

**Assessment of the Opinions
of the Advocates General in *Laval* and *Viking***

and

Six Alternative Solutions

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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 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 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*.

Introduction

1. Decisions are imminent of the European Court of Justice (ECJ) in the cases of *Laval*¹ and *Viking*². The cases concern transnational collective industrial action by workers and trade unions in the European Union and the claim that such action violates employers' economic freedoms in the EC Treaty.
2. The cases will have a major impact on both the European trade union movement and the future of the European Union.³ It is vitally important that the Court proposes solutions which are satisfactory from the point of view both of legal doctrine and industrial relations practice.
3. The purpose of this paper is to demonstrate that there are at least six such satisfactory solutions. These solutions are consistent with the past doctrine of the Court. Equally important, they are practicable from the point of view of the law and practice of industrial relations in the EU Member States and the evolution of the social dimension of the European Union.

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

4. The European Court in its judgment in *Albany*⁴ was concerned with whether collective agreements violated the EC Treaty's provisions on competition by fixing terms and conditions of employment on pensions. The Court cited Article 3 of the EC Treaty under which:⁵

“the activities of the Community are to include not only a ‘system ensuring that competition in the internal market is not distorted’ but also ‘a policy in the social sphere’”.

¹ Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, Avdelning 1, Svenska Elektrikerförbundet*, Opinion of Advocate General Paolo Mengozzi, 23 May 2007.

² Case C-438/05 *Viking Line Abp OU Viking Line Eesti v The International Transport Workers' Federation, The Finnish Seamen's Union*, Opinion of Advocate General Miguel Poiares Maduro, 23 May 2007.

³ B. Bercusson, “The Trade Union Movement and the European Union: Judgment Day”, (2007) 13 *European Law Journal* (No. 3, May), pp. 279-308.

⁴ *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, Case C-67/96; with Joined cases C-115/97, C-116/97 and C-117/97; [1999] ECR I-5751.

⁵ *Ibid.*, paragraph 54.

5. It also cited Article 2 of the Treaty providing that:

“a particular task of the Community is ‘to promote through the Community a harmonious and balanced development of economic activities’ and ‘a high level of employment and of social protection’”.

6. The Court also rehearsed the provisions of the Treaty referring to the right of association and collective bargaining, social dialogue and collective agreements.⁶ It concluded:

“59. 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 Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.

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 Article 85(1) of the Treaty”.

7. The Court considered that “the agreement at issue in the main proceedings was concluded in the form of a collective agreement and is the outcome of collective negotiations between organisations representing employers and workers”. Its subject matter “contributes directly to improving one of their working conditions, namely their remuneration”. The Court concluded:⁷

“Consequently, the agreement at issue... does not, by reason of its nature and purpose, fall within the scope of Article 85(1) of the Treaty”.

The Opinions of the Advocates General in *Laval* and *Viking*

8. Both Advocates General Mengozzi in *Laval* and Maduro in *Viking* reject the solution excluding collective action from the scope of the Treaty provisions on free movement. Instead, they seek to reconcile workers’ collective industrial action with employers’ economic freedom of movement. But their reasoning is different.

⁶ *Ibid.*, paragraphs 55-58.

⁷ *Ibid.*, para. 64.

9. Advocate General Mengozzi in *Laval* acknowledges the issue raised by *Albany* as to the compatibility of collective action and free movement.⁸ He concludes that there is a fundamental right to take collective action protected by the EU legal order.⁹ However, he decided that Member States may restrict the *exercise* of this fundamental right,¹⁰ including in order to comply with their EU obligation to ensure freedom of movement.¹¹ The outcome is the need to reconcile the fundamental right with economic freedoms.¹²
10. Advocate General Maduro in *Viking* also upholds a general principle of Community law protecting the fundamental right to strike.¹³ But he asserts that fundamental rights can be reconciled with economic freedoms.¹⁴ The fundamental right to strike as a public interest, like other public interests, can be assessed together with the rules on free movement.¹⁵ He acknowledges that *Albany* held that collective agreements fall outside competition provisions of the Treaty in light of the contradiction between them.¹⁶ However, he distinguishes competition provisions from free movement provisions, and rejects the analogy with *Albany*, simply asserting there is no risk of contradiction.¹⁷

Solution 1

Albany unqualified

11. *Viking* and *Laval* involve collective industrial action with consequent inevitable effects on free movement. 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 paragraph 60 of the Court's judgment in *Albany*:

It is beyond question that certain restrictions on free movement of goods, services and workers are inherent when collective action is taken by workers or their organisations. However, the fundamental rights to freedom of association and to take collective action would be seriously undermined if workers and their organisations were subject

⁸ Para. 61.

⁹ Paras. 62-78.

¹⁰ Para. 80.

¹¹ Paras. 81-83.

¹² Para. 85.

¹³ Para. 60.

¹⁴ Paras. 23-24.

¹⁵ Para. 25.

¹⁶ Para. 26.

¹⁷ Para. 27.

to Article 28 [43, 49] 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 action, must, by virtue of its nature and purpose, be regarded as falling outside the scope of Article 28 [43, 49] of the Treaty.

Albany qualified

12. 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)**

13. The question is whether employers can use the EC Treaty Articles 43 (freedom of establishment) and 49 (freedom of services) to stop trade unions taking collective action which interferes with their economic freedom of movement (horizontal direct effect). In the Court’s doctrine, these Treaty provisions were aimed at action by public authorities (vertical direct effect). The only exceptions were actions classified as regulatory or quasi-regulatory in cases involving professional associations. Such associations were caught as having the primary aim of regulating access to the labour market, conflicting with the Treaty’s provisions on free movement.¹⁸ 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.

¹⁸ Case C-415/93 *Union Royale des Sociétés de Football Association ASBL & others v Jean-Marc Bosman* [1995] ECR I-4921; Case C-309/99 *Wouters, Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.

The Opinions of the Advocates General in Laval and Viking

14. Both Advocates General Mengozzi and Maduro took the view that there is horizontal direct effect of the free movement provisions of the Treaty as regards establishment and services.¹⁹
15. Advocate General Mengozzi is cautious in holding that in the specific case before him, in the context of the wide powers of trade unions in the specific Swedish model of collective employment relations, Article 49 is capable of direct effect.²⁰
16. Advocate General Maduro is much more ambitious. He asserts the general proposition that Treaty provisions apply to private action capable of effectively restricting the exercise of free movement by obstacles that cannot reasonably be circumvented.²¹ He acknowledges that it is not simple to “determine whether that is the situation”,²² and is anxious to protect the autonomous action of private actors.²³ But he concludes that “the actions of the FSU and the ITF are capable of effectively restricting the exercise of the right to freedom of establishment of an undertaking such as Viking”.²⁴

Doctrinal objections to horizontal direct effect

Collective agreements are not restrictions on freedom to provide services

17. The European Parliament and Council have declared unequivocally that collective agreements are *not* restrictions on free movement of services. In the Services Directive the target is those requirements which are deemed to violate the rules on free movement.²⁵ Article 4(7) (“Definitions”) stipulates that collective agreements are not such requirements: (italics added)

¹⁹ There is a fundamental contradiction between the position of the Advocates General on *Albany* and on horizontal direct effect. On the one hand, in refusing to apply *Albany*, they reject the parallel between competition and free movement so as to exempt collective action from both sets of provisions. On the other hand, their argument on horizontal direct effect implies a parallel between competition provisions (which have horizontal direct effect) and free movement provisions. This is particularly evident in the Opinion of Advocate General Maduro.

²⁰ Paras. 160-161.

²¹ Paras. 43 and 48. There are substantial preliminary problems to do with his criteria of when these Treaty provisions have horizontal direct effect. When is the private actor/defendant “capable” of “effectively” restricting free movement and what action does so “unreasonably”?

²² Para. 43.

²³ Para. 49.

²⁴ Para. 55.

²⁵ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L376/26 of 27.12.2006.

“‘*requirement*’ means any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of *professional* bodies, or the collective rules of *professional* associations or other *professional* organisations, adopted in the exercise of their legal autonomy. *Rules laid down in collective agreements negotiated by the social partners shall not as such be seen as requirements within the meaning of this Directive.*”

18. The Directive’s rules on free movement do not apply to collective agreements. Collective agreements are distinguished not only from State measures, but also from those of professional bodies or associations. As they lack the regulatory effect to be deemed *requirements* subject to the Services Directive’s rules on free movement, the same argument should apply to Articles 43 and 49 EC.²⁶

Collective action is not a regulatory measure

19. The Commission in *Viking* took the view that Article 43 EC does not have horizontal direct effect so as to confer rights on a private undertaking which may be relied on against a trade union or an association of trade unions in respect of collective action by that union or association of unions. In contrast, Articles 39 and 49 catch provisions adopted in a collective manner as if they were State measures. It follows that Articles 43 and 49 apply to regulatory measures adopted by quasi-public bodies. But that is not the situation in this case. The ITF and FSU are not regulatory bodies. The threat to strike and the sending of the circular are not regulatory measures.

