Guest Editorial

Sanctions and Remedies for Unlawful Collective Action in an International and European Perspective

1 INTRODUCTION

This special issue of the *International Journal of Comparative Labour Law and Industrial Relations* contains a selection of articles focusing on sanctions and remedies for unlawful collective action in an international and European perspective. The background for the choice of topic is to be found in the debates following on from the *Laval* and *Viking* judgments[1] of the Court of Justice of the European Union (CJEU), especially within European Union (EU) Member States, but also in developments in the recent court practice of the European Court of Human Rights and the tensions within the International Labour Organization regarding the interpretation of Convention No. 87 and its status as the core Convention setting out the global standard for freedom of association, including the right to strike.

The six articles in this special issue were initiated and commissioned by the ReMarkLab-programme, which is sponsored by the Swedish Council for Working Life and Social Research.[2] The concrete impetus was the judgment by the Swedish Labour Court in the national follow-up to the *Laval* judgment, where the Court found that EU-law required it to impose punitive damages on the trade unions that had undertaken collective action.[3] The earlier case law from the CJEU, on which the Court based its judgment and referred to, dealt with competition law and several commentators strongly doubted that these cases could be regarded as providing a general precedent for principles of tort law

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1 Case C-341/05 [2007] ECR I-11767 and Case C-438/05 [2007] ECR I-10779.

2 The programme is led by the author: the project on sanctions and remedies for collective action was designed and developed in close cooperation with Professor Jonas Malmberg. In 2013 he became Chair of the Swedish Labour Court and concluded his collaboration with the project.

3 The Labour Court Case No 89/2009 of 2 Dec. 2009 has been commented upon by ao. U. Bernitz and N. Reich, 48 Common Market Law Review, 603 (2011) and M. Rönnmar, 39 Industrial L. J., 280 (2010).

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within the EU.[4] However, there is a common understanding that if collective action undertaken by trade unions can be proclaimed 'unlawful' under EU law, the principle of effective enforcement of European law will at least require some sanctions and remedies to be available.

It therefore seemed important to take a closer look at the situation in the different EU Member States regarding sanctions and remedies for purely national 'unlawful' industrial action. For this special issue we asked a group of well-known labour law experts to make an assessment of the state of law regarding sanctions and remedies for unlawful collective action in certain jurisdictions of the EU and the US. We asked Sylvaine Laulom and Antonio Lo Faro to cover France, Belgium, Italy, and Spain; Claire Kilpatrick to assess the situation in UK; Niklas Bruun and Caroline Johansson to explore the situation in the Nordic countries (Denmark, Finland, Norway, and Sweden) and Germany; and finally Joanna Unterschütz to cover Hungary, Poland, and Slovakia. Furthermore César Rosado Marzán and Margot Nikitas present a US perspective on the issue, while Tonia Novitz takes stock of the impact of international law, especially of the fact that the right to strike has long been recognized as a fundamental labour right. Our starting point and brief to the authors was that a discussion of remedies and sanctions should be linked to the national industrial relations system and to the regulation and usage of collective action in the national context and tradition. As a result none of the articles focuses just on sanctions and remedies, but they explore the subject in the context of legal regulation and conceptualization of key issues, while taking both legal issues and labour market practice into account.

2 ECONOMIC SANCTIONS AND EU-UNLAWFUL COLLECTIVE ACTION

The question to be posed is of course what we can learn from national law and practice regarding sanctions and remedies in an EU-context. Since EU law in essence is built on the interaction between national and EU law, we argue that any method for assessing claims of damages on trade unions for arranging 'EU-unlawful' collective action should take national law and practice into account. There are several arguments for this that we briefly examine in the following.

The basis for the discussion is that in *Laval*, the CJEU explained that (now) Article 56 TFEU confers rights on individuals which the national courts must

[4] The cases are C-453/99 *Courage v. Crehan* [2001] ECR I-6267 and C-295/04 to C-298/04 *Manfredi v. Lloyd* [2006] and criticism has been raised ao. by J. Malmberg, European Labour L. J., 3, 5 (2012).

protect. Further, the Court held that this Article also applies to obstacles created by private organizations exercising their legal autonomy in order to collectively regulate the provision of services. In *Viking*, the CJEU stated that (now) Article 49 TFEU may be relied on by a private undertaking against a trade union or an association of trade unions. The Court thus clarified that Articles 49 and 56 TFEU have direct horizontal effect when a trade union exercises its legal autonomy in order to collectively regulate the provision of services, and that a national court should apply these articles instead of a conflicting norm of national law.

