THE LABOUR COURT, Judgment No. 89/09
Case No. A 268/04

Summary

A Latvian company posting workers from Latvia to work for construction companies in Sweden was subjected to industrial actions by Swedish labour unions. The industrial actions, which were for the purpose of compelling the Latvian company to sign a tie-in agreement related to Byggnad's collective agreement, resulted in the work terminating prematurely and the Latvian workers leaving Sweden. The Labour Court requested a preliminary ruling from the European Court of Justice when trying the issue of the lawfulness of the industrial actions and thus stayed the case. The European Court of Justice found in its preliminary ruling that the industrial actions were in conflict with the EC-treaty, as they entailed a restriction of the freedom to provide services that was not found to be justified. The Labour Court now tries the claims for damages that the Company makes in the case, finding the Labour Unions liable to pay damages to the Company for the harm caused by the industrial actions taken in violation of EC law. With respect to the claim for economic damages, the Labour Court finds that though it certainly can be considered evident that the Company suffered economic harm as a consequence of the industrial actions, the Company has not been able to prove that it suffered economic harm in the amount claimed. That claim is denied. The Labour Court orders the Labour Unions to pay exemplary damages to the Company and to bear the majority of the Company's trial costs and legal fees. – The issue as to the permissibility of the Company's petition for a declaratory judgment is also addressed.

An unofficial translation by Jur. Dr Laura Carlson

THE LABOUR COURT JUDGMENT Judgment No. 89/09
2009-12-02, Case No. A 268/04
Stockholm

THE PLAINTIFF
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THE DEFENDANTS
1. Svenska Byggnadsarbetareförbundet, 106 32 Stockholm
2. Svenska Byggnadsarbetareförbundet, avdelning 1, Box 1288, 171 25 Solna
Legal Counsel for 1 and 2: Licensed Attorney Peter Kindblom, Advokatfirma Lindhs DLA Nordic KB, Box 7315, 103 90 Stockholm
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ISSUE
Damages

BACKGROUND

The Industrial Actions

Laval un Partneri Ltd. (Laval or the ”Company”) is a Latvian company with its registered office in Riga, Latvia. The Company previously leased workers from Latvia to companies conducting operations in Sweden, including in connection with building projects managed by the company, L&P Baltic Bygg AB (Baltic), in the municipality of Danderyd and the city of Vaxholm. Baltic managed a construction project with respect to Söderfjärd School in the city of Vaxholm up to and including the month of February 2005, for which Laval leased workers. Baltic was put into bankruptcy in March of 2005.

Laval signed collective agreements with the Latvian Construction Workers´ Union on 14 September 2004 and 20 October 2004, respectively, but was not bound by a collective agreement in relation to either the Swedish Building Workers´ Union (Byggnads), its Local Branch No. 1 (*Byggettan* or the Local Branch) or the Swedish Electrician’s Union (Electrician’s Union). None of these organisations had any members employed by Laval.

Contacts were established in June 2004 between *Byggettan*, on one side, and a representative for Laval and Baltic on the other. Discussions were held as to whether Laval should sign Byggnad's collective agreement. A number of negotiations occurred afterwards without resulting in the reaching of any agreement. The Local Branch gave notice in writing on 19 October 2004 to Laval as to industrial action, including a blockade with respect to all building- and foundation work at Laval's workplaces.

Laval stated in writings to the Local Branch that, among other things, the industrial actions were unlawful and that during that period, a duty to maintain the industrial peace was in effect as the noticed blockade was based on a demand for a collective agreement that entailed an impermissible limitation of the right to provide services in accordance with Article 49 EC-treaty.

The industrial actions went into effect on 2 November 2004.

The Swedish Electrician's Union gave notice in writing on 23 November 2004 to the Electrical Installer's Organisation EIO as to sympathy actions. The sympathy actions went into effect on 3 December 2004.

Request for a preliminary ruling

Laval filed a lawsuit with the Labour Court on 7 December 2004 against Byggnads, the Local Branch and the Swedish Electrician's Union. The Company petitioned therewith that the Court, through an interlocutory decision, declare that the industrial actions by Byggnads and the Local Branch, as well as the sympathy actions by the Swedish Electrician's Union, were unlawful and should cease. Damages were also requested. The Labour Unions objected to the Company's request as to an interlocutory order.

In an order dated 22 December 2004, the Labour Court denied the Company's request as to an interlocutory order (Decision 2004 no. 111).

The Labour Court held the trial in the case on 11 March 2005. The Company petitioned therewith that the Labour Court, in accordance with Article 234 EC-treaty, request that the European Court of Justice issue a preliminary ruling.

The Labour Court decided on 29 April 2005 (Decision 2005 no. 49) to obtain a preliminary ruling from the European Court of Justice based on Article 234 EC-treaty. The Labour Court, in the request for a preliminary ruling dated 15 September 2005, posed the following questions to the European Court of Justice:

> 1. Is it compatible with the rules of the EC Treaty on the freedom to provide services and the prohibition of a discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC for Labour Unions to attempt, by means of collective industrial action in the form of a

blockade, to try to compel a foreign provider of services to sign a collective agreement in the host country in respect of terms and conditions of employment, such as that described in the decision of the Labour Court of 29 April 2005, if the situation in the host country is such that the legislation implementing Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?

2. The Co-Determination Act prohibits a Labour Union from taking collective action with the intention of circumventing a collective agreement concluded by other parties. That prohibition, however, pursuant to a special provision contained in part of the Swedish law known as “Lex Britannia”, only applies where a Labour Union takes collective action in relation to conditions of work to which the Co-Determination Act is directly applicable, which means in practice that the prohibition is not applicable to collective action against a foreign undertaking which is temporarily active in Sweden and which brings its own workforce. Do the rules of the EC Treaty on the freedom to provide services and the prohibition of discrimination on grounds of nationality and the provisions of Directive 96/71 preclude application of the latter rule – which, together with other parts of the Lex Britannia, mean in practice that Swedish collective agreements become applicable and take precedence over foreign collective agreements already concluded – to collective action in the form of a blockade taken by Swedish Labour Unions against a foreign temporary provider of services in Sweden?

The preliminary ruling of the European Court of Justice

The European Court of Justice issued a judgment in the case, Case C-341/05, ECR 2007, p. I-11767, (hereafter the ”*Laval* case” and the ”*Laval* judgment”, respectively) on 18 December 2007.

The European Court of Justice stated, with respect to the first issue, that it was to be understood as that the Labour Court primarily sought clarity as to "whether Articles 12 EC and 49 EC, and Directive 96/71, are to be interpreted as precluding a labour union, in a Member State in which the terms and conditions of employment concerning the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive, save for minimum rates of pay, are contained in legislative provisions, from attempting, by means of collective action in the form of blockading sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers, and to sign a collective agreement, the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.”

In the judgment, the European Court of Justice gave the following answers as to the request for the preliminary ruling.

1. Article 49 EC and Article 3 of 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 are to be interpreted as precluding a labour union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade (*blockad*) of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.

2. Where there is a prohibition in a Member State against labour unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Articles 49 EC and 50 EC preclude that prohibition from being subject to the condition that such action must relate to terms and conditions of employment to which the national law applies directly.

The European Court of Justice stated the following in its reasoning with respect to the first issue.

> 71. [A] Member State in which the minimum rates of pay are not determined in accordance with one of the means provided for in Article 3(1) and (8) of Directive 96/71 is not entitled, pursuant to that directive, to impose on undertakings established in other Member States, in the framework of the transnational provision of services, negotiation at the place of work, on a case-by-case basis, having regard to the qualifications and tasks of the employees, so that the undertakings concerned may ascertain the wages which they are to pay their posted workers.
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> 80. Nevertheless, Article 3(7) of Directive 96/71 cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment that go beyond the mandatory rules for minimum protection. As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 expressly lays down the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to

require those undertakings to observe. Moreover, such an interpretation would amount to depriving the directive of its effectiveness.

81. Therefore – without prejudice to the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a commitment made to their own posted staff, the terms of which might be more favourable – the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision.

91. Although the right to take collective action must therefore be recognized as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may nonetheless be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, it is to be protected in accordance with Community law and national law and practices.

93. [T]he protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods … or freedom to provide services…

94. As the Court held in the judgments in *Schmidberger* and *Omega*, the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty. Such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality…

95. It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Community law inapplicable to such action, taken against an undertaking established in another Member State which posts workers in the framework of the transnational provision of services.

96. It must therefore be examined whether the fact that a Member State's Labour Unions may take collective action in the circumstances described above constitutes a restriction on the freedom to provide services, and, if so, whether it can be justified.

97. It should be noted that, in so far as it seeks to abolish restrictions on the freedom to provide services stemming from the fact that the service provider is established in a Member State other than that in which the service is to be provided, Article 49 EC became directly applicable in the legal orders of the Member States on expiry of the transitional period and confers on individuals rights which are enforceable by them and which the national courts must protect…

98. Furthermore, compliance with Article 49 EC is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, the provision of services. The abolition, as between Member States, of obstacles to the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law…

99. In the case in the main proceedings in the Labour Court, it must be pointed out that the right of Labour Unions of a Member State to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement for the building sector – certain terms of which depart from the legislative provisions and establish more favourable terms and conditions of employment as regards the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 and others relate to matters not referred to in that provision – is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC.

100. The same is all the more true of the fact that, in order to ascertain the minimum wage rates to be paid to their posted workers, those undertakings may be forced, by way of collective action, into negotiations with the Labour Unions of unspecified duration at the place at which the services in question are to be provided.

101. It is clear from the case-law of the Court that, since the freedom to provide services is one of the fundamental principles of the Community…, a restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; if that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it…

107. In that regard, it must be observed that, in principle, blockading action by a Labour Union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers.

> 108. [T]he obstacle which that collective action forms cannot be justified with regard to such an objective linked to signature of the collective agreement for the building sector, which the Labour Unions seek to impose on undertakings established in other Member States by way of collective action such as that at issue in the case in the main proceedings...
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> 109. Finally, as regards the negotiations on pay which the Labour Unions seek to impose, by way of collective action such as that at issue in the main proceedings, on undertakings, established in another Member State which post workers temporarily to their territory, it must be emphasised that Community law certainly does not prohibit Member States from requiring such undertakings to comply with their rules on minimum pay by appropriate means…
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> 110. However, collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective referred to in paragraph 102 of the present judgment, where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay…

With respect to the second issue that the Labour Court had submitted, the European Court of Justice stated the following.

> 114. It is clear from settled case-law that the freedom to provide services implies, in particular, the abolition of any discrimination against a service provider on account of its nationality or the fact that it is established in a Member State other than the one in which the service is provided…
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> 115. It is also settled case-law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations…
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> 116. In that regard, it must be pointed out that national rules, such as those at issue in the case in the main proceedings, which fail to take into account, irrespective of their content, collective agreements to which undertakings that post workers to Sweden are already bound in the Member State in which they are established, give rise to discrimination against such undertakings, in so far as under those national rules they are treated in the same way as national undertakings which have not concluded a collective agreement.

> 117. It follows from Article 46 EC, which must be interpreted strictly, that discriminatory rules may be justified only on grounds of public policy, public security or public health..
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> 118. It is clear from the order for reference that the application of those rules to foreign undertakings which are bound by collective agreements to which Swedish law does not directly apply is intended, first, to allow Labour Unions to take action to ensure that all employers active on the Swedish labour market pay wages and apply other terms and conditions of employment in line with those usual in Sweden, and secondly, to create a climate of fair competition, on an equal basis, between Swedish employers and entrepreneurs from other Member States.
>
> 119. Since none of the considerations referred to in the previous paragraph constitute grounds of public policy, public security or public health within the meaning of Article 46 EC, applied in conjunction with Article 55 EC, it must be held that discrimination such as that in the case in the main proceedings cannot be justified.

After receiving the judgment of the European Court of Justice, the Labour Court recommenced the proceedings in the case and held a new trial.

