COLLECTIVE ACTION AND FUNDAMENTAL FREEDOMS IN EUROPE

Striking the Balance

Edited by
Edoardo Ales
Tonia Novitz

Contributors
Edoardo Ales
Antonio Baylos
Olaf Deinert
Filip Dorssemont
Lorenzo Gaeta
Teun Jaspers
Sylvaine Laulom
Tonia Novitz
Giovanni Orlandini
Aukje A.H. van Hoek

Antwerp – Oxford – Portland
Collective Action and Fundamental Freedoms in Europe. Striking the Balance
Edoardo Ales and Tonia Novitz (eds.)

© 2010 Intersentia
Antwerp – Oxford – Portland
www.intersentia.com

ISBN 978-94-000-0072-8
D/2010/7849/65
NUR 825

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.
CONTENTS

List of contributors ................................................................. xi

1. Preface. ............................................................................... 1

2. National chapters................................................................. 5

2.1. Collective action in Belgium. Looking for the right to strike
Filip Dorssemont ................................................................. 7

I. Collective action: what are we talking about? ....................... 7
II. Collective action: juridical status ....................................... 9
   A. Sources of definition and regulation of collective action ..... 9
   B. Entitlement .................................................................... 13
   C. Consequences for those organising or participating in a collective
      action ........................................................................ 15
III. Limitation of collective action with reference to its aims and content... 18
IV. Ex ante or ex post judiciary/administrative control ............... 19
V. Procedural requirements/preconditions for legality ............... 23
VI. Balancing collective action with other rights and freedoms (national
    level) ........................................................................... 23
VII. (Potential) impact of ECJ case law (on fundamental freedoms) on
     the national regulation concerning collective action .......... 26
Conclusion ................................................................................ 27
Bibliography ............................................................................ 29

2.2. Collective action in France. Towards a restriction of the right to strike?
Sylvaine Laulom ................................................................. 31

I. Collective action: what are we talking about? ....................... 31
II. Collective action: juridical status ....................................... 33
## Contents

A. Sources of definition and regulation of collective action .......................... 33
B. (Legal) definition of the main features of collective action ....................... 36
C. Entitlement. ......................................................................................... 37
D. Consequences on those organising or participating in a collective action .......................... 38

III. Limitation of collective action with reference to its aims and content .......... 40

IV. Balancing collective action with other rights and freedoms .................... 41
   A. The regulation of the right to strike in transport ................................ 42
   B. A very similar regulation of the right to strike in education ................ 46

V. (Potential) impact of ECJ case law (on fundamental freedoms) on the national regulation concerning collective action .......................... 47

Bibliography ............................................................................................ 50

### 2.3. Collective action in Germany. A union-based system

Olaf Deinert. ......................................................................................... 53

I. Collective action: what are we talking about? ....................................... 53
II. Collective action: juridical status ....................................................... 55
   A. Sources of definition and regulation of collective action ....................... 55
   B. Definitions ......................................................................................... 56
   C. Entitlement. ......................................................................................... 56
   D. Consequences on those organising or participating in a collective action .......................... 57

III. Limitations to collective action ............................................................. 62
   A. Excluded workforce ........................................................................... 62
   B. Aims .................................................................................................... 62
   C. Peace obligation .................................................................................. 66
   D. Principle of proportionality ................................................................. 67
   E. **Ultima ratio** .................................................................................... 68
   F. Limitations to lockout .......................................................................... 68
   G. Emergency services ............................................................................ 70
   H. Fair bargaining .................................................................................... 71
   I. Individual activities ............................................................................. 71
   J. Legal protection .................................................................................... 71

IV. Procedural requirements/preconditions for legality ............................. 72
V. Balancing collective action with other rights and freedoms
   (national level) ....................................................................................... 72
VI. (Potential) impact of ECJ case law (on fundamental freedoms) on the national regulation concerning collective action .......................... 73

Conclusion ............................................................................................... 75

Bibliography. ............................................................................................. 75
2.4. **Collective action in Italy. Conceptualising the right to strike**  
*Edoardo Ales, Lorenzo Gaeta and Giovanni Orlandini*  

I. Collective action: what are we talking about?  
   A. Historical background  
   B. Concept of collective action  

II. Collective action: juridical status  
   A. Sources of definition and regulation of collective action  
   B. (Legal) definition of the main features of collective action  
   C. Entitlement  
   D. Consequences for those organising or participating in a collective action  

III. Limitation of collective action with reference to its aims and content  

IV. *Ex ante* or *ex post* judiciary/administrative control  

V. Procedural requirements/preconditions for legality  

VI. Balancing collective action with other rights and freedoms (national level)  
   A. Preliminary remarks  
   B. The right to strike, abstention of law and strike in essential services  
   C. The end of the abstention of law: Act n. 146 of 1990  
   D. A change of perspective: conflict in essential services in the light of Act 83 of 2000  

