Sanctions for ‘EU-unlawful’
Collective Action

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Abstract

The Court of Justice of the European Union (CJEU) has made it clear that collective action taken by trade unions under certain circumstances might violate the freedom of services and the right of establishment under the Treaty (Articles 49 and 56 TFEU). However, the Court has not addressed the issue of which remedies are to be available against a trade union arranging such an ‘EU-unlawful’ collective action. This question was dealt with by the Swedish Labour Court ( Arbetsdomstolen) in its final judgment in the Laval case in December 2009. The chapter discusses this judgment and presents an alternative understanding of the EU law requirements concerning remedies for EU-unlawful collective action. It finds that the remedies for ‘EU-unlawful’ collective action should not be less favourable in comparison with domestic remedies for collective action that are unlawful according to national law (the principle of equivalence). It therefore explores the national rules in EU Member States in order to find some guidance for how to assess trade union liability for such actions. In conclusion the authors argue that national economic sanctions as a main rule also should be applicable to ‘EU-unlawful’ collective action.
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1 Introduction

In the *Laval* and *Viking* cases² the The Court of Justice of the European Union (CJEU) made it clear that collective action taken by trade unions might, under certain circumstances, violate the freedom of services and the right of establishment under the Treaty (Articles 49 and 56 TFEU). These cases have, together with *Rüffert* and *Commission v Luxembourg*, given rise to an intense debate.³

This chapter will not address under which circumstances a collective action might be ‘EU-unlawful’. Instead it will concentrate on which remedies are to be available if such an EU-unlawful collective action is initiated. This question is highly sensitive for industrial relations in many Member States. It is also of relevance to the debate on horizontal liability for breaches of EU law.

The issue of remedies for EU-unlawful collective action has been at the fore in three high profile disputes, the *Viking* case, the *Balpa* dispute and the *Laval* case. The *Viking* case, which concerned a collective action in Finland, was settled outside of court and the content of the settlement is not known. In the *Balpa* dispute in 2008 the threat of huge damages claims made the trade union withdraw its notice on a collective action.⁴ In those two disputes no final judgements were given. The question was, however, dealt with by the Swedish Labour Court in its final judgment in the *Laval* case.⁵

We will in this chapter first give a short overview of the final *Laval* judgment and will then analyse which requirements EU law puts on national remedies for EU-unlawful collective actions. Finally we will confront this analysis with a comparison of sanctions

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for unlawful collective actions in national law of some Member States.

2 The Judgment of the Labour Court

The Swedish Labour Court (Arbetsdomstolen) gave its final judgment in the Laval dispute in December 2009.6

The facts of the Laval case are fairly well known. Laval un Partneri Ltd was a Latvian company which posted workers from Latvia to work for construction companies in Sweden. Laval was subject to collective actions by Swedish trade unions. The aim of the collective actions was to force Laval to sign a collective agreement. Laval commenced proceedings before the Swedish Labour Court against the trade unions, seeking both a declaration that the collective actions were unlawful and an order that the actions should cease. Laval also claimed compensation for the damage suffered.

The Labour Court made a preliminary reference to the CJEU. The CJEU answered two questions. The first question was whether the collective actions were precluded by (now) Article 56 TFEU and the Posting of Workers Directive.7 The second question was whether a specific piece of Swedish legislation – the so called lex Britannia – was in breach of EU law. The shortest possible summary of the preliminary ruling is that the CJEU answered both questions with a “yes”. The collective actions were in conflict with Article 56 TFEU and the Posting of Workers Directive, and lex Britannia was in breach of Articles 56 and 57 TFEU.

Since the CJEU in its preliminary ruling had found that the collective actions were unlawful according to EU law, the only question the Swedish Labour Court had to take a stance on was

6 The Labour Court Judgement AD 2009 nr 89. An unofficial translation of the judgement is available on http://arbetsratt.juridicum.su.se/Filer/PDF/ErikSjoedin/AD%202009%20nr%2089%20Laval%20English.pdf

The Swedish Labour Court is the first and last instance in for many labour disputes, inter alia, disputes on collective actions. The Court has a tripartite composition. See further, Adlercreutz & Nyström, Labour law in Sweden, 150 ff.

whether the trade unions were obliged to pay damages to Laval due to the unlawful collective actions. Laval claimed damages for economic losses of around 150 000 Euro and punitive damages (that is damages for non-economic losses) of almost the same amount.

The reasoning of the Labour Court is very thorough and complex. The findings cover 28 pages in the court report. We will in the following summarise some of the main arguments.

The Labour Court observed that there are no national rules, either in statutes or in case law, which gave Laval a right to damages for collective actions that violate the Treaty. Liability in damages for the trade unions had therefore to be based solely on EU law.

