UNIONS' FREEDOM TO ESTABLISH AND PROVIDE SERVICES

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Abstract
Do unions have the freedom to establish and provide services, as much as business? In the well-known *Viking* and *Laval* opinions, the Court of Justice reviewed the proportionality of collective action by trade unions as interfering with business rights to establish and provide services. Yet the Court of Justice never had the opportunity to address submissions on the rights of trade unions to establish and provide services to workers. A basic reading of the Treaty on the Functioning of the European Union suggests that union freedoms are protected by law as much as business freedoms. Unions provide services: collective bargaining, insurance, or representation to union members. Unions establish: they set up bargaining units, work councils, board representation, and they take collective action to do it. Had the Court examined the clash between rights, it is likely that it would have found a union taking collective action cannot violate a business' right of establishment or service provision, any more than a business can violate rights of another business by fairly outcompeting it. Conflicting rights to establish and provide services cancel each other out. From this perspective, labour rights are overriding interests and human rights, but also form part of the general principles underpinning the EU's social market economy. This article suggests that acknowledging trade union freedoms is desirable, and will advance the EU's social and economic aims.

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1. INTRODUCTION

At the heart of European politics, it is often debated whether the 'economy' or 'society' come first.[2] The opinions of *Viking* and *Laval* held that business' rights to establish and provide services could be used to challenge workers' rights to collectively bargain and strike. The problem is, the Court of Justice did not have the benefit of submissions that unions have rights to establish and provide services, just as much as business. Unions do provide services: collective bargaining, insurance, or representation to union members. Unions establish: they set up bargaining units, work councils, board representation, and they take collective action to do it. If those rights had been considered, it seems likely that the outcomes would have differed. So this

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2 cf *Defrenne v Sabena (No 2)* (1976) Case 43/75 referring to what is now TFEU art 157 on equal pay, saying 'this provision forms part of the social objectives of the community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their people, as is emphasized by the Preamble to the Treaty.'

article asks, do unions have rights to establish and provide services in law, and should they?

In 2008, 2014 and 2018 the effects of *Viking* and *Laval* were limited by legislation,[3] but the policies they advanced remain meaningful in EU labour and company law. Indeed, they have been described as 'the constitutional apex of the neoliberal drive' in the 'fall of EU labour law'.[4] Whether or not such a 'fall' is too drastic, the cases do matter. First, they affect union freedom that has any cross border element, but flout the principle of trans-jurisdictional labour to only create minimum standards.[5] Second, they affect companies that establish in a member state with reduced worker participation rights (e.g. a German business sets up a Belgian SA). The Court of Justice has hinted that companies cannot evade worker voice under the guise of free movement.[6] But collective bargaining is meant to settle such issues, which again *Viking* and *Laval* affected.

Third, *Viking* and *Laval* affect companies that provide services from one member state without worker voice into another member state with it (e.g. a UK plc providing services in Denmark). Domestic codetermination legislation can in principle extend to foreign corporate forms.[7] But until member state legislation catches up, unions need to bargain. Fourth, they affect member state companies that transform into European Companies. While the Employee Involvement Directive 2001 enables worker voice 'before' a transformation to be maintained 'after', the actual results depend on the relative bargaining power of the parties. EU law on the right to collectively bargain, and take action, shapes results. Fifth, they affect union bargaining in cross-boarder mergers.[8] If employees have voice in a merging company (over 500 staff), but the new merged company will be incorporated in a member state requiring weaker voice, employees have the right to at least the same voice they had before,[9] for three years.[10] To reach a lasting

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3 See part 2(1) below: Rome I Regulation (EC) No 593/2008 recital 34, Public Procurement Directive 2014/25/EU art 18, and the Posted Workers Directive 2018/957/EU art 1.

4 S Giubonni, 'The rise and fall of EU labour law' (2018) 24(1) European Law Journal 7

5 e.g. *New State Ice Co v Liebmann*, 285 US 262 (1932) per Brandeis J (dissenting) 'To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment.'

6 e.g. *Erzberger v TUI AG* (2017) C-566/15, [39] discussed in 'Good for Governance: Erzberger v TUI AG and the Codetermination Bargains' (18 April 2017) Oxford Business Law Blog. *Überseering BV v Nordic Construction Company Baumanagement GmbH* (2002) C-208/00, [92] 'overriding requirements relating to the general interest, such as the protection of the interests of creditors, minority shareholders, employees and even the taxation authorities, may, in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment.'

7 This is expressly true of Danish codetermination law and Norwegian law: see *Erzberger v TUI AG* (2017) C-566/15, discussed in the AG Saugmandsgaard Øe Opinion, [83] fn 58.

8 Cross Border Merger Directive 2005/56/EC art 16(2)-(4)

9 CBMD 2005 refers to the standards in Employee Involvement Directive 2001/86/EC arts 3-13.

10 CBMD 2005 art 16(7). If the company transforms after three years, workers would have to bargain or strike to maintain their voice. Legislation does not yet make workers' legal rights in this situation explicit. There are arguably implicit legal rights, on a series of grounds, to be consulted and participate. For example, the Charter of Fundamental Rights of the European Union art 27 enshrines the right of 'consultation', which while not self-standing, must be used to interpret other legislation. Consultation means a duty to negotiate, and if no outcome is reached, and arguably the unilateral abolition of worker voice by management will be an abuse of rights.

solution, unions and employers are expected to bargain. There can only be a just resolution if the bargaining power of labour to capital is at least equally supported by law.[11]