VII. (Potential) impact of ECJ case law (on fundamental freedoms) on the national regulation concerning collective action  
   A. Economic freedoms as constraints on industrial disputes  
   B. The principle of last resort and the purpose of the strike  
   C. Freedom to provide services and collective agreements  
   D. Compensation claims of undertakings damaged by an unlawful strike  

Bibliography  

---  

2.5. **Collective action in Spain**  
*Antonio Baylos*  

I. Collective action: juridical status  
   A. Legal entitlement and exercise of the right to strike: strike action as a procedure  
   B. Publicity of the strike, picketing and information  

II. Limitation of ‘collective action’: aims and content  
   A. External restrictions on the right to strike and the constitutional filter  

---  

Persoonlijke kopie van ()  
Collective Action_09.indd  7  
31-5-2010  10:23:56
B. Internal restrictions; the so-called 'predatory strikes': the presumption of abuse of rights (reference to case law, the Viking and Laval cases) ......................................................... 117

III. Consequences of exercising the right to strike: lawful and unlawful strikes ................................................................. 120
A. Effects of strike action ......................................................... 120
B. In particular, limiting the powers of the employer during the regular exercise of the right to strike ............................. 122
C. Effects of an unlawful strike ................................................. 123

IV. Balancing collective action with other rights and freedoms: strikes affecting 'essential services' .................................. 124
A. Defining the concept of "essential service" ............................. 125
B. Formal and material guarantees surrounding the act of imposing a minimum service .................................. 127
C. Jurisdictional control and excess authority in the establishment of minimum services .................................................. 131

Bibliography ................................................................. 133

2.6. Collective Action in The Netherlands
Teun Jaspers ................................................................. 135

I. Collective action: what are we talking about? ......................... 135
A. Some figures ................................................................. 135
B. The concept of collective action ......................................... 137

II. Collective action: juridical status ........................................ 139
A. Sources of definition and regulation of collective action .......... 140
B. Legal definition of the main features of collective action .......... 142
C. Entitlement ................................................................. 145
D. Consequences for those organising or participating in a collective action ......................................................... 146

III. Limitation of collective action with reference to its aims and content ................................................................................. 147
A. Conventional peace clause ................................................. 148
B. Conflict of rights ............................................................. 149
C. The objective of the actions ................................................ 150

IV. Ex ante or ex post judiciary/administrative control ................. 160
A. Ex ante: Conciliation and arbitration .................................. 160
B. Ex post assessment: by court decision .................................. 163

V. Procedural requirements/preconditions for legality .............. 164

VI. Balancing collective action with other rights and freedoms (national level) ................................................................. 165

VII. (Potential) impact of ECJ case law (on fundamental freedoms) on the national regulation concerning collective action .......... 168

Bibliography ................................................................. 170
2.7. **Collective action in the United Kingdom**

**TONIA NOVITZ** ................................................................. 173

I. Collective action: what are we talking about? ......................... 173
II. Collective action: juridical status ........................................ 174
   A. Sources of definition and regulation of collective action ....... 175
   B. Legal definition of the main features of collective action ....... 180
   C. Entitlement ............................................................... 180
   D. Consequences of collective action on organisers/participants’
      employment relationship ............................................ 182

III. Limitation of collective action referred to its aims and contents .... 187
IV. *Ex ante* or *ex post* administrative/judicial control ............... 191
V. Procedural requirements/preconditions for legality .................. 194
VI. Balancing collective action with other rights and freedoms which fall
    outside the employment relationship (at national level) ......... 199
VII. The present and potential impact of ECJ case law (on fundamental
    freedoms) on national regulation concerning collective action .... 200

Bibliography ............................................................... 210

3. **Collective action in labour conflicts under the Rome II Regulation**

**FILIP DORSSEMONT and AUKJE A.H. VAN HOEK** .................. 213

I. Conceptual framework .................................................... 214
   A. Article 9 of Rome II: background and standard of evaluation .... 214
   B. Introducing the debate – *Tor Caledonia* .......................... 217
   C. The debate during the *Travaux préparatoires* ..................... 220
   D. Cross-border industrial action in employment law and the
      private international law perspective ................................ 222

II. The difficult issue of classification: the scope of Article 9 of Rome II .. 227
   A. The concept “industrial action” ..................................... 227
   B. The non-contractual obligation ....................................... 232
   C. The scope regarding the *ratione personae* .......................... 234
   D. Main issues and preliminary issues .................................... 235
   E. The right to strike as a “civil and commercial matter” ............ 237

III. The conflict of law rules .................................................. 238
   A. The conflict of law rule, *locus actus* and alternatives ............ 238

Bibliography ............................................................... 240
4. The law and the courts. Regulating strike in seven European countries
   EDOARDO ALES ......................................................... 243