Trade unions are not regulatory bodies as “emanations of the State”

20. Directives do not have horizontal direct effect. They apply only vertically, to the State, However, they apply also to “emanations of the state”. Criteria of “emanations” were laid down in *Foster v British Gas*: bodies established/controlled by the state, endowed by the State with regulatory powers and providing a public service.²⁷ If the same criteria were to apply to determine the horizontal direct effect of Articles 43 and 49, trade unions would not be such bodies. There is no delegation of state authority.

²⁶ The link is made through the legal basis of the Services Directive: the first and third sentence of Article 47(2) and Article 55 EC. See further, Recitals 5 and 6.

²⁷ Case C-188/89 [1990] ECR I-3313.

Horizontal direct effect violates freedom of association

21. Trade unions represent the interests of workers and, like other private actors, are free to pursue their private interests without the constraint of direct effect. To subject them to horizontal direct effect would affect their freedom of association.

Horizontal direct effect harmonises EC law on collective action

22. Article 137(5) EC excludes harmonising directives on pay, the right of association, the right to strike and lockout. Applying Articles 43 and 49 horizontally to trade unions and collective action would be effective harmonisation of laws of Member States – by outlawing collective action – thereby circumventing the policy of exclusion of exemplified by Article 137(5).

Practical objections to horizontal direct effect

A flood of complaints against collective agreements

23. To apply horizontal direct effect to collective agreements as having regulatory effect would open the floodgates. The immense diversity of national industrial relations and collective bargaining systems means it is scarcely conceivable that each and every collective agreement could be characterised as having the regulatory effect required to fall within the scope of the free movement provisions.²⁸ National courts would be flooded with complaints that particular collective agreements fall within the scope of Article 43 or 49. Ultimately, the ECJ would be confronted 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.²⁹

Can criteria distinguish agreements having regulatory effect?

24. Nor is it practical to refer the question of whether collective agreements have regulatory effect to national courts. First, criteria would be needed to distinguish regulatory agreements. The major differences *between* Member States' national industrial relations systems, reflecting different social models,

²⁸ For example, in the UK, collective agreements lack legal effect and are relatively sparse in their coverage of the workforce and it would then seem absurd to treat them the same as *erga omnes* collective agreements

²⁹ The English Court of Appeal rightly referred the question to the ECJ on the grounds that it was difficult to contemplate such an outcome.

and *within* national models, among an extraordinary variety of forms and legal effects of collective agreement would make it impossible to devise, and then sensibly apply such criteria. Secondly, these criteria would be applied to continual challenges to collective agreements and action, many of which would inevitably be referred to the European Court.

Solution 2

25. On balance, it is clear and consistent with the EU social policy protecting the autonomy of social partners and the social function of collective agreements to regard them as not subject to the horizontal direct effect of the free movement provisions of the Treaty. The ECJ may perceive the risks entailed in attempting in practice to apply horizontal direct effect. Not least, they may be made aware of these difficulties by other powerful private actors (e.g. multinational enterprises) potentially vulnerable to horizontal direct effect.³⁰

3. Subsidiarity excludes EC competence to regulate collective action

26. The principle of subsidiarity precludes EC law intervening to regulate collective action by workers and trade unions. This area of law is jealously guarded by Member States from EU intervention.³¹ Providing an overarching historical perspective, the ETUC stated in a letter attached to the ITF written submission in *Viking*:³²

‘The precise contours of the rules governing collective action in each Member State are the outcome of different national historical experience... In the Member States of the EU the rules governing collective industrial action reflect an established equilibrium in the balance of forces between the social partners. It would produce a shock of incalculable magnitude if this equilibrium, carefully constructed over time in different Member States, were to be destabilised by an intervention reflecting Viking’s interpretation of Community law’.

27. The Commission also took the view that it was preferable that collective action be governed by national law and disputes left to Member States to resolve.

³⁰ See T. Novitz, “Navigating Between Economic and Social Rights in Europe: The Practical Problems Ahead”, forthcoming in *Competition Law Insight* (October 2007) who points to the consequences of horizontal direct effect on distribution agreements concluded by private actors and suggests that it “could undermine established European competition law”.

³¹ E.g. Article 137(5) EC: ‘The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lockouts’.

³² Paras. 4 and 6.

Problems of private international law

28. Transnational collective action potentially engages courts in different Member States. Cross-border collective action raises difficult questions in private international law: which national court has jurisdiction and the law of which Member State applies?
29. Different laws and different courts take different views regarding the legality of cross-border collective action.³³ The question is whether, and if so, the extent to which Community law should attempt to intervene. In the case of cross-border collective action, problems arise as to which country's court has jurisdiction, which country's law applies and whether judgments of one national court are to be applied in another Member State.

Which court has jurisdiction and which law applies?

30. Determining which court has jurisdiction in cross-border collective action has potentially profound consequences in industrial disputes. There is *no uniform approach* in the Member States on this subject. The decision on jurisdiction in the case of cross-border transfers is left to *national* laws, with the ensuing risk of conflicting solutions.
31. To illustrate: there are potentially serious consequences if the collective action is taken by trade unions in Member State A, but the court with jurisdiction to decide the dispute is in Member State B. The potential confusion is compounded if the court in Member State B is required to apply the law of Member State A. As the *Viking* case shows, this is far from hypothetical: a British court is to apply Finnish law to collective action taken by a Finnish trade union in Finland.

Enforcing court judgments in another jurisdiction

32. Again, if the Court in Member State A makes a decision in a dispute involving cross-border collective action, it may be necessary to enforce that decision against workers or a trade union in Member State B. For example, employers in Member State A have won their case and wish to enforce the decision against the workers or a trade union in Member State B. The workers or trade union may object, arguing that the rules of Member State B are so different that enforcement of that judgment by courts in Member State B is not required by Regulation 44/2001 on jurisdiction and the recognition and enforcement of

³³ Viking was attempting to use EU law to require an English court to assess the balance in Finnish law between economic freedoms and fundamental rights.

judgments in civil and commercial matters.³⁴ The employers may seek to enforce the judgment of the court of Member State A in Member State B. The potential for litigation is impressive.³⁵

Solution 3

33. Again, there is a clear signal from the EU legislative institutions in the recent adoption on 12 December 2006 of the Services Directive.³⁶ This is explicitly concerned to protect *national* social models, in particular, as regards collective bargaining, collective agreements and collective action. Article 1(6) states that the Directive on services in the internal market is not to affect ‘the relationship between employers and workers, *which Member States apply in accordance with national law which respects Community law*’. Similarly, Recital 14, that it does not affect labour law, that is ‘the right to strike and to take industrial action *in accordance with national law and practices which respect Community law*’, reaffirms the autonomy of national social models.³⁷
34. These provisions of the Directive on services in the internal market are powerful indications that Articles 43 or 49 EC on free movement are not to be interpreted so as to override the Services Directive’s respect for “the exercise of fundamental rights as recognised in the Member States and by Community

³⁴ Depending on whether disputes over collective rights are considered to be civil or commercial matters.

³⁵ Public policy rules may apply to preclude enforcement (as was possible in Finland had Viking sought to enforce the judgment of the English court). This is not purely hypothetical, as illustrated by a recent case in the French *Cour de Cassation*. This denied that the failure to give a hearing to employee representatives in case of initiating an insolvency procedure constituted a serious violation of the fundamental right to be heard (*Cass. Com., 27 juin 2006, pouvoi no. 0-3-19.863*). The case arose in the context of a decision by an English court in insolvency proceedings concerning a English company which affected an establishment in France. The plaintiff employees’ representatives sought to prevent recognition of the English court’s decision by the French courts due to the failure with respect to the hearing of employee representatives, arguing, *inter alia*, that the English court’s decision was thereby contrary to fundamental principles of French law and hence was manifestly contrary to *ordre public*. The *Cour de Cassation* rejected the argument, looking to the strict interpretation of *ordre public* required by the Brussels Convention of 1968 (and the Brussels Regulation of 22 December 2000 replacing it) on mutual recognition of judgments. A perceptive comment on the case, however, observes that insolvency proceedings have different stages and that failure to hear the employees’ representatives at a later stage might be considered to violate “*ordre public procédural*” in light of the ECJ’s recognition of Article 6 of the European Convention on Human Rights. Further, it is suggested that total failure to engage employees may be construed as contrary to “*ordre public substantiel*” sufficient to refuse recognition of a foreign judgment ignoring such a fundamental right, which outweighs the policy of mutual recognition. The author of the comment adds that such developments would be part of the construction of “a social Europe whose contours are as yet largely indeterminate (“*la construction d’une Europe sociale aux contours encore largement indéfinis*”). Etienne Pataut, *Revue de Droit du Travail*, Novembre 2006, pp. 344-346 at 346.

³⁶ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, L 376/36 of 27.12.2006.

