
Enemy at the (Flood) Gates

EU ‘exceptionalism’ in recent tensions with the international protection of social rights

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Abstract

During the Great Recession we are witnessing a growing tension between the actions of the EU institutions and the rights and values embodied by the ILO Conventions and the European Social Charter. The present contribution explores two case studies embodying this tension. The first section provides a brief historical account of the relationship between the EU and these legal orders. Sections two and three deal with two recent conflicts, in the areas of austerity policies and the case law of the Court of Justice. The contribution then looks, in section four, at the possibilities offered by the EU legal order for a more genuine commitment to respecting international standards of protection for social rights. Section five considers a different outcome of the conflict, exploring the possibility of a reduced commitment of the EU to the respect of international standards of protection of social rights. Section six is devoted to concluding remarks.

Keywords: Austerity; ILO; European Social Charter; EU; Social Rights.

1. Close (and not so close) encounters with the ILO and the ESC

In the context of the European Union, the level of protection awarded to social rights by international instruments has often been considered as a minimum floor of protection. Implicitly or explicitly, the level of social protection reached by EU Member States was considered as going beyond these minima. However, in recent years (since

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2 See, for example, Vandamme, Les droits sociaux fondamentaux en Europe, 7 Journal des Tribunaux – Droit Européen 57, 49-56, 1999, p. 54: ‘Il est évident que le niveau social des États d’Europe de l’Ouest qui ont ratifié la Charte est assez élevé pour que les droits proclamés par elle soient déjà largement respectés sur leur territoire’.
2007) the action of EU institutions has caused several Member States to violate the standards of protection of social rights set in international documents, such as ILO Conventions and the European Social Charter (ESC).³

Both the ILO and the ESC are well known, so that a specific introduction is not necessary. However, a few elements are worth stressing in connection with the present contribution. In particular, one has to turn briefly to the supervisory and monitoring bodies characterising the ILO and the ESC. Both systems include a reporting system regarding the implementation of respective standards of protection of social rights. The ILO body examining the application of ratified Conventions is the Committee of Experts on the Application of Conventions and Recommendations (CEACR)⁴. On the ESC side, the monitoring is ensured by the European Committee of Social Rights (ECSR).⁵ Parallel to the monitoring procedure, the ILO has a number of ‘special procedures’ and also provides for the possibility to lodge complaints.⁶ More relevant for the present paper, the ECSR is characterised by a ‘collective complaint procedure’,⁷ which entitles a number of employers’ and workers’ associations, as well as NGOs, to lodge complaints regarding the non-respect of the obligations stemming from the ESC.

Turning to the EU, its Treaties ensure, in principle, the firm commitment to respecting international law.⁸ Articles 3(5)⁹ and 21(1)¹⁰ of the Treaty on European Union (TEU) are both a testament to this self-representation. Indeed, this commitment has been identified as one of the distinctive characteristics of EU action in international relations.¹¹ Evidently, the picture is much more complicated than this black and white representation. Looking at the shades of grey, it has been pointed out that EU Member States consistently operate in the context of negotiations of international agreements in order to make these agreements compatible with the specific governance model of the

³ The European Social Charter was adopted in 1961 and revised in 1996. In this paper however I will generally refer to it as ESC rather than RevESC. Hence, when not otherwise specified, ESC also refers to the revised version of the Charter.
⁵ Article 24 of the ESC. The ECSR is composed of 15 independent experts.
⁶ Articles 26 to 34 of the ILO Constitution.
⁹ ‘In its relations with the wider world, the Union […] shall contribute to […] the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter’ (emphasis added).
¹⁰ ‘The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law’ (emphasis added).
EU.

Again, the importance of the European commitment to the respect and promotion of international law has been called into question as being essentially ‘cost free’. This finding is based in particular on the analysis stemming from the field of international agreements regarding military activities, since EU countries ‘largely refrain from using military force and pursue peaceful means to solve international disputes’. Moreover, the EU approach to international agreements predating the Treaty of Rome (1958) or the accession to the EU of a given Member State is even stricter. The first paragraph of Article 351 TFEU seems to provide a ‘respectful’ attitude towards these agreements, allowing Member States to justify the non-respect of EU law on the basis of the need to respect obligations stemming from them. However, the second paragraph clarifies that Member States having recourse to the exception of the first paragraph are under the obligation to solve the conflict. Such an obligation means for the concerned Member State attempting to renegotiate the agreement and eventually, failing this avenue, to unilaterally denounce the instrument.

In this context one has to assess the relationship between the EU and the ILO. As it is well known, the EU is not part of the ILO, nor is it possible for the EU itself to ratify ILO Conventions. Still, throughout history, the EU has recognised the important role of the ILO on a number of occasions. Here I will refer to a few examples, in chronological order. Thus, the first example comes straight from the early years of the European Communities. Indeed, the so-called ‘Ohlin Report’, which provided the theoretical basis for the social policy chapter of the Rome Treaty, was drafted by a group of experts of the ILO. The main finding of the Report was that the creation of the European Communities and of the common market did not require the harmonisation of labour standards. The impact of this finding on the competences granted by the Treaty of Rome is evident. The second stop on this quick journey is the 2006 Communication

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13 Bradford and Posner, supra note 11, p. 22.
14 ‘The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties’ (emphasis added).
15 See Case C-10/61, Commission v. Italian Republic; Case C-84/98, Commission v. Portuguese Republic, para. 58: ‘Furthermore, although, in the context of Article 234 of the Treaty, the Member States have a choice as to the appropriate steps to be taken, they are nevertheless under an obligation to eliminate any incompatibilities existing between a pre Community convention and the EC Treaty. If a Member State encounters difficulties which make adjustment of an agreement impossible, an obligation to denounce that agreement cannot therefore be excluded’ (emphasis added).
16 The EU Commission has the status of non-voting observer.
17 In the paper I will generally use the term ‘EU’, though obviously, the history of the (now) European Union from 1958 to the present days encompasses different denominations.
19 Ibidem, pp. 120-121.
on Decent Work. In this Communication one can find traces of the aforementioned idea that EU standards for social rights already go beyond the international standards. The most interesting point for the analysis carried out in this paper comes from the passage of the Communication devoted to Enlargement. Here the Commission stressed the importance for candidate countries to implement the decent work agenda, and in particular ILO core standards. The reference to these standards was also included in the part dealing with trade policy. The final step provides a more recent reference, although contained in a simple press release. Commenting the adoption by the EU Council of a Decision authorising Member States to ratify ILO Convention No. 189 (concerning fair and decent work for domestic workers), the EU Commission stated that ‘[t]he EU promotes, in all its policies, the ratification and effective implementation of ILO Conventions on core labour standards’. This reference bears an echo of the ‘self-representation’ of the EU, as an actor devoted to the respect and promotion of international law.

Turning to the European Social Charter, one can see that, as De Schutter puts it, this instrument never played an important role for the development of EU law in the social field, being seldom referred to. This notwithstanding, the Treaties (now in Article 151 TFEU) explicitly mention the ESC in the chapter related to social policy, acknowledging the ‘inspirational’ role of this document. As for the ILO, the EU is not part of the ESC. Though the Lisbon Treaty included the obligation for the EU to join the

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22 Ibidem, p. 4: ‘The Community acquis in the fields of employment, social policy and equal opportunities in many respects goes beyond the international standards and measures which underpin the concept of decent work and incorporates the major principles of that concept’ (emphasis added).

23 Ibidem, p. 6.

24 The reference here goes to those Conventions identified as fundamental by the 1998 ILO Declaration on Fundamental Principles and Rights at Work, i.e. Conventions covering: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.


28 Article 151 TFEU: ‘The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives […]’ (emphasis added).
European Convention on Human Rights (ECHR), the ESC did not enjoy similar attention. The first reference to the ESC in the context of primary EU law dates back to the Single European Act (1986). The possibility of accession by the EU to the ESC was then envisaged at the moment of the revision of the Charter, taking place between 1990 and 1994. Indeed, the 1994 draft of the Revised ESC included an Article (L) meant to pave the way for such accession. However, the Article was dropped into the text which was ultimately adopted. After this (missed) encounter, the drafting of the EU Charter of Fundamental Rights (EUCFR) showed once again the distance between the EU and the ESC. Indeed, though the EUCFR makes explicit reference to the European Convention on Human Rights, the ESC is never mentioned in the text. This notwithstanding, several dispositions of the EUCFR itself were directly inspired by similar Articles of the ESC, as stated in the Explanations relating to the Charter of Fundamental Rights of the European Union redacted by the Praesidium of the European Convention.

