


# Damages claims against trade unions after *Viking* and *Laval*

Katherine Apps\*

 Damages; Direct effect; EC law; Freedom of association; Freedom of establishment; Freedom to provide services; Strikes; Trade unions

*This article considers the theoretical framework, potential elements and practical ramifications raised by damages claims against trade unions for breach of Arts 43 EC (freedom of establishment) and 49 EC (free movement of services). The potential for such claims has been opened up by the ECJ's recent judgments in ITWF v Viking Line ABP (C-438/05) and Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet (C-341/05). It is suggested that, at the Community level, the doctrine of "sufficiently serious breach" should apply to the non contractual liability in damages of trade unions: (a) because of the theoretical foundations of the damages action; and (b) in order to protect the freedom of association of the trade union and its members. English law is used as a backdrop to test how the substantive arguments and practical ramifications could develop in domestic courts and in references to the ECJ.*

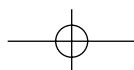
## Introduction

In two recent cases, *ITWF v Viking Line ABP*<sup>1</sup> and *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*<sup>2</sup> the ECJ cast open the door to arguable claims against trade unions for breach of two free movement provisions of the EC Treaty, Art.43 (freedom of establishment) and Art.49 (free movement of services). These cases simultaneously recognise the "fundamental right to strike" as a principle of Community law, whilst at the same time holding that trade unions fall within the scope of Arts 43 and 49 EC such that they owe obligations not to interfere with the free movement rights of employers.

\*The author is a barrister at Littleton Chambers. She would like to thank Professor Catherine Barnard, Philip Syrpis, John Hendy Q.C. and Niamh Nic Shuibhne for their comments on previous drafts, and all those who attended the University of Cambridge Centre for European Legal Studies Seminar on "Reflexive Governance and Free Movement: the cases of Viking, Laval and Rüffert", September 19, 2008 who assisted in the evolution of this paper; however, any errors or omissions are entirely the author's own. The author was second junior counsel in the case of *British Airline Pilots Association v British Airways Plc* Not yet reported (trial commenced May 19, 2008), together with John Hendy Q.C. and Damian Brown; however, the views expressed in this paper are purely personal.

<sup>1</sup> *International Transport Workers' Federation v Viking Line ABP* (C-438/05) [2007] E.C.R. I-10779; [2008] 1 C.M.L.R. 51.

<sup>2</sup> *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (C-341/05) [2007] E.C.R. I-11767; [2008] 2 C.M.L.R. 9.



The ramifications of *Viking* and *Laval* for trade unions have already been criticised as stark. For instance, as Davies<sup>3</sup> and Barnard<sup>4</sup> have noted, in cases in which a union threatens strike action over an issue which involves some element of free movement within the European Union, it is straightforward for an employer in English law, at least, to secure an interim injunction to prevent the industrial action.<sup>5</sup>

What these cases do not directly answer is whether there can now be claims for damages by employers against trade unions, as this question was not referred. However *Viking* and *Laval* do open up the potential for such claims. This article considers the theoretical and practical issues which arise, and uses the English legal system as a backdrop to test the likely arguments, challenges and ramifications.

Following *Viking* and *Laval*, the following key matters await clarification:

- whether there is a private law cause of action against trade unions that breach Arts 43 and 49 EC;
- what the elements of that liability in damages are;
- for English lawyers, whether a statutory cap on damages under s.22 of the Trade Union and Labour Relations (Consolidation) Act 1992 applies.

These are questions with practical ramifications. As long as these matters remain unresolved, trade unions across the European Union remain in the difficult position of being (for all practical purposes) unable to strike on matters which arguably concern the free movement principles in fear of an injunction, and may be (practically) disabled from pursuing a strike ballot or proceedings in the courts for fear of a counterclaim in damages which might not be subject to the statutory cap. It is not entirely simple for employers either. An employer that brings a counterclaim must be prepared to wade deeply into current ongoing debates, not just in trade union law but more broadly in relation to private enforcement of Community law rights in domestic courts.<sup>6</sup>

The theoretical debates and tensions are already playing themselves out before the English courts. These questions in relation to damages claims would potentially have been considered in the *Viking* case when the preliminary ruling was returned from the ECJ, but the case settled before coming back to the English courts. These questions would also have been considered in the case of *British Airline Pilots Association ("BALPA") v British Airways Plc* (trial commenced May 19, 2008).<sup>7</sup> On the fourth day of the trial, BALPA discontinued its claim for a declaration that proposed strike action would not be unlawful contrary to Art.43 or 49 EC. On June 3, 2008, BA discontinued its counterclaim both for declarations and in damages.

<sup>3</sup>A.C.L. Davies, "One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ" (2008) 37(2) I.L.J. 126.

<sup>4</sup>Lecture to the Industrial Law Society March 11, 2008 by Catherine Barnard; and C. Barnard, "Social Dumping or Dumping Socialism" (2008) 67 C.L.J. 262.

<sup>5</sup>In English law the hurdle of an "arguable case" is an exceedingly low one to pass; see, for example, *American Cyanamid Co (No.1) v Ethicon Ltd* [1975] A.C. 396.