THE CLAIMS

The Company, as the case has now finally been defined, has petitioned:

1. That the Labour Court declare that the industrial actions by Byggnads and the Local Branch against all the workplaces of the Company with respect to a total shut-down of work, strike and blockade are unlawful and are to cease,
2. That the Labour Court order Byggnads to pay to the Company exemplary damages in the amount of SEK 500 000,
3. That the Labour Court order the Local Branch to pay to the Company exemplary damages in the amount of SEK 500 000,
4. That the Labour Court order the Swedish Electrician's Union to pay to the Company exemplary damages of SEK 350 000, and
5. That the Labour Court order Byggnads, the Local Branch and the Swedish Electrician's Union to jointly and severally pay to the Company economic damages in the amount of SEK 1 420 000, or – in the event the Labour Court finds that § 61 of the Co-Determination Act is applicable – allocated as to the defendants in accordance with the defendants' membership or according to another allocation that the Labour Court finds fair.

As to the amounts with respect to the claimed exemplary damages that the Company states in the Complaint, the Company has also petitioned for interest in accordance with § 6 of the Interest Act from the date of service (9 December 2004, 9 December 2004 and 8 December 2004, respectively) until payment is made with respect to SEK 150 000 for Byggnads, SEK 200 000 for the Local

Branch and SEK 200 000 for the Swedish Electrician's Union. As to the thereafter-remaining amounts with respect to exemplary damages, and as to the economic damages, interest has been petitioned in accordance with § 6 of the Interest Act from the date of 15 June 2008 (in other words. thirty days after service of the claims) until payment is made.

In addition, the Company has – in the event the Labour Court should find that the Company's claims with respect to damages cannot be granted – requested that the Labour Court obtain a preliminary ruling from the European Court of Justice as to whether damage liability for the defendants exists in this case.

The Company has petitioned for compensation for trial costs and legal fees.

The Labour Unions have argued that when it comes to the petition as to a declaratory judgment under item 1, that it should first be dismissed with reference to the fact that any need for a declaratory judgment is absent, and in the alternative, that it should be denied. The Labour Unions have contested the complaint in general but attest that the claims for interest are reasonable in themselves.

The Labour Unions have in addition – in the event the Labour Court should find that the Company's claims for damages should be granted – requested that the Labour Court obtain a preliminary ruling from the European Court of Justice with respect to the issue of whether Article 49 EC gives the Company the right to damages from the Labour Unions upon violation of that provision.

The Company has contested the Labour Unions' demand as to dismissing the Company's claim under item 1. According to the Company, it is not a question of a petition for a declaratory judgment but rather a petition for an executive judgment with respect to a negative obligation, which is why the provision in § 4:6 of the Labour Disputes Act with respect to the requirements for standing for a declaratory judgment is not applicable.

THE PARTIES' STATEMENTS OF THE CASE

[Omitted]

THE COURT'S REASONING

The Dispute

The dispute in this case concerns the issue of whether the industrial actions the Labour Unions took against the Company posting workers from Latvia to Sweden were in conflict with EC law, and whether these organisations are therefore liable to pay damages to the Company. The European Court of Justice in its judgment in the preliminary ruling found that the industrial actions were unlawful according to EC law, which now is uncontested between the parties in the case. That which the Labour Court now has to take a stance regarding is primarily whether the three labour unions are obligated to pay exemplary and/or economic damages to the Company due to the unlawful industrial actions. Other remaining disputed issues are whether the industrial actions of Byggnads and the Local Branch have now ceased, and whether the Labour Court is to try the Company's petition that the Court declare the industrial actions unlawful and that they are to be terminated.

The Company's petition for a declaratory judgment

The Labour Court has received the preliminary ruling from the European Court of Justice as to the question of the lawfulness of the industrial actions according to EC law, as seen from the introduction to this judgment. The Company maintained that the industrial actions were unlawful, in part due to the fact that the demand for a collective agreement violated the EC-treaty and the directive concerning the posting of workers, and in part due to that the third paragraph of § 42 of the Co-Determination Act, which is included in lex Britannia, should not be applied as the provision is in conflict with the European Community law's prohibition against discrimination. The defendants objected to the allegation that the industrial actions violated EC law. The European Court of Justice found in its preliminary ruling that the industrial actions were in conflict with Article 49 EC and Article 3 in the directive concerning the posting of workers, as well as that the recently mentioned provision in lex Britannia is in conflict with respect to Articles 49 and 50 EC.

It is now uncontested in the case that the industrial actions were unlawful, but the Company has maintained its request that the Labour Court declare the industrial actions of Byggnads and the Local Branch unlawful and that they should cease. Byggnads and the Local Branch have objected, arguing that this request should be dismissed, as there presently is no standing for a declaratory judgment as the industrial actions are no longer ongoing. The Company objects to the request for dismissal, arguing that the requirement of standing for a declaratory judgment is not applicable as the request should be seen as a request for performance with respect to a negative obligation.

The Labour Court finds that the Company's petition that the Labour Court declare that the industrial actions "are unlawful and should be terminated" has

been formulated as a petition for a declaratory judgment, and that it ought to be treated as such.

In accordance with § 4:6 of the Labour Disputes Act, a petition that does not contain a claim that the opposing party is to be obligated to fulfill or to omit doing something, in other words, a petition for a declaratory judgment, is to be dismissed if it is not of considerable significance for the plaintiff that the question be tried.

The Labour Court has found in previous case law (see, for example, AD 1982 no. 35) that a petition for a declaratory judgment has considerable significance for a party where there is reason to assume that a favorable judgment will either directly affect the opposing party in legal actions in relation to that party or is directly decisive for a subsequent lawsuit including claims that the opposing party be ordered to fulfill or omit. Normally, it is the circumstances at the commencement of the lawsuit that are decisive for the permissiveness of the petition, but there are certain possibilities to also take into consideration subsequently revealed circumstances that directly affect the significance of having the case tried. Such circumstances can be a judgment issued in the period during which the trial is ongoing or that the question has become uncontested between the parties (see AD 1996 no. 74).

The Company in this case also petitions for an executory judgment which for its granting assumes, among other things, that the industrial actions were unlawful, which is why the trying of the petition for a declaratory judgment cannot have the above described effect as to a subsequent petition for an executory judgment. The issue consequently is primarily whether there is reason to assume that a favorable declaratory judgment will directly affect Byggnads and the Local Branch in their legal actions in relation to the Company in such a manner that it can be seen to be of considerable significance for the Company that the petition for a declaratory judgment be tried.

The portion of the petition for a declaratory judgment constituting the request as to a declaration that the industrial actions ”be terminated” assumes, for its granting, that the industrial actions are ongoing. Byggnads and the Local Branch have declared in this case that the industrial actions are no longer ongoing. The Chairperson of Byggnads, upon inquiry by the Company, in writing in addition has expressly declared that Byggnads’ industrial action has ceased.

Naturally, it is important with respect to the effects of an industrial action on the party subjected and any third parties that a commenced industrial action be terminated in a clear manner, for example, by an explicit notice to those who have received the notice as to industrial action, however, no statutory provisions as to this exist. An industrial action can be terminated without having to observe any formal requirements.

As stated, at present it is uncontested between the parties that the industrial actions were unlawful, and the Labour Court therewith has this as a starting point in its assessment of the petition for an executory judgment that the Company also presents. In addition, the European Court of Justice in its preliminary ruling may be said to have found that the industrial actions were unlawful. As far as can be seen in the case, the Company no longer conducts any operations in the construction industry, either in Sweden or abroad.

Under the described circumstances, it can no longer be of any considerable significance to the Company, according to the view of the Labour Court, to now have the specific petition for a declaratory judgment that the industrial actions are – or were – unlawful and are to be terminated, tried by the Labour Court. The Company's petition for a declaratory judgment shall therefore be dismissed.

The Court now turns to the question of whether the Labour Unions are liable for damages to the Company due to the violations of EC law that the industrial actions entailed.

The legal bases for the liability to pay damages for violations of EC law

By way of introduction, it can be stated that there are no explicit Swedish statutory provisions that, even after an interpretation consistent with the treaties, give the Company a right to damages from the organisations based on a violation of the treaties caused by the industrial actions, and neither is there support for such a right to damages in the Swedish case law regarding domestic law. Damage liability for the Labour Unions must therefore be solely based on that following from EC law.

According to EC law, member states are obligated, in accordance with the duty of loyalty - or the principle of solidarity - to ensure the effective enactment of EC law, which among other things entails that violations of EC law are to carry effective sanctions. This principle is expressed in Article 10 EC in the following wording:

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

That a violation of an EC law provision can lead to liability for damages on an EC law basis has been established by the European Court of Justice primarily in cases where member states or EU institutions have committed harmful actions against individuals. According to the established case law of the European Court

of Justice, damage liability for the state can arise under the condition that the following three criteria are fulfilled:

1. The State has infringed a rule of law intended to confer rights on individuals;
2. The breach must be sufficiently evident; and
3. There must be a direct causal link between the breach and the loss or damage sustained.

There are no generally applicable regulations as to when and how damage liability is to be imposed in the EC-treaty. Instead, it is the member state regulations that are to be applied when damage liability follows from EC law. It is the obligation of each member state to establish in its legal system the criteria rendering it possible to determine the scope of damages, on terms and conditions that may not be less favorable than those concerning similar claims for damages based on national law (the principle of equivalence) and that in any event, they may not be such that in practice it becomes impossibly or unreasonably difficult to be awarded damages (the principle of effectiveness). The damages are also, in order to be effective and have a deterring effect, to be in a reasonable proportion to the harm caused (the principle of proportionality).

Liability for damages on an EC law basis has been extended in the case law of the European Court of Justice to exist in situations in which a private party claims rights in accordance with EC law as against another private party. In order for damage liability for violations of EC law to exist between private parties, the EC legal regulations that are violated must have direct effect on the national level, and therewith, create rights for the individual that the national courts have to protect. Thereto is required that direct effect is also applicable in the relationship between the two private parties, ”horizontal direct effect”.

Articles in the EC-treaty can have direct effect even if they do not contain any prohibitions. A regulation according to the EC-treaty is to be generally applicable as well as binding in its entirety and therewith has direct effect. The relationship is otherwise with respect to directives. The European Court of Justice has found that provisions in directives can, under certain conditions, have vertical direct effect, in other words, be applicable in the relationship between the state and the individual, but in principle they do not have horizontal direct effect.

Article 49 EC, to the extent it purports to abolish limitations of the freedom to provide services having as their basis that the service provider is established in a member state other than where the services are to be provided, is to be viewed as having direct effect (see paragraph 97 in the *Laval* judgment with therein given references).

That the articles in the EC-treaty concerning competition law, applicable as to agreements that companies execute, have horizontal direct effect, and that therewith, directly through these articles, rights are created for individuals that

the national courts are obligated to protect, was already clear early (see, *inter alia*, judgment of the 20 September 2001 in Case C-453/99, *Courage v. Crehan*, ECR 2001, p. 1-6297 and judgment of the 13 July 2006 in the joined cases C-295/04 to C-298/04, *Manfredi v. Lloyd*, ECR 2006, p. I-6619).

With respect to the articles regulating free movement, the European Court of Justice, in its judgment of the 11 December 2007 in Case C-438/05, *International Transport Workers' Federation v. Finnish Seamen's Union*, ECR 2007, p. I-10779 (*Viking Line* judgment), determined that it follows from the established case law that Articles 39, 43 and 49 EC are not only applicable to the operations of public authorities, but also encompass other forms of regulations that have the purpose of regulating, in a collective manner, employment, self-employed operations and the provision of services (paragraph 33 with references). As the terms and conditions of employment in the different member states are regulated at times through legislation and other acts, and at other times through collective agreements and other legal agreements entered into or adopted by private parties, a limitation of the prohibitions in the above mentioned articles to only include the actions of public authorities could lead, according to the European Court of Justice, to differences in the application of these prohibitions.

A statement of the same content can also be found in the *Laval* judgment, paragraph 98. There it is stated, with reference *inter alia* to the judgment of the 12 December 1974 in Case 36/74, *Walrave and Koch*, ECR 1974, p. 1405, Swedish special issue, vol. 2, p. 409, and the judgments in the cases *Bosman* and *Wouters*, that Article 49 EC is applicable even when it is a question of a "non-public regulation, that has the purpose in a collective manner of regulating the provision of services". According to the Court, the removal of impediments to the freedom to provide services between the member states would be jeopardized if the removal of state impediments could be countermanded by impediments stemming from associations and labour unions, not regulated by public law, exercising their legal autonomy.

