

Facts of the Case

Viking, a company incorporated under German law, is a large ferry operator. It operates seven vessels, including the 'Jenny' which, under the German flag, plies the route between Tallinn (Estonia) and Travemünde (Germany). Germany and Estonia are Member States of the European Union. The crew of the 'Jenny' are members of the GSU – the German Union of Seamen. Viking and GSU have concluded a collective agreement on the wages of the seaman. GSU campaigns are enforced by boycotts and other solidarity actions amongst workers. So long as the 'Jenny' is under the German flag, Viking is obliged to pay the crew wages at the same level as those applicable in Germany. Estonian crew wages are lower than German crew wages. The 'Jenny' was running at a loss as a result of direct competition from Estonian vessels operating on the same route with lower wage costs. As an alternative to selling the vessel, Viking sought in October 2010 to reflag it by registering it in Estonia, in order to be able to enter into a new collective agreement with a trade union established in Estonia and negotiate wages at the lower Estonian pay-level. In order to do so Viking wants to establish a subsidiary in Estonia. GSU expressed its opposition to this plan and called its members for a collective boycott in form of a strike which took place subsequently, in order to prevent Viking from registering the 'Jenny' in Estonia, or alternatively to impel them to negotiate a new collective agreement with the GSU. Viking called upon the Labour Court of First Instance of Lübeck (Germany) requesting it to declare that the action taken by GSU is contrary to Art 49 TFEU, and to order GSU not to infringe the rights which Viking enjoys under Union law.

Submissions of the Parties

Viking

Viking is of the opinion that the actual and threatened collective actions by the GSU infringe its freedom of establishment. It argues that it was the purpose of the internal market that there was competition about wages and that the collective boycott therefore infringed the essence of the freedom of establishment, which could not be justified.

GSU

The GSU claims, inter alia, that the right of trade unions to take collective action to preserve jobs is a fundamental right recognised by EU Law. Consequently, trade unions have the right to take collective action against employers established in a Member State to seek to persuade them not to move part or all of their undertaking to another Member State. Furthermore, the GSU, as a legal person under private law, denies being bound by the freedom of establishment in the first place. It claims that only Member States are capable of violating fundamental freedoms.

Tasks

- 1) You are a trainee lawyer at the labour court of first instance in Lübeck. Your supervisor – who is the judge competent to rule on the case (Case No. 4 Ca 222/22) – asks you to draft a legal analysis of *Viking v. GSU* identifying the main legal problems, particularly possible violations of EU law.
- 2) After having discussed your results with your supervisor (**Teacher's note:** You should discuss the results for Task 1 before you show students Task 2) she admits that she is uncertain about the interpretation of EU law. She asks you what you would recommend doing in such a case.
- 3) Your supervisor would like to refer the case to the CJEU (**Teacher's note:** You should discuss the results for Task 2 before you show students Task 3)
 - a. Before submitting the request for a preliminary ruling, she wants to know if such a request would be admissible and under what conditions. She emphasises that she is uncertain about the interpretation of EU law regarding the following questions:
 - i. If the case at hand falls within the scope of application of Art. 49 TFEU
 - ii. If Art. 49 TFEU has horizontal direct effect
 - iii. If the action of GSU constitutes restriction on Art. 49 TFEU
 - iv. If such restriction can be justified, particularly if permitting the collective action in the case at hand would strike a fair balance between the fundamental rights of the parties to the dispute and if it would pass the proportionality-test
 - b. Also, she is wondering if she might even *be obliged* to refer the case to the CJEU?
 - c. Finally, your supervisor asks you to prepare a draft of the order to refer her questions in the case of *Viking v. GSU* to the CJEU including the exact formulation of the questions to ask the CJEU and the reasoning for the referral.

European Union Law

Article 3 TEU

[...] 3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

Article 49 TFEU

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Article 54 TFEU

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

"Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

Article 151 TFEU

The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Union and the Member States shall implement measures which take account of the

diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy.

They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action.

Article 267 TFEU

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
 - (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
- Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Article 16 Charter of Fundamental Rights of the European Union

Freedom to conduct a business

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

Article 28 Charter of Fundamental Rights of the European Union

Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

National Law

Section 823 German Civil Code (BGB) - Liability in damages

(1) A person who, intentionally or negligently, unlawfully injures the life, limb, health, freedom, property or some other right of another person is liable to provide compensation to the other party

for the damage arising therefrom.

(2) The same duty is incumbent on a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it is possible to violate it also without fault, then liability to compensation only exists in the case of fault.

Section 1004 German Civil Code (BGB) - Claim for removal and injunction

(1) If the ownership is interfered with by means other than removal or retention of possession, the owner may demand that the disturber remove the interference. If there is the concern that further interferences will ensue, the owner may seek a prohibitory injunction.

(2) The claim is excluded if the owner is obliged to tolerate the interference.

Article 9 Basic Law for the Federal Republic of Germany (GG)

[Freedom of association]

(1) All Germans shall have the right to form societies and other associations.

(2) Associations whose aims or activities contravene the criminal laws or that are directed against the constitutional order or the concept of international understanding shall be prohibited.

(3) The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. Measures taken pursuant to Article 12a, to paragraphs (2) and (3) of Article 35, to paragraph (4) of Article 87a or to Article 91 may not be directed against industrial disputes engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions.

LABOUR COURT LÜBECK

Case No. [...]



[DATE]

ORDER

In the proceedings

[Name]

v.

[Name]

the [X] chamber of the Labour Court Lübeck has decided on the oral hearing of [...] by the judges at the Labour Court ...

- I. The proceedings are suspended.
- II. Pursuant to Article 267 section 1 letter a of the Treaty on the Functioning of the European Union, the following questions are referred to the Court of Justice of the European Union for a preliminary ruling: [Questions]

Grounds for the Reference

- I. [Facts of the Case]
- II. [Reasons for the Decision]

