## SOLUTION OUTLINE

[***Note:*** *The Case is based in the CJEU Judgment of the Court (Grand Chamber) of 11 December 2007, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti (Case C-438/05).*]

### Task 1:

**Violation of Art 49 TFEU**

By taking collective action against Viking to prevent them from registering the 'Jenny' in Estonia, or alternatively to impel them to negotiate a new collective agreement with the GSU, the GSU may have violated Viking's freedom of establishment according to Art 49 TFEU.

1.

The first question that needs to be answered is the scope of application of Art 49 TFEU. Art 49 TFEU prohibits any restrictions on the freedom of establishment. According to Art 49 § 2 TFEU, freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, as well as the setting up of agencies, branches or subsidiaries in the territory of any Member State. Viking is a company formed in accordance with the law of a Member State – Germany – and has its registered office, central administration or principal place of business within the Union, according to Art 54 § 1 TFEU, and therefore also enjoys the protection afforded by Art 49 TFEU. Viking is planning on establishing a subsidiary in Estonia. GSU expressed its opposition to this plan and called its members for a collective boycott which took place subsequently.

The second question that arises is if collective action initiated by a trade union or a group of trade unions against an undertaking in order to prevent it from establishing a subsidiary in another Member State and to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising its freedom of establishment, falls within the scope of Art 49 TFEU.

"[33] In this regard, it must be borne in mind that, according to settled case-law, [Article 49 TFEU does] not apply only to the actions of public authorities but extend[s] also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services. […]

Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, limiting application of the prohibitions laid down by these articles to acts of a public authority would risk creating inequality in its application […].

[35] In the present case, it must be stated, first, that the organisation of collective action by trade unions must be regarded as covered by the legal autonomy which those organisations, which are not public law entities, enjoy pursuant to the trade union rights accorded to them, inter alia, by national

law.

[36] Secondly, […] collective action such as that at issue in the main proceedings, which may be the trade unions' last resort to ensure the success of their claim to regulate the work of Viking's employees collectively, must be considered to be inextricably linked to the collective agreement the conclusion of which [GSU] is seeking.

[37] It follows that collective action such as that described in the first question referred by the national court falls, in principle, within the scope of [Art 49 TFEU]."[1]

2.

Second, the question has to be answered if Art 49 TFEU can be relied on vis-à-vis a private entity such as a trade union (or only vis-à-vis a public authority).

"[57] [T]he abolition […] of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy […].

[58] Moreover, the Court has ruled, first, that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down, and, second, that the prohibition on prejudicing a fundamental freedom laid down in a provision of the Treaty that is mandatory in nature, applies in particular to all agreements intended to regulate paid labour collectively […].

[60] In the present case, it must be borne in mind that […] the collective action taken by FSU and ITF is aimed at the conclusion of an agreement which is meant to regulate the work of Viking's employees collectively, and, that those two trade unions are organisations which are not public law entities but exercise the legal autonomy conferred on them, inter alia, by national law. […]

[65] […] Furthermore, it must be pointed out that, in exercising their autonomous power, pursuant to their trade union rights, to negotiate with employers or professional organisations the conditions of employment and pay of workers, trade unions participate in the drawing up of agreements seeking to regulate paid work collectively."[2]

In the light of those considerations, the conclusion is that Art 49 TFEU may be relied on not only vis-à-vis public authorities but also private entities such as trade unions.

3.

The third question is if the collective action undertaken by GSU constitutes a restriction on the freedom of establishment and if such a restriction can be justified.

[1] CJEU, Judgment of the Court (Grand Chamber) of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti [short: Viking]*, Case C-438/05, para 33 et seq.

[2] CJEU, *Viking*, para 57 et seq.

