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Settling dust?
Reflections on the Judgments in *Viking* and *Laval*

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I. Introduction

The judgments in *Viking* and *Laval*¹ are already ‘classics’ in the jurisprudence of the European Court of Justice (ECJ). They have attracted extensive academic commentary;² and, against a trajectory of deepening economic recession, they have claimed a rare (as ECJ decisions go) and rather notorious space in national and transnational public discourse. Together, the judgments raise vital questions that fall broadly within the theme of contested understandings of free movement law. They illustrate the consequences of market opening and raise questions about the way in which the interpretation of those consequences has evolved. Their reception has also revealed that traces of national protectionism are alive and very well, notwithstanding more than five decades of transnational market engineering.

Given the comprehensive legal analysis of the judgments that has already been published, from internal market, labour law and human rights (among other) perspectives, this contribution focuses mainly on one cross-cutting theme: the interplay between economic and social values, and its handling by the Court of Justice. Following a brief outline of the background to and decision in both cases, the article assesses the judgments under three broad headings: first, the coherence of the judgments within the existing framework of

¹ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Eyggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767; Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.

² The literature discussing these judgments provides a rich (and therefore quite daunting) resource for the researcher. See, for example: L Azouli ‘The Court of Justice and the social market economy: The emergence of an ideal and the conditions for its realization’, 45 CMLRev (2008) 1335; C Barnard ‘*Viking* and *Laval*: An introduction’ 10 CYELS (2007-2008) 464; A Dashwood ‘*Viking* and *Laval*: Issues of horizontal direct effect’ 10 CYELS (2007-2008) 525; A Davies ‘One step forward, two steps back? *Laval* and *Viking* at the ECJ’ 37 ILJ (2008) 126; S Deakin ‘Regulatory competition after *Laval*’ 10 CYELS (2007-2008) 581; C Kilpatrick ‘*Laval*’s regulatory conundrum: collective standard-setting and the Court’s new approach to posted workers’ 34 ELRev (2009) 844; C Joerges and F Rödl ‘Informal politics, formalised law and the “social deficit” of European integration: Reflections after the judgments of the ECJ in *Viking* and *Laval*’ 15 ELJ (2009) 1; J Malmberg and T Sigeman ‘Industrial action and EU economic freedoms: The autonomous collective bargaining model curtailed by the European Court of Justice’ 45 CMLRev (2008) 1115; T Novitz ‘A human rights analysis of the *Viking* and *Laval* judgments’ 10 CYELS (2007-2008) 541; S Sciarra ‘*Viking* and *Laval*: Collective labour rights and market freedoms in the enlarged EU’ 10 CYELS (2007-2008) 563; P Syrpis and T Novitz ‘Economic and social rights in conflict: political and judicial approaches to their reconciliation’ 33 ELRev (2008) 411.

internal market law; second, the weighting that is and/or should be accorded to social objectives in the project of market integration; and third, alternative ways in which, even preserving the Court's traditional model for the resolution of free movement questions, the cases might have been reasoned and resolved. Finally, on the volume's theme of the *Single Market for 21st Century Europe*,³ some broader questions about the evolving internal market and the role of law in shaping that market are raised. It is argued that, overall, there is nothing surprising about the judgments in legal terms. But it is also suggested that the Court of Justice missed an opportunity here to mould a more nuanced approach to free movement challenges, thinking especially at its heavy-handed determination of justification and proportionality in *Viking* but especially in *Laval*. Even so, however, it would appear that the Court remains the institution by far the most attuned to the purpose of market integration and to the continuing centrality of that objective in the broader integration story.

II. Background: The cases and judgments⁴

The factual situations in both cases are grounded in the enlargement of the internal market following the 2004 EU accessions, which accentuated the differential in working conditions and especially wages between the 'old' and 'new' Member States. More specifically, the proceedings raised questions about the extent to which national social preferences can be overridden by – or, conversely, are capable of being preserved notwithstanding – a market space grounded in the promotion of free movement of services and freedom of establishment. They also reveal very plainly the two-pronged upshot of market enlargement: enhanced competition flourishes on one side, but concerns about social dumping emanate from the other. We can speak of a 'social market economy' as the cornerstone of EU market integration. Article 3(3) TEU as amended by the Lisbon Treaty now does; but it also asks that the EU social market economy be a 'highly competitive' one. At every turn, then, it would seem that economic and social objectives are programmed to 'do battle' in the EU context.⁵ Moreover, across the EU, there exists a dramatic *range* of markets. Kilpatrick highlights this effectively when she compares the July 2008 statutory monthly minimum wages of Bulgaria (€112) and Luxembourg (€1610).⁶

³ European Commission, *A single market for 21st century Europe*, COM(2007) 724 final.

⁴ The outline of *Viking* and *Laval* presented here is necessarily brief; for comprehensive discussion of the facts of and decisions in both cases, see Barnard, above n. 2.

⁵ C O'Brien, 'Social blind spots and monocular policy making: The ECJ's migrant worker model' 46 CMLRev (2009) 1107 at 1140.

⁶ Kilpatrick, above n. 2 at 865.

In *Viking*, a Finnish company sought to re-flag one of its ships (the *Rosella*, which operated on the route between Tallinn and Helsinki) under the Estonian flag, so that it could hire an Estonian crew and pay those workers less than the existing Finnish crew. The International Transport Worker's Federation (ITF), which had an explicit 'Flag of Convenience' policy and to which the Finnish Seaman's Union (FSU, of which the *Rosella's* crew were members) was affiliated, instructed the FSU and other affiliates to engage in industrial action to prevent the realisation of Viking's plans. Following the breakdown of negotiations, which had included an undertaking from Viking that no redundancies would be effected during the initial re-flagging phase, Viking sought an injunction in the English High Court against the ITF and the FSU for both actual and threatened strike action, on the basis that the strike actions constituted restrictions on its right of establishment under (then) Community law.

Laval was a Latvian company whose wholly owned subsidiary (L&P Baltic Bigg, incorporated under Swedish law) won a contract to refurbish a school in Sweden. Laval sent its own Latvian workers, who were paid considerably less than Swedish workers undertaking similar work, for the execution of the contract. The Swedish union for construction workers wanted Laval to apply the Swedish collective agreement for the building sector; Laval refused to do this, being unsure, in particular, about the consequences for paying its workers (something not articulated expressly in the collective agreement but subsequently to be determined through collective negotiation). Strike action ensued, including picketing and blockades at the school site and sympathy actions undertaken by other unions. These actions were lawful under Swedish law but Laval challenged them on the grounds that they constituted a restriction on its freedom to provide services as protected by Community law.

In summary, the judgments established and/or confirmed the following legal principles:

- 1) The right to take collective action is acknowledged to be a fundamental right within Community law; its *exercise* is, however, subject to limits laid down in both national and Community law.⁷
- 2) Collective action such as that taken by unions in both cases falls within the scope of the EC Treaty provisions on both services and establishment.⁸

⁷ *Viking*, paras 43-44; *Laval*, paras 90-91.

⁸ *Viking*, paras 60-66; *Laval*, paras 97-98.

