

**The Draft Monti II Regulation –
An Inadequate Response to *Viking* and *Laval***

By

**K D Ewing
Professor of Public Law
King’s College, London**

Introduction

1 In my view, there is nothing of merit in the Draft Monti II Regulation, the contents of which reflect a failure to understand the serious implications of the *Viking and Laval* decisions, and a failure also to address the changing nature of human rights law insofar as it affects the right to strike.

2 The failure to understand the implications of the *Viking and Laval* cases is reflected in the explanatory memorandum, which refers to ‘positive elements’ of the *Viking and Laval* jurisprudence. There are no positive elements: these decisions plot EU law on the right to strike at the same place as English domestic law over 100 years ago. That is to say that it will almost certainly always be unlawful in those EU cross border situations where *Viking and Laval* are relevant.

3 The failure to address the changing nature of human rights law is reflected in the fact that the *Viking and Laval* jurisprudence (which appears simply to be written into the draft regulation) has been overtaken by events, by developments in other legal forums to which the ECJ/CJEU is bound to have regard. In my view, inadequate account is taken of these developments by those responsible for drafting the proposed Regulation.

Why are *Viking* and *Laval* a Problem?

4 The *Viking and Laval* decisions are a problem for trade unions because of their impact on the freedom to take collective action in an EU trans-national context. It is true, as the Explanatory Memorandum accompanying the Draft Regulation points out, that in *Viking and Laval* the Court recognised for the first time that ‘the right to take collective action, including the right to strike, forms an integral part of Community law, the observance of which the Court ensures. But the Court also imposed restrictions and limitations that have the effect of ensuring that the right can never be exercised in practice, without the real fear of legal liability.

- *Case C-438/05, Viking Line v ITF (11 December 2007)*

5 In this first case, the Court held that although protected by domestic labour law (the Finnish Constitution), industrial action may be unlawful under EU law if it

breaches the terms of the EC Treaty, Art 43 (now TFEU, Art 49). The case concerned industrial action by the Finnish Seamen's Union (FSU) and the ITF against a Finnish company proposing to re-flag a vessel (the *Rosella*) in Estonia, where terms of employment were lower than in Finland.

6 The Court referred to a number of international treaties (including ILO Convention 87), and accepted that collective action 'may, in principle, be justified by an overriding reason of public interest, such as the protection of workers' (para 90). However, the ECJ had a poor understanding of the scope and content of Convention 87, holding that the right to strike under EU law was subject to very tight restrictions:

- First, collective action may only be taken in exceptional circumstances. According to the Court at para 81: 'as regards the collective action taken by FSU, even if that action – aimed at protecting the jobs and conditions of employment of the members of that union liable to be adversely affected by the reflagging of the *Rosella* – could reasonably be considered to fall, at first sight, within the objective of protecting workers, such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat'.
- Secondly, even if the collective action falls within this narrow band of permissibility, it may only be taken if it is 'suitable' and 'necessary'. According to the Court at para 84: if 'the jobs or conditions of employment of the FSU's members liable to be adversely affected by the reflagging of the *Rosella* are in fact jeopardised or under serious threat, it would then have to ascertain whether the collective action initiated by FSU is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective'.
- Thirdly, in determining what is necessary for these purposes, the trade union is required first to exhaust any other methods of dispute resolution. According to the Court at para 87: 'whether or not the collective action at issue in the main proceedings goes beyond what is necessary to achieve the objective pursued, it is for the national court to examine, in particular, on the one hand, whether, under the national rules and collective agreement law applicable to that action, FSU did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with *Viking*, and, on the other, whether that trade union had exhausted those means before initiating such action'.

7 For the avoidance of doubt, it ought to be said that the *Viking* decision imposes restraints only in relation to collective action with an EU trans-national dimension, which concerns the movement of an enterprise from one EU country to another EU country.

- *Case C-341/05, Laval v Svenska Byggnadsarbetareförbundet (18 December 2007)*

8 In this case, the Court held that, although protected by Swedish national law, (i) collective action by Swedish unions, (ii) designed to compel a Latvian contractor to pay Swedish rates determined by a Swedish collective agreement to his Latvian workers employed on Swedish building sites, (iii) may be unlawful under EU law if it breaches the terms of the EC Treaty, Art 49 (now TFEU, Art 56).

