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DOES PROPORTIONALITY SUIT THE RIGHT TO STRIKE?

SOME NECESSARY REMARKS FROM A PORTUGUESE LAW PERSPECTIVE

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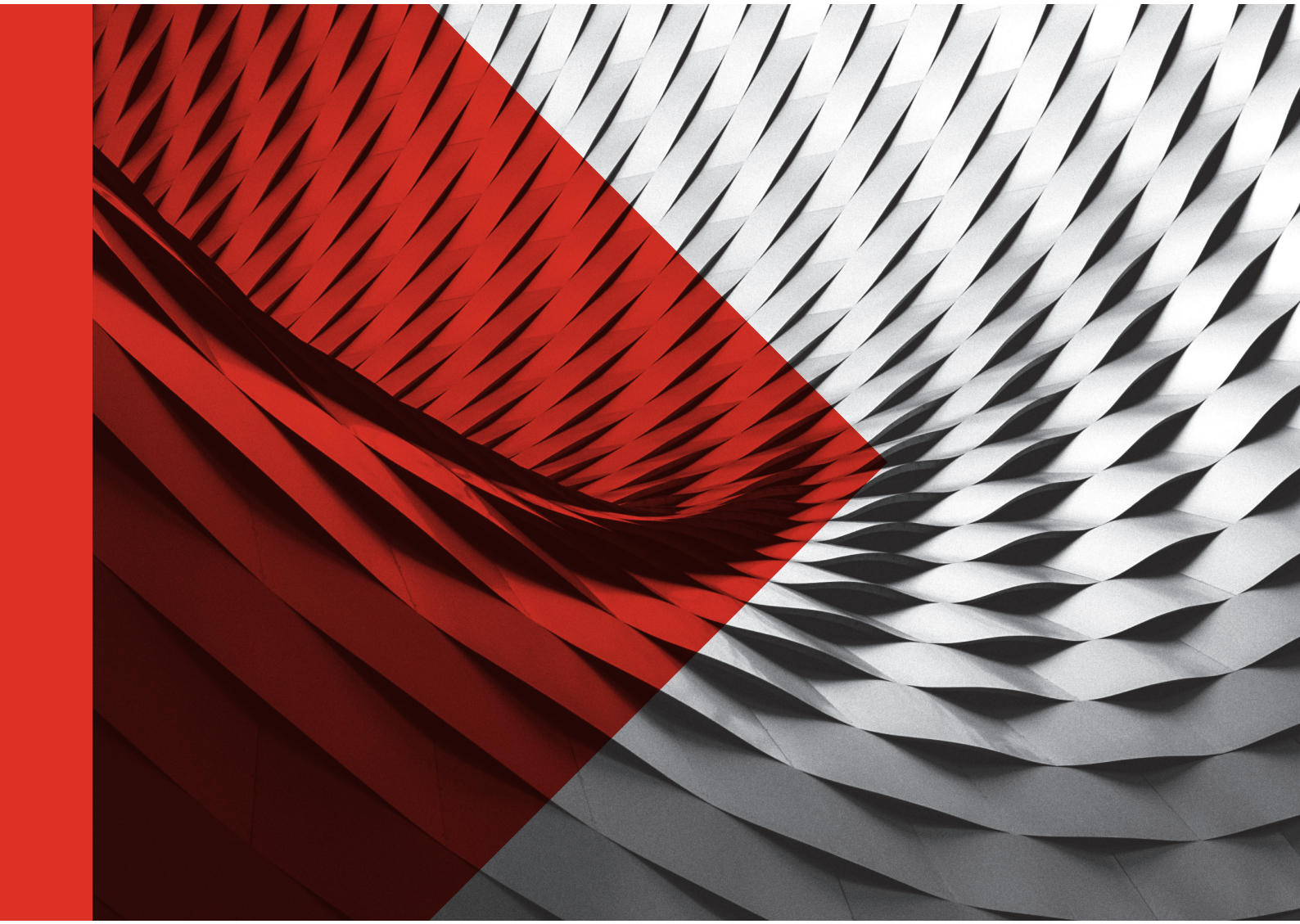

Does Proportionality Suit the Right to Strike?

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List of Abbreviations

AG	Advocate General
ECR	European Court Reports
CJEU	Court of Justice of the European Union
EBLR	European Business Law Review
ELJ	European Law Journal
ELR	European Law Review
ETUI	European Trade Union Institute
ETUI-REHS	European Trade Union Institute for Research, Education and Health and Safety
EU	European Union
FSU	Finnish Seamen's Union
GLJ	German Law Journal
ILJ	International Law Journal
ITF	International Transport Workers' Federation
TEU	Treaty on the European Union
TFEU	Treaty on the functioning of the European Union

1 Introduction*

The scope of this paper is the analysis of the status of the right to strike pursuant to the judgments delivered in *Viking*[1] and *Laval*[2] and a critical comparison of such status with the Portuguese constitutional provisions on the right to strike.

This analysis is intended to primarily address EU law as it is and therefore *de jure condendo* considerations will be limited.

In particular, the conception of the right to strike as a restriction vis-à-vis the employer's free movement rights will be discussed having as background the general interplay between fundamental rights and internal market freedoms.

Furthermore, the particular issues with regard to the exercise of the right to strike arising out of the elements of the proportionality test, primarily suitability and necessity, will be addressed.

Once the criteria that a given strike must meet in order to be legitimate pursuant to the CJEU case law have been dissected, the analysis will turn to the possible application of these criteria to other disputes.

This exercise will focus on the concepts of cross-border situation and restriction. The possible horizontal application of Article 34 TFEU on the free movement of goods will also be addressed.

This debate is all of the more topical since the Commission has recently put forward a proposal (hereinafter the "Commission Proposal") on the exercise of the right to take

* This paper was originally submitted before the College of Europe for the Degree of Master of European Studies (academic year 2011-2012) under the supervision of Professor Síophra O'Leary.

[1] Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line,* [2007] ECR I-10779.

[2] Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others,* [2007] ECR I-11767.

collective action[3], which allegedly aims at clarifying the effects of these two rulings. Throughout this paper reference will be made, when appropriate, to this proposal.

The last part of this paper will be centered on the Portuguese legal system.

The Portuguese Constitution allows certain limitations and provides for the conditions to which the right to strike is subject. However, the constitutional legislator opted for a model where a strike is legal irrespectively of its particular aim. Furthermore, a balance on a case by case basis between the interests to be defended by a given strike and the interests of the employer is not an admissible restriction to the right to strike as provided for under the Portuguese Constitution.

It will be argued that the constitutional approach clearly collides with the principles set forth by the Court in this regard. The assessment on the magnitude of such collision depends upon the previous determination of the scope of application of the principles encapsulated in the CJEU case law.

Lastly, it will be seen whether and how the civil liability regime explicitly set forth as regards unlawful collective action pursuant to the domestic legislation is applicable to strikes deemed unlawful under EU law, particularly in view of the principles of equivalence and effectiveness.

[3] Commission proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM (2012) 130 final, 21.03.2012.

2 The Conditional Recognition of the Right to Strike

2.1 The Recognition of the Right to Strike

In two judgments delivered in December 2007, *Viking*[4] and *Laval*[5], the CJEU was constrained to deal with the interplay between the free movement rights and the right to strike. The CJEU categorically recognized the right to strike as a fundamental right under EU law.[6]

The Commission Proposal[7] emphasizes such recognition under recitals (1) to (3).

However, the right to strike was conceived by the CJEU as a restriction[8] to the free movement rights[9], which implies that "the [Court] recognition of the right to strike is therefore conditional on the satisfaction of the proportionality test".[10]

In Viking,[11] the facts can be summarized as follows:

> "The Viking shipping line runs ferry services between Finland and Estonia under the Finnish flag. The company's management decided to reflag their ferries under the Estonian flag. The decision was also taken to employ Estonian labor in order to take advantage of lower Estonian wages. In response, the FSU warned Viking that they might take collective action to stop the re-flagging process. In an attempt to prevent wages being undercut, it also requested the ITF, with reference to its flag of convenience campaign, to ask their members outside Finland not to enter into any negotiations with Viking. Under this campaign, ITF affiliates agreed that only trade

[4] *Supra* note 1.
[5] *Supra* note 2.
[6] *Viking*, *supra* note 1, at paras. 43-44 and *Laval*, *supra* note 2, at paras. 90-91. The Court drew this conclusion from two international instruments, which the Member States have respectively signed and cooperated in, namely the European Social Charter and the Convention No 87 of the International Labour Organization. The Court also mentioned two "instruments developed by those Member States at Community level or in the context of the EU": the Charter of the Fundamental Social Rights of Workers, and the Charter of Fundamental Rights of the EU. It is noteworthy that since the entry into force of the Treaty of Lisbon, pursuant to Article 6 TEU the Charter of Fundamental Rights of the EU as the same legal value as the Treaties. It is therefore submitted that in future cases Article 28 of the Charter will suffice to qualify the right to strike as a fundamental right under EU law.
[7] *Supra* note 3.
[8] *Viking, supra* note 1, at para. 74 and *Laval, supra* note 2, at para. 99.
[9] In *Viking, supra* note 1, it was at stake the freedom of establishment (Article 49 TFEU) whereas in *Laval*, *supra* note 2, it was at hand the freedom to provide services (Article 56 TFEU).
[10] A.C.L. DAVIES, "One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ" [2008] 37 (2), *ILJ,* 126-148, at p. 141.
[11] *Supra*, note 1.

