EU LAW IN THE MEMBER STATES

Viking, *Laval* and Beyond

EDITED BY MARK FREEDLAND AND JEREMIAS PRASSL

VIKING, *LAVAL* AND BEYOND

'EU Law in the Member States' is a new series dedicated to exploring the impact of landmark CJEU judgments and secondary legislation in legal systems across the European Union. Each book will be written by a team of generalist EU lawyers and experts in the relevant field, bringing together perspectives from a wide range of different Member States in order to compare and analyse the effect of EU law on domestic legal systems and practice.

The first volume focuses on the uneasy relationship between the economic freedoms enshrined in Articles 49 and 56 TFEU and the right of workers to take collective action. This conflict has been at the forefront of EU labour law since the CJEU's much-discussed decisions in C-438/05 *Viking* and C-341/04 *Laval*, as well as the Commission's more recent attempts at legislative reforms in the failed Monti II Regulation. *Viking, Laval* and Beyond explores judicial and legislative responses to these measures in ten Member States, and finds that the impact on domestic legal systems has been much more varied than traditional accounts of EU law would suggest.

EU Law in the Member States

Located at the cross-section between EU law, comparative law and socio-legal studies, *EU Law in the Member States* explores the interaction of EU law and national legal systems by analysing comparative evidence of the impact landmark EU measures—from CJEU decisions and secondary legislation to soft-law—have had across different Member States. The nature and operation of EU law has traditionally been analysed in a highly 'centralised' way, through the lenses of Brussels and Luxembourg, and in terms of the Treaty and its interpretation by the Court of Justice. Beneath this orthodoxy, however, lies the complex world of the genuine life of EU law in the Member States. Judicial and administrative practices across the Union's 28 Member States considerably qualify and sometimes even challenge the long-standing assumption that doctrines such as the direct effect and supremacy of EU law ensure a uniform and effective application of its provisions.

Each volume brings together leading academics, national experts and practitioners in order to draw conclusions both for EU law generally and the specific area in question on the basis of Member State reports and broader horizontal papers, and will be of interest to generalist EU lawyers and specialists in each field across the Member States. Academic audiences will benefit from the tight integration of national case studies and doctrinal analysis, whilst practitioners and policy makers will find systematically presented comparative evidence and commentary.

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Viking, *Laval* and Beyond

Edited by

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and
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SERIES FOREWORD

Why should we be interested in an exploration of the 'genuine life of EU law in the Member States'?

It is almost a platitude to state that by far the greatest part of EU law is transposed, applied and enforced at the domestic level of the Member States, and that the Union is therefore in several respects dependent on national legislative, administrative and judicial institutions. In this way, EU and national law are closely tied together and function in a complex network of interactions. In order to understand what EU law is about, it would seem advisable to zoom in, first, on rules and case law at the Union level. In order to gain a comprehensive understanding of the functioning of the EU legal order, however, one can hardly avoid taking into account what is happening within the Member States, both in terms of transposition and application of the law, which in fact also require its—further—interpretation. A combined study of the different layers is important for both academia and legal practice.

While clarifying, systematising and analysing the law and, in particular, the case law of the Court of Justice of the European Union as such, EU legal doctrine reveals real and potential problems, anticipates new questions and reflects upon the answers that might be given. In a context of mutual dependency and connectivity between EU and national law, a methodology that combines Union law and comparative law has become not only increasingly popular but also very useful, in particular during the last two decades. Comparative research may be a source of inspiration for the further development of EU law. Depending on the focus, it also helps to understand how EU law operates or may operate in domestic legal orders. The results of comparative research can be fed back into EU law, its findings assisting further reflection when searching for solutions to existing problems or for possible answers to emerging questions. Today, this combination of EU and comparative law also takes place, sometimes in an informal fashion, in the framework of various academic networks and working groups set up by scholars in specific areas of law. These networks and working groups are highly encouraged by the Union itself. They may develop various codes, rules, principles or recommendations that should serve as guidelines for legislation or in application of the law. Other networks or working groups may focus on the implementation and application of EU law in various Member States and sometimes both activities are combined.

A parallel story can be told about legal practice. The interest in the comparative law dimension of dealing with Union law and, for that very reason, also in the

domestic transposition and application of EU law, is clearly present. Feedback on these issues from legal practice and, in particular, experiences in national courts to the EU legislative and judicial process, is valuable as it may help to accommodate tensions and uncertainties. Similarly, the findings should also feed further reflection at the Union level and assist the institutions in developing appropriate answers to the problems posed. Apart from comparative law studies conducted or commissioned by the institutions, an increasing number of—informal or institutionalised—European networks of legal practitioners, in particular judges and advocates, contribute to this process of 'informal comparative lawyering' in the EU context. In some cases, important comparative law material is made available through publications or on various groups' respective websites.

A striking feature of these tendencies is the increasing interest in the role of national courts in the application of EU law and the handling of EU law matters. In particular, since the introduction and further intensification of judicial cooperation in civil and criminal matters by the subsequent treaties of Maastricht, Amsterdam and Lisbon, improved cooperation and contact between national judges has greatly gained importance, as witnessed most recently by the ambitious 'Justice Programme for the period 2014 to 2020' (Regulation 1382/2013). It is undoubtedly true that with the cooperation in civil and criminal matters, the transnational interaction of national courts within the Union has considerably increased. Moreover, this cooperation, being based on the principle of mutual trust, requires an understanding of each other's judicial system. However, there is something paradoxical about this somewhat belated wake-up call for support to raise judicial awareness, for training and to improve the overall understanding of EU law: national courts have, to a large extent, been responsible for the application and enforcement of EU law and for judicial protection in cases where EU law has played a role for more than 50 years.

However this may be, in various quarters laudable efforts are being made to improve cooperation, contacts, mutual understanding and knowledge of EU law. A part of this is an ambition to enhance access to Union law and its interpretation and application in national courts. A discrete first step can be seen, for instance, in the introduction of the European Case Law Identifier (ECLI) which aims to facilitate the clear citation of judgments from European and national courts related to EU law. To this one may add the fact that various professional networks make national case law available on their website. However, to trace the relevant case law is one thing; to select it is another thing; and to understand its significance and substance is a real challenge.

The study of the application of EU law by national courts—and the same holds true *a fortiori* for legislation and administrative practice—is a complex enterprise that requires careful preparation and the bringing together of EU and national law experts jointly to engage in the EU law/comparative exercise. The results are often unpredictable but at least certain patterns in the domestic application in a given area of law may become clear.

The present book series, accompanied hand in glove by a conference series, aims at a comparative exploration of the national application of EU law in selected areas. In doing so, the series provides a structure to this kind of research that enhances cross-border cooperation between lawyers. It also contributes to a better understanding of the way in which EU law operates in domestic legal orders. Does this matter? It certainly does: a number of reasons for both the academy and legal practice have been briefly mentioned above. There is, however, still another point. Any legal system uses fictions and assumptions which make it workable. In EU law one of the central assumptions is that in everyday practice national courts do apply EU law and that they do so more or less correctly, in particular in line with the case law of the Court of Justice. This assumption may not entirely correspond with reality, but it is nevertheless of crucial importance for EU law. Indeed, as some scholars have recently put it quite sharply, 'what national courts do not apply in reality, does not exist in practice'.[1] Without going that far, the fact remains that, when the gap between assumptions and reality is too great, there is something fundamentally wrong and the matter needs all our attention. In order to know the reality and to avoid the gap as far as possible, we precisely need the sort of research this series is aiming for.