This article is organised as follows. Part 2 suggests that on a plain reading of the Treaties trade unions do have rights to establish and provide services. It sets out the background of case law in *Viking* and *Laval* and assesses the legal implications of recognising those rights alongside existing service and establishment law. Part 3 addresses whether, as a matter of policy, it is desirable for trade unions to use rights to establish and provide services. The spectre of competition law, and a troubled history of social and democratic oppression has always loomed over courts' involvement in labour law.[12] But unions have the opportunity to embrace their rights to provide services to their members and to establish, within their higher social and political functions. These must be regarded as minimum standards to favour workers, and not a harmonisation project, precisely because the EU (and the CJEU) may not legislate on collective labour rights. The EU is committed to fundamental principles of international law,[13] and to its member states' democratic traditions. It sees that labour is not a commodity, that peace is achieved through social justice, and that workers rights are human rights

2. Union freedoms under the Treaties?

Few lines of case law in recent history have been scrutinised by European lawyers as much as *Viking*, *Laval,* and its progeny.[14] But despite the volume of literature, the principle of trade union freedom in the Treaty on the Functioning of the European Union has not been fully discussed. This may be unsurprising. The opinions in *Viking* and *Laval* subtly (or perhaps overtly) framed the terms of the debate as if the EU treaties put economic union first, and a social union a

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11 Unequal bargaining power is consequent on three main factors: (1) inequality in resources or wealth: A Smith, *The Wealth of Nations* (1776) Book I, ch 8, §12, (2) inequality in collective organisation: JS Mill, *Principles of Political Economy* (1848) Book V, ch XI, §12, and (3) asymmetry of information: WS Jevons, *Theory of Political Economy* (3rd edn 1888) ch 4, §74.

12 e.g. in the UK, see *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] UKHL 1 and *Roberts v Hopwood* [1925] AC 578. In Germany, see O Kahn-Freund, 'The Social Ideal of the Reich Labour Court - A Critical Examination of the Practice of the Reich Labour Court' (1931) in O Kahn-Freund, R Lewis and J Clark (ed) *Labour Law and Politics in the Weimar Republic* (Social Science Research Council 1981) ch 3, 108-161. Further: (2016) KCL Law School Research Paper No. 2016-34. In the US, see *Lochner v New York* 198 US 45 (1905) and *Loewe v Lawlor* 208 US 274 (1908).

13 See the International Covenant on Social, Economic and Cultural Rights 1966 art 8, on the 'right of everyone to form trade unions' with 'No restrictions' except as prescribed by law, necessary in a democracy, for security, order and to protect rights and freedoms of others. Also: 'The right to strike, provided that it is exercised in conformity with the laws of the particular country.'

14 Two examples of polite but devastating criticism are found in S Deakin, 'Regulatory Competition in Europe after Laval' (2008) 10 Cambridge Yearbook of European Legal Studies 581, 'Given the clear wording of the Directive and the wider institutional context of social policy in which it is set, how can the Court's view in Laval be explained?' 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*' (2009) 15(1) European Law Journal 1, 15-19. See further M Freedland and J Prassl (eds), *Viking, Laval and Beyond* (2014) and ACL Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) 37(2) ILJ 126.

distant second.[15] On this view, the four freedoms of moving goods, services, labour and capital, are primarily freedoms that benefit business. Human rights come second. As many have pointed out already, that understanding must be regarded as mistaken.[16] This section summarises (1) the background debate,[17] (2) how unions have rights to provide services, and (3) to establish.

(1) THE BACKGROUND OF UNION FREEDOM: *VIKING*, *LAVAL* AND PRE-EMPTION

The problems of *Viking* and *Laval* are common to all plural legal systems, in a globalising world. When legal systems collide, there are three main choices. First, two systems can each pass conflicting norms, and leave their resolution to political settlement or economic power. For instance, World Trade Organisation rules enable economic retaliation if countries put up unjustified tariffs.[18] Second, one system can prevail over, or 'pre-empt' another. For instance, in the US the federal Clayton Antitrust Act of 1914 §6 mandated that, whatever state law says, trade unions shall never be subject to competition law liability because 'labor is not a commodity'.[19] Third, one system can set minimum standards that other systems may improve upon. The Working Time Directive 2003 requires 4 weeks (or 28 days) paid holidays. But it enables, say, France to have 36 days. Admittedly, what counts as 'minimum' standards depends on one's view. A worker's minimum right to 28 days paid holidays is also an employer's maximum right to make staff work for 337 days (minus weekends and maximum hours). The dominant view is that social policy's goal is to ensure a minimum floor of rights favouring the party with less bargaining power, or in need of protection: workers, consumers, tenants, the environment, and so forth. Law replaces arbitrary market outcomes with democratic norms. Member states in a transnational system should be like laboratories of democracy,[20] experimenting beyond the floor of EU law.

In its early days, Europe's Spaak Report reasoned there was no need to have common rules on labour rights at all, because exchange rates could adjust to reflect each member state's productivity.[21] Different labour standards were certainly no barrier to free movement. But would this lead to a race to the bottom in labour rights? It is true that capital moves faster than labour.

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15 This diverted, without justification, from the principle in *Defrenne v Sabena (No 2)* (1976) Case 43/75 that the European Union 'is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their people'.

16 e.g. P Craig and G de Burca, *European Union Law* (2015) 558 and 819, noting 'extensive critical analysis' with '92 case notes'.

17 Those well acquainted with the background may skip to part 2(2) from page 8.

18 WTO Agreement, Annex 2, Understanding on rules and procedures governing the settlement of disputes, art 22. The fact that the process of economic retaliation is meant to follow a legal procedure cannot be seen as an adequate functional substitute for actual judicial procedures found, for instance, in EU law.

19 Clayton Act of 1914, 15 USC §17. The word 'commodity' alluded more to the US commerce clause than to political theory.