unions established in the state where the vessel's owner was based should have the right to conclude collective agreements covering the vessel concerned".[12]

As regards *Laval*[13], the factual background is the following:

"The Latvian company Laval won a tender for construction work at a school in the Swedish town of Vaxholm. To fulfill the contract, they posted their workers from Latvia to Sweden. As is standard practice in the Swedish industrial relations system the Swedish unions then started negotiations with Laval with the intention of having a collective agreement signed on wages and other working conditions. These are always negotiated on a case-by-case basis. As Laval wanted to take advantage of Latvia's lower wages, it signed a collective agreement there. Following the failure of the Swedish negotiations, the Swedish trade unions took action by blockading the construction site. This was supported by solidarity action from the Swedish electricians' trade unions".[14]

The dissimilarities between these two cases are not confined to the particular free movement right at issue. In fact, the circumstances of *Laval*[15] are somewhat particular as it directly concerned the posting of workers. This subject is covered by EU secondary legislation, the aim of which is precisely to facilitate the mobility of workers in the context of the provision of services within the EU.

Hence, the reasoning of the CJEU was arguably influenced by the need to ensure the application of the provisions enacted by the EU Institutions, which would be deprived of effectiveness if the employers based in a EU Member State posting workers in another Member State were forced to go beyond the minimum conditions set forth under the Posting of Workers Directive[16], which was exactly the aim of the collective action at hand.

Furthermore, the Swedish national rules discriminated against undertakings established in other Member States as they failed

"to take into account, irrespective of their content, collective agreements to which undertakings that post workers to Sweden are already bound in the Member State in which they are established, […] in so far as under those national rules they are

[12] WIEBKE WARNECK "The ECJ Decisions" in ANDREAS BÜCKER, WIEBKE WARNECK (eds.) *Viking – Laval – Rüffert: Consequences and policy perspectives*, ETUI, report 111, ETUI, Brussels, 2010, p. 7.
[13] *Supra* note 2.
[14] WIEBKE WARNECK, *supra* note 12, pp. 7-8.
[15] *Supra* note 2.
[16] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

treated in the same way as national undertakings which have not concluded a collective agreement".[17]

Indeed, pursuant to the Swedish *Lex Britannia*, collective action was deemed illegal if there was a binding collective agreement concluded under Swedish law, i.e. signed by a Swedish trade union, but it was admissible if a collective agreement was concluded with a trade union from a different Member State.[18]

Swedish law was not in line with Articles 56 and 57 TFEU in so far as it treated both undertakings and trade unions established in other Member States differently from those established in its national territory.

Hence, once these discriminatory provisions were judged inapplicable as a result of the principle of supremacy of EU law, the collective actions carried out by the Swedish trade unions were deemed illegal under Swedish national law. [19]

Conversely, the *Viking*[20] judgment does not encompass the application of EU secondary law, solely being at stake the TFEU provisions on the freedom of establishment. Moreover, neither the relevant collective actions at stake nor the applicable domestic law were qualified as discriminatory.

It is therefore submitted that the future application of the principles set forth by the CJEU in this decision regarding the right to strike, are potentially applicable every time the exercise of free movement is at stake, whereas the scope of the application of the ruling in *Laval*[21] is likely to be narrower due to its particular features briefly portrayed above. As a consequence, in this paper particular attention will be given to the *Viking*[22] case.

[17] *Supra* note 2, at para. 116.
[18] In this sense, see NORBERT REICH, "Free Movement v. Social Rights in an Enlarged Union – the *Laval* and *Viking* Cases before the ECJ" [2008] 9 (2), *GLJ,* 125-161, at pp. 137-138.
[19] See A.C.L. DAVIES, *supra* note 10, p. 137. The author argues that in *Laval* "[the] underlying issue appears to be the state's failure to regulate the collective bargaining process on which it was relying for full implementation of the directive".
[20] *Supra* note 1.
[21] *Supra* note 2.
[22] *Supra* note 1.

2.2 The Refusal of the Court to Shield the Right to Take Collective Action from the Internal Market Freedoms

In *Viking*[23], the CJEU did not consider the existence of exclusive competence of Member States to regulate the right to strike as a sufficient argument for collective action to fall outside the scope of Article 49 of TFEU. This assessment is in line with the precedent rulings of the Court on the fields of social security and direct taxation. These rulings, expressly referred to in the judgment[24], establish the principle that Member States must abide by EU law even when they are exercising their competence in areas which are beyond EU competence.[25]

Likewise, the fact that a fundamental right was at stake did not impress the CJEU, as pursuant to the previous case law of the Court[26], "the exercise [of fundamental rights] must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality".[27]

The CJEU also refused to apply the reasoning followed in *Albany*[28], considering that restrictions on the internal market freedoms are not inherent to collective action and thus the arguments grounding this previous decision in the domain of competition law are not transposable to cases concerning the internal market freedoms.[29]

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[23] *Ibidem.*
[24] *Ibidem*, at para. 40.
[25] *Ibidem*.
[26] Case C‑112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, [2003] ECR I‑5659 and Case C‑36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn,* [2004] ECR I‑9609.
[27] *Viking*, *supra* note 1, at paras. 46-47.
[28] Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie,* [1999] ECR I-5751.
[29] *Viking*, *supra* note 1, at para. 48-54.

As for the last and perhaps the hardest obstacle to be surmounted, the question of the possible direct effect of Article 49 TFEU[30] vis-à-vis trade unions, the CJEU asserted that this provision, as well as Articles 45 and 56 TFEU, were potentially applicable to such entities, and, in particular, to their collective actions. [31]

Several questions regarding the extent of this feature of the judgment are still to be clarified[32], among which, the notion of "private activity with some (loosely defined) regulatory character".[33] A thorough analysis of this question is beyond the scope of the present work; however from a pragmatic point of view, there is little doubt that collective action as such will be scrutinized by the CJEU whenever it collides with the internal market freedoms, with a possible exception in the context of the free movement of goods.[34]

As we have briefly seen, all the arguments put forward in the judicial proceedings by the trade unions pertaining to shield the right to take collective action from a possible conflict with the internal market freedoms were unequivocally dismissed by the CJEU.

The Commission Proposal by no means envisages altering this approach, clearly stating in its recital (9) that the undertaking of collective action by trade unions must be done in accordance with EU law.[35]

[30] And, in *Laval*, *supra* note 2, Article 56 TFUE on the freedom to provide services.
[31] *Viking, supra* note 1, at para. 33-37.
[32] For a comprehensive analysis of the meaning of the horizontal effect in *Viking*, see DERRICK WYATT, "Horizontal Effect of Fundamental Freedoms and the Right to Equality after Viking and Mangold, and the Implications for Community Competence" [2008] 4, *Croatian Yearbook of European Law & Policy*, *Oxford Legal Studies Research Paper No. 20/2008*, pp. 1-48, at pp. 6-14, available at http://ssrn.com/abstract=1158490, accessed on 12 April 2012.
[33] A.C.L. DAVIES, *supra* note 10, p. 137.
[34] See *infra* in this paper, pages 23-24, for a perfunctory analysis of this question.
[35] *Supra* note 3.

The analysis will now turn to the assessment of the CJEU on the principle of proportionality, which is argued to be the cornerstone of these decisions.[36]

[36] In this sense, A.C.L. DAVIES, *supra* note 10, p. 141, stresses that "The impact of the Viking and Laval decisions in practice will, of course, turn on the application of the proportionality test". It is submitted that the future determination by the Court of the scope of application of these judgments is also of great relevance as regards their practical impact.