³⁷ Italics added. The phrase “which respects Community law” qualifies national labour law. But these provisions of Article 1(6) and Recital 14 (and Article 1(7) – see paragraph 34 below) make clear that Community law on the internal market freedoms of employers does not limit national labour laws in general or fundamental rights to take collective action in particular.

law...the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices...”.³⁸

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

35. The three solutions canvassed above are straightforward: declaring collective action to fall outside the scope of the Treaty provisions on free movement, denying those provisions horizontal direct effect, or precluding EU intervention on the basis of subsidiarity – all remove the need to address further the question of collective industrial action in EU law.
36. However, the Advocates General rejected these straightforward solutions. Instead, they addressed the task of devising a method to balance the acknowledged existence of a fundamental right to collective action protected by the Community legal order³⁹ with the economic freedoms protected by the Treaty.
37. For Advocate General Mengozzi in *Laval*, “proportionality” is the central concept in the assessment of the balance in EU law between economic freedom and collective action. “Proportionality” is a superficially easy solution to the problem. The concept has the apparent advantage of being familiar in EC law. It appears also to allow for the exercise by national courts of a degree of discretion enabling them to take into account their national context, enabling them to apply EU law as far as possible consistently with national conceptions of what is or is not proportionate collective action.
38. But application of a criterion of proportionality requires further guidance to national courts. A close look at the Opinion of Advocate General Mengozzi reveals the difficulties encountered.
39. Advocate General Maduro’s Opinion never even uses the word “proportionality”.⁴⁰ Instead, formal criteria are invoked which are completely novel, having no foundation in existing doctrine. Close examination reveals substantial problems in their practical application.

³⁸ Directive 2006/123/EC, Article 1(7).

³⁹ Advocate General Mengozzi, paras. 78, 142; Advocate General Maduro, para. 60.

⁴⁰ Paragraph 25 contains an indirect reference to proportionality: “...the Court has consistently recognised that public interests relating to social policy may justify certain restrictions on freedom of movement, as long as these restrictions do not go beyond what is necessary...”.

40. The solution proposed here invokes four criteria for determining the appropriate balance between the economic freedoms of employers and the collective rights of workers and their organisations (the application of “proportionality”). The last criterion in particular builds on the proposals of the Advocates General. In summary form:
- i. transnational collective action by workers is *presumed* to balance (and be proportionate to) the transnational economic activity of employers;
 - ii. the presumption is strengthened if transnational collective action is *lawful under national law*;⁴¹
 - iii. national law *may not prohibit* transnational collective action; national law 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);⁴²
 - iv. transnational collective action is always balanced (proportionate) if it is a response to failure by the employer to comply with obligations under the *acquis communautaire social*.
41. Critical assessment of the criteria proposed in the Opinions of the Advocates General offers insights into the difficulty of establishing a balance between economic freedoms and fundamental rights, and in particular in applying the criterion of “proportionality”. It also provides some clues as to the proposed solution.

The Opinions of the Advocates General in Laval and Viking

42. Advocates General Mengozzi and Maduro accept that collective industrial action which restricts free movement may be legitimate. However, they take radically different approaches to the criteria for determining the legitimacy of workers’ collective action. They share two important presumptions:

⁴¹ Advocate General Mengozzi, para. 80: “...it is necessary to distinguish between the right to resort to collective action and the means of exercising it, which may differ from one Member State to another and do not automatically enjoy the protection enjoyed by that right itself...”.

⁴² Advocate General Mengozzi, para. 142: “...the interpretation of national law in conformity with Community law which the national court might adopt should not lead it to impair the very substance of the right to take collective action to defend the interests of workers, which, in my preliminary observations above, I have recognised as constituting a general principle of Community law, also upheld by the Swedish Constitution”. See also para. 76 referring to Article 28 of the EU Charter on the right to take collective action, including strike action, and the permitted limitations in Article 52(1) of the Charter.

- (i) the risks to workers of social dumping;⁴³
- (ii) the existence of a fundamental right to take collective action protected by the Community legal order.⁴⁴

43. These two presumptions reflect:

- (i) the background of enlargement to new Member States with lower labour costs and the consequent risk of social dumping, and
- (ii) EC law's protection of the fundamental right to take collective industrial action.

44. However, each Advocate General proposes very different criteria for determining whether workers' collective action against social dumping legitimately balances employers' economic freedom.

45. Their conclusions fail adequately to reflect:

- (i) the specific *sectoral context* of the cases before them (construction and maritime transport);
- (ii) the specific *transnational* dimension of social dumping, reflected in EC legislation and EC case law protecting collective agreements (in the Directives on Posting of Workers, Public Procurement and Services).⁴⁵

⁴³ Explicitly in Mengozzi, paras. 249, 251; implicitly in Maduro, paras. 58-60. Paragraph 58: "Yet, while the right to freedom of establishment generates overall benefits, it also often has painful consequences, in particular for the workers of companies that have decided to relocate. Inevitably the realisation of economic progress through intra-community trade involves the risk for workers throughout the Community of having to undergo changes of working circumstances or even suffer the loss of their jobs. This risk, when it materialised for the crew of the *Rosella*, is exactly what prompted the actions of the FSU and the ITF".

⁴⁴ Mengozzi, paras. 78; 142; Maduro, para. 60

⁴⁵ Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. OJ 1996, L18/1; Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L376/26 of 27.12.2006; Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L134/1 of 30 April 2004; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contract, public supplies contracts and public service contracts, OJ L134/114 of 30 April 2004.

Advocate General Mengozzi in Laval: “Proportionality”

46. Advocate General Mengozzi’s assessment of the legitimacy of collective action is based on the criterion of “proportionality”. This is applied, with very different results, to:

- (i) the *primary* collective action taken by the Swedish Building Workers Union (*Svenska Byggnadsarbetareförbundet*) relating to:
 - (a) the *pay* claim,
 - (b) *other* terms and conditions,
- (ii) the *solidarity* action by the Swedish Electricians’ Trade Union (*Svenska Elektrikerförbundet*).

(i) ***The “proportionality” of primary action***

(a) ***“The proportionality of collective action” to impose a rate of pay in accordance with a collective agreement***⁴⁶

47. Advocate General Mengozzi’s position can be summarised as follows:

- i. collective action to support a pay claim generally satisfies the criterion of proportionality,⁴⁷
- ii. even where the wage claim might be excessive,⁴⁸
- iii. unless, in the case of a service provider from another Member State, the workers already have equivalent or essentially similar entitlement.⁴⁹

⁴⁶ Paras. 254 ff.

⁴⁷ Paras. 254-255: “...the taking of collective action in order to compel a service provider of a Member State to agree to pay the remuneration determined in accordance with a collective agreement... is in general appropriate to attaining the objectives pursued, since the mere threat of collective action by trade unions will encourage employers to enter into the collective agreement which they are under pressure to sign”. Para. 258: “...exercise of the right to take collective action in order to compel a service provider to subscribe to the rate of pay applied in the sector in question in the host Member State is, in principle, a less restrictive measure than automatic subjection to a similar rate of pay which, without being a minimum rate of pay, is set by national legislation...”.

⁴⁸ Paras. 259-260: “Admittedly, such a system is liable to produce unforeseeable results or indeed, in certain circumstances, to allow wage claims that might be excessive. However, those circumstances are inherent in a system of collective employment relations which is based on and favour negotiation between both sides of industry, and, therefore, contractual freedom, rather than intervention by the national legislature. I do not think that, at its present stage of development, Community law can encroach upon that approach to employment relationships through the application of one of the fundamental freedoms of movement provided for in the Treaty”.

48. This appears broadly to reflect the position in the Posting of Workers Directive 96/71.⁵⁰ Advocate General Mengozzi states that collective action to enforce a collective agreement is less restrictive than the requirement laid down in Directive 96/71: “automatic subjection to a similar rate of pay which, without being a minimum rate of pay, is set by national legislation...”.
49. On the one hand, Advocate General Mengozzi goes *beyond* the Posting Directive. His endorsement of collective action to enforce pay provisions of collective agreements is apparently *not limited* to the construction sector (though that is the sector in question in *Laval*).
50. On the other hand, Advocate General Mengozzi appears to continue the ECJ’s case law on the Posting Directive by subjecting approval of collective action to secure application of a collective agreement to an important condition: the collective agreement must not replicate “equivalent or essentially similar entitlement” already guaranteed to the workers concerned.⁵¹
51. This is a gloss imposed by the ECJ on the Posting Directive, which includes no such condition. It can be criticised on grounds of *practical reality*: it fails to take account of the sectoral context and of the transnational dimension.
- *the sectoral context*
52. National courts are obliged to make an assessment of whether provisions on pay in another Member State are “equivalent or essentially similar” to those in the collective agreement in question. This is an extraordinarily difficult task in practice. It is rendered even more difficult due to the potential of provisions on “pay” to include a range of benefits of great variety and complexity, such as holiday entitlements and social insurance payments. Comparison of benefits

⁴⁹ Paras. 263-264: “proportionality of restrictions... is possible where it is established that the protection conferred by those restrictions is not guaranteed by *identical or essentially similar* obligations by which the undertaking is already bound in the Member State where it is established... [This] requires host Member States, and in particular their courts, to assess the equivalence or essential similarity of the protection already available to posted workers under legislation and/or collective agreements in the Member State where the service provider is established, in particular as regards the pay such workers receive”. On the facts of the case (para. 273): “If the gross wage paid by Laval was not the same as or essentially similar to that determined in accordance with the Byggnadsarbetareförbundet agreement fall-back clause, which I believe to be the case but cannot be certain, it could in my view be concluded that the collective action, in so far as it sought to impose the rate of pay provided for by the Byggnadsarbetareförbundet collective agreement, would not be disproportionate to the objectives of protecting workers and combating social dumping”.