The Court first recalls the case law of the CJEU concerning Member State liability for breaches of EU law. The principle of state liability was first applied in Francovich and has been developed in subsequent case law. According to this case law, a Member State may be liable for loss and damage caused to private entities as a result of breaches of European Union law. Private entities harmed have a right to damages when three conditions are met:

1. the rule of Community law breached is intended to confer rights upon individuals,
2. the breach is sufficiently serious, and
3. there is a direct causal link between the breach of Community law and the damage sustained by any individual.

We could call these the Brasseu du Pecheur-conditions.

The Labour Court states that liability for damages on an EU law basis, in the case law of the EU Court, has been extended to horizontal relations, that is when a private party claims damages in accordance with EU law against another private party. The Labour Court refers to two cases dealing with competition law (Courage v. Crehan and Manfredi v. Lloyd) and one case concerning free move-

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ment of workers (Raccanelli). One prerequisite for such horizontal liability is that the piece of EU law that has been violated has horizontal direct effect (that the EU provisions create rights for individuals that the national courts have to protect in horizontal relationships). From this case law the Labour Court draws the conclusion that it may be

‘considered established that there is a general legal principle within EC law that damages are also to be able to be awarded between private parties upon a violation of a treaty provision that has horizontal direct effect. That this principle is not only applicable within the area of competition law but also ought to be applicable with respect to violations against other treaty provisions can be seen from the judgement in the case, Raccanelli.’

The Labour Court found that the trade unions in principle were liable in damages ‘assuming that the remaining criteria for such liability are fulfilled’. The Court then referred to the Brasserie du Pêcheur-conditions, with one adjustment: the infringed EU law must have horizontal direct effect (it is not enough that it is ‘intended to confer rights on individuals’). When applying this formula to the case, the Labour Court found that Article 56 TFEU has horizontal direct effect in relation to the trade unions. It was also, according to the Court, evident that there is such causality as is required. Further, the Court considered the breach of Article 56 TFEU sufficiently serious.

The Labour Court stressed that the Brasserie du Pêcheur-conditions do not constitute an exhaustive regulation of damages. In the absence of any EU legislation it is in accordance with the rules of national law on liability that the Member States must make reparation for the consequences of the loss and damage caused. Therefore, the Labour Court applied the regulations concerning damages in the Swedish Co-Determination Act analogously. A trade union organising a collective action which is unlawful according to the Co-Determination Act is liable to pay both reparation for economic loss and punitive damages (allmänt skadeständ), the latter being a particular form of damages which may be payable in addition to compensation for the economic loss.

According to the Labour Court, it was evident that Laval had suffered economic losses as a consequence of the unlawful collective actions, but that Laval had not been able to prove that it had suffered economic loss to the amount claimed. The claim with respect to the economic damages was therefore denied. The Labour Court set the punitive damages that Laval were to receive from the trade unions to 550 000 SEK (about 55 000 Euro).

Three out of seven judges in the panel were of a dissenting opinion.

3. Is there a general principle of EU law on liability of private entities to pay damages for breach of EU law (analogous to the state liability principle)?

The stance taken by the Labour Court gives rise to the question of whether the CJEU has established a general principle of EU law concerning the liability of private entities to pay damages for breach of EU law (analogous to the state liability principle). As already mentioned, the Labour Court refers to three cases: Courage, Manfredi and Raccanelli.

Both Courage (from 2001) and Manfredi (from 2006) concerned breaches of EU competition law (now Article 101 TFEU). In Courage a pub tenant had concluded a standard form of agreement for lease of a pub, which contained a provision that he had to buy beer exclusively from the Courage brewery. The pub tenant argued, inter alia, that the beer tie in his contract was contrary to Article 101 TFEU and that he had suffered damages since the price he had to pay for the beer was substantially higher than the price Courage applied for independent pubs. In the Manfredi case, a consumer claimed damages from an insurance company for the increase in the cost of premiums paid by reason of an agreement between several insurance companies, which had been declared unlawful according to competition law.

In both cases the CJEU stated that the full effectiveness of Article 101 TFEU would be put at risk if it was not open to any private entities to claim damages for loss caused to him by a contract or by
conduct liable to restrict or distort competition. Article 101 is thus interpreted as meaning that any private entities can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm.

Could these cases be regarded as expressions of the general principle of horizontal liability as proclaimed by the Labour Court?

The interpretation of *Courage* and *Manfredi* has been subject to thorough debate in the literature. The common position seems to be that the *Courage* and *Manfredi* cases are not expressions of a general principle of horizontal liability, analogous to the state liability principle. There are several reasons for this position.

First, it can be noted that the *Brasserie du pêcheur* or subsequent state liability case law are not mentioned at all in *Courage*. In the subsequent case, *Manfredi*, the Court does refer to *Brasserie du pêcheur* (paragraph 93 and 96). The reference, however, is not made when answering the question of whether Article 101 TFEU entitles a harmed individual to claim damages in horizontal relations. Rather, the reference to *Brasserie du pêcheur* is given when the Court addresses the specific question of whether Article 101 is to be interpreted as requiring national courts to award punitive damages and compensations for loss of profit (*lucrum cessans*), when such damages are available in national law (see more about the principle of equivalence below).