3 The Proportionality Principle

3.1 Overview

The CJEU uses the principle of proportionality, more specifically, the application of the proportionality test as the standard for the review of national measures conflicting with the internal market freedoms.[37]

Furthermore, the importance of the proportionality test is accrued in the context of the switch from a discrimination based approach to the market access approach, or to the restrictions formula[38], which empowers the CJEU to review all "national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty", irrespectively of the non-discriminatory nature of such measures.[39] In other words, "proportionality is elevated to the principal criterion for determining the dividing line between lawful and unlawful barriers to trade".[40]

The need to balance the virtually unlimited powers of the CJEU deriving from the restrictions approach to review national measures with the proportionality test is perhaps the

[37] See TAKIS TRIDIMAS, *The General Principles of EU Law*, 2nd Ed., Oxford EC Law Library: Oxford, 2006, pp. 137 and 193.
[38] LAURENCE W. GORMLEY, "Free Movement of Goods and Their Use – What is the use of it?" [2011] 33 (6), *Fordham International Law Journal,* 1589-1628 at p. 1627, argues that the market access test is just a "nice shorthand for Dassonville [restrictions formula]".
[39] See, *inter alia*, case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] ECR I-4165, at para. 37.
[40] TAKIS TRIDIMAS, *supra* note 37*,* p. 196.

reason why this test is "highly context-sensitive"[41] and it is applied by the CJEU in a rather pragmatic and flexible way.[42]

At present, the starting point of the approach of the CJEU is the four fold test set forth in *Gebhard*.[43] According to this test, a national restriction to the market freedoms is admissible if (i) it is applied in a non-discriminatory manner; (ii) it is justified by imperative requirements; (iii) it is suitable for securing the attainment of the pursued objective (suitability); and (iv) does not go beyond what is necessary in order to attain it (necessity).[44]

The flexibility of the test lies mainly on the different level of stringency employed by the CJEU when applying the necessity criterion.[45] Legal uncertainty is, however, the price to pay for flexibility.[46]

3.2 Proportionality Principle meets Fundamental Rights

Based upon different criteria, different dogmatic exercises have been attempted in order to regroup the approaches of the CJEU within different categories, such as, among others, the concrete market freedom at issue, the nature of the economic activity curtailed by

[41] A.C.L. DAVIES, *supra* note 10, p. 142.
[42] See NIKOLETT HOS, *The Principle of Proportionality in the Viking and Laval Cases: An appropriate standard of judicial review?*, European University Institute, series 2009/06, 2009, p.11, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553158, accessed on 11 April 2012.
[43] *Gebhard*, *supra* note 39, para. 37. As TAKIS TRIDIMAS , *supra* note 37, p. 139, points out, the CJEU as a general rule encompasses the assessment of the proportionality *stricto sensu* in the necessity part of the proportionality test.
[44] See NORBERT REICH, *How proportionate is the proportionality principle? Some critical remarks on the use and methodology of the proportionality principle in the internal market case law of the ECJ,* paper presented at the Oslo conference on "The Reach of Free Movement", 2011, p. 12, available at http://www.jus.uio.no/ifp/forskning/prosjekter/markedsstaten/arrangementer/2011/free-movement-oslo/speakers-papers/norbert-reich.pdf, accessed on 11 April 2012.
[45] See NIKOLETT HOS, *supra* note 42, pp. 4-5.
[46] TAKIS TRIDIMAS, *supra* note 37*,* pp. 196-197.

the restriction, the nature of the restriction, the impact of the restriction, or the type of the relevant judicial proceedings.[47]

It is argued that the most important distinguishing feature of *Viking*[48] is the nature of the restriction as it amounts to the exercise of a fundamental right.[49] The leading case involving the qualification of fundamental rights – namely the rights of freedom of expression and freedom of assembly –, as restrictions to a market freedom, in case the free movement of goods, is *Schmidberger*.[50] A brief analysis of the reasoning of the Court in this case is therefore indispensable to better understand *Viking*[51] and *Laval*.[52]

Eugen Schmidberger, a German transportation company, filed a claim against the Austrian State before the Austrian jurisdiction. In short, Austria authorized a demonstration with environmental purposes that involved the closure of the Brenner motorway for a limited period of time. Schmidberger argued that in so doing Austria impeded the inter-state transport goods thereby infringing Article 34 TFEU.

The protection of the rights of freedom of expression and freedom of assembly was considered by the CJEU as a legitimate objective *per se*.[53] Another important remark is the fact that the scrutiny of the CJEU was on the decision of the national authorities not to

[47] In this respect, see TOR-INGE HARBO, "The Function of the Proportionality Principle in EU Law" [2010] 16 (2), ELJ, pp. 158-185 at p. 171-183, and the bibliography referred therein.
[48] *Supra* note 1.
[49] *Supra* note 6.
[50] *Supra* note 26.
[51] *Supra* note 1.
[52] *Supra* note 2.
[53] Schmidberger, *supra* note 26, at para. 74.

impede the exercise of the fundamental rights and not on the conduct of the individuals exercising these fundamental rights.[54]

As regards the balancing between the fundamental rights at hand and the free movement of goods, the reasoning of the CJEU in this case is somewhat inconsistent.

On the one hand, the exercise of the fundamental right is qualified as a restriction, thereby triggering the application of the standard proportionality test.[55] This would lead one to believe that market freedoms hierarchically prevail over fundamental rights.

On the other hand, the CJEU asserts the need to weigh the two interests involved "in order to determine whether a fair balance was struck between those interests". [56] [57] Conversely, one could deduce from this assertion that there is no hierarchical precedence between fundamental rights and market freedoms.

The apparent paradox may be explained by the fact that the jurisdiction of the CJEU in these cases is dependent on market freedoms being at stake and therefore such freedoms are formally bound to be the starting point of the assessment of the Court.[58]

Whatever the case may be, the qualification of the right to strike as a restriction entails a presumption of legality of the restricted market freedom. Another consequence of

[54] *Ibidem*, at para. 68. It is clear that it could not had been otherwise, as the assessment of the CJEU was conditional upon the procedural choice of the claimant to bring the proceedings solely against the Republic of Austria.
[55] *Ibidem*, at paras. 64 and 93.
[56] *Ibidem*, at para. 81.
[57] This is what NORBERT REICH, *supra* note 44, p. 19, denominates as "[a] complex double proportionality balancing of free movement vs. fundamental rights".
[58] See VASSILIOS SKOURIS "Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance" [2006] 17 (2), *EBLR,* 225-239 at p. 237.

this approach is that the burden of proof will lie upon the party invoking the exercise of a fundamental right.[59]

In *Schmidberger*[60], the CJEU limited the consequences of this reasoning through the application of the necessity criterion in a very loose way: the national authorities were to be entitled with wide discretionary powers in this matter.[61]

3.3 The Principle of Proportionality and the Right to Strike: an Ugly Duckling Fundamental Right?

As opposed to *Schmidberger*[62], *Viking*[63] directly concerns the exercise by a private party of fundamental rights.

In this case, the CJEU did not stress the need to weigh the two interests involved as it did in *Schmidberger*[64]. Indeed, the Court merely referred to the need to balance the right of establishment against objectives pursued by social policy[65] and moved straightforward to qualify the collective action at issue as a restriction.[66] Moreover, as we shall see, the proportionality test was then applied in a very different manner.

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[59] See ERIC ALLEN ENGLE, "The Rights' Orchestra: Proportionality, Balancing, and Viking" [2011] *New England Journal of International Law and Comparative Law*, available at http://ssrn.com/abstract=1704503, accessed on 18 April 2012, pp. 11-12.
[60] See *supra* note 26.
[61] *Ibidem*, at para. 93.
[62] *Ibidem*.
[63] *Supra* note 1.
[64] *Supra* note 26.
[65] *Viking, supra* note 1, at para. 79.
[66] CATHERINE BARNARD, "Social Dumping or Dumping Socialism?" [2008] 67 (2), *The Cambridge Law Journal,* 262-264, at p. 264, considers that in substance the assessment amounts to confer prevalence to the market freedoms over the right to take social action.

First, the right to strike was not considered by the CJEU as a legitimate interest *per se*. Indeed, the Court asserted that the legitimacy of the right to strike depends upon its aim, which in *Viking* was the protection of workers.[67] [68] As a result, a case by case analysis must be undertaken in order to ascertain whether or not a particular strike can qualify as an objective justification. In other words, the CJEU is entitled to control the scope of the interests that are to be defended by a given strike. Notably, a strike will not be legitimate if "it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat".[69]

Secondly, the suitability must be established in relation to the aim pertaining to the protection of workers. Strictly speaking, this means that a strike will be deemed unlawful if its particular aim is not attainable.

Thirdly, the necessity criterion of the proportionality test was very stringently applied. Indeed, in order to fulfill this last step of the proportionality test, prior to taking collective action trade unions must have exhausted all other means at their disposal that are less restrictive of the market freedom of the employer.[70]

[67] *Supra* note 1, at para. 77.
[68] See A.C.L. DAVIES, *supra* note 10, p. 141.
[69] *Viking*, *supra* note 1, at para. 81.
[70] *Ibidem*, at para. 87.

3.4 A Critical Review

Did the way the CJEU applied the principle of proportionality render immaterial the recognition of the right to strike as fundamental right?[71] It is submitted that for several different reasons it might do so.

