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Three Questions to the Opponents of the *Viking* and *Laval* Judgments

Hans-W. Micklitz
Professor of Economic Law
European University Institute

www.ose.be

rue Paul Emile Janson 13 / 1050 Bruxelles / tél.: 32 (0)2 537 19 71 / fax: 32 (0)2 539 28 08 / e-mail: info@ose.be

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Hans-W. Micklitz
Professor of Economic Law
European University Institute
Hans.Micklitz@eui.eu

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Table of contents

Introduction

Few judgments have provoked as strong a reaction in academia as *Viking* ([1]) and *Laval* ([2]). The vast majority of legal scholars interpret the two judgments as questioning the post Second World War achievements of the social welfare state, as giving precedence to economic freedoms over social rights. I belong to the minority who reject a black-and-white scenario and who understand the two judgments not only as a threat but as an opportunity to rethink the relationship between market freedoms and social rights in a supranational entity such as the European Union (EU).

I will not reiterate the endless stream of arguments, be they doctrinal, theoretical or political. Instead I will restrict myself to raising three questions that have not been sufficiently taken into consideration during the last five years of discussion. My short note is based on a pro European perspective. This means I am not questioning the integration process. Nor am I ready to return to the model of the nation state. Quite to the contrary, I am convinced that what we observe is a transformation of statehood which is due to forces that reach beyond Europe. I understand Europe as a being at the forefront of the transformation process, one which can be caught by the notion of the market state, so forcefully promoted and analysed by *Bobbitt* ([3]), *Afilalo*/*Patterson* ([4]), *Sassen* ([5]) just to name a few of the most eminent writers. The European market state yields its own model of justice which is different from the national social distributive justice that lies at the heart of the welfare state and which I termed access justice (Zugangsgerechtigkeit) ([6]). Access justice alludes to the concept of equity, which was meant to guarantee access to all those citizens who were barred from the common law. Equity means that all market participants, including workers, must have a fair and realistic chance to get access to the labour market, as well as to participate from the benefits of the market. Access justice may be understood as a materialized (*Max Weber*) concept of equality.

Laval fits neatly into such a concept of justice. *Viking* is different - the Estonian workers are hired as cheap labour. In a somewhat misleading way the two judgments are thrown into the same box – the European Court of Justice (ECJ) is de-constructing the Member States' social welfare law, opening the borders for cheap labour and introducing competition between West and East European workers. For the purpose of this note I will not discuss the difference between the two judgments in detail.

1. Judgment, 11.12.2007, Case 438-05, The International Transport Workers' Federation and The Finnish Seamen's Union ECR 2007, I-10779.
2. Judgment, 18.12.2007, Case 341-05, Laval and Partneri ECR 2007, I-11767.
3. The Shield of Achilles, *War, Peace and the Course of History* (Knopf, New York, 2002).
4. The New Global Trading Order (CUP: 2008).
5. S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, May 2006).
6. H.-W. Micklitz (ed.) The Many Faces of Social Justice in Private Law, Elgar 2011.

A further disclaimer is needed: I am not applauding the decline of the social welfare state and the replacement of patterns of social distributive justice via means of access justice. I am neither a hidden supporter nor a promoter of neo-liberal thinking. I understand myself to be an independent researcher whose task is to pinpoint the ongoing transformation process of statehood and to elaborate the banal truth that each crisis provides for new opportunities - here in thinking the so-called European social model through. It is in this spirit that I would like to shortly address three issues.

1. The West against the East or the East against the West

Perhaps I am wrong, but I am not aware of any research focusing on the vast set of directives and regulations which have been adopted by the old 15 Member States just before the 10 new Member States entered the EU. These last-minute agreements were reached in the shadow of the new member states standing close to the entry door, an enlargement that was expected to complicate the political bargaining process considerably. This is just one further variant of the rather ugly policy that surrounded the enlargement process on open markets for West European products vs. closed markets for East European workers. The German unification process had set the tone for the debate. Here the West German industry seriously discussed the possibility of building a net of supply chains in East Germany that should guarantee the servicing of the East German population with products made in West Germany. The 1 to 1 exchange of the Deutsche Mark against the GDR mark deprived the East German economy and the East German workers of the sole asset they could carry weight - cheap labour. Ten years later, when the enlargement process started to take shape, the very same discussion reappeared. The famous Polish plumber who takes the German plumber's job continues to be a fixture of day-to-day politics in Germany and maybe even in Europe. So Germany strongly opposed open labour markets after the enlargement and closed its borders while strongly promoting open access for German products in the enlarged EU. Due in part to the bigger European market, Germany became the largest exporter of the world - now being superseded by China.

In *Laval*, and maybe wrongly so in *Viking*, the ECJ - this is my reading of the underlying message - had its eye on the imbalance between an open market for products and a closed market for labour. It was guided by the idea opening up Western labour markets for cheaper Eastern European workers. Is this so wrong? Is the reaction of Western trade unions really convincing when they claim that East European workers are welcome provided they are paid the same salary as their Western European colleagues? Is there not a different message here, one where the same-salary argument is used to shield West European workers from East European competition? Sweden had not followed Germany in closing its borders to cheap labour after the enlargement.

