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Judgment of the Court of Justice in Case C-438/05

*The International Transport Workers' Federation & The Finnish Seamen's Union v Viking Line
ABP & Oü Viking Line Eesti*

**COLLECTIVE ACTION SEEKING TO INDUCE A FOREIGN UNDERTAKING TO
CONCLUDE A COLLECTIVE LABOUR AGREEMENT WITH A TRADE UNION AND
LIABLE TO DETER IT FROM EXERCISING ITS FREEDOM OF ESTABLISHMENT
IS A RESTRICTION ON THAT FREEDOM**

Such a restriction may be justified on the basis of the protection of workers, provided that it is established that it is suitable for ensuring the achievement of the legitimate objective pursued and does not go beyond what is necessary to attain that objective

The International Transport Workers' Federation (ITF) is an international federation which groups together 600 transport workers' unions from 140 countries, with its headquarters in London. One of its principal policies is that of combating the use of flags of convenience. In this context, in order to improve the conditions of employment of crew employed on vessels, only unions established in the State of beneficial ownership have the right to conclude collective agreements, irrespective of the flag under which the particular vessel is registered.

Viking Line, a Finnish ferry company, is the owner of the Rosella, a ferry which, under the Finnish flag, operates the route between Tallinn and Helsinki. The crew of the Rosella are members of the Finnish Seamen's Union (FSU), which is affiliated to ITF.

In October 2003, Viking Line gave FSU notice of its intention to reflag the Rosella, which was running at a loss, by registering it in Estonia, where it had a subsidiary, in order to be able to employ an Estonian crew, at a lower level of pay than that applicable in Finland, thereby enabling it to compete with other ferries on the same route. In November 2003, following a request from FSU, ITF sent a circular to all its affiliates requiring them to refrain from entering into negotiations with Viking Line, with the threat of sanctions if they failed to comply. That had the effect of preventing the Estonian trade unions from entering into negotiations with Viking Line.

In parallel, FSU laid down conditions on the renewal of the manning agreement and announced its intention to strike. It required, on the one hand, an increase in the number of the crew on the Rosella, and, on the other, the conclusion of a collective agreement, according to which, if the vessel was reflagged, Viking Line would continue to comply with Finnish labour law and would not lay off crew.

In 2004, after Estonia joined the European Union, Viking Line, which was determined to register the loss-making vessel under the Estonian flag, brought proceedings before the courts in the United Kingdom where ITF had its seat. Viking Line requested that ITF be ordered to withdraw the circular and that FSU be ordered not to infringe its right of establishment with regard to the reflagging of the Rosella.

The Court of Appeal, before which an appeal was lodged by FSU and ITF, referred to the Court of Justice of the European Communities a number of questions for a preliminary ruling on the application to the present case of the rules of the Treaty on freedom of establishment and on whether the action of FSU and ITF constituted an unjustified restriction on free movement.

First of all, the Court points out that the rules of the Treaty on freedom of establishment apply to collective action initiated by a trade union or a group of trade unions against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising that freedom.

The Court recognises that, in the context of an agreement seeking to regulate paid work collectively, **the provisions on freedom of establishment confer rights on a private undertaking which can be relied on against a trade union or an association of trade unions exercising their autonomous power, pursuant to trade union rights, to negotiate with employers or professional organisations the conditions of employment and pay of workers.**

Next, the Court points out that the conditions laid down for the registration of vessels must not form an obstacle to freedom of establishment. First, collective action such as that envisaged by FSU has the effect of making less attractive, or pointless, Viking Line's exercise of its right to freedom of establishment, inasmuch as such action prevents both Viking Line and its Estonian subsidiary from enjoying the same treatment in the host Member State as other economic operators established in that State. Secondly, collective action taken in order to implement ITF's policy of combating the use of flags of convenience, which seeks, primarily, to prevent ship-owners from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, must be considered to be at least liable to restrict Viking Line's exercise of its right of freedom of establishment.

It follows that such action constitutes a restriction on freedom of establishment.

Such a restriction can be accepted only if it pursues a legitimate aim such as the protection of workers. It is for the national court to ascertain whether the objectives pursued by FSU and ITF by means of the collective action which they initiated concerned the protection of workers.

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

If it transpired that the jobs or conditions of employment at issue were in fact jeopardised or under serious threat, it would then have to be ascertained whether the collective action initiated by FSU is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective.

In that regard, the Court points out that it is common ground that collective action, like collective negotiations and collective agreements, may, in the particular circumstances of the case, be one of the main ways in which trade unions protect the interests of their members. As regards the question of whether or not the collective action at issue in the main proceedings goes beyond what is necessary to achieve the objective pursued, it is for the national court to examine, in particular, first, whether, under the national rules and collective agreement law applicable to that action, FSU did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with Viking Line, and, secondly, whether that trade union had exhausted those means before initiating such action.

In relation to the collective action seeking to ensure the implementation of the policy in question pursued by ITF, the Court notes that, to the extent that that policy results in ship owners being prevented from registering their vessels in a State other than that of which the beneficial owners of those of vessels are nationals, the restrictions on freedom of establishment resulting from such action cannot be objectively justified. Nevertheless, the objective of that policy is also to protect and improve seafarers' conditions of employment.

The Court points out, however, that, in the context of its policy of combating the use of flags of convenience, ITF is required, when asked by one of its members, to initiate solidarity action against the beneficial owner of a vessel which is registered in a State other than that of which that owner is a national, irrespective of whether or not that owner's exercise of its right of freedom of establishment is liable to have a harmful effect on the work or conditions of employment of its employees. Therefore, the policy of reserving the right of collective negotiations to trade unions of the State of which the beneficial owner of a vessel is a national is also applicable where the vessel is registered in a State which guarantees workers a higher level of social protection than they would enjoy in the first State.

Unofficial document for media use, not binding on the Court of Justice.

Languages available: All

The full text of the judgment may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-438/05>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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*Pictures of the delivery of the judgment are available on EbS "Europe by Satellite",
a service provided by the European Commission, Directorate-General Press and
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