First, the statement that the objective justification is the protection of workers and not the right to strike itself implies a systematical judicial review of the reasons underpinning trade unions' actions. This constitutes an important hindrance of the autonomy of trade unions.[72]

Viking[73] itself provides for a good example of how far-reaching this hindrance might potentially be: the general benefits pursued by ITF with its collective action policy do not qualify as an objective justification if it is not established that each individual action is concretely capable of improving the workers terms and conditions of employment.[74] [75] This means that collective action is required to have a high degree of immediateness. One may therefore ask if this reasoning implies that solidarity actions as well as other general objectives pursued by collective actions are now presumed to be unlawful under EU law. [76]

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[71] See A.C.L. DAVIES, *supra* note 10, p. 141.
[72] See "Viking and Laval Cases Explanatory Memorandum" ETUC, 4 March 2008, available at http://www.etuc.org/IMG/pdf_ETUC_EXEC_Viking_Laval_-_expl_memorandum_7-3-081.pdf, accessed on 13 April 2012.
[73] *Supra* note 1.
[74] *Ibidem*, at paras. 88-89.
[75] In support of this view, see KRISTINA LAGERCRANTZ VARVNE "Free Movement of Services and Nondiscriminatory Collective Action", 2010, available at http://gupea.ub.gu.se/bitstream/2077/24159/1/gupea_2077_24159_1.pdf, accessed on 13 April 2012, p. 74.
[76] On a side note, in this type of assessment it is not absolutely clear where to draw the line between the issue of the existence of an objective justification and the question of the suitability of the collective action. It is submitted that the non qualification of the right to take collective action as the objective justification itself blurs the boundaries of these two criteria. In any case, one might question if the fact that the aim pursued by a given

Indeed, by their very nature, these types of collective actions will rarely fulfill the immediateness requirement as set forth by the CJEU. [77]

Furthermore, this approach conflicts with the legal framework of a significant number of EU Member States where the aims of collective action may be other than the mere protection of workers' interests.[78]

Secondly, the application of the necessity criterion raises particular issues with regard to the exercise of the right to strike as the effectiveness of a strike is in most cases in an inverse correlation with the notion of necessity in the context of the proportionality test. As a matter of fact, by definition, the more negative consequences are triggered by a given strike the more is such strike likely to be effective in attaining its underlying goals and the more the employer's free movement rights will also be affected.[79]

Thirdly, the application of the proportionality principle in the context of the internal market was mainly construed to tackle the obstacles to the free movement freedoms deriving from the action, mainly, but not only, in the lawmaking process, of the Member States.

Scrutinizing by the same token the action of trade unions (i.e., applying the proportionality test horizontally) runs against the very essence of the right to strike. In fact, the hindrances to market freedoms deriving from actions and omissions of the public authorities, most of which governed by *jus imperii,* are particularly detrimental to private

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strike that is in practice unrealistic entails that such strike is not suitable for achieving its purpose thereby infringing EU law.

[77] In this sense, NORBERT REICH, *supra* note 18, p. 159. For a different perspective, see TONIA NOVITZ, "The Impact of Viking and Laval" in EDOARDO ALES, TONIA NOVITZ (eds.) *Collective Action and Fundamental Freedoms in Europe. Striking the Balance* [2010] 23, Intersentia, Social Europe Series, 251-273, at p. 260. The author considers that the "Court did not have any objection to secondary action or sympathy strikes per se."

[78] *Ibidem*, pp. 262-263. See also *infra* pages 32-35 regarding the Portuguese case.

[79] In this sense, NORBERT REICH, *supra* note 44, pp. 19-20 and A.C.L. DAVIES, *supra* note 10, p. 143.

parties, as such public authorities are typically the strongest party in the intertwined relations with private parties.

A rigorous review of the state action by the CJEU grounded on the principle of proportionality is therefore a way of offsetting that natural supremacy of the public authorities.

On the contrary, in employment relations employers are typically the strongest party. Trade unionism and collective action in particular is a way of counterbalancing such supremacy.[80] Transposing the proportionality test to the assessment of trade unions' action, moreover in its most stringent version, curtails the rebalancing function of the right to take collective action.[81]

Furthermore, it is doubtful whether the fact that collective action is "inextricably linked to the collective agreement"[82] entails that collective action has in itself a regulatory nature.[83] Indeed, according to the Court, regulatory power implies the competence to enact "rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services".[84] Collective action in itself is ancillary to negotiations and therefore deprived of any regulatory powers.[85]

[80] See NIKOLETT HOS, *supra* note 42, p. 29.
[81] Additionally, it is, to say the least, arguable that when taking collective action trade unions are exercising regulatory powers.
[82] Viking, *supra* note 1, at para. 36.
[83] Which seems to be the reasoning followed by the CJEU in *Viking*, *supra* note 1, at paras. 33-37.
[84] *Ibidem,* at para. 33.
[85] BRIAN BERCUSSON, "*Assessment of the Opinions of the Advocates General in Laval and Viking and six alternative solutions",* 2007, available at http://www.etuc.org/IMG/pdf_TTUR.Viking.Solutions.Oct._2007.ETUC.f.pdf, accessed on 16 April 2012, p. 14, considers that strikes do to have a regulatory nature. One should also note that collective action may be undertaken out of the context of the negotiation of a collective agreement.

It is therefore submitted that if it might make sense to assess, pursuant to the same criteria, the rules enacted by public authorities and the rules enacted by other entities under an explicit or implicit delegation of powers by the first, the same criteria, and *a fortiori* more stringent criteria, should not apply to the non-regulatory action of private parties and namely trade unions. [86]

Fourthly, trade unions bear the burden of proof on all elements of the proportional test. The discharge of this burden appears to be a particularly hard task, notably as regards the necessity criterion applied by the CJEU in its hardcore version.[87]

It is argued that the Commission Proposal[88] merely confirms the approach of the Court as regards the way the proportionality test should apply. The "double proportionality balancing"[89] apparently referred to in its Article 2 is rendered completely illusory when read in conjunction with recital (7). Indeed, this recital not only reaffirms that the exercise of the right to strike qualifies as a restriction to the market freedoms but also reiterates the application of the necessity criterion, not making any reference at all to a possible less stringent approach to the latter.

Moreover, recital (8) confirms that the right to take collective action does not constitute a legitimate interest as such, with such legitimacy being therefore dependent upon a case-by-case analysis of the pursued aim.[90]

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[86] In favour of distinguishing between regulatory and non-regulatory action of trade unions based upon the existence or not of delegated state regulation powers, see PHIL SYRPIS and TONIA NOVITZ , "Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation" [2008] 33 (3), *ELR,* pp. 411-426, at p. 421.
[87] See KRISTINA LAGERCRANTZ VARVNE, *supra* note 75, p. 84.
[88] See *supra* note 3.
[89] See *supra* note 57.
[90] *Supra* note 3.

4 The Scope of Application of the Principles encapsulated in Viking and Laval

4.1 *Overview*

In the previous chapter, we endeavored to dissect the substance of the *Viking*[91] judgment, pointing out its most problematic aspects, in particular those related to the application of the proportionality test. It is now time to discuss how far-reaching this judgment might be.

This discussion entails the analysis of the concept of cross-border situation[92], of the notion of restriction as well as of the possible horizontal application of Article 34 TFEU on the free movement of goods.

4.2 *The notion of cross-border element*

The application of EU law and the subsequent jurisdiction of the CJEU imply the existence of a cross-border element. This requirement excludes the application of the *Viking*[93] ruling to purely internal situations. However, the CJEU has a generous approach as to what might qualify as a cross-border situation.[94]

[91] *Supra* note 1.
[92] The scope *ratione materiae* of EU law.
[93] *Supra* note 1.
[94] For an overview on the developments of the CJEU approach on this topic see CYRIL RITTER, "Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234", 2006, available at http://ssrn.com/abstract=954242 or http://dx.doi.org/10.2139/ssrn.954242, accessed on 16 April 2012.

Drawing analogies from the existing case law, one may find a cross-border element in the following hypothetical collective actions: a strike aiming at improving the working conditions in a subsidiary of a company primary established in a different EU Member State;[95] a strike in a public transportation company which lines link two different Member States or a strike of air traffic controllers; [96] a strike in a company based in a Member State that provides services for the market of a different Member State even if no real movement takes actually place.[97]

Irrespectively of the way the CJEU would deal with the substance of such hypothetical cases, it is likely that from a *ratione materiae* view point, the CJEU would assert its jurisdiction over them.

Furthermore, it is not to exclude that employers may attempt to create transnational links in order to convert purely internal situations into cross-border situations thereby triggering the application of the additional lawfulness conditions of collective action provided for in EU law.[98]

Lastly, one may not exclude the possible indirect influence of the principles enshrined in *Viking*[99] ruling on the assessment of national courts on the lawfulness of collective action even in purely internal situations.[100]

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[95] In the case C-153/02, *Neri v European School of Economics (ESE Insight World Education System Ltd),* [2003] ECR I-13555, at para. 40, the CJEU considered that the mere existence of a secondary establishment suffices to trigger the application of EU law.

[96] This situation is similar to the one in *Schmidberger, supra* note 26. It is submitted that taking the reasoning to its final conclusions, such cases do not only hinder the inter-state free movement of goods but also the movement of providers of services.

[97] In the case C-60/00, *Carpenter v Secretary of State for the Home Department,* [2002] ECR I-06279, at para. 29, the CJEU stressed that the mere fact that an individual "provides cross-border services without leaving the Member State in which he is established" suffices to trigger the application of EU law.