As it was just highlighted, the EU is not part of the ESC nor of (any Convention of) the ILO. However, the effects of its action do have an impact on the rights and values protected by these legal orders. Hence, I will briefly look at the relationship the other way round, that is, from the point of view of the ESC and the ILO.

The supervisory bodies of both systems have been confronted with the issue. One can see that they scrutinised the situation in the Member States without awarding any special justification or presumption of conformity on the basis of the role of the EU in the issue. In this sense their attention was focused ‘downstream’: the supervisory

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29 Now in Article 6 TEU, though mentioning this already sounds rather pointless, in light of Opinion 2/13 of the Court of Justice. I will come back to this later.
30 ‘Article L - Accession by the European Community
1 After its entry into force, the Committee of Ministers of the Council of Europe may invite the European Community to accede to this Charter, by decision taken on the majority required by Article 20.d of the Council of Europe’s Statute, and by a unanimous vote of the representatives of the Contracting States entitled to sit on the Committee. […]’
32 Article 52(2) EUCFR: ‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’
34 ‘These explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. […] Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter.’
35 European Committee of Social Rights, Decision on Admissibility and the Merits, 3 July 2013, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, para 74: ‘neither the current status of social rights in the EU legal order nor the substance of EU legislation and the process by which it is generated would justify a general
bodies did not analyse EU law or the action of the EU *per se* but examined instead the situation at the national level.\textsuperscript{36} This approach makes it evident that EU Member States find themselves between the proverbial rock and a (relatively) hard place: on the one hand they must apply EU law, on the other they are bound to the commitment to respect the obligations stemming from international agreements they have ratified.

All in all, the relationship emerging from this brief overview appears to be a rather platonic one. Due to the impossibility of the EU to accede to these instruments, the legal orders of the ILO and the ESC are bound to *ignore*, at least from a legal point of view,\textsuperscript{37} the role played by EU law and action when assessing the situation in the signatory countries. As for the EU, the possibility of a true commitment towards the ESC was ruled out by the preference for ‘self-sufficiency’, i.e. for drafting its own instrument (the EUCFR). Though the relationship with the ILO is essentially platonic, the EU appears to recognise a higher ‘moral’ duty in relation to ILO standards, in particular when it comes to its external relations.

2. Austerity and International Standards for Social Rights

During the Great Recession the concept of austerity has become a familiar one. Austerity is in itself a package of policies presented as a cure.\textsuperscript{38} Very briefly, austerity policies are a mix of cuts in public spending, privatisations, labour market de-regulation and wage moderation (or outright reduction).\textsuperscript{39} The choice in favour of the austerity

\textsuperscript{36} International Labour Conference, 99th Session, 2010, Report of the Committee of Experts on the Application of Conventions and Recommendations (The United Kingdom), 208-209, 209: ‘the Committee wishes to make clear that its task is not to judge the correctness of the ECJ’s holdings in Viking and Laval as they set out an interpretation of the European Union law, based on varying and distinct rights in the Treaty of the European Community, but rather to examine whether the impact of these decisions at national level are such as to deny workers’ freedom of association rights under Convention No. 87’ (emphasis added). Similarly in International Labour Conference, 102nd Session, 2013 Report of the Committee of Experts on the Application of Conventions and Recommendations (Sweden), 178-179, 178. European Committee of Social Rights, supra note 35, para 72: ‘It is ultimately for the Committee to assess compliance of a national situation with the Charter, including when the transposition of a European Union directive into domestic law may affect the proper implementation of the Charter’ (emphasis added).

\textsuperscript{37} As it will be highlighted *infra*, supervisory bodies both of ILO Conventions and of the ESC appear perfectly aware of the role played by EU institutions in the violations at stake.

\textsuperscript{38} About the ‘cure’ metaphor, see Krugman, Bleeding Europe, *The Conscience of a Liberal* (Blog), 11 December 2012, available at http://krugman.blogs.nytimes.com/2012/12/11/bleeding-europe (last accessed 19/09/2015): ‘it really is like medieval medicine, where you bled patients to treat their ailments, and when the bleeding made them sicker, you bled them even more’.

\textsuperscript{39} As regards the public sector and general minimum wage in Greece, see Karakioulafis, Grèce: Les syndicats dans la ligne de mire de la Troïka, 143-144 *Chronique internationale de l’IRES*, 121–132, 2013.

As is well known, Greece occupies the unenviable first place in the sorry group of countries interested in austerity measures, and more precisely in Memoranda of Understanding (MoUs). MoUs lay down the conditions for obtaining financial help in the form of loans, under the scrutiny of the so-called Troika, formed by the EU Commission, the ECB and the IMF. Thus, I will only provide a brief account of the measures imposed on, and introduced by, Greece during the Great Recession.\footnote{For a more thorough analysis, see Achtsioglou, ‘Greece 2010-2012: labour in the maelstrom of deregulation’, 19 Transfer: European Review of Labour and Research 1, 125–127, 2013; Karakioulafis, ‘Grèce: Les syndicats dans la ligne de mire de la troïka’, supra note 39; Koukiadaki and Kretsos, ‘Grèce/Greece’, in: Escande Varniol et al (eds.), Quel droit social dans une Europe en crise?, Brussels, Larcier, 189–231, 2012; Achtsioglou and Doherty, ‘There Must Be Some Way Out of Here: The Crisis, Labour Rights and Member States in the Eye of the Storm’, 20 European Law Journal 2, 219-240, 2014.}

In particular, I will focus on the measures which gave rise to the violations of international standards of protection of social rights which represent the main object of this section.

On the individual side, two measures can be highlighted. First, the reduction of compensation for dismissal, introduced by Law 3863/2010, and more specifically the provision of a ‘trial period’ of 12 months. During such a period the employee has no right to compensation in case of dismissal. Second, the same law introduced the possibility to conclude ‘special apprenticeship contracts’ of up to one year's duration with persons between 15 and 18 years of age. These contracts are characterised by lower wages (70% of the minimum or daily wage), limited social security benefits and are excluded from the application of labour law provisions (except for health and safety provisions). This measure goes hand in hand with the general reduction in the minimum wage, which was more pronounced (32%) for young workers (under the age of 25). On the collective side, the whole Greek system of collective bargaining was deeply changed during the years of the Great Recession. Indeed, collective bargaining was directly affected by austerity measures from the very first Memorandum of Understanding.\footnote{See Deakin and Koukiadaki, ‘The sovereign debt crisis and the evolution of labour law in Europe’, in Countouris and Freedland (eds.), Resocialising Europe in a Time of Crisis, Cambridge, Cambridge University Press, 163–188, 2013, pp. 180-181.}

Afterwards, Law 4024/2011 established a generalised priority for company level agreements, which would then prevail over a conflicting sectoral agreement, even if the latter is more favourable to the worker. The same law also suspended the possibility of extending erga omnes sectoral agreements, while also introducing the possibility to conclude company agreements with ‘associations of workers’ representing at least 3/5 of the workforce. The government also intervened directly with regard to the results of collective bargaining, for example by reducing the agreed minimum wage (of 22%) and by suspending clauses providing for wage increases relating to seniority for as long as
unemployment is over 10%. Finally, turning to social security, the Greek government introduced several reductions to primary and complementary pensions. In particular, these measures reduced holiday bonuses for pensioners (which were removed for pensions over 2500€ per month and for pensioners aged under 60 years); drastically cut pensions for pensioners younger than 60; levied a ‘social security contribution’ on pensions over 1400€ per month, the rate of the contribution varying on a slide scale between 3% and 14%.