Sacha Prechal

Court of Justice of the European Union
Luxembourg, September 2014

[1] Jans et al, *National Courts and EU Environmental* Law (Europa Law Publishing 2013) 3.

PREFACE

This book is the first volume in the *EU Law in the Member States* series, dedicated to exploring the impact of EU law—from landmark CJEU judgments and secondary legislation to a wide range of 'soft-law' measures—in legal systems across the European Union. The workshop on which this book is based took place in the Autumn of 2013 at St John's College, Oxford, bringing together a team of generalist EU lawyers and experts in employment and labour law and their perspectives from a wide range of different Member States. Over the course of two days, we compared and analysed the effect of EU law on domestic legal systems and practice in lively discussion; in addition to those writing in the present volume, we would like to thank Katherine Apps and Anne Davies for their participation.

The approach of the first workshop will be mirrored in subsequent volumes, work on two of which is already under way. Volume 2, edited by Michal Bobek, explores the institutional, mental and structural (non-) transformation of the judiciaries in the Central and Eastern new Member States some 10 years after the 2004 EU enlargement. Volume 3, jointly edited by Jeremias Prassl and Michal Bobek following a recent workshop at the College of Europe, Bruges, explores the impact of Air Passenger Rights Regulation 261/2004 across the EU and beyond. The series editors hope in due course to invite other editors to contribute to this series, both with proposals to work on a particular landmark case or legislation, and to develop their own topics of interest, thus building up evidence from as broad a range of topics as possible.

The project leading to the present volume could not have been completed without much support from the EU Law and Labour Law communities in Oxford and beyond, many of whom kindly agreed to participate in the present volume. Catherine Barnard, Nicola Countouris, Paul Craig, Anne Davies, Angus Johnston, Benjamin Jones, Steve Weatherill and Simon Whittaker provided tremendously helpful advice from early on. Our international collaborations through ELLN, the European Labour Law Network, under the co-ordination of Bernd Waas, and INLACRIS, the International Network for Labour Law Studies in Times of Crisis, under the co-ordination of Sylvaine Laulom, introduced us to the authors of many of the subsequent chapters.

Particular thanks are also due to Stefan Vogenauer and Ulf Bernitz of Oxford's Institute of European and Comparative Law for their support, advice and help from the very initial stages of the project. Our workshop and subsequent preparation of the manuscript were made possible by the financial support of the Wallenberg Foundation, Stockholm, and the Research Centre of St John's College,

Oxford, under the leadership of Linda McDowell. St John's College, of which we were both teaching Fellows at the time of the workshop, provided invaluable institutional support, in particular through the help of Jackie Couling, Murray Goodes, Paul Ashman and their respective teams. At the IECL, we gratefully acknowledge the advice and support of Jenny Dix.

At Hart Publishing, Richard Hart supported this project from the very beginning, guiding us through the preparation of the first workshop and volume in particular. Following the transition to Bloomsbury Publishing, his successor Sinead Moloney has been equally supportive and enthusiastic about the establishment of the new series. We are also deeply indebted to Rachel Turner, whose help with putting together the first volume was invaluable, and Mel Hamill, Tom Adams and their team, who steered us through the publication process.

Last, but by no means least, there are many thanks due to Martin Voelker, whose support in ensuring a smooth running of the original workshop and, in particular, in meticulously editing the present volume, has been indispensable.

Mark Freedland
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St John's College, Oxford
Magdalen College, Oxford
Michaelmas Day, 2014

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LIST OF ABBREVIATIONS

ACAS	Advisory, Conciliation and Arbitration Service (UK)
ADEDY	Civil Servants' Confederation (Greece)
AEEA	Agreement on the European Economic Area
BA	British Airways
BALPA	British Airline Pilots Association
CAA	Collective Agreements Act (Estonia)
CBI	Confederation of British Industry (UK)
CCAS	Conference Committee on the Application of Standards (ILO)
CDRA	Collective Dispute Resolution Act (Estonia)
CDS	Act of 23 May 1991 on Collective Disputes Settlement (Poland)
CEACR	Committee of Experts on the Application of Conventions and Recommendations (ILO)
CFA	ILO Committee on Freedom of Association
CFR	Charter of Fundamental Rights of the European Union
CGIL	Italian General Confederation of Labour
CJEU	Court of Justice of the European Union
COP	Country of origin principle
EC	Treaty establishing the European Community
ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECJ	European Court of Justice
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
ESA	European Free Trade Association Surveillance Authority
ESC	European Social Charter
ESEE	National Confederation of Hellenic Commerce
ETA	Employee Trustee Act (Estonia)
ETP	Equal treatment principle
ETUC	European Trade Union Confederation
EU	European Union

FSU	Finnish Seamen's Union
GSEBEE	General Confederation of Professionals, Craftsmen & Tradesmen of Greece
GSEE	General Confederation of Greek Workers
HRA 1998	Human Rights Act 1998 (UK)
IAG	International Consolidated Airlines Group SA
ICJ	International Court of Justice
IFALPA	International Federation of Airline Pilots Association
ILO	International Labour Organization
ITF	International Transport Workers' Federation
LC	Labour Code (Poland)
LO	Trade Union Confederation (Norway)
MBL	1976:580 Co-determination Act (Sweden)
NHO	Confederation of Norwegian Enterprise
PWD	Posted Workers Directive (Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services)
PWED	Posted Workers Enforcement Directive (Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services)
RMT	National Union of Rail, Maritime and Transport Workers (UK)
SEPLA	Spanish Airline Pilots' Association
SEV	Hellenic Federation of Enterprises
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TUA	Trade Union Act (Estonia)
TUC	Trades Union Congress (UK)
TULRCA 1992	Trade Union and Labour Relations (Consolidation) Act 1992
UK	United Kingdom of Great Britain and Northern Ireland

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Viking, *Laval* and Beyond: An Introduction

MARK FREEDLAND AND JEREMIAS PRASSL

The nature and operation of European Union law have traditionally been analysed in a highly 'centralised' way, through the lenses of Brussels and Luxembourg, and in terms of the Treaty and its interpretation by the Court of Justice of the European Union (CJEU). In consequence, both scholarship and legal discourse have often been aimed at the European level, describing and analysing EU law primarily from a perspective akin to that from which autonomous legal systems are usually discussed. Member States and their legal systems, on the other hand, feature much less frequently—at least, that is, beyond the supposedly obedient application and (where necessary) implementation of primary and secondary EU law, and as a source of preliminary references and recipients of the rulings thus issued.

I. EU Law in the Member States—Descending from Olympian Heights?

With the exception of a few areas such as the CJEU's intricate case law in areas such as competition law or the free movement of goods, and the resulting sophisticated analyses thereof, there is therefore surprisingly little comparative understanding and discussion of the day-to-day reality of how EU law operates in different Member States. As a result, a series of long-standing, frequently unspoken and only rarely challenged assumptions have developed in this context—most importantly as regards the operation of key tenets such as the doctrines of direct effect and supremacy of EU law, which are assumed to ensure a uniform and effective application of its provisions when interacting with national legal systems.

Beneath this orthodoxy, however, lies the complex world of national (non-) implementation. In their immense diversity, judicial and administrative practices across the Union's 28 Member States considerably qualify this picture. This heterogeneity can, in some sense, of course be understood as the very *raison d'être* of

the European project. At the same time, differences in national practices as regards the implementation and reception of EU law pose a considerable challenge to our understanding of the Union's legal order.