The question of whether Article 43 EC, prohibiting limitations in the free right to establishment, can have horizontal direct effect was tried by the European Court of Justice in the *Viking Line* case. The issue addressed there concerned whether this article could entail rights for a private enterprise that it could invoke against a labour union or an association of labour unions. The European Court of Justice referred herewith to its above-mentioned case law, adding that the Court furthermore had already found that the fact that certain of the Treaty's provisions are formally directed to the member states did not exclude that rights at the same time are created for individuals that have interests in that the obligations adopted in such a manner are observed, and that the prohibition according to a mandatory provision in the treaty against restricting a fundamental freedom encompasses, among other things, all agreements that have the purpose of collectively regulating employment (paragraph 58 with references). The conclusion was that Article 43 EC, regulating a fundamental

freedom, could entail rights for a private enterprise that it can invoke against a labour union or an association of labour unions. That the industrial actions taken by the Labour Unions are to be considered encompassed by the legal autonomy that these non-public organisations exercise could also be seen from the judgment in that case (paragraph 35).

It can be seen from the European Court of Justice's judgment of the 17 July 2008 in Case C-94/97, *Raccanelli*, ECR 2008, p. I-5939, that liability for damages between private parties for violations of EC law can come into question even with respect to violations of Article 39 EC containing regulations concerning freedom of movement for employees. That case concerned the question of whether an Italian doctoral candidate had been discriminated against by a private research institution in Germany due to nationality, by not having been treated in the same manner as domestic doctoral candidates. The European Court of Justice stated that even a private association, such as the research institution in question, is encompassed by the prohibition against discrimination of employees as stated in Article 39 EC. The Court also had to answer the question of what were to be the consequences in the event the foreign doctoral candidate had been discriminated against through the institution's actions against him, namely not giving him the opportunity to become employed at the institution. The Court stated, with reference to the judgments of *von Colson and Kamann*, as well as *Paquay* (judgment of the 10 April 1984 in Case C-14/83, *von Colson and Kamann*, ECR 1984, p. 1891, Swedish special issue, vol. 7, p. 577 and judgment of the 11 October 2007 in Case C-460/06, *Paquay*, ECR 2007, p. I-8511, respectively) that neither in Article 39 EC nor in the provisions in the regulation as to freedom of movement for employees is it prescribed that the member states, or such organisations as the institution at issue, have to take any defined measures upon the violation of the prohibition against discrimination, but rather, they are given the freedom to choose, depending upon the different situations that can arise, between different suitable solutions in order to achieve the objectives of these provisions. According to the Court, it is the duty of the referring court, against the background of the national legislation concerning tort liability, to determine the compensation that the plaintiff in the national case has the right to demand for injuries arising in the event he is subject to discrimination (paragraphs 50–52).

With respect to the retroactive effect of the judgments of the European Court of Justice, the Court in the judgment of the 5 March 1996 in the joined cases C-46/93 and C-48/93, *Brasserie du pêcheur* and *Factortame*, ECR 1996, p. I-1029, pronounced that a member state's liability for damages cannot be limited to only include those injuries arising after a violation of the treaty in question has been established by court judgment. This would namely entail that the right to damages according to the Community's legal system would be jeopardized. This would also be in conflict with the principle of effectiveness, according to the European Court of Justice, in the event damages were made dependent upon a requirement that the Court previously had established such a violation of EC law (paragraphs 94 and 95). In those cases in which the European Court of Justice

intended to limit the retroactive effect of its decisions, such has been stated in the decision. As a main principle, consequently, it may be deemed that the European Court of Justice's decisions have retroactive effect. The interpretation of an EC legal rule as recognized in a judgment by the European Court of Justice is consequently normally to be considered applicable to legal relationships also with respect to the period prior to the judgment.

The Labour Court now turns to its assessment of the Company's claim for damages.

Can liability be imposed on the Labour Unions for damages due to the industrial actions taken in order to compel the execution of a collective agreement in conflict with Article 49 EC and the posting of workers directive?

The Company has alleged two grounds for its damage claims that the Company argues are cumulative, in other words, the Company wishes that both grounds be tried by the Labour Court and used as the basis for the damage assessment. The first ground concerns the circumstance that taking industrial actions, in order to enforce such contract demands as those at issue in this case, against a company from another EU-member state posting workers in Sweden, is in violation of the EC-treaty regulations as to freedom of movement. According to the Company's second ground, liability for damages stems from the industrial actions that were unlawful, as the Company was already bound by collective agreements and the objective of the industrial actions was for Byggnad's collective agreement to displace these collective agreements, and that according to EC law, the rule in the third paragraph of § 42 of the Co-Determination Act must be disregarded as it is discriminatory on the basis of nationality according to the European Court of Justice. The Labour Unions have objected, alleging that damage liability does not exist under any of these grounds.

The Labour Court first addresses the question of whether damage liability exists according to the first ground alleged by the Company, as well as the statutory basis for damages in such an event that is applicable. The Court, after having addressed the Company's second ground for damages, will determine below if and to what degree potentially applicable tort regulations in such a case entail that the Company's claims for damages can be granted.

With respect to the first of the Company's grounds, the Court answers first the question of whether the Labour Unions can be held liable for a violation of the treaty.

Can the Labour Unions be held liable for a violation of the treaty?

The Company briefly is of the following view. The judgment by the European Court of Justice in the *Laval* case entails that the European Court of Justice has granted Article 49 EC horizontal direct effect in the present case. This can be seen particularly from paragraph 98 of the judgment where the European Court

of Justice determines that Article 49 EC is also to be applied to certain non-state regulations that have the purpose of regulating in a collective manner the provision of services. The European Court of Justice finds that the Swedish governmental authorities have entrusted the social partners with setting wages for domestic companies through collective agreements. The judgment by the European Court of Justice entails that the defendants have complete responsibility for their actions. Nothing in the European Court of Justice's judgment indicates that there should be liability for the Swedish state in this case.

The Labour Unions have primarily objected in this respect with the following. Article 49 of the EC-treaty does not have horizontal direct effect in the meaning that it entails that an individual, in this case the Company, can allege that the defendants' concrete actions in the form of a blockade constitute a violation of Article 49 EC in the relationship between the Company and the Labour Unions. This can be seen from how the European Court of Justice expressed its opinion *inter alia* in paragraphs 96 and 99 in the *Laval* judgment. It is the *right* to take industrial actions that was the object and not the concrete actions. It can certainly be seen from the previous case law of the European Court of Justice that Article 49 EC includes non-public bodies such as, for example, sports associations, where they conduct regulatory or norm-giving operations, but it cannot be seen that the concrete actions of associations, such as, for example, the Labour Unions, are encompassed by the horizontal direct effect. In addition, the European Court of Justice, when answering the first issue, has not only referred to Article 49 in the EC-treaty but also to Article 3 in the posting of workers directive, which results in that the judgment must be seen as being directed to the member states.

The Labour Court makes the following assessment.

The Labour Court in its request for a preliminary ruling has not posed any question to the European Court of Justice concerning the potential liability of the Labour Unions for damages. The issue then is whether the general principles for damage liability that have been developed by the European Court of Justice in its case law can give sufficient guidance. In order for damage liability to come into question, according to the view of the Labour Court and in accordance with that upon which the parties appear to be in agreement, it is first required that the EC legal provisions that the Labour Unions have breached have horizontal direct effect in the relationship between the Company and the Labour Unions. The Labour Court therefore tries this question first.

The European Court of Justice in its preliminary ruling has established that Article 49 EC is directly applicable to the present situation, and that it gives the Company rights that it can invoke before the courts and which the national courts are to protect, in other words, that this provision here has direct effect. In addition, the European Court of Justice has established that Article 49 is to be observed even when it is a question of non-public regulations that have the

purpose of regulating the provision of services in a collective manner, as even associations and organisations that are not regulated by public law – such as the Labour Unions –when they exercise their legal autonomy, could be able to prevent the free movement of services.

According to the Company, the first fundamental prerequisite for the Labour Unions' damage liability exists therewith, namely that Article 49 EC in this case has horizontal direct effect in the relationship between the Labour Unions and the Company.

The Labour Unions do not share this view but rather argue that the European Court of Justice's statement in the *Laval* judgment is to be interpreted so that it is not the Labour Unions' concrete actions, but rather their *right* to take industrial actions that was the object, as well as that which was in conflict with the treaty. Consequently, according to this view, only the Swedish state, whose legislation allows the action in conflict with EC law, can be held liable for damages, but not the Labour Unions following valid national regulations.

The European Court of Justice states in its answer to the first question, which the European Court of Justice reformulated in the manner as can be seen from the introduction to this judgment, that Article 49 EC and Article 3 in the posting of workers directive constitute impediments for that a labour union "is given the opportunity" to take industrial actions in a situation as the one in the case at issue. According to the view of the Labour Court, this choice of words could potentionally be interpreted as that the European Court of Justice is primarily expressing an opinion as to the Swedish regulations and not to the concrete actions by the Labour Unions. The European Court of Justice also states, as the Labour Unions have noted, in paragraph 96 as to the circumstance that the Labour Unions "may" take industrial action and in paragraph 99 that this "right" which they have been given to take industrial actions constitutes a restriction in the freedom to provide services in the meaning intended by Article 49 EC.

There is reason, however, according to the view of the Labour Court, to more closely examine several different language versions of this answer to the first question in the *Laval* judgment prior to drawing any definite conclusion from the above-mentioned choice of words.

According to the French language version of the judgment, the answer to the first question is that EC law is to be interpreted so that it constitutes an impediment for a Labour Union "*puisse tenter de contraindre... un prestataire de services*". In the German language version, it is stated that EC law prevents that a labour union *"versuchen kann... einen... Dienstleister dazu zu zwingen"*.

In the English language version, given here in its entirety, there exists however no correspondence to the words "*kan försöka* [can attempt]" or "*ges möjlighet att försöka* [is given the possibility to attempt]" to compel or encourage. Here it is stated that EC law impedes that labour unions "attempt to force", through

industrial actions, the foreign service provider to enter into negotiations and conclude a collective agreement:

> 1. Article 49 EC and Article 3 of 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 *are to be interpreted as precluding* a labour union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, *from attempting, by means of collective action in the form of a blockade* ('blockad') of sites such as that at issue in the main proceedings, *to force a provider of services* established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive (*italics added*).

The Danish language version has the same content. It is also restated here. The italicization in both language versions is that by the Labour Court.

> 1) Artikel 49 EF og artikel 3 i Europa-Parlamentet og Rådets direktiv 96/71/EF af 16. december 1996 om udstationering af arbejdstagere som led i udveksling af tjenesteydelser *skal fortolkes således, at de er til hinder for, at en fagforening* i en medlemsstat, hvor arbejds- og ansættelsesvilkårene på de områder, der er nævnt i direktivets artikel 3, stk. 1, første afsnit, litra a)-g), er fastsat i lovgivningen, bortset fra bestemmelser om mindsteløn, *gennem kollektive kampskridt i form af en blokade* af byggepladser, som det er tilfældet i hovedsagen, *forsøger at få en tjenesteyder*, der har hjemsted i en anden medlemsstat, til at indlede forhandlinger om lønniveauet til de udstationerede arbejdstagere samt at tiltræde en kollektiv overenskomst, hvis bestemmelser på visse af de nævnte områder fastsætter mere fordelagtige betingelser end dem, der følger af den relevante lovgivning, mens andre vedrører områder, der ikke er nævnt i direktivets artikel 3 (*italics added*).

According to the view of the Labour Court, that now stated demonstrates that the portion of the judgment at issue cannot be seen as having the content that the Labour Unions argue, namely that it is only the actual right to take industrial actions – the national regulations permitting the industrial action – that was the object and not the concrete actions of the unions.

Neither can the Labour Court find that the European Court of Justice's manner of expressing itself in paragraphs 96 and 99 can be given the interpretation that the Labour Unions allege when read in context. The European Court of Justice reemphasizes in paragraph 98 that Article 49 EC is applicable even where it is a

question of "non public regulations, that have the purpose of in a collective manner regulating the provision of services", as the removal between the member states of impediments to the freedom to provide services would be jeopardized if the removal of state impediments could be counteracted by impediments following from associations and organisations not regulated by public law exercising their legal autonomy. It can be seen from the case law of the European Court of Justice, according to the view of the Labour Court, that with respect to non-public bodies, it is not only their regulatory or norm-giving operations that are encompassed by EC law, but also their concrete actions. As mentioned above, the Court's statements take aim at situations where the organisations "exercise their legal autonomy". According to the view of the Labour Court, there is no doubt that the taking of industrial actions entails such an exercise. This can also be seen in general from the statements by the European Court of Justice in its *Viking Line* judgment.