<sup>6</sup>For instance, since cases in the competition sphere such as *Courage Ltd v Crehan* (C-453/99) [2001] E.C.R. I-6297; [2001] 5 C.M.L.R. 28 and *Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04) [2006] E.C.R. I-6619; [2006] 5 C.M.L.R. 17.

<sup>7</sup>The author acted as second junior counsel for BALPA, junior to John Hendy Q.C. and Damian Brown.

## Viking and Laval

This analysis does not provide a detailed summary of the judgments in *Viking* and *Laval*, in part because they have already been the subject of detailed and impressive academic study elsewhere already.<sup>8</sup> However, before exploring the questions on non contractual liability in damages it is necessary briefly to note four points about these cases.

First, neither the *Viking* nor *Laval* case made an attempt to hide the fact that the Court of Justice was extending the application of the free movement provisions in Art.43 EC (in *Viking*) and Art.49 EC (*Laval*) where it had never before been extended i.e. the inclusion of trade unions within their material scope.<sup>9</sup>

Secondly, the ECJ left a critical ambiguity over the question of whether Arts 43 and 49 EC have full horizontal direct effect in the same way as Art.39 EC.<sup>10</sup> In *Viking* this question was directly referred to the ECJ.<sup>11</sup> A.G. Maduro had recommended that Art.43 should have full horizontal direct effect.<sup>12</sup> However the ECJ proceeded more cautiously, by not answering this question quite so directly. It instead expanded the area of case law under which quasi public bodies that collectively regulate employment, self-employment and the provision of services have already been held to come under the scope of these Treaty articles (i.e. *Walrave and Koch*,<sup>13</sup> *Dona v Mantero*,<sup>14</sup> *Bosman*<sup>15</sup> and *Wouters*<sup>16</sup>). The nature of this analysis is critical to the question of the criteria which could apply to an action in damages by an employer against a union.

Thirdly, although the facts of *Viking* and *Laval* were clearly dominant in the Court's mind, it is similarly clear that the proportionality test which the ECJ applied is the standard narrow one of whether the action goes beyond what is necessary to attain a legitimate aim. Such a test holds trade union action tightly to account. Although A.G. Maduro had recommended that a margin of discretion be afforded, the ECJ does not seem to give any such margin.<sup>17</sup>

Finally, it is interesting to note that the ECJ derived a right to strike in both cases from a wide range of international instruments including the European Social Charter (signed at Turing on October 18, 1961), Convention 87 of the ILO Concerning Freedom of Association and Protection of the Right to Organise, the Charter of Fundamental Rights

<sup>8</sup> Davies, "One Step Forward, Two Steps Back?" (2008) 37(2) I.L.J. 126; the Lecture to the Industrial Law Society March 11, 2008 by Barnard; and Barnard, "Social Dumping or Dumping Socialism" (2008) 67 C.L.J. 262.

<sup>9</sup> In *Viking* [2007] E.C.R. I-10779 at [33]; *Laval* [2007] E.C.R. I-11767 at [97]–[98].

<sup>10</sup> As already is the case with Art.39 EC on the free movement of workers. See *Angonese v Cassa di Risparmio di Bolzano SpA* (C-281/98) [2000] E.C.R. I-4139; [2000] 2 C.M.L.R. 1120.

<sup>11</sup> *Viking* [2007] E.C.R. I-10779 at [27].

<sup>12</sup> *Viking* [2007] E.C.R. I-10779 at [38] of the Opinion.

<sup>13</sup> *Walrave v Association Union Cycliste Internationale* (36/74) [1974] E.C.R. 1405; [1975] 1 C.M.L.R. 320.

<sup>14</sup> *Dona v Mantero* (13/76) [1976] E.C.R. 1333; [1976] 2 C.M.L.R. 578.

<sup>15</sup> *Union Royale Belge des Societes de Football Association (ASBL) v Bosman* (C-415/93) [1995] E.C.R. I-4921; [1996] 1 C.M.L.R. 645.

<sup>16</sup> *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (C-309/99) [2002] E.C.R. I-1577; [2002] 4 C.M.L.R. 27.

<sup>17</sup> See Barnard, "Social Dumping or Dumping Socialism" (2008) 67 C.L.J. 262. See in particular in *Viking* [2007] E.C.R. I-10779 at [84], [87] and [90]; A.G. Maduro at [50], [65].

of the European Union, and Art.11 of the ECHR.<sup>18</sup> At first glance, there is an apparent conflict between this fundamental right and the free movement rights of the employer. In *Viking*, unlike in the key case of *Schmidberger*,<sup>19</sup> although the ECJ refers to “balance” (at [79] of its judgment) it then goes on to apply the ordinary (and stricter) proportionality test (at [84], [87] and [90]).

However, on the national level, domestic courts also have competence and obligations in respect of fundamental rights instruments (for example the ECHR) within their own constitutional order. The approach of the ECtHR to freedom of association arguably provides greater protection for that right than the *Viking* and *Laval* cases do.<sup>20</sup> The fact that the ECJ has determined that the ordinary strict proportionality test applies as regards the question of breach of the free movement provisions does not necessarily mean that domestic courts will disregard the wider “balancing” approach or the margin of appreciation in determining liability for such breach in the national courts. The *Kompetenz-Kompetenz* dilemma arises. In English cases, post *Viking*, it will be interesting to see how domestic judges deal with the tension generated by the ECtHR freedom of association cases.<sup>21</sup> Later on, this paper notes how the fundamental rights angle could be used by the ECJ or domestic courts in affording trade unions special protection in relation to defending damages claims.