[98] DANIEL ORNSTEIN, HERBERT SMITH, "Laval, Viking Line and the Limited Right to Strike", available at http://www.elaweb.org.uk/resources/lavalvikinglineandthelimitedrighttostrike.aspx, accessed on 16 April 2012, put forward this scenario.

[99] *Supra* note 1.

4.3 *The notion of restriction*

Once established the applicability *ratione materaie* of EU law, the following step is to (try to) determine which collective actions will be reviewed by the CJEU.

As above mentioned[101], the trend, in all market freedoms, is to apply the wide restrictions' formula.

In *Viking*[102], the CJEU did not step away from this broad formula, stating that for a collective action to come under the radar of the CJEU it is sufficient that it make less attractive and, or, that it is liable to restrict the exercise of the market freedom at stake.[103]

This formulation amounts to say that almost all, if not all, collective actions may in principle be scrutinized by the CJEU.[104] The fact that the CJEU did not make any reference to the (possible) discriminatory nature of the collective action at issue is also noteworthy.

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[100] In this sense, TONIA NOVITZ, *supra* note 77, p. 252. For particular aspects concerning Portugal, notably in view of the principle of equality as provided for by the Portuguese Constitution, see *infra* pages 35-37.
[101] *Supra* pages 9-10.
[102] *Supra* note 1.
[103] *Viking, supra* note 1, at para. 71-72.
[104] In this sense, see A.C.L. DAVIES, *supra* note 10, p. 120. For a different perspective, see KRISTINA LAGERCRANTZ VARVNE, *supra* note 75, p. 46. This author argues that the market access test is substantially different from the general restriction test and that the CJEU stated that the right to take collective is not necessarily prejudicial to the fundamental market freedoms. As for the first argument, it is noted that in Viking the CJEU did not use the expression market access and that it is not clear that market access and the restrictions formula constitute two different approaches of the CJEU (see *supr*a note 38). As regards the second argument, the CJEU clearly used that expression in a very particular context, i.e., to refuse the *Albany* argument. Furthermore, with that expression the CJEU may have only envisaged purely internal situations.

Moreover, the examination of objective justifications entails that the action was not seen by the Court as discriminatory.[105]

Assuming that the CJEU did not want to rule out the possibility of assessing the compatibility of certain types of collective action with the internal market freedoms, different solutions to do so could nevertheless have been reached.

Indeed, the CJEU could have highlighted the fact that the effect of the collective action undertaken amounted to the absolute impracticability or at least to a very substantial impairment of the exercise of the freedom of establishment. Such an approach would probably dispel the uncertainty cast by the straightforward application of the restrictions formula.

Another possibility would have been to partially follow the reasoning of the AG Poiares Maduro, anchored on the concept of market partition and on the discriminatory nature of the collective action at issue.[106] Additionally, the solution proposed by the learnt AG appears to be restricted to relocations.[107]

It is true that this opinion entails the non applicability of the proportional test[108] which would run counter the ordinary methodology employed by the CJEU. However, it would have been possible for the CJEU to follow in part the solution suggested by the AG, thereby accepting that not all collective actions would qualify as a restriction to the market freedoms, and subsequently applying the proportionality test to those that do qualify.

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[105] See FILIPE DORSSEMONT, "The Right to Take Collective Action v. Fundamental Economic Freedoms" in MARC DE VOS (ed.) *European Union Internal Market: Friends or Foes*, [2009] 19, Intersentia, Social Europe Series, 45-104, at p. 87.

[106] Opinion of AG Poaiares Maduro, delivered on 23 May 2007, in case C-438/05, *International Trasnport Workers' Federation and Finnish Seamen's Union v Viking Line,* [2007] ECR I-10779, at paras. 57-72.

[107] *Ibidem*, at paras. 65-66.

[108] NORBERT REICH, *supra* note 18, pp. 152-154.

4.4 Free movement of goods: a particular case?

The CJEU has constantly and consistently denied conferring horizontal application, even in limited terms, to Article 34 TFEU on the free movement of goods. In the two leading cases where the CJEU had to strike a balance between the conduct of individuals and the free movement of goods[109], at stake was not the individual conducts as such but the conduct, *rectius*, the absence of a conduct, from the relevant Member States to impede and remove the obstacle to the free movement of goods caused by the action of individuals.[110]

Nevertheless, some authors argue that *Laval*[111] and specially *Viking*[112] might have altered this *status quo*.[113] If this theory proves right, the rulings of the CJEU in those two cases would apply *mutatis mutandis* to analogous situations involving the free movement of goods. A comprehensive analysis of this issue is beyond the scope of this paper.

It is, however, submitted that to draw the conclusion that there is a new approach in this regard form the references of the CJEU in *Viking*[114] to *Schmidberger*[115] is perhaps going far beyond what was in fact meant by the CJEU.[116]

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[109] *Schmidberger, supra* note 16, and case C-265/95, *Comission v. France*, [1997] ECR I-6959.
[110] For an overview see CAHTERINE BARNARD, *The Substantive Law of the EU: The Four Freedoms*, 3rd Ed., Oxford University Press: Oxford, 2010, pp. 76-78.
[111] *Supra* note 2.
[112] *Supra* note 1.
[113] See DERRICK WYATT, *supra* note 32.
[114] *Supra* note 1.
[115] *Supra* note 16.
[116] DERRICK WYATT, *supra* note 32, considers that the fact that "in Viking the Court cites these statements [from Schmidberger] as supporting the conclusion that Article 43 EC must be interpreted as meaning that [Article 34 TFEU] may in appropriate circumstances be relied upon by a private undertaking in a direct action against a trade union or an association of trade union".

This view is also supported by the Commission Proposal[117] as it solely attempts to reconcile the right to take collective action with the freedom of establishment and the freedom to provide services, intentionally leaving outside of its scope the free movement goods.[118]

In a nutshell, it is argued that it is unlikely that the CJEU will consider the TFEU provisions on the free movement of goods to be directly enforceable against trade unions. This being said, an analytical reading of paragraphs 61 and 62 of the *Viking*[119] judgment inevitably leads to a certain degree of uncertainty in this respect.

4.5 Uncertainty: does anybody know what a legal strike looks like?

Read together and in a strict manner, the chapters regarding the application of the principle of proportionality and its scope of application would imply that a very substantial number of collective actions would be deemed unlawful under EU law.

It is submitted, however, that the CJEU judgments were decisively influenced by the actual facts with which the Court was forced to deal with, and, as such, the conclusions therein are not be transposed word by word to upcoming cases involving the right to take collective action.

For one thing, the collective action in *Viking*[120] was particularly intense as it effectively impeded the relocation of the claimant company. Additionally, on one hand

[117] *Supra* note 3.
[118] *Supra* note 3, Articles 1 and 2.
[119] *Supra* note 1.
[120] *Ibidem.*

relocation is at the core of the freedom of establishment, whilst, on the other hand, relocation implies, by definition, the existence of a strong inter-state element.

As to what regards the application of the principle of proportionality, it is true that generalizations departing from *Viking*[121] to different cases may prove wrong. In fact, there is very little doubt that the Court is – as it should be – more concerned to strike what in its view configures a fair balance between the interests at stake (through the application of the proportionality principle) than to elaborate a flawless theoretical doctrine.[122]

In any case, it appears that the proportionality test departing from the internal market freedoms is not the most suitable methodological tool to reconcile all these aspects in a satisfactory manner. Nonetheless, with some intellectual contortion, the criterion of necessity may be twisted on a case by case basis to bring all these elements into the equation, thereby paving the way for reasonably balanced solutions.

It therefore remains to be seen if the Court is willing to apply a less stringent version of the proportionality test, notably as far as necessity is concerned, bringing together its case law on the interplay between fundamental rights and internal market freedoms.[123] If the Court does so, the impact of the *Viking* ruling would be substantially lessened.

Another alternative for the CJEU is to dismiss possible future cases such as the ones referred to above,[124] on the basis of the unofficial *de minimis* rule, pursuant to which these cases would be deemed "too uncertain and indirect […] to be capable of being regarded as

[121] See *supra* note 1.
[122] In this sense, LAURENCE W. GORMLEY, *supra* note 38, pp. 1627-1628.
[123] I.e., using the *Schmidberger* (*supra* note 26) approach as the standard of review.
[124] See *supra* page 20.

liable to hinder freedom of movement".[125] It is arguable that, by stating that "it cannot be considered that it is inherent in the very exercise of trade union's rights and the right to take collective action that those fundamental freedoms will be prejudiced to a certain degree",[126] the Court has left the door open for applying the *de minimis* rule regarding the right to take collective action.