⁵⁰ Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. OJ 1996, L18/1.

⁵¹ *Arblade v. Leloup and Sofrage SARL*, Cases C-369/96 and C-276/96, [1999] ECR I-8453; judgment of 23 November 1999.

across such a wide range available in different Member States is extremely difficult.⁵²

- *the transnational dimension*

53. Even where equivalent entitlements may be identified, prescribing compliance with the national collective agreement is important as surveillance by the trade union party to the agreement is essential to its effective application.⁵³

54. The Community legislator in the Services Directive did not require such a condition for the application of labour standards in the context of cross-border provision of services. Rather, it excluded labour law in general as a factor to be considered in free movement and explicitly provided that collective agreements were not to be considered obstacles to free movement.⁵⁴ This made unnecessary any assessment of their proportionality regarding free movement.

55. Instead, Advocate General Mengozzi has both:

- (i) adopted the condition (i.e. “absence of equivalent protection”) posited by the ECJ - as to when collective agreements within the Posting Directive may be enforced by Member States to apply - similarly as a condition for collective action by trade unions to enforce collective agreements;
- (ii) extended this jurisprudence to cover collective action aimed at enforcing collective agreements in *other* sectors, beyond the construction sector covered by the Posting Directive.

Both these propositions raise doctrinal and practical problems.

⁵² Such an exercise was required by the ECJ in *Mazzoleni*, Case C-165/98, [2001] ECR I-2189, where the Court insisted that national authorities determine whether French and Belgian workers ‘enjoy an equivalent position overall in relation to remuneration, taxation and social security contributions’ (para. 35). One commentator observed wryly: “One can imagine the reaction of the Belgian court receiving this judgment”. P. Davies, “The Posted Workers Directive and the EC Treaty”, (2002) 31 *Industrial Law Journal* 298 at p. 304.

⁵³ *Finalarte Sociedad de Construcao Civil Lda and others v. Urlaiubs- und Lobnausgleichskasse der Bauwirtschaft.*, Cases C-49-50/98, C-52/98, C-54/98, C-68/98 and C-71/98, [2001] ECR I-7831.

Wolff & Müller v. Pereira. Case C-60/03, judgment of 12 October 2004.

⁵⁴ Articles 4(7) and 16(3).

56. In *doctrinal* terms, they deviate from the legislative policy agreed in the Services Directive (wholesale exclusion of labour law as a factor in free movement,⁵⁵ stipulating that collective agreements are not obstacles to free movement, and guaranteeing fundamental rights to collective action). While extending the policy of the Posting Directive regarding collective agreements on pay to other sectors, they retain the doctrinal gloss of subjecting application of such collective agreements to the condition that equivalent protection is not available in the country of origin.
57. In *practical* terms, the “equivalent protection” test is extremely difficult to apply even when comparing an *existing* collective agreement with what is prescribed in the country of origin. It is virtually impossible if the test is applied to collective action seeking a collective agreement where *none has yet been agreed*.
- (b) **“The proportionality of the collective action” to impose other terms and conditions of a collective agreement**⁵⁶
58. Advocate General Mengozzi departs from the framework indicated by the Posting Directive and its jurisprudence by the assertion that to make it a condition of the pay claim that the employer agree to *all* the terms of a collective agreement may be disproportionate.⁵⁷ The proposition can be summarised as follows:
- i. in the context of posting of workers, the conditions for which collective action is taken must entail, for the workers concerned, a *real advantage* which contributes *significantly* to their social protection and is not already guaranteed by obligations that are the same or essentially similar to those by which the service provider is already bound in the Member State in which it is established;⁵⁸

⁵⁵ The (amended) Services Directive provides that the rules on freedom of establishment and free movement of services are not to affect labour law and employment conditions. This is spelled out in Article 1 (‘Subject matter’), para 6. See also Recital 14.

⁵⁶ Paras. 279 ff.

⁵⁷ Para. 280: “...the fact of making the very possibility of applying a given rate of pay conditional upon prior signing up to all the conditions of a collective agreement that apply in practice to undertakings established in Sweden in the same sector and in a similar situation goes beyond what is necessary to ensure the protection of workers and to prevent social dumping”.

⁵⁸ Para. 282: “That approach is, in my view, consonant with the case-law which requires, first, that the conditions laid down by the rules of the host Member State for the provision of services in the context of the posting of workers entail, for the workers concerned, a real advantage which contributes significantly to their social protection and, second, as stated earlier, that the protection offered by such conditions is not already guaranteed by obligations that are the same or essentially similar to those by which the service provider is already bound in the Member State in which it is established”.

- ii. all the more so if the action is against an employer bound by a collective agreement in another Member State providing the same or essentially similar conditions.⁵⁹
 - iii. in this specific case, collective action to require Laval to agree to *all* terms and conditions of a collective agreement as a condition of application of a particular pay agreement was disproportionate.⁶⁰
59. This proposition may be criticised on a number of practical grounds.
60. First, Advocate General Mengozzi was wise not to enter the minefield of assessing the value of a trade union demand and consequent collective action regarding pay.⁶¹ The same caution should be exercised regarding other terms and conditions of employment.
61. Secondly, to insist on the trade union not linking pay demands to demands on other terms and conditions of employment is to ignore the reality of bargaining practices. Bargaining frequently links pay demands not only to other benefits (e.g. pensions, holidays), but to working time, working practices and other provisions of collective agreements related to productivity. Contrary to much public policy on macro-economic management, the proposition is an inducement for unions to place all their demands under the heading of pay increases.
62. Finally, the Posting Directive, Article 3, requires compliance with terms relating not only to pay, but also to working time, holidays, health, safety and hygiene, maternity and pregnancy and equal treatment between men and women and other non-discrimination provisions. Compliance is not subject to the condition that the terms constitute “a real advantage which contributes significantly to their social protection”. Further, the Directive allows Member States to extend mandatory application of collective agreements to other terms and conditions of employment (Article 3(10)), without any condition as to proportionality or equivalence. To be consistent with this, the inference of Advocate General Mengozzi’s proposition would be that collective action should be lawful at least where one Member State has done this. But the result would be uneven application of the EC law on free movement and

⁵⁹ Para. 281: “That assessment extends *a fortiori* to a situation in which, as in this case, the undertaking which temporarily posts workers to the host Member State is bound by a collective agreement legally entered into in another Member State. In such a situation, it would in my view be contrary to the principle of proportionality to seek, even following collective action taken in accordance with domestic law, to make a service provider of another Member State comply either with conditions which are not designed to attain the objects for which the taking of collective action is justified or with conditions that duplicate those to which that provider is subject in the Member State in which it is established, in particular under the collective agreement concluded in that Member State”.

⁶⁰ Para. 280, see footnote 57 above.

⁶¹ Paras. 259-260, see footnote 48 above.

collective action depending on whether a Member State had exercised that option.

63. In sum: Advocate General Mengozzi's application of the principle of "proportionality" to assessing the balance between workers' collective action in support of a bargaining demand and resulting obstruction of an employer's economic freedom is fraught with doctrinal and practical difficulties.

(ii) ***The proportionality of solidarity action***

64. Advocate General Mengozzi concludes that the proportionality of solidarity action, even where it is the main contributor to the effectiveness of the collective action, is dependent on that of the primary action. If the primary action is proportionate, the solidarity action is not to be assessed differently.⁶²
65. The obvious criticism here is that the legality of solidarity action is dependent on determining whether the primary action is proportionate, and therefore lawful. This is an impossibly complex assessment for the national judge to make. It depends on whether the primary action is about pay, the action is not linked to other terms and conditions,⁶³ and there is no equivalent protection. Or, if the primary action is not about pay, then whether there is a significant/real advantage to the workers which is also not already guaranteed by equivalent provision.

Conclusion

66. The criterion of proportionality as proposed by Advocate General Mengozzi has major disadvantages. Without further specification, it is too vague to be applied to the many forms which collective action takes (ranging from normal collective bargaining to workplace occupations). It will give rise to great divergences in the practice of national courts, both probably *within* national systems and certainly *between* national systems. Collective action in one Member State may be deemed an unacceptably disproportionate restriction on

⁶² Paras. 305-306: "Finally, for the sake of completeness with regard to the problem of the proportionality of restrictions deriving from the collective action in question in this case, I do not think that, in the context of the review that the national court should carry out in that connection – including its assessment of the wellfoundedness of the action for damages brought by Laval against the trade unions in this case – it need treat the defendants in the main proceedings differently by drawing a distinction between, first, Byggnadsarbetareförbundet and its local branch, which initiated the blockade, and, second, the SEF [the Swedish electricians' trade union Svenska Elektrikerförbundet (SEF)], which carried out the solidarity action. Although it was the latter action that caused the stoppage of work on the Vaxholm building site and mainly contributed to Laval's terminating the posting of Latvian workers to that site, the fact nevertheless remains that, in law, that action was necessarily dependent upon the setting up of the blockade".

