CASE ANALYSIS: INTERNATIONAL TRANSPORT WORKERS' FEDERATION V. VIKING LINE ABP

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1. Introduction

European Union (EU) law represents a unique legal order that was born out of the project of European integration, whose first objective was to establish an internal market on the basis of the four freedoms - freedom of movement of goods, services, capital and persons. Over time, EU law has evolved into a constitutional system that covers not only economic activity, but also increasingly interacts with fundamental rights and social protection. Such dual character has frequently given rise to tensions between the economic and social dimension of the Union, for instance, in the labour law domain, where national traditions interact with EU principles.

The Viking case (International Transport Workers' Federation v Viking Line ABP, C-438/05) is paradigmatic in this regard, as it puts into focus the clash between the freedom of establishment under Articles 49 and 54 TFEU and the fundamental right to strike as guaranteed in the EU Charter of Fundamental Rights and international labour instruments. When the owners of a ship tried to reflag the vessel to Estonia in order to get cheaper labour costs, trade unions in both countries opposed it, and threatened collective action to stop what was seen as social dumping. This case therefore posed key questions relating to the relationship between economic freedoms and social rights and the horizontal application of EU law in conflicts between private entities.

2. Brief Description of the Case

The Viking case, formally known as ***International Transport Workers' Federation (ITWF) and Finnish Seamen's Union (FSU) v Viking Line ABP,***[1] deals with the intersection between

[1] International Transport Workers' Federation (ITWF) and Finnish Seamen's Union (FSU) v Viking Line ABP, Case C-438/05, [2007] ECR I-10779.

the European Union's fundamental economic freedoms and the equally fundamental social right of workers to take collective action, that is including strike action.

The dispute had arisen due to the operational strategies of Viking Line ABP, which was a Finnish ferry company that operated the vessel *Rosella* on the routes between Finland and Estonia. In an attempt to reduce operating costs, Viking had sought to "reflag" the *Rosella* under the Estonian flag. This was because the practical effect of such reflagging would be that the company could employ Estonian crew members at substantially lower wages than Finnish seafarers, and that in turn would have cut labour costs and improved competitiveness.

The International Transport Workers' Federation (ITWF), which is a global trade union federation, together with the Finnish Seamen's Union (FSU), had strongly opposed this move. This is because they perceived that the reflagging strategy was nothing but a form of "social dumping" that is, undermining the local labour standards by exploiting disparities in wages and employment conditions across different jurisdictions. In response to that, the unions also threatened industrial action, which included strikes and boycotts, so as to pressure Viking into abandoning its reflagging plan.

Viking, in turn, had argued that such collective action by the unions was directly infringing on its rights under EU law, specifically the Freedom of Establishment **(Article 49 TFEU,[2] formerly Article 43 EC[3])** and also the Freedom to Provide Services (**Article 56 TFEU,[4] formerly Article 49 EC[5]**). The company contended that the threatened strike action was essentially intended to prevent it from exercising what the treaty-based rights had already given to it, namely the right to reflag and establish its business operations under a more favourable regime in another Member State.

The case had then been referred to the ECJ for a preliminary ruling by the High Court of Justice (Queen's Bench Division) in the United Kingdom. The central legal issue was whether collective action undertaken by trade unions, which is traditionally understood as part of the fundamental right to strike, could nevertheless be restricted by the EU's economic freedoms.

The ECJ's ruling in which the Court had balanced these competing principles. It held that while

[2] Treaty on the Functioning of the European Union, art. 49, Oct. 26, 2012, 2012 O.J. (C 326) 47.
[3] Treaty Establishing the European Community, art. 43, 2002 O.J. (C 325) 33.
[4] Treaty on the Functioning of the European Union, art. 56, Oct. 26, 2012, 2012 O.J. (C 326) 47.
[5] Treaty Establishing the European Community, art. 49, 2002 O.J. (C 325) 33.

the right to take collective action, including strike action, constitutes a fundamental right recognised by EU law, such a right is not absolute. That is to say, it must be balanced against the fundamental freedoms of the internal market. The Court concluded that collective action which has the effect of restricting a company's freedom of establishment could, in principle, amount to a violation of EU law unless it is justified by overriding reasons of public interest and proportionate to the aim pursued.

