COLLECTIVE ACTION AND FUNDAMENTAL FREEDOMS IN EUROPE

Striking the Balance

Edited by
Edoardo ALES
Tonia Novitz

Contributors
Edoardo Ales
Antonio Baylos
Olaf Deinert
Filip Dorssemont
Lorenzo Gaeta
Teun Jaspers
Sylvaine Laulom
Tonia Novitz
Giovanni Orlandini
Aukje A.H. van Hoek



CONTENTS

List o	f contributors	. X
1.	Preface	1
2.	National chapters	5
2.1.	Collective action in Belgium. Looking for the right to strike	
	Filip Dorssemont	7
I.	Collective action: what are we talking about?	7
II.	Collective action: juridical status	
	A. Sources of definition and regulation of collective action	
	B. Entitlement.	
	C. Consequences for those organising or participating in a collective	
	action	15
III.	Limitation of collective action with reference to its aims and content	18
IV.	Ex ante or ex post judiciary/administrative control	19
V.	Procedural requirements/preconditions for legality	23
VI.	Balancing collective action with other rights and freedoms (national	
	level)	23
VII.	(Potential) impact of ECJ case law (on fundamental freedoms) on	
	the national regulation concerning collective action	26
Conc	lusion	27
Biblio	ography	29
2.2.	Collective action in France. Towards a restriction of the right to strike?	
	Sylvaine Laulom	31
[.	Collective action: what are we talking about?	31
II.	Collective action: juridical status	

Intersentia

	A. Sources of definition and regulation of collective action	33
	B. (Legal) definition of the main features of collective action	
	C. Entitlement	37
	D. Consequences on those organising or participating in a collective action	38
III.	Limitation of collective action with reference to its aims and content	
IV.	Balancing collective action with other rights and freedoms	41
	A. The regulation of the right to strike in transport	
	B. A very similar regulation of the right to strike in education	
V.	(Potential) impact of ECJ case law (on fundamental freedoms) on	
	the national regulation concerning collective action	47
Bibli	ography	50
2.3.	Collective action in Germany. A union-based system	
	Olaf Deinert	53
_		
I.	Collective action: what are we talking about?	
II.	Collective action: juridical status	
	A. Sources of definition and regulation of collective action	
	B. Definitions	
	C. Entitlement D. Consequences on those organising or participating in a collective	
	action	
III.	Limitations to collective action	
	A. Excluded workforce	
	B. Aims	
	C. Peace obligation	
	D. Principle of proportionality	
	E. Ultima ratio	
	F. Limitations to lockout	
	G. Emergency services	
	H. Fair bargaining	
	I. Individual activities	
IV.	J. Legal protection	
V.	Procedural requirements/preconditions for legality	/ 2
v.	Balancing collective action with other rights and freedoms (national level)	7
VI.		14
V 1.	(Potential) impact of ECJ case law (on fundamental freedoms) on	7
Con	the national regulation concerning collective action	
	ography	
ווטוט	ogiapny	/ .

Vi Intersentia

2.4.	Collective action in Italy. Conceptualising the right to strike	
	EDOARDO ALES, LORENZO GAETA and GIOVANNI ORLANDINI	77
I.	Collective action: what are we talking about?	77
	A. Historical background	77
	B. Concept of collective action	79
II.	Collective action: juridical status	82
	A. Sources of definition and regulation of collective action	82
	B. (Legal) definition of the main features of collective action	83
	C. Entitlement	83
	D. Consequences for those organising or participating in a collective action	85
III.	Limitation of collective action with reference to its aims and content	
IV.	Ex ante or ex post judiciary/administrative control	
V.	Procedural requirements/preconditions for legality	
V. VI.	Balancing collective action with other rights and freedoms	90
٧ 1.	(national level)	90
	A. Preliminary remarks	90
	B. The right to strike, abstention of law and strike in essential services	91
	C. The end of the abstention of law: Act n. 146 of 1990	94
	D. A change of perspective: conflict in essential services in the light of Act 83 of 2000.	97
VII.	(Potential) impact of ECJ case law (on fundamental freedoms) on),
V 11.	the national regulation concerning collective action	98
	A. Economic freedoms as constraints on industrial disputes	98
	•	100
		100 101
	D. Compensation claims of undertakings damaged by an unlawful	101
	•	103
Biblio		105 105
2.0	8-4r/····	
2.5.	Collective action in Spain	
	Antonio Baylos	109
I.	Collective action: juridical status	109
	A. Legal entitlement and exercise of the right to strike:	
	strike action as a procedure	112
	B. Publicity of the strike, picketing and information	114
II.	Limitation of 'collective action': aims and content	115
	A. External restrictions on the right to strike and the constitutional	
	filter	116