⁶³ One need only contemplate the problem of solidarity action which differs from the primary action in being taken not ostensibly about pay, or ostensibly linked to other terms and conditions.

Community economic freedoms while identical collective action in another Member State is considered a wholly acceptable restriction. Not least, such divergences will inevitably give rise to references to the ECJ questioning national courts' application of the criteria.⁶⁴

67. Advocate General Mengozzi's Opinion illustrates the risks entailed in laying down general propositions of proportionality to be applied to collective action in the very diverse systems of industrial relations and collective bargaining operating in different sectors across 27 Member States.⁶⁵

Advocate General Maduro in Viking: Timing and voluntary solidarity

68. Advocate General Maduro's Opinion in *Viking* includes a number of general statements of policy and principle. Some are more questionable than others. The assertion that the Treaty's economic order is based on a "social contract" between workers and society is a claim requiring more argumentation than is provided in the Opinion.⁶⁶ In principle, the protection in the EU legal order of

⁶⁴ The lessons of the Acquired Rights Directive 1977 and the definition of "transfer of an undertaking" are all too plain to see. Council Directive 77/187 of February 14, 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 61/26, as amended by Directive 98/50/EC of 29 June 1998, OJ L 201/88. Consolidated in Directive 2001/23 of 12 March 2001, OJ L/82/16.

⁶⁵ The *Laval* case itself illustrates this. The distinction between collective action in support of pay claims, as contrasted with action in support of (all?) other terms of a collective agreement, is perhaps explicable only by the specific facts of the dispute in *Laval*. This concerned posted workers in Sweden and the Posting of Workers Directive 96/71, which highlights the mandatory nature of minimum pay standards in collective agreements in the construction sector. A summary of the task facing the national court is provided in para. 284: "In order to assess the proportionality of the collective action taken by the defendants in the main proceedings, the national court, when considering the conditions of the Byggnadsarbetareförbundet collective agreement that the collective action was intended to induce Laval to sign, even before starting any negotiation as to the applicable rate of pay or applying the rate of pay determined in accordance with the fallback clause in that agreement, should:

– first, with regard to possible terms and conditions of employment provided for in the Byggnadsarbetareförbundet collective agreement- which, as we have seen in the part of this opinion concerning Directive 96/71, relate to matters other than those listed in the first subparagraph of Article 3(1) – verify whether, in so far as those conditions are governed by public policy conditions in Sweden within the meaning of Article 3(10) of that directive, the subjection of Laval to those conditions did not go further than was necessary to attain the objectives pursued by the collective action concerned;

- second, with regard to the other conditions of the Byggnadsarbetareförbundet collective agreement, verify whether those conditions involved a real advantage that made a significant contribution to the social protection of posted workers and did not duplicate any identical or essentially similar protection offered to them by the legislation and/or collective agreement applicable to Laval in the Member State in which it is established".

⁶⁶ Paragraphs 59-60: "Although the Treaty establishes the common market, it does not turn a blind eye to the workers who are adversely affected by its negative traits. On the contrary, the European economic order is firmly anchored in a social contract: workers throughout Europe must accept the recurring negative consequences that are inherent in the common market's creation of increasing prosperity, in exchange for which society must commit itself to the general improvement of their living and working conditions, and to the provision of economic support to those workers who, as a consequence of market forces, come into difficulties. As its preamble demonstrates, that contract is embodied in the Treaty... This touches upon a major challenge for the Community and its Member States: to look after those workers who are harmed as a consequence of the operation of the common

fundamental rights to take collective action is categorically declared.⁶⁷ However, the Opinion outlines specific conditions for lawful collective action. Whereas “proportionality” is the central concept in Advocate General Mengozzi’s assessment of the balance in EU law between economic freedom and collective action,⁶⁸ Maduro’s Opinion never even uses the word “proportionality”.⁶⁹

69. Instead, Maduro proposes to assess the lawfulness of collective action using two criteria.
- i. collective action: *timing* is everything;
 - ii. solidarity action must be *voluntary*.
70. These criteria aimed to address the different positions in the *Viking* case of the FSU (collective action) and the ITF (solidarity action).⁷⁰

Collective action: Timing is everything

71. Workers may take collective action to protect their jobs and working conditions against relocation by employers of their economic activities to other Member States provided this collective action is taken *before* the relocation.⁷¹ This appears to derive from a broader statement of the principle

market, while at the same time securing the overall benefits from intra-Community trade”. This is admirable sentiment but it is both legally questionable under present Treaty provisions (the imbalance between the Community’s competence to promote market forces and its competence to provide social protection raises questions as to the existence of this “social contract”) and wholly unrealistic in the present political climate.

⁶⁷ Paragraph 60: “The right to associate and the right to collective action are essential instruments for workers to express their voice and to make governments and employers live up to their part of the social contract. They provide the means to emphasise that relocation, while ultimately gainful for society, entails costs for the workers who will become displaced, and that those costs should not be borne by those workers alone. Accordingly, the rights to associate and to collective action are of a fundamental character within the Community legal order, as the Charter of Fundamental Rights of the European Union reaffirms. The key question, however, that lies behind the present case, is to what ends collective action may be used and how far it may go”.

⁶⁸ Both Mengozzi and Maduro cite the consequences for workers of the free movement of employers which allows for relocation of their economic activities to areas of lower labour costs: social dumping. Mengozzi invokes “proportionality” to allow for some collective action by workers to protect their interests.

⁶⁹ Para. 25 contains an indirect reference to proportionality (see footnote 40 above).

⁷⁰ This is my reading of the somewhat enigmatic para. 63: “In order to establish whether the policy of coordinated collective action currently under consideration has the effect of partitioning the labour market in breach of the principle of non-discrimination, it is useful to distinguish between two types of collective action that may be at issue in the present case: collective action to persuade Viking Line to maintain the jobs and working conditions of the current crew and collective action to improve the terms of employment of seafarers throughout the Community”.

⁷¹ Para. 66: “Thus, in principle, Community law does not preclude trade unions from taking collective action which has the effect of restricting the right of establishment of an undertaking that intends to relocate to another Member State, in order to protect the workers of that undertaking”. Para. 67:

of equivalence: that collective action in cases of intra-Community relocation is not treated less favourably than in cases of relocation within national borders.⁷²

72. However, collective action *after* the relocation amounts to discrimination against the jobs and working conditions of workers in the other Member State.⁷³ This is deemed to be partitioning the labour market, a form of discrimination on grounds of nationality prohibited by EU law.⁷⁴

“...collective action to persuade an undertaking to maintain its current jobs and working conditions... represents a legitimate way for workers to preserve their rights and corresponds to what would usually happen if relocation were to take place within a Member State”.

⁷² Para. 65: “In view of the margin of discretion which Community law leaves to the Member States, it is for the national court to determine, in the light of the applicable domestic rules regarding the exercise of the right to collective action, whether the action under consideration goes beyond what domestic law considers lawful for the purpose of protecting the interests of the current crew. However, when making this determination, national courts have a duty under Community law to guarantee that cases of intra-Community relocation are not treated less favourably than relocations within national borders”.

⁷³ Para. 67: “However, collective action to persuade an undertaking to maintain its current jobs and working conditions must not be confused with collective action to prevent an undertaking from providing its services once it has relocated abroad. The first type of collective action represents a legitimate way for workers to preserve their rights and corresponds to what would usually happen if relocation were to take place within a Member State. Yet, that cannot be said of collective action that merely seeks to prevent an undertaking that has moved elsewhere from lawfully providing its services in the Member State in which it was previously established”. The last sentence seems directly to contradict the policy of both the Posting Directive and the Services Directive. Both allow the host Member State to enforce domestic labour standards in law and collective agreements. If so, it seems trade unions should be allowed to take collective action in their own Member State to enforce collective agreements against undertakings which have relocated and now seek to provide services in the host Member State.

⁷⁴ Para. 62: “A coordinated policy of collective action among unions normally constitutes a legitimate means to protect the wages and working conditions of seafarers. Yet, collective action that has the effect of partitioning the labour market and that impedes the hiring of seafarers from certain Member States in order to protect the jobs of seafarers in other Member States would strike at the heart of the principle of non-discrimination on which the common market is founded”. Paragraph 68: “Blocking or threatening to block, through collective action, an undertaking established in one Member State from lawfully providing its services in another Member State is essentially the type of trade barrier that the Court held to be incompatible with the Treaty in *Commission v. France*, since it entirely negates the rationale of the common market. Furthermore, to allow those kinds of action would carry the risk of creating an atmosphere of constant retaliation between social groups in different Member States, which could gravely threaten the common market and the spirit of solidarity embedded in it”. This invokes a strange notion of “solidarity”: the spirit of solidarity is that of the common market, said to be threatened by collective action, but not by relocation! There is another, quite different, non-market spirit of solidarity: social solidarity. If anything, that is threatened by relocation, and strengthened by collective action. So like Michelle Everson’s “market citizenship” (M. Everson, “The Legacy of the Market Citizen”, in J. Shaw and G. More(eds), *New Legal Dynamics of European Union*, Oxford, 1995), we have the concept of “market solidarity” – an oxymoron, a contradiction in terms, as markets consist of individualised atomised actors, the converse to collective (social) solidarity manifest in trade unions’ collective action...