- 3) The actions taken by the unions were found to constitute *prima facie* restrictions on these freedoms in both cases.
- 4) This then triggered an assessment of justification and proportionality: the unions had to demonstrate that their actions were justifiable on public interest grounds and, even if this could be established, that they were proportionate in terms of the restrictions imposed on the market rights of Viking and Laval.
- 5) In *Viking*, although determination of questions on justification and proportionality was left to the referring court in formal terms, the Court was very clear that action taken by the ITF to prevent companies from registering vessels in other Member States could not be justified.⁹ Regarding the action taken by the FSU, it was recognised that collective action for the protection of workers *could* be justified in the context of jobs or working conditions being ‘jeopardised or under serious threat’.¹⁰ Again, the ECJ left the concrete resolution of this question for the referring court, while reminding that court that even if the action was justifiable, a proportionality assessment would then have to be applied: essentially, examining whether the FSU’s actions were suitable for attaining the objective pursued and ensuring that they did not go beyond what was necessary to attain that objective¹¹ – in practical terms, were less restrictive means available to the union, and were those means were exhausted before embarking on the collective action? The case was settled, however, before the High Court could apply the ECJ’s judgment.
- 6) In *Laval*, following an obviously services- rather than employee-oriented interpretation of the Posted Workers Directive,¹² the Court accepted that, in principle, collective action to protest against social dumping could be a justifiable restriction on the free provision of services. But in this case, given that the collective agreement did not clearly outline core issues such as the level of payment to which Laval was being asked to commit, the Court decided (itself) that the action could not be justified.¹³ Furthermore, applying the logic of mutual recognition, the failure of Swedish rules to accommodate protection guaranteed by a home State collective agreement that an undertaking had entered into was also found to restrict the free provision of services;

⁹ *Viking*, paras 88-90.

¹⁰ *Viking*, para. 81.

¹¹ *Viking*, para. 87.

¹² Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L18/1). The Court’s interpretation of the Directive was another controversial aspect of the judgment in *Laval*; these issues are discussed in section III(B) below.

¹³ *Laval*, paras 108 and 110.

as a discriminatory restriction, only the grounds of public policy, public security or public health, as outlined in the Treaty itself, could be considered on this point but, in this case, no justification arguments on any of these grounds had been offered.¹⁴

A critical analytical pivot on which the outcomes are considered to have turned is that, while the Court acknowledged the existence and fundamental nature of a right to take collective action in both cases, its prescriptive, market-oriented application of justification and proportionality, especially in *Laval*, meant that the substance of that right was, in effect, negated. This in turn exposes difficult questions about the extent to which the values and objectives of social policy are accommodated, at least, and prioritised within the broader ambitions of free movement law – in this instance, removing undue obstacles to freedom of establishment and the provision of services. The next section unpacks these charges in more detail.

III. Were the judgments ‘wrong’?

The following paragraphs look more closely at the judgments in *Viking* and *Laval* and at the criticism levelled against them using three strands of analysis: first, assessing the extent to which the outcome was, essentially, predictable in terms of free movement law more generally; second, focusing more specifically on the extensive critique grounded in the Court’s commitment, or otherwise, to social policy objectives; and third, looking at some alternative ways in which the justification/proportionality analysis could have been worked out. In doing so, the article seeks to distinguish concerns expressed about the *form* and *substance* of the judgments. Considerable criticism has been directed at both aspects; here, however, it is argued that both perceived problems *and* scope for more nuanced reasoning lie more properly in the latter.

A. Form, predictability and coherence: Questioning the framework of free movement law

The arguments made in this contribution are grounded in a basic preliminary assertion: that the judgments in *Viking* and *Laval* were, in legal terms at least, predictable and rational; and that they fit coherently within the internal market framework applied consistently by the

¹⁴ *Laval*, paras 112-119.

Court of Justice. In this section, concentrating first on the form of the judgments, the Court's application of the basic structure and principles of free movement law is defended; the substance of the decisions, looking at the material outcomes reached and with more specific emphasis on the nature and role of social objectives, is then examined in parts B and C.

The free movement case law is not a perfect model of consistency. Scholars often direct criticism (and sometimes frustration) at the Court's decisions from the perspective of jurisprudential coherence. But in one core respect at least – the application of the three-step restriction/justification/proportionality methodology – the case law is as formulaic, and therefore reliable, as case law can get. Furthermore, almost every national rule or practice challenged is found to be a restriction on free movement law, thus triggering the next steps in that process.¹⁵ The breadth of this capture is certainly open to criticism in a substantive sense but a consistency *in approach* is overwhelmingly apparent. In respect of *Viking* and *Laval*, it has been repeatedly suggested that it was open to the Court to find that labour law and social rights were outside the scope of Community law altogether – in other words, a finding that the actions of the unions could not, therefore, constitute a restriction on free movement rights in the first place. This argument can be further broken down into three assertions: first, that the actual subject matter of the disputes should have led the Court to decline jurisdiction, given the absence of direct legislative competence for the Community to regulate the right to take collective action in the context of negotiations with an employer; second, that the fundamental status of the right to take collective action similarly removed the cases from the scope of ECJ review; and, third, that the reach of free movement law should not have been extended horizontally so as to catch the actions of unions at all.

On the first point,¹⁶ it must be emphasised the Court does not reason in this way, irrespective of subject matter, when the 'competing' (see further, section B below) market claims flow from the free movement provisions. As was clearly reaffirmed in both judgments, even in policy areas for which national regulatory competence would seem to be exclusive (e.g. determination of nationality; regulating social security and direct taxation, organisation of the armed forces), the Court will nonetheless review national choices against the general

¹⁵ For a recent example of this, see the 2009 use of goods case law on the scope of Article 28 EC (Case C-110/05 *Commission v Italy*, judgment of 10 February 2009, nyr and Case C-142/05 *Mickelsson and Roos*, judgment of 4 June 2009, nyr); for discussion and analysis, see T Horsley 'Anyone for *Keck*', case comment, 46 CMLRev (2009) 2001 and E Spaventa 'Leaving *Keck* behind? The free movement of goods after the rulings in *Commission v Italy* and *Mickelsson and Roos*' 34 ELRev (2009) 914.

¹⁶ See *Viking*, paras 39-40; *Laval*, paras 86-88. Barnard has remarked that finding otherwise could have been 'the easy way out' for the Court (C. Barnard 'Social dumping or dumping socialism' 67 CLJ (2008) 262 at 263).

principles of Community law, especially nationality discrimination.¹⁷ Labour law fell similarly victim to ‘EC Law’s empire’¹⁸ in *Viking* and *Laval*, but – crucially – no more than any other competence areas impacting on free movement law had before it. If the Court had acted differently on this point, the judgments would have been strikingly inconsistent with the broader corpus of free movement case law. This is not something that was acknowledged in the submissions to the Court. The point was made with regard to labour law per se, but no new or special case was put forward that took account of the relevant, and firm, line of case law on subject specific exclusions more generally.

Similarly, second, the Court has never excused itself from grappling with situations involving the protection of fundamental as well as free movement rights. Notwithstanding submissions to the contrary in both *Viking* and *Laval*, the Court again affirmed a clear line of case law within which it has been established that the protection of fundamental rights may constitute a legitimate public interest reason that justifies a (proportionate) restriction on free movement law – but this is precisely what must be *shown*; classification of a given claim as a fundamental right is not in itself enough to remove the disputed scenario from the scope of free movement law.¹⁹ Remember too that, even when establishing the existence of an EU fundamental right, the Court has long tied itself to drawing from the common constitutional traditions of its Member States and to the international obligations that those States have assumed. It is therefore inevitably harder to attempt to settle on the merits of one particular level of social protection when the State ‘raw materials’ themselves diverge so much. It must also be acknowledged that looking to the EU Charter of Fundamental Rights to ascribe ‘fundamental’ status to the right to strike, as the parties in both cases did here, has an inverse consequence too – because it confirms that such questions *do* form part of Community law to some extent.