That the European Court of Justice includes non-public bodies exercising their legal autonomy within the application of Article 49 EC consequently demonstrates, according to the view of the Labour Court, that the Company's rights are not only applicable as against the state but also as against such private law associations, such as the Labour Unions, when taking industrial actions in such a situation as in the case at hand.

This conclusion also receives support from statements made in the legal expert opinions submitted in this case, in part by Doctor of Laws Jörgen Hettne, cited by the Company, and in part by Professor Torbjörn Andersson, cited by the Labour Unions. Dr. Hettne states that it is obvious that Article 49 EC has legal effect between the parties in the case, and that it purports to give rights to the one of the parties, as the European Court of Justice declared that the industrial actions taken in this dispute were not compatible with Article 49 EC and violated the Company's right to provide services in Sweden. Prof. Andersson, despite the fact that he finds that "certain questions can be raised", makes the assessment that Article 49 EC has direct effect to the extent it creates rights for individuals and obligations for individual associations, organisations, etc., and that these obligations not only concern the norm-giving regulations such associations decide and apply, but also the concrete actions they take.

That now stated entails in accordance with the view of the Labour Court that Article 49 EC in the actual situation has horizontal direct effect between the Labour Unions and the Company, and that consequently the conditions exist for the Company to be able to plead successfully in court directly against the Labour Unions based on the violation of the treaty alleged. That the European Court of Justice in its judgment not only refers to Article 49 EC but also to Article 3 in the posting of workers directive leads, in accordance with the view of the Labour Court, to no other assessment.

Should the remedy for the violation of the treaty be damages?

The Labour Unions are of the understanding that even if the Labour Court were to find that Article 49 EC has horizontal direct effect, this does not automatically mean that the violations at issue must be compensated for by damages. According to them, it would also be in violation of fundamental requirements as to legal certainty to allow individual legal subjects to bear the economic risks and take the economic consequences for the type of mistake now at hand.

The Company maintains that Article 10 EC requires that the member states provide effective sanctions for violations of EC legal provisions that have been given direct effect, and therefore, it is self evident that damages should be awarded.

The Labour Court makes the following assessment as to this issue.

The starting basis for the Labour Court's assessment is the above-described duty of loyalty, according to which a violation of EC law should result in effective sanctions in order to deter such violations. The member states are to insure that the suitable effect of EC legal provisions is not jeopardized. It may also be considered established that there is a general legal principle within EC law that damages are also to be able to be awarded between private parties upon a violation of a treaty provision that has horizontal direct effect. That this principle is not only applicable within the area of competition law but also ought to be applicable with respect to violations against other treaty provisions can be seen from the judgment in the case, *Raccanelli*. There is no explicit support, however, in the case law of the European Court of Justice for the proposition that an individual is to pay damages on an EC law basis to another individual upon a violation specifically of Article 49 EC.

As accounted for above, the European Court of Justice includes non-public associations of the type such as the Labour Unions, attorney bar associations and sport associations in the circle encompassed by Article 49 EC, which is natural against the background of that these types of associations fulfill important societal interests, have authority and influence as well as conduct norm-giving operations. It can, therefore, when it comes to violations of EC legal regulations applicable with respect to both the state and individual subjects, be seen as odd to make a distinction between damage claims depending upon whether the violator is a part of the state or happens to be independent of the state.

The Swedish labour unions enjoy a large degree of self-regulation and considerable authority when it comes to taking actions in order to compel employers to sign collective agreements. They can be seen as having exercised that which the European Court of Justice terms "their legal autonomy" when they took the industrial actions and sympathy actions at issue, respectively, in order to compel the Company to commence negotiations as to wages and the execution of a collective agreement, in conflict with Article 49 EC. It appears

against this background that liability for damages consequently should be able to be imposed on the Labour Unions, assuming that the remaining criteria for such liability are fulfilled.

As previously mentioned, damage liability for the state can arise on an EC law basis in accordance with established case law under the condition that three criteria are fulfilled, namely that the rule which was violated is intended to create rights for an individual, that the violation is sufficiently clear, and that there is a direct causality between the violation and the harm. If these criteria are applied to the situation now at hand, it can be asserted that the first criterion, against the background of that which the Labour Court has concluded above, is fulfilled, and it may be considered evident that there is such causality as is required. That which remains then is the requirement as to that the violation is sufficiently clear. The European Court of Justice has stated in the judgment in the cases *Brasserie du pêcheur* and *Factortame*, with respect to the member states' liability for legal provisions or national court judgments that are in violation of EC law, that a violation of Community law is sufficiently clear when a member state has obviously and seriously misjudged the boundaries for its discretionary assessment. Among other circumstances that can then be taken into consideration are the intentional or unintentional character of the commissioned treaty violation or the harm caused, the excusable or inexcusable character of a potential misconception of the law, or that a stance taken by a Community institution could have contributed to the failure, the adoption or the maintenance of the regulations or of a national court judgment that is in conflict with Community law.

Without taking a stance as to the question of whether that stated above can be completely applied in the present situation, the Labour Court finds that the actions of the Labour Unions at issue, the industrial actions, in accordance with the European Court of Justice's preliminary ruling, constituted a serious violation of the treaty, as they were in conflict with a fundamental principle in the treaty, the freedom to provide services. Even if the right to take industrial actions has also been recognized by the European Community as a fundamental right, it was found that the actual industrial actions, despite their objective of protecting workers, are not acceptable as they were not proportionate. The Labour Court finds that the stance of the European Court of Justice in these issues entails in this case that there is a violation of EC law that is sufficiently clear. The requisites for damage liability exist therewith. Whether the imposition of liability for damages on the Swedish state can even be contemplated is a question that ought not affect the Labour Court's assessment. It can, however, be added here that the European Court of Justice stated that EC law does not constitute any impediment that a legal subject other than a member state can incur liability for damages in addition to the member state's own liability for damages for injuries that were caused by an individual through measures that this legal subject had taken in conflict with EC law (see the judgment in the case *Soumen valtio and Lehtinen*, paragraphs 97-99).

In summary and against the background of that stated above, the Labour Court makes the assessment that the suitable effect of EC law would be jeopardized unless the Labour Unions could be ordered to pay compensation as to the Company for the injuries that the Company can prove it has suffered on the basis of that the Labour Unions, in conflict with EC law, took the concrete industrial actions.

Which damage liability regulations are then applicable?

EC law does not, as mentioned earlier, designate any specific procedural or tort law regulations that are to be applied in the event of a violation of EC law. There is an absence, as mentioned initially, of regulations in Swedish law that are directly applicable in situations such as the case at hand. The Labour Court consequently must, against the background of the Swedish legislation, after setting aside conflicting Swedish law or reconstructing such, determine the type of compensation that the Company has the right to claim.

In accordance with EC law, it is the duty of every member state to establish in its national legal system criteria rendering it possible to determine an amount of damages on terms and conditions that may not, among other things, be less favorable than those concerning similar claims for damages based on national law, and they may not in any event be such that in practice it becomes impossibly or unreasonably difficult to be awarded damages.

The Company has claimed compensation for the economic harm it has suffered as a consequence of the unlawful industrial actions, and also exemplary damages. With respect to the national legal provisions that could be applicable for the determination of the damages, the Company refers in part to the provision as to compensation for pure economic loss in § 2:2 of the Tort Liability Act, in part to the regulations concerning damages in §§ 54 and 55 of the Co-Determination Act, which according to the Company are to be applied analogously. The Labour Unions have stated that the provision in § 2:2 of the Tort Liability Act in itself may be considered to give room for economic damages in this case, while on the other hand, according to their understanding, specific legal support for exemplary damages on the basis of a violation of a treaty is absent, and that such damages already for this reason cannot come into question.

The Labour Court notes that both parties to this case refer, with respect to the Company’s claim for economic damages, to the Tort Liability Act. According to the wording of § 2:2 of this Act, a party who causes pure economic loss through a criminal act is to compensate the harm. This provision is considered not to be understood as a "principle of restriction" in the sense that it constitutes an impediment against imposing liability for pure economic loss in certain other cases, as developed in the case law, where the tortious act does not constitute a crime (see *e.g.* NJA 2005 p. 608). The legal expert opinions submitted in this case also lend support to the understanding that § 2:2 of the Tort Liability Act

does not impede compensation for pure economic loss in a case such as the one now at hand. The rule must, however, be reinterpreted in order to be able to be applied as a basis for economic damages for the present violation of EC law.

Non-pecuniary damages – compensation for a violation of integrity – can in accordance with § 2:3 of the Tort Liability Act be awarded if an individual has been seriously aggrieved on the basis of a crime that encompasses an attack against that person, or his or her freedom, peace or honor. This regulation, that likewise in accordance with its wording assumes criminal conduct, must also be reinterpreted in order to be able to be applied as a basis for exemplary damages for the now at hand violation of EC law.

The provisions in the Tort Liability Act concerning such forms of damages as claimed in this case are consequently not directly applicable. According to the view of the Labour Court, it is then more reasonable to instead seek guidance in the damage provisions of the Co-Determination Act concerning exactly the situation where a party has taken an industrial action against another that is unlawful according to the Act. The Labour Court therefore leaves the Tort Liability Act and turns to more closely investigating whether the Co-Determination Act's provisions can be applied with the assessment of all the damage claims based on the violations.

It follows from § 54 of the Co-Determination Act that the party who is in violation of the Act is to compensate the harm that has arisen. Herewith is intended both economic and non-pecuniary harm. Section 55 of the same act prescribes that with the assessment of and to what extent harm has arisen for a party, consideration is also to be given to that party's interest of that the provisions in the Act are followed, and to other circumstances of other than a pure economic significance. According to § 60 of the Co-Determination Act, damage awards can be lowered or entirely nullified, in other words, be reduced, if it is fair. It follows from § 61 of the Co-Determination Act that where several parties are liable for the injuries, the liability for damages is to be distributed between them according to that which is fair taking into consideration the circumstances.

Consequently, the Swedish lawmaker chose economic and exemplary damages in the Co-Determination Act as remedies in those cases in which industrial actions have been taken in conflict with the provisions of the Co-Determination Act concerning the industrial peace. These provisions, however, are not directly applicable, as in the present case it is a question of a violation of the EC-treaty that is the basis for the right to damages. The issue then is whether the regulations can be applied analogously.

When it comes to economic compensation, the European Court of Justice has noted that it must be adequate in the sense that it, in accordance with applicable national regulations, provides complete compensation for the actual harm that has been caused by the violation of EC law that has occurred, see judgment of

the 2 August 1993 in Case C-271/91, *Marshall*, ECR 1993, p. I-4367, Swedish special issue, p. I-315. Economic harm, among other things, pure economic loss, as recently stated, can be compensated with the application of § 54 of the Co-Determination Act. The Labour Court finds that the Company's claim as to economic damages by the Labour Unions on the basis now at hand ought to be suitably assessed with an analogous application of the regulations concerning damages in the Co-Determination Act. The Labour Court in a subsequent section will address whether the circumstances are such that the Company can be granted its claim.

This Court thereafter has to take a stance as to whether the provisions in the Co-Determination Act are to be applied analogously also with respect to the Company's claim for exemplary damages on the now given basis.

The Labour Unions are of the opinion that there is no room to award exemplary damages with reference to that an EC law provision has been violated. They have herewith referred to the European Court of Justice's judgment in the case *Suomen valtio and Lehtinen*, paragraph 88, stating that damages for a violation of Community law are not intended to function as "a deterrent or a sanction", but rather have the purpose of that an individual should be able to receive compensation for injuries they have suffered on the basis of any violations of EC law.

According to the Company, EC law requirements of effective sanctions entail that even exemplary damages are to be awarded for violations against Article 49 EC.

The Labour Court makes the following assessment.

The member states enjoy a large degree of freedom when it comes to the choices of sanctions available for violations of EC law, and therefore it is not self-evident that the Labour Unions should be able to be sanctioned with liability to pay exemplary damages for the violation of the treaty at issue. The Labour Court has recently found that the regulations concerning damages in the Co-Determination Act can be applied analogously for sanctions against a violation of the treaty in the form of compensation for pure economic loss. These legal provisions, including the regulations concerning the allocation of damage liability between several parties liable for damages and as to reductions, ought to not entail any limitations that should be in conflict with the EC legal principle of effectiveness. Under such circumstances, it should be viewed as sufficient that the Company has the possibility to have the claim as to compensation for the economic harm it has suffered tried with the application of these legal provisions.