This is, however, far from being settled since the Court has been quite parsimonious as to the application of this rule. A good illustration of this parsimony is *Schmidberger*[127], a case wherein at first sight the application of the said proviso appeared as a reasonable solution. Nonetheless, the Court decided otherwise following moreover the advice of AG Jacobs.[128]

Here again, instead of being a clarifying instrument, the Commission Proposal[129] can be seen as an additional source of uncertainty. In fact, the explanatory memorandum provides for what is no more than *une vérité de la palisse* in this respect: "in situations where cross-border elements are lacking or hypothetical, a collective action shall be assumed not to constitute a violation of the freedom of establishment or the freedom to provide services".[130]

For one thing, this is not an equivalent expression to the one that embodies the above mentioned unofficial *de minimis* rule. What is more, *a contrario sensu* this may entail that all

[125] Case C-190/98, *Graf v. Filzmoser Maschinenbau GmbH*, [2000] ECR I‑493 (*apud* NIKOLETT HOS, *supra* note 42, t p. 20).
[126] *Viking, supra* note 1, at para. 52. As discussed *supra* (see note 104), this assertion from the Court does not necessarily entail such a conclusion.
[127] See *supra* note 26.
[128] Opinion of AG Jacobs, delivered on 11 July 2002, in case C‑112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, [2003] ECR I‑5659, at paras. 65-67 (apud NIKOLETT HOS, *supra* note 42, p. 20).
[129] *Supra*, note 3.
[130] Explanatory Memorandum of the Commission Proposal (see *supra* note 3).

non-hypothetical cross-border collective actions will be scrutinized by the Court, even if their effects are too indirect and uncertain.

One thing seems to be clear: all discriminatory collective actions going beyond the threshold of a hypothetical *de minimis rule* will be unlawful under the first criterion of the *Gebhard* test.[131]

This conclusion can be drawn from the fact that the protection of workers as well as any other objective to be considered by the Court as a legitimate purpose of collective action qualifies as an objective justification. Pursuant to settled case law, as opposed to treaty based derogations, discriminatory measures cannot justify a restriction to the internal market freedoms grounded on an overriding requirement.[132]

As we have seen[133], the Court has firmly stated that the lawfulness of the right to take collective action in the context of the internal market should be assessed under the proportionality principle.

It is therefore highly unlikely that, with the putative exception of the cases where the *de minimis rule* applies, the CJEU will propose a standard of review other than the proportionality test as regards collective action.

It should also be noted that both in *Viking*[134] and *Laval*[135] the Court was not requested to take a position on the issue of the possible liability of trade unions for damages caused to

[131] *Supra* page 9.
[132] See *supra* page 20.
[133] See *supra* pages 6-7.
[134] See *supra* note 1.
[135] See *supra* note 2.

employers by collective action deemed unlawful pursuant to EU law. The fact that this question remains unsettled almost five years after these decisions were delivered overshadows trade unionism within the EU.[136]

If the Court turns this hypothesis into reality, further doubts will have to be clarified, among which the constitutive elements of this liability and its extension notably in view of principles of equivalence and effective protection of EU law.[137]

To cut a long story short, it is submitted that the judgment delivered in *Viking*[138] is *maladroit* foremost for the reason that it constitutes a source of uncertainty to trade unions, workers, national courts and national lawmakers. As a matter of fact, in the aftermath of *Viking*[139] no one can provide reliable answers to numerous questions related to the interplay between EU law and the right to take collective action.

Indeed, which objectives may be legitimately pursued by a given collective action? What is the *hindrance threshold* for a strike to be considered detrimental to the exercise of market freedoms? Are the principles underpinning the *Viking*[140] ruling to be applied in the context of the free movement of goods? How will the proportionality test, in particular regarding necessity, apply? Will trade unions be rendered liable for damages caused to employers deriving from collective action deemed unlawful pursuant to EU law? If so, which requirements will have to be met in order to trigger such liability?

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[136] In this sense, KATHERINE APPS "Damages Claims Against Trade Unions after *Viking* and *Laval*" [2009] 34 (1), *European Law Review,* pp. 141-154 at p. 142.
[137] *Ibidem*. KATHERINE APPS carries out her analysis using the English legal system as a background. Some considerations will be made further in this paper, pages 38--42, as regards the principles of equivalence and effective protection of EU law in the context of the Portuguese legal system.
[138] See *supra* note 1.
[139] *Ibidem.*
[140] *Ibidem*.

Until the Court is not forced to precise these notions, trade unions and workers will face serious difficulties assessing whether a given strike is lawful and what consequences unlawfulness may entail. It is submitted that this uncertainty is a strong deterrent to social actions.

The need for the submission of a Commission Proposal[141] in this regard shows the unclearness of the current situation. Regrettably, this proposal does not shed light on most, if not all, doubts outlined in this paper. In fact, it appears that its only *effet utile* is to implement a dispute resolution mechanism covering potential cross-border situations.[142]

According to Article 3 (3) it would seem that judicial remedies would only be available once the out of court settlement mechanisms had been exhausted. However, Article 3 (4) clearly states that the use of alternative non-judicial dispute mechanisms shall be without prejudice to the role of the courts, including the CJEU, in particular to assess "whether the collective action does not go beyond what is necessary to attain the objectives pursued."[143]

It is therefore argued that pursuant to the last paragraph of the mentioned Article 3 the implementation of a dispute resolution mechanism is not to be seen as a *moratorium* to the potential judicial disputes and thereby does not effectively lessen the harmful consequences of the legal uncertainty pointed out above.

[141] See *supra* note 3.
[142] *Ibidem*, Article 3.
[143] *Ibidem,* Article 3 (4).

5 The Portuguese Case

5.1 Overview of the Portuguese Legal Framework

At a national law level, the right to take collective action is constitutionally guaranteed in twenty of the twenty-seven EU Member States.[144]

In Portugal, the right to strike is dealt with by the Portuguese Constitution with a considerable level of detail. In particular, Article 57 provides as follows:

> **"(**Right to strike and prohibition of lock-outs)
> **1.** The right to strike shall be guaranteed.
> **2.** Workers shall be responsible for defining the scope of the interests that are to be defended by a strike and the law shall not limit that scope.
> **3.** The law shall define the conditions under which such services as are needed to ensure the safety and maintenance of equipment and facilities and such minimum services as are indispensable to the fulfillment of essential social needs are provided during strikes.
> **4.** Lock-outs shall be prohibited."

From the outset, it should be noticed that the right to strike is not conceived as a trade union's right but rather as an individual right of each worker, even if its exercise is collective in nature.[145] As a general rule, the decision to go on strike is made by trade unions. In certain circumstances such a decision may yet be made by the workers' general assembly.[146]

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[144] See WIEBKE WARNECK, "Strike Rules in the EU27 and Beyond: a Comparative Overview", ETUI-REHS, Brussels, 2007, p. 7. Pursuant to this author, the seven countries where the right to strike is not enshrined in the Constitution are Austria, Belgium, Luxembourg, Malta, the Netherlands, Ireland and the UK. In Finland and Germany this right is a consequence of freedom of association.

[145] This is expressly stated under Article 530 (1) of the Portuguese Employment Code (Law 7/2009, of 12 February, as amended). This code regulates the right to strike in its Articles 530 to 543. Similar provisions are provided for in the Employment Contract in Public Functions Act (Law 59/2008, of 11 de September, as amended) vis-à-vis civil servants and other employees in the public sector.

[146] Article 531 of the Portuguese Employment Code.

The Portuguese Constitution allows certain limitations to which the right to strike might be subject to. The Portuguese Employment Code, implementing the Portuguese Constitution in this respect, limits and regulates the right to strike in different ways.

First, pursuant to the relevant procedural provisions, a mandatory notice must be delivered to the employer five working days prior to the scheduled date of the envisaged collective action.[147] This procedural requirement obviously protects the employers against possible collective action carried out by surprise.

Secondly, the services related to the safety and maintenance of premises and equipments of the employer must be ensured by the workers. Moreover, in case of services of general interest minimum services must be provided.[148]

Thirdly, *self-service* actions, actions not entailing the effective suspension of service as well as actions causing damages others than those inherent to the suspension of functions of the workers, such as blockades, are not allowed.[149]

Contractual based restrictions are also allowed. Indeed, collective agreements may provide for procedures aiming at settling disputes which might lead to collective action as well as for peace obligation clauses, whereas restrictions in individual agreements are unlawful.[150]

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[147] Article 534 of the Portuguese Employment Code. The prior notice is extended to ten days if services of general interest are concerned.
[148] Article 534 and 537 of the Portuguese Employment Code.
[149] See JOSÉ GOMES CANOTILHO and VITAL MOREIRA, *Constituição da República Portuguesa - Anotada - Volume I - Artigos 1º a 107º,* 4th Ed., Coimbra Editora: Coimbra, p. 753.
[150] Article 542 of the Portuguese Employment Code.

However, these peace obligations only bind the trade unions that are part to such collective agreements. As a result, workers and different trade unions are not to be rendered liable for the breach of peace obligations.

Furthermore, peace obligations solely apply to strikes aiming at altering the content of the relevant collective agreement and during the lifetime of the latter. Both the non-compliance of the employer with the collective agreement and abnormal supervening changes of the circumstances render the peace obligation clause unenforceable vis-à-vis trade unions. [151]

5.2 Proportionality

A quick look at Article 57 (2) suffices to conclude that the constitutional legislator opted for a model where strikes are legal *per se*, i.e., irrespectively of their particular aim. Furthermore, the idea of a proportionality test or even of a balance on a case by case basis between the interests to be defended by a given strike, on the one hand, and the interests of the employer on the other hand, is also alien to the Portuguese legal system.