20 *New State Ice Co v Liebmann*, 285 US 262 (1932) per Brandeis J

21 Spaak Report, *Comite Intergouvernemental créé par la conference de Messine. Rapport des chefs de delegation aux ministres des affaires etrangeres* (21 April 1956) Unofficial translation by ECSC Information Service (June 1956).

Yet among democratic societies, experience has shown that ideas move faster than capital, and ideas stick. If countries remained democratic, so that experiments in social policy continued,[22] a race to the bottom might not occur. Nevertheless a legitimate function of European governance was to spread best practice. Like ironing out creases in a patchwork quilt, the view developed that companies should not be able to exploit lower labour rights in one country, to unfairly compete with others.[23] So, there were rules for equal pay between women and men. A new social chapter was embraced by every member state after the Treaty of Amsterdam.[24] EU legislation and case law developed to embed social rights.[25]

But then, a proposed Directive led by Commissioner Frits Bolkestein argued that to become the most 'competitive' and 'dynamic' economy in the world, Europe should abolish all 'barriers' to market access for (business) service providers.[26] The draft said if a service provider complied with rules in its 'country of origin' it should not have to comply with rules of any other country, even though it operated abroad. This proposal would have let companies set up paper headquarters in member states with low regulation, while concentrating their lobbying efforts in Brussels to cut EU regulation. It would not have improved, but damaged EU competitiveness and dynamism because companies would be competing not to improve quality, but to cut wages, taxation and social standards. In this 'cut-throat competition', the bad corporation would have led the good, and the worst would have led the bad.[27] It would have been a Hayekian dystopia, where democratic decision making was crippled, and where unrestricted free movement meant unrestricted evasion of law.[28]

The Bolkestein proposals triggered mass protest around Europe, resembling opposition since 2012 to the Transatlantic Trade and Investment Partnership.[29] Meanwhile in 2005 both France and the Netherlands held referendums on a new Constitution for Europe. As implacable opposition to the Bolkestein Directive was stoked, Dutch and French voters rejected the Constitution.[30] In the end, the Services Directive 2006 passed with exemptions for labour, public

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22 *New State Ice Co v Liebmann*, 285 US 262 (1932) per Brandeis J, 'It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment.'

23 See the *Social action programme submitted by the Commission to the Council on 25 October 1973* (1973) COM(73)1600

24 The 'social chapter' of the Treaty of Maastricht 1992 was rejected by the UK government, at that time run by the Conservative Party. When the Labour Party won the 1997 election, it joined the social chapter. The fact that the Conservatives have never been reconciled to labour rights (or financial regulation) explains some of their passion for 'Brexit'.

25 See also F Lecomte, 'Embedding employment rights in Europe' (2011) 17 Columbia Journal of European Law 1

26 E Grossman and C Woll, 'The French debate over the Bolkestein directive' (2011) 9(3) Comparative European Politics 344

27 cf Winston Churchill MP, Trade Boards Bill, Hansard HC Debs (28 April 1909) vol 4, col 388

28 cf FA Hayek, *The Constitution of Liberty* (1960) ch 12, The American Contribution: Constitutionalism, 161, applauding how enforced free movement could halt 'economic control' for tax, labour rights or public services, which could 'be effective only if the authority exercising them can also control the movement of men and goods across the frontiers of a territory'.

29 N Lindstrom, 'TTIP and Service Liberalization: Bolkestein returns?' (2012) oefse.at

30 The French rejected the Constitution by 55% to 45% on a turnout of 69% (29 May 2005). The Dutch rejected the

services, and with no 'country of origin' rule. The only problem was that a group of lawyers decided that what could not be won in a deliberative democratic process,[31] namely decoupling economic growth from social progress,[32] should be enforced by the European Court of Justice.

So, in *ITWF v Viking Line ABP* the Finnish shipping company Viking Line ABP claimed that the International Transport Workers Federation, a union of shipping workers, violated its right of establishment (now in TFEU art 49) by striking for fair wages. The company was renouncing a Finnish collective agreement, and putting new staff on Estonian contracts, by changing the flag of its ships from Finnish to Estonian.[33] The union, headquartered in London, took strike action by blockading Viking's ships. The Court of Justice, following an opinion of Advocate General Maduro, held that although the right to strike was a fundamental human right, its exercise by the ITF had been a disproportionate infringement of the business' right of establishment.[34] Instead of evaluating which right has greater importance, the Court decided that strike action in this instance was disproportionate because the workers' 'jobs or conditions of employment' were not 'jeopardised or under serious threat'.[35]

Both the Advocate General and Court opinions in *Viking* displayed to European labour lawyers some basic misunderstandings. First, strikes are not legitimate merely when jobs or conditions are 'under serious threat'. Collective bargaining, without the right to strike, is collective begging.[36] Strikes not only protect but advance fair wages, advance human development, secure voice at work and voice in politics. Second, the reason collective action is a human right is it has been one of the central vanguards of democracy. Strikes helped depose the Kaiser.[37] Strikes ended British Imperial rule in India.[38] Strikes collapsed the Iron Curtain.[39] Strikes finished apartheid in South Africa.[40] Strikes are not comfortable, and employers who leave no alternative

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constitution by 61% to 39% on a turnout of 62% (1 June 2005).

31 This is not to suggest that referendums are a necessary part of a 'fair democratic process'. Referendums may be especially susceptible to manipulation, both in the framing of the question, timing, media focus, or external interference: e.g. AJ Zurchner, 'The Hitler Referenda' (1935) 29(1) American Political Science Review 91, on crude, but still familiar strategies.

32 cf FW Scharpf, 'The European Social Model: Coping with the Challenges of Diversity', (2002) 40 Journal of Common Market Studies 645

33 *ITWF and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* (2007) C-438/05, [2007] I-10779

34 *Viking* (2007) C-438/05, [44] 'the right to take collective action, including the right to strike, must... be recognised as a fundamental right which forms an integral part of the general principles of Community law', but 'the exercise of that right may none the less be subject to certain restrictions... in accordance with Community law and national law and practices.'