With regard to the question of whether the full effectiveness of EU law requires damages as a remedy, it is possible to point to several differences between the situations in the competition law judgments *Courage* and *Manfredi*, on the one hand, and the kind of 'EU-unlawful' collective action discussed here, on the other.

It should first be noticed that the practices in *Courage* and *Manfredi* had an illegal aim. EU-unlawful collective action will, on the other hand, typically have the aim of protecting the workers. This aim is regarded as a legitimate interest, which in principle could justify restrictions of the fundamental freedoms of the Treaty. The central issue will be whether a collective action goes beyond what is necessary to achieve this aim. When considering whether the full effectiveness of EU law requires damages as a remedy, due account must also be taken of the fact that the right to strike is regarded as a fundamental right and that the threat of substantial damages might risk creating a situation where the right to strike cannot be exercised.

One of the main arguments in *Courage* was that the practices in such a case are covert and difficult to detect. A right to damages would give each of the parties an incentive to reveal the practices which distort competition thus strengthening the effectiveness of competition law. Collective actions, in contrast, are almost without exception played out in the public domain. Further, Member States often adopt mechanisms for preventing unlawful collective action *ex ante*, such as various forms of mediation or interim decisions by Courts, which serve as an alternative to *ex post* claims for damages.

It should also be mentioned that the EU has exclusive competence as regards the establishment of competition rules for the functioning of the internal market (Article 3 TFEU). In such areas, Member States may only adopt legally binding acts if so empowered by the EU or for the implementation of EU acts (Article 2 TFEU). Thus, it is natural that the EU provides full regulation of the area, establishing whether behaviour is acceptable or not on the market, and determining the sanctions available in the case of a breach of EU law. In the internal market and social policy areas, however, competence is shared between

the EU and the Member States. In areas of shared competence in accordance with the principle of subsidiarity, the EU may act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States (Article 5 TEU). Arguably, intrusions into the procedural autonomy of a Member State require stronger justification in areas of shared competence than in areas of exclusive competence.

Further, collective actions are excluded from the competence of the EU to adopt directives in accordance with its competence in social policy (Article 153.5 TFEU). Even if this provision does not exclude collective action from the domain of economic freedoms, it implies that Member State should be allowed a margin of appreciation in regulating remedies for unlawful collective actions.

The restriction of EU competences under Article 153.5 TFEU applies not only to collective action, but more generally also to the principle of freedom of association. It is worth noting that this principle covers important elements, for example the autonomy of the collective bargaining system and the possibility for the social partners to decide on procedures and rules relating to collective bargaining. In several Member States the autonomy of collective bargaining is safeguarded by the Constitution. Against this background, sanctions, and remedies in the context of industrial action can also be seen as a part of the national identity that is embedded in the political and constitutional structures of Member States and which the EU is required to respect in accordance with Article 4.2 TEU.

Taking all this into account, it is far from obvious that the CJEU would consider, for instance, that Article 56 TFEU should be interpreted as meaning that an individual must be able to claim compensation for the harm suffered from an 'EU-unlawful' collective action if the Member State provides other effective methods of preventing such collective actions.

However, the issue of whether the infringement of the full effectiveness of EU law requires damages as a remedy will often not be decisive, since damages will be awarded in similar cases according to national law in many Member States. The remedies for 'EU-unlawful' collective action must be no less favourable than domestic remedies for collective action that is unlawful under national law (the principle of equivalence).

A crucial question is whether national rules limiting the possibility of claiming damages make the exercise of EU law excessively difficult (principle of effectiveness). In Member States it is not unusual to have rules limiting trade union liability as is clearly shown in the articles in this issue. The question then is whether the exclusion or reduction of damages in national law may be justified. This analysis should take into account the nature of the violation of EU law and

the reason for the restrictions, as well as the extent to which such restrictions are recognized in most of the legal systems of the Member States.