The ECJ acknowledged that the freedoms established in the EC Treaty could be subject to restrictions designed to protect fundamental rights (in this case the right to strike).¹ Nevertheless, it was held that the collective action in this case could not be justified where it was being taken to compel the employer to comply with the terms of a collective agreement that had not been declared universally applicable. As a result

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- In systems (such as Sweden) **where national law does not require a posting employer to comply with a statutory minimum wage or with universally applicable collective agreements**, a trade union may not take collective action against a posting employer in order to secure a collective agreement, or to seek compliance with the terms and conditions of a collective agreement;
- In systems **where (i) national law requires a posting employer to comply with a statutory minimum wage, but (ii) there are no universally applicable collective agreements (as defined)**, it is now unclear whether a trade union may take collective action with a view to requiring the posting employer to pay higher wages than the minimum set down in statute;
- In systems **where national law requires a posting employer to comply with universally applicable collective agreements (as defined)**, it is now unclear whether a trade union may take collective action to require the posting employer to observe terms and conditions of employment on matters which fall outside the minimum list of mandatory items in article 3(1) of the PWD.

9 What is more, it would appear that industrial action for these purposes will be unlawful, regardless of whether its purpose is to (i) protect standards in collective agreements from being undercut, or (ii) protect posted workers from being exploited in the domestic labour market, or (iii) both.

ILO Convention 87

10 Although the ECJ acknowledged the importance of ILO Convention 87, it did not do enough to ensure compliance with ILO standards, and in particular ILO Conventions 87 and 98. Although EU Member States have a duty to comply with EU law, they all also have an obligation to comply with ILO Conventions 87 and 98.²

¹ As in *Viking*, the Court referred to a number of international treaties (including ILO Convention 87), to support the view that ‘the right to take collective action’ must be ‘recognised as a fundamental right which forms an integral part of Community law’.

² On the duty of governments committed to the rule of law to comply with international legal obligations, see the famous lecture by Lord Bingham, ‘The Rule of Law’ [2007] CLJ 67.

The application of *Viking and Laval* in the domestic courts of EU Member States has been the subject of complaints to the ILO supervisory bodies, which have made it very clear that the law as developed by the ECJ is not consistent with obligations arising under ILO Conventions 87 and 98.

- **The *BALPA* case**

11 So far as the specific impact of *Viking* on trade union autonomy and the right of workers and their organisations to take collective action to protect their interests is concerned, this has already been seen in the *BALPA* case, which led to a complaint to the ILO from the United Kingdom. In that case, British Airways' pilots were concerned about their employer's decision to base part of its operations in France, and the implications this might have for their terms and conditions of employment. The union sought various assurances from the company and when negotiations failed, the union conducted a strike ballot in accordance with the detailed procedures of British law, and otherwise acted in accordance with British legislation (which itself has been found to breach ILO and Council of Europe standards,³ and which is now the subject of several complaints to the ECtHR).

12 BALPA were threatened with legal action by the employer not because the union had acted in breach of domestic law, but because its proposed action would constitute a breach of the employer's right under the EC Treaty, Art 43 (now TFEU, Art 49) following the decision in *Viking*. BALPA then took the unusual step of seeking a declaration in the High Court that its action was lawful, while the employer counterclaimed seeking (in the words of Mr John Henty QC, counsel for the union) 'unlimited damages, including damages in respect of damage alleged to have been sustained by it by the mere fact that BALPA had served notice to ballot for strike action'. The union's action for a declaration was discontinued only three days after it commenced, and the industrial action was discontinued for fear that it might be unlawful, with the risk that the union might be liable in damages for all the losses suffered by the employer as a result of the dispute.

13 Having discontinued the domestic litigation, BALPA made a complaint to the ILO Freedom of Association Committee, a complaint that was referred in turn to the ILO Committee of Experts. The latter has now reported twice on the complaint, making it clear in uncompromising terms that the effect of *Viking* as reflected in *BALPA* was to take the United Kingdom even deeper in breach of Convention 87. In 2010, the Committee of Experts challenged the very basis of the decision in *Viking* by reporting that

The Committee observes that when elaborating its position in relation to the permissible restrictions that may be placed upon the right to strike, it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services. The Committee has only suggested that, in certain cases, the notion of a negotiated minimum service in order to avoid damages which are irreversible or out of all proportion to third parties, may be considered and if agreement is not possible the issue should be referred to an independent body (see 1994 General Survey on Freedom of Association and

³ See [http://www.ilo.org/ilolex/cgi-lex/countrylist.pl?country=\(United+Kingdom\)](http://www.ilo.org/ilolex/cgi-lex/countrylist.pl?country=(United+Kingdom)).

