Article 28—Right of Collective Bargaining and Action

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The right of collective bargaining and collective action
within a legal order based upon an Economic Constitution

‘The recognition of the right to strike as a human right imposes a duty on the state to protect and facilitate the exercise of the right to strike.’¹

Article 28 Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Explanation

This Article is based on Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers (points 12 to 14). The right of collective action was recognised by the European Court of Human Rights as one of the elements of trade union rights laid down by Article 11 of the ECHR. As regards the appropriate levels at which collective negotiation might take place, see the explanation given for the above Article 27.²

The modalities and limits for the exercise of collective action, including strike action, comes under national laws and practices, including the question of whether it may be carried out in parallel in several Member States.


² See the reference in the explanation to Article 27: ‘The reference to appropriate levels refers to the levels laid down by Union law or by national laws and practices, which might include the European level when Union legislation so provides’.
I. Introduction

A. Context and Main Content

The recognition of the ‘right of collective bargaining and action’ in the CFREU constitutes the heart of the legal prerequisites of any system of industrial relations. Without effective recognition of these collective rights, such a system ceases to pulse and the right to organise is deprived of its effet utile. Ever since a landmark decision of the tripartite Committee on the Freedom of Association (CFA) of the International Labour Organisation in 1952, the right to collective action has been considered a ‘corollaire indissociable’ of the right to organise. This seminal formula was embraced three decades later (1983) by the Committee of Experts on the Application of Conventions and Recommendations (CEACR). That recognition was prefigured by an important statement in the Report of the Commission of Inquiry examining a complaint against Poland (1982). Prior to this reception, a more comprehensive right to collective action was explicitly recognised for the first time in a human rights instrument at international level, id est the European Social Charter (1961—ESC). The said formula also served as a catalyst for the landmark judgment Enerji v Turkey of the European Court of Human Rights (ECtHR). In this judgment, the ECtHR did not hesitate to condemn Turkey for a violation of Article 11 of the European Convention on Human Rights (ECHR) by depriving in a generic way its civil servants from recourse to strike action. Although the Grand Chamber has limited the importance of this reference, in the infamous RMT v UK judgment, it did not deny that ‘restrictions to the right to collective actions’ need to pass the test of Article 11(2) ECHR. In a subsequent Croatian case, the ECHR did not hesitate to qualify the right to strike as ‘the most important means’ to defend workers’ interests. Despite, or rather due to, this progressive success story, the formal recognition of the right to strike was made subject to judicial and procedural challenges, which have been orchestrated from the employers’ side.

5 COMPLAINT (article 26) - 1982 - POLAND - C087, C098. See No 517.
6 ECtHR, 21 April 2009, App No 68959/01, Enerji Yapı-Yol Sen v Turkey.
7 ECtHR, 8 April 2014, App No 31045/10, National Union of Rail, Maritime and Transport Workers v United Kingdom.
8 ECtHR, 27 November 2014, App No 36701/09, Hrvatski Lijecnici Sindikat v Croatia.
The major blow to the constitutionally anchored right to collective action in Sweden and Finland was administered by an institution situated at the Kirchberg. About a decade ago, the European Court of Justice (CJEU) imposed restrictions on the exercise of such a right that were unprecedented under Scandinavian law. In Viking and Laval (2007), although paying lip service in an in se pioneering way to the right to collective action as a general principle of EU law, it imposed restrictions of a teleological and substantive nature which proved to be at odds with the recognition of the right to collective action at international and European (Council of Europe) level.

The outbreak of the financial, economic and monetary crisis (2008) prompted the European Commission to reform the economic governance of the European Union and to design Memoranda of Understanding within the framework of bailouts, which, in their turn, have pushed numerous Member States to reform their systems of collective bargaining following recommendations or obligations to the detriment of collective autonomy.