35 *Viking* (2007) C-438/05, [81]

36 LJ Siegel, 'The unique bargaining relationship of the New York City Board of Education and the United Federation of Teachers' (1964) 1 Industrial & Labor Relations Forum 1, 46, referring to Jules Kolodney, during teacher strikes, 'In New York, you can't have true collective bargaining without the implied threat of a strike. If you can't call a strike you don't have real collective bargaining, you have 'collective begging."

37 W Deist, 'The Military Collapse of the German Empire: The Reality Behind the Stab-in-the-Back Myth' (1996) 3(2) War in History 186, 206-7.

38 B Chandra et al, *India's Struggle for Independence 1857-1947* (2000) ch 36.

39 RA Sense, 'How Poland's Solidarity Won Freedom of Association' (1989) 112 Monthly Labor Review 34.

40 NL Clark and WH Worger, *South Africa: The Rise and Fall of Apartheid* (3rd edn 2016) 111.

to strikes cause economic loss to their businesses and communities. But the right to strike is essential precisely so that does not need to be used. 'People who are hungry and out of a job are the stuff of which dictatorships are made',[41] but the right to take collective action ensures people can do a fair day's work for a fair day's wage.

Then the Court decided *Laval un Partneri Ltd v Swedish Builders Union*.[42] Here a Latvian building company claimed the Swedish Builders Union violated its right to provide services (now in TFEU art 56). Laval Ltd refused to sign a collective agreement to pay its Latvian workers the same as their Swedish colleagues. It was blockaded in a strike, and went insolvent. As the company's workers were 'posted', the Posted Workers Directive 1996 was engaged. Article 3(1) says 'Member States shall ensure that, whatever the law applicable to the employment relationship' undertakings should guarantee workers the terms of 'collective agreements or arbitration awards which have been declared universally applicable'. Sweden did not make its collective agreements universally applicable. But recital 17 should have given the solution, as it says: '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'. Article 3(1) set a minimum standard that any collective agreement could improve upon.[43]

The Court of Justice held a strike to enforce standards in any collective agreement not declared universally applicable would infringe Laval's right to provide services. It interpreted the PWD 1996 as creating maximum standards. It said the 'right to take collective action for the protection of the workers of the host state against possible social dumping may constitute an overriding reason of public interest'. Yet it felt that the 'lack of provisions, of any kind, which are sufficiently precise and accessible' in the collective agreement, apparently made it 'difficult in practice' for companies like Laval to understand a collective agreement.[44] As well what seemed to be a misreading of the PWD 1996, this misunderstood how collective bargaining functions. Companies know their obligations because they agree them, and if they do not agree to pay fair wages, or cut wages, they will understand their obligations in practice when they face strikes.

Viking and *Laval* were not inevitable results of EU law, but political choices. Those choices had consequences. In 2008 in the UK, a dispute broke out after Alstom, a power company, contracted Spanish and Polish businesses to build power stations in Nottinghamshire

41 FD Roosevelt, *Eleventh State of the Union Address* (1944)

42 *Laval Un Partneri Ltd v Svenska Byggnadsarbetareforbundet* (2008) C-319/05, and C-319/06

43 This is all the more clear given that TFEU art 153(4) which says member states can maintain 'more stringent protective measures compatible with the Treaties.' The CJEU, on completely inadequate grounds, dismissed this on the basis that improvement had to be compatible with the Treaties, and therefore (somehow) collective agreements were not good enough.

44 *Laval* (2008) C-319/05, [110] referring to *Arblade*

and Kent using labour that was paid 40 per cent less than the collectively agreed wage for similar UK workers.[45] In 2009, despite secondary action being suppressed in UK statute,[46] engineers went on strike across the country in sympathy with workers at the Lindsey Oil Refinery in Lincolnshire.[47] They carried banners saying 'British jobs for British workers'. This was an implicitly racist slogan, for which the then Prime Minister Gordon Brown had been responsible. Yet it responded to people driven to desperation during sustained wage cuts in the financial crisis.[48] The European Commission, which could see the effects that *Viking* and *Laval* had, acted promptly and responsibly.[49] *Viking* and *Laval* were implicitly reversed by legislation, as the Rome I Regulation reaffirmed that where systems of law conflict, the standards to be preferred in employment are those most favourable to the employee.[50]

Nevertheless, the Court of Justice persisted with ruling in *Rüffert v Land Niedersachsen* in 2008 that public procurement policy should not require bidders to comply with a local collective agreement.[51] Here, the Lower Saxony government required that companies contracted out to do public works comply with local collective agreements. But the Court of Justice held that fair wages for workers in Germany would be unfair for a business in Poland. This decision failed to see that a Polish company could pay the same wages as a German company, and still outcompete it on quality and profit margins, with no competitive disadvantage. Banning common wage standards makes lower-wage countries relatively poorer, and further segregates the internal market. In 2010 after the Rome I Regulation sunk in, the Court appeared to pause it position in *Commission v Germany*.[52] But in *Bundesdruckerei*,[53] and *RegioPost*,[54] it reincarnated similar ideas. Again,

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45 UNITE Press Release, 'Isle of Grain Power Station: UK workers excluded, EU workers exploited' (13 March 2009)

46 See *RMT v United Kingdom* [2014] ECHR 366

47 C Kilpatrick, 'British jobs for British workers? UK Industrial Action and Free Movement of Services in EU Law' (2009) LSE Law, Society and Economy Working Papers 16/2009

48 See the statement in Hansard HC Debs (4 February 2009) col 842, Colin Burgon MP: 'Does the Prime Minister agree that the threat to British workers does not come from other European workers, but from the workings of the unregulated capitalism...?' Prime Minister Gordon Brown: 'an expert review has been set up in the European Union to look at the impact of the *Laval*, *Viking* and other judgments, and a group of employers and the work forces are also meeting to review that at the same time. When they reach their conclusions, we will look at what they have to say.'