Collective Bargaining, para 160). The Committee is of the opinion that there is no basis for revising its position in this regard.

14 In the same report, the Committee also observed ‘with serious concern’, the practical limitations on the effective exercise of the right to strike of the BALPA [members] in this case’. According to the Committee, ‘the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the *Viking* and *Laval* judgments, creates a situation where the rights under the Convention cannot be exercised’. Although no judgment was granted by the domestic courts in the *BALPA* case, the Committee considered that there was nevertheless ‘a real threat to the union’s existence and that the request for the injunction and the delays that would necessarily ensue throughout the legal process would likely render the action irrelevant and meaningless’.⁴

15 The Committee revisited this matter in 2011, again expressing concern that ‘the doctrine that is being articulated in these ECJ judgments is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to [Convention 87]’. The British government had responded to the Committee’s 2010 observations by contending that the problems in the *BALPA* case arose as a result of its obligations derived from EU treaties, which it was powerless unilaterally to address by domestic legislation. In once again recalling its ‘serious concern’, the Committee responded by observing that

protection of industrial action in the country within the context of the unknown impact of the ECJ judgments referred to by the Government (which gave rise to significant legal uncertainty in the *BALPA* case), could indeed be bolstered by ensuring effective limitations on actions for damages so that unions are not faced with threats of bankruptcy for carrying out legitimate industrial action. The Committee further considers that a full review of the issues at hand with the social partners to determine possible action to address the concerns raised would assist in demonstrating the importance attached to ensuring respect for this fundamental right. The Committee therefore once again requests the Government to review the [domestic legislation], in full consultation with the workers’ and employers’ organizations concerned, with a view to ensuring that the protection of the right of workers to exercise legitimate industrial action in practice is fully effective, and to indicate any further measures taken in this regard.

- **The *Laval* case**

16 One of the issues left unresolved in the *BALPA* case was the question of liability in damages for action by a trade union in breach of EC Treaty, Arts 43 and 49 (now

⁴ The Committee was also concerned that ‘in the current context of globalization, such cases are likely to be ever more common, particularly with respect to certain sectors of employment, like the airline sector, and thus the impact upon the possibility of the workers in these sectors of being able to meaningfully negotiate with their employers on matters affecting the terms and conditions of employment may indeed be devastating’.

TFEU, Arts 49 and 56). BA had claimed at one point that its losses would run to £100 million per day,⁵ of which it is unclear how much could be recovered from the trade union under EU law. However, even the possibility that damages could be unlimited would be a severe chill on the freedom of the trade union to take collective action. The question was not addressed in the *Viking* case, as there were no further legal proceedings. The dispute between the enterprise and the trade unions was settled out of court, and the terms of the settlement are confidential.

17 In the *Laval* case, however, the matter was returned to the Swedish Labour Court on the question of the remedy for the company. Final judgment was delivered in 2 December 2009, dealing exclusively with liability.⁶ Although the action had previously been found lawful under Swedish law, on this occasion the unions did not contest the claim – in the light of the ECJ decision – that the action was unlawful under the directly effective provisions of EU law. In dealing with the question of liability, the Swedish Labour Court accepted that there was a principle of EU law that damages may be awarded against one private party in proceedings brought by another private party, provided the claim involves the violation of a right which is said to have ‘horizontal direct effect’. In this case it was held that EC Treaty, Art 49 (now TFEU, Art 56) has ‘horizontal direct effect’, and therefore could be enforced by *Laval* against the trade unions. According to the Labour Court –

The actions of the Labour Unions at issue, the industrial actions, in accordance with the European Court of Justice’s preliminary ruling, constituted a serious violation of the treaty, as they were in conflict with a fundamental principle in the treaty, the freedom to provide services. Even if the right to take industrial action has also been recognized by the European Community as a fundamental right, it was found that the actual industrial actions, despite their objectives of protecting workers, are not acceptable as they were not proportionate. The Labour Court finds that the stance of the European Court of Justice in these issues entails in this case that there is a violation of EC law that is sufficiently clear. The requisites for damage liability exist therewith.

18 The national unions (the Swedish Building Workers’ Union and the Swedish Electricians’ Union) were found liable in damages for violating the EU rights of *Laval*, even though the action of the unions was lawful under the national law of Sweden. Damages were assessed in total at SEK 3,155,000 (circa EUR 342,000), this constituting the total of SEK 550,000 (c EUR 60,000) by way of general damages; SEK 2,129,739 (c EUR 230,000) by way of litigation costs; and SEK 475,000 (c EUR 52,000) by way of interest. *Laval* failed in its attempt to recover economic damages, because it had not shown that it had suffered the loss in question. In addition, the defendant unions also incurred significant – though unspecified – litigation costs involved in proceedings before the domestic courts and the ECJ. Payment was made in October 2010 after the company applied to the Swedish Enforcement Authority for enforcement of the Labour Court’s order.