Third, the span of horizontal effect within free movement law was also clarified in *Viking* and *Laval*. The Court’s decision on this question was somewhat more innovative than the case law threads summarised immediately above.²⁰ But again, the outcome was

¹⁷ See, for example, Case C-369/90 *Micheletti and others v Delegación del Gobierno en Cantabria* [1992] ECR I-4239, para. 10 (determination of nationality); Case C-120/95 *Decker v Caisse de Maladie des Employés Privés* [1998] ECR I-1831, paras 22-23 (social security); Case C-446/03 *Marks & Spencer plc v Halsley (Her Majesty Inspector of Taxes)* [2005] ECR I-10837, para. 29 (direct taxation); and Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para. 26 (organisation of security forces).

¹⁸ Azouli, above n. 2 at 1341.

¹⁹ *Viking*, paras 42-46; *Laval*, 89-95; citing Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659 and Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

²⁰ For a critique of and proposed alternative to the declaration of horizontal effect in both cases, see Syrpis and Novitz, above n. 2.

predictable if we remember that regulatory decisions of sporting associations have long been captured by Community law.²¹ The application of this case law in *Laval* is broadly considered to have been a logical extension of the existing rules.²² The judgments do leave open some broader questions, however; for example, would the *Spanish Strawberries/Schmidberger* approach applied to non-State restrictions under Article 28 EC be relevant to services or establishment in the case of, for example, wildcard strikes that may not be lawful under national law but in respect of which a government (or indeed, a union?) did not act to stop? It is also unclear whether the horizontal reach of free movement law might go further still, into the realm of responsibility for the individual as has already occurred with respect to the free movement of workers.²³

The devices that the Court *does* sometimes use to find that something is not a restriction of free movement rights were not relevant and thus not invoked either in these cases. There was a cross-border element in both disputes,²⁴ thus the situations were not wholly internal to one Member State and thereby outwith the scope of free movement law. Neither could it be said that the unions' actions were too remote from or uncertain in their effects on the provision of services or freedom of establishment²⁵ – on the contrary, the very real and certain impact of the actions undertaken led to the instigation of the proceedings in the first place.

²¹ This line of case law begins with Case 36/74 *Walrave and Koch* [1974] ECR 1405, paras 17 and 18; cited in *Laval*, para. 98, but not in *Viking* (see n. 22 below).

²² In *Viking*, the principle of State responsibility for tackling free movement restrictions effected by private actors comes from Case C-265/95 *Commission v France (Spanish Strawberries)* [1997] ECR I-6959, para. 30; and *Schmidberger*, paras 57 and 62. That jurisprudence is normally considered as authority for the *absence* of horizontal direct effect in the context of Article 28 EC. Unhelpfully, the Court used this case law in *Viking* for the related but different point, finding support there for a *general* principle about non-State responsibility for free movement restrictions (see para. 62, drawing from para. 38 onwards of the Opinion of AG Maduro). In contrast to the reasoning set out in *Viking*, Dashwood, above n. 2 at 534, commends instead the 'analogical reasoning' applied by AG Mengozzi in *Laval* towards extending the case law on sporting associations to trade unions. It is not clear whether any difference in legal effect was intended by the use of different authorities for the horizontal scope point in *Viking* and *Laval*. Both were judgments came from an identically composed Grand Chamber, although different Advocates General and *juges rapporteur* were responsible for each case.

²³ Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano* [2000] ECR I-4139, para. 36. In *Viking*, AG Maduro sketched a similar responsibility for individuals across the spectrum of free movement law, while also discussing the limitations that might attach to such an imposition on private autonomy; see paras 31-54 of his Opinion.

²⁴ Cf. Deakin, n. 2 above from 589 onwards, however, who argues that this was not clearly apparent from the facts of *Laval*.

²⁵ Drawing from Case C-190/98 *Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-493, Deakin offers an alternative view for *Laval*, pointing out that workers must take a host State's regulation of labour law as they find it and proposing a similar principle with respect to services (at 607). This analogy underscores the reverse situation of posted workers, however, since they are defined by the Court as precisely *not* seeking access to the host State's labour market (e.g. Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, para. 15).

Thus, that the Court engaged its three-stage restriction, justification and proportionality paradigm in *Viking* and *Laval* is a predictable and consistent application of the framework of free movement law. The ease with which an actual or potential, direct or indirect,²⁶ or even likely restriction on free movement can now be established is undoubtedly controversial. That debate might well *include* the judgments in *Viking* and *Laval*, but it is so much bigger than these judgments. It ripples right across the different Treaty provisions of free movement law.²⁷ What seems absent from reflections that criticise *Viking* and *Laval* from this perspective, focusing on the *form* of the judgments, is an acknowledgement that if the Court had proceeded any differently, the framework of free movement law would have been, in consequence, either dis-applied or fundamentally altered. Either way, it would have been an asymmetric outcome and it would have needed to be rationalised against the enormous weight of jurisprudence to the contrary.

Azouli has explained the methodology typically applied by the Court by invoking the image of a collage. Unpeeling the judgments in *Viking* and *Laval*, he traces how a patchwork of case law principles is pulled together from across the spectrum of ECJ jurisprudence. While the application of this collage methodology to *Viking* and *Laval* has been criticised,²⁸ Azouli points out that the technique ‘form[s] the conceptual and ideological framework of the Court’s reasoning [offering] security and permanence in the judicial work’.²⁹ The Court has certainly fudged decisions in some instances in a way that does seem influenced by the subject matter of the case.³⁰ And its willingness to engage in the questions that come before it irrespective of the nature of the dispute has often drawn criticism on a case-by-case basis. But what choice does it have? In responding to the questions that are sent to it by national courts and tribunals, the Court has resolutely refused to abandon the framework of free movement law on the basis of the *subject matter* of a preliminary reference alone.³¹ To do otherwise would open up a problematic discretionary function for the Court

²⁶ Recalling the formula in Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, para. 5.

²⁷ For example, see again the articles cited in n 15 above regarding the use of goods case law.

²⁸ See Barnard, n. 2 above at 492.

²⁹ Azouli, n. 2 above at 1339-1340.

³⁰ The conflation of services and economic links in *Grogan* comes to mind as a good example of this, against the backdrop of highly sensitive questions about how States regulate abortion and abortion advertising (Case C-159/90 *Society for the Protection of the Unborn Child (SPUC) v Grogan* [1991] ECR I-4685; see further, N Nic Shuibhne ‘Margins of appreciation: National values, fundamental rights and EC free movement law’ 34 *ELRev* (2009) 230 at 244.

³¹ The Court does sometimes decline jurisdiction in preliminary reference cases on grounds including the hypothetical nature of the national dispute. For a brief outline of this and other relevant criteria, see paras 45-47 of the judgment in *Laval*.

that has no place in the preliminary reference procedure or in the functions of case law more generally.

The inevitability of the *outcome* achieved through the material or substantive determination of justification and proportionality is never, however, so certain. As Azouli himself remarks, application of the collage of legal reasoning does not ‘dictate the outcome. Finding the actual solution remains a product of imagination.’³² Bearing this in mind, the next section explores more deeply the extent to which the social objectives pitted against the free movement of services and freedom of establishment in both cases could or should have made more of a material difference. We saw above that conceptualisation of collective action as a fundamental right was not, by itself, enough to bring the cases outside of the free movement law framework. In other words, there was no reason to rethink the *form* of this case law. But should the fundamental status of the social objectives underpinning the unions’ actions and, more specifically, the protection of workers have nonetheless contributed to a different outcome in *substance*? Proceeding from an acceptance of the restrictions on free movement as legitimate in both cases, these questions are examined below in the context of justification and proportionality, the next steps in the framework. The relationship between the judgment in *Laval* and the Posted Workers Directive, which raises important questions about the interplay between negative and positive integration, is also discussed.