### Non contractual liability in damages for breach of Articles 43 and 49 EC

On the Community level there are already two areas of relatively developed case law on non contractual damages actions: (a) those relating to state liability; and (b) those relating to private liability under horizontally directly effective provisions.

Under category (a) it is already clearly established in the case law that Member States can be liable for non contractual damages for breach of Art.43 EC.<sup>22</sup> Under category (b), on the Community level there has been a recent flurry of case law<sup>23</sup> and academic comment,<sup>24</sup> most recently in relation to the fully horizontally directly effective competition provisions in Arts 81 and 82 EC.

<sup>18</sup> *Viking* [2007] E.C.R. I-10779 at [43]–[46] and [79]; *Laval* [2007] E.C.R. I-11767 at [90]–[91].

<sup>19</sup> *Eugen Schmidberger Internationale Transporte Planzuge v Austria* (C-112/00) [2003] E.C.R. I-5659; [2003] 2 C.M.L.R. 34.

<sup>20</sup> See, e.g. *Gustafsson v Sweden* (1996) 28 E.H.R.R. 409, margin of appreciation; *Wilson Palmer and Doolan v UK* [2002] I.R.L.R. 568.

<sup>21</sup> English courts are under an obligation to have regard to and interpret legislation consistently with the ECHR under ss.2 and 3 of the Human Rights Act 1998. Under s.2 of the European Communities Act 1972 English courts must give full effect to the supremacy of Community law.

<sup>22</sup> The paradigm example being *Francovich v Italy* (C-6/90 and C-9/90) [1991] E.C.R. I-5357; [1993] 2 C.M.L.R. 66.

<sup>23</sup> See again, *Courage v Crehan* [2001] E.C.R. I-6297 and *Manfredi* [2006] E.C.R. I-6619; see also, *Antonio Munoz y Cia SA v Frumar Ltd* (C-253/00) [2002] E.C.R. I-7289; [2002] 3 C.M.L.R. 26.

<sup>24</sup> Including (but not limited to) G. Betlem, “Torts, a European IUS commune and the private enforcement of Community law” (2005) C.L.J. 126; P. Nebbia, “Damages claims for the infringement of EC competition law: fault requirements” (2008) E.L. Rev.; A. Komninos, “Procedural Autonomy and Civil Antitrust Remedies” in Barnard and Odudu (eds), *Outer Limits of European Union Law* (Oxford: Hart Publishing, forthcoming February 2009); R. Nazzini, “Potency and Act of the Principle of Effectiveness: the Development of Competition Law Remedies and Procedures in Community Law” in Barnard and Odudu (eds), *Outer Limits of European Union Law* (Oxford: Hart Publishing, forthcoming February 2009).

Any private law damages liability of a trade union as a result of *Viking* and *Laval* would seem to fall into a rather intermediate position between these two lines of case law. The ECJ did not hold that trade unions are state entities, but neither did it hold expressly that Art.43 or 49 EC has full horizontal direct effect. As noted above, the judgment in *Viking* is very carefully worded in this regard.<sup>25</sup>

This article will now address, first, the elements of “state liability” and, secondly, the private liability cases. It then draws together a list of the likely elements of the “trade union damages action” at the Community level.

### Elements of state liability

In order to establish liability it is necessary to show not just that the Member State has breached Community law, but that it has committed a “sufficiently serious breach”.<sup>26</sup> If the breach is sufficiently serious, it is necessary to go on to ask whether the breach caused the loss and damage suffered by the claimant. National procedural law will govern the recovery of damages, provided that it complies with the longstanding EC law principles of equivalence and effectiveness.<sup>27</sup>

The factors amounting to “sufficiently serious breach” were summarised by the ECJ in the infamous combined cases of *Brasserie du Pecheur* and *Factortame*. They include,

“the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law”.<sup>28</sup>

### Elements of private liability

As noted in much of the academic commentary, there is less clarity about the elements of private liability for directly effective Treaty rights. It is simplest to look mostly at the case law under Arts 81 and 82 EC to see how this line of case law has evolved.

The ECJ and Community institutions positively encourage parties to pursue enforcement of competition law in the domestic arena, rather than necessarily through the European

<sup>25</sup> As noted above, the first referred question asked whether Art.43 EC has horizontal direct effect. The answer which is given is that trade union liability is “not excluded” from the scope of the Article (see *Viking* [2007] E.C.R. I-10779 at [55]). The basis for this is the *Walrave* [1974] E.C.R. 1405, *Dona* [1976] E.C.R. 1333, *Bosman* [1995] E.C.R. I-4921 and *Wouters* [2002] E.C.R. I-1577 line of case law as cited in *Viking* [2007] E.C.R. I-10779 (see [33]).