2.1 Violations

In September 2011 a high level mission from the ILO was sent to Greece in order to assess the respect of several Conventions following the adoption of what was to be the first in a long list of austerity packages. The Report of the mission highlighted a number of issues in the areas of freedom of association and collective bargaining, wages, equality and non-discrimination, social security, labour inspection and labour administration, employment policies. Regarding the first area, the Report expressed its concerns in particular regarding the freeze in wage negotiations and the possibility for an ‘association of workers’ (as opposed to trade unions) to validly conclude collective agreements. As regards wages, the most pressing critique was directed at the level of minimum wages which was falling dangerously close to the poverty line. Finally, the Report openly criticised the fact that in the context of negotiations with the so-called Troika, employment objectives were rarely discussed. The mission also noted that the impact of pension reforms (i.e. cuts) on poverty level had not been considered. In 2012 the ILO Committee on Freedom of Association (CFA) reviewed the Greek situation regarding Convention Nos. 87 and 98. The CFA further criticised the freeze on negotiations regarding wages, and more generally the ‘important and significant interventions in the voluntary nature of collective bargaining’ going against the very principle of the ‘inviolability of freely concluded collective agreements’. The Committee, moreover, expressed its concerns regarding the possibility for an ‘association of persons’ to conclude collective agreements, noting in particular that those associations would not offer the same guarantees of independence than trade

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46 Ibidem, paras. 330-332: ‘the mission has been struck by the reports that in discussions with the Troika employment objectives rarely figure’.
47 Ibidem, para. 323.
49 The Committee (CFA) is composed of an independent chairperson and three representatives each of governments, employers, and workers, and was set up in 1951 in order examine complaints about violations of freedom of association. The CFA accepts Complaints against a member state introduced by employers’ and workers’ organisations.
The concerns on this point are also expressed in the Report of the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR)\textsuperscript{52} of 2014. The CEACR based these concerns on statistics showing a staggering prevalence of company-level collective agreements concluded with said associations of persons, with a vast majority of those agreements providing for wage cuts.\textsuperscript{53}

Turning to the European Social Charter, the complaint raised by the Greek trade unions were aimed at the special apprenticeship contracts,\textsuperscript{54} the compensation-free dismissal during the trial period\textsuperscript{55} and the pension reform.\textsuperscript{56} In all these decisions, the European Committee of Social Rights (ECSR) ultimately found the austerity measures adopted by the Greek government to be in breach of one or more Articles of the European Social Charter. Thus, the ‘special apprenticeship contracts’ violate Articles4§1\textsuperscript{57}, 7§7\textsuperscript{58}, 10§2\textsuperscript{59} and 12§3\textsuperscript{60} of the ESC. The ECSR considers that these contracts do not respect the right to a fair remuneration inasmuch as they provide for a minimum wage lower than the poverty line.\textsuperscript{61} They also violate the right of young persons to protection since they do not provide the minimum level of three weeks’ annual paid leave.\textsuperscript{62} Furthermore, the legal framework for these contracts does not mandate any form of training and was hence considered by the ECSR as violating the

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\textsuperscript{51} Ibidem, para. 998.


\textsuperscript{53} Ibidem, p. 112: ‘The Committee now observes from the latest statistics provided by the Government that national occupational collective agreements have gone down from 43 in 2008 to seven in 2012 whereas firm-level collective agreements have increased from 215 in 2008 to 975 in 2012 (706 signed by associations of persons and 269 signed by trade unions). Moreover, 701 of those agreements signed by associations of persons and 76 signed with trade unions have provided for wage cuts. Similarly, 313 enterprise level collective agreements have been signed in 2013 of which 178 have been signed by associations of persons (156 providing for wage cuts) and 135 signed by trade unions (42 providing for wage cuts).’

\textsuperscript{54} European Committee of Social Rights, General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece, Complaint No. 66/2011.

\textsuperscript{55} European Committee of Social Rights, General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece, Complaint No. 65/2011.

\textsuperscript{56} European Committee of Social Rights, Pensioner’s Union of the Agricultural Bank of Greece (ATE) vs. Greece, Complaint No. 80/2012; Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) vs. Greece, Complaint No. 79/2012; Pensioners’ Union of the Athens-Piraeus Electric Railways (I.S.A.P.) vs. Greece, Complaint No. 78/2012; Panhellenic Federation of Public Service Pensioners vs. Greece, Complaint No. 77/2012 (hereinafter collectively referred to as ‘ECSR Greek Pensions’, due to the identical numbering); Federation of Employed Pensioners of Greece (IKA-ETAM) vs. Greece, Complaint No. 76/2012 (hereinafter ‘IKA-ETAM’).

\textsuperscript{57} Right to a fair remuneration.

\textsuperscript{58} Right of children and young persons to protection.

\textsuperscript{59} Right to vocational training.

\textsuperscript{60} Right to social security.

\textsuperscript{61} General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece, supra note 54, para. 60.

\textsuperscript{62} Ibidem, para. 31.
right to vocational training for boys and girls. Finally, the apprenticeship contracts only include a very limited access to social security benefits, a situation which, in the words of the ECSR had ‘the practical effect of establishing a distinct category of workers who are effectively excluded from the general range of protection offered by the social security system at large’. Thus, the measure was also found in breach of the right to social security. The second object of complaint was the possibility to dismiss a worker without notice and/or compensation during the first 12 months of an open-ended contract. The ECSR found this measure to be in breach of Article 4§4 of the ESC, providing for a right of all workers to a reasonable period of notice. In particular the ECSR stressed that the concept of ‘all workers’ includes those on trial period, reinforcing its reasoning by noting a contrario that immediate dismissal could only be accepted in cases of serious misconduct. With regard to pensions, the five complaints are essentially identical. In all cases the ECSR considered the Greek measures as violating Article 12§3 of the ESC. However, in these decisions the stance of the ECSR was more nuanced, opting for a rather procedural critique, in lieu of the more substantial one delivered in the ones analysed so far. The ECSR found that the cumulative effect of the measures at stake was ‘bound to bring about a significant degradation of the standard of living and the living conditions of many of the pensioners concerned’. However, it criticised in particular the lack of assessment and analysis of the impact of these measures, the absence of discussion with the organisations concerned and the disregard for other possible measures which could have limited the said cumulative impact.

In all these procedures, both in the context of the ILO and of the ESC, the Greek government tried to defend itself by hiding behind the obligations contained in the Memoranda. This line of defence was not particularly successful. Though the different bodies of the ILO and the ECSR recognised the difficult situation of the Greek government, they nonetheless considered the adopted measures to be in violation of the respective international standards. In the pensions' decisions the ECSR was clear in this regard, affirming that ‘the fact that the contested provisions of domestic law seek to fulfil the requirements of other legal obligations does not remove them from the ambit of the Charter’ since ‘when states parties agree on binding measures, which relate to matters within the remit of the Charter, they should -both when preparing the text in question and when implementing it into national law- take full account of the commitments they have taken upon ratifying the European Social Charter’.

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63 Ibidem, para. 38-40.
64 Ibidem, para. 48
65 Right to a fair remuneration.
66 General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece, supra note 55, para. 25-27.
67 Right to social security.
68 ECSR Greek Pensions, supra note 56, all at para. 74; IKA-ETAM, para. 78.
69 ECSR Greek Pensions, supra note 56, all at para. 75-77; IKA-ETAM, para. 79-81.
70 ECSR Greek Pensions, supra note 56, all at para. 46-47; IKA-ETAM, para. 50-51.
71 Ibidem.
Furthermore, the ECSR added that ‘it is ultimately for the Committee to assess compliance of a national situation with the Charter, including when the implementation of the parallel international obligations into domestic law may interfere with the proper implementation of those emanating from the Charter ambit of the Charter’, confirming its ‘downstream’ position when assessing national measures implementing other international obligations. The Report of the ILO high level mission to Greece highlights the symmetric position of the representatives of the EU Commission. Indeed, in the Report we are told that ‘the policy choices were always made by the Greek Government’ and that the European Commission exerted no ‘pressure to violate ratified international labour Conventions’. Such a stance allowed the Commission to wash its hands of the whole matter of respecting international standards of protections of social rights. At the same time, it provides the best justification for the approach of the ECSR and the CEACR to these issues, namely to examine the national implementation of measures agreed in the context of MoUs or of EU acts without providing any presumption of conformity with the respective standards.

3. Social Rights, the EU Internal Market and the Court of Justice

The decisions delivered by the Court of Justice of the European Union (CJEU) in Viking and Laval need no particular introduction. Indeed, these decisions have sparked a huge debate among scholars. Borrowing the words of the Report ‘A New Strategy for the single Market’ redacted by Mario Monti, these cases ‘revived an old split that had never been healed: the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level’. These decisions ended up also as (indirect) object of review from the CEACR and the ECSR. Here I will (very briefly) highlight a few fundamental points of Viking and Laval which are mandatory to fully understand the procedures in front of the said supervisory bodies.