B. The substance: Transposing the social market economy to the market framework

The judgments in *Viking* and *Laval* and the rich scholarship addressing them have amplified uncomfortable questions about the privileging of short-term trade gains over nationally embedded social guarantees and, concurrently, about the extent to which the latter should be protected as *European* values within the framework of market integration. This critique can thus be framed in two ways, either as support for the devolution of social protection, and/or regret at the weakness of social policy infusion into the premises and application of free movement law itself.

On the first point, the judgments bring into sharp focus the extent to which States may (and, left alone, would choose to) do things differently. National market rationales are often deeply different when viewed through a social policy optic; and those differences are often deeply rooted in political, sociological, and cultural choices – as well as being reflective

³² Azouli, n.2 above at 1340.

of the priorities and *capacities* of national economies. To what extent can the transnational market level these differences? To what extent should it? This is not as simple either as an 'old/new' State clash. The UK, which, as the location of the ITF headquarters, found itself to be something of an accidental participant in *Viking*, is not exactly known for being comfortable with prescribed levels of social protection that might unduly, in its view, hamper business initiative. It is worth remembering too that the unions who took action in these cases did not have ambitions to transplant a higher or 'European' level of social protection across the Union. Rather, they sought (in *Laval*) to ensure that national understandings of social protection continued to apply within the national territory and (in *Viking*) to block transnational enterprise. When do these actions cross the line into undue protection of national jobs, when do the intentions of the unions change from legitimate and justifiable social protection into market-thwarting national protectionism? And, more difficult still, who should decide?

Second, looking more at the prospect of *European* social values, this line of argument sees the judgments as problematic from, in effect, the opposite angle: that the ECJ failed in its EU responsibility to integrate higher thresholds of social protection into its articulation of contemporary free movement law. A latent criticism in the same vein is that the ECJ failed to integrate higher thresholds of social protection into (national) arrangements suggested to be lacking. In terms of free movement law's framework, this question is more about working social policy driven questions and priorities *into* it than disapplying it. The potential contribution of the Posted Workers Directive is relevant here too: did it prescribe a minimum European standard of social protection (the second or European point) or did it enable States to insist that their own, higher, standards of protection had to be applied with respect to workers temporarily posted in their territories (the first or devolution point)? It was suggested in part A above that forsaking the framework of free movement law was not an appropriate step to take for the resolution of these tensions, so that any room for manoeuvre in *Viking* and *Laval* lay most likely in a more socialised understanding and application of the justification and proportionality steps (and/or the Posted Workers Directive in *Laval*). These issues will now be examined in more detail.

1. Socialising the Framework

It was noted above that the application of the free movement framework in *Viking* and *Laval* has been criticised because of the inherent implications of this methodology. Framing this

question from a more self-consciously social perspective, it means that, in essence, irrespective of how much the Court talked about balancing the economic and social objectives set out in (then) Articles 2 and 3 EC, '[t]he moment collective action is found to be a "restriction"...the "social" interests are on the back-foot, having to defend themselves from the economic.'³³ The Court seemed initially to suggest that it would embark on its analysis in a balanced way, even implying that priority might in fact be given to the relevant social objectives in both cases: '[s]ince the Community has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy' – interestingly, here, *not* the other way around.³⁴ But this would appear to be the social high watermark of the judgments. The framework of free movement law was applied in a straightforward way thereafter, reverting to the normal restriction (economic)/justification (social) sequence. Perhaps no-one outlines the powerful rationale behind this converse, market-oriented starting point clearer than Advocate General Maduro in *Viking*.³⁵ He argued that nothing in the Treaty itself suggests that social rights should *always* take precedence over 'the objective of a properly functioning common market'.³⁶ He also suggests that collective action in the transnational context essentially impedes the hiring of, in that case, Estonian workers in an attempt to protect Finnish workers – the type of barrier that 'entirely negates the rationale of the common market' and therefore raises charges of overt nationality discrimination and protectionism.³⁷ In other words, Advocate General Maduro reasoned that this is simply how free movement law *works*. Notwithstanding the range of objectives listed in the Treaty's introductory articles, the specific free movement provisions are clearly structured on a restriction/justification basis. The free movement framework applied by the Court simply mirrors the framework pinned down in primary law.

If this is true, then why do the judgments seem just, wrong to so many people? In contrast to the outcome in *Viking* and *Laval*, Azouli and O'Brien draw expressly from *Schmidberger* in terms of its 'practical method for...reconciliation' (Azouli) and as an example of 'integrated interpretation' (O'Brien).³⁸ In *Schmidberger*, an officially sanctioned environmental protest, which necessitated the closing of an inter-State motorway for over 30

³³ Barnard, above n. 16 at 264.

³⁴ *Viking*, para. 79; *Laval*, para. 105.

³⁵ For academic analysis also grounded strongly in the value and demands of free movement, see N Reich 'Free movement rights v social rights in an enlarged Union: The *Laval* and *Viking* cases before the ECJ' *German Law Journal* (2008) 125.

³⁶ *Viking*, Opinion of AG Maduro, para. 23.

³⁷ *Ibid.*, para. 68.

³⁸ Azouli, n. 2 above at 1349; O'Brien, n. 5 above at 1137.

hours, was found to be a legitimate and proportionate restriction on the free movement of goods. In balancing the free movement and fundamental rights interests (freedom of expression and of assembly) in this case, the Court stated that the national authorities (against whom, for having authorised the protest, the action was directed) enjoyed ‘a wide margin of discretion’.³⁹ There is a question worth asking here, however; even if applying a reconciliatory or integrated *process*, does the *outcome* not require one set of objectives nonetheless to take precedence in some way in any given case? Does this more ‘balanced’ process not mean, really, that economic and social objectives are still competing but that the social goals (or, as in *Schmidberger*, the protection of fundamental rights) are found to trump the interests of spreading the internal market instead?

The even more State-sensitive approach taken by the Court in *Omega*, which sheltered the German understanding and protection of human dignity from the right to provide transnational services through a very understated application of proportionality stands similarly in contrast to the prevalence accorded to free movement in *Viking* and *Laval*. The free movement framework was applied, in formal terms, in the same way in all three of these decisions. But the outcome was very different in *Omega*. There, a clear margin of appreciation was delineated for Germany and, whatever the Court might have said,⁴⁰ for the operation of its constitution.⁴¹ Why did the Court act so differently in *Viking* and *Laval*? There, the Court rather cleverly engaged *Omega* as authority for the fact that the fundamental nature of a right did not preclude review of the exercise of those rights against Treaty freedoms. The application of this as a legal principle or precedent was supported in part A above. But what differed profoundly was the way in which proportionality was applied in *Omega*. The formal application of free movement law looks the same, but significant allowances were made in *Omega* in the substance. With the framework intact, the reasons behind the difference would not appear to be ones grounded in legal reasoning. If human dignity is a no-go area but nationally (often, constitutionally) protected understandings of social protection are open to subjugation where they unjustifiably and disproportionately hinder free movement rights, where (and indeed, what) is the mythical ‘line’ between the two from the perspective of the Court of Justice? The constitutional protection of human dignity in Germany, on its own, is not enough to explain the difference. Article 17 of the Swedish *Regeringsformen* protects the right to take collective action. More generally, the Court has consistently repeated and

³⁹ *Schmidberger*, para. 82.