I. Collective action: what are we talking about? ......................... 243
II. Strike as a constitutional right ........................................... 243
III. Strike as a right .......................................................... 245
IV. Strike as a freedom .......................................................... 248
V. Some comparative remarks ................................................. 248

5. The impact of Viking and Laval. Contesting the social function and legal regulation of the right to strike
   TONIA NOVITZ .............................................................. 251

I. Introduction ................................................................. 251
II. The judgments in Viking and Laval ....................................... 253
III. The assumptions underlying the ECJ jurisprudence .................... 256
IV. Running counter to ECJ assumptions: the evidence from the country reports .................................................. 258
V. An analysis of the challenge posed ........................................ 269

Bibliography .................................................................. 272
LIST OF CONTRIBUTORS

Edoardo Ales is Professor of Labour Law and Equal Opportunity Law at the University of Cassino (Italy), Professor of EU Labour Law and Policy at LUISS – Guido Carli (Roma – Italy) and Professor of Labour Law at the Pontifical Lateran University (Roma – Italy).

His main fields of research are Comparative Labour Law, EU Labour Law, EU Social Policy and Labour Law in the Public Sector.

In 2005 he has coordinated the Group of experts on Transnational Collective Bargaining appointed by the European Commission.

Antonio Baylos is Professor of Labour Law and Social Security at the University of Castilla La Mancha (Spain), Head of Department of Labour Law and Social Work.

His main fields of research are EU Labour Law and International Labour Standards, Collective Labour Law and Employment Law.

Olaf Deinert is Professor of Labour Law, Social Law and Civil Law at the Georg-August-University of Göttingen (Germany) and co-director of the Institute for Labour Law.

His main fields of research are National and EU Labour Law, including Private International Law and Social Law.

Since 2007 he is a lay judge at the German Federal Labour Court and a co-opted member of the board of the German Labour Law Court’s Association.

Filip Dorssemont is hosted as Professor of Labour Law at the Université Catholique de Louvain (Louvain-la-Neuve – Belgium) thanks to a Mandat d’Impulsion Scientifique (Ulysse) which is granted by the Belgian Fonds national de la Recherche Scientifique of the Communauté française. He was invited as Guest Professor at the Université Robert Schumann de Strasbourg (2001); University of Cassino (2002) and the Università statale di Milano (2008–2009-2010) to teach EU Labour Law.

Lorenzo Gaeta is Professor of Labour Law at the University of Siena (Italy) and Professor of History of Modern Constitutions at the University of Siena in Grosseto. Since 2004 he is Dean of the Faculty of Law of the University of Siena.

His main fields of research are Labour Contract, Industrial Conflict, History of Labour Law.
Teun Jaspers is Professor of Labour Law at the University of Utrecht (The Netherlands).

His main fields of research are national Labour Law, European and International Labour Law and Social Policy.

He was former Member of the European Committee of Social Rights (formerly the Committee of Independent Experts of the European Social Charter of the Council of Europe), member of the group of experts on Transnational Collective Bargaining appointed by the European Commission; co-editor of the study on Cross-border Collective Actions (2007) and member of the steering committee of the Specific Targeted Research Project: Social regulation of European transnational companies (CSR), financed by the European Commission.

Sylvaine Laulom is lecturer in law in the Law Faculty at the University of Saint-Etienne (France) and member of CERCRID (Centre de recherches critiques sur le droit). Her research interests include Labour Law, European Social Law and Comparative Law.

Tonia Novitz is Professor of Labour Law at the University of Bristol (United Kingdom). She is also a member of the editorial board of the UK Industrial Law Journal, with special responsibility for the Recent Legislation section. Her publications include International and European Protection of the Right to Strike (Oxford University Press, 2003). In addition, she has written on domestic Labour Law, EU Social Policy, EU external relations, and mechanisms for the protection of human rights.

Giovanni Orlandini is Professor of Labour Law and Social Security Law at the University of Siena (Italy) and Professor of Social Security Law at the University of Florence (Italy).

His main fields of research are EU Labour Law and Collective Labour Law. He is a member of the Group of experts for the Study on the legal aspect of the posting of workers in the framework of the provision of services in the EU, appointed by the European Commission.

Aukje A.H. van Hoek is Professor of Private International Law and Civil Procedure at the University of Amsterdam. Her main fields of research are the legal consequences of and conditions for economic and social integration. As a specialist in the conflict of laws, she concentrates on the coordination between national legal systems and the cooperation between national institutions with regard to the enforcement of private law rules. Within this field she specializes in the regulation of cross border labour relations in the EU. From 2004 to 2009 she was a member of the Dutch Standing Government Committee on Private International Law - an official advising body of the Dutch government. She is a honorary justice in the Court of Appeal (labour law section) in Den Bosch.