Second, it must be stressed that the Court, when explaining the conditions for awarding damages, neither refers to nor applies the *Brasserie du pêcheur*-conditions. The reasoning of the Court in *Courage* and *Manfredi* follows another line of reasoning, which we will return to below.

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13 See, for instance, Dougan, National remedies before the Court of Justice: issues of harmonisation and differentiation 378, Nazzini in Barnard & Odudu, The outer limits of European union law 420 and Ward, Judicial review and the rights of private parties in EU law 249 ff. Advocate General van Gerven argued in his famous opinion in C-128/92 *Banks* [1994] ECR I-1209 that the Francovich doctrine should apply also in horizontal relationships.
Third, the reasons put forward by the Court for establishing the doctrine on state liability differs from the ratio legis for horizontal liability in the event of a breach of Article 101 TEU. The basis for state liability is, according to the Court, first, the full effectiveness of Community rules and the effective protection of the rights which they confer and, second, the obligation to cooperate imposed on Member States by (now) Article 4.3.14 Francovich is often explained as a reaction to lack of commitment by the Member State to honour at home what they have promised in Brussels.15 The argument is not valid in horizontal relations. Private parties, like trade unions, could not be under obligation to cooperate.16 In Racanelli the Court confirmed its earlier case law according to which (now) Article 45 TEU could, under certain circumstances, apply in horizontal relations.17 The Court was also asked what the consequences in law are if there had been a violation of Article 49 TFEU. The Court’s answer contains, in my opinion, reference to the procedural autonomy of the Member States, limited by the principle of effective judicial protection, which we will return to below. However, the wording used by the Court is somewhat ambiguous. After stating that Member States are free to choose between different remedies (paragraph 50, cited below), the Court holds that it is for the court of the Member State to assess ‘the nature of the compensation which he would be entitled to claim’ (paragraph 51, italics added).18 The wording indicates that this sentence

15 See, for instance, Dougan in Craig & De Búrca, The Evolution of EU Law p. 414 f.
16 Ward, Judicial review and the rights of private parties in EU law 252.
18 Danish: ‘som han måtte være berettiget til’. French: ‘la nature de la réparation à laquelle il serait en droit de prétendre’. German: ‘welche Art von Wiedergutmachung er beanspruchen könnte’. The Swedish version, which is the one the Swedish Labour Court referred to, is instead using the indicative: ‘fastställa den ersättning som denne har rätt att kräva’,

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is to be read as ‘the Member State court shall decide both if damages are to be awarded and the more precise modalities’, rather than ‘damages must be available at national level, but the more precise modalities are to be decided by the Member State court.’ This interpretation is also consistent with the starting point of the Court, according to which the Member States are free to choose between the different remedies. Further, and perhaps most importantly, it seems most unlikely that the CJEU would finally decide such a controversial issue as horizontal liability for breaches of directly effective Treaty provisions in a judgment with only three judges and without an opinion from the Advocate General, and without giving any further reason for its decision.  

It follows from the foregoing that the Labour Court’s arguments are far from convincing. As a court of last instance, the Labour Court is required to make a reference to the CJEU before giving a judgment which comprises interpretation of EU law. A national court may refrain from requesting a preliminary ruling if the point of law at issue is clear from the settled case-law of the Court or leaves no room for any reasonable doubt. From the above it follows that the issue of liability for private entities to pay damages for breach of EU law is manifestly unclear. Further, according to the so called CILFIT-criteria the national court must be convinced that the interpretation is equally obvious to the courts of the other Member States and to the CJEU. In this case, three out of seven judges did not agree with the interpretation made by the majority of the Court. When the interpretation is not obvious to all members of one and the same court, it can certainly not be obvious to the courts of all Member States.  

The conclusion of the Swedish Labour Court, that it is established that there is a general principle of EU law on liability of private entities to pay damages for breach of EU law (analogous to the state liability principle), must have particularly low value as a precedent, taking into account the lack of support for the reasoning which would be translated to English as ‘the compensation which he is entitled to claim’.  

19 For another reading of the case, see Bernitz & Reich, Common Market Law Review 2011 p.612.  


in the case law of the CJEU, the small majority dictating the judgment and the fact that no preliminary reference was made.

4 A method for determining when liability of private entities to pay damages for breach of EU law is required

If there is no such principle, as the Labour Court argues, what should apply instead? Even if one does not accept the Labour Court’s view, this does not imply that Courage and Manfredi lack relevance for the question of whether a trade union arranging an ‘EU-unlawful’ collective action is liable to pay damages according to EU law.