⁴⁰ *Omega*, para. 34.

⁴¹ *Omega*, para. 39.

applied the principle, originating in *Simmenthal*,⁴² that the *source* of national law is irrelevant in the context of EU law primacy. Even in *Schmidberger*, the most interesting discussion on balancing free movement and protection of fundamental rights⁴³ took place under the express ‘justification’ heading; the free movement framework had already been applied, and a restriction on free movement had already been established, requiring then to be justified. What *Schmidberger* offers is an example of lighter touch justification and proportionality review. It does not invert the framework of free movement law per se. But something quite different happened, also in *Omega*, in the application of justification and proportionality in a context involving the protection of fundamental rights.

I have argued elsewhere that a constitutionally rooted theory of fundamental State boundaries that the ECJ is willing to recognise could explain the different outcomes in these cases to *some* extent.⁴⁴ Other factors stem from the murkier, more subjective sphere of the way in which preferences are expressed when the Court engages in substantive adjudication of justification and proportionality. Perhaps too, to some degree at least, there is an underlying awareness of the economic scale and importance of the sectors affected by the relevant judgments – one 30 hour closure of one motorway in *Schmidberger*; preventing the emergence of a laser ‘killing games’ sector in one State in *Omega*; questions about regulatory competition on a significantly greater scale, however, in *Viking* and *Laval*. The undercurrent of protectionism emerging as the economic climate worsened may also have contributed to the harder line taken by the Court;⁴⁵ this may not have seemed like the time even to *appear* to endorse the insulation of national jobs from the wider market. Part of the solution may also lie in the States’ own failure, legislatively, *themselves* to indicate the kind of social priority to the field of posted workers that the Court could or would not find in *Laval*; this is discussed in the next section. An alternative approach to justification and proportionality will then be worked out in section 3.

2. *Socialising the Legislative Context*

Writing in an academic capacity in 1999, before his term as Advocate General, Maduro observed that ‘the free movement of persons has been developed as a function of economic efficiency: the intent is on optimal allocation of labour under the mechanisms generated by

⁴² Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629.

⁴³ See *Schmidberger*, paras 77-81 especially.

⁴⁴ See again Nic Shuibhne, n. 30 above.

⁴⁵ Sometimes, much more overt than an undercurrent; see the contribution to this volume by E Spaventa.

market integration'.⁴⁶ Notwithstanding the evolution of EU law in the interim decade, even considering the legal substantiation of EU citizenship that has been a significant part of things this statement is remarkably prescient regarding the interpretation given to the Posted Workers Directive in *Laval*. Discussion of the Directive centred primarily on the inclusion of 'minimum rates of pay' in a list of conditions in Article 3(1) that had to be guaranteed in host States for workers posted temporarily from other Member States. The host State standards were to apply as regards these conditions so long as they were laid down in law or in a universally applicable collective agreement – neither of which was the case as regards the Swedish collective bargaining framework; it may be recalled that the collective agreement which *Laval* was being asked to sign neither spelled out the applicable wages nor had *erga omnes* (universal) effect. Furthermore, there is no legislatively codified minimum wage in Sweden.

Sciarra is one of the few commentators to suggest that the Court might have avoided at least some criticism by having focused in more depth on Sweden's 'imprecise implementation' of the Directive.⁴⁷ The critical point latched onto in the judgment instead was that the measure's legal basis was Article 55 EC, *not* the Treaty's social provisions, and this was clearly the deciding factor in its interpretation by the Court. In other words, the Directive's primary purpose was confirmed as the facilitation of the provision of services, not the protection of working conditions or a means to give effect to host State social policy (above and beyond the defined and very limited core of minimum standards of protection detailed in Article 3(1) of the Directive).⁴⁸ Given the uncertainty on the question of wages in *Laval*, which was set to be resolved only after the company had first signed the Swedish collective agreement for the construction sector, the Court thus moved on from the Directive to address whether there was a restriction flowing from the Treaty provisions on services directly.

⁴⁶ M. Poaires Maduro 'Striking the elusive balance between economic freedom and social rights in the EU' in P. Alston (ed.) with M. Bustelo and J. Heenan *The EU and Human Rights*, (Oxford OUP 1999) 449 at 462.

⁴⁷ Sciarra, n. 2 above at 578-9.

⁴⁸ See the clear ascription of priorities in paras 75-76 of the judgment in *Laval*. For a contrary interpretation of the Directive, see Deakin, n. 2 above at 597. Deakin argues that attribution of, first and foremost, a social purpose to the Directive is 'in so many words, clearly indicate[d]'; he also suggests that such an interpretation would be 'consistent with the widely accepted understanding of other social policy directives and regulations, which do not seek to set out either uniform laws or even a level playing field, but to establish a floor of rights above which regulatory competition is possible.' This aligns with the kind of integrated interpretation approach favoured by O'Brien on conceptual terms, but it does not deal directly with the question of respective, express legal bases.

The Court made a choice, therefore, but it made a choice that is expressly underscored by the intentions of the Community legislature. Commentators point to Recital 17 of the Directive's preamble ('[w]hereas the mandatory rules for minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers') to suggest that the Court's interpretation of the Directive was, therefore, simply wrong. But it is arguably possible to read 'more favourable conditions' as referring to the *home* State – another example, perhaps, of the tacit yet prevalent 'country of origin' preference built into the regulation of cross-border services.⁴⁹ Moreover, the first four recitals focus exclusively on the provision of services; even in Recital 5, which speaks about 'guaranteeing respect for the rights of workers', this is expressed alongside the need for fair competition. Other references to a 'nucleus of mandatory rules' and 'hard core of clearly defined protective rules' do seem to support, on balance, the Court's 'ceiling rather than floor of protection' characterisation of the Directive.⁵⁰ Interestingly, a dilution of the national discretion that had been presumed to be afforded through minimum harmonisation directives is also evident in internal market case law more generally.⁵¹ This is not to say that the balance of protection settled on by the Court is therefore *right*; but it does ask that criticism must be directed just as much at the legislature as it has been at the Court. Could the Court have chosen here to effect a more socially balanced interpretation? Yes; but it is suggested that this would have been to construe the Directive against an overly stretched and not an actual reading of its purpose and objectives, which must be extrapolated from reliance on more than one of its provisions. This recalls the point made above, then, about the extent to which calls for balanced interpretation are asking for, in reality, priority for social objectives. There is nothing wrong with this in principle; but it needs to be acknowledged that the ramifications of success for free movement law more generally would be significant indeed. The usefulness of such a reading might have been of

⁴⁹ Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221, para. 12. In the context of *Laval*, Deakin, n. 2 above, refers to this as the principle of 'regime portability'.

⁵⁰ This outcome is emphasised by several commentators; see, for example, Barnard, n. 2 above at 477-78 and Kilpatrick, n. 2 above at 847 onwards.