This judgment also had the effect of placing significant limitations on trade unions' ability to deploy industrial action in cross-border disputes.

3. Historical background and current practice

The judgment of the Court in this matter cannot be properly understood in isolation, because of the fact that it must be seen within the broader historical trajectory of the European integration project, which had always balanced, and at times struggled to reconcile, the economic freedoms with the social rights. From the very beginning, the process of European integration was never just a purely economic exercise. There was also the element of labour, fairness, and rights which had been present, though in the early stages they had been subordinated to the wider goals of economic growth and market efficiency.

The Treaty of Rome of 1957[6] had already laid down the four fundamental freedoms which are, the free movement of goods, workers, services, and capital which served as the very foundation of the common market. This was because of the strong emphasis on dismantling barriers to trade and investment across the Member States. Social policy, however, including matters of labour rights and industrial relations, had remained largely within the competence of the nation-states themselves. There is also **Article 153(5) TFEU**[7] **(formerly Article 137(5) EC)**[8]**,** which explicitly excluded the right to strike from EU legislative competence, and that is why industrial action had been kept as a matter falling under the sovereignty of individual Member States.

Despite that, from the 1990s onwards there had been escalating tensions due to the fact that the European Union was pursuing deeper economic integration, while at the same time there was

[6] Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3.
[7] Treaty on the Functioning of the European Union, art. 153(5), Oct. 26, 2012, 2012 O.J. (C 326) 47.
[8] Treaty Establishing the European Community, art. 137(5), 2002 O.J. (C 325) 33.

also an attempt to make gestures towards social protection. This is what the adoption of the **Community Charter of the Fundamental Social Rights of Workers in 1989[9],** and later the **Charter of Fundamental Rights of the European Union in 2000[10],** seemed to represent**. Article 28[11]** of the Charter expressly recognised the right to collective bargaining and collective action, including strike action, which many scholars and unions interpreted as the elevation of such rights to the status of EU-level fundamental rights.

At the same time, what the businesses had started doing was increasingly exploiting the internal market freedoms to restructure their operations or relocate them, a practice which had been described as "regime shopping." This dual development that is, the strengthening of social rights on one hand and the aggressive reliance on economic freedoms on the other had created a structural conflict, which ultimately crystallised in the Viking judgment.

CURRENT PRACTICE

ECHR & ECtHR: Stricter Scrutiny of Strike Action:

In January 2025 the European Court of Human Rights (ECtHR) ruled that Article 11 ECHR (freedom of assembly and association) was not breached where Belgian trade union officials were criminally convicted for obstructing a motorway during a general strike (and not the striking per se), Bird & Bird. This is a restrictive definition of what is meant by protected industrial action: legitimate strikes may still be prohibited if they transgress into activities which create risks to public safety or break criminal law.

EU-Level Collective Bargaining: Initiatives & Challenges:

The EU Minimum Wage Directive (2022) sought to strengthen collective bargaining and social protection - and yet many Member States have failed to transpose it in accordance with the November 2024 deadline, as reported by EWC News.

More importantly, an opinion of the Advocate General (January 2025) cast doubt on the EU's competence to regulate wages, and argued that the very legality of the directive could be called into question as wage-setting is not a subject area of the Treaty on European Union (ECW

[9] Community Charter of the Fundamental Social Rights of Workers, Oct. 30, 1989, COM(89) 471 final.
[10] Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1.
[11] Charter of Fundamental Rights of the European Union, art. 28, 2000 O.J. (C 364) 1.

News). If the CJEU were to agree with this opinion, the Directive, or its main social goals, would be void, which in turn would amount to a retreat of the EU-level support for collective social rights.

Industrial Action remains rampant in Europe:

Eurofound's 2023 report outlines an upswing in industrial dispute strikes across sectors-from transport, healthcare, education and platform delivery. Strikes in relation to wages, working conditions and structural reforms are still widespread.