However, this is exactly what the Swedish trade unions wanted to achieve in *Laval* ([7]). All this came to the fore in the Viking and Laval.

The ECJ has a long history of promoting European integration, first by opening borders for products, now by opening markets for workers (and for citizens). The old Member States were obviously not ready to seriously consider that the enlargement process would not only open up new market opportunities for Western-based companies but also transform the old cosy European Community into an uncomfortably competitive European Union. It was left to the ECJ to tackle these tricky questions. The Court dealt with them by opening the market for East European workers. It might well remain for future generations of researchers to find out whether and to what extent the decision was influenced by the fact that the Court itself has become less homogeneous now that judges from the new Member States were sitting on the bench.

2. Mechanical and organic solidarity between workers in the EU

There is the famous quote in Advocate General Maduro's *Viking* opinion which alludes to cross-border solidarity of workers. Here is what he wrote:

> 70. Naturally, the FSU may, together with the ITF and other unions, use coordinated collective action as a means to improve the terms of employment of seafarers throughout the Community. A policy aimed at coordinating the national unions so as to promote a certain level of rights for seafarers is consistent with their right to collective action. In principle, it constitutes a reasonable method of counter-balancing the actions of undertakings who seek to lower their labour costs by exercising their rights to freedom of movement. One must not ignore, in that regard, the fact that workers have a lower degree of mobility than capital or undertakings. When they cannot vote with their feet, workers must act through coalition. The recognition of their right to act collectively on a European level thus simply transposes the logic of national collective action to the European stage. However, in the same way as there are limits to the right of collective action when exercised at the national level, there are limits to that right when exercised on a European level.
>
> 71. A policy of coordinated collective action could easily be abused in a discriminatory manner if it operated on the basis of an obligation imposed on all national unions to support collective action by any of their fellow unions. It would enable any national union to summon the assistance of other unions in order to make relocation to another Member State conditional on the application of its own preferred standards of worker protection, even after relocation has taken place. In effect, therefore, such a policy would be liable to protect the

7. D. Trubek and M. Nance, The Strange Case of the Posted Worker Directive: EU Law as Reflexive Co-ordination? Paper prepared for the workshop on Laval and Viking at Cambridge University, September 19, 2008. For a copy please contact the authors dmtrubek@wisc.edu and mark_nance@ncsu.edu

> collective bargaining power of some national unions at the expense of the interests of others, and to partition the labour market in breach of the rules on freedom of movement.
> 72. By contrast, if other unions were in effect free to choose, in a given situation, whether or not to participate in collective action, then the danger of discriminatory abuse of a coordinated policy would be prevented. Whether this is the situation in the circumstances of the present case must be left to the referring court.

At face value, the Advocate General is submitting actions of trade unions to the application of the discrimination principle, an argument which can already be found in Regulation 1612/68. My understanding of the paragraphs, which did not find their way into the judgment, is that the Advocate General recognizes the opportunity and maybe even the need of trade unions to engage in a cross-border dialogue in order to solve issues of different wage levels. This forms an essential part of what Trubek and Nance call 'reflexive co-ordination'. A closer look must be taken at what transnational solidarity is all about and what its potential might be.

What matters in our context is Durkheim's recognition of the changing function of solidarity, which is transformed from mechanical into organic or network solidarity. Mechanical solidarity may be associated with collective national solidarity routed in the nation states whereas organic or network solidarity refers to those new forms of collective (transborder) activities which are made possible by the international division of labour once individuals are freed from their national collective environment. The impact on the law, according to Durkheim, is striking. The rights of individuals are strengthened - he calls this the 'cult of the individual' - while the rights of the collective national entities are weakened. This is what we can observe in the EU. Durkheim developed his vision of the future European Society twenty years before the First World War. His insistence on the role and function of individual rights looks modern, in particular in light of the making and shaping of the European legal order by the ECJ through the extension of subjective rights, thereby indirectly turning down collective rights ([8]). The cult of the individual, however, is characteristic for the EU as a whole.

The long term effects of the transformation process Durkheim had forestalled are becoming ever clearer. Somewhat overstated, we may observe that national collective entities - i.e., societies, but also groups within societies (trade unions, consumer organisations) - are losing their homogeneity and that the sharp differences between formerly deviating national cultures are beginning to wane. This complies with the summary findings of Th. Wilhelmsson's contribution to the conference on 'Private Law and the Many Cultures of Europe' ([9]). By way of inner differentiation (migration, foreign workers) the national societies are steadily assimilating each other. EC law and

8. D. Kelemen, The EU Rights Revolution: Adversial Legalism and European Integration: in T.A. Börzel/R.A 'Cichowski (ed), The State of the European Union, 2003, 223.
9. Chaper 1 Introduction: harmonisation and National Cultures, in Th. Wilhelmsson et al, Private Law and the Many Cultures of Europe, 2007, 3.

the European legal order are enabling this transformation process and they are accelerating it by way of extending the legal position of all those who are willing and able to make use of the new freedoms. The recent case law of the ECJ on migrant workers and migrants provides ample evidence of such a development ([10]). This process, according to Durkheim and later Münch ([11]), enables the development of transnational ties between individuals, who are freed from their national cultural constraints. The question remains of whether these transnational networks that yield out of de-nationalisation and de-territorialisation may still be associated with the term 'solidarity'.