Ever since 2012, the employers’ group within the tripartite Committee on the Application of Standards of the International Labour Conference (CAS) has consistently criticised both the direct link between the right to strike and Convention No 87, as well as the extensive interpretation of this right under Convention No 87, which is formally mute on the issue of the right to strike.9

Despite a long-standing legislative tradition of shielding the right to strike from EU directives and EU regulations, the European Commission recently communicated a Staff Working Document (SWD) on Practices Favouring Air Traffic Management Service Continuity (2017), paying tribute to severe procedural restrictions to strike action both on the collective and the individual level.10

The adoption of this SWD casts a shadow on the narrative the Commission has promoted regarding a so-called European Pillar of Social Rights (EPSR) (2017). Furthermore, its Recommendation on the EPSR11 is extremely disappointing in the way it treats the right to collective bargaining and collective action. Although it rightly links these issues to the

10 SWD/2017/0207 final.
comprehensive chapter on right and fair working conditions, these rights are included under point 8 as an issue of ‘Social Dialogue and involvement of workers’. Thus, the Commission clearly blurs the dialectical nature of these rights. Indeed, the Commission reiterates the idea that autonomy is to some extent a limit to its obligation to encourage the social partners to negotiate and conclude collective agreements, whereas collective autonomy generates obligations to respect, to ensure and to promote. In the same vein, the Commission fails to understand that it is severely restricting the freedom of collective bargaining and its obligation to encourage it, where it argues it can assess the appropriateness of the agreements concluded at European level prior to implementing them. Furthermore, such an approach witnessed by the latest hairdressers\textsuperscript{12} case, clearly violates its constitutional obligation to adopt proposals to implement these agreements, in a case of joint request.\textsuperscript{13} Questions can be raised regarding the delay of implementation after a joint request of an agreement concluded between EUPAE (European Public Administration Employers) and TUNED (Trade Unions National and European Administration Delegation) for informing and consulting civil servants and employees of central government, which was concluded after an invitation of the Commission to deal with this issue.\textsuperscript{14}

The only interesting opening offered by the Recommendation on the EPSR is related to its broad approach to the notion of workers. Particularly, it states that ‘where a principle refers to workers, it concerns all persons in employment, regardless of their employment status, modality and duration’. In view of the fact that the EPSR has been adopted, among other reasons, as a reaction to the new challenges stemming from the digital revolution,\textsuperscript{15} this can only imply that digitalised workers can have effective recourse to the freedom of collective bargaining as well as to collective action.

Coming to Article 28, one can see that it recognises ‘the right of collective bargaining and action’ as an aspect of Solidarity. The Article clarifies the holding of these rights by indicating four categories of actors (workers, employers or their respective organisations). It describes the right of collective bargaining as a right to negotiate and conclude collective

\textsuperscript{12} http://ec.europa.eu/social/BlobServlet?docId=7697&langId=en.
\textsuperscript{13} See Art 155(2) TFEU.
\textsuperscript{15} See the Preamble to the Pillar, Recital 14.
agreements. It specifies that the right to take collective action includes the right to have recourse to strike action. The provision provides two elements that could potentially reduce the scope of Article 28. It recognises these rights only insofar as they are exercised ‘in accordance with Union law and national laws and practices’ (emphasis added). It recognises the right of collective bargaining only ‘at the appropriate levels’. The notion ‘at appropriate levels’ refers to ‘the levels laid down by Union law or by national laws and practices, which might include the European level when Union legislation so provides’. These potential ‘appropriate’ levels are manifold. At European level, they range from the level of industrial relations at EU institutions, to cross-sectoral levels, over sectoral levels to transnational company levels. At the level of the Member States, appropriate levels range from cross-sectoral levels, over sectoral levels to company levels. This distinction is not linked to the distinction between the institutional actors to which the Charter provisions are addressed.

Article 28 CFREU does not clarify the link between the two specific rights it covers (collective action and collective bargaining), neither does it relate these rights to a comprehensive or overarching right indicated in the rubrica of Article 28.