<sup>26</sup> *Brasserie du Pecheur SA v Germany* (C-46/93 and C-48/93) [1996] E.C.R. I-1029; [1996] 1 C.M.L.R. 889 at [51].

<sup>27</sup> See for example, *Unibet (London) Ltd v Justitiekanslern* (C-432/05) [2007] E.C.R. I-2271; [2007] 2 C.M.L.R. 30.

<sup>28</sup> *Brasserie du Pecheur SA v Bundesrepublik Deutschland* [1996] E.C.R. I-1029 at [56].

institutions.<sup>29</sup> At the heart of the modern competition law agenda is a devolution of enforcement powers to individual Member States in accordance with Community law principles of competitiveness. It is therefore in full accordance with this driving force that the principle of effectiveness can provide for a private law remedy in damages in the national courts.<sup>30</sup>

However the case law on the elements of this private law liability is still only at a youthful stage. For instance, the question of whether the element of “sufficiently serious breach” applies is still unresolved. In *Banks v British Coal Corp*,<sup>31</sup> A.G. van Gerven suggested that the requirement of “sufficiently serious breach” would not apply; this was in respect of horizontally directly effective provisions for breach of competition law. However there has been no final pronouncement on this issue.<sup>32</sup> Since *Manfredi* it is clear that the “fault” requirements for the competition damages action do not work identically to those governing non contractual liability of state entities.

There are several cases dealing with the conditions of damages liability for breach of competition law wending their way through the English Courts at the moment (for example, the *Sanofi Aventis* case which has so far determined whether aggravated or exemplary damages can be recovered where the Commission has already levied a fine<sup>33</sup>). However, these cases tend to have arisen in the context of where there has been either a Commission investigation and fine, or measures taken by the OFT. These sanctions are, of course, not available in the trade union context.

Another interesting issue which arises in the private context (but not so much the state context) is which parties have standing to sue. As noted by Nazzini,<sup>34</sup> there remains the question as to whether so called “indirect purchasers” can sue a cartel or competition infringer for damages. Indirect purchasers are those who have usually purchased goods from those who have purchased from a cartel at an inflated price, and who have passed on that inflation to the indirect purchasers.<sup>35</sup> Nazzini considers that, following the ECJ’s judgment in *Manfredi*, there can no longer be any distinction between direct or indirect purchasers. If this is true for horizontal damages liability for breach of competition law, it is conceivable that it may also be so for any “trade union tort”.

<sup>29</sup> Particularly since Regulation 1/2004 [2004] OJ L7/1 and *Courage* [2001] E.C.R. I-6297. See also, Commission Proposal for a Council Regulation on Implementation of the Rules on Competitions laid down in Arts 81 and 82 of the Treaty and the Amending Regulations 1017/68, 2988/74, 4056/86 and 3975/87 COM(2000) final 582.

<sup>30</sup> See most recently, e.g. White Paper on Damages Actions for Breach of the EC antitrust rules COM(2008) 165.

<sup>31</sup> *HJ Banks & Co Ltd v British Coal Corp* (C-128/92) [1994] E.C.R. I-1209; [1994] 5 C.M.L.R. 30 at [53].

<sup>32</sup> See further, Nebbia, “Damages actions for the infringement of EC competition law: compensation or deterrence?” (2008) E.L. Rev. 23 and Nazzini, “Potency and Act of the Principle of Effectiveness: the Development of Competition Law Remedies and Procedures in Community Law” in Barnard and Odudu (eds), *Outer Limits of European Union Law*. It would appear that, since *Manfredi* [2006] E.C.R. I-6619, the liability is “strict” and that there is no need to show additionally that the breach is sufficiently serious.

<sup>33</sup> *Devenish v Sanofi Aventis* [2008] EWCA Civ 1086; to which the answer is no.

<sup>34</sup> See Nazzini, “Potency and Act of the Principle of Effectiveness” in Barnard and Odudu (eds), *Outer Limits of European Union Law*.

<sup>35</sup> Some of the claimants in the *Sanofi Aventis* [2008] EWCA Civ 1086 case are indirect purchasers.

### Trade unions as sui generis in EC law

The nuances of what the ECJ did decide (and what it did not decide) in *Viking* become particularly important when considering the potential scope of a damages action for breach of Art.43 or 49 EC. As noted above, the ECJ did not hold that Arts 43 and 49 had full horizontal direct effect, unlike Arts 81 and 82 EC.<sup>36</sup> The route used by the ECJ, through cases such as *Walrave & Koch*, *Wouters* and *Bosman*, is interesting. This line of case law extends the free movement provisions to those quasi public regulatory bodies which are not governed by “public law”, a species of extended vertical direct effect.

*Walrave* concerned the body that regulated international professional cycling as a sport the (“Union Cycliste Internationale”). The ECJ nevertheless held rules of a non public law entity which were “aimed at regulating in a collective manner gainful employment and the provision of services” fell within the scope of the provisions on free movement of services and persons.<sup>37</sup> In *Wouters*, this line of case law was extended outside the sporting context and applied to the Belgian lawyers’ regulatory body. In *Angonese*, as noted above, the ECJ extended the case law on free movement of workers to full horizontal direct effect. This case has not been applied thus far in the context of the other free movement articles. The ECJ judgments in *Viking* and *Laval* do not cite *Angonese*.<sup>38</sup>

The rationale from this “quasi public” line of case law appears to be that it should not be the case that bodies which collectively regulate conditions of employment, self-employment and service provision can impose obstacles to the freedom of movement of persons and services across the European Community. Critically, these cases do not establish that such private bodies are, for all purposes, identical to public law emanations of Member States. They are in some respects a sui generis class of body under EC law and, for this reason, cannot be slotted automatically into the *Factortame* state-liability mould.