At a first glance, the minutiae of detailed national accounts of the interaction between EU law and a range of domestic legal systems might not appear to be particularly important. Viewed from a central, Union-level perspective, EU law seems to be working well. Until recently, there had been relatively few (open) challenges to well-established doctrines such as supremacy and direct effect, backed up by a range of policing systems built into the Treaties, including not least the Commission's ability to bring infringement proceedings against individual Member States.[1] From a broader perspective, however, the uneven implementation or reception of Union-level developments might pose a significant challenge to our understanding of EU law, both in procedural and substantive terms. As regards the former, it is only through domestic legal evidence that we can understand how EU law is actually applied by national courts, whether rights granted under it can effectively be exercised or whether levels of protection are indeed uniform. From a substantive perspective, it is crucial to understand the extent to which judicial norms and legislative standards set at European level actually 'arrive' in national legal systems, and whether Member States' implementation duties, in combination with the supremacy and direct effect of EU law, are able always to address the remaining compatibility problems.

Despite this (long-recognised) need for national perspectives, EU law scholarship and practice have suffered from a chronic lack of systematic evidence and analysis as to how Union rules operate in different countries. This is of course not surprising given the challenges facing attempts to understand the impact of the EU's legal order from a comparative perspective. Many of them, from linguistic and conceptual difficulties in locating and analysing very different sources to watching out for *faux amis* or hidden normativities have of course long been discussed by comparative law scholars,[2] and are increasingly tackled through a range of cross-European projects, ranging from subject-specific expert networks[3] to thematic textbooks.[4]

With the present book, we hope to take a careful first step in a slightly different direction. Our goal is to begin an exploration of the relationship between EU law and the legal systems of different Member States by examining a series of landmark CJEU decisions (and, in due course, secondary EU legislation), tracing their impact in a range of countries over a period of five to ten years and analysing the results in the light of established Union-level scholarship and doctrine.

[1] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/49 (TFEU), Art 258.

[2] See eg H Muir Watt, 'Globalization and Comparative Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2008) 579.

[3] Such as eg the European Labour Law Network: www.labourlawnetwork.eu/.

[4] Such as the *Ius Commune Casebooks* (Hart Publishing): www.casebooks.eu/horizontalEffects/about/.

The present book therefore brings together perspectives from several groups of scholars, including subject specialists at the national and EU level and generalist EU lawyers more broadly. Our aim is for the resulting dialogue to break down the compartmentalisation in EU law scholarship which goes hand-in-hand with compartmentalisation (and specialisation) in each of the legal systems themselves, thus offering both a deeper understanding of each substantive area under discussion and insights into the operation of EU law more broadly.

How, then, might such 'landmark' developments be identified? Whilst there have been some notable attempts at deploying network analyses to this end,[5] for present purposes, simpler criteria are applied at the two levels the book hopes to bring together: first, whether the topic in question is thought to be of particular significance and controversy in a specific regulatory domain of EU law, be that due to the development of a novel legal point or due to a change of tack in existing approaches; and second, whether the decision has caused particular upheaval or controversy in at least some Member States' domestic systems.

II. *Viking* and *Laval*

Applying these two criteria, one of the first sets of cases to provide rich materials for discussion is the judgments handed down by the CJEU in *Viking* and *Laval*. Judging from discussion in the literature and subsequent legislative controversy, the decisions have been amongst the most high-profile judicial developments in EU law during the last decade.

EU labour law and its implications for different Member States have of course long been a challenging and controversial topic:[6] domestic labour law and industrial relations systems vary widely, both as regards their legal conceptualisation and political orientation, and will therefore react very differently to EU-level norms.[7] *Viking* and *Laval*, however, go much further than traditional discussions of EU labour law. First, insofar as they address a combination of traditional concerns and new challenges, notably the free movement of workers and the right to take industrial action; and second, because they are not 'purely' labour law cases or even EU labour law cases as such. By bringing in the dimension of the EU's core internal market principles, the decisions thus highlight the uneasy relationship between the economic freedoms enshrined in Articles 49 and 56 of the Treaty on

[5] M Derlén and J Lindholm, 'Goodbye van Gend en Loos, Hello Bosman? Using Network Analysis to Measure the Importance of Individual CJEU Judgments' (2014) *European Law Journal* (forthcoming).

[6] The terms 'labour' and 'employment' law are used interchangeably throughout this work.

[7] For a full overview, see P Syrpis, *EU Intervention in Domestic Labour Law* (Oxford, Oxford University Press, 2007).

the Functioning of the European Union (TFEU) and workers' right to take collective action.[8]

In *Viking*,[9] the eponymous Finnish ferry operator found itself in conflict with the Finnish Seamen's Union (FSU) over attempts to reflag the vessel Rosella in Estonia (or Norway) in order to enter into a new collective agreement covering its crew. Upon the FSU's request, the International Transport Workers' Federation (ITF) issued a circular instructing all affiliated unions not to enter into negotiations with Viking Line, thus frustrating the latter's efforts to reduce crewing costs. Following Estonia's accession to the European Union in the spring of 2004, the ferry operator brought a series of claims in the English courts, alleging that the ITF circular (issued in London) violated its free movement rights under EU law. In responding to a preliminary reference from the English Court of Appeal, the CJEU was thus asked to rule on a series of questions exploring the extent to which collective action should be subject to Union law.

The CJEU held that such actions could not be considered to fall outside the scope of the freedom of establishment as laid down in Article 49 TFEU (ex 43 EC): the explicit limitations on EU action as regards the right to strike in Article 153(5) TFEU (ex 137 EC) were inapplicable as Member States had to comply with Union law in the general exercise of their competences, and the wholesale exclusion of collective agreements from the scope of EU competition law in *Albany*[10] could not be read across into the present context. Even the recognition of the right to strike as 'a fundamental right which forms an integral part of the general principles of [Union] law'[11] and the fact that Viking's horizontal claim went against the right's exercise by a trade union could not stand in the way of a finding that the FSU's and ITF's actions were aimed at hindering or severely restricting the ferry operator's freedom of establishment, and thus prima facie in breach of Article 49. A detailed scrutiny of potential justifications suggested that whilst fundamental rights could be relied upon, in principle, to abrogate fundamental freedoms, on the facts referred by the national court the proposed action had likely been disproportionate, as it had gone beyond what was necessary to protect the current crew's employment rights, not least because the FSU may well have had other, less restrictive, means at their disposal.

[8] The other two cases frequently discussed as part of what has become known as the '*Laval* Quartet' are Case C-346/06 *Rüffert* [2008] ECR I-1989 (Lower Saxony's public procurement law stipulating compliance with host State terms and conditions including those set by collective bargaining found in violation of Art 56 TFEU and the Posted Workers Directive (PWD)) and Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323 (Member State's failure adequately to implement the PWD, in particular by construing Art 3 too liberally) are less directly relevant to the questions surrounding industrial action treated in this volume.

[9] Case C-438/05 *ITWF and FSU v Viking Line ABP* [2007] ECR I-10779.

[10] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

[11] *Viking* (n 9) para 44.

In *Laval*,[12] the industrial action at the heart of the proceedings was aimed primarily at forcing the eponymous Latvian construction company (and its domestic subsidiary, Baltic) to enter into collective agreements with Swedish trade unions to cover the employment conditions of its (Latvian) workers involved in construction work in Sweden. Following Laval's refusal to enter into such negotiations, the building workers' union organised an effective blockading of Laval construction sites as well as an eventual sympathy action by the electricians' union, thus making it impossible for Laval to carry out its work in Sweden. Proceedings before the CJEU, on a preliminary reference from the Swedish *Arbetsdomstolen* court, were complicated somewhat by the fact that the Posted Workers Directive (PWD) applied in this context.[13] The CJEU found that as rates of pay were not laid down in Swedish legislation (and as Sweden had furthermore not availed itself of potentially applicable derogations under the PWD), the provisions of Article 3 of that Directive were not applicable, and that an extension to posted workers of the host country's employment conditions at issue was therefore not possible.