Illustrative examples include the strikes by railway and airline companies, the strikes of platform workers over the right to collective bargaining, and general protests - thereby demonstrating that despite restrictive legal arrangements, social struggles still occur with force.

3.1 The Courts Reasoning and Underlying Issues

In its reasoning, the Court recognised that the right to strike is indeed a fundamental right under EU law, deriving authority from the Community Charter, the CFR, and also from international instruments like the **ILO Convention No. 87**.[12] Yet, at the same time, the Court had qualified this recognition by stressing that such a right is not absolute and that it must be reconciled with the Treaty-based freedoms.

The reasoning behind the court's judgement is

1. **Collective action as restriction** – Industrial action which prevents or deters a company from exercising freedom of establishment or providing services was held to constitute a restriction under **Articles 49[13] and 56[14] TFEU.**

2. **Possibility of justification** – The Court also said that such restrictions can still be applicable in cases which are for pursuing legitimate objectives, like the protection of workers' rights.

3. **Proportionality** – Any industrial action must be suitable, necessary, and proportionate. That is, disproportionate or overly broad strike actions would be unlawful under EU

[12] Freedom of Association and Protection of the Right to Organise Convention, 1948, C87, 68 U.N.T.S. 17.
[13] *Supra* Note 2.
[14] *Supra* Note 4.

law.

This reasoning had the effect of assimilating trade union activity into the same framework as restrictions imposed by states, meaning that both had to undergo a proportionality review if they conflicted with internal market freedoms.

3.2 Conflicts of Rules and Principles

The judgment epitomises the ongoing tension between two foundational principles of the European Union. On the one hand, there is the principle of **economic freedoms**, particularly freedom of establishment and the freedom to provide services, which had always been treated as constitutional cornerstones of the internal market. On the other hand, there is the principle of **social rights**, especially the right to strike, which has been recognised under ILO conventions, the European Social Charter, and the EU Charter of Fundamental Rights.

4. Identification of legal dilemma

The legal dilemma that is raised by the Viking example is one of the most acute in the EU law: the collision of the objectives of the market integration and the rights of social protection.

In its fundamental form, the issue is that the EU legal order subjects economic freedoms, including freedom of establishment, to the same normative status as foundational social rights, including the right to strike. However, social rights are not so centralized in their framework (constitutions of the countries, the European Convention on Human Rights, the European Social Charter, the EU Charter of Fundamental Rights) as economic freedoms are directly codified and easily enforced in the Treaties. This imbalance leaves it uncertain as to their scope and enforceability.

This complexity is practical as it is the case in life that in practice, companies and workers are aiming at conflicting goals. Employers are trying to cut costs and gain as much competitiveness as possible in the internal market (in the case of Viking Line, by reflagging the ships into Estonia to tap into cheaper labour).

The trade unions aim at maintaining the current jobs and wage levels by acting in collective bargaining which involves strikes and boycotts. A conflict of these aims compels EU law to engage in a balancing exercise lacking any evident guidance in the Treaty:

Is economic freedom the best to override social rights to have uniformity of the internal market? Or must an essential right, such as the right to strike, prevail, at the expense of restraining cross-border business activity?

To make things more difficult, the case presented a question of horizontal applicability as well: the EU freedoms were not applied to a state, but to trade unions, which are private entities. The acknowledgement of such horizontal effect could potentially change the nature of EU law by restricting the autonomy of the unions and redefining industrial relations as subject to market freedoms.

Therefore, the dilemma is not only doctrinal, but constitutional and practical: it casts a doubt on the very compromise of the economic constitution of the EU and its new social constitution.

5. Issues identification

I. Right to Strike v Freedom of Establishment.

The strike action by trade unions, where the trade unions sought to avoid a company reflagging its ships to save on labour laws of the country of establishment, constituted an unlawful interference with the right of the company to establishment under the EU law.

II. Horizontal Application of EU Fundamental Freedoms.

Can EU internal market freedoms bind the actions of private actors (such as trade unions, not solely states) and restrict their activities in labor disputes?

III. Proportionality of Collective Action

The question of whether the strike actions are a reasonable and reasonable limitation on the freedom of establishment i.e. the social right of workers versus the economic freedom of employers.