⁵¹ There are clues to this effect in the *Tobacco Advertising* judgment (Case C-376/98 *Germany v Parliament and Council ('Tobacco Advertising')* [2000] ECR I-8419, paras 103-105; the insistence on the necessity of a free movement clause in the challenged directive seems to undermine the logic of minimum harmonisation in the first place. For a contrary view on the significance of this, see S Weatherill 'Supply of and demand for internal market regulation: Strategies, preferences and interpretation' in N. Nic Shuibhne (ed.) *Regulating the Internal Market*, (Cheltenham Edward Elgar, 2006), 29.

limited value in the *Laval* case itself in any event, given the thorny issue of horizontal effect of directives.⁵²

The judgments have been criticised for *causing* a problem; but perhaps they have in fact *revealed* a real problem – in the field of posted workers, because of the degree to which their protection as workers is considered as subsidiary to the competitive success of their employers: not just by the Court but within the internal market per se which, in this instance, has been subject to legislative intervention. Already considered by the Court to be outwith the scope of more general EU legal protection of workers,⁵³ those who are posted temporarily to other States to fulfil work obligations outside their home States seem strikingly cast as the last remaining ‘factors of production’, realising still the original image of Community workers that the case law on free movement of persons more generally has long tried to shake off. With its subsequent judgments in *Rüffert*⁵⁴ and *Commission v Luxembourg*,⁵⁵ however, the stance of the ECJ on this point has been hardened.

Maduro also noted in 1999 that ‘the gap between negative and positive integration has generated spill-over effects favouring economic freedom against social rights at the national level’.⁵⁶ The judgments in *Viking* and *Laval* illustrate most acutely how true that remains. Redressing the negative/positive integration imbalance provides a real manifestation of and opportunity for the reconciliatory/integrated approach to blending the economic and social objectives to which the Union is, Treaty-wise, committed. So the legislature must act. It would have to do so now against an uncomfortable imprint of restraint, given the sheer power exuded by Article 49 EC through the momentum of case law. Maduro finds some optimism, however, in the ‘defence and promotion of social policies’ exhibited by secondary legislation in the field of labour law when this *is* expressly intended.⁵⁷

⁵² See similarly, Deakin, n. 2 above at 595. This would have raised a whole other set of legal questions, beyond finding that trade unions can come within the scope of Articles 43 and 49 EC. See further, Dashwood, n. 2 above. Barnard has also noted the double-bind for unions regarding the Posted Workers Directive to the extent that the Court did discuss its applicability; though found to fall within the scope of Community law in terms of restricting the provision of services (and may engage justification arguments in that context), their non-public status shuts down access for unions to the specific public policy mechanism in Article 3(10) of the Directive (see *Laval*, para. 84; and Barnard, n. 2 above at 473). It is worth noting, however, that even where a State is involved, the decision in Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323 shows the extremely limited space for public policy derogation through Article 3(10).

⁵³ Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte* [2001] ECR I-7831, paras 22-23.

⁵⁴ Case C-346/06 *Rüffert v Land Niedersachsen* [2008] ECR I-1989.

⁵⁵ Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

⁵⁶ Maduro, n. 46 above at 463.

⁵⁷ *Ibid.* at 465.

3. *Socialising justification and proportionality: Strikes cause disruption but isn't that the point?*

At this stage, a number of arguments have been suggested: in summary, that the way in which the Court approached both judgments was systematic and in keeping with both the framework and rationale of free movement law; that the Court is nonetheless required by the Treaty properly to consider the impact of social objectives on the realisation of the internal market; that it could not have done so in its interpretation of the Posted Workers Directive in *Laval* without undue blurring of the legal signposts built into the measure itself; and that the ideal of 'balanced' interpretation of economic and social objectives can be something of a misnomer, if the underlying argument or preference is, in fact, that priority should be accorded to social objectives. But a concern was also observed that there is, nonetheless, a remarkable certainty in the tone of the Court regarding its application of justification and proportionality (in both judgments, but especially in *Laval*), in contrast to other cases in which constitutionally embedded fundamental rights have been weighted 'against' free movement claims, notably *Schmidberger* and *Omega*. Apart from (legitimate) procedural questions about the de facto resolution of cases by the Court within the Article 234 EC system,⁵⁸ it must be emphasised that in both *Viking* and *Laval*, Advocates General Maduro and Mengozzi respectively offered more detailed, nuanced and socially-sensitive analyses on justification and proportionality.⁵⁹ The way in which the Court balanced economic and social concerns was not, therefore, the only way. In *Viking*, there was also the possibility, at least, of an interesting outcome back in the national court. The reasoning of the Advocates General is firmly rooted in the framework of free movement law in both cases, seeing the actions of the unions as restrictions that must be justified and proportionate, and so the solutions outlined do not go as far as some would want. They are more outcome than process focused. But they do demonstrate the potential for greater accommodation of social concerns even *within* the framework of free movement law. And that is surely, ultimately, the key point.

As Davies has pointed out, the implications of the judgments, in contrast, pose a stark and seemingly irreconcilable tension between EU and labour law: the more effective the

⁵⁸ The Court's decisiveness and precision in respect of the outcome in *Laval* can be contrasted, for example, with how comfortable it was with factual ambiguities underpinning the validity of the reference; compare paras 43-49 of the judgment in *Laval* with the analysis by Deakin, n. 2 above.

⁵⁹ See *Viking*, Opinion of AG Maduro, para. 62 onwards; in *Laval*, see the Opinion of Ag Mengozzi, para. 241 onwards. Commenting on the solutions proposed by the Opinions, see Barnard, n. 2 above at 479-481; see also, M Rönmar, 'Free movement of services versus national labour law and industrial relations systems: Understanding the *Laval* case from a Swedish and Nordic perspective' CYELS (2007-2008) 493 at 518 onwards, discussing the aftermath of *Laval* in particular.

industrial action from the perspective of the union, the more difficult it will be to justify and/or meet proportionality requirements.⁶⁰ Strike action is one of the most effective tools that unions can invoke and not to take account of this suggests that the Court utterly de-contextualised its reasoning from the specifics of industrial relations, generating an unfortunate proportionality paradox.⁶¹ Drawing also on the horizontal effect point, used here for the benefit of rather than 'against' the employer, Azouli has argued that the Court fundamentally misjudges the relative power of the players involved, and most especially and in contrast to its case law historically, it does so at cost to the position of and options available to the workers.⁶²

The seeds of another mechanism through which a more favourable justification and/or proportionality analysis could have been undertaken, acknowledging the specific resonance of strike action within industrial relations, could lie in one of the ITF and FSU submissions in *Viking*: 'since certain restrictions on freedom of establishment and freedom to provide services *are inherent* in collective action taken in the context of collective negotiations', then the Court's reasoning in *Albany* should be applied.⁶³ In *Albany*, collective agreements were found to fall outside the scope of Article 81(1) EC given the social policy objectives that they pursue, notwithstanding the 'inherent' restrictions they can effect on competition.⁶⁴ In its judgment in *Viking*, the Court rejected the relevance of that submission. The stronger of its counter-arguments is simply that 'the fact that an agreement or an activity are excluded from the scope of the provisions of the Treaty on competition does not mean that that agreement or activity also falls outside the scope of the Treaty provisions on the free movement of persons or services since those two sets of provisions are to be applied in different circumstances'.⁶⁵ The more disputable statement precedes this: 'it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced to a certain degree'.⁶⁶ Simply put, why not? Novitz criticises the mistaken conflation here of collective *agreements* and collective *action*. She expressly recognises potential for the kind of recognition of transnational interests within

⁶⁰ Davies, n. 2 above at 143.

⁶¹ For example, Sciarra has observed that '[i]n attempting to adopt the language of labour law, the Court does not ultimately capture its deepest message' (n. 2 above at 564).

⁶² Azouli, n. 2 above at 1354.

⁶³ *Viking*, para. 48 (emphasis added), citing Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

⁶⁴ *Albany*, para. 59.