It was against this background that the broader question of the industrial action's legality under EU free movement law, in particular the freedom to provide services under Article 56 TFEU (ex 49 EC), fell to be assessed. Whilst repeating its recognition of the right to strike as a fundamental right in *Viking*, handed down in the previous week, the Court then nonetheless went on to scrutinise the trade unions' actions for compliance with the Treaties. As collective action aimed at forcing Laval to sign collective agreements going beyond the scope of Article 3 PWD was liable to make the undertaking's exercise of free movement rights less attractive, it was found to be in violation of Article 56. The industrial action's worker-protective aims could not justify this violation, as the domestic implementation of the PWD did not cover pay levels, and the collective agreement sought would thus have gone beyond the scope of Article 3 PWD. Trade unions were thus effectively precluded from using industrial action to force foreign service providers to enter into such agreements.

From the moment the original judgments were handed down in Luxembourg in December 2007, *Viking*, *Laval* and their follow-up decisions have spawned significant amounts of scholarship. Academic debate, broadly speaking, has however mostly been split into two camps, the first of which is focused primarily on the EU level: What is the future of collective bargaining and action in the European legal order? Should it be a permissible restriction on fundamental economic freedoms? If so, how should the two goals be balanced against each other? And what about the potential horizontal effect of Treaty provisions? A second group, on the other hand, focuses on comparative legal enquiries into the perspectives of different Member States' labour laws.[14] There, a small number of countries where

[12] Case C-341/04 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundets* [2007] ECR-I 11767.

[13] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1996] OJ L 018/001.

[14] A fuller overview of the extensive literature can be found in the appended bibliography.

the cases originated and had a particularly high-profile impact are discussed in depth (notably Sweden and its oft-cited *Lex Laval*, and developments in the United Kingdom following proposed action by BALPA, a pilots' union); often, however, the problems are seen as compartmentalised challenges—perhaps not surprisingly, as national systems of industrial relations differ widely, even within the context of traditional legal families.

These perspectives, however, leave gaps in our understanding of the mutual interaction of the two domains. Some such avenues have of course been discussed extensively—the influence of domestic litigation on EU law through the preliminary reference procedure, for example, or the intervention of EU law in Member States' labour market regulation. More diffuse interaction between the different legal systems, on the other hand, has been significantly more difficult to capture—not least because of an insufficient lapse of time between the landmark cases and different studies, and because a 'lack of impact' may prima facie appear to be irrelevant.

Writing in the early spring of 2014, well over five years after the judgments in *Viking* and *Laval* were handed down, it has become possible to observe how the decisions have begun to be absorbed into national discourse and practice, to sometimes surprising and unpredictable effect. This latter aspect—the reception of *Viking* and *Laval* as landmark cases in Member State courts and national industrial relations practice—sits at the heart of this book, with a series of national case studies exploring issues as diverse as the limitations of EU action in areas beyond Treaty competence, the range of (conflicting) regulatory devices used, and the supposed uniformity of EU law as applied by domestic courts.

III. Multi-Level Perspectives

With these aims in mind, the present collection is organised as follows. Part I focuses on analysing *Viking* and *Laval* at the EU level: first, by exploring the judgments from the perspective of internal market law, before turning to EU labour law in the context of broader international obligations, and a discussion of two more recent events with a direct bearing on the balance between fundamental economic freedoms and fundamental labour rights: the pending accession of the European Union to the Council of Europe and its key document, the European Convention on Human Rights, and the now moribund attempt by the European Commission to address the balance struck in *Viking* and *Laval* through legislative action. Part II then turns to the Member State perspectives, surveying the surprisingly diverse impact of *Viking* and *Laval* in nine EU (or, in the case of Norway, EEA) Member States, ranging from a near-complete ban on industrial action in cross-border scenarios and the need for detailed legislative changes to little practical significance or even a resurgence in collective labour spirits. Part III begins to engage in a dialogue across these various spectra, with chapters by specialists

working in EU internal market and EU labour law exploring the implications of EU Law in the Member States.

A. EU-Level Perspectives

Part I thus opens with *Steve Weatherill's* exploration of the decisions in *Viking* and *Laval* from an internal market lawyer's perspective, focusing on the place of the judgments in the larger corpus of free movement jurisprudence. Whilst acknowledging the difficult challenges for collective labour law in the Member States, the chapter questions what has often become the standard diagnosis in this area: that the outcome preferring market freedoms over fundamental rights was inherent in the very structure of the EU's free movement law, given the latter's broad reach and few limits. Instead, the absence of such strong scope limitations in successive Treaty revisions has made the CJEU the focal point in ensuring that internal market law remains (or becomes) sensitive to other, competing aims: most notably through its operation of the justification stage. As trade barriers become more complex, the Court has begun to move away from a bias in favour of deregulation trumping national regulatory choices by becoming more deferential both to national regulatory choice generally, and the referring court in particular.

Schmidberger v Austria[15] famously demonstrated this approach: the environmental protest at hand was politically sensitive, and not immediately a commercial issue; the Court thus granted the Member State a broad scope of justification and showed significant deference to domestic authorities. The justification stage can thus be understood as a safety valve, and one that is particularly important in areas where the Treaties do not give the Union institutions legislative competence, as shown for example in the context of *Bosman*, where the Court had to address the regulation of football transfer practices.[16] In *Viking* and *Laval*, on the other hand, a double failure of that safety valve appears to have taken place: both as regards the limitations of circumstances where collective action may be adduced in justifying a trade barrier, and in the drastic limitation of the margin of discretion left to the referring courts. The chapter concludes with a thought-provoking experiment, refashioning the key paragraphs of the judgment in *Viking* so as to bring its terms back in line with orthodox internal market law.

An entirely different perspective is offered by *Alan Bogg*, whose chapter examines the CJEU's case law and the current protection of collective interests in EU law more broadly through the lens of key standards of the International Labour Organization (ILO). Both the independent Committee of Experts on the Application of Conventions and Recommendations (CEACR), and the tripartite

[15] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republic of Austria* [2003] ECR I-5659.

[16] Case C-415/93 *Union royale belge des sociétés de football association ASBL v Bosman* [1995] ECR I-4921.

Committee on Freedom of Association (CFA) have built up a significant body of jurisprudence surrounding the right to strike as an inherent value of the ILO's Constitution. This emphasises, amongst other aspects, a broad understanding of which matters might legitimately be the objective of collective action, thus posing a clear challenge to the CJEU's narrow approach to the question through its use of the proportionality enquiry, in particular where this departs from other Member States' solutions, such as the (weak) *ultima ratio* test deployed by the German courts. This 'fundamentally irreconcilable' relationship between EU law and ILO standards, binding on both the EU and (directly or indirectly) its Member States, is then carefully mapped onto six dimensions of institutional interaction between EU (labour) law and the ILO. In a response to the preceding chapter, Bogg argues that EU internal market law, even if carefully rephrased to ensure more respect for domestic labour law standards and trade unions' right to strike, cannot be brought into line with the ILO approach, unless (domestic) labour law is granted a high degree of autonomy—not least through an approach resembling the decision of the (then) European Court of Justice (ECJ) in *Albany*,[17] which provided for such a clear-cut insulation in the context of competition law.