The main finding in Courage and Manfredi was that individuals are entitled to claim compensation for that harm caused them by an agreement or practice violating Article 101 TFEU. This finding – which is specific to Article 101 TFEU and the kinds of violations of Article 101 TFEU specific to those cases – could not in itself be applied analogously to other violations of other pieces of EU law. The judgments do however provide a method or programme for determining whether or not it should be possible for private entities to claim compensation for a violation of EU law caused by another private entity. In our opinion, this method is not limited to competition law, but might also be relevant to other EU provisions with horizontal direct effect, although the requirements for awarding damages must be qualified. The reasoning of the CJEU in Courage indicates an analysis in five steps.

First, the Court concludes that individuals may rely on breaches of Article 101 TFEU before national courts in horizontal relations (paragraph 24), consequently, it has direct horizontal effect.

22 Arnell, The European Union and its Court of Justice, p. 328, Biondi & Farley, The right to damages in European law, p. 75 and Dougan, National remedies before the Court of Justice: issues of harmonisation and differentiation. See also C-253/00 Muñoz and Superior Fruticola [2002] ECR I-7289.

23 The following is inspired by a responsum given by Professor Torbjörn Andersson in the Laval-case (available in the file of the Labour Court).
It is a debated issue how the legal effects of a directly effective provision are best described and understood. We will not enter into that discussion. In short, a national court should apply a directly effective EU provision instead of a conflicting norm of national law or in the absence of transposition.

However, just by stating that a national court should directly apply, for instance Article 56 TFEU, does not answer the question of when liability of individuals to pay damages for breach of EU law is required. EU provisions often only give a norm concerning which behaviours are accepted or not (a rule of conduct or a substantive provision), but do not specify what should happen if these rules are violated. To give one example: Article 18 TFEU prescribes that any discrimination on grounds of nationality should be prohibited, but does not indicate how a breach of the prohibition shall be remedied. The EU provision is, in this sense, incomplete.

Due to this, a directly effective EU (substantive) provision will usually be complemented with national remedies. In, for instance, Raccanelli the Court explains this.

‘… [EU law does not prescribe any specific measure] to be taken by the Member States … in the event of a breach of the prohibition of discrimination, but leaves them free to choose between the different solutions suitable for achieving the objective of those respective provisions, depending on the different situations which may arise’ (paragraph 50).

This starting point is often described as a principle of national procedural autonomy. The fact that a directly effective (substantive) EU provision has to be complemented with national remedies does not give the Member States full procedural autonomy. The limita-

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24 See, for instance, de Witte in Craig & De Búrca, The Evolution of EU Law 323-362, Craig & De Búrca, EU law : text, cases and materials, ibid.268 ff., Prechal in Barnard, The fundamentals of EU law revisited : assessing the impact of the constitutional debate 35 ff. and Edward in Prinssen & Schrauwen, Direct effect : rethinking a classic of EC legal doctrine

25 Rosas & Armati, EU constitutional law : an introduction 64.

26 On the concepts of substantive rules and rules of conduct, see Malmberg et al, Effective enforcement of EC labour law 30ff.

27 Arnulf, The European Union and its Court of Justice 268.
tion in the procedural autonomy of the Member State is addressed in the following questions posed by the Court in *Courage*.

Second, after concluding that Article 101 TFEU has direct horizontal effect, the Court in *Courage* poses the question of whether the possibility of seeking compensation for loss is required to ensure the full effectiveness (*effect utile*) of the piece of EU law in question (paragraph 25). This question is answered with arguments closely connected to the enforcement of the particular piece of EU law at hand. The Court mentions that agreements or practices which are liable to restrict or distort competition are frequently covert. From that point of view, the possibility of actions for damages by parties of such an agreement before the national courts can make a significant contribution to the full effectiveness of Article 101 TFEU. The Court’s conclusion is that an absolute bar in national law against bringing damages claims for breaches of Article 101 is not compatible with EU law (paragraph 26-27). In *Manfredi* the Court went one step further and stated that any individual can claim compensation for that harm suffered by a breach of Article 101 (paragraph 63).

The Court then iterates that in the absence of EU rules governing the matter, remedies and sanctions for breach of horizontal directly effective EU law are to be decided by the domestic legal system, subject to the principles of equivalence and effectiveness (paragraph 29).

The third question thus is if the claim made by the claimant may be awarded according to national law. If that is the case, the national court need not address the requirements of EU law.

If, on the other hand, the question is answered in the negative, two more questions must be asked. It follows from the case law of the CJEU that EU rules are not to be discriminated against by being subject to less favourable conditions for enforcement in comparison with domestic rules of a similar nature (*the principle of equivalence*) and that national rules may not render the exercise of (rights conferred by) Community law virtually impossible or excessively difficult (*principle of effectiveness*). This case law is now reflected in the Treaty of the European Union, where it is prescribed that Member States should provide remedies sufficient to ensure effective legal protection in the fields covered by EU law (Article 19 TEU).

*The fourth question* thus is whether it is possible, according to national law, to award damages in similar cases. If that is the case, the
same possibility must apply with respect to claims based on EU law (the principle of equivalence). This was not an issue in Courage. In Manfredi, however, the Court made it clear that if, for instance, punitive damages may be awarded in similar actions according to national law, it must also be possible to award such damages pursuant to actions founded on the Union rules (paragraph 93).