⁵ See K D Ewing and J Hendy, ‘The Dramatic Implications of *Demir and Baycara*’ (2010) 39 ILJ 2, at p 44, f/n 173. John Hendy QC was counsel for the union in the case.

⁶ This account is based on briefing material supplied by LO.

19 The *Laval* case has now been raised before the ILO Committee of Experts as part of its supervision of ILO Conventions 87 and 98. In its report for 2011, the Committee noted comments made by the Swedish Trade Union Confederation (LO) and the Swedish Confederation of Professional Employees (TCO) about the implications of the decision for ILO Convention 98 in particular. According to the Committee, the LO and the TCO referred to ‘the ex post facto application of the interpretation given to European Union law in the *Laval* judgment with regard to the industrial action giving rise to that case and the punitive damages and legal fees levied against the unions’. The concern here – also raised to no avail before the Labour Court – was that the union was being held liable for action which had been declared lawful at the time it was taken, and only became unlawful by virtue of an unexpected and unanticipated decision of the ECJ. **As a matter of principle, it is strongly arguable that liability should be limited to losses incurred after 18 December 2007 (the date of the ECJ decision).**

20 In its 2011 report, the Committee also observed that the matters raised by the LO and the TCO touched upon both ILO Conventions 87 and 98, and that the unions ‘highlighted the intrinsic link between collective bargaining rights and effective industrial action’. Given the importance of the matters raised by the LO and the TCO, and the significance of the potential effect of legislative measures taken in Sweden (which themselves have given cause for concern), the Committee requested the Swedish government ‘to monitor the impact of these legislative changes on the rights under the Convention and provide a detailed report in time for its examination at the Committee’s next meeting in November-December 2011’. It is essential, however, in view of the EU-wide implications of the *Laval* decision (and its progeny in the shape of *Ruffert* and *Luxembourg*), that the Committee should at some point address directly the question whether these decisions are compatible with Convention 87 (in the case of *Laval*), and Convention 98 (in the case of *Laval*, *Ruffert* and *Luxembourg*).

European Convention on Human Rights

21 Although of the greatest importance, *Viking* and *Laval* are thus not the last word on the questions they address. In an altogether separate development, the ECtHR made an equally momentous contribution to labour law within a year of these decisions being published. In so doing, *Demir and Baycara v Turkey*,⁷ opened up the ECHR to trade union rights in a way quite anticipated. Together with the ILO jurisprudence, the ECtHR has cast a long shadow over the decisions in *Viking* and *Laval*, by emphasising the shifting sands on which the latter were built. In reaching its decisions in these cases, the ECJ took into account the ECHR as part of the general principles of law. The content of these principles has changed markedly in light of *Demir and Baycara*, with implications which are considered below.

- **ECHR and Trade Union Rights**

22 The application in *Demir and Baycara v Turkey* related to the invalidation of a collective agreement between a local government employer and a trade union. The applicants (representatives of the union party to the agreement) argued that the

⁷ [2008] ECHR 1345. See Ewing and Hendy, above.

invalidation of the agreement violated their right to freedom of association under ECHR, Art 11, and in 2006 the second section of the ECtHR unanimously agreed, insofar as the domestic courts had declared the collective agreement to be null and void.

23 The Turkish government asked for the matter to be referred to the Grand Chamber,⁸ which in 2008 returned a 17-0 decision upholding the second section of the Court. This was a bold decision, which required the Grand Chamber to overrule earlier established case law decided in the 1970s that had emphasized that while Art 11(1) requires Member States to ensure that trade unions are free to pursue their members' interests generally, it does not guarantee to trade unions any particular form of trade union action.

24 In upholding the complaint, the Court relied heavily on a number of international treaties, including ILO Conventions 98 and 151, both of which Turkey had ratified. But it also referred to the Council of Europe's Social Charter, Art 6(2), which Turkey has not accepted,⁹ and the EU Charter of Fundamental Rights,¹⁰ which Turkey is not in a position to ratify. In considering these sources, the Court made clear that it was deferring to the relevant supervisory bodies (the ILO Committee of Experts and the Council of Europe's Social Rights Committee) for their interpretation.¹¹ The Court also looked for guidance to law and practice of other European states.