Neither do trade unions fit entirely easily into the company of such quasi public agencies as sports regulatory bodies and self-regulating professional organisations. In English law, at least, trade unions are not generally speaking “top down” regulators that impose conditions on employers and employees.<sup>39</sup> Trade unions also already occupy their own sui generis place in Community law in the Community legislative process under the Social Chapter. In competition law, collective agreements between labour and management are exempted from the scope of Arts 81 and 82 EC on policy grounds (under the principle in *Albany*<sup>40</sup>). The rationale for this principle is said to be that the social policy objectives which such collective agreements pursue (particularly the aim of improving conditions of work and employment) would be seriously undermined if they were to be subject to the competition regime.

Although the ECJ in *Viking* rejected the argument advanced before it that the *Albany* principle should apply to remove trade unions from the scope of Art.43, this does not

<sup>36</sup> *Belgische Radio en Televisie v SV SABAM* (127/73) [1974] E.C.R. 51 at [16].

<sup>37</sup> *Viking* [2007] E.C.R. I-10779 at [17].

<sup>38</sup> Although A.G. Maduro did at [46] of his Opinion in *Viking* [2007] E.C.R. I-10779.

<sup>39</sup> This is true in English law, but the position is somewhat different in Scandinavian countries.

<sup>40</sup> *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (C-67/96) [1994] E.C.R. I-1209; [2000] 4 C.M.L.R. 446 at [53].

mean that the *Albany* rationale is not relevant when considering the separate question of whether there is private law damages liability. It may also mean that courts will be particularly careful in importing the competition damages case law into the trade union damages action.<sup>41</sup>

### Trade unions as sui generis in English law

Trade unions also occupy a sui generis position in English law. There is a vast array of statutory regulation of unions and, importantly for the purposes of this paper, there are various statutory protections from tort liability and a cap on damages liability.

Under Pt V of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) trade unions are exempted from certain liabilities if they can establish that the industrial action is in “contemplation or furtherance of a trade dispute” (s.219 TULRCA). “Trade dispute” is a term of art within TULRCA and only covers disputes concerning matters set down in an exhaustive statutory list.<sup>42</sup> The problem, post *Viking*, is that this list could potentially include matters which are contrary to Art.43 or 49 EC. However, such matters would not, as a matter of consistent interpretation, be likely to be considered as falling legitimately within the definition of a “trade dispute”. Employers are likely to argue that disputes which are contrary to Art.43 or 49 cannot be protected by the statutory immunity under s.219 of TULRCA.

This is not the only protection for trade unions under TULRCA. Section 22 of TULRCA provides for a cap on the amount of damages for which a trade union can be sued for in tort. Section 22 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides:

“22 *Limit on damages awarded against trade unions in actions in tort*

- (1) This section applies to *any proceedings in tort* brought against a trade union, except—  
[not relevant]

<sup>41</sup>Note also in *Courage* [2001] E.C.R. I-6297 that the basis of “effectiveness” is framed not just from general principles of EC law but by reference to the “significant contribution” to the specific Antitrust regime in Europe (Nazzini, “Potency and Act of the Principle of Effectiveness: the Development of Competition Law Remedies and Procedures in Community Law” in Barnard and Odudu (eds), *Outer Limits of European Union Law*).

<sup>42</sup>Section 244(1) includes:

- “(a) Terms and conditions of employment, or the physical conditions in which any workers are required to work;  
(b) Engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;  
(c) Allocation of work or duties of employment between workers or groups of workers;  
(d) Matters of discipline;  
(e) A worker’s membership or non-membership of a trade union;  
(f) Facilities for officials of trade unions; and  
(g) Machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers’ associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.”

- (2) In any *proceedings in tort* to which this section applies the amount which may be awarded against the union by way of damages *shall not exceed* the following limit—

<i>Number of members of union</i>	<i>Maximum award of damages</i>
Less than 5,000	£10,000
5,000 or more but less than 25,000	£50,000
25,000 or more but less than 100,000	£125,000
100,000 or more	£250,000” (emphasis added).

Claims in damages against trade unions will most likely be considered “proceedings in tort”. A natural reading of s.22 would mean that, in English proceedings, unions would be protected by this cap on damages. As set out below, however, it is arguable that this cap on damages does not apply to damages claims based on a breach of Art.43 or 49 EC by a trade union.

### **Elements of the trade union damages liability**

In light of the case law on both state liability and horizontal liability it is likely to be most difficult for a trade union to argue that there is no liability in damages at all. There are, however, three key contentious questions which are likely to arise: (a) whether there is an element of “sufficiently serious breach”; (b) what the scope of a damages action could be; and (c) whether a cap on damages in domestic law applies to the Community damages liability.