B. Relationship to Other Provisions of the Charter

Title IV, related to Solidarity, does not mention an essential legal prerequisite of a system of industrial relations, id est the right of everyone to form and to join trade unions for the protection of his or her interests. Such a right has been enshrined in Article 12 CFREU, which is part of Title II on Freedoms. Title IV does enshrine another right which is at the heart of industrial relations: the right to information and consultation (Article 27 CFREU). The holding of these rights is spelled out differently (workers or their representatives). Compared with the structure of the European Social Charter, there is thus a tremendous gap between recognition of the right to organise (Article 12) under the heading of Freedom and the recognition of the right to collective bargaining and collective action (Article 28). Whereas in the (Revised) ESC the posterior recognition of the right to information and consultation might explain why the latter is mentioned at the end of the instrument, in the CFREU the right to information and consultation is recognised prior to the right of collective bargaining and action. The fact that the right to organise has not been integrated into the Solidarity title can easily be explained by the fact that Article 12 CFREU has a generic ‘civil and political’ character, as well as a specific social character. All in all, the situation is better than in the EPSR Recommendation, which in
fact completely omits any reference to the right to organise.\footnote{Klaus Lörcher, ‘Die Europäische Säule Sozialer Rechte – Rechtsfortschritt oder Alibi?’ (2017) \textit{Arbeit und Recht} 390.} More importantly, this gap might provide a unique opportunity to limit the impact of the Protocol on the Application of the Charter to Poland and the United Kingdom.\footnote{Although the relevance of the so-called opt-out has already been reduced by CJEU, 21 December 2011, Joined cases C-411/10 and C-493/10, \textit{NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform}.} In a strict reading this Protocol suggests that the right to collective bargaining and action are not judicially cognisable at all in both Member States. However, this limitation only covers the rights enshrined in Chapter IV, \textit{a contrario}, the right to organise is judicially cognisable. Since the right to organise should have at least the same scope as the rights granted under the ECHR,\footnote{Cf Art 52 3) CFREU.} the right to organise also entails a right to bargain collectively and a right to collective action. Another advantage of Article 12 CFREU is related to the fact that the recognition of freedom of association and the right to organise has far fewer strings attached. It is not subjected to respect for Union law and national law and practices.

The idea that the right of collective bargaining could \textit{not} be seen as an aspect of ‘freedom’ or of ‘equality’ is problematic. The use of the word ‘of’ instead of ‘to’ and in French of ‘de’ (\textit{droit de négociation}) seems to suggest that collective bargaining constitutes essentially a \textit{freedom} granted to trade unions.\footnote{In the same vein, see also the idea that there is no right to become member of an association. There is no ‘\textit{droit à l’association}’, just a ‘\textit{droit d’association}’, as was highlighted by the ECtHR in \textit{Associated Society of Locomotive Engineers and Firemen v United Kingdom}, 27 February 2007, App No 11002/05.} In a number of national traditions, this tends to be associated with the idea of (collective) autonomy.\footnote{See Andrea Iossa, \textit{Collective Autonomy in the European Union: Theoretical, Comparative and Cross-border perspectives on the Legal Regulation of Collective Bargaining}, Doctoral Dissertation, Lund, 2017.} The recent introduction of this notion into Article 152 TFEU bears witness to this legal tradition. The right of collective bargaining entails an obligation for public authorities to refrain from interfering in the process of negotiations. The voluntary character of the process of bargaining has indeed been stressed by the Committee on the Freedom of Association.\footnote{ILO, Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006, § 925 and \url{http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO:70002:P70002_HIER_ELEMENT_ID:P70002_HIER_LEVEL:3932024,1, nrs 1313–15}.} This voluntary character in fact complicates the identification of

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positive obligations for governmental actors, let alone for employers and their organisations stemming from recognition of the right to collective bargaining. The latter is particularly true if no agreements are concluded or, worse, if no negotiations take place. The recognition of the right of collective bargaining will not oblige employers and their organisations to start negotiations. The only way to force them to do so is recourse to collective action, or the threat of such an action. In one exceptional scenario, EU law has introduced a legal pressure to start negotiations. If a central management refuses to start negotiations with a special negotiating body to form a European Works Council (EWC), the subsidiary requirements will enter into force.

It is also well known that collective agreements seek to create a level playing field and prevent social competition between workers that could level down their remuneration. Hence, it is a lever for equality, as well as a means to ensure a right to fair and just remuneration, which has unfortunately not yet been explicitly enshrined in the CFREU. In this sense, the rubrica of Article 31 CFREU does not match its substance. It ignores the issue of wages and remuneration, although it pretends to address fair and just working conditions. Seen in this perspective, the EPSR constitutes progress, insofar as it puts a right of workers to fair wages that provide for a decent standard of living at the fore.