73 Ibidem.
74 Case C-438/05, Viking Line ABP v. The International Transport Workers’ Federation and the Finnish Seaman’s Union (hereinafter Viking).
75 Case C-341/05, Laval un Partneri, 18 December 2007 (hereinafter Laval).
77 Monti, A New Strategy for the single Market – at the Service of Europe's Economy and Society, Report to the President of the European Commission José Manuel Barroso, 9 May 2010, p. 68.
79 Decision on Admissibility and the Merits, 3 July 2013, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, supra note 35.
The *Viking* and *Laval* cases concerned a conflict between one of the fundamental freedoms of the EU internal market and the right to take collective action. Although the right to take collective action was for the first time recognised as a fundamental one in these cases, the CJEU analysed its exercise as a restriction to a fundamental freedom of the internal market. Having decided on this approach, the Court of Justice applied a rather standardised reasoning, considering whether it was possible to justify such a restriction. In very brief, the said collective action should: a) pursue a legitimate aim compatible with the Treaty, and b) be justified by overriding reasons in the public interest; c) be carried out in a way suitable for securing the attainment of the objective pursued, not going beyond what is necessary in order to attain it. In *Viking* the CJEU found that the collective action passed steps (a) and (b) of the test, sending the case back to the national court, although with a rather clear guidance, for the assessment of point (c) (the so-called proportionality test *stricto sensu*). The dispute was eventually settled privately, the content of the settlement itself remaining confidential. In *Laval* the collective action was found wanting under point (b) of the test. The issues, however, lie in the very approach concocted by the CJEU to tackle the conflict between the (fundamental) right to take collective action and the fundamental freedoms of the internal market. To consider just two critiques to this approach, the stance was criticised because it suggested a hierarchical relationship between fundamental social rights and fundamental freedoms of the internal market, with the latter enjoying a higher ground than the former. Secondly, the principle of proportionality was criticised as being essentially illogic, provided that the more a collective action is successful, the more it will infringe on the economic freedoms of an employer, the less likely it would be for the action to pass the proportionality test. It is worth mentioning these critiques, among the host which have been flung at the twin decisions, inasmuch as they will be confirmed by the decisions/conclusions of the CEACR and the ECSR which will soon be presented.

Beyond the approach delivered by the CJEU, it is relevant to look at the sources referred to in order to affirm the fundamental nature of the right to take collective action. Indeed, in both decisions the Court of Justice refers to a number of international texts, including the European Social Charter and Convention No. 87 of the ILO. However, in both cases the CJEU never refers to the body of decisions elaborated by the respective monitoring bodies, although the same Court is definitely aware of the

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80 Respectively, the freedom of establishment and the freedom to provide services.
81 *Laval*, para. 90-93; *Viking*, para. 43-46.
82 *Laval*, para. 101; *Viking*, para. 75.
85 *Laval*, para. 90; *Viking*, para. 43.
existence and of the importance of this (sui generis) ‘case law’86. Indeed, as is well
known, the text of ILO Convention No. 87 never mentions the right to take collective
action, or the right to strike for what it matters. The right to take collective action has
been considered as included under the protection of the freedom of association by the
ILO supervisory bodies.87 Still, the CJEU did not feel the need to mention this
contribution. More generally, the Court of Justice appears particularly recalcitrant when
it comes to referring to other sources of human or fundamental rights law and
‘jurisprudence’.88

3.1 Violations

The impact of the decisions of the CJEU in Viking and Laval came under the
scrutiny of both the CEACR and ECSR. In fact, the CEACR analysed these impacts
twice, the first time because of a collective dispute89 (the so-called BALPA case) and
the second because of a national reform aimed at ‘implementing’ the decision of
Laval.90 The ECSR only analysed the latter impact.91 In all these occasions the approach
developed by the CJEU was openly criticised. As I explained in Section 1, this was
done through the analysis of the national situation.

The BALPA dispute92 arose in the context of negotiations between British Airways and the British Air Line Pilots’ Association (BALPA). British Airways was
planning to launch a wholly owned subsidiary airline that would operate between Paris
and (among others) the US. Along with this operation, the process of collective
classroom started: the thorny issue revolved around the working conditions
applicable to

86 Dorssemont, ‘The right to take collective action versus fundamental economic freedoms in the
aftermath of Laval and Viking. Foes are Forever’ in De Vos (ed.), European Union Internal Market and
87 The Committee on Freedom of Association first recognized this in 1952, the CEACR in 1959. See
Gernigon, Odero, and Guido, ILO Principles concerning the right to strike, ILO, Geneva, 2000, available
see the unsurpassed analysis of Tonia Novitz in International and European Protection of the Right to
88 See Barnard, The Protection of Fundamental Social Rights in Europe after Lisbon: a Question of
Conflicts of Interest, supra note 84, pp. 43-44; De Burca, ‘After the EU Charter of Fundamental Rights:
The Court of Justice as a Human Rights Adjudicator?’, 20 Maastricht Journal of European and
Comparative Law 168, 168-184, 2013, p. 173: ‘[…] there has been a remarkable lack of reference on the
part of the Court of Justice to other relevant sources of human rights law and jurisprudence’; Flauss, ‘Les
interactions normatives entre les instruments européens relatifs à la protection des droits sociaux’, in
Flaus (ed.), Droits sociaux et droit européen. Bilan et prospective de la protection normative, Nemesis,
Bruxelles, 89-114, 2002, p. 109: ‘en effet, si la Cour de Luxembourg, s’est à l’occasion référée à la Charte
sociale européenne, elle l’a fait avec mesure et discrétion, et en toute hypothèse à dose homéopathique’.
90 International Labour Conference, 102th Session, 2013, supra note 78.
91 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees
(TCO) v. Sweden, supra note 35.
92 See further Ewing and Jones, Introduction, in Ewing and Hendy (eds.), The New Spectre Haunting
favour of collective action. The company held that any strike action would be unlawful because of the doctrine developed by the CJEU in Viking, since the action would violate the freedom of establishment. The main threat revolved around a claim for unlimited damages, estimated by the company at £100 million per day. Such a ‘life-threatening’ amount forced the trade union to cancel the collective action. At this point BALPA lodged a complaint before the CEACR, being joined by the International Transport Federation (ITF). The CEACR delivered its conclusions on the dispute on the basis of the 2010 Report. Also on this occasion, the defence of ‘hiding behind the EU’ was deployed (in casu by the UK government). To this the CEACR responded with the stance outlined before, that is, by placing its scrutiny ‘downstream’. In the words of the conclusions: ‘the Committee wishes to make clear that its task is not to judge the correctness of the ECJ’s holdings in Viking and Laval as they set out an interpretation of the European Union law, based on varying and distinct rights in the Treaty of the European Community, but rather to examine whether the impact of these decisions at national level are such as to deny workers’ freedom of association rights under Convention No. 87.’ Still, notwithstanding this rather careful approach, the CEACR clearly concluded against the application of the principle of proportionality to the right to take collective action. Furthermore, the CEACR added that ‘the doctrine that is being articulated in these ECJ judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention’.

The same critiques were repeated almost verbatim in the conclusions relating to the so-called Lex Laval. Lex Laval is in fact the nickname for a package of amendments introduced by the Swedish government enacted in order to bring the Swedish system in line with the Laval decision. These amendments are meant to integrate the points raised by the CJEU decision into the Swedish system. Although the whole issue is strictly connected with the distinct topic of posting of workers, the statements delivered by the CEACR and by the ECSR when assessing the Lex Laval can be analysed without stepping in the minefield of posting. Of the critiques raised by the CEACR I have already said. These are essentially a repetition of the ones regarding the

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93 International Labour Conference, 99th Session, 2010, supra note 78, pp. 208-209: “The Committee notes the Government’s indication in its reply that BALPA’s application is misdirected and misconceived because any adverse impact of Viking and Laval would be a consequence of the European Union law, to which the United Kingdom is obliged to give effect, rather than of any unilateral action by the United Kingdom itself”.

94 Ibidem, p. 209 (emphasis added).

95 International Labour Conference, 99th Session, 2010, supra note 78, p. 209: “The Committee observes that when elaborating its position in relation to the permissable restrictions that may be placed upon the right to strike, it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services”.