Vilija Velyvyte's contribution is the first of two chapters on important EU-level developments moving beyond *Viking* and *Laval* themselves, exploring the impact of the European Union's pending accession to the European Convention on Human Rights (ECHR) on the judgments' strict qualifications of the right to strike. The CJEU's approach, requiring justification of the interference with economic freedoms by reference to a right to strike is explained as fundamentally juxtaposed with the baseline approach of the European Court of Human Rights (ECtHR) in Strasbourg, which requires any derogations or restrictions of the collective freedom to be justified. Recent case law of the ECtHR has interpreted widely Article 11 ECHR, the right to freedom of association—including, notably, the right to strike.[18] That right is, of course, not absolute, but rather subject to strict derogations, which must be proportionate to the goal to be achieved. These stark differences in the two Courts' reasoning, then, seem to translate into significantly different levels of protection—which may come to a head following the accession mandated in the Treaty of Lisbon.[19]

Once the ECHR becomes fully binding on the Union legal order, the Strasbourg court will, in principle, be able to scrutinise the EU and its institutions for compliance. The extent to which such developments will occur is however questionable, given the CJEU's notion of EU law autonomy, staunchly defended both against Member States and international law obligations—and now reflected in the notion of preserving the Union's 'specific characteristics', over which the CJEU is to remain the final arbiter. The enactment of specific conciliatory provisions in the EU's Charter of Fundamental Rights (CFR) seems not to have changed this

[17] *Albany* (n 10).
[18] *Enerji Yapi-Yol Sen v Turkey* App no 68959/01 (ECtHR, 21 April 2009).
[19] Consolidated Version of the Treaty on European Union [2010] OJ C83/01 (TEU), Art 6(2).

picture, as an analysis of *Commission v Germany* shows.[20] Might the prospect of judicial review before the Strasbourg Court change matters? The most likely scenario, especially on the basis of some Member State reports, is an appeal against a domestic court's application of the *Viking* and *Laval* jurisprudence, which is then appealed before the ECtHR, with the EU joined as a co-respondent (thus giving the CJEU a right of 'prior involvement'). Any ECtHR decision, however, would therefore be subject to a significant margin of appreciation—in the EU context, not least to the fundamental economic freedoms.

It thus appears that the Court's jurisprudence in *Viking* and *Laval* will continue to play a key role in EU law, with legislative invention at national level difficult, if not impossible, and EU-level legislative intervention unlikely following the public controversy which ensued in 2012, when the Commission published its plans for a 'Monti II' Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services. [21] In the final chapter of Part I, the *Adoptive Parents* of this Regulation, seen by academic commentators and national trade unions as enshrining much of the substance of the Court's decisions in *Viking* and *Laval* in secondary EU legislation, recount *Monti II's Life of a Death Foretold*. This, they argue, was inflicted not by the 12 so-called 'reasoned opinions' expressing national Parliaments' objections to the proposal on the basis of its non-compliance with the principle of subsidiarity, but rather the Commission's realisation of the immense political difficulties in gathering enough support to allow the measure to be adopted: trade unions objecting to the lack of a clear priority of social rights, employers suspicious of any liberalisation of the rules surrounding industrial action, and several Member States concerned about excessive interference with their national regulatory domains.

One of the key goals of the Regulation would have been to provide for the insulation of purely domestic industrial conflicts from the threat of potential EU law liability, and to deny explicitly the primacy of (fundamental) economic considerations over (equally fundamental) social rights, thus tackling one of the key criticisms of *Viking* and *Laval*, and indeed EU law more broadly. This was to be achieved through a subtle reconfiguration of the proportionality principle to balance the competing interests at stake, and to mandate a much more generous margin of appreciation for domestic courts. On this basis, the authors suggest, the Regulation would have complied with the requirements of subsidiarity and stood on a firm legal basis, as required under the Treaty on European Union's rules governing the exercise of the Union's legislative competence. Furthermore, as an act implementing Union law, it would have triggered Article 52(3) CFR, thus

[20] Case C-271/08 *Commission v Germany* [2010] ECR I-0000.

[21] European Commission, 'Proposal for a Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services' COM (2012) 130 final.

requiring its interpretation in line with the position taken in the leading decisions of the ECtHR.

B. National Perspectives

The second Part of the book turns from discussions of *Viking* and *Laval* at the European level to in-depth reports exploring Member State perspectives. Nine EU (or EEA) countries are surveyed in alphabetical order, chronicling the domestic impact of the CJEU's decisions over a period of approximately five years: Austria (*Eva Tscherner*), Estonia (*Tatjana Evas*), Germany *(Bernd Waas*), Greece (*Aristea Koukiadaki*), Italy (*Edoardo Ales*), Norway (*Stein Evju*), Poland (*Leszek Mitrus*), Sweden (*Mia Rönnmar*), and the United Kingdom (*Tonia Novitz and Phil Syrpis*). Each chapter is roughly structured to provide a brief introduction to the relevant country's industrial relations system and legal framework, before setting out *Viking* and *Laval*'s implications, if any, for primary legislation, judicial decision making and social partners' actions, as well as academic debate and public discussions.

The reports are prefaced with a horizontal overview chapter, in which *Jeremias Prassl* sets out the highlights and key conclusions from each contribution, and explores the *Three Dimensions of Heterogeneity* along which the different national reports may be understood. It is, of course, a trite observation that the situations of Member States are highly heterogeneous—this could be said to justify the very need for action in the internal market.[22] It should therefore not come as too much of a surprise that the implications of the judgments in *Viking* and *Laval* have ranged widely. The picture drawn in the chapters from across the Member States is nonetheless bewildering at first sight: the impact ranges from the need to change primary domestic legislation in Sweden to barely any practical impact in countries such as Greece; from a near-complete cessation of industrial action with a potential cross-border element in the United Kingdom to a revival in collective organising spirits in Estonia; from the introduction of a (primarily academic) right to strike in Austria to significant inter-judicial discord in Norway.

The first dimension of heterogeneity which can be observed against this backdrop is systemic—different Member States' industrial relations and employment law systems vary widely; as do their attitudes to the implementation of EU (labour) law. This results in rather different starting points, or situations where the norms of EU law meet domestic norms—in some countries the systems quickly become deeply interwoven, whereas in others their relationship is more similar to that of oil and water. In this dimension, significant differences between 'old' and 'newer' Member States also become apparent; with recent reforms in Greece as an interesting turning-point. The second dimension of heterogeneity is a

[22] Though mere difference alone might not suffice: Case C-376/98 *Germany v Parliament* [2000] ECR I-8419 (Tobacco Advertising I).

conceptual one: the technical apparatus surrounding industrial action in different Member States can be radically different; not least when it comes to balancing the competing interests of different parties. A third, procedural or remedial, dimension explains the significant divergence in domestic industrial reality following the judgments—from de facto bans on strikes to a significant encouragement of collective spirits. In Member States with a finely calibrated (legislative or judicial) procedural system, the decisions' impact might be much more negative than in those where the base-level is already one of strict restrictions—or indeed the absence of any acknowledgment of a right to strike. A brief conclusion explores the extent to which existing structures or mechanisms within EU law might be able to grapple with these, and other, dimensions of heterogeneity—from the development of general principles to notions of national procedural autonomy.