The fifth question is whether a national rule that limits the possibility of claiming for damages, renders the exercise of EU law excessively difficult (principle of effectiveness). The Court had already (in paragraph 26) determined that the full effectiveness of Article 101 TFEU would be put at risk if it was not open to any individual to claim damages for loss caused to him by a contract liable to restrict or distort competition. The arguments then focused on the effectiveness of EU law. The Court at this stage turns to national law and analyses whether the exclusion or reduction of the right to damages pursuant to national law might be justified. In Courage the CJEU gives a list of considerations which are acceptable for limiting the liability, such as preventing unjust enrichment and that a party should not profit from his own unlawful conduct. Further, it is possible to take into account the economic and legal context of the parties, the market position of the parties and the possibility of reducing loss.

It is obvious that the grounds which could justify national limitations of the right to damages mentioned in Courage do not constitute an exhaustive list. It should also be noted that the justifications which the CJEU discusses in Courage relate to damages for violation of Article 101. Further, when discussing which limitations of damages are justified, the Court takes into account whether the restrictions are recognised in most of the legal systems of the Member States.28

5 The method of assessing damages in EU-law

What would then be the answer if the method just mentioned were to be applied regarding claims for damages on trade unions for arranging ‘EU-unlawful’ collective action? We will not try to give a

full answer to that question, but rather limit ourselves to some short remarks.

(1) In *Laval*, the CJEU explained that (now) Article 56 TFEU confers on individuals rights which the national courts must protect. Further, the Court held that this Article applies also to obstacles created by private organisations exercising their legal autonomy in order to collectively regulate the provision of services.\(^{29}\) In *Viking*, the CJEU stated that (now) Article 49 TFEU may be relied on by a private undertaking against a trade union or an association of trade unions.\(^{30}\) The Court, thus, has clarified that Articles 49 and 56 TFEU have direct horizontal effect when a trade union exercises their legal autonomy in order to collectively regulate the provision of services and that a national court should apply these articles instead of a conflicting norm of national law.

(2) When it comes to the question of whether the interest of the full effectiveness of EU law requires damages as a remedy, it is possible to point to several differences between the situations in *Courage* and *Manfredi*, on the one hand, and the kind of ‘EU-unlawful’ collective action discussed here, on the other.

I could first be noticed that the practices in *Courage* and *Manfredi* had an illegal aim. EU-unlawful collective action will, on the other hand, typically have the aim of protecting the workers. This aim is regarded as a legitimate interest, which in principle could justify restrictions of the fundamental freedoms of the Treaty.\(^{31}\) The central issue will be if a collective action goes beyond what is necessary to achieve this aim. When considering if the interest of the full effectiveness of EU law requires damages as a remedy, due account must be taken also of the fact that the right to strike is regarded as a fundamental right\(^ {32}\) and that the threat of severe damages might risk creating a situation where the right to strike cannot be exercised.

One of the main arguments in *Courage* was that the practices in such a case are covert and difficult to detect. A right to damages

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29 C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 97-98.
31 *Ibid*., paragraph 77.
32 See for instance Article 28 of the Charter of fundamental rights of the EU.
would give each of the parties an incentive to reveal the practices which distort competition and thus strengthens the practical working of competition law. Collective actions, on the contrary, are almost without exception made public. Further, in Member States often there are mechanisms for preventing unlawful collective action, for example different forms of mediation or interim decisions by Courts, which serve as an alternative to damages claims. It may also be mentioned that the EU has exclusive competence as regards the establishment of the competition rules for the functioning of the internal market (Article 3 TFEU). In such areas, Member States may only adopt legally binding acts if so empowered by the Union or for the implementation of EU acts (Article 2 TFEU). Thus, it is natural that the EU provides full regulation of the area, including both what behaviour is acceptable or not on the market, and the sanctions available in case of a breach of EU law. In the areas of internal market and social policy, on the other hand, the competence is shared between the EU and Member States. In areas of shared competence the EU may – according to the principle of subsidiarity – act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States (Article 5 TEU). Arguably, intrusions in the procedural autonomy of a Member State requires stronger justifications in areas of shared competence than in areas of exclusive competence.

Further, collective actions are excluded from the competence of the EU to adopt directives according to its competence in social policy (Article 152.5 TFEU). Even if this provision does not exclude collective action from the domain of the economic freedoms, it calls for providing the Member State with a margin of appreciation in regulating remedies for unlawful collective actions.

The restriction of EU competences under Article 152.5 TFEU does not only apply to collective action, but more generally to the principle of freedom of association. It is worth noting that this principle covers important elements, for example the autonomy of the collective bargaining system and the possibility for the social partners to decide upon procedures and rules related to collective

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bargaining. In some Member States the autonomy of collective bargaining is constitutionally guaranteed. Against this background sanctions and remedies in the context of industrial action also can be seen as a part of the national identity which is embedded in the political and constitutional structures of Member States and which the European Union must respect in accordance with Article 4.2 TEU.