Viking and *Laval* are just a variant of that story. The Advocate General is very much concerned with the abuse of the power trade unions might exercise. But he equally sees the opportunity and maybe even the need for trade unions to engage in a transborder dialogue in order to avoid the barring of East European workers from working in West European countries. What organic solidarity really means is subject to further analysis. However, abuse might be equated with closing national markets against transnational competition. More research is needed to disclose the nature of a European concept of solidarity in labour law and to seek mechanisms which might be apt to reconcile the Internal Market dictum with social rights ([12]). Trubek and Nance have convincingly put the PWD in the broader context of what they term 'reflexive co-ordination', a new means to develop a European social model, one which takes the transformation of statehood into account.

3. Social responsibilities of private parties

If our assumption is correct that statehood is undergoing a transformation and that the EU as a blueprint for the market state cannot compensate for the loss of statehood in the social sphere, then more than ever we must consider if and how private parties exercising economic power can become subject to social rights. So far EU law is dealing with the opposite situation. Private associations (*Bosman*) ([13]) have been treated as quasi public actors. They then become addressees and guarantors of market freedoms. Mr. Bosman enjoyed advantages from putting private associations on an equal footing with states. The Football Association was seen as a regulator, setting the standards under which footballers may gain access to the market.

10. M. Dougan (2009) Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States? In: C. Barnard C and O. Odudu (eds). The Outer Limits of EU Law. Oxford, Hart Publishing.
11. Die Konstruktion der Europäischen Gesellschaft – Zur Dialektik transnationaler Integration und nationaler Desintegration', A somewhat shortened version will appear under R. Münch, European Governmentability. The Liberal Drift of Multilevel Governance, 2010.
12. See on the concept of solidarity in insurances against accidents at work and occupational diseases, ECJ, 5.3.2009, Case C-350/07 Kattner Stahlbau, 2009 ECR I-1513.
13. ECJ 15 December 1995, Case C-415/93 ASBL v Bosman [1995] ECR I-4921.

Viking and *Laval* concern a different situation. In *Viking*, trade unions were treated as public regulators, the ECJ thus drawing a line between football associations and trade unions. One of the major critiques against the ECJ focuses on that equation. Trade unions are said to be different from football associations. The latter must be regarded as economic actors, the former as societal players to which democracies have entrusted a particular social responsibility. But even if that difficulty can be overcome the fact remains that Trade Unions could not be seen as regulators — collective actions do not fit into that category. Last but not least, the principle of equal arms is seen to be violated. The counter arguments are formulated in a straight forward way. The distinction between football associations and trade unions is said to be based on a very narrow understanding of societal tasks and on a public/private divide which is long overcome ([14]). Trade unions are setting up rules. They are private regulators to which a societal task is entrusted, but this does not exempt them from the application of the Treaty, more particularly from Art. 43.

I have no interest in delving deeper into that debate. It helps, however, to highlight that one difference remains. In *Bosman*, the ECJ promoted the economic freedoms of a football player. He was granted access to a transfer market that was otherwise barred by the rules of the football associations. In *Viking* and *Laval* the effects work exactly the other way round. Trade unions are becoming bearers of rights, such as the right to strike, but this right is bound to the limits of the market freedoms. Loic Azoulai ([15]) has convincingly shown that his logic can be turned upside down. Private parties as far as they are addresses of the market freedoms may very well become addresses of social rights as well. Here lies an enormous potential for the exercise of economic freedoms which are bound to the limits of social rights. The key question is who the private parties that could become addressees of economic freedoms are. So far the ECJ has only extended the horizontal direct effect to collective entities. One might wonder, however, whether and to what extent the case law could not be extended to the area of universal services, where secondary Community law requires Member States to nominate one supplier of last resort in charge of providing access to public services. A forward looking analysis should take this potential of *Viking* and *Laval* into account. It might pave the way for imposing social rights on private parties, a well-known issue in international economic law ([16]). In turning *Viking* and *Laval* on its head and refusing to simply blame the ECJ for down-turning the national welfare state, the two judgments might pave the way for rethinking the opportunity that lies in the transformation of statehood and the shaping of the European social model that is necessarily distinct from a national welfare state social model.

14. The public/private devide is at the forefront of the academic interest now, see already D. Kennedy, The States of Decline of the Public/Private Distinction, Pennsylvania Law Journal 130 (1982) 1349.
15. The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization', (2008) 45 *CMLR* 133.
16. Alien Tort Act, multi-national corporations as addressees of human rights, see from the vast literature G.-P. Calliess/P. Zumbansen, Rough Consenus and Running Code, 2011.