C. Broader Horizontal Perspectives

On the basis of the comparative insights developed throughout Part II, the final set of chapters then turns to providing broader perspectives from EU employment law, as well as EU internal market and EU constitutional law more generally.

Robert Rebhahn fastens on the oft-ignored fact that labour law and industrial relations are amongst the most diverse systems of law in Europe. This perspective is developed in the context both of industrial action, and the posting of workers, exploring first various instances of domestic discrepancies, before turning to their implications for Union law. In the former context, the resulting uncertainty can be traced back into two competing visions of the role of trade unions in the European (labour) market. There is, on the one hand, the notion of collective action as a countervailing force to industrial power in most of the Member States, which stands in stark contrast with EU law's perspective of strikes as a potentially market-distorting activity on the other. In the latter, different domestic legal frameworks for the setting of basic employment terms and conditions are challenged by the juxtaposition of traditional 'home' and 'host' States of posted workers, akin to more traditional accounts of insiders versus outsiders in labour law: in that sense, *Laval* in particular can be understood as an unequivocal commitment to intra-European competition, with domestic labour law as a potentially suspect obstacle. A final argument then turns to the seeming lack of domestic changes in a significant number of Member States, which is linked back to the underlying diversity of labour law systems, and the prevalent view of EU labour law developments as applicable in cross-border settings only: as a result, very little, if any, harmonisation has taken place, and the judgments (whilst critically evaluated from socio-economic and industrial relations perspectives *in extensu*) have continued to evade detailed scrutiny from a consistency-based dogmatic perspective.

The conflict-laden relationship between economic concerns and social rights in EU law is further explored by *Dorota Leczykiewicz*, in a contribution which suggests that the (economic) goal of creating an internal market properly falls within

the domain of EU law, whereas domestic regulation has remained responsible for setting appropriate levels of social protection. In challenging the traditional view of an economic bias inherent in free movement law, she argues that a social dimension exists within the very framework of the internal market freedoms, allowing weaker parties to look for valuable opportunities in other countries' (employment) markets. In that context, the use of social rights arguments within EU law could equally be seen as 'instruments of domination and expressions of power on the part of those who possess them', including, it is suggested, trade unions. As the national reports show, Member States' social policies differ widely in their levels of protection of individual autonomy—and it is therefore not be inconceivable that some are in fact protectionist rules, that is to say, rules which restrict the private autonomy of other market participants and are thus prima facie open to scrutiny by European Union law. The main criticism of the judgments in *Viking* and *Laval*, then, is, according to this view, the Court's failure to articulate the supposed social benefits of the resulting intra-Member State wage competition, and free movement law more broadly, for the citizens of the Union's 'new' Member States, whose lower labour cost give them a significant competitive advantage in penetrating new markets.

Nicola Countouris and *Samuel Engblom* are similarly critical of the Union institutions' handling of the relationship between social rights and economic freedoms, albeit from a rather different perspective. Their chapter explores potential avenues designed to 'civilise the European Posted Workers Directive' in response to the increasing (ab-)use of the PWD's provisions. The original measure envisaged but a limited number of posting scenarios, and was designed to address the resulting conflict of law problems whilst ensuring a high level of worker protection and Member State flexibility to set higher standards where desired. In reality, however, cross-border operators have become increasingly adept at creating posting scenarios solely in order to undercut local working conditions—including temporary work agencies designed exclusively to supply posted workers. In addition to this downright abuse, the competition resulting from 'regime shopping', even within the framework of the PWD, can end up pitching 'the most vulnerable interest holders' against each other, as the East Lindsay Refinery dispute of 2009 showed. The original Directive is unable to engage with most of these issues, whilst individual Member States' actions are severely limited by the Court's decisions in cases such as *Laval* and *Rüffert*.

Against this backdrop, *Countouris* and *Engblom* develop an ambitious reform agenda for the EU—in both its legislative and its judicial capacity. As regards the former, a clear shift from the current emphasis on a country of origin principle to the primacy of equal treatment rules is advocated to ensure that dignitarian or 'fair competition' concerns are addressed. The Court of Justice, on the other hand, is urged to embrace the 'robust and coherent web of supranational rules and interpretative approaches' of international fundamental rights standards in revisiting its jurisprudence in *Viking* and *Laval*. The stakes are high: European labour law's inability to channel and thus civilise the fundamental conflicts at

hand, the authors suggest, may well play directly into the hands of nationalist and right-wing elements across the Union.

Michal Bobek's contribution returns to the deeper underlying issues raised by the volume's examination of the diverse implications of EU Law in national courts, likening the phenomenon to Schrödinger's cat in the black box: it is only by observing and comparing what is actually going on in different Member States that the true extent of EU law's penetration of domestic legal systems can be assessed. The answer to that question is not merely of descriptive or practical interest: the broad acceptance and implementation of EU law forms part of the very normativity, and thus legitimacy, of the Union's regulatory efforts. A first potential avenue to finding out facts might be quantitative analyses: how much of EU law is applied in relevant cases? How often do domestic courts revolt? In addition to difficult numerical questions (which suggest that the current number of preliminary references is abnormally low), a key challenge lies in the fact that national courts' silence cannot necessarily be equated with acceptance—indeed, it may frequently mask ignorance or downright disregard. What follows, then, is a need for qualitative analyses to determine how successful the norm-setting institution (in the case of *Viking* and *Laval*, the Court of Justice itself) is in ensuring domestic compliance—not least, by rendering judgments which can be applied with reasonably clarity and predictability. If not, the Court risks the creation of 'virtual case law', that is, bodies of doctrine which exist in EU law reports and textbooks, without however ever being applied by domestic judges. As the national reports show, at least in some jurisdictions this is exactly what seems to have materialised: *Viking* and *Laval* failed to have a significant impact beyond a relatively small group of national legal systems. What an examination of EU law in the Member States has thus begun to highlight is a need to become much more attuned to the complex realities of individual legal communities—whether epistemic or national—with comparative analysis as the key tool in informing such decision making.

A brief *Epilogue* prepared by *Ulf Bernitz* concludes the volume with a discussion of some of the most salient issues identified in the different dimensions explored by national reporters and the broader thematic chapters—from the resurgence of rights-based reasoning before the Court of Justice to the ever more challenging relationship of (domestic) labour law and the (Union's) fundamental freedoms.

IV. Implications for European Labour Law

With the revelation of that particular need as our starting point, we can attempt to sketch out some implications for EU labour law, including Union-influenced labour law in the EU Member States, which might be thought to emerge from the

inquiries and reflections which are detailed in this book.[23] The ensuing chapters, as summarised or surveyed in the foregoing pages, may help us to tackle a quandary for European labour lawyers—a quandary which existed before *Viking* and *Laval*, but which has been greatly intensified by that line of decisions. This is, we suggest, a quandary within a problem. The problem had been apparent for a long time; it had from the outset of the common market been in some sense evident that what we now think of as EU internal market law had the potential, in pursuit of a set of economic freedoms, to disrupt or undermine some of the protections which national labour laws confer upon the individual and/or collective interests and freedoms of workers.[24]

The problem had, however, been a largely dormant one before *Viking* and *Laval*; but those decisions turned it into a clear and present danger, and moreover one which presented what has appeared to be an acute, even in the view of some an existential, dilemma for those concerned with the evolution of labour law in Europe. After *Viking* and *Laval*, it was soon realised that there was a new quandary: given that the EU law of economic freedoms was now being strongly superimposed upon labour law's regulation (both national and international) of collective labour relations and individual employment relations, could the proponents of European labour law somehow absorb and deal with this real culture shock, both at the theoretical and the practical levels, or had it become necessary for the *Viking* and *Laval* approach to be somehow extruded from the regulation of this sphere of economic and social action if European labour law was in any meaningful sense to retain its identity and autonomy? We proceed to draw from the writings in this book some ideas which might help to understand the extent or depth of this dilemma and to provide some indications as to how it could and should be resolved.

