

# Free movement and labour rights

## Is it possible to square the circle?

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# The problem

- *Viking* litigation apparently prioritised *EU* economic rights over *national* social rights
- Strike action can only be taken where:
  - National law conditions are complied with, and
  - EU law conditions are complied with
    - Terms and conditions of employment seriously jeopardised
    - Strike is last resort
- Applies only where there is an inter-state element (effect of *eg Carpenter*)
- Risk of uncapped damages
- Uncertainty and chilling effect on industrial action
- Aim is to consider whether there are any alternatives in the light of the Monti II proposal

What can be done?  
The options

# 1. Be more robust about the scope of application of EU law I?

- The question of scope (Art. 153(5) v Art. 352)
- The *Albany* principle
  - Non-application to collective action
  - Cf Monti II ‘The right to take collective action, which is the corollary of the right to collective bargaining is recognised by various international instruments...’
- Fundamental rights – excluded from scope of EU law?
  - CJEU rejected this
  - Monti II confirms

# Be more robust about the scope of application of EU law II?

- Inter-state element
  - *An Post* decision
  - Cf Monti II
    - ‘When cross border elements are lacking or hypothetical, any collective or industrial action shall be assumed prim facie not to constitute a violation of the freedom of establishment or the freedom to provide services and therefore in principle be legitimate and lawful under Union law.
    - This presumption is rebuttable and without prejudice to the conformity of the collective action with national law and practice.’
- Introduce a threshold element

## 2. Reverse the priority of the rights

- Prioritise the social over the economic (ECtHR approach)
  - Pros: solves one problem
  - Cons: creates another
  - Monti II would make that difficult:
    - The exercise of the fundamental right to take collective action, including the right or freedom to strike, should fully respect the economic freedoms enshrined in the Treaty, in particular the freedom of establishment and to provide services, and conversely, the exercise of these economic freedoms shall fully respect fundamental social rights. No primacy exists between the two.
- Reconceptualise the dispute: collective rights v individual rights
  - Pros: solves one problem
  - Cons: creates another

# 3. Engage in proper balancing I?

- AG Trstenjak *Commission v Germany*
  - 190. A fair balance between fundamental rights and fundamental freedoms is ensured in the case of a conflict only when the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom.
- 15th Recital of Monti II
  - A fair balance between fundamental rights and fundamental freedoms will in the case of a conflict only be ensured when the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise the fundamental right. Conversely, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom.

# Engage in proper balancing II?

- Reminiscent of German Constitutional Court's approach to balancing rights of equal weight, namely 'practical concordance' (*praktische Konkordanz*).
- Professor Konrad Hesse 'The principle of the constitution's unity requires the optimisation of [values in conflict]: Both legal values need to be limited so that each can attain its optimal effect. In each concrete case, therefore, the limitations must satisfy the principle of proportionality; that is, they may not go any further than necessary to produce a concordance of both legal values.'
- Kommers: the three pronged test of proportionality is fully compatible with, if not required by, the principle of practical concordance.



# Engage in proper balancing III?

- Pros:
  - it might work
  - Monti II helps
    - (Recitals 1 -5 and 20 of the 2011 draft).
    - reference to the Charter paves the way, via Article 52(3), for access to the Convention
    - Convention now more robustly interpreted by the Court of Human Rights in *Demir* and *Olaffson*, both of which are expressly referred to in the second and third recitals of the 2011 draft and Explanatory memorandum.
- Cons:
  - Balancing is grand language to hide prejudices (cf *Commission v Germany*)
  - Balancing the unbalanceable: Balpa dispute
  - proportionality inconsistent with collective action

# Monti II

- Article 2(2): ‘In specific circumstances, the exercise of the right to take collective action, including the right or freedom to strike, may have to be reconciled with the requirements relating to the rights and economic freedoms enshrined in the Treaty, in particular the freedom of establishment and to provide services cross border, in accordance with the principle of proportionality.’
- Article 3: it is for the national courts to ‘determine whether and to what extent such collective action is suitable for ensuring the achievement of the objective(s) pursued and does not go beyond what is necessary to attain that objective’.

# 4. Modifying the Proportionality principle I

- Procedural approach to proportionality
  - Cf the UK
    - i.c.f.t.d
    - Notice
    - Balloting
  - *Volker and Schecke* (did council/commission take into consideration methods less damaging to beneficiaries' respect for private life)
  - Trade unions keep proper paper trail
- Externalising the proportionality principle (CJEU now backs off)

# Modifying the Proportionality principle

## II

- Addition of extra limb to proportionality principle
  - does the application of the proportionality principle undermine the essence of the right
    - *Ruiz Zambrano*
- Recital 15 reference is made to a three limbed proportionality text cf Article 3 only two limbed test of proportionality which the Court used in *Viking*