#### *Sufficiently serious breach*

It is easy to see how the factors identified in *Factortame* for whether there has been a “sufficiently serious breach” would be highly pertinent to a trade union.

Adoption of the “sufficiently serious breach” element could also add an additional safeguard for trade unions’ Art.11 ECHR rights to freedom of association. It would be attractive if a trade union that was found to have breached Art.43 or 49 EC and which could not establish the strict proportionality test set out in *Viking* and *Laval* might, in suitable circumstances, still escape liability in damages on the basis that its breach was not sufficiently serious.

One particularly pertinent factor in assessing the seriousness of any breach in English law could be the extent to which a trade union complies with the complicated and strict domestic rules on balloting its members.<sup>43</sup> It could potentially be argued that, if a union complies with national law on balloting for industrial action, this could give rise to an

<sup>43</sup> The law on balloting in English trade union law is notoriously complicated. See further John Bowers Q.C., Michael Duggan and David Reade, *The Law of Industrial Action and Trade Union Recognition* (Employment Law Practice (OUP, 2004).

evidential presumption that any breach of the free movement provisions would not be sufficiently serious. However it should be noted in *Laval* that the trade unions based some of their arguments on the fact that they had complied with Swedish trade union law. The police had not intervened because in Swedish law the blockade was not unlawful.<sup>44</sup>

Another factor to consider is how an action for damages could work in a case like the recent *Ruffert* case.<sup>45</sup> In *Ruffert* a German administrative region (“Land”) was sued by an employer for breach of the free movement of services because it required higher labour law standards to be used by contractors for public contracts than more generally within the state. The ECJ held that, as the German Land had breached the Posted Workers Directive,<sup>46</sup> its domestic requirements were contrary to Art.49 EC. If, however, a union had balloted for strike action in support of the domestic contracting requirements it would, potentially under the principle in *Viking* and *Laval*, be subject to a damages or injunction claim, even though it would be acting wholly within the scope of domestic law. This issue poses a practical dilemma for trade unions, which must ensure not just that their own actions are compatible with the free movement provisions of the Treaty, but also exercise caution where it is possible that the domestic legislature has itself misapplied EC law.

In these circumstances it would also seem to be attractive if trade unions in such cases were to be entitled to an evidential presumption that they are not to be treated as having committed “sufficiently serious” breaches of EC law where they have complied with provisions of domestic law, particularly in English law where the law on industrial action is already restrictive.

There is, accordingly, a strong rationale for applying a strict approach to the elements of any damages liability of trade unions for breach of Art.43 EC because of the effect that any such liability has on the exercise of that union’s and its members’ fundamental rights to strike, to associate and to assemble. This is a totally different rationale than that used in respect of state liability; but is as sound a rationale, if not more so.

#### *The scope of an action in damages*

As noted by Barnard and Davies, the likely first encounter by a union of this new *Viking* liability is likely to be on an injunction application by an employer. *Viking* was itself such a case. In the *Viking* case in the Court of Appeal, before the questions were referred to the ECJ, the Court of Appeal made clear that it considered that the primary relief envisaged for a threatened breach of Art.43 EC was to be injunctive. The Court of Appeal observed at that stage that,

“if Viking were not granted interim relief and ultimately held to be right in their arguments it seems to me that the recoupment of any loss in relation to whatever action Viking had taken in the intervening period (ie whether it sold the ferry or whether it continued to run it at a loss) *has major difficulty*” (emphasis added).<sup>47</sup>

<sup>44</sup> *Laval* [2007] E.C.R. I-11767 at [10]–[23], and [34].

<sup>45</sup> *Ruffert v Land Niedersachsen* (C-346/06) [2008] 2 C.M.L.R. 39.

<sup>46</sup> Directive 96/71 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1.

<sup>47</sup> *Viking* [2006] I.R.L.R. 58 at [9].

It appears to have been the position of both parties to that case that a horizontal “breach of Article 43 EC” would be a new tort within English law in so far as it extends to bodies which are not state emanations. That case did not go on to determine whether such a tort does, in fact, exist in English law. In that context, because the test for an injunction application in English law requires the applicant to show that “damages would not be an adequate remedy”,<sup>48</sup> the employer was in the perverse situation of arguing that it would be difficult to establish a cause of action in damages. That case settled once the ECJ had determined the questions referred to it.

The second part of this question relates to “who” the parties to the action could be. As noted above, if competition law analysis is used, then there would appear to be no difference between “direct” and “indirect” purchasers. Could this potentially mean that parties other than the disappointed employer could obtain an injunction against a trade union whose unlawful strike action would have a detrimental effect on those parties’ business? It is easy to think of examples of such potential claimants in the trade union context. A strike in, for instance, the transport sector, is most unlikely only to affect the employer’s business; it will affect those of the customers and those with whom those customers have contracts. Currently, the standing of such parties is governed by whether they can fit within the scope of one or more of the indirect economic torts within English private law. However, post *Viking*, it is quite possible that large commercial parties would be more likely to be able to establish the threshold for an interim injunction application if such industrial action was threatened.