25 It was thus held that the right to bargain collectively is now protected by Art 11(1). Crucially important was the approach of the Court to Art 11(2). Here the Court engaged in a familiar analysis and considered whether the restrictions on the Art 11(1) right were 'prescribed by law' and in 'pursuit of a legitimate aim'. Having answered both questions in the affirmative, the Court then considered whether the restrictions were 'necessary in a democratic society', for the purposes of which the government had to demonstrate a 'pressing social need'. Here the ECtHR said:

164. The Court, performing its own examination, considers that at the material time a number of elements showed that the refusal to accept that the applicants, as municipal civil servants, enjoyed the right to bargain collectively and thus to persuade the authority to enter into a collective agreement, did not correspond to a 'pressing social need'.

165. Firstly, the right for civil servants to be able, in principle, to bargain collectively, was recognised by international law instruments, both universal (see paras 147-148 above) and regional (see paras 149, 150 above). Moreover, an examination of European practice shows that this right was recognised in the majority of member States (see paras 52 and 151 above).

⁸ For details of this procedure, see ECHR, Art 43.

⁹ Under the Social Charter and the Revised Social Charter, it is possible to ratify without accepting all of its provisions.

¹⁰ The EU Charter provides by Art 28 that 'Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action'.

¹¹ *Demir and Baykara*, above, paras 43, 50, 166.

166. Secondly, Turkey had in 1952 ratified ILO Convention 98, the principal instrument protecting, internationally, the right for workers to bargain collectively and enter into collective agreements (see paras 42-43 and 151 above). There is no evidence in the case file to show that the applicants' union represented 'public servants engaged in the administration of the State', that is to say, according to the interpretation of the ILO's Committee of Experts, officials whose activities are specific to the administration of the State and who qualify for the exception provided for in Art 6 of ILO Convention 98.

26 This strikes me as being extremely important. Whether or not it meant to do so, what the ECtHR is emphasising here is that in order to determine whether a restriction on Convention rights is proportionate or not, it is necessary to have full regard to relevant international treaties. The Court here is asking three very simple but highly relevant questions: (i) is the restriction consistent with an appropriate international labour convention (in this case ILO Convention 98); (ii) has the respondent (in this case Turkey) ratified the international labour convention in question; and (iii) is the restriction at issue in the case before the Court one which is permissible under the international labour convention in question (in this case ILO Convention 98, Art 6)?

27 It would thus appear to be very difficult to conclude that a restriction on Convention rights will be proportionate, if the restriction is inconsistent with the international labour conventions that informed the scope of the rights in the first place. ILO conventions now set the benchmark for both the substance of the Art 11(1) right, and the circumstances in which it may be qualified under Art 11(2). The importance of ILO standards and the related jurisprudence was emphasised again by the Grand Chamber in a more recent case, this time involving an unsuccessful claim by a trade unionist dismissed for his trade union activities. In that case, the application failed partly because the restriction in question could be seen to be justified under the relevant ILO instrument.¹²

- **ECHR and the Right to Strike**

28 *Demir and Baykara v Turkey* was concerned with collective bargaining rather than collective action. But the arguments presented by the Court for recognising the right to collectively bargain under the umbrella of Art 11 apply with equal force to the right to collective action. In *Enerji Yapi-Yol Sen v Turkey*,¹³ the ECtHR applied the principles in *Demir and Baykara* to a circular published by the Prime Minister's Public-Service Policy Directorate banning public-sector workers from taking part in a one day strike organised by the public service trade union confederation. The strike was designed to secure a collective agreement, and despite the order, a number of trade union members took part in the action for which they were disciplined by their employer.

29 In upholding the complaint by the union, the Court is said to have acknowledged that

¹² *Palomo Sanchez v Spain* [2011] ECHR 1319.

¹³ Application No 68959/01, 21 April 2009.

The right to strike was not absolute and could be subject to certain conditions and restrictions. However, while certain categories of civil servants could be prohibited from taking strike action, the ban did not extend to all public servants or to employees of State – run commercial or industrial concerns. In this particular case the circular had been drafted in general terms, completely depriving all public servants of the right to take strike action.¹⁴

30 It is also reported that by joining the action, the members of the applicant trade union had simply been making use of their Art 11(1) freedom, the effect of the disciplinary action being to discourage trade union members and others from exercising their ‘legitimate right to take part in such one-day strikes or other actions aimed at defending their members’ interests’.¹⁵ So far as Art 11(2) is concerned, the Turkish government had failed to justify the need for the impugned restriction in a democratic society. According to the Court, the ban did not answer a ‘pressing social need’, and there had been a disproportionate interference with the union’s rights.