IV. Social Policy vs. Economic Integration in EU Law

The larger constitutional issue about whether the preference towards economic integration (free movement, establishment, services) or social rights is dominant in EU law, and what room is left to Member States and unions to safeguard workers.

6. Legal reasoning of issues and EU compliance with the help of principles

I. Right to Strike v. Freedom of establishment

The Court had begun by recognising that the right to take collective action including the right to strike is a fundamental right and this is because of the fact that such a right has been reflected in a number of international instruments and also in the Community or Union instruments such as the Community Charter and the Charter of Fundamental Rights. That recognition however did not mean that the fundamental nature of the right would automatically place it outside the scope of the Treaty freedoms. The Court held that collective action which makes it pointless or even unattractive for an undertaking to exercise the freedom of establishment is to be understood as a restriction of that freedom. Such a restriction can be justified but only if it pursues a legitimate aim that is compatible with the Treaty and if it meets the proportionality requirements. This means that the measure must be suitable and necessary and must go no further than what the situation requires. The CJEU therefore had imposed what the Court described as a balancing test between the social right to strike and the economic freedom of establishment and that is the central point of the reasoning.

Practical Implications:

The right is not absolute. Unions retain the right to collective action but this right is not absolute when cross border freedoms are engaged and this is due to the balancing approach. There is a case by case proportionality test and the national court must examine whether less restrictive alternatives were available for example other negotiation or industrial action measures and whether the action actually protected jobs and conditions or whether it was merely an undifferentiated solidarity policy. The CJEU explicitly rejected broad policies which required solidarity irrespective of any real threat to workers conditions and moresoever the Court stressed that such policies cannot be justified.

II. Horizontal application of EU fundamental freedoms

What the Court had held was particularly important. A key outcome of Viking is that the freedom of establishment which at that time was Article 43 EC[15] is capable of conferring rights on a private undertaking which may then be relied on against a trade union or an association of

[15] *Supra* Note 3.

trade unions. In short, the Court accepted that Treaty freedoms can have effect in disputes involving private parties where the private action had the effect of restricting a Treaty freedom. The reasoning was based on prior authorities that showed that the Treaty freedoms aim at abolishing barriers between Member States and that private obstacles would undermine that very purpose.

The legal significance and limits are that this is not an unconditional form of horizontal direct effect. The Court did not announce a general rule that Treaty freedoms always trump private law. Instead, it recognised a functional horizontal reach where private conduct produces effects equivalent to state measures. That is for example when private collective action neutralises the effect of free movement. Context therefore matters. The CJEU accepted enforceability against unions in situations where there is a cross-border element and where private action would nullify Treaty freedoms and where the action did not fall within the Albany type exclusion from competition rules. The Court had stated that the Albany reasoning for competition did not extend automatically to free movement. Therefore there is some room but not a sweeping immunity for trade unions.

III. Proportionality of collective action

The proportionality framework which the Court applied followed the established three-part assessment. First there must be a legitimate aim and here the protection of workers is a recognised overriding reason of public interest. The right to strike is a fundamental right and that is something that may justify restricting a Treaty freedom. Second the suitability test requires that the action must be capable of securing the objective and that means it must be appropriate to protect workers jobs or conditions in the concrete situation. Third the necessity or minimal impairment requirement means that the action must not go beyond what is necessary and so the national court must check whether less restrictive national remedies or negotiation tools were available and whether they had been exhausted. The Court had demanded factual review by the national judge on these points.

In the Viking case the Court signalled that it is for the national courts to determine whether jobs and conditions were indeed jeopardised and whether the unions had used less restrictive means. The Court was critical of blanket solidarity policies such as the ITF policy that obliged solidarity whether or not workers conditions were threatened and the Court said that such undifferentiated policies cannot be objectively justified. That illustrates the insistence of the

Court on tailoring and on evidence based action.