⁶⁵ *Viking*, para. 53. At para. 54, the Court also confirmed that there can be no *general* exemption of collective agreements from the scope of free movement law.

⁶⁶ *Viking*, para. 52.

collective agreements, as advocated by Sciarra and Kilpatrick.⁶⁷ But, as Novitz rightly points out, ‘it is difficult to imagine how collective action taken against any employer could not be regarded as having some negative effect on the employer’s exercise of [Treaty] freedoms’.⁶⁸ Finally, Novitz draws from several examples of the more context-sensitive reasoning she urges the Court to consider within ILO jurisprudence.⁶⁹

The *Albany* route *per se* does not seem very promising, then, given the easy option still offered simply by distinguishing free movement and competition circumstances and legal contexts.⁷⁰ But we *can* find a recent example of *Albany*-style, more tempered application of justification and especially proportionality elsewhere within free movement law itself. In *UTECA*, the Court of Justice recently assessed Spanish legislation on the funding of films against inter alia Article 49 EC.⁷¹ In particular, requirements that television operators had to allocate 5% of their operating revenue for the previous year to the funding of full-length and short cinematographic films and European films made for television and 60% of that funding to the production of films of which the original language is one of the official languages of Spain were challenged by the Unión de Televisiones Comerciales Asociadas (UTECA). The Court applied the three-step framework of free movement law, discussing the objective of protecting Spain’s multilingualism in the context of justification and proportionality and finding nothing to suggest that the national measures were *disproportionate* in that case. The interesting paragraph for present purposes finds that;

[t]he fact that [a linguistic] criterion may constitute an advantage for cinema production undertakings which work in the language covered by that criterion and which, accordingly, may in practice mostly comprise undertakings established in the Member State of which the language constitutes an official language *appears inherent to the objective pursued*. Such a situation cannot, *of itself*, constitute proof of the disproportionate nature of the measure at issue in the main proceedings *without rendering nugatory* the recognition, as an overriding reason in the public interest, of

⁶⁷ Sciarra, n. 2 above at 580. See similarly, Kilpatrick, n. 2 above at 864, who advocates an approach that makes ‘collective bargaining *internally* sensitive to foreign needs’ (emphasis added). Writing in an academic capacity in 1999, Maduro argued that ‘our conception of fundamental social rights must change and can no longer be opposed to economic freedom’ (n. 46 above at 471).

⁶⁸ Novitz, n. 2 above at 550.

⁶⁹ *Ibid.* at 558-559.

⁷⁰ In his Opinion in *Viking*, AG Maduro rejected the submission on similar grounds, noting the built-in mechanism for balancing economic and social objectives in free movement law that is not possible within competition law; see para. 27. It has been observed, however, that the Advocate General was more successful in the application of this balancing than the Court itself was considered to have been. The potential for problematic balancing thus remains.

⁷¹ Case C-222/07 *UTECA v Administración General del Estado*, judgment of 5 March 2009, nyr; I am grateful to Bruno de Witte for raising this judgment for discussion in a different context.

the objective pursued by a Member State of defending and promoting one or several of its official languages.’⁷²

This way of thinking about proportionality needs to be worked out by the Court in more detail, to ensure that this version of the test does not itself undermine the contribution of proportionality assessment in the first place. It does offer an attractive logic for certain disputes, however, and it could have made a material difference to the Court’s thinking about collective action (notably in *Laval*). And there is a further interesting twist in the *UTECA* case: in contrast to the Posted Workers Directive, the Television Without Frontiers Directive⁷³ expressly allows Member States to introduce stricter measures towards the achievement of linguistic protection goals. Again, then, the interplay between negative and positive integration is exposed as a critical gap in the social protection of posted workers. The Court recognised this notion of ‘inherent restriction’ to some extent in *Viking*, in respect of the action taken by the FSU, when it observed that ‘it is common ground that collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members’.⁷⁴

In *Viking*, the Court referred to European Court of Human Rights (ECtHR) case law in support of this view.⁷⁵ Barnard argues that the Court immediately ‘undermined’ this promising statement, however, by its ‘last resort’ approach to industrial action in its subsequent articulation of proportionality.⁷⁶ The Court of Justice has long cited Strasbourg primary law and case law in its judgments. Interestingly, the ECtHR now frequently engages EU instruments in its own judgments too, notably the EU Charter of Fundamental Rights. It could be significant, then, that, after the judgments in *Viking* and *Laval*, the Strasbourg court intensified its own conception of freedom of association as protected by Article 11 ECHR. In *Demir v Turkey*,⁷⁷ the ECtHR emphasised that it ‘does not accept restrictions that affect the essential elements of trade-union freedom, without which that freedom would become

⁷² *UTECA*, para. 36 (emphasis added).

⁷³ Council directive of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L298/23), as amended.

⁷⁴ *Viking*, para. 86.

⁷⁵ *Viking*, para. 86, citing *Syndicat national de la police belge v Belgium* (1979-80) 1 EHRR 578 and *Wilson, National Union of Journalists and Others v United Kingdom* of 2 July 2002, 2002-V, § 44.

⁷⁶ Barnard, n. 2 above at 483; see *Viking*, para. 87 (instructing the national court to ask whether FSU had ‘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... whether that trade union had exhausted those means before initiating such action’).

⁷⁷ (2009) 48 EHRR 54.

devoid of substance.⁷⁸ The ECtHR also recognised, for the first time, a right to collective bargaining, as one of the ‘essential elements’ of the right of association.⁷⁹ We must be careful to remember that appropriate limitations to the exercise of these rights are accepted within the Strasbourg framework too; and we should not conflate collective bargaining and collective action in the way the Court of Justice was criticised for doing in *Viking* and *Laval*. But the strengthening language of Strasbourg is unmistakable. Moreover, its frequent cross-references to EU law leave us in no doubt that *Viking* and *Laval* were part of the legal context in which the Court of Human Rights chose to amplify its own previous case law and to suggest that enhanced protection for association rights had evolved over time. All of this seems to signal that greater respect will have to be accorded to the toolbox inherent in collective bargaining, and that toolbox inherently includes collective action. The approach taken in *UTECA* offers an assessment of proportionality through which these considerations can be taken into account while simultaneously ensuring that the free movement law framework can be preserved.

Finally, it is worth reflecting briefly on another inherent tension that is heightened by *Viking* and *Laval*: that free movement rights are typically constituted or interpreted as *individual* rights, contrary to the *collective* ethos underpinning social rights. This point emphasises that the rights claimed by the companies in both cases configure not only a ‘trade versus social’ dichotomy. They also reflect a privileging of the individual over the collective.⁸⁰ There are parallel examples within other strands of internal market case law too – thinking, for example, of how individuals’ claims to medical treatment typically supersede justification arguments about the structural aspects of national health-care systems.⁸¹ That free movement has not *itself* emerged as a shared collective good is, however, another interesting reflection. Advocate General Maduro’s Opinion in *Viking* perhaps comes closest to this interpretation of things. More specifically, he touched on a degree of responsibility that needs to be assumed by workers themselves in the transnational employment context.⁸² We have also seen calls for unions themselves to take the special situation of posted workers on board in their own

⁷⁸ *Demir v Turkey*, para. 144. Similarly, at para. 146, the Court affirmed that ‘limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights’.

⁷⁹ *Demir v Turkey*, para. 150.

⁸⁰ For discussion on this point, see Novitz, n. 2 above at 544-5.