Intersentia Vii

	B. Internal restrictions; the so-called 'predatory strikes': the	
	presumption of abuse of rights (reference to case law, the Viking	
	and Laval cases)	117
III.	Consequences of exercising the right to strike: lawful and unlawful	
	strikes	
	A. Effects of strike action	120
	B. In particular, limiting the powers of the employer during the	
	regular exercise of the right to strike	122
	C. Effects of an unlawful strike.	123
IV.	Balancing collective action with other rights and freedoms: strikes	
	affecting 'essential services'	124
	A. Defining the concept of "essential service"	125
	B. Formal and material guarantees surrounding the act of imposing	
	a minimum service	127
	C. Jurisdictional control and excess authority in the establishment	
	of minimum services	131
Biblio	graphy	133
2.6.	Collective Action in The Netherlands	105
	Teun Jaspers	135
I.	Collective action: what are we talking about?	135
	A. Some figures	135
	B. The concept of collective action	
II.	Collective action: juridical status	
	A. Sources of definition and regulation of collective action	
	B. Legal definition of the main features of collective action	
	C. Entitlement.	
	D. Consequences for those organising or participating in a	
	collective action	146
III.	Limitation of collective action with reference to its aims and content.	
111.	A. Conventional peace clause	
	B. Conflict of rights.	
	C. The objective of the actions	
IV.	·	
IV.	Ex ante or ex post judiciary/administrative control	
	A. Ex ante: Conciliation and arbitration	
	B. Ex post assessment: by court decision	
V.	1 1 0 7	164
VI.	Balancing collective action with other rights and freedoms	
	·	165
VII.	(Potential) impact of ECJ case law (on fundamental freedoms) on	
	the national regulation concerning collective action	168
Biblio	graphy	170

viii Intersentia

2.7.	Collective action in the United Kingdom	
	Tonia Novitz	173
I.	Collective action: what are we talking about?	173
II.	Collective action: juridical status	174
	A. Sources of definition and regulation of collective action	175
	B. Legal definition of the main features of collective action	180
	C. Entitlement	180
	D. Consequences of collective action on organisers/participants'	
	employment relationship	182
III.	Limitation of collective action referred to its aims and contents	187
IV.	Ex ante or ex post administrative/judicial control	191
V.	Procedural requirements/preconditions for legality	194
VI.	Balancing collective action with other rights and freedoms which fall	
	outside the employment relationship (at national level)	199
VII.	The present and potential impact of ECJ case law (on fundamental	
	freedoms) on national regulation concerning collective action	200
Biblio	ography	210
3.	Collective action in labour conflicts under the Rome II Regulation	
	FILIP DORSSEMONT and AUKJE A.H. VAN HOEK	213
I.	Conceptual framework	214
l.	A. Article 9 of Rome II: background and standard of evaluation	
	B. Introducing the debate – <i>Tor Caledonia</i>	
	C. The debate during the <i>Travaux préparatoires</i>	
	D. Cross-border industrial action in employment law and the	220
	private international law perspective	222
II.	The difficult issue of classification: the scope of Article 9 of Rome II	
и.	A. The concept "industrial action"	
	B. The non-contractual obligation	
	C. The scope regarding the <i>ratione personae</i>	
	D. Main issues and preliminary issues	
	E. The right to strike as a "civil and commercial matter" The conflict of law rules	
III.	A. The conflict of law rule, <i>locus actus</i> and alternatives	
D:L1: -	oranhy	
DIDHC	JYI auliv	470

Intersentia ix

4.	The law and the courts. Regulating strike in seven European countries		
	EDOARDO ALES		
I.	Collective action: what are we talking about?		
II.	Strike as a constitutional right		
III.	Strike as a right		
IV.	Strike as a freedom		
V.	Some comparative remarks		
5.	The impact of Viking and Laval. Contesting the social function and		
	legal regulation of the right to strike		
	Tonia Novitz		
I.	Introduction		
II.	The judgments in Viking and Laval		
III.	The assumptions underlying the ECJ jurisprudence		
IV.	Running counter to ECJ assumptions: the evidence from the country		
	reports		
V.	An analysis of the challenge posed		
Bibli	ography		

X Intersentia