49 Vladimír Špidla, 'Statement in response to the strikes in the UK' Brussels' (4 February 2009)

50 Rome I Regulation (EC) No 593/2008 recital 34 'The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with 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.'

51 *Rüffert v Land Niedersachsen* (2008) C-346/06

52 *Commission v Germany* (2010) C-271/08, [52] suggesting that a 'fair balance' should be achieved between 'the level of the retirement pensions of the workers concerned, on the one hand, and attainment of freedom of establishment and of the freedom to provide services, and opening-up to competition at European Union level, on the other (see, by analogy, Case C-112/00 Schmidberger [2003] ECR I-5659, paragraphs 81 and 82).' See P Syrpis (2011) 40(2) ILJ 222.

53 *Bundesdruckerei GmbH v Stadt Dortmund* (2014) C-549/13, at [34] saying a minimum wage could not be imposed 'which bears no relation to the cost of living in the Member State in which the services relating to the public contract at issue are performed and for that reason prevents subcontractors established in that Member State from deriving a competitive advantage from the differences between the respective rates of pay, that national legislation goes beyond what is necessary to ensure that the objective of employee protection is attained.' The court misses the point that any company in another member state, even with lower living costs, is at no competitive disadvantage, because the procuring authority will be paying to cover those costs.

these rulings were in effect reversed by legislation, in the Public Procurement Directive 2014.[55] Most recently, the Posted Workers Directive 2018 has amended the 1996 text to clarify that the law must 'not in any way affect the exercise of fundamental rights... including the right or freedom to strike'.[56] But reversing the ideology is somewhat harder. This requires reading the Treaties and the Charter as a coherent whole, and to expressly acknowledge that workers rights are fundamental to democratic life.

(2) SERVICE PROVISION

A plain reading of the TFEU suggests that trade unions have a right to provide services under article 56. Under article 57, 'services' mean those that 'are normally provided for remuneration'.[57] A list of examples (which is not-exhaustive) includes 'activities of the professions'. The Court of Justice's case law follows this rule, so that an activity qualifies for protection if some remuneration is paid, even if the service (like health care) primarily serves a social function.[58] Trade unions, of course, have long been acknowledged to provide services.[59] Their core functions include providing services such as sickness insurance, death benefits, legal advice and assistance. They provide workplace representation in employer negotiation, grievances or disciplinary hearings, and in collective bargaining.[60] Member state legislation often refers to the services that unions provide, for instance to ensure workers will 'not be subjected to any detriment' by 'making use of trade union services'.[61] The remuneration unions receive is usually in membership fees, through an employer's payroll, in cash or by direct debit.

It is true that non-union members, who do not pay fees, also benefit from unions.[62] However, so long as someone is paying for the service it does not matter where the money comes from.[63] For instance the 'union wage premium', or the benefit of being in a unionised workplace, has been estimated as being around 2-3 per cent in France,[64] around 5-10 per cent in the UK,[65]

Companies then compete on profit margins and quality. Higher procurement wages accelerate growth in low wage countries.

54 *Regiopost GmbH & Co KG v Stadt Landau in der Pfalz* (2015) C-115/14

55 Public Procurement Directive 2014/25/EU art 18(2)

56 Posted Workers Directive 2018/957/EU art 1. Further the new art 3(7) says 'Paragraphs 1 to 6 shall not prevent the application of terms and conditions of employment which are more favourable to workers.'

57 nb the Services Directive 2006/123/EC art 4(1) merely refers back to the Treaty.

58 eg *Geraets-Smits v Stichting Ziekenfonds* and *Peerbooms v Stichting CZ Groep Zorgverzekeringen* (2001) C-157/99, [55] held that health care was a service even though it was partly government funded.

59 e.g. S Webb and B Webb, *Industrial Democracy* (9th edn 1926) Part II, 160, on mutual insurance

60 KD Ewing, 'The Function of Trade Unions' (2005) 34 Industrial Law Journal 1

61 In the UK, the Trade Union and Labour Relations (Consolidation) Act 1992 s 146

62 This is possible because the 'closed shop' was abolished in Europe, largely following *Young, James and Webster v United Kingdom* [1981] ECHR 4, while in the US unions can only collect fees from non-union workers in certain states. This is currently being threatened by the Republican majority on Trump's Supreme Court. See *Janus v AFSCME*, _ US _ (2018)

63 cf *Bond van Adverteerders v Netherlands* (1988) Case 352/85

64 T Breda, 'Firms' rents, workers' bargaining power and the union wage premium in France' (2015) 125 Economic Journal 1616

65 J Forth and A Bryson, 'Trade Union Membership and Influence 1999-2010' (14 July 2012) TUC

and as much as 22 per cent among US private sector workers.[66] Whatever the statistical situation between different legal systems, this exemplifies the significant social benefits (or 'positive externalities') from unions' existence.

Furthermore, just as much as unions have a right to provide services, potential union members have a right to receive services.[67] Those services of a union – especially the benefits of a collective agreement – must be able to be received by a non-union member across borders without restriction, unless justified under TFEU article 52 by laws on the grounds of 'public policy, public security or public health.'[68] In this way, the Treaties' structure can be seen to achieve the same result as that in the International Covenant on Economic, Social and Cultural Rights 1966 article 8.[69] Every European Union member state has ratified this and it is part of customary international law.[70]

The law of member states will apply to union activity in relation to companies that are wholly within its borders.[71] However, it would appear that whenever a union is engaged in a trade dispute with a multi-national employer, there is a requisite cross-border element to engage EU law, because 'a degree of extraneity' derives from the fact that one of the parties moves (e.g. a worker) has organisational connections (e.g. the enterprise) to another member state.[72] In the cases of both *Viking* and *Laval*, *or* any situation where business operates across borders, and unions respond, that criteria will be fulfilled.