Taking this into account, it is far from obvious that the CJEU would consider that, for instance, Article 56 TFEU must be interpreted as meaning that an individual must be able to claim compensation for the harm suffered from an ‘EU-unlawful’ collective action if the Member State provides other effective methods of preventing such collective actions.

However, the issue of whether the interest of the full effectiveness of EU law requires damages as a remedy will often not be decisive, since damages will be awarded in similar cases according to national law in many Member States. The remedies for ‘EU-unlawful’ collective action must not be less favourable in comparison with domestic remedies for collective action that is unlawful under national law (the principle of equivalence).

A crucial question is whether national rules that limit the possibility of claiming for damages render the exercise of EU law excessively difficult (principle of effectiveness). In Member States it is not unusual to have rules limiting trade unions’ liability. The question then is if the exclusion or reduction of damages in national law may be justified. This analysis should take into account the nature of the violation of EU law and the reason for the restrictions, as well the extent to which such restrictions are recognised in most of the legal systems of the Member States.

This analysis would benefit from comparative analyses of the law of remedies for unlawful collective action in Member State. In the following section we will conduct such an analysis.
6 Economic sanctions for unlawful collective action in the EU Member States

6.1 Introduction

There has been a general acceptance – especially in those democratic states that have joined the European Union – that a national industrial relations system based on free collective bargaining between trade unions and employers’ organisations and a right to undertake collective action form an integral part of the modern welfare state and the so called European Social Model. This has been confirmed by several global and European Human Rights Conventions including the core ILO Conventions (especially Conventions 87 and 98) which not only recognises the right to collective bargaining and the right to strike, but also establish an obligation for State Parties to promote and facilitate collective bargaining. The EU Lisbon Treaty marked a final confirmation of the EU’s commitment to this value base, by making the EU Charter of Fundamental Rights an integral part of EU Law.34

This approach to the industrial relations system is also reflected in the approach to economic sanctions generally and damages especially for unlawful collective action. On one hand economic sanctions are regarded as a reasonable sanction to use in order to prevent unlawful collective action, on the other hand this sanction should be designed in such a way that they not endanger a continuation of the contractual relationship between the parties and the capacities for the trade unions to fulfil their tasks.

The fundamental problem with the regulation of economic sanctions for collective action is that the whole purpose of such action is to exert pressure on the employer by threatening or actually causing economic losses by not performing work. On the other hand there is normally also a significant loss on the employee side, since during the time of collective action as a rule no wages are paid and the participating employees will lose their daily income.

In most cases the factual economic impact of a collective action for the employer is very difficult to foresee. It can depend on con-

34 See Art 28 of the Charter.
tractual arrangements with business partners, for instance on whether collective action fulfils the criteria for ‘force majeure’ within the framework of contractual relations. These contractual relations are often so called ‘trade secrets’ to which employees and trade unions have no access.

Within the industrial relations system there is a need for predictability of sanctions and a need to relate them to different factors of graveness of breach of a peace obligation. Therefore in many legal systems economic sanctions for unlawful collective action is related to a number of such factors as for example: Is the unlawfulness of the action obvious, was the employer guilty of conduct that has caused the action (for instance non-compliance with collective agreements), has obligations to give prior notice of intended action been complied with, for how long has the has the collective action been going on, etc.

Especially in the legal systems within EU with a long tradition of autonomous collective bargaining, specific criteria for determining economic sanctions against trade unions for unlawful collective action have been developed. In the following we give an overview of the existing approaches to this issue within the European Union.

6.2 Assessment of the Economic Sanction in the EU Member States

The Nordic Countries. In the Nordic Countries economic sanctions are clearly defined in law for situations in which there is a collective agreement in force and collective action is undertaken in breach of the peace obligation emanating from the collective agreement. In Finland, for instance, the Collective Agreements Act prescribes an obligation to maintain collective peace while the agreement is in force. This passive duty to maintain collective peace lies also upon

35 In this context we are not assessing the possible liability of individual employees, an issue that falls outside the scope of liability under EU law.

36 The following is based on national reports written by Filip Dorssemont (Belgium and the Netherlands), Claire Kilpatrick (UK), Sylvaine Laulom (France), Antonio Lo Faro (Italy), Jonas Malmberg & Lisa Sjöstrand (Sweden), Magdalena Nogueira Guastavino (Spain), Dagmar Schiek & Jule Mulder (Germany and Austria), Tove Söderberg Lundmark (Denmark and Norway) and Joanna Unterschütz (Poland). The national reports, pertaining to another research project, have not yet been published.
the affiliated organizations, such as the local trade union branches. Furthermore the associations have an active duty to ensure that their members do not undertake collective action in breach of agreement. This pertains to all organizations bound by the collective agreement, not only to the signatory parties.