⁸¹ For an example of failed justification arguments in this context, see Case C-444/05 *Stamatelaki v NPDD Organismos Asfaliseos Eleftheron Epangelmaton (OAE)* [2007] ECR I-3185, para. 30 onwards.

⁸² See para. 59 of the Opinion: ‘workers throughout Europe must accept the recurring negative consequences that are inherent to 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’.

negotiations which have cross-border implications.⁸³ Trade union, employee and media reactions to *Viking* and *Laval* did not really reflect or embrace this kind of shared commitment to market opening or to the wider (and even deeper) ambitions of integration that market opening exemplifies. Requiring social objectives to be justified against free movement claims might seem more palatable if viewed against this expression of a shared commitment to the value of free movement too. Does widespread disengagement from a commitment to or even the benefits of the internal market mean that the broader ambitions underpinning the free movement ideal have somehow 'failed' in the EU context?

IV. Conclusions: *Viking*, *Laval* and the 21st Century Internal Market

It has been argued in this contribution that, even without a revolutionary change in how free movement cases are resolved in formal or process terms,⁸⁴ the Court could have explored a more socially sensitive interpretation in *Viking* and in *Laval* in a substantive sense, either by re-orienting the centre of gravity of the Posted Workers Directive in *Laval* and bringing the prominence of its social dimension more to the fore (possible, but thought here to be beyond the proper remit of the Court looking at the weighting of the objectives coded into the measure, taking its provisions as a whole) or by recognising the particular or 'inherent' consequences of industrial action more readily in a less authoritarian justification and proportionality analysis (the preferred solution). Subsequent case law does not seem promising on either front thus far, apart from an isolated recognition of 'inherent' free movement restrictions in a different context in *UTECA*. But a legislative responsibility was also emphasised, towards ensuring that posted workers are not exploited so as to facilitate *unfair* and *inappropriate* regulatory competition.

The concrete issues resolved in (and indeed, those remaining problematic since) the judgments in *Viking* and *Laval* provoke an interesting question about the role of law (and more specifically, case law) in market integration: is the realisation of a sufficiently rounded, multilaterally transposable (in theory at least) transnational market driving the development

⁸³ See again, n. 67 above.

⁸⁴ The revolutionary quality of the interpretative shift in question here is well demonstrated by two of the examples O'Brien uses in collating an alternative approach to balancing economic and social objectives (n. 5 above at 1137); the use of services rather than citizenship as the interpretative basis of Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279 and the apparently general recourse to fundamental rights obligations, outwith the free movement of workers in Case C-109/01 *Secretary of State for the Home Department v Akrich* [2003] ECR I-9607 have attracted sharp criticism from what we could broadly term free movement lawyers. For further discussion, see N Nic Shuibhne 'Derogating from the free movement of persons: When can EU citizens be deported?' 8 CYELS (2005-2006) 187 at 199-200 and 205-6.

of EU free movement law; or is the development of EU law more autonomously driving some sort of economically skewed, overly simplistic version of the internal market? More precisely, is the social market economy potentially meaningful, or is it only meaningful if the Court decides so? Going further, it is worth asking whether, in the 21st century, when attention seems to radiate more readily outwards towards addressing challenges such as climate change and global financial dependency, the internal market seems like a small, antiquated and inward-looking project with little relevance for contemporary challenges. An unflattering conception of the EU, thinking of the ECJ's approach to these *inward*-focused market dimensions, evokes neither a nascent federal state nor a *sui generis* 'something', the ideas normally debated in discussions about the nature of the EU as a polity; but the arguably less benign image of an empire, mentioned briefly already⁸⁵ but worth taking further. This empire seeks to dissolve internal borders, levelling divergent value systems. This is, to me, an exaggerated picture, but it was clearly felt by some to be the case in the aftermath of *Viking* and *Laval*. That is somewhat worrying and demands to be taken seriously.

The empire analogy is a depiction rather clumsily evoked by Commission President Barroso himself but for present purposes it is more about a manifestation of, borrowing (crudely) from Dworkin, law's empire.⁸⁶ The judgments in and debates surrounding *Viking* and *Laval* illustrate a disjunction in terms of the power of the Court on free movement matters and the contemporary political emphases of the EU and its institutions more generally. States may have presumed the protection of national differences through devices such as reserved competences and minimum harmonisation, but such choices remain greatly vulnerable to negative integration. Commentators are broadly agreed that where secondary legislation in the social field has been adopted, the Court has dealt subject-sensitively with any related disputes that have arisen. But what we see in *Viking* and (thinking of the Posted Worker Directive dimension, especially in) *Laval* is that the national values at stake became susceptible to what has emerged as an imperial rather than collectively shared goal of market integration – in large part, because the Member States have not taken ownership of their own market-place.

Does the Commission's template for the *21st Century Single Market* recognise and address these challenges? The Communication offers 'encompass[ing] a strong social and environmental dimension' as one of four challenges, noting that 'single market policy must take full account of the social and environmental implications of market opening'.⁸⁷ But the

⁸⁵ See n. 18 above and accompanying text.

⁸⁶ See further, N Nic Shuibhne 'Is it time to worry yet?' 34 ELRev (2009) 521.

⁸⁷ European Commission, n. 3 above at 3.

Commission then establishes that the focus of the Communication will be on ‘new working methods ... better regulation ... a more varied set of tools and a more impact-driven approach’⁸⁸ – in other words, forms of governance to secure better implementation and enforcement. Without wishing to undermine the critical significance of implementation, it nonetheless seems that, to use the language applied by this article elsewhere, the Communication is singularly focused on *form* rather than first engaging with deeply contested questions of *substance*. Where the Communication does go on to address the ‘social, environmental and cohesion dimension’ more specifically – over just two pages in total – it refers to a ‘set of shared rights and values’ and to ‘[maintaining] a level playing field’ in terms of workers’ rights⁸⁹ – rather missing the converse *reality* that led to the proceedings in *Viking* and *Laval* in the first place. More telling perhaps is the reference to ‘unleash[ing] the single market’s full potential’.⁹⁰ The Court is certainly on track for helping to achieve that objective.

The volume, fervour and sincerity of the reactions (academic and otherwise) to *Viking* and *Laval* show that questions about regulatory competition matter very much indeed. The paleness of the Communication in terms of any contribution it makes to managing the difficult realisation of both economic and social objectives is acutely disappointing. The impression remains, therefore, that free movement is currently an imperial rather than shared, collective goal. Are we content to ‘leave’ the internal market to the Court, acting almost alone? Again, the reaction to *Viking* and *Laval* would suggest otherwise. Although the outcome in both cases has been criticised here in one respect (justification and proportionality), the Court did, at least, deal with the questions sent to it, not evading the issues because of their difficult, sensitive or controversial nature. The Court went on to receive ample criticism, often simply for dealing with the cases at all. Maybe it should be blamed just a bit less for doing so. In the *Single Market for 21st Century Europe*, the profoundly important questions raised by *Viking* and *Laval* – how to reconcile divergent social traditions in a competitive ‘single’ market space; how and to what extent internal market law as developed by the Court should determine such matters – do not find any real reflection in the Commission’s Communication and thus seem unlikely to engage the States or the European Parliament any time soon.⁹¹ Why not?

⁸⁸ *Ibid.* at 4.

⁸⁹ *Ibid.* at 10-11.

⁹⁰ *Ibid.* at 10.

⁹¹ Subsequent measures such as the Commission Recommendation of 31 March 2008 on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services, 2008 OJ C85/1 also appear to gloss over the more contested questions exposed by the Court’s judgments.