It follows that under article 56 'restrictions on' a trade union's 'freedom to provide services within the Union shall be prohibited'. So, a Finnish union may provide its services of collective bargaining to Estonian workers under EU law. A Swedish union must, without unjust restriction, be able to collectively agree to cover Latvian workers. It might, perversely, be argued that strike action by Finnish and Swedish unions harmed Estonian and Latvian workers, excluding them from jobs. But this argument misses the fact that it is employers who 'hold out' until workers accept a lower wage.[73] The effect of stopping the benefits of collective agreements

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66 PE Gabriel and S Schmitz, 'A longitudinal analysis of the union wage premium for US workers' (2014) 21(7) Applied Economic Letters 487

67 See P Van Cleynenbruegel, 'The freedom to *receive* trade union services: an additional stepping stone for enhancing worker protection within the EU internal market' (2018) European Labour Law Journal (forthcoming)

68 TFEU art 52, which is referred to by analogy from art 62.

69 ICESCR 1966 art 8, 'No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.'

70 It reflects what was already implicit in the Universal Declaration of Human Rights 1948 arts 20-24.

71 TFEU art 56, 'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.' e.g. *Procureur du Roi v Debauve* (1980) Case 52/79 and cf *Société générale alsacienne de banque SA v Koestler* (1978) Case 15/78.

72 *Deliege v Ligue francophone de judo et disciplines associées ASBL* (2000) C-51/96, [58]

73 See A Smith, *The Wealth of Nations* (1776) Book I, ch 8, §12, 'In all such disputes the masters can hold out much longer...

to cross borders is to hold back European development, stall growth in lower-income member states, segregate markets and divide society. This ends up harming business itself, and its long-term stability, for questionable short-term profit. In this way, collective bargaining is also a service for employers, even the ones who resist.

(3) ESTABLISHMENT

Because unions provide services, it automatically follows that trade unions have the right to establish in TFEU article 49.[74] Examples of the right of establishment 'include' people pursuing 'activities as self-employed persons and to set up and manage undertakings', but this list is not exhaustive. Non-self-employed entities and non-undertakings, like unions and other social movements, have a right to establish and pursue their activities too. Unions establish by setting up offices, organising a bargaining unit, or any collective agreement, lasting on 'a stable and continuous basis'.[75] Unions establish work councils, for the purpose of information, consultation, and participation in the management of enterprise. They establish representative mechanisms in pension funds and regulatory institutions. Unions also establish employee voting in company general meetings, organise elections by employees for seats on company boards, and they nominate directors.

Under article 49 'restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited', unless they are non-discriminatory (i.e. at least as favourable as existing member state law), are 'justified by imperative requirements in the general interest', and are proportionately applied.[76] This could apply in *Viking* as follows: the company reflagged the ship from Finland to Estonia. The Finnish union wanted to establish a bargaining unit on the newly flagged 'Estonian' vessel. Therefore the union was exercising its freedom of establishment.

Unions may initially establish their offices without any employer involvement, but to provide their essential services of collective bargaining and voice at work, they negotiate and strike. Just as 'the right... to strike is an essential element in... collective bargaining',[77] and 'clearly

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Many workmen could not subsist a week, few could subsist a month, and scarce any a year without employment.'

74 TFEU art 49, 'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.'

75 cf *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* (1995) C-55/94, [25] holding that a German lawyer's right of establishment could be infringed if the duty to register in Italy was applied is a discriminatory or disproportionate manner.

76 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* (1995) C-55/94, [37]

77 *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1941] UKHL 2, per Lord Wright. This understanding directly informed the European Convention on Human Rights 1950 art 11.

protected' by article 11 of the European Convention,[78] the right of a union to take all forms of collective action is essential to freedom of establishment. Just as the Court of Justice has recognised that employees' rights of consultation entail an 'obligation to negotiate' on an employer,[79] there can also be an obligation to negotiate on employers (in good faith) to ensure that unions' right of establishment is genuinely effective.[80] For example, in *Viking*, the problem was never that the employer's right of establishment was infringed by the union's strike: quite the reverse. The failure of Viking ABP to negotiate in good faith, and ultimately to settle wages for its workers according to a collective agreement was an infringement of the union's right of establishment. Had Viking ABP negotiated, and had a strike still occurred, the conflicting rights of the business and the union to establish would have simply cancelled each other out. Viking could have no more complained about being blockaded by a union than it could about another more efficient business drawing all of its customers away.[81]

Explicit recognition of the fundamental right of establishment opens the possibility that EU law's standards are higher than the minimums set by the European Convention on Human Rights, to which the EU is bound to be a party. Plainly the functions of each institution differ. The ECHR, in its current membership, has to guard adherence to human rights in legal systems that remain in a process of democratic development. The ECHR has acknowledged the rights to join a union, collectively bargain, and to strike, which apply even to systems which poor labour rights records such as Russia, Turkey and (it must for the time being be said) the United Kingdom. Because its jurisdiction covers drastically differing qualities of commitment to human rights, it has stated that it allows a wide margin of discretion, and has declined in particular to strike down prohibitions on secondary action,[82] disproportionate balloting rules, or restrictions on essential services.[83] But while the European Court of Human Rights applies a 'margin of appreciation' test for 50 member countries, EU law directly applies a proportionality test to the issue at hand. Much of the degradation in labour rights seen in the UK, or any system approaching the 'ossification of labor law' in the United States,[84] can be halted by a watchful and principled Court of Justice.[85]

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78 *RMT v UK* [2014] ECHR 366, [84] though hesitating to call it an 'essential element'. It seems EU law could go further.

