worsening of the working conditions. For this case, the statements in par. 90 apply, according to which there is a restriction on the freedom of establishment set out in Art. 43 EC; however, this is justified if the measure proves to be suitable and necessary.

> Already in favour of the lawfulness of ITF campaigns on the basis of the Opinions given by the Advocates General, Reich, Gemeinschaftliche Verkehrsfreiheiten versus Nationales Arbeitskampfrecht, EuZW 2007, 391, 393

3. Actions in relation to working conditions on reflagged vessels

The ECJ does not make a direct statement with regard to the question as to whether strikes by seamen, and in particular boycotts by dockers, must observe limitations under Community law if the reflagging has already taken place, and the only objective is to implement the terms of the ITF standard collective agreement.

> From the economic point of view, these terms are on a medium level between the developing countries on the one hand and the industrialised countries on the other hand.

The issue concerned in these cases is the freedom to provide services guaranteed under Council Regulation No. 4055/86 of 22 December 1986 (OJ 31 Dec. 1986, No. L 378/1). According to Art. 1 par. 2 of said Regulation, the provisions also apply to nationals of the member states established outside the Community, however, only if their vessels are registered in the member state of which the economic owners are nationals (for details, see B I 2 above). This means that the only issue at stake can be "flags of convenience" from an EU member state. If vessels are registered within the EU, but are chartered to a company in a flag of convenience state for a certain period of time, the freedom to provide services under Community law is not applicable either, as they operate as third country vessels during this period of time.

Due to the reference in Art. 3 par. 1 of the Regulation, the principles applicable in the area of Art. 49 et seq. of the EC Treaty also apply to restrictions.

According to its Art. 1 par. 2, the so-called "Posting of Workers Directive" of 16 December 1996 (Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services, OJ 21 Jan. 1997, No. L 18/1), is not applicable, which means that the detailed statements by the ECJ in the Laval judgment (ECJ 18 Dec. 2007 – C-341/05 – AuR 2008, 59, par. 54 et seq.) are irrelevant in the present context.

Can a strike by seamen or a boycott by dockers be reconciled with the freedom to provide services? The ITF Standard Collective Agreement is aimed at securing a minimum level which is intended to be guaranteed irrespective of the shipowner's or his subsidiary's nationality. It is implemented world-wide and is intended to embrace as many flag of convenience ships as possible. Discriminating elements are completely alien to it; the decisive point is only the flag of convenience, rather than a certain nationality. As a result, its recognition does not lead to making market access more difficult, or even impossible, for certain providers; this is why the restriction prohibition does not apply either. It has, therefore, been stressed correctly in legal literature that there was not even a restriction of the freedom to provide services.

Rebhahn, ZESAR 2008, 109, 117

Even if one held a different opinion in this regard, the measure would still be covered by the protection of workers' interests. The seamen's strike, or the dockers' boycott, only interrupts the provision of services for a short period of time, so that one may consider a parallel to the facts in the Schmidberger case. Other possibilities of achieving somewhat reasonable working conditions do not exist, which not least becomes clear in the fact that the majority of the flag of convenience ships, in spite of years of endeavour by the ITF, have still not been able to be prompted to conclude a collective agreement.

IV. Summary

1. Companies established in third countries cannot rely on the fundamental freedoms under Community law for the vessels belonging to them flying "flags of convenience". For the re-flagging of vessels into a third country, these freedoms do not apply either.

2. The judgments by the European Court of Justice in cases Viking and Laval deserve criticism. They ignore Art. 137 par. 5 of the EC Treaty, and therefore, without sufficient justification, leave behind the principles which have been applicable in competition law since the Albany judgment. To provide the fundamental freedoms with direct horizontal effect would lead to a comprehensive guarantee of the entrepreneurial freedom of action, as soon as a company goes beyond the area of merely local markets. To change the workers' opposing fundamental rights into exception provisions, would shift the burden to the disadvantage of dependent employees.

3. The ECJ exposes itself to the accusation of acting "ultra vires" by developing rules for collective action, and of no longer guaranteeing an equivalent protection of fundamental rights - which the BVerfG (German Federal Constitutional Court) demands in its Solange II judgment - by rendering absolute the fundamental freedoms.

4. ITF's collective actions, which are directly targeted against a reflagging, continue to be admissible, provided that less restrictive means which would be similarly successful, are not available. There are no legal obstacles under Community law against boycotts by dockers aiming to improve the working conditions on flag of convenience vessels.