However, according to the opinion of the Labour Court, there is significant support, despite this, for applying the Co-Determination Act's legal provisions as to exemplary damages analogously in this case. Such support can be found

primarily in the above-mentioned principles of equivalence and effectiveness in EC law.

The principle of equivalence entails that national damage liability regulations may not discriminate EC law based claims in comparison with comparable claims based on domestic law. This is also clearly established in the judgment in the case *Suomen valtio and Lehtinen*. The statement in the judgment that "a member state's liability for damages based on EC law is not intended to function as a deterrent or sanction" can according to the opinion of the Labour Court therefore not be given the meaning that the Labour Unions argue. Immediately after this statement, the European Court of Justice also finds that it follows from the established case law that when the requirements for a EC law based right to damages are fulfilled, it is the obligation of the member states to compensate the harm caused within the framework for the national tort legislation, as well as that the requisites that then are determined as regards damages may not be less favorable than those regarding similar national claims for damages.

The European Court of Justice has also expressed its opinion as to the type of sanction that exemplary damages can be seen to constitute. For example, the Court in the judgment in the cases *Brasserie du pêcheur* and *Factortame* has noted that damages of "an exemplary character" may not be excluded within the framework for a claim that has been presented in a legal proceeding and that is based on Community law if such damages can be awarded within the framework for similar claims presented in a legal proceeding based on national law. In the judgment in the case *Manfredi v. Lloyd*, which concerned competition law, the following is stated (paragraph 99):

> Therefore, first, in accordance with the principle of equivalence, if it is possible to award specific damages, such as exemplary or punitive damages, in domestic actions similar to actions founded on the Community competition rules, it must also be possible to award such damages in actions founded on the latter type of case.

The Labour Court finds support in the case, AD 2002 no. 45, for the proposition that exemplary damages can be awarded in the event of a violation of a treaty through an analogous application of national regulations. According to the judgment in that case, a county council was ordered, with an analogous application of § 25 of the Equal Treatment Act, to pay exemplary damages to a woman who was found to have been discriminated against in the appointment of an employment position as midwife. The Labour Court in the judgment stated the following: ”In the Equal Treatment Act, the Swedish lawmaker has chosen damages as a remedy for cases of violations of the prohibition against sex discrimination. Against the background of the above mentioned principle of solidarity according to the EC-treaty, the Labour Court finds that the damage provisions in § 25 of the Equal Treatment Act must be seen as being analogously applicable with a stated violation of such articles in the equal treatment directive

that have direct effect." The principle of solidarity mentioned in that statement is that which in this judgment is referred to as the duty of loyalty.

The Labour Unions allege that the situation in the 2002 case is not comparable to the present case, among other things,because at the point of time for the discrimination there already existed a clear EC case law in the question and that the deficiencies in the Swedish Equal Treatment Act rather depended upon a mistake. According to the opinion of the Labour Court, these circumstances have no decisive significance for the assessment of the question of whether an analogous application is to be made in a case such as the one now at hand. Even in the present case, it is a question of violations of provisions in EC law that have direct effect and the existence of Swedish regulations that allow room for a proceeding in conflict with EC law.

The Labour Court in summary makes the following assessment. Exemplary damages are somewhat typical for Swedish labour law and can be awarded in situations where industrial actions in the form, for example, of a blockade, have been taken in conflict with the regulations in the Co-Determination Act. With the support of the EC legal principle of equivalence, such damages ought therefore to be able to be awarded even for the unlawful industrial actions now at hand. Against this background, and taking into consideration the duty of loyalty stemming from the EC-treaty, the Labour Court finds that overwhelming reasons speak for that the provisions concerning damages in the Co-Determination Act ought to be applied analogously also with respect to the claim for exemplary damages for the violations of Article 49 in the EC-treaty at issue here.

The Labour Court returns below to the question of whether an application of the damage liability provisions in the Co-Determination Act entails that the Labour Unions should be ordered to pay exemplary damages, and in such a case, whether any damages should be lowered or nullified entirely.

The Labour Court now turns to the Company's other basis for its claim for damages.

Can damage liability be imposed on the Labour Unions according to the Co-Determination Act on the basis that the industrial actions were taken in order to displace collective agreements the Company was already bound by?

According to the Company's second basis for its claim for damages, damage liability can be imposed on the Labour Unions because the provision in the Co-Determination Act rendering the industrial actions lawful is discriminatory according to the European Court of Justice, and therefore, cannot be applied. According to this basis, it is not assumed that the demand for a collective agreement is unlawful, but rather that which is decisive is that the Company was already bound by Latvian collective agreements, which would be displaced by

Byggnad's collective agreement if the Labour Unions were conceded their demand that the Company sign this agreement.

The Labour Unions have alleged that they followed the provision in the third paragraph of § 42 of the Co-Determination Act, and that which made the industrial action unlawful was not the Co-Determination Act, but rather the EC-treaty. Therefore, damages cannot be awarded according to their view through a direct application of the Co-Determination Act. They have also argued that as it was the legislation that was erroneous, that the Labour Unions are not responsible for any harm, but rather the Swedish state is.

The provisions of the Co-Determination Act concerning the industrial peace and lex Britannia

Chapter Two of the Instrument of Government contains a catalogue of fundamental freedoms and rights of citizens. According to Article 17 of this Chapter, the labour unions and employer organisations have the right to take industrial action if nothing to the contrary follows from law or agreement. There are regulations limiting the right to take industrial action in the Co-Determination Act.

It can be seen from § 41 of the Co-Determination Act that the duty to maintain the industrial peace is applicable between parties who are bound by collective agreement as against each other. It is forbidden to take industrial action, among other things, in order to achieve alterations in a collective agreement. In the event an industrial action is unlawful, any sympathy actions taken to support the party taking an unlawful industrial action are also unlawful (first paragraph point 4 of § 41 of the same Act).

The first and second sentences in the first paragraph of § 42 state, *inter alia*, that employer and employee organisations may not arrange, or in any other manner bring about, unlawful industrial actions, or through support or in any other manner assist unlawful industrial actions. In the Britannia case (AD 1989 no. 120), the Labour Court made a pronouncement as to the content of these regulations. Through the judgment, the Labour Court established that the prohibition was also applicable when industrial action was taken in Sweden for the purpose of forcing a nullification or amendment of an existing collective agreement between foreign parties as to a foreign work place, if the industrial actions according to the there applicable foreign law were unlawful in the relationship between the parties to the contract. According to this judgment, this was applicable even if no industrial action was actually taken against the targeted counterparty to the collective agreement.

With lex Britannia, which came into force the 1st of July 1991, the lawmaker intended to limit the scope of application of the principle established in the *Britannia* case. Lex Britannia consists of three regulations that have been enacted in the Co-Determination Act, namely § 25a, § 31a and the third

paragraph of § 42. The third paragraph of § 42 of the Co-Determination Act states that the provisions included in the first and second sentences in the first paragraph are only applicable when an organisation takes measures based on employment conditions to which the Co-Determination Act is directly applicable. The prohibition against industrial actions is applicable consequently only when the conditions of employment have such a tie to the Swedish labour market that the Co-Determination Act is directly applicable. Industrial actions consequently are not prohibited according to the first paragraph of § 42 of the Co-Determination Act in those cases in which a foreign employer conducts temporary operations in this country and an overall assessment demonstrates that the ties in Sweden are so weak that the Co-Determination Act cannot be viewed as directly applicable to the conditions of employment.

The circumstances in the case at hand

It can be seen from the investigation in this case that the Company was bound by two collective agreements with the Latvian Building Workers´ Union – a tie-in agreement regulating the terms and conditions of employment and containing provisions as to monthly wages, and a contract entailing that the tie-in agreement would be applicable to all Company workers posted outside of Latvia, regardless of labour union membership. The latter agreement also entails that the Latvian Building Workers´ Union was given the exclusive right to represent Company workers posted outside of Latvia, and that the Company agreed to not enter into other collective agreements with respect to the employment terms and conditions of the posted employees.

The Labour Court found in its decision dated the 29 April 2005, no. 49/05, that the investigation presented in the case demonstrated that it was the Local Branch's intent at the time of the eruption of the dispute to demand that the Company apply the employment terms and conditions in Byggnad's collective agreement as well as a wage level of SEK 145 per hour. According to the Court, it could be ruled out that such an application as to the Company employees would be compatible with a simultaneous application of the terms and conditions of employment in the Latvian collective agreements. With such a relationship, and against the background that none of the Labour Unions had any members who were affected by the demands, it was viewed as established, according to the view of the Labour Court, that the objective with taking the industrial actions was for the Company to enter into a collective agreement with the Local Branch that would replace the existing collective agreements between the Company and the Latvian Building Workers' Union, or in other words, nullify the Latvian agreements.

It may be deemed proven that Latvian law entails that industrial actions for the purpose of achieving a nullification or alteration of a valid collective agreement are unlawful.

Can damages be imposed directly under the provisions in the Co-Determination Act?

The European Court of Justice has established in the *Laval* judgment that Articles 49 and 50 EC constitute impediments in this case as to applying the third paragraph of § 42 of the Co-Determination Act. In addition, the European Court of Justice has found that regulations, pursuant to which consideration is not taken as to whether a company from another member state is already bound by a collective agreement in its resident country, regardless of the content of that agreement, are discriminatory according to EC law.

When it comes to national regulations in violation of Community law, the European Court of Justice has established in the judgments in the cases *Simmenthal* and *Alonso* (judgment of the 9 March 1978 in case 106/77, *Simmenthal*, ECR 1978, p. 629, Swedish special issue, vol. 4, p. 75 as well as judgment of the 7 September 2006 in Case C-81/05, *Alonso*, ECR 2006, p. I-7569) that a national court must disregard national regulations that are incompatible with EC law, without the court needing to request or wait for the national lawmaker to repeal such. From the judgment in the case *Factortame* (judgment of the 19 June 1990 in Case C-213/89, *Factortame*, ECR 1990, p. I-2433, Swedish special issue 1990 p. 435), it can be seen that any national legislation that can have as a consequence a weakening of the effect of Community law is incompatible with the requirements following from the character of Community law. It follows furthermore from the judgment that a national court may not apply a regulation that weakens the functional effect of Community law.

The Labour Court makes the following assessment.

The case law of the European Court of Justice consequently entails that the Labour Court is prevented from applying the third paragraph of § 42 of the Co-Determination Act, taking into consideration that the European Court of Justice has found that the provision is in conflict with Community law. A natural consequence of disregarding the provision in the third paragraph of § 42, according to the view of the Labour Court, is that the first paragraph in the aforementioned provision is to be applied. The application of this provision, in light of the case law of the Labour Court (AD 1989 no. 120), entails that Byggnads and the Local Branch have taken industrial actions in conflict with the prohibition as stated in the provision, and that the Swedish Electrician's Union has taken sympathy actions in conflict with the first paragraph point 4 of § 41 of the Co-Determination Act, despite the fact that the duty to maintain the industrial peace existed. Hereof it follows, according to the Labour Court's understanding, that the provisions regarding damage liability in the Co-Determination Act are to be applied and the Court consequently does not share the view of the Labour Unions that liability for damages cannot be based directly on the act.

Section 54 of the Co-Determination Act prescribes that employers, employees and organisations that are in violation of this act, or of a collective agreement, are to compensate for the harm that has arisen. It consequently follows explicitly from the provision that it is the Labour Unions that are to be responsible for any eventual harm.

The Labour Court now turns to an assessment of whether the application of the provisions concerning damages in the Co-Determination Act entails that the Labour Unions are to pay damages.

Are the Labour Unions liable to pay economic damages to the Company?

The Labour Court, with respect to the Company's first ground for damages, has made the assessment that the Company's claim as to economic damages is to be tried with an analogous application of the regulations concerning damages in the Co-Determination Act. With respect to the second ground for damages, the Court has found that these regulations are to be applied directly as the rule in the third paragraph of § 42 of the same Act is to be disregarded as discriminatory on the basis of nationality in conflict with the treaty.