However, we should note that excessive sanctions or the threat of sanctions can be seen as a restriction of the freedom of association as understood by the ILO supervisory bodies. The observation of the Committee of Experts involving the right to strike, examined by both Kilpatrick and Novitz in their articles, illustrates this point. In its 2010 report in relation to Convention 87 addressed to the United Kingdom, the Committee of Experts examined an alleged infringement by UK of the freedom of association. In this dispute, the employer, British Airways, had engaged in negotiations with the pilots' union, BALPA, about the terms of employment of union members working out of London Heathrow. The employer decided to set up a wholly owned subsidiary company and to have that company use an airport in another city where the company would be able to fly customers from Europe to North American locations. The union, fearing a loss of work for its members at Heathrow to pilots at the new location, threatened to strike. The employer stated that if the union did so, it would seek to enjoin the strike on the grounds that it would be successful in a lawsuit considering the law that the UK Court would apply based on the EU restrictions as determined by *Viking* and *Laval*. The employer also stated that as any disruption at London Heathrow would cause substantial economic loss, it would seek damages of at least GBP 100 million per day. Facing bankruptcy if it went on strike for one day, the union decided not to strike. The Committee of Experts was of the opinion that the UK had infringed the freedom of association by failing to provide sufficient legal protection for workers acting in defence of their occupational interests: The Committee observed that the omnipresent threat of an action for damages that could bankrupt the union, possible in the light of the *Viking* and *Laval* judgments issued by the CJEU, created a situation where the rights under the Convention could not be exercised. The Committee furthermore noted that it had been raising the need to ensure fuller protection of the right of workers to exercise legitimate industrial action in practice, and it considered that adequate safeguards and immunities from civil liability are necessary to ensure respect for this fundamental right, which is an intrinsic corollary of the right to organize. Also the Committee on Freedom of Association (CFA) has underlined that excessive sanctions may have an intimidating effect on trade unions, inhibiting their legitimate trade union activities. For instance, in a case concerning the USA, Case 2741, which the Committee dealt with in November 2011, a public transport union, Local 100 from New York State, complained about the prevailing legislative restrictions on the right to resort to collective action. In this case the president of the union had been sentenced to ten days in prison for a strike lasting sixty hours.

Furthermore, the trade union had to pay fines amounting to USD 2.5 million and the workers taking part were subject to wage deductions of two days for one each day of action. The CFA came to the following conclusions, *inter alia*:[5]

> The Committee duly observed that the sanctions imposed were related to the violation of an injunction granted on the basis of section 210(1) of the Taylor Law, which does not permit any strike action in the public service and, in the case at hand, is contrary to the principles of freedom of association.
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> The Committee recalled that, like the Committee of Experts on the Application of Conventions and Recommendations, it considers that criminal sanctions should not be imposed on any worker for participating in a peaceful strike and therefore, measures of imprisonment should not be imposed on any account: no one should be deprived of their freedom or be subject to penal sanctions for the mere fact of organizing or participating in a peaceful strike.

In these circumstances, the Committee expressed its deep concern at the seriousness of the criminal and financial sanctions imposed on Local 100 in relation to a strike that lasted less than three days. The Committee considered that these penalties were likely to have had a significant damaging effect on the financial resources of the union and may have hindered its activities as well as its capacity to adequately represent its members, resulting in an intimidating effect on the right to organize. Moreover, the Committee recalled that the withdrawal of the check-off facility, which could lead to financial difficulties for trade unions, is not conducive to the development of harmonious industrial relations and should therefore be avoided.

In the light of this and other ILO case law, there are good reasons to argue that restrictions on excessive sanctions are not only legitimate, but required not just under ILO Convention 87 (which the US has not ratified), but also under the general principles of freedom of association as enshrined in the Constitution of the ILO.

Regardless of the possible restrictions on sanctions emanating from the ILO Constitution and Convention 87 it is clear that an analysis of the implications of the principles of equivalence and effectiveness in EU law on sanctions and remedies in the field of collective action will benefit from a thorough comparative analysis of the law of remedies for unlawful collective action in the Member States of the EU.

3 NATIONAL SOLUTIONS

The comparative overview provided by the articles in this issue casts light on a wide spectrum of variations in the regulation of collective action in different

[5] See paras 771–773 of Case No 2741.

states. Even in industrial relation systems that we often regard as rather similar, such as those in the Nordic States, we find significant 'internal' differences.

However, there are also similarities. The trade unions in the Nordic States and Germany are deemed to be the legitimate subject and actor in industrial action. Both the legislator and the courts have built national systems based on recognition of collective action as a legitimate tool for trade unions, but a tool that is not allowed to be misused and that has been developed to support and fit into the national industrial relations system and traditions of collective bargaining. The starting point is that unlawful collective action should be regulated by the use of economic sanctions, but the sanctions applied should not endanger the ongoing contractual relations between the labour market parties. These economic sanctions are not primarily calculated on the base of the economic loss suffered by the employers, but take many factors into account, such as the size of the trade union as well as different possible mitigating and aggravating factors in accordance with national law and practice.

There is no reason why these aspects, that can be justified also by the fact that the right to industrial action is protected as a fundamental right, should not be taken into account also in cases of 'EU-unlawful' collective action.