Conceptual and practical problems

i. Consistency with EC directives

73. Making the lawfulness of collective action conditional on timing offers every incentive to employers not to disclose their decision to relocate. This conflicts with their obligations under Community directives to inform and consult employees' representatives about such decisions.⁷⁵ There would be considerable irony in a situation where an employer violating the obligation to inform and consult before relocating was thereby protected from collective action.
74. Conversely, it offers incentives to workers and their trade unions to commence collective action as soon as possible. Again, practical issues arise of when collective action can be deemed to have begun.

ii. Relocation outside the EU: Workers who are non-EU nationals

75. The objection to collective action after relocation is that it is a form of discrimination on grounds of nationality prohibited by EU law.⁷⁶ This will presumably not be the case where collective action is directed against relocation to a *non-EU* Member State. Nor does collective action partition the EU labour market where the workers employed by the relocating employer are *non-EU* nationals.

iii. The sectoral dimension

76. If the collective action is taken *before* the undertaking relocates outside the Member State, the action is lawful. If the undertaking has relocated and seeks to provide services *back* to the Member State of origin, it is unlawful. The question of timing is difficult: when can relocation be said to have occurred?

⁷⁵ Council Directive 75/129 of February 17, 1975 on the approximation of the laws of the Member States relating to collective dismissals, OJ L 48/29, as amended by Directive 92/56 of 24 June 1992, OJ L 245/92; consolidated in Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225/16. Council Directive 77/187 of February 14, 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 61/26, as amended by Directive 98/50/EC of 29 June 1998, OJ L 201/88; consolidated in Directive 2001/23 of 12 March 2001, OJ L/82/16. Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. OJ L 254/64 of 30.9.94. Council Directive No. 2002/14 establishing a framework for informing and consulting employees in the European Community. OJ 2002, L80/29.

⁷⁶ Para. 62, *ibid.*.

No guidance is offered. There are severe difficulties in making legality dependent on contingencies of fact, which lend themselves to manipulation.

77. Advocate General Maduro appears to distinguish between services and other sectors. This is especially difficult if “establishment” is the issue: are services established by simply registering an office? Is manufacturing different? Is transfer of substantial assets required before relocation is deemed to occur?⁷⁷ This appears to distinguish collective action against relocation of manufacturing (more easily protected) v. collective action against services (less easily protected). Or will this provide the same protection to manufacturing relocations which is now offered to cross border relocation of services by the Posting Directive and more recently the Services Directive?⁷⁸

iv. *Maritime transport*

78. The maritime transport sector in *Viking* illustrates the practical difficulty of determining when relocation has taken place. Is it when the company has formally registered in another Member State, when the registration of the ship itself has changed, when the ship begins its voyages under the new flag, when the crew is replaced...? The lawfulness of collective action depends on the arbitrary selection of a date. Again, there are incentives to employer secrecy and hasty trade union collective action.

⁷⁷ There is an uncanny parallel with the concept of transfer of an undertaking (when does the transfer occur, what constitutes a transfer...). Council Directive 77/187 of February 14, 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 61/26, as amended by Directive 98/50/EC of 29 June 1998, OJ L 201/88; consolidated in Directive 2001/23 of 12 March 2001, OJ L/82/16.

⁷⁸ Para. 68 is at odds with the policy of the Posting and Services Directives: “Blocking or threatening to block, through collective action, an undertaking established in one Member State from lawfully providing its services in another Member State is essentially the type of trade barrier that the Court held to be incompatible with the Treaty in *Commission v. France*, since it entirely negates the rationale of the common market. Furthermore, to allow those kinds of action would carry the risk of creating an atmosphere of constant retaliation between social groups in different Member States, which could gravely threaten the common market and the spirit of solidarity embedded in it”. Both the Posting Directive and the Services Directive aim precisely at the solidarity achieved by requiring equal treatment – between workers in the host state and workers from other Member States providing services in the host state – including terms of employment in collective agreements.

Solidarity action must be voluntary

79. The criterion of lawfulness is whether affiliates called upon to take collective solidarity action do so voluntarily, or are obliged to do so.⁷⁹

Conceptual and practical problems

i. Voluntary v. compulsory

80. There is some artificiality in the distinction of voluntary v. compulsory compliance. There is a distinction between being under an obligation as a member of the federation, and being obliged to act as result of the federation's power.⁸⁰ The former may be correct, the latter not. The analogy with other international organisations, not least the ILO, is instructive.

ii. What constitutes compulsion?

81. Which power, if any, of the federation (for example, the ITF or the ETUC) over affiliates failing to comply suffices to render the action compulsory: reprimand, financial penalty, suspension, expulsion? Are any of these sufficiently compelling to oblige the affiliate to comply?

⁷⁹ Paras. 70-72; "Naturally, the FSU may, together with the ITF and other unions, use coordinated collective action as a means to improve the terms of employment of seafarers throughout the Community. A policy aimed at coordinating the national unions so as to promote a certain level of rights for seafarers is consistent with their right to collective action. In principle, it constitutes a reasonable method of counter-balancing the actions of undertakings who seek to lower their labour costs by exercising their rights to freedom of movement. One must not ignore, in that regard, the fact that workers have a lower degree of mobility than capital or undertakings. When they cannot vote with their feet, workers must act through coalition. The recognition of their right to act collectively on a European level thus simply transposes the logic of national collective action to the European stage. However, in the same way as there are limits to the right of collective action when exercised at the national level, there are limits to that right when exercised on a European level.

A policy of coordinated collective action could easily be abused in a discriminatory manner if it operated on the basis of an obligation imposed on all national unions to support collective action by any of their fellow unions. It would enable any national union to summon the assistance of other unions in order to make relocation to another Member State conditional on the application of its own preferred standards of worker protection, even after relocation has taken place. In effect, therefore, such a policy would be liable to protect the collective bargaining power of some national unions at the expense of the interests of others, and to partition the labour market in breach of the rules on freedom of movement. By contrast, if other unions were in effect free to choose, in a given situation, whether or not to participate in collective action, then the danger of discriminatory abuse of a coordinated policy would be prevented. Whether this is the situation in the circumstances of the present case must be left to the referring court".

⁸⁰ See H.L.A. Hart, *The Concept of Law*, Oxford, 1961.

iii. *Incentives to manipulate*

82. Once more there are difficulties in making legality depend on conditions which may be manipulated. Would a formal amendment to the statutes of the organisation suffice to render compliance “voluntary”?

Conclusion

83. In the Opinion of Advocate General Maduro, collective action is a fundamental right protected in EU law. However, this protection is contingent on collective action not partitioning labour markets. This means that they should not impede the hiring of workers from some Member States in order to protect jobs of workers in other Member States. Collective action aims to improve labour standards in general and EU protects such collective action if it is undertaken *before* relocation has occurred, or, in case of solidarity action, if it is *voluntary* for all unions involved. If these conditions are satisfied, then coordinated collective action is legitimate.⁸¹

Solution 4

84. This solution aims at balancing the economic freedoms of employers and the collective rights of workers and their organisations.
85. 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.

⁸¹ In *Viking*, therefore, the ITF and FSU must demonstrate to the English Court of Appeal that these conditions are satisfied. The answers offered by Advocate General Maduro to the questions posed by the Court of Appeal would indicate the following. As regards the ITF: UK domestic rules make *all* solidarity action unlawful, whether it engages intra-Community relocation or not. Yet the Opinion states that *voluntary* solidarity action, taken *before* the service is relocated, is protected as reflecting a fundamental right protected by the EU legal order. Arguably, this overrides any conflicting domestic law. The ITF would have to show that (i) the collective action preceded the relocation; (ii) affiliates were not compelled to take solidarity action. For the future, the ITF’s Flag-of-Convenience policy (FOC) could be formulated to secure this. Specifically, as regards solidarity action affecting relocation (re-flagging) to non-EU Member States not protected by EU law on non-discrimination on grounds of nationality. As regards the FSU: Finnish law protects solidarity action against relocation *within* Finland. *Equivalent* protection must be available for solidarity action which is intra-EU. This is the case here. The EU right to collective action is said to be contingent on it being (i) before relocation and (ii) voluntary, not compulsory. As these conditions do not apply to domestic relocations, can they be imposed on the FSU in this case? Or, dangerously, could they be deemed now to override domestic law so as to impose them as conditions for *domestic* solidarity action? If so, the FSU also would have to demonstrate that it took action preceding the relocation (would this be re-flagging (establishment) or the actual provision of services)?