A fundamental prerequisite in general in order for the Labour Unions to be sanctioned to pay economic damages, however, is that the Company can demonstrate that it has suffered economic damages. The requirement of proven economic damages in order to receive such compensation, according to the opinion of the Labour Court, cannot be viewed as diminishing EC law's effectiveness or discriminating against EC legal claims. The Labour Court chooses to first examine the question of whether the Company has demonstrated that it has suffered economic damages.

The Company maintains that it lacks the ability to present complete evidence as to the harm, or that such can only occur with great difficulties. According to the Company, the Court therefore ought to estimate the harm to a fair amount in accordance with § 35:5 of the Code of Judicial Procedure. According to the Labour Unions, the Company has not proven that it has suffered any economic harm, and the conditions for applying the aforementioned rule reducing the burden of proof are absent according to their view.

The Company, with respect to the petitioned compensation, states the following: Because of the industrial actions taken against the Company, it was forced to cease posting workers to Baltic, and Baltic was forced to terminate its ongoing construction projects. If the Company had not been prevented, due to the industrial actions, from fulfilling the posting of workers, the Company ought to have been able to make a profit comparable to at least five percent of the contract sums for Baltic's projects, in an amount up to twenty-five million Swedish crowns with respect to the construction project in Vaxholm and SEK 3.4 million on the unpaid portion of the construction project in Djursholm, a combined total of SEK 28.4 million. A lost profit as to five percent of the

contract amounts in the construction industry is not an abnormal level. The Company therefore requests that the Court, based on § 35:5 of the Code of Judicial Procedure, estimate the Company's economic harm as five percent of SEK 28.4 million, which becomes SEK 1 420 000.

The Company in this aspect cites the witness testimony of the Regional Head for the construction company, JM, Johan Sahlberg, and Fredrik Carlsson at Grant Thornton Sweden AB. The Company furthermore cites an investigation by Grant Thornton Sweden AB and excerpts from the trustee's report in the Baltic bankruptcy.

The Labour Court finds that the evidence the Company cites is based on Baltic's contract amounts with respect to the two at issue construction projects, as well as that which is viewed as a reasonable profit margin within the construction industry. The Company has not given any reasons for why the Court should base its judgment on Baltic's contract amounts and losses with the assessment of the harm the Company has suffered. As the information concerns Baltic, in other words, a separate company, according to the Labour Court's understanding, it cannot without additional information be used as a basis for an assessment of the harm the Company has been caused, nor function as a starting point for a calculation of the profit margin.

The Labour Unions have also objected that the profit margin within the construction industry cannot be used as a basis for an estimation of damages as the Company was a staffing agency, and not a construction company. The Labour Court finds that the investigation the Company has presented concerns the profit margin of companies conducting construction operations. The Company has certainly stated that it did not only conduct staffing operations, but that other tasks, such as building and construction project operations, were also included in its commission. According to the Company, these issues were discussed in connection with the negotiations as to signing the collective agreements, and Byggnad's collective agreement was then considered applicable in the choice between the staffing collective agreement and Byggnad's collective agreement. That which the Company now has stated, does not, according to the view of the Labour Court, lead to that the Company's operations can be equated with the given construction company's operations. No additional investigation by the Company has been presented. The Labour Court therefore finds that it is not possible to use the given profit margin as a basis for an estimation of the harm the Company has suffered.

Taking into consideration that now stated, the Labour Court finds that proof based on the evidence as submitted by the Company that it has suffered harm in an amount up to the petitioned amount is absent in this investigation.

The issue then becomes whether the requisites for applying the rule in § 35:5 of the Code of Judicial Procedure are fulfilled.

According to § 35:5 of the Code of Judicial Procedure, where it is a question of an arisen harm and complete evidence cannot at all, or only with difficulty, be presented, the court may estimate the harm at a fair amount. Such a fair estimation may also be made if the evidence can be assumed to entail costs and inconveniences that are not in a reasonable proportion to the amount of the loss and the claimed damages concern a lesser amount. The regulation in § 35:5 focuses on cases in which it is difficult to determine the scope of the amount of damages, but it is clear that the plaintiff suffered harm, see Committee Report 1926:32 p. 261 and Heuman, BEVISBÖRDA OCH BEVISKRAV I TVISTEMÅL, 2005, p. 292.

According to the opinion of the Labour Court, it may be viewed as evident that the Company has suffered harm as a consequence of the unlawful industrial actions.

The rule concerning a lesser burden of proof that is in question with the assessment of the economic damages as claimed by the Company is the one found in the first sentence in the above-mentioned provision. The rule in the second sentence is only applicable, as can be seen from the wording of the statute, when the claimed damages concern a lesser amount. The limit as to the amount is not defined, but it is intended to be approximately one-half of the price base amount, see legislative bill, 1987/88:1, Department Report JuU 1987/88:14 as well as Fitger, RÄTTEGÅNGSBALKEN, pp. 35:61–35:63.

The rule in the first sentence of § 35:5 consequently entails that a lessening of the burden of proof can be permitted in the event complete evidence concerning a harm cannot at all, or only with difficulty, be presented. According to that which can be seen from the legislative preparatory works (see NJA II 1943 p. 449), this encompasses those cases where, taking into consideration the nature of the harm, an investigation regarding the scope of the damages cannot be presented, as well as those cases where the extent can be investigated, but due to the circumstances, evidence concerning the evaluation of the damage cannot be presented or would be united with all too great difficulties. It can be seen furthermore from the legislative preparatory works that a party is not released from the obligation to present an investigation that can reasonably be brought.

It can be seen from the case, NJA 2006 p. 367, that the injured party has the burden of proof for those circumstances that are decisive for the assessment as to fairness that the Court is to make.

The Company has alleged that it cannot report calculated revenues and costs with respect to the period after year-end 2004, as such calculations only would be based on hypothetical assumptions as the Company, due to the industrial actions, was forced to terminate its ongoing construction projects. Furthermore, according to the Company, a period has now passed after the harms arose, making the calculation of lost profits for the years 2004 and 2005 more difficult, as well as the fact that the Company in addition nowadays conducts an entirely

different type of operations. On this basis, and also because those persons who constituted the Company's management during the fall of 2004 are no longer with the Company, it is difficult to obtain proof of the actual harm according to the Company.

According to the understanding of the Labour Court, that certain difficulties exist for the Company to precisely determine the amount of the loss and present complete evidence as to the harm is natural. The Company, however, had filed the case already in December 2004 with the claims that the industrial actions should be declared unlawful and be terminated as well as claims for exemplary damages. The Company must have already then had strong reason to gather any evidence then available, even if the claim as to economic damages came to be presented later on during the litigation. Against this background, the Company has not cited support for assuming that the possibility did not present itself as to presenting adequate evidence that in any event would be able to give a base for an estimation with the support of § 35:5 of the Code of Judicial Procedure (compare NJA 2005 p. 180). The Company consequently has not produced the investigation that reasonably could have been brought. Therewith the requisites for applying § 35:5 of the Code of Judicial Procedure are not fulfilled.

The Company's claim as to compensation for economic damages shall therefore be denied.

Should the Labour Unions be ordered to pay exemplary damages to the Company?

The European Court of Justice has established that EC law constituted an impediment against the industrial actions of the Labour Unions in two aspects; with respect to the content of the contract demands posed, and as to the specific treatment of the Company in its capacity as a foreign legal subject. The industrial actions of the Labour Unions are therewith, in both these aspects, in conflict with the EC-treaty regulations concerning freedom of movement. As already seen, the Labour Court has found with respect to the first violation that the Co-Determination Act's damage liability regulations as to exemplary damages are to be applied analogously. With respect to the second violation, according to the Court, these regulations are directly applicable.

The Labour Unions maintain, in the event the Labour Court would come to this conclusion, that damage liability according to the Co-Determination Act requires the existence of negligence by the tortfeasor, and that they have not been negligent in such a manner that liability for damages is to come into question. According to the Company's view, the Co-Determination Act does not impose any requirements as to negligence in order for damage liability to be found. In the event such a requirement should be viewed as existing, the Labour Unions according to the Company's view have been grossly negligent.

The Labour Court first tries the Labour Unions' objection as to the requirement of negligence.

Does the Co-Determination Act require negligence in order for damage liability to be imposed?

The actual provisions of §§ 54 and 55 of the Co-Determination Act do not state that damage liability assumes intent or negligence. According to the wording of the Act, the party in violation of the Act is to compensate for the harm that has arisen, if nothing to the contrary follows from that stated in the subsequent paragraphs. An explicit limitation of the liability for damages with respect to subjective requisites, to only include situations in which a party lacks reason for its stance, in contrast can be found in § 57 of the Co-Determination Act, regulating the liability of labour organisations to pay damages for, among other things, an incorrectly invoked right of precedence with respect to the interpretation of a collective agreement. By the term "lacks reason", according to the case law of the Labour Court, may be understood as including in part cases in which it was a question of entirely irrelevant objectives, in part cases of qualified misjudgements as to existing circumstances or the state of the law.

The legislative preparatory works to the Co-Determination Act state that the absence of intent can be a factor of considerable significance with the assessment as to damages (legislative bill 1975/76:105 attachment 1 p. 302 f. and Department Report InU 1975/76:45 p. 49). In contrast, no statements can be found as to whether any subjective requisites need to be fulfilled in order for damage liability in general to come into question.

As to the interpretation of collective agreements, claims as to exemplary damages for a breach of a collective agreement in certain of the older cases have been denied where employer parties could not be said to have lacked reasons for their stance (see AD 1976 no. 134 with there-in given references). There are also cases concerning unintentional violations of collective agreements in which the Labour Court considered whether the employer, in its application of the provisions in a collective agreement, handled the issues "in a manner that could be expected with a normal, careful management of the system of regulations of that actual type" and consequently not awarded exemplary damages for breaches of collective agreements other than where the error in application "went beyond the boundary for that which can be seen as excusable" (see AD 1987 no. 40, compare AD 2009 no. 76).

In accordance with the view of the Labour Court, there is no support in the Court's case law for the assertion that negligence is a prerequisite in order for damages in general to be able to come into question. As can already be seen from the wording of the statute, it is sufficient that a violation of the act has arisen for damage liability to be imposed. With the application of §§ 54 and 55 of the Co-Determination Act, the Court often simply finds that violations against the Act or collective agreements exist, and that exemplary damages are therefore

to be paid (see, for example, AD 2006 no. 10 and AD 2008 no. 5 with respect to liability for damages because of unlawful industrial actions). It is a separate issue that the tortfeasor's degree of negligence or intent, as well as other circumstances, is regularly taken into consideration with the determination of the level of exemplary damages, and with an assessment as to fairness in accordance with § 60 of the Co-Determination Act regarding whether damages should be lowered or entirely nullified.

It can also be noted here that it follows from the case law of the European Court of Justice that national damage liability regulations may not render liability for damages dependent upon whether the bodies found to have committed the violation acted intentionally or negligently, if there exists a clear violation of EC law (see the judgment in the joined cases, *Brasserie du pêcheur* and *Factortame*).

The determination of exemplary damages

A remaining question then is whether the exemplary damages in this case are to be entirely nullified, and if not, at what amount the damages should be set.

In the event damage liability is found, the Labour Unions maintain that a reduction to a zero amount should be made on the basis of the absence of negligence on their part. They furthermore in summary argue the following: The state of the law did not indicate that the industrial actions would be unlawful. The Labour Court in its case law in a large number of cases has lowered damages on the basis of such circumstance that the state of the law was not clear. They could not have possibly foreseen the outcome of the case before the European Court of Justice. According to them, there was no reason to assume that the posting of workers directive would be interpreted as a norm-giving directive that would prevent better terms and conditions than the minimum conditions, and that in conflict with its wording, could affect the right to take industrial action. They furthermore have followed the explicit legal regulation in the third paragraph of § 42 of the Co-Determination Act constituting a part of lex Britannia, and whose compatibility with EC law was treated thoroughly in different legislative preparatory works in which the conclusion was drawn that lex Britannia did not conflict with EC law.