96 Ibidem.

97 International Labour Conference, 102th Session, 2013, supra note 78.

BALPA dispute. The substance of the decision delivered by the ECSR99 is also similar. Repetitive it may be, it is also worth stressing that the ‘hiding behind the EU’ argument was once again put forward by the defendant government (Sweden).100 And, once again, it was dismissed, this time by the ECSR, on the ground that it is the conformity of the resulting national law with the ESC that has to be assessed by the Committee.101 In this context the ECSR also refused to award EU a ‘special treatment’, in the form of a presumption of conformity with the ESC.102 As regards the more substantial points, the ECSR completely reversed the logic of the approach delivered by the CJEU, by affirming that the restrictions to the right to collective action should be proportionate,103 since these restrictions have to be assessed from the point of view of Article G of the ESC.104 Finally, the ECSR seemed to agree with the critiques aimed at the hierarchy between fundamental freedoms and fundamental social rights created by the decisions of the CJEU. The Committee underlined that ‘the facilitation of free cross-border movement of services and the promotion of the freedom of an employer or undertaking to provide services in the territory of other States – which constitute important and valuable economic freedoms within the framework of EU law – cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater a priori value than core labour rights, including the right to make use of collective action to demand further and better protection of the economic and social rights and interests of workers’.105 More recently, the importance of this violation was confirmed by the Report of the Secretary General of the Council of Europe on the State of Democracy Human Rights and the Rule of Law in Europe.106 The Report makes explicit mention of the Decision of the ECSR107 and stresses the

99 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, supra note 35. I had the occasion to analyse this decision in greater detail; see Rocca, A Clash of Kings – The European Committee on Social Rights on the ‘Lex Laval’… and on the EU Framework forPosting of Workers, 3 European Journal of Social Law, 217-232, 2013.
100 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Document No. 2, Submissions of the Government on Admissibility and Merits, p. 3: “the Swedish government would like to stress that the legislative changes were considered necessary in order for the Swedish legislation to comply with EU law on freedom to provide services and non-discrimination, as interpreted by the ECJ in the Laval case’.
101 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, supra note 35, para. 72-74.
102 Ibidem, para. 74: ‘the Committee considers that neither the current status of social rights in the EU legal order nor the substance of EU legislation and the process by which it is generated would justify a general presumption of conformity of legal acts and rules of the EU with the European Social Charter’.
103 Ibidem, para. 121.
104 Establishing the conditions for restricting the rights protected by the ESC.
105 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, supra note 35, para. 122.
107 ‘In 2013 the European Committee of Social Rights found a breach, inter alia, of the right to bargain collectively and the right to strike important corollaries of the right to organise. The measures in question had been adopted as a result of a judgment of the Court of Justice of the European Union. The decisions of the States Parties (resulting directly or indirectly from EU law) must conform to the rights enshrined in the Charter. Therefore we see an urgent need to find pragmatic solutions to settle conflicts between the two sets of standards.’
necessity of finding ‘pragmatic solutions to settle conflicts between the two sets of standards’. In providing Recommendations for the area of ‘Dignity, participation and solidarity’, (which includes the statement just highlighted) the Report suggests that the EU should: a) accede to the ESC, and to b) ‘fully implement the accepted provisions of the charter and follow up the findings of the European Committee of Social Rights’. In a way, the Report is the seal upon the actual existence of a conflict between the system of rights enshrined in the ESC and EU law.

To conclude this gallery of violations, it seems useful to add yet another potential clash, though this ultimately failed to materialise. Following the critiques against Viking and Laval, a legislative solution was proposed in 2012 by the EU Commission. The solution, in itself a proposal for a new EU Regulation,\textsuperscript{108} was never adopted, following a lack of the necessary support among Member States.\textsuperscript{109} This premature death notwithstanding, two strictly intertwined points are worth mentioning. First, in the Explanatory Memorandum accompanying the Proposal, the aforementioned Conclusions delivered by the CEACR in the BALPA case are explicitly referred to. This shows at the very least the awareness on the EU Commission’s side of the violation of ILO standards caused by the application of Viking and Laval.\textsuperscript{110} However, as regards the second element, the Proposal itself refers to the principle of proportionality, as the tool for reconciling the exercise the right (or freedom) to take collective action and the freedom of establishment and to provide services.\textsuperscript{111} Indeed, the actual stance of the CEACR about this very principle seems somewhat lost on the Commission.

4. Scenario 1: Beyond Fair-weather Friendship?

As should be evident, the violations outlined so far highlight first and foremost a political problem. However, here I will stick to the legal approach, in order to analyse the road not taken. To do so, I will look to the instruments already present in EU law


\textsuperscript{109} See the letter of the Commission accompanying the withdrawal of the proposal, Brussels 12 September 2012, Ares(2012)1058907.

\textsuperscript{110} Explanatory Memorandum of COM(2012) 130 final, supra note 108, pp. 8-9: ‘The importance of this problem has been highlighted in the 2010 Report of the ILO Committee of Experts on the Application of Conventions and Recommendations which expressed “serious concern” about the practical limitations on the effective exercise of the right to strike imposed by the CJEU rulings. The right to strike is enshrined in ILO Convention No. 87, which is signed by all EU Member States.’

\textsuperscript{111} Ibidem, Recital 11: ‘The exercise of the right to take collective action, including the right or freedom to strike, and the requirements relating to the freedom of establishment and the freedom to provide services may thus have to be reconciled, in accordance with the principle of proportionality, which often requires or implies complex assessments by national authorities.’
which could have allowed (and could still allow) for a clearer commitment to the respect of the international standards described before, without exploring more ‘creative’ (i.e. de jure condendo) solutions. In this sense, I will analyse the possibilities offered by the EU Charter of Fundamental Rights (EUCFR) and by Article 351 TFEU.

This approach is not without its drawbacks. The major one is related to the issues analysed in Section 2. This is due to the legal nature of MoU, which are considered as simple declarations. As was stressed before, the EU Commission considers the Greek state to be the sole organ responsible for the political choices implementing the various MoU, so that the non-respect of the conditions would ‘only’ cause the interruption of the loan. Answering a written question on this point, Mr. Katainen affirmed that ‘the programme [MoU] documents are not EC law, but instruments agreed between Greece and its lenders: as such, the Charter [EUCFR] cannot be used as a reference, and it is for Greece to ensure that its own obligations on fundamental rights are respected.’

In fact, an attempt to pierce this veil was made by the Tribunal do Trabalho do Porto (Portugal). The Tribunal sent a request for a preliminary ruling to the CJEU, asking whether the principles of equality and non-discrimination and of fair and just working conditions recognised by the EUCFR were being violated by the decision of the Portuguese government to cut wages in the public sector. The CJEU simply affirmed its lack of jurisdiction on the matter. Thus, it remains unclear whether the EUCFR is applicable to MoU. However, and this is why the present discussion remains interesting also for the issues highlighted in Section 2, it has been argued convincingly that the EUCFR binds EU Institutions even when acting in their role as ‘Troika members’.

The position of the new Commission is not yet clear on this point. During the hearing of Mr. Timmermans (first Vice-President of the new Commission and Commissioner for Better Regulation, Interinstitutional Relations, the Rule of Law and the

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112 Parliamentary questions, 3 July 2014, E-005633-14, Georgios Katrougkalos (GUE/NGL), Dimitrios Papadimoulis (GUE/NGL), Kostadinka Kuneva (GUE/NGL), Emmanouil Glezos (GUE/NGL), Kostas Chrysogonos (GUE/NGL), Sofia Sakorafa (GUE/NGL).
113 At the time Commissioner for Economic and Monetary Affairs and the Euro, Mr. Katainen was later confirmed as Vice President and Commissioner for Jobs, Growth, Investment and Competitiveness in the new EU Commission.
114 Article 21 EUCFR.
115 Article 31 EUCFR.
116 Reference for a preliminary ruling from the Tribunal do Trabalho do Porto (Portugal) lodged on 8 March 2012 - Sindicato dos Bancários do Norte and Others v BPN - Banco Português de Negócios SA, Case C-128/12.
117 Order of the Court (Sixth Chamber) of 7 March 2013 in case C-128/12.
118 As argued by the study of Fischer-Lescano, Human Rights in Times of Austerity Policy - The EU institutions and the conclusion of Memoranda of Understanding, Legal opinion commissioned by the Chamber of Labour, Vienna, 17 February 2014; and by Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?', 10 European Constitutional Law Review, 393-421, 2014, pp. 405-406. More generally, Kilpatrick makes a very strong case for the applicability of the EU 'social constitution' to the measures taken by Member States in application of MoUs.
Charter of Fundamental Rights) he answered a specific question from MEP Barbara Spinelli (GUE/NGL) about the relationship between MoU and the EUCFR.\textsuperscript{119} The new Commissioner gave the impression of considering EUCFR as being applicable to the action of the Commission also when acting in its capacity of a member of the Troika.\textsuperscript{120}

Leaving aside the stance of the Commission on this issue, the first ‘legal window’ allowing EU Institutions to fully commit to the respect of international standards set by ILO Conventions and by the ESC is Article 53 EUCFR. The window however is definitely a narrow one. Article 53 EUCFR states that the Charter itself shall not be interpreted ‘as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party’. Hence, it could be argued, in situations in which the EUCFR does apply, this instrument should be interpreted in a way which is compatible with ‘international agreements to which the Union, the Community or all the Member States are party’. As for example, all Member States have ratified ILO Convention No. 87, which was at stake both in the Greek context (regarding the reform of the system of collective bargaining) and in the CJEU decisions in Viking and Laval. The situation is less clear for the ESC. This is due to the peculiar nature of the instrument, first signed in 1961 and then revised in 1996. Some Member States have only ratified the first version of the ESC, some have ratified both and another group of states only has ratified the revised version. The situation is summarised by the Table below.