86. In accordance with the principle of subsidiarity, this presumption is strengthened if transnational collective action is lawful under national law.
87. 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).
88. Finally, a specific criterion operates in the hypersensitive context of exercise by employers of their transnational economic freedoms. Regardless of any national conditions on its exercise, 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.⁸²
89. This last criterion reflects the approaches adopted in the Opinions of the Advocates General in *Viking* and *Laval*.
90. In *Viking*, Advocate General Maduro takes the position that in cases of relocation, collective action is permitted to combat social dumping provided it is taken *before* the relocation occurs. Relocation is almost invariably accompanied by collective dismissals of workers. The ECJ has declared unequivocally that any decision to collectively dismiss workers can only be taken *after* the completion of the process of information and consultation.⁸³ The conclusion, consistent with the reasoning of Advocate General Maduro in *Viking*, is that collective action *should always be lawful* as any decisions

⁸² This, of course, is without prejudice to the legality of collective action otherwise under taken in the normal course of industrial relations governed by the preceding criteria.

⁸³ *Irmtraub Junk c. WolfgangKuhnel als Insolvenzverwalter uber das Vermogen der Firma AWO*, Case C-188/03, 27 January 2005, paras. 40-45, interpreting Council Directive 75/129 of February 17, 1975 on the approximation of the laws of the Member States relating to collective dismissals, OJ L 48/29, as amended by Directive 92/56 of 24 June 1992, OJ L 245/92. Now consolidated in Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225/16. Relocation between Member States will often be the action of multinational enterprises. European works councils (EWCs) have successfully taken legal action to block decisions by multinationals where the enterprise failed to comply with the requirements of the EWCs directive. Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. OJ L 254/64 of 30.9.94. Council Directive 97/74/EC of 15 December 1997 extending to the United Kingdom Directive 94/45/EC. OJ L 10/22 of 16.1.98. There are three recent decisions of national courts in Belgium (British Airways, Cour de Travail de Bruxelles, 6 December 2006) and France (Gaz de France, Tribunal de Grande Instance et Cour d'Appel de Paris, 15 November 2006; Alcatel/Lucent, Tribunal de Grande Instance de Paris, 27 April 2007).

affecting the workforce *cannot* be taken until the information and consultation requirements have been complied with.⁸⁴

91. According to Advocate General Mengozzi in *Laval*, the balance between fundamental rights to collective action protected by the EU legal order and economic freedoms guaranteed by the Treaty is determined by the criterion of proportionality.⁸⁵ The ECJ could provide further guidance in the form of a criterion of “proportionality” inspired by Advocate General Maduro’s Opinion in *Viking*. The criterion would be whether the employer had complied with the EU obligation to inform and consult *prior* to any decision, on relocation or on any other matter, requiring such a process of prior engagement with the workforce.⁸⁶ Failure to do so *ipso facto* makes collective action proportionate and protected by EU law.⁸⁷

92. The *acquis* of the EU industrial relations system embodies a principle of social partnership implying mutual cooperation between the social partners. The social dialogue process of “information and consultation with a view to reaching an agreement” underpins much of the *acquis communautaire social* engaging the social partners in a cooperative exchange.⁸⁸ At the end of this cooperation process management has the economic freedom to make the decision. Equally, however, workers have the fundamental right to take collective action. Managerial prerogative exercising economic freedoms is balanced with workers’ fundamental right to take collective action.

⁸⁴ Arguably, the same requirement as to timing applies to the equivalent obligation of information and consultation in the framework Directive 2002/14 as regards other decisions affecting the workforce.

⁸⁵ As outlined above, without more, this criterion threatens to produce considerable confusion with regard to its practical application by courts in different Member States.

⁸⁶ Not only the EWC Directive, but also Council Directive No. 2002/14 establishing a framework for informing and consulting employees in the European Community. OJ 2002, L80/29. 2002/14

⁸⁷ Again, failure by the employer properly to inform and consult with a view to reaching agreement is *sufficient*, but *not necessary* to render collective industrial action proportionate. If the employers in *Laval* or *Viking* merely went through the motions and never genuinely intended to reach agreement, as they had already decided (1) in *Laval*, to pay Latvian workers without regard to Swedish collective agreements, (2) in *Viking*, to hire Estonian seafarers without regard to any collective agreement with the Finnish Seamen’s Union, this in itself would suffice to make the collective action proportionate,. But it would not be necessary as the collective action would satisfy the three criteria outlined previously (paras. 85-87 above).

⁸⁸ See, for example, Article 1(3) (“Object and principles) of. Council Directive No. 2002/14 establishing a framework for informing and consulting employees in the European Community. OJ 2002, L80/29: “...the employer and the employees’ representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees”. See also Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. OJ L 254/64 of 30.9.94, Article 9: “The central management and the European Works Council shall work in a spirit of cooperation with due regard to their reciprocal rights and obligations”. Also Article 6(1): “The central management and the special negotiating body must negotiate in a spirit of cooperation with a view to reaching an agreement on the detailed arrangements for implementing the information and consultation of employees provided for in Article 1 (1)”.

Doctrinal and practical advantages

93. In doctrinal terms, this is a specifically EU solution based on the *acquis communautaire social* reflected in Articles 27 and 28 of the EU Charter.⁸⁹ protection by EU law of the transnational economic freedom of employers is balanced with protection of transnational collective action by workers.
94. 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 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

95. The argument that collective agreements are not consistent with the internal market reflected in the Treaty's competition provisions was rejected by the Court in *Albany*. The same argument is now resurrected against collective action, this time invoking the Treaty's free movement provisions.
96. 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.
97. The rationale for free movement is market integration. Market integration is premised on market efficiency. Workers and their organisations, trade unions, are also market participants and have rights. Their activity is equally crucial to the allocative efficiency of the market. Market efficiency requires collective action by workers and trade unions to ensure their voice is heard and their interests are taken into account. Drawing on concepts of "exit", "voice" and "loyalty" developed by the economist Albert Hirschman,⁹⁰ Miguel Poiars Maduro has argued:⁹¹

⁸⁹ Article 27: Workers' right to information and consultation within the undertaking; Article 28: Right of collective bargaining and action..

⁹⁰ *Exit, Voice and Loyalty - Responses to Decline in Firms, Organisations and States*, (Harvard University Press, 1970).

⁹¹ M. Poiars Maduro, "Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU", in P. Alston (ed), *The EU and Human Rights* (Oxford University Press, 1999), pp. 449-472, at 470. As Maduro stated in his earlier book, *We The Court: The European Court of Justice and the European Economic Constitution* (Hart Publishing, 1998), at pp. 138-139: "From a representative point of view, a market operating at its best will be a market where decisions are the result of voluntary transactions in which all the people affected participate, and in which all costs and benefits and alternative transactions are taken into account. Such a market would be an ideal decision-maker from

“In this respect, the system requires a set of social rights that can be said to guarantee participation and representation in market decisions and, by internalizing costs which tend to be ignored in those decisions, increase efficiency. Those social rights are related to forms of voice and exit in the market... rights of participation and representation such as the freedom of association, the right to collective bargaining, and the right to collective action should be considered as instrumental to a fully functioning integrated market which can increase efficiency and wealth maximization”.⁹²

98. Workers and trade unions must be allowed to compete with employers in the setting of labour standards.⁹³ The Commission constantly cites the role of social dialogue as central to the EU economic model.⁹⁴ There is no contradiction between market integration, economic freedoms and trade union collective action. The Treaty’s provisions on free movement are to be so interpreted.⁹⁵
99. Economic provisions of the Treaty have come to be re-interpreted in light of changes in the scope of activities of the EU.⁹⁶ The ECJ’s decision in *Albany* is

the point of view of resource allocation efficiency. Of course this ideal market will rarely, if ever, exist. But for our purposes what is important is not determining when the market is the ‘best’ or even when it is ‘at its best’, but rather when it is ‘better’ than the alternative available institutions”. See generally, Chapter 4: “The Alternative Models of the European Economic Constitution”, pp. 103-149.

⁹² Maduro produced only a partial account of his earlier theory in his Opinion as Advocate General in *Viking*, para. 33: “The rules on freedom of movement and the rules on competition achieve this purpose principally by granting rights to market participants. Essentially, they protect market participants by empowering them to challenge certain impediments to the opportunity to compete on equal terms in the common market. The existence of that opportunity is the crucial element in the pursuit of allocative efficiency in the Community as a whole”.

⁹³ Instead, in his Opinion, Advocate General Maduro continues, para. 36: “Thus, at the heart of the matter lies the following question: does the Treaty imply that, in order to ensure the proper functioning of the common market, the provisions on freedom of movement protect the rights of market participants, not just by limiting the powers of the authorities of the Member States, but also by limiting the autonomy of others?”

⁹⁴ The introduction to the Commission’s Communication on ‘The European social dialogue, a force for innovation and change’ (COM(2002) 341 final, Brussels, 26 June 2002) states (p. 6): “The social dialogue is rooted in the history of the European continent, and this distinguishes the Union from most other regions of the world”.