It is worth to note that no other constitution of the EU member states provides for a provision similar to the mentioned Article 57 (2), even if other legal systems do share similar conceptions as to the right to strike. [152]

Assessing the lawfulness of collective action trough the application of principle of proportionality is in clear conflict with Article 57 (2).

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[151] *Ibidem*.
[152] See WIEBKE WARNECK *supra* note 144.

As regards the aim of a strike, this provision entails that the right to strike is not and cannot be limited to employment relations as such. As a general rule, all aims and goals are admissible, subject to two conditions, one positive and one negative: they must have at least an indirect link with the rights and interests of the workers and they cannot contravene the constitution.[153]

The first condition is to be construed in a very loose way. In fact, this condition will be fulfilled not only in case of solidarity strikes, but also in strikes against the enactment of State Acts in fields such as employment, tax or social security, which have an impact, even though indirect, on the employment relationships.

Moreover, quasi-political strikes are also lawful. Indeed, workers may strike against the privatization of a company even if they are not workers of such company, i.e., irrespectively of the contractual nature of the aims and goals at stake. In other words, the addressee of what is requested in a given strike needs not to be the employer.[154]

As an example, a general strike took place on 24 November de 2010 with multiple aims, among which the requests for a fair and equitable distribution of wealth and for the repeal of the Stability and Growth Pac for the 2011 state budget.[155]

The negative condition entails that the aims and objectives of strikes cannot run against the fundamental principles enshrined in the constitution. As a result, strikes with

[153] See JOSÉ GOMES CANOTILHO and VITAL MOREIRA, *supra* note 149, pp. 755-756.
[154] *Ibidem*.
[155] See the respective prior notice available at http://www.fnsfp.pt/pdf/APGREVE24112010.pdf accessed on 23 April 2012.

racist purposes, entailing gender discrimination or with any other non-democratic aims are not allowed under the Portuguese fundamental law.

It is submitted that, by the same token, strikes which are discriminatory in nature against an employer of a different nationality shall be deemed unlawful. However, this implies that the aim of the strike is itself the nationality of the employee, meaning that in the exact same circumstances a strike would not be carried out by the sole fact that the employer was of Portuguese nationality.

Therefore, if the aim of a strike is to struggle against social dumping arising out of relocations, as was the case of the secondary action in *Viking*[156], the strike will not be considered unlawful for that reason solely. It is acknowledged that in such cases it is extremely difficult to assess, and *a fortiori* to prove, whether the aims of a collective action are discriminatory or not.

It goes without saying that the apparent subordination made by the CJEU of the admissibility of the exercise of the right to strike to the pursuance of a very limited number of purposes calls into question Article 57 (2) of the Portuguese Constitution.

The same reasoning applies to the notion of suitability as construed by the Court. In fact, the principle of self regulation of the interests of workers underpinning the Portuguese Constitution also entails that the appropriateness of a strike to attain the envisaged goal is to be assessed by the workers and therefore no judicial review whatsoever is admissible in that respect.

[156] See *supra* note 1.

A strike may be carried out as a means to express an opinion and it need not to be likely to effectively achieve its goal, as is moreover the case of almost solidarity and quasi-political strikes.

This is not the case in all EU Member States. In France, for instance, "in July 1986 the Supreme Court ruled that a strike in support of "unreasonable" or "excessive" demands that an employer could not reasonably be expected to meet may constitute an unlawful strike." [157]

Necessity is also alien to the concept of self regulation: workers are entitled to make use of the means that they consider more effective to pursue a given objective irrespectively of having or not any other measures at their disposal less harmful to the rights of the employer.

It is worth noting that the only reference in Portuguese law regarding the application of the proportionality principle, in the context of the right to strike, is to determine the extent of the mandatory minimum services in general interest services.

As opposed to the reasoning of the CJEU, the right to strike is deemed as the starting point of the analysis being this particular restriction subject to a proportionality test.

[157] WIEBKE WARNECK, *supra* note 144, p. 30.

5.3 Interplay between EU and Domestic Law

The Portuguese constitutional approach to the right to strike clearly collides with the principles set forth by the Court in this respect.

The assessment on the magnitude of such collision depends upon the answer to the questions highlighted above.[158] In any case, even if the principles enshrined in *Viking*[159] and *Laval*[160] prove to have a very narrow scope of application, Article 57 (2) cannot anymore be regarded as being applicable to all strikes. One can therefore reasonably conclude that Article 57 (2) of the Portuguese Constitution is in breach of EU law and should therefore be disapplied by virtue of the supremacy principle, whenever the internal market freedoms are at stake.

A subsequent problem arises out of the principle of equality as set forth by the Portuguese Constitution in its Article 13:

> "(Principle of equality)
> **1**. Every citizen shall possess the same social dignity and shall be equal before the law.
> **2**. No one shall be privileged, favoured, prejudiced, deprived of any right or exempted from any duty on the basis of ancestry, sex, race, language, place of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation."

The above-quoted paragraph 2 clearly prohibits a different legal or *de facto* treatment grounded, *inter-alia*, on the place of origin of the individual. As we have seen, collective action triggering the application of EU law will be subject to more severe legality requirements than purely internal collective action.

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[158] See *supra* page 28.
[159] See *supra* note 1.
[160] See *supra* note 2.

This differentiated treatment doubly infringes this principle. Indeed, the right to private economic enterprise will be less limited by collective action as regards to foreign based employers when compared with Portuguese employers. Conversely, workers employed by foreign employers will be entitled to a more limited right to strike when compared with workers rendering services to domestic employers.

It is therefore submitted that the existence of such a dual regime deprived of any reasonable and objective justification is not compatible with the equality principle, as provided for under the Portuguese Constitution.

Therefore, in a comparable situation, an indirect application of EU law may take place in a purely internal situation.

An example of this would be collective action similar to the one at hand in *Viking*[161] taken against a Portuguese employer intending to relocate its activity within the Portuguese territory. In this example, the collective action complies with all the lawfulness conditions foreseen in domestic law.

The employer could argue that if he were to relocate its activity within the territory of another EU Member State he would benefit from the EU law limiting the right to strike and thereby more effectively protecting his right to private economic enterprise.

The inter-European cross-border nature of a given relocation does not substantially differentiate it from an internal relocation. In other words, there is no reasonable and objective justification to treat in a different way these two situations which are in essence similar. By doing so, the Portuguese legal framework on the right to take collective action contravenes the principle of equality as provided for under the Portuguese Constitution.

[161] *Supra* note 1.

The remedy to this situation is to apply the same legal regime to both situations. Since in virtue of the supremacy principle one is prevented from disapplying the EU principles governing this matter, the only possible solution would be to use the EU principles in such a purely internal situation.

5.4 Civil Liability

Under Portuguese law, by participating in illegal collective action workers might be subject to disciplinary liability. Additionally, both workers and trade unions might be held liable for the damages caused to the employer as a result of an unlawful collective action.[162]

In very broad terms, civil liability[163] implies the fulfillment of the following conditions: (i) an unlawful conduct attributable to the offender; (ii) fault, either malicious or negligent; (iii) the existence of damages; and (iv) a causal link between the conduct and the damages. Damages encompass both actual loss and loss of profit.

As regards workers, this liability will be contractual in nature, since an unlawful strike amounts to the non fulfillment of the relevant employment agreements, whereas the tort liability regime is applicable vis-à-vis trade unions.[164]

The Contractual liability regime differs from the tort liability one in so far that contrarily to the latter the first provides for a rebuttable presumption of unlawfulness and fault in case of non-fulfillment of any contractual obligation.

[162] Article 541 of Portuguese Employment Code.
[163] Strict liability, i.e., non-fault liability, is an exceptional regime under Portuguese law that is applicable neither to trade unions nor to employees in the context of collective action.
[164] Tort liability is regulated in Article 483 of Portuguese Civil Code. Contractual liability is foreseen in Articles 798 and 799 of the same code. In the event that the unlawfulness of the strike derives from the breach of peace obligations, trade unions may arguably incur in contractual liability.

Apart from this difference, it may be stated that in general terms both liabilities apply in the same manner pursuant to the conditions referred to above.

The key issue here is whether a strike carried out in accordance with the requirements set forth by national law but in breach of EU law, notably of the proportionality principle, might render the trade unions and, or, the workers involved liable for damages.