As noted above, the basis for the discussion on liability in EU law emanating from *Viking* and *Laval* is the direct horizontal effect of Articles 49 and 56 TFEU, when trade unions exercise their legal autonomy in order to collectively regulate the provision of services in a way that contradicts EU law. As a result the liability of trade unions is not an issue in Belgium, since trade unions lack a legal status entailing a legal capacity that involves extra-contractual liability. This is a unique provision compared with trade unions in other European countries.

Also in cases when the right to strike is considered an individual right and, as a result, the trade union is not the actor to whom that right is granted on an exclusive basis, problems arise relating to the identification of which damages originate from the actions of a trade union. In the case of collective action that deemed to be unlawful, the trade union can be held liable for the damages resulting from non-compliance with procedural requirements, any damage resulting from (unlawful) political or sympathy strikes, and damages resulting from the refusal of the union strike committee to collaborate on safety and maintenance services and the minimum level of essential services. However, participating in a strike and in that sense exercising an individual right is each worker's free choice which, in the case of an unlawful strike, implies that a plurality of individual actions may be the basis of the damage caused.

From the comparative analysis by Laulom and La Faro on France, Belgium, Italy, and Spain, it may be concluded that the way strikes are regulated in these

countries seems to immunize them from any major influence of the *Laval* and *Viking* cases, at least as far as claims for compensation for damages is concerned.

The contrast offered by the US and UK regimes regarding sanctions and remedies is striking. However, even in these countries punitive damages are restricted and although trade union liability in tort for damages is laid down in the legislation, as explained in detail by Kilpatrick, there are certain limits on liability (GBP 250,000).

In EU Member States like Poland, Hungary, and Slovakia, which lack a long tradition of collective bargaining and free trade unions, the issue of economic liability for trade unions has often been framed primarily in theoretical terms. In practice, measures are not taken against trade unions but rather against individuals undertaking collective action. The organizers of an unlawful collective action are held liable. A collective action must be preceded by negotiations and a conciliation procedure. If the trade union fails to fulfil its duties regarding negotiation and conciliation, it can be held liable. It is often the Court which determines whether a collective action is lawful or not.

In Slovakia, the trade union calling the collective action can be held liable if the collective action is declared unlawful or if the trade union does not fulfil its duties in relation to the employer during the collective action. Similar legal provisions are adopted also in Hungary and in Slovakia. Taking part in a strike, after a court decision concerning the illegal status of the strike has taken legal effect, is deemed to be unauthorized leave of absence, giving rise to the risk of dismissal for the workers concerned as a justifiable cause of termination of employment contract.

4 CONCLUDING REMARKS

It is possible to see a development in which highly divergent national solutions are combined with polycentric tendencies towards harmonization and acceptance of similar values regarding the principle of freedom of association and the right to strike. Even the developments within the ILO, well described by Novitz in her article, are full of contradictions. The representatives of the employers are questioning the interpretations regarding the right to strike under Convention 87, whereas the CFA is unanimously extending the doctrine of the right to collective action in the form of lockouts undertaken by employers.[6]

In such a situation it is difficult to find any good arguments for strong legal activism on the part of the EU. On the contrary, the lessons learned by the efforts to introduce the Monti II regulation show that there is little room for

[6] See CFA, Governing Body 321st Session, Geneva, 13 Jun.2014, Case 3038 Norway.

manoeuvre for the EU between national regulation and international and European standards.[7]

As a result, if we believe that the EU legal system must provide sanctions or enforcement mechanisms for EU-unlawful collective action, the crucial question is whether damages will be awarded in a similar case according to the relevant national law in the Member State concerned. It follows from the principle of equivalence, developed by the CJEU,[8] that remedies for 'EU-unlawful' collective actions must be no less favourable than domestic remedies for collective actions deemed to be unlawful according to national law. Against this background, it seems that the starting point should be that the national principles for economic liability for unlawful collective action embedded in national law should also be applicable in cases of 'EU-unlawful' collective actions in accordance with the principles of procedural autonomy. The comparative overview shows that 'caps' or other limits on the amount of economic compensation are commonly applied in national law and that Member States can use different tools to remedy unlawful action. Only in the rare cases where national law does not provide any economic sanctions at all, or any other effective enforcement mechanisms, does it seem reasonable to argue that principles of effectiveness of EU law might enter into play and justify the application of specific provisions within EU law.

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7 See the *Monti II proposal* COM(2012) 130 final, later withdrawn by the European Commission due to criticism from national parliaments on the basis of subsidiarity. See further N. Bruun, A. Bücker, & F. Dorssemont, 28(3) IJCLLIR, 279 (2012).

8 See for instance Case C-260/96 *Spac* [1998] ECR I-07835 p. 18.