31 Apart from extending *Demir and Baycara* from collective bargaining to collective action, *Enerji-Yapi Yol Sen* is important for raising a number of questions about (i) the nature of the right to strike, (ii) the scope of the right to strike, and (iii) the type of restrictions that would constitute a violation of the right to strike. In three cases decided since *Enerji-Yapi Yol Sen*, these points do not appear to have been formally addressed. A clear picture is nevertheless beginning informally to arise. Thus, so far as the first question is concerned, it would appear that the right to strike is a right of both the union and individual workers, albeit that it is a right that can be exercised by individuals only when acting collectively.

32 This means that a restriction on the right of the union would be a breach, as would a penalty imposed on the individual. Not only that: as the *Enerji-Yapi Yol Sen* case makes clear, a penalty imposed on the individual may also constitute a breach of the union’s right, albeit vicariously. As indicated in the *Wilson and Palmer* case in 2002,¹⁶ this is not unusual in the context of earlier ECtHR decisions, and would seem to follow inexorably from a system of jurisprudence that purports to track ILO developments. *Viking*, *Laval* (and *BALPA*) were however fairly straightforward, the threat arising clearly and unequivocally to the freedom of the trade unions directly, the threats being directed at the unions rather than their members.

33 So far as (ii) the scope of the right to strike is concerned, it is clear that it applies to traditional trade union matters, such as a strike to secure a collective agreement (as in *Enerji Yapi –Yol Sen*), or a national strike day aimed at improving the terms and conditions of employment (*Saim Ozcan v Turkey*),¹⁷ or a public demonstration to defend the living conditions of public servants (*Karacay v Turkey*).¹⁸ More significant perhaps is *Kaya and Seyhan v Turkey*¹⁹ in which Art 11 was found to have

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ *Wilson and Palmer v United Kingdom* [2002] ECHR 552.

¹⁷ Application No 22943/04.

¹⁸ Application No 6615/03.

¹⁹ Application No 30946/04.

been breached where sanctions were imposed on two public servants who had taken part in a strike about what appears to have been the re-organisation of the public service, a matter which at the time was the subject of discussion in Parliament.

34 So far as (iii) - the type of restrictions that would constitute a violation of the right to strike - is concerned, the ECtHR has taken a remarkably robust approach, condemning a wide range of State and employer responses. In *Saime Ozcan* the imposition of criminal penalties on a schoolteacher for taking part in a strike was unexpectedly found to be a breach, even though the conviction was subsequently quashed. In other cases less serious penalties have been found to constitute a breach: in *Enerji – Yapi Yol Sen*, the circular and the attendant disciplinary action was found to be a breach, while in *Danilenkov v Russia* a breach was established by discrimination against strikers in the subsequent allocation of work assignments and in selection for redundancy.²⁰

Why is Monti II Inadequate?

35 Qualifications of the right to strike introduced by *Viking and Laval* are a clear and present danger to trade union freedom, and have no parallel in the domestic law of any national labour law system with which I am familiar. That danger arises for two reasons: first, for applying restrictions that make it virtually impossible to take industrial action in disputes with an EU trans-national dimension; and secondly, for opening up the question of trade union liability in damages where these opaque boundaries are exceeded. As already indicated, the Draft Monti II Regulation fails adequately to meet these concerns.

- **Failure to Reflect Developments after *Viking and Laval***

36 The first weakness of Monti II is that it writes into a legislative form and preserves in aspic a judicial formulation that was out of date within a year of its expression. Particularly significant is Art 2(2), which provides that

In specific circumstances, the exercise of the right to take collective action, including the right or freedom to strike, may have to be reconciled with the requirements relating to the rights and economic freedoms enshrined in the Treaty, in particular the freedom of establishment and to provide services cross border, in accordance with the principle of proportionality.

37 This seems to me to represent no more and no less than the writing across into legislative form the restrictions on the right to strike formulated judicially in *Viking*. This is despite the fact that the decisions of the ECJ will surely now have to be reconsidered in the light of both the ILO jurisprudence and the ECtHR developments, especially if it is the case (as the ECJ/CJEU claims it to be) that ‘the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of

²⁰ *Danilenkov v Russia*, Application No. 7336/01. Most unexpected perhaps was *Kaya and Seyhan* where the applicants were disciplined for leaving their workstations without authority, the discipline taking the form of a warning that they must be ‘more attentive to the accomplishment of [their] functions and to [their] behaviour’.

the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods' (*Viking*, para 45).