The Company, who finds that any reason for a reduction is absent, briefly states the following: The Labour Unions acted grossly negligent by demanding far-reaching contractual terms and taking industrial actions, despite the fact that the Company in its objection based on the existence of the duty to maintain the industrial peace argued that the contract demands were unlawful and that the industrial actions would be in conflict with EC law. Lex Britannia was based on a questionable discrimination of foreign legal subjects, whose compatibility with international law since its inception has been put into question. The Labour Unions disregarded the "warnings" that the Company presented in its objection concerning the existence of the duty to maintain the industrial peace. The

Labour Unions had alternative courses of action available, for example, limiting the contract demands clearly to minimum wages or canceling the industrial actions awaiting a preliminary ruling from the European Court of Justice.

The Labour Court makes the following assessment.

The Labour Court, as noted previously, has to take into consideration the principle of effectiveness, in other words, the requirement that EC law is given functional effect in all the member states. This requirement entails, *inter alia,* that with the application of the national law concerning damages, the principle of legal certainty can be taken into consideration, but that the requisites that are in place for the right to damages may not be less favorable than those concerning similar national claims for damages, nor be formulated so that it in practice becomes impossibly or unreasonably difficult to receive damages.

The Labour Court consequently has to take into consideration that now stated with the application of the provisions in the Co-Determination Act as to damages. It follows from the main rule as stated in § 54 of the Co-Determination Act that an organisation that is in violation of the Act is to compensate for the harm that has arisen, and § 55 of the same act states that with the assessment of whether, and to what extent, harm has arisen to a party, consideration is also to be taken to the party's interest in that the regulations of the Act, or of a collective agreement, are observed, and to other circumstances of other than a pure economic significance. According to the first paragraph of § 60 of the Co-Determination Act, which is applicable to both exemplary and economic damages, an award of damages can be lowered or entirely nullified if fair. According to the legislative preparatory works to the Co-Determination Act, exemplary damages are to be at such a level that the respect for the regulations is maintained. A reduction of exemplary damages therefore is not to come into question in conscious and/or flagrant cases. According to the legislative preparatory works to the provision, the regulations concerning a reduction of an award of damages ought to be invoked when the violation appears as more excusable, or in any event, less blameworthy, for example, if it was justified to raise doubts as to the existence of an obligation according to the Act or where the employer faced a more difficult assessment in the choice between different courses of action (see legislative bill 1975/76:105, attachment 1, p. 424.). An assessment of the facts as a whole and of all the influencing circumstances in the individual case is to be made.

As the Labour Court has previously stated, the industrial actions at issue were not in conflict with applicable national regulations. They constituted, however, clear violations of EC law. The industrial actions were underway during a relatively long period, and were not terminated before the construction project was terminated and the posted workers had left the country.

It is obvious that the state of the law with respect to the issues raised in the case was not clarified until and with the European Court of Justice's judgment. As

mentioned earlier, however, the European Court of Justice in the *Laval* judgment has not limited the judgment's effect in time. The judgment may therefore be seen as having retroactive effect, and consequently, applicable to the violations at issue taken prior to the judgment. The European Court of Justice, in the cases *Brasserie du pêcheur* and *Factortame,* has stated that a member state's liability for damages cannot be limited to only include those harms that have arisen after a judgment has been issued by the Court in which a violation of the treaty in the question has been established. This would namely entail that the right to an award of damages according to the Community's legal system would be jeopardized. According to the European Court of Justice, this would also be in conflict with the principle of effectiveness, where an award of damages is made dependent upon the requirement of that the court previously had established such a violation of EC law. The rights for an individual that follow from EC legal provisions having direct effect in the member states' national legal systems cannot be made dependent, according to the European Court of Justice, upon that the Court has issued a judgment with respect to eventual treaty violations (paragraphs 94 and 95).

Even if the state of the law was not established, there was reason according to the view of the Labour Court for the Labour Unions to consider whether the industrial actions notwithstanding were consistent with EC law. The Court considers herewith particularly the circumstance that the Company in its objections based on the existence of the duty to maintain the industrial peace extensively stated in the grounds for its stance that the industrial actions were unlawful according to EC law. The objections cannot be seen as having been presented in bad faith, but rather just the opposite, to have been well founded. The Labour Court has maintained that high demands must be placed on the labour market organisations when it comes investigating, with exactitude and care, whether a planned industrial action is not prevented by an eventual arising duty to maintain the industrial peace (see AD 1977 no. 150; compare AD 2008 no. 5). The same view ought to be applied, according to the view of the Labour Court, when it comes to those impediments that EC law can potentially lay down.

The question furthermore is whether it ought to be of any significance that the Labour Court at a subsequent stage, when the industrial actions already had been taken, in its interlocutory decision did not find that there was probable reason for that the industrial actions were unlawful. In its decision, this Court stated that based on the then existing investigation, it could not draw any sufficiently certain conclusions as to the relationship of the industrial actions to the EC legal regulations. The Court's majority denied the Company's claims and the consequences of that decision were that the industrial actions could continue. According to the Labour Unions, this circumstance ought to also be weighed in with the assessment now being made. The Labour Court's interlocutory decision entailed, however, that the Labour Court did not with any high degree of certainty express itself in the question as to the permissiveness of industrial actions. It ought not therefore to be attributed any significance in this context.

According to the opinion of the Labour Court, any contributory negligence by the Company to the harm that the industrial actions caused cannot be viewed as existing.

The Labour Court finds, after an assessment of the facts as a whole and of the circumstances in the case, that the circumstances in connection with the taking of the industrial actions by the Labour Unions were not such that the organisations can be released from the liability of paying exemplary damages to the Company.

The Labour Court now finally has to determine in what amount the exemplary damages are to be awarded. The Company has petitioned that the Labour Court order Byggnads and the Local Branch to pay exemplary damages of SEK 500 000 each, as well as that the Swedish Electrician's Union pay SEK 350 000 in exemplary damages to the Company, as well as interest. No amount has been attested as reasonable in itself, however the claims for interest have been attested.

The Labour Court determines that exemplary damages are to be set at SEK 200 000 to be paid by Byggnads and the Local Branch, respectively, as well as at SEK 150 000 to be paid by the Swedish Electrician's Union.

The request for a preliminary ruling

As seen from the Court's reasoning, the Labour Court has found that the content of the European Court of Justice's preliminary ruling in this case, together with the general principles as to sanctions for violations of EC law that have been established in the case law of the European Court of Justice, provide sufficient guidance with the assessment of the issues of damages now at hand. According to the view of the Labour Court, there consequently is no need to obtain a preliminary ruling from the European Court of Justice.

Summary

The Company petitioned that the Labour Court declare that the industrial actions that the Labour Unions took against the Company are unlawful and are to be terminated. As the European Court of Justice in its preliminary ruling determined that the industrial actions violated EC law and the Labour Unions have accepted that they were unlawful, it is not of considerable significance for the Company to receive a declaratory judgment as to the lawfulness of the industrial actions according to the Labour Court's assessment. The Labour Court has also found that all of the industrial actions may be seen as having ceased, albeit that with respect to Byggnads' industrial actions, this occurred in a formless manner.

That the European Court of Justice in its preliminary ruling found that the industrial actions were unlawful has been thereafter the basis for the Labour Court's assessment as to the Company's claims for damages. With respect to the first of the Company's grounds for its claim for damages, referring to the content of the contract demands, the Labour Court first finds that the Labour Unions can be held liable for the violations of Article 49 EC at issue, as that article may be seen as having horizontal direct effect between the Labour Unions and the Company. The Court, in addition, has found that the consequences of a violation of the treaty is to be an award of damages, and that the provisions in the Co-Determination Act as to exemplary and economic damages can be applied analogously. With respect to the Company's second ground related to the circumstance that the Company was already bound by collective agreements, the Labour Court has found that the provision in the third paragraph of § 42 of the Co-Determination Act entailing that the industrial actions, despite being bound by a collective agreement, were lawful, are discriminatory in conflict with the treaty according to the European Court of Justice's preliminary ruling and therefore is not to be applied. A natural consequence of the recently mentioned rule not being applied is that the industrial actions, with a direct application of the other regulations in the Co-Determination Act and in light of the case law of the Labour Court, were unlawful, and that the Act's damage liability regulations are to be applied.

The Labour Court thereafter has tried whether the Company's claims for damages can be granted with an application of the provisions in the Co-Determination Act and by observing the EC legal duty of loyalty, principle of effectiveness and principle of proportionality. With respect to the Company's claim as to economic damages, the Court finds that it may certainly be viewed as evident that the Company has suffered economic harm as a consequence of the industrial actions, but that the Company has not been able to prove that it has suffered economic harm to the amount claimed. Neither has the Court found that the requisites necessary in order to apply the specific rule reducing the burden of proof in § 35:5 of the Code of Judicial Procedure are fulfilled. The claim as to economic damages therefore has been denied. With respect to the claim for exemplary damages, the Labour Court has first determined that the Co-Determination Act does not place any requirements of negligence in order for damage liability in itself to exist, and thereafter has set exemplary damages to be paid by Byggnads and the Local Branch, respectively, at SEK 200 000 and by the Swedish Electrician's Union at SEK 150 000.

The Labour Court finally finds no reason to obtain a preliminary ruling from the European Court of Justice as to the issue of damages.

The trial costs and legal fees

The Labour Unions have requested that the Labour Court, based on § 5:2 of the Labour Disputes Act, order each party to bear its own trial costs and legal fees. They argue that they, following an explicit Swedish legal rule and thereto having

had the support of the Labour Court's interlocutory decision, may be seen as having had fair reason to have the dispute tried. The Company's view is that there is no reason to order that each party bear its own trial costs and legal fees, but rather, according to its view, the main rule in the Code of Judicial Procedure as to the losing party's responsibility for costs and fees should be applied. The Company argues that it would be in conflict with the requirement that EC law be given functional effect in the event an injured party does not receive its trial costs and legal fees compensated.

Even in this question the Labour Court is obligated to take into consideration the EC legal principles of equivalence and effectiveness.

The Labour Court makes the following assessment.

According to the first paragraph of § 5:2 of the Labour Disputes Act, the trial costs and legal fees in a labour dispute can be set off between the parties, in other words, each party may be ordered to bear its costs, if the party that lost the case had fair reason to have the dispute tried. This provision constitutes an exception from the main rule in § 18:1 of the Code of Judicial Procedure, that the losing party is to compensate the opposing party his or her trial costs and legal fees. According to the first paragraph of § 5:3 of the Labour Disputes Act, this provision in the Code of Judicial Procedure is also applicable in a labour dispute.

The background to the specific set-off provision in the Labour Disputes Act is that the main rule as to the liability for trial costs and legal fees according to the Code of Judicial Procedure was considered to affect all too strongly an individual party's choice as to litigating labour disputes. At times, the rule could have a result that appeared altogether too harsh against the losing party (see legislative bill 1974:77 p. 124).

The intent with the rule is that it should be applicable both to legal and to evidentiary issues that are uncertain (see, *inter alia,* AD 1981 no. 46). Fair reason to have the dispute tried can be that both parties, when they consist of organisations, have a mutual interest in an authoritative interpretation of the state of the law, regardless of outcome. It can also be a question of an outcome that is the result of circumstances that previously had been unknown to the losing party or that the state of the law was difficult to assess. It can be noted that it can be seen from the case law of the Labour Court that it is relatively unusual that the circumstances are such that a set-off in accordance with the now mentioned provision is allowed. This is particularly true with respect to cases involving other than collective agreement disputes.

The circumstances in the present case are without doubt special, such as that a preliminary ruling has been obtained in order to receive guidance with the assessment of the lawfulness of the industrial actions in accordance with EC law. According to the view of the Labour Court, the situation, however, is not in

any decisive manner different from when the Labour Court, absent such a preliminary ruling, decides a dispute after a typical assessment of evidentiary and legal issues that can be so complicated and hard as to make any prediction as to the outcome difficult. Against this background, and taking into consideration the Labour Court's above described case law, as well as particularly the circumstance that on one party's side there was no organisation, the Court makes the assessment that the circumstances in this case are not such that the set-off rule ought to be applied. It can also be noted here that with respect to the Company's petition for a declaratory judgment, which was not tried on its merits but rather dismissed, the set-off rule is not applicable (see AD 1995 no. 131).

The allocation of the trial costs and legal fees consequently ought to occur according to the provisions in § 18:4 of the Code of Judicial Procedure, which contains the rules as to how the liability for trial costs and legal fees is to be allocated when a case contains several claims and the parties win certain of these. As the Company's petition for a declaratory judgment was dismissed, the Company is to be considered the losing party in this issue in accordance with § 18:5 of the Code of Judicial Procedure. The Company in addition has completely lost its claim as to economic damages, but has won its claim as to exemplary damages.