"[Summary of the Judgement, para 4] [Art 49 TFEU] is to be interpreted to the effect that collective actions which seek to induce a private undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitute restrictions within the meaning of that article. […]

[Summary of the Judgement, para 4] Such collective action has the effect of making less attractive, or even pointless, the exercise by an undertaking of its right to freedom of establishment, inasmuch as it prevents that undertaking from enjoying the same treatment in the host Member State as other economic operators established in that State. Similarly, such collective action, seeking to prevent shipowners from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, must be considered to be at least liable to restrict an undertaking's exercise of its right of freedom of establishment. […]"[3]

4.

Lastly, we have to consider whether a restriction can be justified in order to protect the exercise of conflicting fundamental rights, *inter alia* the right to take collective action, including the right to strike.

"[75] It is apparent from the case-law of the Court that a restriction on freedom of establishment can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest. But even if that were the case, it would still have to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it […]

[77] In that regard, it must be observed that the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty […] and that the protection of workers is one of the overriding reasons of public interest recognised by the Court. […]"

"[43] [T]he right to take collective action, including the right to strike, is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, […] to which, moreover, express reference is made in [Art 151 TFEU] – and Convention No 87 concerning Freedom of Association and Protection of the Right to Organise, [ILO] – and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers […], which is also referred to in [Art 151 TFEU], and the Charter of Fundamental Rights of the European Union […]."[4]

"[79] Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of [Art 151 TFEU], inter alia, improved living and working conditions, so as to make

[3] Summary of the Judgment of the CJEU (Grand Chamber) of 11 December 2007, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, para 4.

[4] CJEU, *Viking*, para 43 et seq.

possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour. […]

[81] First, as regards the collective action taken by FSU, even if that action – aimed at protecting the jobs and conditions of employment of the members of that union liable to be adversely affected by the reflagging of the 'Jenny' – could reasonably be considered to fall, at first sight, within the objective of protecting workers, such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat. […]

[86]As regards the appropriateness of the action taken by FSU for attaining the objectives pursued in the case in the main proceedings, it should be borne in mind that it is common ground that collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members […].

[87] As regards the question of whether or not the collective action at issue in the main proceedings goes beyond what is necessary to achieve the objective pursued, it [must be] examine, in particular, on the one hand, whether, under the national rules and collective agreement law applicable to that action, FSU did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with Viking, and, on the other, whether that trade union had exhausted those means before initiating such action."[5]

*[Students are free to argue for any position at this point.]*

"[88] Secondly, in relation to the collective action seeking to ensure the implementation of the policy in question pursued by ITF, it must be emphasised that, to the extent that that policy results in shipowners being prevented from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, the restrictions on freedom of establishment resulting from such action cannot be objectively justified."[6]

*[Students are free to come to any conclusion regarding the justification of the infringement, if they provide adequate arguments.]*

## Task 2

Since the uncertainty at hand concerns the correct interpretation of Union law, a request for a preliminary ruling from the CJEU according to Art 267 TFEU should be recommended.

## Task 3

a) Admissibility

The question must be answered whether a reference for a preliminary ruling according to Art 267 TFEU would be admissible and under what conditions.

[5] CJEU, *Viking*, para 79 et seq.
[6] CJEU, *Viking*, para 88.

1.

According to Art 256 § 1 TFEU the CJEU has jurisdiction to deliver preliminary rulings. Hence the referral would have to be made to the CJEU, and not the General Court.

2.

Art 267 § 2 TFEU provides that a reference for a preliminary ruling may be made by any court or tribunal of a Member State, hence also by the Labour Court of First Instance of Lübeck (Germany).

3.

According to Art 267 TFEU, the questions referred must concern the interpretation of the Treaties or the interpretation or validity of EU secondary legislation, not the interpretation of national law. Furthermore, the questions may not be purely hypothetical.

"[28] [T]he Court has regarded itself as not having jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious, inter alia, that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical."[7] The court, however, grants the national courts a wide margin of appreciation.