38 As we have seen, since *Viking and Laval* it has been established that the ECHR, Art 11(1) protects both the right to bargain collectively and the right to take collective action, including the right to strike. It is also clear from the cases that in determining both the content of the right and its permitted restrictions and limitations, it is necessary to have full regard to ILO Conventions and the accompanying jurisprudence of the supervisory bodies. It is at least strongly arguable that the general restrictions on the right to strike in *Viking and Laval* are inconsistent with this new approach.

39 Industrial action of the type contested in the *Viking and Laval* cases would almost certainly fall within the boundaries of the protected action recognized by the ECtHR discussed at paras 27 – 33 above: it was collective action by a trade union, for the purpose of protecting working conditions (*Viking*) or collective agreements (*Laval*), and involved restraints or restrictions by way of injunctions (in the case of *Viking*) and damages (in the case of *Laval*). Equally important, the ILO Committee of Experts had no difficulty with the nature of the action pursued in the *BALPA* case, which it clearly thought to be legitimate.

40 It is true that for the purposes of the ECHR, the right to take collective action is not unlimited, and that a balancing exercise is required for the purposes of Art 11(2). Here, it may be necessary to balance the Art 11(1) right to take collective action against the rights and freedoms of others, which conceivably could include the multinational corporation's freedom of establishment or freedom to provide services. But in determining whether there is 'a pressing social need' for these purposes, it will be necessary to consider whether the restrictions in question are consistent with ILO Convention 87.

41 As the *BALPA* case makes clear, however, both the **general** restriction introduced by the ECJ in *Viking and Laval*, and its anticipated **specific** application in the *BALPA* case, are inconsistent with the requirements of ILO Convention 87. As the ILO Committee of Experts pointed out in *BALPA*, the ILO jurisprudence 'has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services'. **In my view, Monti II thus reflects what may well have been the law on 11 and 18 December 2007; but it does not reflect the law as it is today.**

- **Continuing Threat to Trade Union Freedom**

42 Given the failure of the Draft Monti II Regulation to take into account changing developments, it follows inexorably that the Draft – together with the *Viking* and *Laval* decisions it fossilizes – represents a continuing threat to trade union freedom, and makes absolutely no difference in practice to the legal position as it is today. This gives rise to two additional concerns, one of which is to be found in Art 3 of the Draft Regulation, which provides that -

In the case of labour disputes resulting from the exercise of the right or freedom to strike by one side of management and labour with the objective workers or workers' rights, it is ultimately for the national court in the Member State where the industrial action is planned or has started, which has single jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such collective action is suitable for ensuring the achievement of the objective(s) pursued and does not go beyond what is necessary to attain that objective

43 It is difficult to see this as anymore than a declaratory statement of the law as set down in *Viking*, with the result that it appears to add nothing and to change nothing. So much is clear from para 85 in *Viking*, where it is said that:

it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such collective action meets [the] requirements [as to the legality of collective action]. . . .²¹

This may be acceptable in some countries where there is an autonomous Labour Court that enjoys the confidence of the labour movement and which can be relied upon to apply these vague principles in a fair and balanced way. But it is not a solution that is likely to inspire British trade unionists with confidence. It is true that the Court of Appeal has recently discovered ILO Convention 87 as well as the ECHR, Art 11.²² But it is also true that there is no Labour Court in the United Kingdom, and that transnational industrial action cases are likely to begin life in the Commercial Court and to be heard by a judge with little or no labour law experience whatsoever.

44 It is inconceivable that the proposed Regulation will help trade unions in litigation before national courts. Admittedly, Art 2(1) of the Draft Monti II Regulation provides that 'no primacy' is to exist between economic freedoms and fundamental social rights. But this is implausible, and is either naïve or disingenuous. It is in the nature of disputes between economic freedoms and social rights that both cannot prevail simultaneously. Indeed, in the Explanatory Memorandum, it is explained that

While reiterating that there is no inherent conflict between the exercise of the fundamental right to take collective action and economic freedoms enshrined in and protected by the Treaty, in particular the freedom of establishment and to provide services, or primacy of one over the other, Art 2 clarifies that situations may arise in which their exercise may have to be reconciled in case of conflict, in accordance with the principle of proportionality (pp 11 – 12).

²¹ The para continues: 'the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance, based on the file in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment in the particular case before it'.

