European Trade Union Confederation (ETUC)
Confédération européenne des syndicats (CES)

Assessment of the Opinions of the Advocates General in *Laval* and *Viking* and Six Alternative Solutions

Advice to the ETUC of Brian Bercusson, King's College London 31 October 2007

Executive Summary

1. Decisions are imminent of the European Court of Justice (ECJ) in the cases of *Laval* and *Viking* concerning the claim that transnational collective industrial action by workers and trade unions violates employers' economic freedoms in the EC Treaty. This paper[1] proposes six solutions which may be considered satisfactory from the point of view both of legal doctrine and industrial relations practice.

1. Collective action is not subject to and falls outside the scope of the Treaty's economic free movement provisions (the *Albany* solution)

2. The ECJ in *Albany* offers a clear and unambiguous solution: Community law on free movement does not apply to collective action by workers and trade unions, protected as a fundamental right by the Community legal order. To paraphrase paragraphs 59-60 of the Court's judgment in *Albany*: "The fundamental rights to freedom of association and to take collective action would be seriously undermined if workers and their organisations were subject to the free movement provisions of the Treaty when seeking to take collective action to defend their interests, including strike action. It therefore follows from an interpretation of the provisions of the EU Charter and the Treaty which is both effective and consistent that collective action by workers or their organisations to defend their interests, including strike

[1] Extended version including explanatory note can be found on ETUC website

action, must, by virtue of its nature and purpose, be regarded as falling outside the scope of the free movement provisions of the Treaty".

3. A qualified solution following *Albany* would be to allow national courts to look to the "nature and purpose" of the collective action. If the collective action by workers or their organisations is of the nature reflected in the fundamental right, and its purpose is to defend their interests and promote the objectives of improving living and working conditions, it should be regarded as falling outside the scope of the free movement provisions of the Treaty.

2. Employers may not use economic freedoms in the Treaty against trade unions taking collective action (horizontal direct effect)

4. EC Treaty Articles 43 (freedom of establishment) and 49 (freedom of services) were aimed at regulatory action by public authorities (vertical direct effect) or professional associations regulating access to the labour market. This is not the case with trade unions engaging in collective action in pursuance of a collective agreement which regulates substantive terms and conditions of employment, not free movement.

5. To apply horizontal direct effect to collective agreements means the ECJ would be flooded with endless references from national courts asking whether a specific collective agreement in a particular Member State's collective bargaining system possessed the requisite regulatory effect.

3. Subsidiarity excludes EC competence to regulate collective action

6. The principle of subsidiarity precludes EC law intervening to regulate collective action by workers and trade unions, an equilibrium carefully constructed over time in different Member States and an area of law jealously guarded by Member States. EU intervention would be destabilising, as transnational collective action raises difficult questions in

private international law: which national court has jurisdiction and the law of which Member State applies. Different laws and different courts take different views regarding the legality of cross-border collective action.

7. The Services Directive rejected the “country of origin” principle to protect national social models, in particular, as regards collective bargaining, collective agreements and collective action: “the exercise of fundamental rights as recognised in the Member States and Community law… the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices…” (Article 1(7)).

4. Workers’ right to take collective action balances employers’ economic freedoms

8. Four criteria determine the appropriate balance between the economic freedoms of employers and the collective rights of workers and their organisations (the application of “proportionality”):

   i. The starting point is a presumption that transnational collective action by workers is a legitimate means to balance the transnational economic activity of employers. Both are protected by Community law.

   ii. In accordance with the principle of subsidiarity, this presumption is stronger if transnational collective action is lawful under national law.

   iii. Moreover, as a fundamental right protected by the general principles of Community law, national law may not prohibit transnational collective action. Although Member States may impose conditions on its exercise reflecting the national context and legal framework of industrial relations, Member States must “respect the essence” of the right to take collective action (Article 28 of the EU Charter) and “limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to

protect the rights and freedoms of others" (Article 52(1) of the EU Charter).

iv. Finally (building on the Opinions of Advocates General Mengozzi in *Laval* and Maduro in *Viking*), a specific criterion operates in the hypersensitive context of exercise by employers of their transnational economic freedoms. Collective action is lawful where the employer fails to comply with obligations under the *acquis communautaire social* protecting the rights of workers as an objective of general interest recognised by the Union. In doctrinal terms, this is a specifically EU criterion based on the *acquis communautaire social* reflected in Articles 27 and 28 of the EU Charter: protection by EU law of the transnational economic freedom of employers is balanced with protection of transnational collective action by workers. In practical terms, this solution contributes to avoiding the negative consequences of both litigation (seeking remedies in the form of injunctions from national courts to enforce the obligation to inform and consult) and precipitate collective industrial action by workers who should be properly informed and consulted before decisions affecting them are made.

5. Interpreting the Treaty as recognising that collective action is essential to the effective functioning of the internal market

9. The solution proposed is an interpretative approach to the Treaty. Treaty provisions are to be interpreted as recognising that collective action by workers is consistent with the effective functioning of the internal market. Workers and trade unions, as market participants, may take collective action to ensure their voice is heard and their interests are taken into account, a feature essential to the effective functioning of the internal market. Collective bargaining, collective agreements and collective action are essential to the effective and equitable functioning of the labour market.

10. This interpretative approach to the Treaty balances the discrepancy between the power of employers benefiting from European transnational economic integration, and the relative

weakness of a labour movement largely confined to national boundaries in its collective bargaining and collective action.

6. ***Ordre communautaire social* protects collective action by workers and trade unions**

11. *Laval* and *Viking* highlight the central role of the European Court in formulating principles governing collective action by workers. Apart from the EU Charter, the Court can invoke principles which reflect the general *acquis communautaire social* of regulation of employment and industrial relations by the Treaties and relevant secondary legislation: *ordre communautaire social*. In brief: labour is not a commodity like others (goods, services, capital), so free movement is subject to the Community objective of improvement of working conditions (Article 136 EC) and respect for the fundamental rights of workers as human beings (the EU Charter), acknowledging the central role of social dialogue and social partnership at EU and national levels and adhering to the strict principle of equal treatment without regard to nationality.

12. The Court protects collective action by workers and trade unions based on these principles of *ordre communautaire social*.

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