In particular we suggest a way of theorising this dilemma: it consists of constructing a set of models which represent the relation or intersection between European labour law and EU internal market law as it has developed over time and as it might develop in future—at the Union level, across the different Member States, and through the multifaceted interaction of those legal systems. The starting position for this analysis is an assertion that there have been, are, and will be into the predictable future, variable kinds and degrees of functional intersection between EU internal market law and European as well as domestic labour law. This is not in any sense a novel or dramatic claim; it is simply a way of making the point that the principles of economic freedom and undistorted competition which EU internal market law asserts have the intrinsic potential to be brought to bear to regulate, to de-regulate, or to re-regulate the collective and individual

[23] We have had the great advantage of reading, while awaiting its publication, T Novitz and P Syrpis, 'The EU Internal Market and Domestic Labour Law' in A Bogg, C Costello, A Davies and J Prassl (eds), *The Autonomy of Labour Law* (Oxford, Hart Publishing, forthcoming). We readily and gratefully acknowledge the additional influence upon this section of the ideas put forward in that chapter.

[24] See notably B Bercusson, *European Labour Law*, 2nd edn (Cambridge, Cambridge University Press, 2009) 5ff.

relations between employers and workers which are the very subject-matter of (European) labour law.

A more provocative claim, though still by no means a wholly novel one, is that we can discern three theoretical models or ideal types which characterise three different ways amongst and between which that intersection between EU internal market law, European labour law and national industrial relations systems has been constructed and might be constructed or re-constructed in the future. These are:

> First, a model or ideal-type in which EU internal market law is excluded from functioning in the sphere of the collective and individual relations between employers and workers, leaving that as the exclusive domain of European and/or domestic labour law ('the exclusion type');
>
> Second, a model or ideal-type in which EU internal market law functions in tandem, and in some kind of state of reconciliation, with European and/or domestic labour law, in the sphere of collective and individual relations between employers and workers ('the reconciliation type'); and,
>
> Third, a model or ideal-type in which EU internal market law is so extensively superimposed upon the sphere of collective and individual relations between employers and workers in the Union and each of its Member States, that it has to be regarded as having over-ridden or superseded European labour law's regulation of those spheres ('the supersession type').

The application of these theoretical models or ideal types to the past and present and likely future of the intersection between EU internal market law and European labour law may help to understand and deal with the dilemma for European labour law which has been brought about by the *Viking* and *Laval* case law. We find that these three theoretical models or ideal-types have been and are interplayed with each other in different configurations as the relationship between EU internal market law and European labour law, as well as their (non-)impact on national laws and practice, have evolved over time. We think that the *Viking* and *Laval* decisions undoubtedly represented a watershed in this evolution, so that it becomes useful to distinguish between two complex but significantly different models which obtained respectively before and after *Viking* and *Laval.*

The pre-*Viking* and *Laval* model of the intersection between EU internal market law and European labour law in particular seems to us to have combined, differently over time, the 'exclusion type' with the 'reconciliation type'. The original model of the intersection, under the Common Market and the EEC regimes, can be regarded as one predominantly of the exclusion type with some elements of the reconciliation type. The exclusionary foundations consist primarily in the original limitations of the (legislative) competence of what we now think of as EU law, in the sphere of collective and individual relations between employers and workers. For a long time the attention of European labour lawyers was focused upon the ways in which these limitations of competence inhibited the development of Community-level social law, leaving the difficult policy questions involved in

the hands of individual Member States. The limitations could also, and perhaps equally satisfactorily in retrospect, be regarded as holding back the inflow of an emergent body of internal market law into the sphere of collective and individual relations between employers and workers—at both the Union and national levels. Those exclusionary foundations seemed to be significantly reinforced by the judicial insulation of those spheres from the impact of Community competition law which is identified with the decision of the ECJ in the *Albany* case.[25]

The pre-*Viking* and *Laval* model also had elements of the reconciliation type, and indeed these were accumulated over time as the economic freedoms which form the core of EU internal market law began to obtrude themselves into the sphere of collective and individual relations between employers and workers. An initial and largely un-noticed step in this direction consisted in the gradual recognition that the law of free movement of workers within the Community represented a kind of intersection between EU internal market law and European labour law. In recent years, that intersection has become a profoundly difficult and contested one as the exercise of that freedom has greatly increased and has been perceived, controversially but nevertheless quite widely, as threatening to labour standards and social standards in Member States obliged to accept workers from other Member States. It is, however, important to remember that until those recent years, this freedom was not perceived as one which was fundamentally threatening to or disruptive of national labour laws, but rather as, if anything, supportive to them—and thus understood as a social freedom, just as much as an economic one. We could say that the freedom of movement of workers was an aspect of EU internal market law which for a long time seemed to contain its own inbuilt reconciliation with European labour law, as well as (at least in theory) Member States' regulatory concerns. During that early period, so in the pre-*Viking* and *Laval* phase, freedom of movement of workers was the 'Cinderella provision among the original four fundamental freedoms of the EU', as Catherine Barnard has famously styled it,[26] not only by reason of the limited use which was made of it, but also because it seemed to display the subdued timidity of Cinderella vis-a-vis national labour standards and national labour laws—not least in the form of explicit provisions for national derogations and higher levels of worker-protection standards in the relevant regulatory frameworks.

Even in that pre-*Viking* and *Laval* phase it was, however, becoming apparent that, if we may brutally change the metaphor, free movement of workers was something of a Trojan horse in the way that it secreted EU internal market law, in an innocent guise, into the citadel of European labour law. For quite a long time before *Viking* and *Laval*, it had been apparent that much more real threats were posed to European labour law from the quarters of freedom of establishment and

[25] *Albany* (n 10).
[26] See C Barnard, *EU Employment Law*, 4th edn (Oxford, Oxford University Press, 2012) 144.

freedom of provision of services. As the Court strengthened those freedoms,[27] so their potential was revealed to support and protect various forms of inter-State arbitrage on the part of European employing enterprises between the labour standards and labour laws of the Member States in which they were based and of the Member States in whose labour markets they might choose to operate. At the inevitable risk of some over-simplification, we can observe that such threats were concentrated upon, though by no means wholly confined to, practices whereby employing enterprises sought to implant workers in Member States where high labour standards were protected by strong labour law regimes so as to continue to apply the lower labour standards permitted by the weaker labour law regime of their home State.

From the early 1990s onwards, and for the remainder of the pre-*Viking* and *Laval* era, the institutions of the EU, confronted with various forms of this 'posted workers' problem, responded in a combination of the 'exclusion' mode with the 'reconciliation' mode. The ECJ in *Rush Portuguesa*[28] went out of its way, in full 'exclusion' mode, to shield Member States from internal market law if they wished to extend their labour legislation or multi-employer collective agreements to all persons employed within their territory; and even if later decisions brought its case law more into line with 'the *Säger* "market access" approach',[29] the Court was still operating in 'reconciliation' mode. So also was the European Commission; we suggest that the Posted Workers Directive represents a complex attempt to reconcile the freedom to provide services with the prevention of 'social dumping'. Although proclaiming itself to be an internal market measure, the Directive actually inclined quite a long way towards a labour law stance of protecting labour standards in the host countries to which workers might be posted—not least through the provisions of Article 3, which became so central to the Court's decision in *Laval*, there morphing from a floor or *minimum* standard of rights to a firm ceiling, laying down the limits of domestic labour laws' protective effects.