⁹⁵ The ECJ recognised the implications of the transformation from the purely common market nature of the EU in Case C-50/96 *Deutsche Telekom AG v Schroder* [2000] ECR I-743. The Court concluded: (para 57) (italics added) ‘...it must be concluded that the *economic aim* pursued by Article 119 [now 141] of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is *secondary to the social aim* pursued by the same provision, which constitutes the expression of a *fundamental human right*’. There is similar reasoning in the Opinion of Advocate General Tesouro and the judgment of the ECJ in Case C-13/94 *P. v S. and Cornwall County Council* [1996] ECR I-2143.

⁹⁶ For example, the Commission must now take employment into account due to Article 127(2) EC inserted by the Treaty of Amsterdam, which requires that: ‘The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Community policies and activities’. Even before, in interpreting the Treaty provisions on competition, the ECJ has explained that an agreement’s beneficial effect on employment ‘since it improved the general conditions of production, especially when market objectives are unfavourable, comes within the

a crucial illustration where the Court acknowledged that the EC Treaty provisions on competition policy must be conditioned by other Treaty provisions on social policy; specifically, collective action in the form of collective bargaining/social dialogue.⁹⁷ The ETUC's letter attached to the ITF submission in *Viking* proposed this approach:⁹⁸

‘The ETUC considers that the relationship between economic freedoms of movement and fundamental social rights to collective action should be consistent with the evolution of the EU from a purely economic Community establishing a common market to a European Union with a social policy aimed at protecting workers employed in the common market who are also citizens of the Union...

Economic provisions of the Treaty have to be interpreted in light of changes in the scope of activities of the EU...’.

Solution 5

100. 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. Treaty provisions on free movement are to be interpreted consistently with the recognition that workers and trade unions, as market participants, may take transnational 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.
101. This interpretative approach to the Treaty is necessary to balance the growing 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.⁹⁹

framework of the objectives to which reference may be had pursuant to Article [81(3)]'. Case 26/76 *Metro-SB-Großmarkte GmbH & Co LG v Commission & SABA* [1977] ECR 1875, para 43.

⁹⁷ Submissions of a number of Member States in the *Viking* case proposed that the provisions on economic freedoms in Title III of the EC Treaty are to be *interpreted* so as to be consistent with the social policy provisions of Title XI of the Treaty. See now the proposed “horizontal” social clause in the draft Reform Treaty: “In defining and implementing its policies and actions, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health”. New Title II, Article 7, amendment 23.

⁹⁸ Paras 14, 16.

⁹⁹ The ITF's Flags-of-Convenience policy at stake in the *Viking* case illustrates how the balance of economic power in an integrated European market may be re-established. As put by the ETUC in its letter attached to the ITF's written submission (paras. 2, 7, 8): “Although the case concerns the specific collective actions of the FSU and the ITF, it is of the greatest importance to acknowledge that their actions are in no way unusual or exceptional. The FSU and the ITF have taken exactly the same type of

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

102. The question before the European Court is protection of workers and their organisations engaged in transnational collective bargaining and collective action aiming to balance the economic power of employers due to their transnational freedom of movement granted by the Treaties. Without such a balance, multinational enterprises make decisions without having to take into account the interests of their employees, inadequately protected only by national labour laws, subject to the supremacy of the Treaties.
103. Fundamental rights in the EU Charter offer the Court a legal foundation for a response. But the Court has legal support apart from the Charter in 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:
- i. labour is not a commodity like others (goods, services, capital); this is the foundational principle of the International Labour Organisation of which all EU Member States are members and have subscribed to the ILO Declaration of Principles of 1998;
 - ii. the exercise of economic freedoms is conditional on the Community objective of improvement of working conditions (Article 136 EC);
 - iii. respect for the fundamental rights of workers as human beings (the EU Charter);
 - iv. acknowledging the central role of social dialogue and social partnership at EU and national levels (endlessly reiterated by the Commission and embodied in Articles 138-139 EC), and
 - v. adhering to the strict principle of equal treatment without regard to nationality.
104. The Court may adopt an interpretative framework for European law based on these principles of *ordre communautaire social*.

collective industrial action as is taken on a regular, normal and systematic basis by organisations of workers everywhere in the European Union. Collective industrial action is part of the ordinary conduct of industrial relations involving the social partners engaged in collective bargaining... The restrictions on employers' activities inherent in collective industrial action by workers may – and with the coming about of the internal market this may more frequently be the case – affect cross-border production and transport activities of the employer. However, this was also the case long before the economic integration of the European single market... It cannot seriously be contended that the 1957 Treaty is to be interpreted, almost half a century later, to produce a violent overthrow of the norms established in national industrial relations systems...”.

105. In the Directives on Posting of Workers, Services and Public Procurement,¹⁰⁰ the Community legislator states that requiring compliance with collective agreements does not violate the free movement provisions of the Treaty. This was inspired by the ECJ's case law in the line of cases following *Rush Portuguesa*.¹⁰¹
106. For the Court to hold that collective action to achieve collective agreements violated the free movement provisions would (i) reverse its previous jurisprudence, (ii) go against the repeated choices of the Community legislator and not least, (iii) undermine fundamental rights of collective bargaining and collective action laid down in Article 28 of the EU Charter of Fundamental Rights.
107. A recent Opinion of Advocate General Bot illustrates this solution. Advocate General Bot states:¹⁰²
- “The question raised by the court making the reference once again calls on the Court to strike a balance between the freedom to provide services, on the one hand, and the overriding requirements of the protection of workers and the prevention of social dumping, on the other”.
108. The issue in *Rüffert* was whether a public authority in Germany could require a contractor from Poland to observe German local collective agreements. Failure to comply led to heavy financial penalties and ultimately cancellation of the contract. The contractor complained that this was incompatible with Article 49 EC, as mandatory compliance meant they lost their competitive advantage and, consequently, it constituted an impediment to market access.¹⁰³
109. The large majority of Member States making submissions considered this restriction justified by the objective of worker protection and proportionate to achievement of that objective.¹⁰⁴ The Polish government disagreed.¹⁰⁵ The Commission took the view that only universally applicable collective agreements qualified under the Posting Directive. The public authority was seeking to apply specifically local collective agreements.¹⁰⁶

¹⁰⁰ See footnote 45 above.

¹⁰¹ *Rush Portuguesa Lda v. Office National d'Immigration*, Case C-113/89, [1990] ECR I-1417.

¹⁰² Case C-346/06, *Rechtsanwalt Dr. Dirk Rüffert v. Land Niedersachsen*. Opinion of Advocate General Bot, 20 September 2007, paragraph 2.

¹⁰³ *Ibid.*, paragraph 41.

¹⁰⁴ *Ibid.*, paragraph 47.

¹⁰⁵ *Ibid.*, paragraph 51.

¹⁰⁶ *Ibid.*, paragraphs 52-55.

110. Advocate General Bot cited the EC Directives on procurement which allow public authorities to make compliance with collective agreements a contract performance condition – another indication of the Community legislator’s reconciliation of market freedoms with social regulation.¹⁰⁷ The Advocate General concluded that there was little doubt that a restriction on the freedom to provide services exists.¹⁰⁸ But the public authority was not violating Article 49 because it sought to ensure the protection of posted workers.¹⁰⁹ This was an appropriate means of preventing social dumping as it ensures that local workers and posted workers on the same site will be treated equally.¹¹⁰
111. The conclusion, as with the Services Directive, is that public authorities imposing severe sanctions for failure by contracted service providers from other Member States to comply with collective agreements are not violating Article 49. Consistency demands that workers and trade unions taking lawful collective action to achieve the same result are also not violating Article 49.

Solution 6

112. *Laval* and *Viking* highlight the central role of the Court in formulating principles concerned with collective action by workers and their organisations. As with *Rush Portuguesa*, the ECJ in *Laval* and *Viking* may establish principles which will eventually be followed by the Community legislator. Community law should address conclusively the threat of “social dumping” to Social Europe. The ECJ, consistently with the EU Charter, should recognise the fundamental rights of workers and their organisations to take transnational collective action to combat “social dumping”. The result would be a definitive reaffirmation of *ordre communautaire social*.

¹⁰⁷ *Ibid.*, paragraphs 58-60.

¹⁰⁸ *Ibid.*, paragraph 102.

¹⁰⁹ *Ibid.*, paragraph 118.

¹¹⁰ *Ibid.*, paragraph 119. Although it could facilitate free movement if employers could obtain a competitive advantage by hiring migrant workers on less favourable terms of employment, this is clearly prohibited by Community law. To claim that applying collective agreements to employees of service providers from other countries operates to restrict free movement faces the same principled objection. It is sometimes argued that that this prejudices the jobs of migrant workers. This argument tends to come not from workers but from service providers/employers. Trade unions representing the workers concerned, both in the host country and the migrant workers, oppose undermining collective standards. Migrant workers, who are subject to the same cost of living in the host country, are not prominent in litigating to demand they should be paid less than provided in collective agreements.