²² *RMT v Serco Ltd* [2011] EWCA Civ 226.

45 Quite so. But it is almost certainly the case that in reconciling that conflict the courts are almost bound to reconcile it in favour of economic freedoms to restrain the right to strike. This will be particularly true in proceedings for an interim injunction, where the courts will not be in a position to say in advance of a full trial of the issue whether the action of the union was ‘suitable’ or ‘necessary’, or whether the union had exhausted all methods of dispute resolution. In such proceedings the English courts at least are not constrained by matters of law, but must also take into account a wider range of considerations. These include the financial implications for the employer and, the capacity of the defendant union to meet any damages should they lose at the trial in legal proceedings.

46 This is not a problem to be lightly diminished. It was a decision of the English Commercial Court that started the ball rolling in *Viking*, and it was the threat of an injunction by British Airways that led to the *BALPA* litigation. The latter brings into focus another failure of the Draft Monti II Regulation to make any difference to the *Viking* and *Laval* law. This is the fact that it does not address the ‘omnipresent threat of an action for damages that could bankrupt the union’, which according to the ILO Committee of Experts ‘creates a situation where the rights under the Convention cannot be exercised’.

47 This latter problem with the Draft Monti II Regulation (the damages problem) arises in two respects, the first being the entrenchment of the *Viking* and *Laval* restrictions, which continue to make it very difficult for trade unions to know in what circumstances they can lawfully take industrial action and the circumstances in which they may be liable in damages. While this threat is left hanging as a result of opaque principles, no responsible trade union could now contemplate taking industrial action if there was any possibility that it could be unlawful under *Viking* and *Laval*, and that it could as a result lead to a liquidation of the union. Wide and general principles and ill-defined liability are the antithesis of the rule of law.

48 But it is not just the failure to address the lack of certainty about the circumstances in which damages can be awarded against a trade union (and perhaps also individuals involved in industrial action?). There is also the question of the amount of damages recoverable in any particular case. Even if steps were taken to clarify the rules about when collective action is banned because of the de facto overriding supremacy of the economic freedoms, the risk of unlimited damages will be a major de facto restraint on the freedom to take collective action, if trade unions are aware that one wrong move could lead to liquidation.

49 In the *BALPA* case, the ILO Committee of Experts referred to the need for national governments to introduce ‘effective limitations on actions for damages so that unions are not faced with threats of bankruptcy for carrying out legitimate industrial action’. The ILO Committee of Experts is bound only to address national governments on this matter, the EU not being a member of the organization. It is, however, a matter of great regret that the Commission has not responded to this prompt from the Committee of Experts and taken steps in the Draft Monti II Regulation to address this question of liability. There will be no freedom to strike until it is addressed.

Conclusion

50 In my view the Draft Monti II Regulation is not only a wasted opportunity, but it is also an unnecessarily and inappropriately restrictive response to *Viking* and *Laval*. The ECJ/CJEU has been held to account before the ILO supervisory bodies, and dramatic new jurisprudence has been developed in the ECtHR.²³ In view of the acknowledgement of both the ILO and the ECHR by the ECJ/CJEU,²⁴ these developments simply cannot be ignored in any credible legislative response to the *Viking* and *Laval* decisions.

51 In my view, there are clearly dangers with a legislative instrument that appears to pretend that these highly significant developments have not taken place. The purpose of human rights and the purpose of EU accession to the ECHR is that human rights values should infuse all aspects of the political and legal processes. That has failed to happen here, with the Draft Regulation taking **no** account whatsoever of these developments, whatever warm words the Explanatory Memorandum may express to the contrary.

52 There will be no solution to the *Viking* and *Laval* problem until there are clear rules indicating that collective action may be taken in accordance with human rights principles,²⁵ and until the threat of unlimited damages is lifted from trade unions for exercising a fundamental social right (as recognized by the international legal obligations of all member states).²⁶ Developments in the ECtHR provide an obligation to raise the level of protection at EU level, an obligation which in my view Monti II has failed adequately to meet.

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²³ It cannot be said that the proposed Regulation succeeds in ensuring ‘full respect’ for the freedom of association as claimed in recital 20.

²⁴ Though remarkably there is no express reference to ILO Conventions 87 and 98 in any of the recitals to the Draft Regulation.

²⁵ For a suitable precedent, see ICCPR, Art 21(3) and ICESCR, Art 8(3). The latter provides that ‘Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention’.

²⁶ Compare the UK’s Trade Disputes Act 1906, s 4, a piece of legislative genius.