79 *Junk v Kühnel* (2005) C-188/03, [43] holding the Collective Redundancies Directive 1998 'imposes an obligation to negotiate'.

80 CFREU 2000 art 47 requires that legal rights are effective. This includes the right to strike.

81 Put another way, and in contrast to the ambiguities found in *Schmidberger v Austria* (2003) C-112/00, the union's right of protest (to establish a bargaining unit) is accorded an equal weight to the business' right of establishment.

82 *RMT v United Kingdom* [2014] ECHR 366, [104]

83 *Hrvatski Lijecnicki sindikat v Croatia* [2014] ECHR 1337

84 See CL Estlund, 'The Ossification of American Labor Law' (2002) 102 Columbia Law Review 1527 and E McGaughey, 'Fascism-Lite in America (or the Social Ideal of Donald Trump)' (2018) British Journal of American Legal Studies

85 A good model is the *Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26, [66] 'Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers.

3. SHOULD UNION RIGHTS BE ACKNOWLEDGED?

Although an ordinary reading of the Treaties appears to provide unions with the legal right to provide services and establish, it does not necessarily follow that recognition of those rights is politically desirable. At least three possible arguments could be advanced: (1) that courts could endanger union rights, and ought not to be trusted, (2) that if unions provide services, competition law might be applied to unions, leading to a modern *Lochner* era in Europe today, and (3) that seeing unions as service providers and having a right to establish detracts from their social and political functions. There are, however, good reasons to think that each of these concerns is unwarranted.

(1) MISTRUST OF JUDGES

First, would it be a danger to allow the courts to interpret unions' rights to provide services and establish? As the great European labour lawyer, Otto Kahn-Freund, put it, 'the power to interpret... is the power to destroy'.[86] Labour lawyers could rightly be suspicious of a Court of Justice that is empowered to interpret labour rights, as indeed they could be of any court. The experience of the US in the *Lochner* era, the UK following the *Taff Vale* case, or indeed the EU following *Viking* and *Laval* may not inspire confidence.

However, just as *Viking* and *Laval* made clear, this danger of judicial overreach exists whether or not one believes the judiciary should be empowered. The real guards against judicial abuse of power are education, the force of opinion, and civil society.[87] These require one fundamental principle: judges set out minimum standards for labour rights, and never maximum standards.[88] The only way to achieve that consensus is by opening the debate, not hiding it. The principle of minimum standards does drive the EU constitution's approach to labour rights, at least most of the time, and will be integral to the Treaties if they are to remain a force for 'social

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Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lockout). The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out. The argument that it is necessary in order to maintain equality to entrench the right to lock out once the right to strike has been included, cannot be sustained, because the right to strike and the right to lock out are not always and necessarily equivalent.'

86 O Kahn-Freund, 'The Impact of Constitutions on Labour Law' (1976) 35(2) Cambridge Law Journal 240, 244, himself paraphrasing Marshall CJ in *M'Culloch v Maryland* (1819) 4 Wheat 316, 431, 'The power to tax involves the power to destroy.'

87 See JS Mill, *On Liberty* (1857) ch 1, but also pointing out that social opinion can be as much a force for tyranny.

88 This should have already been clear from a consistent interpretation of TFEU art 153(4)-(5).

progress'.[89]

(2) COMPETITION LAW AND LABOUR

Second, could the courts seize upon the fact that unions have a right to provide services and establish as an excuse to apply competition law? The answer to this must be 'no', and it must be 'no' regardless of whether unions have freedom to establish and provide services. Quite apart from this debate, the Court of Justice held in *FNV Kunsten Informatie en Media v Staat der Nederlanden* that staff in a Dutch orchestra were probably employed under false self-employment contracts.[90] When the orchestra members, each earning very modest wages, tried to organise they were told that they could have violated the competition law prohibition on collusion between undertakings because their contracts said they were self-employed. The court suggested that self-employed people could be regarded as undertakings under TFEU article 101, which prohibits collusion. Like *Viking*, the case invited severe criticism for suggesting people who work for a living could face competition law sanctions.[91] In international law 'everyone' has the right to unionise, and to strike, as a fundamental human right.[92] This includes self-employed people such as taxi drivers,[93] criminal barristers,[94] or any individual who personally performs work.

The appropriate construction of EU law, which is plainly expressed in the Treaties, is that there are three categories of actor: undertakings subject to competition law, other service providers, and workers. Consistent EU case law establishes a division between people who are workers, and those who provide services. The same division, between employed and self-employed, is relevant for most legal systems' employment rights, and status in tax and social security. Workers are never and must never be subjected to competition law. This is fundamental to every modern democracy since the US Clayton Act of 1914. When workers were subjected to the US Sherman Antitrust Act of 1890, it meant that Eugene Debs, America's first socialist Presidential candidate, was sent to prison for organising a strike.[95] Before 1914, it led to damages and injunctions being imposed on unions for trying to collectively bargain.[96] This held back

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89 TEU art 3(3), 'It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.'