In Sweden, damages shall compensate for any economic loss that has been incurred due to the collective action (economic damages). However, the court shall also take into account the injured parties’ interest in compliance with statutory provisions and/or provisions in the collective agreement (punitive damages). The leading principle is that punitive damages (together with the economic damages, as the case may be) should be at such a level that it ensures respect for compliance with laws and collective agreements. The distinction between economic and punitive damages is not strictly upheld in case law.

According to the Co-determination Act, damages may be reduced or waived entirely when it is reasonable under the circumstances (§ 60). One reason for this possibility is that the awarded damages should not be disproportional in relation to the solvency of the liable subject. Reduction of economic damages has not been dealt with particularly often. A reason for that is that there has been only a few cases where the Labour Court has awarded damages for unlawful collective action. During the 1980s the Labour Court imposed punitive damages amounting to 15 000 to 30 000 SEK (appr. 1690 to 3380 Euro). However, in the Laval case, the Labour Court imposed considerably higher amounts, 500 000 SEK, as well as compensation for legal costs which amounted to just over 2 million SEK.

Denmark was the first Nordic country to regulate the question of remedies for breach of collective agreements by statute. The main remedy is of economic nature and constitutes a hybrid between damages and fines. It makes it possible to sanction breaches of collective agreements regardless of whether an economic loss has been suffered or not. On the other hand, if economic loss has been incurred, the amount is taken into consideration when deciding the size of the economic sanction. The Labour Court should take all circumstances in the case into consideration, which implies that the economic sanction can both exceed and be below the economic loss of the other party.
For breaches of collective agreement that are considered gross, the fine can be considerable. There are many examples where trade unions have been fined between 100,000 to 500,000 Danish crowns (appr. 13,500 to 135,000 Euro) and in a few cases up to one million Danish crowns. There are a couple of exceptional cases from 1981 where two unions were fined 10 million and 20 million Danish crowns respectively.

In contrast to Sweden and Denmark, in Norway only compensation for economic loss is available. In principle, compensation is to be paid with the full amount of the economic loss suffered and there is no specific limit on the amount that an organization or individual worker may be held liable to pay. However, the Labour Court shall consider, besides the economic loss suffered, the blameworthiness, the economic capacity of the party at fault and the circumstances of the party suffering the loss.

Due to their economic ability, trade unions are often held liable to compensate rather high amounts. The Labour Court rarely reduces the amount of compensation if the party is an organisation, whereas the amounts for which individual workers are held liable are consistently fixed at quite modest sums.

In Finland, according to the Collective Agreements Act a compensatory fine can be imposed on the organization as well as a local trade union branch (or employer) that has either implemented unlawful collective action or has neglected the active duty to maintain collective peace (Section 9). The maximum amount of the fine that can be imposed repeatedly if the collective action continues, is 29,500 Euros. The fine can be imposed both on the national trade union federation and its member organization and the maximum amount applies to each of them.

The Labour Court is the exclusive forum in disputes concerning the application, interpretation or breach of collective agreements. Therefore the Court decision in a dispute is usually handed down within a few months, in disputes concerning collective action often in a few days.

Other EU Member States. In Germany trade unions may, due to their financial status, be held liable to pay considerable amounts. Some trade unions have therefore agreed upon liability limits with employer’s associations.

On the other hand, the employer has to prove that the damage is caused by the collective action. He or she must also convince the
court that all possible measures of minimising the damage have been taken. Due to this, the liability might be quite limited in spite of that no statutory cap on the amount of damages exists.

In the UK, trade unions’ liability in tort was reinstated in 1982. Since then there has been some damages claims, but the primary remedy sought by employers are injunctive relief in order to put an end to the collective action.

According to section 22 TULRCA, the maximum amount a trade union can be liable to pay is £250,000 for the largest trade unions and £10,000 for the smallest trade unions. Damages are awarded according to general principles in the law of tort. Punitive damages are very rarely awarded in tort claims.

It should be stressed that damages claims is not the most common way to come to terms with unlawful collective action in any of the countries surveyed. This is even more apparent in the Netherlands and in Austria, although for different reasons.

In the Netherlands, three cases concerning trade unions’ liability in damages arising in the context of collective action has been tried by the Supreme Court. Two of them concerned atypical collective action such as plant occupation, followed by bankruptcy. The extreme circumstances illustrate that liability proceedings against trade unions are highly unlikely in the Dutch context.

In Austria, there are no specific labour law sanctions but an employer can sue for damages based on general tort law. However, due to the scant use of collective action and thus a lack of case law on this matter, there is much legal uncertainty. In practice, damages claims have not had any real relevance in Austria.

In France, trade unions are not considered the main actor when it comes to collective action and therefore the trade unions’ liability is rather limited. However, a trade union can be held liable when it organises or instigates an unlawful collective action. This situation arises more often in the public service sector since the procedural requirements requires that the trade union is involved.