It can first be ascertained that the fundamental issue at dispute in the case that incurred the majority of the costs, namely the compatibility of the industrial actions with EC law, has had significance for both the claim for a declaratory judgment as well as the petition for an executory judgment and that the Company substantively won this issue. The costs for the part of the investigation concerning the question of whether Byggnads and the Local Branch terminated the industrial actions, which only had significance for the petition for a declaratory judgment, may be viewed as minor in this context. The Company, however, has also entirely lost its claim as to economic damages. This circumstance ought naturally have significance for the allocation of the trial costs and legal fees, even if the investigation in this respect has not been particularly extensive. The Company consequently to a certain extent ought to have reduced compensation for its trial costs and legal fees.

The Company petitions for compensation in a total amount of SEK 3 051 444, of which SEK 160 739 constitutes expenses for expert legal opinions, travel costs, costs for witnesses etc., which costs, taking into consideration the scope of the case, in themselves may be viewed as reasonable. With respect to the outcome in the case, the Labour Court finds that the Company ought to receive compensation of a combined total of SEK 2 129 739. Of that amount, SEK 2 000 000 is for fees and the remaining part compensation for expenses. With respect to the expenses, deductions have been made for such costs that are related to the Company's claim as to economic damages.

JUDGMENT

1. The Labour Court dismisses the petition filed by Laval un Partneri Ltd. for a declaratory judgment.

2. The Labour Court denies the claims made by Laval un Partneri Ltd. as to economic damages.

3. The Labour Court denies the request that the Labour Court obtain a preliminary ruling from the European Court of Justice in the question as to the liability of the Labour Unions for damages.

4. The Labour Court orders Svenska Byggnadsarbetareförbundet to pay exemplary damages to Laval un Partneri Ltd. of two hundred thousand Swedish crowns (SEK 200 000) as well as interest in accordance with § 6 of the Interest Act on SEK 150 000 from 9 December 2004 as well as on SEK 50 000 from 15 June 2008 until payment is made.

5. The Labour Court orders Svenska Byggnadsarbetareförbundet, Local Branch 1, to pay exemplary damages to Laval un Partneri Ltd. of two hundred thousand Swedish crowns (SEK 200 000) as well as interest in accordance with § 6 of the Interest Act from 9 December 2004 until payment is made.

6. The Labour Court orders Svenska Elektrikerförbundet to pay exemplary damages to Laval un Partneri Ltd. of one hundred fifty thousand Swedish Crowns (SEK 150 000) as well as interest in accordance with § 6 of the Interest Act from 8 December 2004 until payment is made.

7. Svenska Byggnadsarbetareförbundet, Local Branch 1, and Svenska the Swedish Electrician's Union by one-third each are to compensate Laval un Partneri Ltd. for trial costs and legal fees of two million one hundred twenty nine thousand seven hundred thirty nine Swedish crowns (SEK 2 129 739), of which SEK 2 000 000 constitutes attorneys' fees, as well as interest in accordance with § 6 of the Interest Act on the first named amount from the day of this judgment until payment is made.

Members of the Judging Panel: Inga Åkerlund, Sören Öman (dissenting and concurring), Kurt Eriksson (dissenting and concurring), Jan Nordin, Anders Hagman, Lennart Olovsson (dissenting and concurring) and Kjell Eriksson.

Secretary: Kristina Andersson

Attachment 1 to the Judgment
in Case A 268/04

Opinion of Judging Panel Member Sören Öman, concurring in part and dissenting in part

I am in agreement with the majority as far as concerns the assessment and conclusion with respect to the Company's petition for a declaratory judgment.

As does the majority, I find that there are no explicit Swedish statutory provisions that would, even after an interpretation consistent with the treaties, give the Company the right to damages from the organisations based on the industrial actions in violation of the treaties, and neither does there exist support for such a right to damages in the Swedish case law interpreting domestic law. The liability of the Labour Unions for damages must therefore in my opinion be solely based on that required in accordance with EC law.

On the other hand, I am not convinced by that which the majority has stated as to what is required in accordance with EC law in the question of damage liability between private parties in the event of a violation of a treaty of the type at issue here. I find, for reasons stated below, that it is not necessary to take a stance as to whether EC law requires that damage liability should exist in a case such as this. If EC law does require such, this requirement according to my view cannot entail more than that the damage liability regulations existing in the Act (1975:580) on Co-Determination in the Workplace (the "Co-Determination Act") should, taking into consideration the EC legal duty of loyalty, principle of effectiveness and the principle of proportionality, be applied in a manner comparable as when a Swedish labour union has taken an industrial action unlawfully according to the Act against a Swedish employer.

As does the majority, and for the reasons the majority has stated, I find that the Company has not demonstrated in the case that it has suffered any economic harm and that the regulations in § 35:5 of the Code of Judicial Procedure cannot be applied. I also consequently come to the conclusion that the Company's claim as to compensation for economic harm should be denied.

In the issue as to the claimed exemplary damages, I make the following assessment.

As does the majority, I find that it is evident that the state of the law as to the issues at hand in the case was not clarified until and with the judgment of the European Court of Justice. I also find that the Swedish lawmaker has enacted explicit statutory provisions that directly have the purpose of allowing such industrial actions against foreign companies as those at issue in the case that are violations of the treaties (legislative bill 1990/91:162) and that the State, as a consequence of the judgment of the European Court of Justice, has now

commenced legislative changes in order to cure the demonstrated deficiencies in the Swedish legislation (committee mandate 2008:38, committee report 2008:123 and legislative bill 2009/10:48). According to my opinion, therefore, the circumstances are such that an application of the provisions regarding damage liability in the Co-Determination Act entails that no exemplary damages should be awarded, in other words, any eventual exemplary damages should be entirely nullified. I would have applied these regulations in the same manner whether it had been a question of a Swedish instead of a Latvian company, and regardless of whether it had not been an EC law but rather a domestic superior norm, for example, a provision in a constitutional act, that entailed that damage liability in itself existed. In the previous case law of Labour Court, exemplary damages for violations against the regulations in the Co-Determination Act have not been awarded where the Court clarified a legal status that had earlier been unclear (see, for example, AD 1979 no. 118, AD 1980 no. 72 and AD 1981 no. 8 as well as AD 1979 no. 149, AD 1980 no. 34 and AD 1981 no. 125).

I find that such a typical application of the provisions regarding damage liability in the Co-Determination Act is also compatible with the EC legal duty of loyalty, the principle of effectiveness and the principle of proportionality. The following circumstances are of significance according to my view in addition to that which has already been stated as to the actions of the Swedish lawmaker.

Private parties who are affected by industrial actions that are violations of the treaties have the possibility to very quickly – in several days or one week – petition a court for an order that the industrial actions are to cease. Such orders are routinely followed in the Swedish labour market.

A private party who has been affected by industrial actions that are violations of the treaties can, in the event of a sufficiently clear violation of the treaty, as a consequence thereof be harmed, and any proven or fairly estimated economic harm is to be compensated by the State, alternatively possibly by the party who has taken, caused or supported the industrial action.

A party who is subjected to industrial actions that are violations of the treaties, such as the Company, consequently has effective possibilities with the court's assistance to receive a quick cessation of the industrial actions, and in addition, receive all economic harm compensated. As far as known, no comparable industrial actions that are violations of the treaties have been commenced on the Swedish labour market after the judgment of the European Court of Justice in the preliminary ruling.

My conclusion consequently is that even the Company's claim as to exemplary damages should be denied.

When it comes to the Company's claim as to trial costs and legal fees, taking into consideration the conclusion the majority reached in the matter, I come to the same conclusion as the majority.

Attachment 2 to the Judgment
in Case A 268/04

Opinion of Judging Panel Member Kurt Eriksson, concurring in part and dissenting in part

I dissent when it comes to the amount awarded of exemplary damages for the following reasons.

The majority has found that the Labour Unions are obligated to pay exemplary damages to Laval for a violation of 49 EC and for a violation of the Britannia principle in the Co-Determination Act. I agree with the majority that exemplary damages should be awarded for a violation of the Britannia principle, but not for a violation of the treaty.

The EC-treaty is directed primarily to the member states. It therefore is not a given that statements made in judgments by the European Court of Justice as to the member states' liability for damages as against private parties in the event of a violation of a treaty by the state can directly be transferred to the situation in the case concerning damage liability between private parties in the event of a violation of a treaty. As is the majority, I am of the opinion that Laval is entitled to compensation for proven economic harm, which ought to be completely sufficient in order for EC law to receive effect in accordance with the duty of loyalty - or principle of solidarity. Exemplary damages present similarities with damages "of an exemplary nature". The judgment in the cases, *Brasserie du pêcheur* and *Factortame,* concerned member state violations of Community law. A question in the case concerned damages "of an exemplary nature" in accordance with English law. That type of damages could be awarded when it had been established that the concerned public governmental authorities had acted in a manner that is excessively invasive, arbitrary or in violation of a treaty or constitution. As such an action can give rise to or aggravate a violation of Community law, the granting of damages "of an exemplary nature" may not be excluded according to the European Court of Justice within the framework for a claim based on Community law when such damages can be awarded within the framework for similar claims that are based on the national law. The reasoning is approximately the same in the judgment in the case *Manfredi v. Lloyd*. If specific damages can be awarded in a case according to the national law, it must be possible to do so in similar cases where the case is brought based on the Community's competition regulations. The case concerned consequently competition law and where the applicable articles in the treaty directly are directed towards companies. The national court's question concerned whether 81 EC entails that a court, when it finds that the compensable amount of damages according to the national law is lower than the economic advantages for a company violating 81 EC, is to award *ex officio* any third party who has suffered harm an increased award of damages as sanctions against that company.

The issues in both judgments concern specific situations. The one concerned proceedings that most closely can be described as misuse of governmental authority, while the other concerned insufficient national damage liability regulations in order to prosecute disloyal competition. Certainly the European Court of Justice's statements in the cases are more of a general character, but despite this, it is highly doubtful that these can lead to the conclusion that the EC legal principle of equivalence truly requires that the Co-Determination Act's regulations concerning exemplary damages be applied analogously to a violation of 49 EC. I am of the view that such is not the case. This means that exemplary damages are only to be awarded for a violation of the Britannia principle. Normally, in a proceeding that simultaneously constitutes a violation of two laws, for example a dismissal in violation of the act concerning employment protection and the act as to employee representatives, the employer is ordered to pay increased exemplary damages, however, not double. The increased damages as set by the majority for the Labour Unions should therefore be reduced by one-third.

Outvoted in this respect, I am as to the remaining issues in agreement with the majority.

Attachment 3 to the Judgment
in Case A 268/04

Opinion of Judging Panel Member Lennart Olovsson, dissenting in part and concurring in part

I agree with that which Member Sören Öman has stated in his dissenting and concurring opinion except with respect to the trial costs and legal fees.

It can be seen from the first paragraph of § 5:2 of the Labour Disputes Act that the court can order that each party bear its costs when the losing party with respect to the nature of the case has had fair reason to have the dispute tried by a court. A reason, *inter alia,* for this provision according to the legislative preparatory works is that certain cases have great interest beyond that of the individual case. It appears obvious to me that the outcome of this case is of great interest for the entirety of the Swedish labour market.

Even if this provision has the greatest significance in collective agreement disputes, from the legislative preparatory works it can also be seen that it can be applied in other cases. By way of example is mentioned where the outcome in a case depended on circumstances that from the beginning were unknown to the losing party or where the state of the law was very difficult to assess. Similar to the Court's majority, I find that the Swedish lawmaker enacted explicit statutory provisions that are directly for the purpose of allowing such industrial actions as at issue in this case. This dispute, in addition, has been the object of assessment by the Labour Court previously in the interlocutory decision issued in December, 2004. The Court then found that the Company's assertion that the industrial actions were unlawful was not probable. It is also particularly unusual that Swedish labour legislation is in direct conflict with EC law. That EC law has shown itself to have a content that Sweden's Government and Parliament did not realize must be seen as entailing that the state of the law was very difficult to assess even for private parties.

I find that the situation in this case is a clear example of when a party has had fair reason to have the dispute tried and that each party therefore ought to bear its own trial costs and legal fees.