C. Relationship to Other Relevant Instruments

i. EU Instruments

The Community Charter of Fundamental Social Rights of Workers of 1989 (Community Charter) recognised the right ‘to negotiate and conclude collective agreements’ in Article 12 and the right to take collective action in Point 13. Interestingly, this instrument affirmed that these rights had to respect the conditions laid down, respectively, by ‘national legislation and practice’ or ‘national regulations and collective agreements’, whereas no mention was made about the limitations imposed by EU (Community) law.

Article 153(5) TFEU has explicitly excluded the use of the competences under the Social Policy Title for regulating the right to strike and lock out. It is doubtful whether other

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23 But see the contribution by Lörcher on Article 31 in this book (ch 24).
24 See Point 6 of the EPSR. Lörcher and Schömann have criticised the absence of a link between the notion of minimum wages and the idea of fairness: Klaus Lörcher and Isabelle Schömann, ‘The European Pillar of Social Rights: Critical Legal Analysis and Proposals’ (2016) ETUI Report 139, 62–63.
legal bases under the TFEU could be an appropriate tool for the adoption of regulations or directives. In our view, the notion of strike or ‘grève’ and ‘lock out’ needs to be interpreted as a *pars pro toto*. It should be understood as any means of collective action.

The lack of any EU competence in the area of strike law has not prevented the EU legislator from making reference to the neutrality of some EU instruments with regard to the right or freedom to strike as recognised in the EU Member States (Monti I Regulation, Services Directive and Regulation 1176/2011). These so-called Monti clauses will not, however, shield the right to strike from the fundamental economic freedoms as recognised in the TFEU. However, they might be taken into consideration in case the CJEU balances human rights and fundamental economic freedoms.

The issue of collective bargaining has not been excluded from EU competences. It has not been listed in Article 153(5) TFEU. As far as cross-sectoral and sectoral European social dialogue is concerned, a constitutional and embryonic framework has been put in place, ever since the Maastricht Treaty (cf Articles 154 and 155 TFEU). No *specific* legislative framework has been put in place for transnational company agreements.

Neither has the European legislator ever tried to harmonise the various systems of collective bargaining at the level of the Member States. Such an exercise might indeed run counter to the obligation of the European Union to respect the ‘diversity of the national systems’

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25 See the Opinion of AG Mengozzi (§ 57) in *Laval*: ‘If the effectiveness of Article 137(5) EC is to be upheld, the Community institutions could not of course resort to other legal bases in the Treaty in order to adopt measures designed to approximate the laws of the Member States in this field’.


(Article 152 TFEU). However, some provisions of EU directives are related to selected issues of collective agreements. Two EU directives tend to enhance the coverage of collective agreements in respect of employers who are neither signatory to these agreements nor affiliated to a signatory organisation. The Transfer of Undertaking Directive (1977) obliges the transferee to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Furthermore, the Posting of Workers Directive 96/71/EC obliges the service provider to apply a specific number of employment conditions enshrined in collective agreements or arbitration awards that have been declared universally applicable for the building sector (building work related to the construction, repair, upkeep, alteration or demolition of buildings). In our view, these measures tend to promote and encourage the conclusion of collective agreements, although they might always be challenged nowadays as a restriction of the negative freedom of association.30 EU law has also restricted a problematic use of collective autonomy amounting to discriminatory clauses in collective agreements.31

ii. Council of Europe Instruments

According to the Explanations (2000–03) both the ESC and the case law of the ECtHR related to Article 11 have been a source of inspiration for the drafting of Article 28 of the Charter. Though this influence is evident, some differences can be highlighted between Article 6 ESC and Article 28 CFREU. Article 6 ESC merely mentions an obligation ‘to promote, where necessary and appropriate a machinery for voluntary negotiations … with a view to the regulation of terms and conditions of employment by means of collective agreements’. In the rubrica, Article 6 ESC does not refer to a right of collective bargaining, but to a right to bargain collectively. The CFREU innovates by introducing a right to negotiate and conclude collective agreements and it is mute on the voluntary character of the process. In our view, this voluntary character can be deduced from the semantics of its rubrica (the right of collective bargaining/droit de négociation collective). Neither is there a reference in Article 28 to a duty to promote the establishment and to the use of appropriate machinery for conciliation and

30 See within the European Union, CJEU, C-499/04, Werhof. Per analogiam within the Council of Europe, albeit not successful: ECtHR, 2 June 2016, App No 23646/09, Geotech Kancev GmbH v Germany.