90 *FNV Kunsten Informatie en Media v Staat der Nederlanden* (2014) C-413/13

91 V de Stefano and A Aloisi, 'Fundamental Labour Rights, Platform Work and Human-Rights Protection of Non-Standard Workers' in JR Bellace and B Haar (eds), *Labour, Business and Human Rights Law* (2018) and Bocconi LSR Paper No. 3125866

92 Universal Declaration of Human Rights art 23. International Covenant on Economic, Social and Cultural Rights 1966 art 8

93 G Topham, 'Black-cab drivers' Uber protest brings London traffic to a standstill' (10 February 2016) Guardian

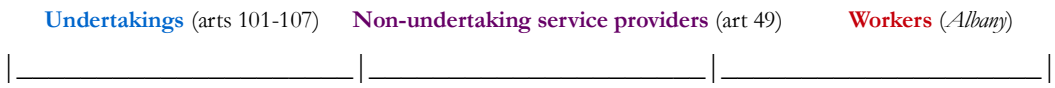
94 B Thompson, 'Budget cuts and low pay behind strike say UK criminal barristers' (2 April 2018) Financial Times

95 *In re Debs* 64 Fed 724 (CC Ill 1894), 158 US 564 (1895) Listen to the documentary by Bernie Sanders and Jane Sanders, Eugene V. Debs Documentary (1979) youtube.com

96 *Loewe v Lawlor* 208 US 274 (1908)

decades of social development, and such suppression only finally ended in the Great Depression.

But then there also is a division among service providers who are undertakings, and service providers who are not: non-undertaking service providers include consumer groups, environmental organisations, unions, and self-employed people who personally perform work. TFEU article 49 plainly envisages this, as it says the right of establishment 'shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings'. It follows that undertakings are distinct from self-employed persons, and other similar groups, including unions. On a correct construction of the Treaties (which is compatible with international law) self-employed people, who personally perform work, cannot be regarded as undertakings, or subject to competition law. This can be depicted diagrammatically as follows:



The spectrum of legal status among persons performing work

This construction upholds the purpose of the law, which is to tackle unaccountable business combinations, not combinations of labour with systematically unequal bargaining power.

The result is that trade unions benefit from the right to provide services but they may never be classified as undertakings. They are the same as a consumer group that organises a boycott, or an environmental group that holds protests. To the extent that *FNV* suggested otherwise, it is incompatible with a plain reading of the Treaties and international law. The better precedents from the Court have, in fact, recognised this. In *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, the Court of Justice held that a collective agreement, which set up a pension fund did not fall within the scope of what is now TFEU article 101.[97] Although it was a multi-employer pension plan, it pursued a social objective. The pension fund itself, once running, could be regarded as having a dominant position, and it certainly engaged in an economic activity. But it fell outside competition law because it served a social purpose, underpinned by the value of solidarity. That decision was correct. A union that sells insurance services to its members could obviously be competing with private providers, and might have market power. But the very fact of its social objectives, and democratic structure, means it will seek to improve, not damage, the welfare of its members.

[97] *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (1999) C-67/96

(3) UNIONS' SOCIO-POLITICAL FUNCTIONS

Third, could acknowledgement of rights to provide services and establish undermine the social and political functions of unions? This concern is not merely philosophical, because it is true that the provision of services often falls within the 'economic' sphere. In *Höfner and Elser v Macrotron GmbH*, the Court of Justice held that the definition of an 'undertaking' in competition law captures 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'.[98] But just because unions might provide services, it does not follow that their services are all economic. Even if unions compete with other entities, their social role eclipses any economic functions that they exercise. On the contrary, unions in their very essence are devoted to transforming the subordination of social life to economic power, and the services they provide are part of this. The reason unions must have freedom to establish and provide services, without unjustified restriction, is precisely to enable the full democratisation of society in the 21st century.

4. CONCLUSION

Do trade unions have rights to provide services and establish in the European Union? The answer must be that they do, on a plain reading of the EU Treaties. Had the Court of Justice benefited from submissions on these points, the decisions in *Viking* and *Laval* would have been very different. In essence, whenever unions and businesses each seek to exercise their freedoms, and even when they clash in a trade dispute, the rights cancel each other out. Business rights do not trump human rights. On this basis it seems prudent to suggest that unions must be protected by EU law in having the minimum rights to take cross-border collective action without unjustified restrictions, to establish bargaining units, and require employers bargain in good faith. Member states may always be more protective than minimum EU standards.

Of course, the law can rarely be separated from the politics. Yet it would appear desirable to recognise fundamental labour rights in the structure of EU freedoms. The judiciary should be guided by the central principle that all labour rights set minimum standards. The stakes are high today, as the EU has witnessed a significant growth in inequality, hand-in-hand with far-right extremism.[99] In Germany, France, Italy and the UK, the evidence suggests that its political success follows economic insecurity,[100] which always follows weakened labour rights. This is

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98 *Höfner and Elser v Macrotron GmbH* (1991) C-41/90

99 Much of the recent history is encapsulated by Yale historian T Snyder, *The Road to Unfreedom: Russia, Europe, America* (2018)

100 e.g. A Gorres, D Spies and S Kumlin, 'The Electoral Supporter Base of the Alternative for Germany' (2017) SSRN. R Ford et al, 'Strategic Eurosceptics and Polite Xenophobes: Support for the United Kingdom Independence Party (UKIP) in the 2009 European Parliament Elections' (2012) 51(2) European Journal of Political Research 204.

particularly true among white-collar professionals in depressed regions,[101] who feel like they have the most to lose. A positive revival of the social compact that underpinned the European Treaties has the potential to shift this situation. It is rare that fundamental, constitutional documents employ empty rhetoric, or form a mere programmatic agenda, rather than being a set of careful, historically informed choices. The EU recognises that its aim to 'promote peace' requires a 'social market economy, aiming at full employment and social progress', just as the International Labour Organisation once said 'peace can be established only if it is based upon social justice'. Unions must have the freedom to establ

[101] See E McGaughey, 'The Codetermination Bargains: The History of German Corporate and Labour Law' (2016) 23(1) Columbia Journal of European Law 135, 165. But also see the role of the Reich Labour Court at 157-162.