Only if a trade union itself participates in criminal offences or in the realisation of acts that cannot be considered as a normal exercise of the right to strike can it be liable in damages for loss that may such acts have caused to the employer. It is not sufficient that trade union officials participate in an unlawful strike or commit

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37 Trade Union and Labour Relations (Consolidation) Act.
illegal acts, the trade union itself must organise or instigate the illegal conduct.

For *Italian* trade unions organising workers in an essential services sector, the criteria pertaining to what constitutes a lawful strike are much more restrictive compared with other sectors in Italy. They are also at a larger risk of being held liable in court. A trade union calling for an unlawful collective action can be obliged to pay a minimum of 2500 Euro to a maximum of 25 000 Euro, depending on the gravity of the violation with regards to its effect on the functioning of the public service at stake.

The only other way to deem a collective action unlawful in Italy is either if it constitutes a criminal offence or if it causes damage to business productivity.

Violent picketing, sabotage and plant occupation are activities which have been considered to be regulated by the penal code. Scholars argue that this type of actions should not be considered as collective action at all and the use of the term ‘unlawful collective action’ is therefore not relevant in this context.

There are only a few cases in which damage to business productivity has been held to occur and those have been cases of destruction of equipment and devices necessary for the undertaking’s production. Analysing the case law on this subject matter reveals that even in those cases where damage to business productivity is at hand, no real compensation of the damage suffered by the employer is awarded.

*Spanish* law stipulates that trade unions can be held liable for actions and agreements which are within the scope of their powers. However, there are no labour law rules constituting a system for compensatory claims in labour disputes. Instead, reference must be made to the general laws of the Civil Code regarding damage liability.

Trade unions cannot be held liable for acts committed by their members if it cannot be proved that such acts were carried out due to union instructions.

When the right to strike is considered an individual right and, therefore, the trade union is not the actor exclusively owning that right, problems regarding which damages that originate from the actions of a trade union’s occur. In the case of a collective action that has been deemed unlawful, the trade union can be held liable for the damages resulting from the non-compliance with proce-
dural requirements, any damage resulting from (unlawful) political or sympathy strikes and damages resulting from the union’s strike committee’s refusal to collaborate on safety and maintenance services and minimum level of service in essential services. On the other hand, participating in a strike and in that sense exercise an individual right is each worker’s free choice which, in case of an unlawful strike, implies that a plurality of individual actions may be the basis of the damage caused.

The liability of trade unions is a non-issue in Belgium, since trade unions lack a legal status entailing a legal capacity that involves extra contractual liability. This is a unique feature compared with trade unions in other European countries.

In the new Member States of the European Union which lack a tradition of collective bargaining and trade unions the issue of economic liability for trade unions have rarely been formulated in more than purely theoretic terms. In practice, measures are not taken against trade unions but instead towards active individuals undertaking collective action. For instance in Estonia, the organisers of an unlawful collective action are held liable. A collective action must be preceded by negotiations and a conciliation procedure. If the trade union fails to fulfil its duties according to the Collective Labour Dispute Act regarding negotiation and conciliation it can be held liable. It is the court which determines if a collective action is lawful or not.

In Slovakia, the trade union which has called the collective action can be held liable if the collective action is declared unlawful or if the trade union does not fulfil its duties to the employer during the collective action.

7 Conclusions
The assessment of the different legal regimes show a rather complex variety of solutions and traditions developed within the framework of the different national systems of industrial relations. One can argue about whether common legal principles exist regarding trade union liability for unlawful industrial action. One such principle might be the general starting point that unlimited economic liability for damages is not acceptable as a general sanction. On the other hand, economic sanctions clearly are applied in most countries.
As argued above it is far from obvious that the CJEU would – in analogy with Courage and Manfredi – consider that, for instance, Article 56 TFEU must be interpreted to mean that an employer must be able to claim compensation for the harm suffered from an ‘EU-unlawful’ collective action if the Member State provides other effective methods of preventing such collective actions. Another solution – taking into account the diversity of national laws – would strongly undermine the predictability and legitimacy of EU law. Further, it would not be in line with the tradition in EU law to promote the role of the social partners, taking into account the diversity of national systems (Article 152 TEU).38

Instead the crucial question is if damages will be awarded in similar cases according to national law in the Member States. It follows from the principle of equivalence that remedies for ‘EU-unlawful’ collective actions must not be less favourable in comparison with domestic remedies for collective actions unlawful according to national law. Against this background it seems that the starting point should be that the national principles for economic liability for unlawful collective action embedded in national law should also be applicable in cases of ‘EU unlawful’ collective actions. The comparative overview shows that ‘caps’ or other limitations of the amount of economic compensation are commonly applied in national law. Only in the rare cases where national law does not provide any economic sanctions at all or any other effective enforcement mechanisms it seems reasonable to argue that principles of effectiveness of EU law might enter into play and justify specific solutions within EU law.

References