#### *The statutory cap*

The statutory cap on damages in TULRCA s.22 is reproduced above. Employers (or “indirect purchasers”) may argue that the statutory cap should be disapplied or “read down” under consistent interpretation, because of the EC law principles of effectiveness and equivalence (just as claimant employees managed to dispense with the cap on damages for sex discrimination in the *Marshall (No.2)* case<sup>49</sup>).

The principles of effective remedy and equivalence between remedies for breach of national and Community law have a long pedigree.<sup>50</sup> Recently, the ECJ has entered into another “activist” phase, especially in the employment context (for example, in the recent *Impact* case).<sup>51</sup>

It could be argued that it is not an effective remedy unless it compensates the employer for the considerable cost caused to the business by the industrial action/threat of industrial action. The cap has not been raised for many years so it may be difficult to justify its current arbitrary level. Furthermore, although all proceedings in tort against a trade

<sup>48</sup> See *American Cyanamid* [1975] A.C. 396.

<sup>49</sup> *Marshall v Southampton and South West Hampshire AHA* (C-271/91) [1993] E.C.R. I-4367; [1993] 3 C.M.L.R. 293.

<sup>50</sup> See, e.g. *Unibet* [2007] E.C.R. I-2271; *Rewe Zentralfinanz eG v Landwirtschaftskammer für das Saarland* (33/76) [1976] E.C.R. 1989; [1977] 1 C.M.L.R. 533 at [5]; *Comet BV v Produktschap Voor Siergewassen* (45/76) [1976] E.C.R. 2043 at [13]; *Peterbroeck, Van Campenhout & Cie Scs v Belgium* (C-312/93) [1995] E.C.R. I-4599; and *Levez v TH Jennings (Harlow Pools) Ltd* (C-326/96) [1998] E.C.R. I-7835; [1999] 2 C.M.L.R. 363.

<sup>51</sup> *Impact v Ministry of Agriculture and Food* (C-268/06) [2008] 2 C.M.L.R. 47.

union are caught by s.22, the appropriate comparator proceedings could be argued to be those against other purely private parties, or against the Member State (for which full compensation can be recovered). An employer/claimant can generally sue other parties in tort and can recover full uncapped damages.

### **Justifying the cap?**

Trade unions may, in the future, need to justify the current cap on damages. There are powerful (although of course far from watertight) arguments which could be used. Potentially this question raises questions which could require clarification by reference to the ECJ. If a trade union was to seek to justify the cap on damages it would need to engage with the principles of effectiveness and equivalence.

#### *Effectiveness*

The cap on damages is a core provision of domestic trade union law which (arguably) provides protection for the ECHR Art.11 rights of trade unions and their members. As noted below, the rationale for its existence, since 1906, has been to limit the scope of the *Taff Vale* judgment, which first exposed trade unions to damages actions by employers affected by industrial action.<sup>52</sup>

Furthermore, there is a good argument that the cap in s.22 of the 1992 Act was introduced because it recognises that the right to withdraw labour may well cause significant loss to the employer but that the union is unlikely to be able to compensate the employer if it is proved wrong at the end of the day. It recognises the inherent asymmetry in the collective bargaining relationship between worker and employer. It protects a trade union's ability to protect the fundamental rights of its members to associate, and protects the trade union's ability to collectively bargain without the threat of a damages award which is likely to be wholly beyond the reach of its membership. These considerations simply do not arise in relation to pure horizontal causes of action in damages, or claims against sporting regulatory bodies or claims against member states.

The existence of s.22 of TULRCA does not mean that the only cause of action an employer has for a trade union's breach of Community law is in damages against the union. It is clear from cases such as *Commission v France (Spanish Strawberry Pickers)* that the state owes positive obligations to prevent actions of third parties which interfere with an employer's lawful exercise of Art.43.<sup>53</sup> This is particularly pertinent to the facts of cases such as *Laval*, where one of the main complaints of the employer was that the Swedish police had not intervened. It also becomes important in cases such as *Ruffert* where a trade union is faced with a public employer that has already breached the Posted Workers Directive.

Any level of a cap on damages would at first glance, appear to be entirely arbitrary. However s.22 avoids arbitrariness by linking the size of the cap to the number of members. The number of members of a union is likely to be proportional to the economic power of the union and its ability to pay damages.

<sup>52</sup> *Taff Vale Co v Amalgamated Society of Railway Servants* [1901] A.C. 426.

<sup>53</sup> *Commission v France (Spanish Strawberry Pickers)* (C-265/95) [1997] E.C.R. I-6959 (although this case did have most extreme facts).

*Equivalence*

Under the cap all “proceedings in tort” are treated the same against a trade union, whether in domestic torts or Community law derived torts. As set out above, there is a large volume of material, both domestic and on the Community level, to demonstrate why trade union liability is a form of *sui generis* liability which cannot be treated identically to other forms of liability. In this regard, it is helpful to trade unions that the ECJ chose to impose liability by expanding the *Walrave* line of case law rather than by extending *Angonese*.