IV. Social policy versus economic integration in EU law

The constitutional stance taken by the Court was that it explicitly acknowledged the social objectives of the EU which are contained in Articles 2[16] and 3[17] EC and Article 136[18] EC and the Court emphasised that the internal market must be balanced with social policy aims. Nonetheless the judgment reaffirmed that the fundamental economic freedoms are constitutional pillars of the EU and that social objectives can justify restrictions only within the proportionality framework. In plain language social rights are recognised and may justify limiting internal market freedoms but they do not automatically outweigh those freedoms and there is always a case by case balance.

The broader constitutional tension is what the Viking case exemplifies. The Court in its role as guardian of the internal market frequently has to test national and private social regulation against the Treaties freedoms and this has produced friction with national social models particularly with those systems based on autonomous collective bargaining such as the Nordic model. That tension due to the impact on social models prompted a political and legislative response as well.

6.1. EU compliance with principles analysis of legal reasoning

6.1.1. Consistency with precedent and principles:

The Court grounded its approach in established principles. This is because of the direct applicability and the fundamental character of free movement and establishment. There was also the recognition of fundamental rights as general principles of EU law and there is also the reference to the Charter and to international instruments. The Court applied the settled proportionality method from free movement case law such as Gebhard[19], Bosman[20] and

[16] Treaty Establishing the European Community, art. 2, 2002 O.J. (C 325) 33.
[17] Treaty Establishing the European Community, art. 3, 2002 O.J. (C 325) 33.
[18] Treaty Establishing the European Community, art. 136, 2002 O.J. (C 325) 33.
[19] einhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Case C-55/94, 1995 E.C.R. I-4165.
[20] Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman, Case C-415/93, 1995 E.C.R. I-4921, [1996] 1 C.M.L.R. 645 (ECJ).

Schmidberger.[21] The decision therefore sits coherently within what the Court had already developed as its toolkit and it integrated protection of social rights into the proportionality balancing that already governed clashes between freedoms and other rights.

6.1.2. Problematic aspects and criticisms:

However there has been a number of criticisms. There is uncertainty for trade unions because the proportionality test is highly fact sensitive and this leaves unions with legal uncertainty about what solidarity action is lawful. Trade unions and commentators argued that this uncertainty chills collective bargaining. There was also an apparent prioritisation of economic freedoms because critics said that the Courts framework effectively constitutionalised market freedoms and diluted social autonomy especially in those national systems that rely heavily on collective bargaining to set terms and to monitor enforcement such as in the Nordic countries. Scholarly commentary accused the Court of substituting legal tests for what are essentially political choices about social policy. There was also horizontal uncertainty because while the Court recognised enforceability against unions, it did not define a bright line test for when Treaty freedoms apply horizontally. As a result of which there was ambiguity with regards to the doctrine.

6.1.3. Subsequent developments in policy and law:

The political response has been significant over time. The EU has strengthened protection for posted workers partly due to concerns about social dumping that surfaced in cases such as Laval[22] and Viking[23]. The Posted Workers Directive was subject to enforcement measures through Directive 2014/67/EU and was then amended by Directive 2018/957 to clarify the applicability of collective agreements the scope of remuneration and the rules for long term postings. The EU also adopted the European Pillar of Social Rights in 2017 which is non-binding but stresses social dialogue and fair working conditions. All of these measures show that there has been a legislative attempt to rebalance social protection within the framework of the internal market.

[21] Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich, Case C-112/00, 2003 E.C.R. I-5659.
[22] Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, Case C-341/05, 2007 E.C.R. I-11767.
[23] *Supra* Note 1.

7. Topic resolution and possible solutions

7.1. How a national court should resolve Viking-type disputes:

First, the national court should begin by characterising the cross-border element and this is because of the fact that it is essential to confirm that the particular situation had indeed engaged the freedom of establishment which is not only about the registration of a company but also about the fixed and continuing economic activity across borders and that is what the CJEU in Curia has underlined on many occasions.

The second task is for the national court to assess whether the union action restricts a Treaty freedom and this is because of the reality that if the action had the effect of making the establishment itself pointless or preventing the equal treatment of the operators in the host state then it is indeed a restriction.