Then there was the *Viking* and *Laval* sequence of decisions in the CJEU: we suggest that those decisions ushered in a phase in which the Court has chosen and the Commission has been forced to operate in a mode which purports to be one of 'reconciliation' between EU internal market law and European labour law but is actually one of supersession of European labour law (and, to a varying extent, of domestic labour law) by EU internal market law. The pretension of the post-*Viking* and *Laval* regime to be one of reconciliation is a false one for the following reason. On the face of it, the method of testing various limitations on economic freedoms for proportionality seems to be a promising recipe for a general reconciliation between European labour law and EU internal labour market law, especially when coupled with an unexpectedly fulsome rhetorical recognition

[27] Barnard, *EU Employment Law* (n 26) 201 convincingly cites 'the Court's embrace in the 1990s of the *Säger* "market access" approach'.

[28] Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* [1990] ECR I-1417.

[29] See Barnard, *EU Employment Law* (n 26) 214.

of the fundamental character of the rights to freedom of association and collective industrial action. What, after all, could be more apparently reconciliatory, when faced with two bodies of law whose underlying normative tendencies are divergent ones, than to require them to be balanced by reference to the notion of proportionality?

However, most commentators, ourselves included, are convinced that the appearance of balanced neutrality in the *Viking* and *Laval* case law is a deceptive one in various senses. Although systems of judicial review according to notions of proportionality usually claim not to have fixed the odds in favour of one side before the game is played, they equally usually have design features which do quite strongly determine the outcomes. Thus, it usually matters a lot which body of norms is being brought to bear on the other in a forensic sense, and that is certainly true of the post-*Viking* and *Laval* regime. The normative positions which have been established by or under the protection of European labour law are systemically exposed to scrutiny by reference to EU internal market law, but this is almost entirely one-way traffic—it is not as if the normative positions of EU internal market law are being scrutinised by reference to those of European labour law, or indeed to those of different Member States' regulatory choices.

This matters very greatly, especially by reason of the open-endedness of the largely uni-directional judicial review process which the *Viking* and *Laval* case law has seemed to usher in. It is a process which seems to extend to private or civil society actors not previously regarded as directly susceptible to this kind of review, namely trade unions. It is moreover a process in which the adjudicating body—the CJEU—seems prone unexpectedly to expand the normative basis of its own review in the course of the process, most notably in the recent *Alemo-Herron* decision,[30] where a militant understanding of the 'freedom to conduct a business' embodied in Article 16 CFR was brought into the equation, and one where scant regard, if any, seems to be paid to the potential effects of a decision on the diverse national industrial relations systems. It is unsurprising that the proponents of European labour law experience a strong sense of existential insecurity in the face of the post-*Viking* and *Laval* regime.

However, when uttering those strictures we have to remind ourselves that they have largely become the received wisdom of European labour law, and that we set ourselves the task of seeing whether any new light could be shed on the many shadows which the *Viking* and *Laval* case law seems to have cast before itself. At the outset of this section, we presented this as a dilemma for the proponents of European labour law; will they and should they become rejectionists who feel that the *Viking* and *Laval* case law has irreparably encroached upon the autonomy of

[30] Case C-426/11 *Alemo-Herron v Parkwood Leisure Ltd* (2013) ECR-I 00000. See J Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law' (2013) 42 *Industrial Law Journal* 434, 442; S Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: on the Improper Veneration of "Freedom of Contract"' (2014) 10 *European Review of Contract Law* 157.

their discipline and thereby totally unsettled their faith in EU law, or will they and should they continue to look for and hope for new bases of reconciliation between European labour law and EU internal market law? The sad fate of the 'Monti II' proposals, as chronicled in this book, suggests that an initially promising legislative avenue for reconciliation has become an impasse, no doubt in part because of the negativity, even at times the understandable paranoia, which the *Viking* and *Laval* case law has generated in several Member States. In the next and concluding section of this chapter, we advance some claims as to ways in which this writing project and this book may indicate paths out of that current impasse.

V. Conclusion: Exploring Future Paths

Three topics, all of which tie in with broader themes of European Union law and legal scholarship, in particular merit brief attention—both because they are woven into the chapters which follow, and because of their potential importance in informing future work exploring the operation of EU law in the Member States.

First, there is the importance of extensive comparative legal research, of the particular kind trialled in the present work: by using individual landmark cases (or, in due course, secondary legislation) and tracing their impact at both Union and Member State levels over a period of five to ten years, different groups of scholars can begin to engage with a broad range of materials, and build up a picture of the actual impact in different Member States—including crucially accounts of what did *not* happen, a set of considerations which may frequently be left out in standard implementation accounts. Many of the usual methodological warnings continue to apply, of course—not least to see whether the case in question was an outlier (*Laval* in particular could be said to be a unique case, a hard set of facts which led to bad law; the same is much less true of *Viking*). The specific sub-discipline or area of enquiry is an equally important question—could it be said to be unique or somehow unrepresentative of broader trends? Whilst labour law might in some sense of course be said to be special, both as regards its normativity and the stark differences between national industrial relations and employment law systems, it can nonetheless be understood as symptomatic of the broader questions developed.

A second important theme woven throughout the discussion is the CJEU's (frequently criticised) assertion of judicial control over an ever-widening range of substantive areas, in the face of explicit provisions to the contrary in the Treaties and secondary legislation. One of the recent key drivers of this development has been the Court's willingness to find a wide range of principles to be 'fundamental', thus bringing them into conflict with each other. This brings with it the potential danger of political questions becoming legal ones, as difficult policy questions, once addressed in national debate, are shifting onto the EU plain. The authors of the proposed Monti II Regulation were in that sense right to suggest that the

issues surrounding *Viking* and *Laval* had become truly European ones, and cannot therefore sufficiently be regulated by Member States—yet that was the very ground on which the proposal was vetoed by a significant number of national Parliaments. Union law is increasingly forcing the resolution of complex ambiguities, some of which the Court may have created in the first place. As institutions other than the Court find it increasingly difficult to address such questions, the CJEU must become carefully attuned to developments in different Member States—not least because EU law's penetration of much of their legal systems might frequently be much less deep than suggested in received accounts.

Discussion throughout the book, finally, reveals the potential for a growing mismatch between legal developments at the Union level and their impact in different Member States. Regulatory choices (such as the balancing of economic freedoms and fundamental rights) which might look subtle when seen from the EU level will frequently not translate as such into domestic legal systems, where substantive EU law interacts with different provisions of Member States' legal order. The former might be the result of a (subtle) compromise between two competing values, balanced without giving clear primacy to either. Due to the supremacy of EU law, the interaction with domestic norms, on the other hand, cannot usually involve such balancing exercises (a problem potentiated by the fact that the way in which the original compromise has been struck might be conceptually alien to a particular Member State). This is particularly difficult where the standard set at EU level then becomes a ceiling or maximum level rather than a mere baseline of minimum harmonisation.

It is our hope, then, that this book presents labour lawyers with different perspectives from which to understand and discuss *Viking* and *Laval*, and to consider a broader range of viewpoints. At the same time, it represents a first step towards building up a comprehensive body of systematic evidence on the basis of which EU lawyers may challenge and refine our understanding of the interaction of Union law with legal norms and practice across the 28 Member States.