<table>
<thead>
<tr>
<th>Instrument</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Only ESC (1961)</td>
<td>Austria, Croatia, Czech Republic, Denmark, Germany, Greece, Hungary, Latvia, Luxembourg, Poland, Slovakia, Spain, United Kingdom</td>
</tr>
<tr>
<td>Only RevESC (1996)</td>
<td>Bulgaria, Estonia, Lithuania, Romania, Slovenia</td>
</tr>
<tr>
<td>Both</td>
<td>Belgium, Cyprus, Finland, France,</td>
</tr>
</tbody>
</table>

\textsuperscript{119} Hearing of Frans Timmermans, First Vice-President Designate, Tuesday 7 October 2014, Brussels. The text of the hearing is available at http://www.elections2014.eu/resources/library/media/20141022RES75832/20141022RES75832.pdf (last accessed 19/09/2015). The question was asked in Italian, and Mr. Timmermans replied in the same language: ‘Quanto ai diritti fondamentali, mi pare ci sia contraddizione, fra quello che dice Lei – il piano della troika era basato sul diritto comunitario – e quello che dice il Commissario Katainen, la Carta dei diritti non si applica a memorandum di questo tipo. Come vi metterete d'accordo?’, which can be translated as ‘Regarding fundamental rights, there seems to be a contradiction between your position – namely that the intervention of the troika was based on EU law – and the position of Commissioner Katainen, that the EUCFR does not apply to these memoranda. Will you be able to find a common ground?’ (my translation).

\textsuperscript{120} ‘Per quanto riguarda l’applicazione dei diritti umani fondamentali, si tratta di una cosa non molto difficile: questo è diritto europeo. Nelle azioni che intraprendono, le istituzioni europee devono osservare i diritti che sono iscritti nei trattati e nella Carta. Dunque, in questo ambito, non vedo altra possibilità nell’azione delle istituzioni europee’; ‘Regarding the application of fundamental human rights, the answer is rather straightforward: this is EU law. In their action, EU institutions must respect rights enshrined in the Treaties and in the EUCFR. Hence, in this field, I see no other possibility as regards the action of EU institutions’ (my translation).
In a recent contribution, a member of the ECSR has argued in favour of the interpretation of the ESC as falling into the category of treaties signed by all Member States and hence covered by Article 53 EUCFR. However, as it was stressed before, the possibility to look through this ‘window’ presupposes a legal dispute where the EUCFR is applied.

The second window is quite wider. The problem in this case is what lies outside. Article 351 TFEU explicitly provides the tools to solve a conflict between EU law and international treaties concluded before the accession to the EU. Hence, the question would be one of chronological order. Each ILO Convention has obviously a different date of adoption and (for each Member State) ratification, so that it would be hard to provide a single answer. Looking at the aforementioned ILO Convention 87, one can see that all Member States, save for Italy and Luxembourg, have ratified it before the accession to the EU.

For the ESC the picture is again more complicated, due to the ‘dual’ nature of the instrument, with the Revised ESC being ratified at a much later date. It has been argued that, in the case of a Member State having ratified both instruments, the ratification date of the Revised ESC would be the one to take into account, hence ‘resetting the clock’ in respect of Article 351 TFEU. However, the contrary stance was maintained by the ETUC in its submission to the ECSR in the *Lex Laval* case, arguing in favour of a ‘continuity’ of the two instruments.

Once again, the situation can be summarised with a Table. A fairly large group of Member States could invoke the first paragraph of Article 351 TFEU in order to protect the rights and obligations covered by the ESC and by (certain) ILO Conventions from the effects of EU law. This is particularly interesting in respect of the issues identified in Section 3.

<table>
<thead>
<tr>
<th>Before EU Accession</th>
<th>After EU Accession</th>
</tr>
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<tbody>
<tr>
<td>Ireland, Italy, Malta, the Netherlands, Portugal, Sweden</td>
<td></td>
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</tbody>
</table>

122 Article 351(1): ‘The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.’
123 Which ratified Convention No. 87 a few months after the creation of the European Communities, respectively on 13 March 1958 and 3 March 1958.
124 De Schutter, L’adhésion de l’Union européenne à la Charte sociale européenne revisée, *supra* note 31, pp. 8-9, on the basis of the precedent of Case C-466/98, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*.
125 *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, Complaint No. 85/2012, Document No. 4, Observations by the European Trade Union Confederation (ETUC), para. 52.
As regards Section 2 and the MoU, the rather disturbing impression is that an eventual successful invocation of international instruments protecting a given social right would simply force the given government to ‘cut’ elsewhere. Or it would stop the payment of the loan linked to the application of the MoU in question. Another problem arises when one looks further than the first paragraph of Article 351. In order to keep up the suspense, I will come back to this issue in Section 5.

4.1 A Short Deviation to Strasbourg

This contribution looks exclusively to the legal systems of the ILO and the ESC. This choice was based on their ‘specialisation’ in the field of social rights. In this sense, the role of the European Court of Human Rights (ECtHR) and of the European Convention on Human Rights (ECHR) remains outside the scope of the present analysis. However, the ECtHR may have a role to play also in lending its superior ‘strength’ to the more specialised bodies supervising the application of the ESC and of ILO Conventions.

The first and most evident basis for this strength stems, at least in theory, from the obligation\textsuperscript{126} of the EU to accede to the ECHR contained in the Lisbon Treaty and now in Article 6 TEU. Evidently, the relevance of this obligation should now be reassessed on the basis of Opinion 2/13 delivered by the Court of Justice.\textsuperscript{127} At the same time, Opinion 2/13 (and the non-accession) leaves the situation unchanged, so that shaping the relationship between the EU legal order and the ECHR remains left to the two Courts.

The second basis justifying the assumption of a major ‘strength’ on the ECtHR side lies in the EUCFR. Indeed, the EU Charter of Fundamental Rights explicitly refers to the ECHR in Article 52§3. In the words of the Explanations provided by the Praesidium,\textsuperscript{128} this Article is meant ‘to ensure the necessary consistency between the

\textsuperscript{126} See Peers, The EU’s Accession to the ECHR: The Dream Becomes a Nightmare, 16 German Law Journal 1, 213-222, 2015, p. 218.
\textsuperscript{128} Supra notes 33-34.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|}
\hline
\textbf{Only ESC (1961)} & Austria, Croatia, Czech Republic, Denmark, Hungary, Latvia, Poland, Slovakia, Spain, United Kingdom & Germany, Luxembourg \\
\hline
\textbf{Only RevESC (1996)} & Bulgaria, Estonia, Lithuania, Romania, Slovenia & \\
\hline
\textbf{Both (reset)} & Cyprus & Belgium, Finland, France, Greece, Ireland, Italy, Malta, Netherlands, Portugal, Sweden \\
\hline
\textbf{Both (continuity)} & Cyprus, Finland, Ireland, Malta, Sweden & Belgium, France, Greece, Italy, Netherlands, Portugal \\
\hline
\end{tabular}
\end{table}
Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. The Explanations make it clear that this reference includes the case law of the European Court of Human Rights. Explanations have no binding legal value, though they are ‘a valuable tool of interpretation intended to clarify the provisions of the Charter’. Following this ‘valuable tool’ it would seem that the rights recognized by the EUCFR should be interpreted as providing at least the same level of protection granted by the case law of the ECtHR.

It remains to see how this ‘strength’ can be used in support of the supervisory bodies mentioned before. The tool lies in the Demir and Baykara\textsuperscript{129} decision, where the ECtHR opened an important channel to the corpus of decisions of the ECSR\textsuperscript{130} and of other supervisory bodies, such as the CEACR.\textsuperscript{131} The ECtHR referred to the interpretation provided by these bodies of their respective international agreements (ILO Conventions and the European Social Charter), in order to assess the emerging consensus (and the ‘continuous evolution’) regarding the rights protected by the ECHR.\textsuperscript{132} In casu such emerging consensus brought the ECtHR to consider the right to bargain collectively as an ‘essential element’ of the right to form and join trade unions,\textsuperscript{133} protected by Article 11 ECHR. This approach was later confirmed in the Enerji\textsuperscript{134} and RMT\textsuperscript{135} decisions, dealing with the right to take collective action.