As it is well known, state liability for damages deriving from the breach of EU law depends upon the fulfillment of three conditions: (i) the rule of law infringed should be intended to confer rights on individuals; (ii) the breach should be sufficiently serious; and (iii) there should be a direct causal link between the breach of the obligation incumbent on the State and the damage sustained by the injured parties.[165]

Outside of the field of competition law, it is uncertain if private parties may incur in liability for damages arising out of the breach of EU law. In any case, one of the natural consequences that flow from the horizontal enforcement of EU law provisions appears to be the possibility of rendering liable the infringing party for the damages caused.[166]

Some authors argue that there is no valid reason to extend the condition of a sufficient serious breach to private parties, since this condition is intrinsically linked to the "sovereign nature of the state".[167] This conclusion might also be drawn from the judgment delivered in *Manfredi*.[168]

[165] See TAKIS TRIDIMAS, *supra* note 37, p. 509.
[166] *Ibidem* p. 544.
[167] *Ibidem*. The author considers that this condition applies not to put at risk the *jus imperii* of Member States as well as to safeguard their financial balance.
[168] Joined cases C-295/04 to C-298/04, *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, [2006] ECR I-6619.

In this case, it was at stake the liability of a company for damages suffered by individuals deriving from the breach of competition rules. The Court considered that the individuals were entitled to claim compensation for damages pursuant to the mechanisms provided for by national law on the condition that such mechanisms were in line with the principles of equivalence and effective protection. As no reference whatsoever was made to the condition *sufficient serious breach*, it seems that a regular liability regime grounded on a mere breach applies vis-à-vis private parties.[169]

It is arguable whether this ruling is applicable outside of the scope of competition law, notably for the reason that typically this type of judgments are delivered on the basis of a previous investigation conducted by the Commission culminated by the application of a sanction. This context is obviously not transposable to different situations including the action of trade unions.[170]

It also remains to be seen if the way the Court qualifies trade unions, which as it was pointed out is quite unclear,[171] will be of any importance. In fact, if trade unions were to be seen by the Court as an emanation of the state power, it would be reasonable to argue that their liability should require the fulfillment of the same conditions applicable to the state.[172]

However, there is a crucial argument in favor of the application of the regular liability regime drawn from the principle of equivalent protection. Pursuant to this principle, in the absence of specific EU law provisions, the conditions regarding liability shall be governed by national rules provided that these rules do not differentiate between an infringement of domestic law and an infringement of EU law. Therefore, if regular liability

[169] See KATHERINE APPS, *supra* note 136, p. 146.
[170] *Ibidem*.
[171] See *supra* page 7.
[172] See KATHERINE APPS, *supra* note 136, p. 147.

suffices to entitle a claim grounded on the violation of domestic law it shall also suffice to base a comparable claim grounded on the violation of EU law. [173]

On a related note, if the free movement provisions were to be considered as having full horizontal effect, workers would also be rendered individually liable for damages caused by strikes deemed illegal under EU law. This would specially be the case in legal systems such as the Portuguese where individual liability is expressly foreseen for collective action breaching domestic law. Here again, it is submitted that this would be a necessary consequence entailed by the principle of equivalence.

From the perspective of the effective safeguarding of the right to take collective action, it would unquestionably be desirable to apply the condition of a *sufficient serious breach* both to trade unions and workers. Furthermore, this condition should be presumed not to be fulfilled when the collective action was convened and executed in strict compliance with domestic law.[174]

Nonetheless, such an approach would run against the core of the principle of equivalence, and therefore it is unlikely see it being upheld by the Court in upcoming cases. What is more, the fact that the collective action at issue both in *Viking*[175] and *Laval*[176] complied with domestic law was immaterial for the Court also suggests that it would also be of no relevance for liability purposes. [177]

[173] See TAKIS TRIDIMAS, *supra* note 37, pp. 544-545.
[174] In this sense, KATHERINE APPS, *supra* note 136, p. 150.
[175] *Supra* note 1.
[176] *Supra* note 2.
[177] See KATHERINE APPS, *supra,* note 136, p. 150.

As mentioned, fault is a condition *sine qua non* for the application of the Portuguese liability regime. If it is established that the offender could not reasonably expect his conduct to be unlawful, the fault requirement is considered not to be met.

According to the Portuguese Supreme Court, the conviction in good faith of the lawfulness of a strike exempts the worker who has acted with due care from liability.[178] This reasoning is also applicable vis-à-vis trade unions. Nonetheless, in view of their institutional nature and specific knowledge in this area, the threshold of due care is substantially higher than the one applicable in relation to workers.

Given the unclearness of the EU law regime, under domestic law one would be forced to conclude that both workers and trade unions have to be considered in good faith when deciding or executing collective action in compliance with national law but in breach of EU law and therefore should not be rendered liable for damages.

This would however run contrary to the principle of equivalence for the very same reasons expressed regarding the non application of the condition *sufficient serious breach*. Moreover, such a rule would undermine the principle of effectiveness of EU law, in so far as it would render the principles set forth by the Court regarding the interplay between the right to take collective action and the market freedoms meaningless.[179]

It is therefore submitted that if the legal reasoning of the Court is taken to its final conclusion, strikes deemed legal pursuant to national law but in breach of EU law might entail civil liability both for workers and trade unions even if they could reasonable believe their conduct to be lawful.

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[178] Case 07S4006, *STAD v. AA – Sociedade de Limpezas Industriais, S. A.,* [2008] avaliable at www.dgsi.pt, accessed on 22 April 2012.
[179] See TAKIS TRIDIMAS, *supra* note 37, p. 423.

6 Conclusion

Both in *Viking* and *Laval* the Court qualified the right to strike as a fundamental right while refusing to shield this fundamental right from the internal market freedoms. Subsequently, the Court made clear that the exercise of the right to strike amounts to a restriction vis-à-vis the free movement rights and as such its conformity with EU law should be accessed through the application of the proportionality test.

As opposed to *Laval*, in the *Viking* judgment neither concerned the application of EU secondary law nor was the relevant domestic law at hand discriminatory. It is therefore argued that the *Viking* case may be seen as a significant general precedent for future rulings on conflicts between the right to take collective action and the internal market freedoms.

In *Schmidberger*, the leading case as regards balancing between fundamental rights and fundamental freedoms, the Court considered the fundamental rights at issue as an objective justification *per se*. Moreover, the necessity criterion of the proportionality test was applied in a very loose way.

Conversely, in *Viking* the right to take collective action was not considered a legitimate aim *per se* which substantially curtails the autonomy of trade unionism in setting its goals and the means for the attainment of such goals. Furthermore, the application of the necessity criterion to the right to strike is inappropriate as its effectiveness is in an inverse correlation with the notion of less harmful means.

Applying the proportionality test horizontally to trade unions runs against the very essence of the right to strike. In fact, this test was designed to tackle obstacles to the internal market caused by public authorities who are typically the strongest party in the relations intertwined with private parties. However, in employment relations employers are typically the strongest party and collective action is historically a way of counterbalancing this preeminence. Reviewing obstacles deriving from trade unions' action through the proportionality test substantially undermines the balancing function of collective action.

The analysis of the case law on the internal market shows a far reaching approach to the notion of cross-border element. Moreover, for collective action to be deemed as a restriction it suffices that it makes less attractive and, or, it is liable to restrict the exercise of the market freedom at hand. Hence, if the proportionality test as construed in *Viking* is to apply to all these situations, a very substantial number of collective actions will be deemed unlawful under EU law.

Generalizations departing from *Viking* may however prove wrong, as when applying the proportionality test the Court is more sensitive to the need of achieving a fair balance between the competing interests than to strict methodological coherence. In any case, the present uncertainty as to the lawfulness of collective action overshadows trade unionism within the EU, uncertainty moreover heightened by the possible liability of trade unions deriving from collective.

The Portuguese Constitution expressly imposes the lawfulness of collective action irrespectively of its aim as long as there is an indirect, if not tenuous, link with the rights and interests of the workers and the aim does note contravene other constitutional principles. Additionally, proportionality is not used as standard of review as to the legality of collective action.

The principle of supremacy of EU law entails that the Portuguese Constitutional provision relating to the autonomy of trade unions must be set aside whenever cross-border situations are at hand.

From the principle of equality as enshrined in the Portuguese Constitution flows that in a comparable situation an employer may not be less protected by the sole fact that a strike takes place in a purely internal situation. Read together with the supremacy principle, this

equality commandment implies an extension of the EU principles to comparable purely internal situations.

Outside the field of competition law the existence of horizontal liability deriving from the breach of EU law and the conditions related thereto remain unclear. It is however submitted that if, as it is the case in Portugal, a civil liability regime is provided for the breach of conditions as to the lawfulness of the exercise of the right to strike set forth by domestic law, the principle of equivalent protection implies the application of the same regime for the breach of EU law.

Furthermore, if regular liability suffices to entitle a claim grounded on the violation of domestic law it shall also suffice in case of a comparable claim grounded on the violation of EU law and therefore the condition of a *sufficient serious breach* is not applicable.

It is submitted that, pursuant to the principle of effectiveness, the fact that collective action breaching EU law was lawful pursuant to the relevant domestic law does not exempt trade unions from civil liability.

The Commission proposal does not attain its self-proclaimed aim of clarifying the effects of the *Viking* and *Laval* rulings. In fact, this proposal does little more than to incorporate these two judgments into an EU Regulation, without even attempting to dissipate the doubts cast by such judgments and referred to in this paper.

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