*The Constitutional argument*

However, if these arguments fail, the next issue which the parties would have to deal with relates to the constitutional ramifications: does a domestic court have the power or obligation to disapply the statutory cap, or is it constrained only by the doctrine of indirect effect? As noted above, the judgment in *Viking* is very carefully phrased in relation to the question of horizontal direct effect. Although the Court was asked whether Art.43 EC has horizontal direct effect and it presumed that unions owe specific duties under it, its answer was that trade unions “do not fall outside the scope” of Art.43. This is an important question because of the uneven constitutional terrain in relation to the constitutional effects of horizontally directly effective rights on purely private parties.

On the one hand, it is a long established principle of the primacy of Community law that rights under the EC treaty take priority over national legislation.<sup>54</sup> It is established law that, at least in vertical cases, national law must be “automatically inapplicable” if the provisions are inconsistent with a Treaty provision.<sup>55</sup>

On the other hand, this strong principle of primacy has grown up in the context of vertically directly effective Treaty rights. In the context of rights derived from directives, there is a sharp distinction between vertical and horizontal cases: directives only confer rights which have vertical direct effect; in horizontal cases the directive is given indirect effect only through the principle of consistent interpretation.<sup>56</sup> It is similarly established law that the principle of consistent interpretation can be used so as to confer additional obligations on a private party in a purely horizontal case.<sup>57</sup> From a policy perspective it is quite different for a Member State entity to be prevented from relying on an inconsistent provision of national law than an individual in purely private litigation.

There would appear to be a rather surprising lacuna in the European case law on this point. One interesting case in this regard *Levez*<sup>58</sup> in which it appears to have been assumed (although was not directly in question) that a statutory provision of the Equal Pay Act

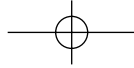
<sup>54</sup> See, e.g. *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (106/77) [1978] E.C.R. 629; [1978] 3 C.M.L.R. 263.

<sup>55</sup> *Simmenthal* [1978] E.C.R. 629 at [17].

<sup>56</sup> The principle of consistent interpretation was recently helpfully summarised in the English courts by Flaux J. in the context of directives in *Byrne v Motor Insurers Bureau* [2007] 3 All E.R. 499 at [39].

<sup>57</sup> *Unilever Italia SpA v Central Food SpA* (C-443/98) [2000] E.C.R. I-7535; [2001] 1 C.M.L.R. 21 at [46]–[52]; *CIA Security International SA v Signalson SA* (C-194/94) [1996] E.C.R. I-2201; [1996] 2 C.M.L.R. 781.

<sup>58</sup> *Levez* [1998] E.C.R. I-7835.



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1970 would need to be disapplied as inconsistent with the horizontally directly effective Art.141 EC in a case involving a claim by an employee against a private employer. Presumably this assumption could have been based on the primacy rationale of cases such as *Factortame* and *Simmenthal*.

However, in light of arguably cautious case law in the field of directives, including also the particularities of the *Unilever* and *Signalson* cases, this question is not necessarily entirely straightforward. It might be that, because of the limits of direct applicability of Treaty articles in the horizontal arena, and because of the ECJ's cautious findings in *Viking* as to the scope of Art.43 EC, a national court is not necessarily bound to disapply an inconsistent statutory provision in domestic law. As a preliminary view, it would seem that such a line of argument would be difficult to make, particular in light of the strident rhetoric in cases like *Signalson* and *Unilever*. Nevertheless, this is an important point in relation to s.22 and the cap on damages because the duty of consistent interpretation alone is unlikely to achieve the desired effect for an employer. It is difficult to imagine a more clearly drafted s.22 to cover proceedings in tort; the doctrine of consistent interpretation does not require a domestic court to go against a fundamental feature of the legislation. There is a good argument that it is one of the central fundamental provisions of English trade union legislation. There are considerable legal arguments that it is not possible to interpret s.22 of TULRCA consistently with the principles of effectiveness and equivalence (if they do indeed require a cause of action in uncapped damages).

Finally, from a policy perspective, if Arts 43 and 49 EC do not demand the disapplication of national legislation in such horizontal cases, this does not necessarily leave the employer unprotected. As noted above, an employer still has the possibility of claiming against the relevant Member State in damages for its breach of its positive obligations under Art.43 or 49 if it permits industrial action to go ahead in such a way as to cause damage to an individual.<sup>59</sup>

### Conclusion

It has already been noted that the *Viking* and *Laval* judgments are likely to result in substantial chilling effects on industrial action or the threat of industrial action. However, the source of that chilling effect is as much in what those judgments have not yet decided (in particular the damages questions), as in what they do. In the meantime, employers and trade unions are left in a position of uncertainty which incentivises employers to threaten litigation, and makes it unattractive for trade unions to fight such cases.<sup>60</sup> Hopefully there will be more references to the ECJ which will resolve these knotty questions and add clarity to this area. However, it should be noted that, as the current incentives for trade unions to fight such cases into the courts are so low, however, it is unlikely that such references will flood from the English courts, at least, in the near future.

<sup>59</sup> Under the *Francovich* [1991] E.C.R. I-5357 principle.

<sup>60</sup> A form of ambiguity which calls rather to mind the study by Ayres and Gertner of the tactical use of ambiguity in the negotiation of contracts, and especially contracts of employment: Ian Ayres and Robert Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules" (1989) 99 Yale L.J. 87.