The obstacle to this deviation through Strasbourg is represented by a certain deference which the ECtHR shows when dealing with EU law. This approach is epitomised by the well-known Bosphorus\textsuperscript{136} case, where the ECtHR ruled that EU law enjoys a ‘presumption of conformity’ with respect to the ECHR.\textsuperscript{137} Though it is impossible to assess the likelihood (and eventual form) of such a possibility, one might think that the ECtHR could revise this approach as a ‘reaction’ to Opinion 2/13. Moreover, the eventual exclusion of MoUs from the scope of EU law should warrant the immediate and symmetrical exclusion of the measures taken in application of these instruments from the Bosphorus presumption.

\textsuperscript{129} European Court of Human Rights, 12 November 2008, Demir and Baykara v. Turkey, no. 34503/97.
\textsuperscript{130} Ibidem, paras. 50 and 149.
\textsuperscript{131} Ibidem, paras. 38, 43, 101, 122, 147 and 166.
\textsuperscript{133} Demir and Baykara v. Turkey, para. 154.
\textsuperscript{134} European Court of Human Rights, 21 April 2009, Enerji Yapi-Yol Sen v. Turkey, no. 68959/01.
\textsuperscript{135} European Court of Human Rights, 8 April 2014, National Union of Rail, Maritime and Transport Workers v. The United Kingdom, no. 31045/10.
\textsuperscript{136} Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, supra note 36.
\textsuperscript{137} Ibidem, paras. 165-166.
5. Scenario 2: EU Exceptionalism?

The interest in this second scenario has been triggered by the reactions of EU institutions to the condemnations and concerns described so far. For the issues examined in Section 2 (austerity in Greece), these ‘reactions’ amount to nothing. Neither the EU Commission nor the ECB have so much as commented on the number of concerns raised by the ILO high level mission. Even more problematically, the same silence met the direct condemnations which were delivered by the ECSR, the CFA and the CEACR. This is in fact coherent with the logic one can observe in the statement of the EU Commission in the context of the ILO high level mission.\(^{138}\) The same approach has been clarified in the second MoU with Greece, where it is reaffirmed that ‘the ownership of the programme and all executive responsibilities in the programme implementation remain with the Greek Government’\(^{139}\) One might say that this approach conflicts with the self-representation delivered by the EU Commission during the application of the MoU in Greece, based on the idea that ‘[t]he EU promotes, in all its policies, the ratification and effective implementation of ILO Conventions on core labour standards.’\(^{140}\) However, from a legal point of view this is not a particularly strong argument. As regards the issues analysed in Section 3, the follow-up from the EU Commission was in turn even more puzzling. As highlighted before, the legislative proposal which should have solved the problems created by Viking and Laval relied on a legal approach extremely similar to the one explicitly criticised (at the time of the proposal) by the CEACR, and later also by the ECSR. In front of the condemnations and concerns presented in this contribution, the EU Commission (in particular) and the ECB remained rather relaxed, and any change in approach was implicit (and difficult to discern) at best, non-existent at worst.

This is why looking at the possibilities offered by Article 351 TFEU is ultimately disturbing. The first paragraph was described in the previous Section. As I said, a Member State having ratified the ESC or a given ILO Convention before the accession to the EU could theoretically invoke Article 351 TFEU in order to immunise certain rights against the effects of EU law. However, in such a hypothesis, the ultimate outcome could be the contrary to that envisaged before, i.e. reaffirming the commitment of the EU to the respect of international standards of protection of social rights. This possibility stems from the second paragraph of Article 351 TFEU, which states that, in our hypothesis ‘the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established’. This process may take three different directions: a) a change in the policies of the given Member State; b) a change on the

\(^{138}\) See supra notes 72-73.


\(^{140}\) European Commission, Working conditions: time for Member States to implement the ILO domestic workers convention, supra note 26 (emphasis added).
side of EU law and action; or c) a change on the side of the ESC or the ILO. The first possibility is only available for the issues regarding austerity policies in Greece, since the tensions caused by the case law of the CJEU stem from the interpretation by an independent judge of EU primary law – both elements being beyond the reach of a single Member State (or a small group of Member States for that matter).\footnote{What Falkner calls the ‘court decision trap’. See Falkner, Introduction: The EU’s Decision Traps and their Exits - A Concept for Comparative Analysis, in Falkner (ed.), The EU’s Decision Traps: Comparing Policies, Oxford, Oxford University Press, 1-17, 2011, pp. 10-11.} As regards austerity policies, outcome (a) is in a way the most likely. The respect of international standards of protection of social rights would just add the umpteenth constraint to the action of the Greek government, which could in turn find other measures to appease the Troika. A good example in this sense, \textit{mutatis mutandis}, is the wording included in the Euro Summit Statement of 12 July 2015.\footnote{Euro Summit Statement, Brussels, 12 July 2015, SN 4070/15.} The statement requires the Greek government ‘to fully compensate for the fiscal impact of the Constitutional Court ruling on the 2012 pension reform’.\footnote{Ibidem, p. 3. On the 10 June 2015 the Greek Council of State ruled that a series of pension cuts (covering the private sector) introduced following the second Greek MoU are contrary to the Greek Constitution.} This is a good example of the \textit{malaise} of legal pluralism emerging during the Great Recession.\footnote{Sarmiento, ‘The OMT case and the demise of the pluralist movement, Despite our Differences’ (Blog), available at \url{https://despiteourdifferencesblog.wordpress.com/2015/09/21/the.omt.case.and.the.demise.of.the.pluralist.movement/} (last accessed on 26/09/2015).}

Solutions (b) and (c) are evidently much more difficult to achieve. In the case of the CJEU decisions, outcome (b) would require nothing less than a change of the Treaties. In the case of Greek austerity, it would require the EU institutions which are part of the Troika to take into account the criticisms and/or condemnations outlined above and modify the MoU accordingly. Their stance so far suggests that the possibility of this happening is indeed remote. Outcome (c) requires a very broad international consensus in order to intervene in the agreements in question, so that it appears even more remote.

However, the three possibilities just highlighted may all end up as dead ends. In such a situation the case law of the CJEU has already clarified that the given Member State(s) would have to \textit{denounce} the international agreement conflicting with EU law.\footnote{Case C-10/61, \textit{Commission v. Italian Republic}; Case C-84/98, \textit{Commission v. Portuguese Republic}, \textit{supra} note 15. See further Ličková, ‘European Exceptionalism in International Law’, \textit{supra} note 12, pp. 472-473.} For the ESC this could be achieved more easily, since the Charter allows for the (to a certain extent) ‘selective’ ratification of its Articles.\footnote{States which are members of the ESC can decide to accept only certain Articles of Part II of the Charter, as long as they accept (among other conditions) at least 16 Articles out of 31. See further De Schutter, ‘The Two Lives of the European Social Charter’, pp. 16-17, \textit{supra} note 7.} ILO Convention No. 87 would put up a stronger fight in this regard. Indeed, its inclusion in the 1998 Declaration on Fundamental Principles and Rights at Work\footnote{ILO Declaration on Fundamental Principles and Rights at Work, \textit{supra} note 24.} makes its respect an obligation directly stemming from the membership of the ILO itself. It seems safe to affirm that the
eventuality of EU Member States being forced to leave the ILO en masse is almost unthinkable, though the Great Recession, characterised by a sort of continuous ‘EU state of emergency’, somewhat changed our perception of what is ‘unthinkable’ in Europe.

The ‘EU exceptionalism’ mentioned in the title of this Section has historically been affirmed from a different point of view. In particular, several authors have highlighted the exceptionalism of the EU with respect of the tension between the regional economic integration and the participation in international agreements and bodies devoted to international trade (GATT; WTO). It may sound quite ironic in light of the analysis carried out so far, but the European exceptionalism has also been identified in the tendency to neglect ‘international law obligations’ in order to maintain a high level of social protection.

The seminal contributions which have described the ‘American exceptionalism’ have identified a number of manifestations of this approach to public international law. The most extreme of these manifestations, in the hierarchy developed by Koh, is that of double standards, which characterises the situation in which a country (in casu the US) advocates the application of different rules to other countries than to itself. In this sense it could be argued that the apparent disregard of EU institutions for the rights and obligations stemming from ILO Conventions falls in this category. Indeed, the EU considers the same ILO Conventions as a fundamental element both in its trade policy and in evaluating a candidate country for accession. Hence the double standard could

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151 Koh (‘On American Exceptionalism’, 1, Yale Law School Legal Scholarship Repository, 1479-1527, 2003), who identifies four manifestations: distinctive rights (i.e. a particular attention for some distinctive rights, as the freedom of speech), different labels to describe the same rights and obligations, a flying buttress mentality, or compliance without ratification, double standards (i.e. the application to other countries of obligations which are in turn considered as not applying to the US); M. Ignatieff , (‘Introduction’, in Ignatieff (ed.), American Exceptionalism and Human Rights, Princeton University Press, Princeton , 1-26, 2005) identifies three manifestations: human-rights narcissism, judicial exceptionalism, exemptionalism (i.e. the attitude of not joining international agreements, joining without reservations, or joining without complying).