"[29] In the present case, the reference for a preliminary ruling concerns the interpretation […] of provisions of the Treaty on freedom of establishment." [8] The collective actions by GSU directly effect Viking's decision to establish its subsidiary in Estonia and reflag the 'Jenny'. The questions referred are not merely hypothetical.

b) Obligation to make a reference for a preliminary ruling

According to Art 267 (3) TFEU, a tribunal or court of a Member State of the EU is obligated to make a reference for a preliminary ruling to the CJEU if a question of the interpretation or validity of EU law is raised and there is no judicial remedy under national law against the decisions of that tribunal or court (i.e., it is a tribunal or court of last instance.

In the case at hand, the decisions of the Labour Court of First Instance of Lübeck may be appealed against. Hence the court is not under an obligation to make a reference.

c) Draft reference (Order of the Labour Court of First Instance)

[7] CJEU, *Viking*, para 28.
[8] CJEU, *Viking*, para 29.

**LABOUR COURT LÜBECK**

**Case No. 5 Ca 222/22**

**2 June 2023**

**ORDER**

In the proceedings

*Viking*

vs.

*German Seemans Union*

the 5th chamber of the Labor Court Lübeck has decided on the oral hearing of 22 March 2022 by the judges at the Labor 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:

(1) Where a trade union or association of trade unions takes collective action against a private undertaking so as to require that undertaking to enter into a collective bargaining agreement with a trade union in a particular Member State which has the effect of making it pointless for that undertaking to re-flag a vessel in another Member State, does that action fall outside the scope of Article 49 TFEU?

(2) Does Article 49 TFEU have horizontal direct effect so as to confer rights on a private undertaking which may be relied on against another private party and, in particular, a trade union or association of trade unions in respect of collective action by that union or association of unions??

(3) Where a parent company is established in Member State A and intends to undertake an act of establishment by reflagging a vessel to Member State B to be operated by an existing

wholly owned subsidiary in Member State B which is subject to the direction and control of the parent company is threatened or actual collective action by a trade union or association of trade unions which would seek to render the above a pointless exercise capable of constituting a restriction on the parent company's right of establishment under Article 49 TFEU?

(4) Where:

- a parent company in Member State A owns a vessel flagged in Member State A and provides ferry services between Member State A and Member State B using that vessel;
- the parent company wishes to re-flag the vessel to Member State B to apply terms and conditions of employment which are lower than in Member State A;
- the parent company in Member State A establishes a subsidiary in Member State B and that subsidiary is subject to its direction and control;
- it is intended that the subsidiary will operate the vessel once it has been re-flagged in Member State B with a crew recruited in Member State B covered by a collective bargaining agreement negotiated with a trade union in Member State B;
- the vessel will continue to provide ferry services between Member State A and Member State B on a daily basis;
- a trade union established in Member State A takes collective action so as to require the parent and/or subsidiary to enter into a collective bargaining agreement with it which will apply terms and conditions acceptable to the union in Member State A to the crew of the vessel even after reflagging and which has the effect of making it pointless for the parent to re-flag the vessel to Member State B,

does that collective action strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services and is it objectively justified, appropriate, proportionate and in conformity with the principle of mutual recognition?

**Grounds for the Reference**

**I.**

The Court is confronted with an action for injunction by a private undertaking 'Viking' against the German Seeman's Union (GSU). Viking is seeking for an order against GSU to cease its collective action against Viking by which the GSU intended to require Viking to enter into a collective bargaining agreement with the GSU which has the effect of making it pointless for Viking to re-flag a vessel in Estonia and subsequently pay its staff members lower wages. The Court considers a decision of the Court of Justice of the European Union on the interpretation of Article 49 TFEU to be necessary for its judgment.

Viking is a company under German law and a large ferry operator. It operates seven ships, including the 'Jenny', which sails between Tallinn and Travemünde under the German flag. The crew of the 'Jenny' are members of the GSU. Viking and the GSU have a collective agreement on seafarers' wages. Campaigns by the GSU are reinforced by boycotts and other solidarity actions among workers. As long as the 'Jenny' sails under the German flag, Viking is obliged to pay the crew the same wages as in Germany. The Estonian crew's wages are lower than those of the German crew. The 'Jenny' was

making losses due to direct competition from Estonian ships. As an alternative to selling the ship, Viking tried in October 2010 to re-flag it in either Estonia or Norway in order to conclude a new collective agreement with a union based in one of these states and to be able to negotiate wages at the lower Estonian level. The GSU opposed this plan and called on affiliates to collectively boycott Viking, which took place.

