
Case C-271/08, Commission v. Germany [2010] ECR I-000

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In this case the Court of Justice of the European Union had once more to examine the interrelationship between fundamental economic freedoms guaranteed by the Treaty and fundamental social rights. In the aftermath of Viking, Laval and Rüffert, this relationship has become one of the most debated topics in the discussion about social Europe. Under this light, in analyzing the case, I will focus on this issue, although a large part of the judgment (and of the opinion) is in fact devoted to the calculations necessary to assess the respect of the thresholds established by the Public Procurement Directive.

The issue at stake in the infraction procedure was the direct awarding, by local authorities and local authority undertakings having more than 1218 employees, of service contracts in respect of occupational old-age pensions, without call for tenders at European level, to bodies specified into collective agreements. Such agreements were concluded between the Vereinigung der kommunalen Arbeitgeberverbände (Federation of Local Authority Employer Associations) and the Vereinte Dienstleistungsgewerkschaft eV (ver.di; United Service Sector Union). This practice was considered by the Commission as being in breach of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, in conjunction with Articles 23 to 55, of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

Following in the footsteps of Viking and Laval, the Court here reaffirms its competence in solving the clash between market freedoms and collective agreements. Indeed, those two cases do represent the compass guiding the Court in its quest for a fair balance between fundamental freedoms and fundamental rights. Looking at the issue through those lenses, it comes as no surprise that the Republic of Germany, after the application of the proportionality test, was found in breach of the Directives, in their role of implementations of fundamental freedoms. It was once again through article 28 of the Europe-

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2 Case C-341/05, Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet [2008] IRLR 160.
3 Case C-346/06, Dirk Rüffert v. Land Niedersachsen [2008] IRLR 467.
4 It must be noted that the Commission in its reply redefined the subject-matter of its action “by requesting the Court to find a failure to fulfill those obligations because local authorities and local authority undertakings which had more than 2 044 employees, in 2004 and 2005, more than 1 827 employees, in 2006 and 2007, and more than 1 783 employees, in the period from 2008, awarded such contracts directly, without a call for tenders at European Union level”.
7 Para. 42-44.
8 Para. 52-67.
an Charter of Fundamental Rights that collective social rights were submitted to EU law. An interesting novelty is that, in the present case, article 28 was used explicitly to overcome a constitutional protection of collective autonomy. As stated by the Court: “while it is true that the right to bargain collectively enjoys in Germany the constitutional protection conferred, generally, by Article 9(3) of the German Basic Law upon the right to form associations to safeguard and promote working and economic conditions, the fact remains that, as provided in Article 28 of the Charter, that right must be exercised in accordance with European Union law”.

On its path to this solution, the Court had to circumvent the “Albany immunity” put forward by the Republic of Germany as a defensive argument. Indeed Germany proposed the application of the reasoning delivered by the Court in Albany via analogy between competition law (where the Albany doctrine was elaborated) and fundamental freedoms (at stake in the present case). The Court did not accept such a reasoning, directly denying the very possibility of the analogy, as it had already done in Viking. Indeed the Court, in its distinguishing of the two sets of rules (competition and fundamental freedoms), carries the narrowing of the “Albany doctrine” to its furthest end. This may be puzzling as in Albany the Court was already aware of the possible restriction of cross-frontier business and service, nonetheless granting the immunity to collective agreements. As an interim conclusion on this subject, one can see as the Albany immunity, at least for now, has become almost useless in disputes concerning trans-national issues, as a foreign enterprise (or service provider) can easily complain about the restriction of its fundamental freedoms, instead of relying on competition law. On the contrary, Albany still has an effet utile in purely internal situation, as national actors cannot rely on fundamental freedoms for their claims against collective agreements restricting competition (a situation that could amount to a reverse discrimination).

Apart from the reaffirmed loyalty to Viking and Laval, this decision is interesting for what it ignores. In first place, still focusing on the question of balancing fundamental rights and fundamental freedoms, the Court ignores the whole reasoning proposed by the AG in her opinion. Indeed, AG Trstenjak did propose a different approach to the issue, an approach based on what I will call a “cross proportionality test”. The AG, making reference to the solution delivered by the Court in Schmidberger, argued in favor of a renewed centrality of the idea of equal ranking for conflicting fundamental freedoms and fundamental rights. Following this reasoning, she proposed to the Court to revise its approach (the one of Viking and Laval) to the balancing of fundamental rights and fundamental freedoms, by applying the proportionality test not only to the restriction to the lat-

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9 Para. 43.
10 Ibidem.
11 See Case C-67/96 Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie [1999] ECR I-5751. It is interesting to note that the facts in Albany were similar to the ones of the present decision, as the Court had to assess the compatibility of competition law with a collective agreement establishing a mandatory pension found.
12 See Viking, para. 52.
13 See Albany para. 50: “Moreover, such an agreement affects trade between Member States in so far as it concerns undertakings which engage in cross-frontier business and deprives insurers established in other Member States of the opportunity to offer a full pension scheme in the Netherlands either by virtue of cross-frontier services or through branches or subsidiaries.”
15 See the Opinion of AG Trstenjak, para. 195.
ter arising from the exercise of the former, but also, the other way round, to the restriction of the former caused by the eventual application of the latter. It is worth noting that, in introducing this (proposal of a) solution, the AG actually criticized the approach to the issue of Viking and Laval, on the ground that such an approach would sit “uncomfortably alongside the principle of equal ranking for fundamental rights and fundamental freedoms.” In doing so, she made vast reference to the widespread critique directed towards Viking and Laval by the European scholarship: the enormous debate surrounding those two cases thus seems to have made its way to Luxembourg, although not to the judges sitting there. That being said, the fact that the Court did completely ignore this part of the opinion delivered by the AG, reinforces a contrario what I already said about the judges in Luxembourg reaffirming their loyalty to the solution delivered in Viking and Laval, provided that the application of the solution proposed by the AG could have brought to the very same outcome in the present case.

In second place, it is interesting to note another ignored subject, although less noticeable. In affirming the fundamental nature of the right to bargain collectively, both the Court and the AG didn’t make any reference to the European Convention of Human Rights (and especially to the jurisprudence of the European Court of Human Rights on the subject), relying just on the Charter of Fundamental Rights of the EU (the AG) plus the European Social Charter and the Community Charter of Fundamental Social Rights of Workers (the Court). This is worth mentioning because the ECtHR has delivered, in 2008, a landmark judgment, which in very brief considered the right to bargain collectively as an essential element of the (human) right to form and join a trade union. As this construction may be in contrast with the (restrictions imposed by the) one delivered by the Court in Viking and Laval, the present case does represent a missed opportunity for a clarification: in the field of collective social rights, the dialogue has yet to come.

16 Opinion of AG Trstenjak, para. 192 and 199.
17 Opinion of AG Trstenjak, para. 183.
18 See ili, notes 91, 94, 95, 98 and 99.
20 Demir and Baykara, para. 154.