152 See supra Section 1. Indeed, it is interesting to note that the EU places great emphasis in this regard on ILO Conventions regarding ‘promoting trade union freedom and collective bargaining in order to enhance the capacity of the parties concerned to engage in autonomous social dialogue’. This clearly includes Convention No. 87, which was at stake both in the violations caused by the decisions of the CJEU and in the concerns and violations regarding austerity in Greece.
be identified in the tension between internal and external commitment to international labour standards.¹⁵³

One could also focus on the discrepancy between the self-representation of the EU, which was highlighted in Section 1, and the lack of reaction to the violations highlighted so far. Clearly, this should not be qualified as ‘exceptionalism’, representing more of a political embarrassment than an exceptionalist approach to international commitments.¹⁵⁴

6. Perspectives

The, by now unsurprising, conclusion of the analysis carried out in this contribution is that, in the age of austerity, the EU appears rather unconcerned by its failure to respect international standards of protection of social rights. What makes this finding more interesting is the supposed minimalist nature of these rights. Indeed, international standards of protection of social rights have often been considered as representing a minimum level

In the previous Section I outlined four possible outcomes when a conflict between EU law and action and an international agreement breaks out under Article 351 TFEU. These possibilities were: a) a change in the policies of the given Member State; b) a change on the side of EU law and action; or c) a change on the side of the ESC or the ILO. To this, however, one should add another possibility, which sounds like ‘d) ignore the conflict with international standards of protection for social rights’. This possibility is in fact the first which comes to the mind looking at the issue with a realist mindset. International standards of protection of social rights! How many divisions have they got? And the pragmatic answer, taking into account the sheer disproportion in the arsenal of sanctions between the ILO, the ESC and the CJEU or, even worse, the loan facility dependent upon the respect of the MoU, would be: not many.

However, in concluding this rather bleak picture, it should be added that one can find some reaction from at least one EU institution. On the 13th March 2014 two reports were adopted by the European Parliaments: one on ‘Employment and social aspects of the role and operations of the Troika’,¹⁵⁵ and the other on the ‘Role and operations of


¹⁵⁴ Or what Nolte and Aust call ‘a weak form of “double standards”, i.e., one in which the mere discrepancy between rhetoric and practice would form the building block of the claim to exceptionality’. See Nolte and Aust, ‘European exceptionalism?’, 2, Global Constitutionalism 3, 407-436, 2013, 432-433.

the Troika with regard to the euro area programme countries’. Both Reports mention the ESC, and both do so by affirming that, on the basis of Article 151 TFEU, ‘action taken by the EU and its Member States must be consistent with the fundamental social rights laid down in the 1961 European Social Charter’. What is more, the Report on Employment and social aspects of the role and operations of the Troika mentions the condemnations highlighted in Section 2 and refers to the necessity to restore the respect of international obligations stemming from ILO Conventions and from the ESC. Still, the ‘Role and operations of the Troika with regard to the euro area programme countries’ Report confirmed the idea that MoU are situated outside the scope of EU law, by regretting ‘that the programmes are not bound by the Charter of Fundamental Rights of the European Union, the European Convention of Human Rights and the European Social Charter, due to the fact that they are not based on Union primary law’. In this sense, the concerns and condemnations delivered by the ILO supervisory bodies as well as by the ECSR seem to have contributed in providing the political legitimacy to condemn (or at least criticise) those very same policies they could not scrutinise through legal means. One could also read a (potential) reference to international standards of protection of social rights in the wording included in the Statement of the Euro Summit of the 12 July 2015. In addressing the request to reform ‘collective bargaining, industrial action and […] collective dismissals’, the statement refers to ‘international and European best practices’.

Thus framed, the question leaves its legal aspects in the background to become one of legitimacy. The de minimis nature of the international protection of social rights plays a different role in highlighting the problem of legitimacy in the ‘output’ of EU action, which is not able to respect the standards set by the ILO and by the ESC. In this light, one can also stress an interesting correlation between these shortcomings in output legitimacy and the recent advancement on the input one. The ultimate choice of the EU


157 ‘The Council of Europe has already condemned the cuts in the Greek public pension system, considering them to be a violation of Article 12 of the 1961 European Social Charter and of Article 4 of the Protocol thereto, stating that ‘the fact that the contested provisions of domestic law seek to fulfil the requirements of other legal obligations does not remove them from the ambit of the Charter’; ‘notes that the ILO Expert Committee has requested that the social dialogue be re-established’.

158 ‘Calls on the Troika and the Member States concerned to end the programmes as soon as possible and to put in place crisis management mechanisms enabling all EU institutions, including Parliament, to achieve the social goals and policies – also those relating to the individual and collective rights of those at greatest risk of social exclusion – set out in the Treaties, in European social partner agreements and in other international obligations (ILO Conventions, the European Social Charter and the European Convention of Human Rights)’.

159 Euro Summit Statement, 12 July 2015, p. 4.

160 See in general Scharpf, Legitimacy in the multilevel European polity, 09 MPIfG working paper 1, 1-33, 2009.
Council in favour of Mr. Juncker, one of the *Spitzenkandidaten* of the last European elections, makes sense in this respect. The same can be said for the recommendations of the EP Report on the ‘Role and operations of the Troika with regard to the euro area programme countries’, which presents a milder critique on the *output* of the Troika programmes focusing instead on the need to further involve the European Parliament in adjustment programmes by bringing MoU under the umbrella of EU law and community method.\(^\text{161}\)

Alas, closing this contribution with a legal point of view brings about a rather depressing note. As I just described, there are calls to improve the legitimacy of EU action by bringing MoU under the rule of EU law. In both EP Reports, this move was identified as able to guarantee the application, among others, of ILO Conventions and of the ESC. However, such an outcome can only be foreseen on the basis of a radical change of approach by the CJEU to these sources. Rather than merely referring to the texts of these instruments, the Court of Justice should then take into account the *corpus* of the decision delivered by the supervisory bodies of ILO Conventions and of the ESC. At the peak of the Euro-crisis, an un-elected EU institution stepped up in order to (try to) avoid the collapse of the Eurozone. The time would be now for the CJEU to do ‘whatever it takes’ in order to avoid the embarrassing situation where Member States must choose between following EU law (or the MoUs ‘negotiated’ with EU institutions) and respecting international social rights.

To keep up with the promise of a depressing ending I will just add that this scenario looks unlikely at best. The stance delivered by the Court in Opinion 2/13 appears like an insurmountable obstacle on the path to challenging EU law and action through the appeal to international social rights. The Court has clearly stated that the application of higher standards of protection for fundamental rights, based on national or international sources, cannot compromise the ‘primacy, unity and effectiveness of EU law’.\(^\text{162}\) The treatment reserved to fundamental rights in the precedents of *Viking* and *Laval*, later confirmed in *Commission v. Germany*,\(^\text{163}\) (and more recently hinted at in *Fonship*)\(^\text{164}\) does not inspire optimism either.

\(^\text{161}\) ‘Calls for the memoranda to be placed within the framework of Community legislation so as to promote a credible and sustainable consolidation strategy […]’. It seems now that the European Parliament will be involved in the “implementation and evaluation” of the third Greek MoU. See http://www.primeminister.gov.gr/english/2015/09/24/prime-minister-a-tsipras-meetings-with-the-president-and-the-vice-president-of-the-european-parliament/ (last accessed 24/09/2015).

\(^\text{162}\) Opinion 2/13, paras. 188-189. The same point, though, only with reference to a national constitutional source, was already present in the *Melloni* decision (Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, 26 February 2013).

\(^\text{163}\) Case C-271/08, 15 July 2010.

\(^\text{164}\) Case C-83/13, *Fonship A/S v. Svenska Transportarbetareförbundet, Facket för Service och Kommunikation (SEKO)*, 8 July 2014. Notably, at para. 41, the Court underlines that in case of conflict between fundamental social rights and fundamental freedoms, the national judge has to apply the *Laval* doctrine.