*Viking* is of the opinion that the actual and threatened collective action by the GSU imposes restrictions on its freedom of establishment and, in the alternative, constituted unlawful restrictions on freedom of movement for workers and freedom to provide services. They argue that it is the purpose of the common market that there is competition about wages and that the collective strike is therefore infringing the heart of the provision on freedom of establishment, which cannot be justified.

> *Viking* is therefore seeking a declaration that GSU's action is infringing its right to establishment according to Art 49 TFEU and an injunction against the GSU to cease its collective action.
>
> The *GSU* has asked the court to establish that there is no infringement of Art 49 TFEU and deny such an injunction.

The *GSU* claims that the right of trade unions to take collective action to preserve jobs is a fundamental right recognised by EU Law. Consequently, the trade unions have the right to take collective action against an employer established in a Member State to seek to persuade it not to move part or all of its undertaking to another Member State. Furthermore, the GSU contests that as a private legal person it is bound by the freedom of establishment (or the freedom of movement for workers and freedom to provide services) in the first place. They claim that only Member States may violate fundamental freedoms.

**II.**

The request for an injunction is admissible.

In German law the claim to cease collective actions may generally be based on § 1004 and § 823 of the German Civil Code (BGB) in conjunction with Art 14 of the Basic Law (GG). Interference in the operation of an undertaking is, however, not unlawful if it is permissible as an industrial action ('Arbeitskampfmaßnahme'). In this regard the right to strike guaranteed by Art 9 (3) of the Basic Law affords special protection to industrial actions guaranteeing *inter alia* the right of the employees and trade union officials to participate in a strike. The crucial question at hand is how these conflicting rights should be balanced in the individual case and how a suitable and proportionate compromise may be struck between the two poles ('praktische Konkordanz').

[*An actual reference to the CJEU would need a comprehensive description of the national law, in order to enable the CJEU to render a well-informed decision. For the purpose at hand such a description of German Law would is however neither of interest to teachers from different national backgrounds nor necessary.*]

The court is of the option that this balance is highly influenced by EU Law. The question whether, where a parent company is established in a Member State and intends to undertake an act of establishment by reflagging a vessel to another Member State to be operated by an existing wholly owned subsidiary in the other Member State which is subject to the direction and control of the parent company is threatened or actual confronted with a collective action by a trade union which would seek

to render the above a pointless exercise, is capable of constituting a proportionate restriction on the parent company's right of establishment under Article 49 TFEU and how it is to be balanced with the Right of collective bargaining and action according to Art 28 CFR of the trade union, essentially influences the question how the balance between the freedom for entrepreneurs according to Art 14 of the Basic Law and the right to strike under Art 9 Basic Law should be struck in German law.

In order to answer this question it is, however initially necessary to determine whether a collective action taken by a trade union or association of trade unions against a private undertaking so as to require that undertaking to enter into a collective bargaining agreement with the trade union in a particular Member State which has the effect of making it pointless for that undertaking to re-flag a vessel in another Member State, falls outside the scope of Article 49 TFEU and if Article 49 TFEU has horizontal direct effect so as to confer rights on a private undertaking which may be relied on against another private party such as a trade union.

[*In an actual reference to the CJEU the national court may at this point deliver its own opinion on the interpretation of EU Law. Since students have already been asked to deliver an analysis of the substantive law in task 1, further elaborations are however not necessary here.*]

The Court has therefore decided to refer the questions above to the Court of Justice of the European Union for a preliminary ruling and to suspend the proceedings until a judgment has been made by that Court.