The third stage concerns legitimacy and here the court should check carefully whether the aim of the union is genuinely the protection of workers which has been accepted as a legitimate overriding interest in EU law and that is what the CJEU made clear.

After that comes the proportionality analysis and here the national court should ask several layered questions that is

(a) is the action suitable for achieving the stated purpose?

(b) is it necessary in the sense that less restrictive means had been available or had been exhausted?

(c) does the action have an excessive impact on the market freedoms and moresoever if any of these questions fail then the action cannot be justified in law.

Finally the remedies need to be tailored with care and this is because of the fact that if the action is disproportionate then the national court should fashion remedies that protect the employer's Treaty right while also enabling legitimate industrial action where that action is tailored for example by limiting the scope or the duration or by requiring prior negotiation and that is how balance can be maintained.

7.2. Policy and legislative solutions that could reduce Law - Market tensions

One of the clearest priorities is to clarify the legal status of collective action in EU law and a legislative instrument such as a Council Decision or a Directive could specify the circumstances in which collective action aimed at protecting local wages and working conditions is a legitimate justification for restricting the freedom of establishment or services and due to this there is also the need to set objective criteria for proportionality this would reduce uncertainty and protect both the workers and the integrity of the internal market and this is what the 2018 revision of the Posting Directive has been moving toward because it clarified the scope of collective agreements for posted workers as is evident in EUR-Lex.

Another important step is to strengthen the enforcement of host-state labour standards and to improve the mechanisms which prevent circumvention and social dumping this could include more administrative cooperation as well as joint liability in subcontracting chains and clearer rules on the applicability of universally applicable collective agreements and while this has been already partially implemented by the Enforcement Directive of 2014 and the 2018 revision there is still the need for further harmonisation or at least clearer guidance and that would reduce the conflict in a significant way as EUR-Lex shows.

There is also the proposal to create structured dispute-resolution and social-dialogue channels at the EU level which means encouraging rapid mediation or arbitration whenever cross-border reflagging or posting threatens jobs and a formal mechanism could allow social partners and authorities to resolve disputes before strikes escalate which has been shown in other contexts to be effective.

Judicial doctrine development also plays a role because the CJEU together with the national courts should develop more concrete proportionality guidance for example by identifying indicia of less restrictive measures and laying out factors for necessity so that unions and employers can better predict outcomes and avoid excessive litigation.

7.3. Protecting genuine social aims while policing blanket solidarity policies:

It is important that genuine job-protection strikes remain clearly shielded especially if there is evidence of a real threat to employment while at the same time limiting sweeping transnational solidarity rules that do not target concrete harm and that is what the CJEU itself had drawn as

a line in its reasoning in Curia.

7.4. Practical steps for unions and employers:

For the unions the essential steps are to document the substantive threat to jobs and conditions and to exhaust domestic remedies first and to keep solidarity measures proportional targeted and time-limited and also to engage promptly in transnational negotiation and information exchange.

For the employers the steps include making sure that where reorganisations had involved cross-border elements they proactively communicate the legal and contractual guarantees for the affected workers and seek declarations or undertakings which show that the change will not undermine working conditions and that will reduce the scope for justified action.

8. Conclusion

The Viking judgment is a landmark because it articulates in a reasoned and principled way how to reconcile two constitutional goods of the European Union which are the internal market freedoms on the one hand and the social rights including the right to strike on the other hand and this is because of the fact that the CJEU did not infantilise social rights but instead acknowledged them as legitimate grounds that could restrict market freedoms while demanding a structured proportionality assessment and that approach respects what the Court's mandate has been to keep the internal market coherent while leaving space for the national social models provided that those are proportionate and evidence-based.

Yet the practical problem lies in the fact that proportionality is always fact-sensitive and politically loaded and due to this the optimal solution is not purely judicial but rather a combined legal and political response that is clearer EU legislation as has partly happened with the Posted Workers Directive revisions stronger enforcement tools against abuse and social dumping and better institutionalised social dialogue and dispute resolution which would prevent the hard clashes that the courts otherwise must resolve and moresoever those combined measures will preserve what the freedoms of the Single Market had promised while also protecting what the social protections of European democracy had asked for.