31 Directives 2000/43 (art 14), 2000/78 (art 16), 2006/54 (art 23), as well as Regulation 492/2011 (art 7). See also CJEU, C-297/10 and C-298/10, Hennigs and Mai.
voluntary arbitration. Contrary to the CFREU, the right to collective action has been explicitly framed in Article 6 ESC as an aspect of the right to bargain collectively. The latter does not suggest that the right to collective action can be exercised only within the process of negotiating a collective agreement.\(^{32}\) Hence, the CFREU does not link the right to take collective action to the right to collective bargaining. The conflict of interests which is mentioned should not \(\textit{per se}\) be situated within a context of bargaining, neither should it, in our view, oppose employers and trade unions. Another difference is linked to the issue of holdership. The ESC makes it abundantly clear that the right to bargain collectively on the employee side is exercised by workers’ organisations, whereas the right to collective action is held by workers and employers. The CFREU has blurred this differentiated approach to holdership by mentioning workers, employers and their organisations in an indiscriminate way.\(^{33}\)

Last but not least, whereas the ESC explicitly states that the right of workers and employers to collective action is subject to obligations that might arise out of collective agreements previously entered into, the CFREU does not mention collective agreements as a potential source for restricting that right. Such a source could be deduced from the reference to ‘laws and \textit{practices}’ (emphasis added). However, there is an essential difference. Whereas, under the ESC, restrictions stemming from collective agreements do not need to pass the test of Article G, there is no reason to assume that conventional restrictions of the right to take collective action need to be treated differently from national laws under Article 52(1) CFREU.

The Explanations of 2003 stated that ‘the right of collective action was recognised by the European Court of Human Rights as one of the elements of trade union rights laid down by Article 11 of the ECHR’. It seems to us that this statement needs to be formally mitigated. At present the ECtHR has never stated that the right to collective action contrary to the right of collective bargaining would be an essential means to defend workers’ interests. The most ambitious statement refers to ‘the most powerful means’.\(^{34}\) However, there can be no doubt that restrictions to the right to collective action need to pass the test of Article 11(2) ECHR.


\(^{33}\) In the same vein, see Rodière on the fact that the provision of the CFREU is mentioned solely at the end: Pierre Rodière, ‘Article 28’ in F Picod and S Van Droogenbroeck, \textit{Charte des droits fondamentaux de l’Union européenne} (Bruxelles, Bruylant, 2018) 640.

iii. ILO Instruments

The adoption of the Declaration of Philadelphia by the ILO’s General Conference (1944) was innovative insofar as it highlighted a human rights dimension underlying the ILO’s aims and purposes. Supiot has qualified the Declaration of Philadelphia as the first International Human Rights Declaration to have universal scope.35

The Declaration of Philadelphia introduced ‘the right of collective bargaining’ (le droit de négociation collective) into international law. The 26th International Conference recognised ‘the solemn obligation of the International Labour Organization to further among the nations of the world programmes’ which would achieve ‘the effective recognition’ of that right.

The semantics of this Declaration, which has been annexed to the Constitution, need to be considered carefully. The text of the Declaration does not provide guidance on the scope ratione personae of the right of collective bargaining. The text is not conclusive regarding the question of whether it applies to the private and the public sector alike. More importantly, the Declaration does not refer to a right to collective bargaining nor to a droit à la négociation collective. The effective recognition of the right of collective bargaining is construed in a programmatic manner. It requires Member States to adopt programmes that will achieve the realisation of this right. The distinction between a right to and a right of (droit de or droit à) is important. A right to collective bargaining suggests that there is an enforceable right to gain access to the bargaining table, which could be labelled a duty of a bargaining partner to open negotiations. A right of collective bargaining suggests that there is no such right. It suggests that there is an area of freedom given to bargaining partners to enter or not to enter into negotiations. Public authorities are asked not only to respect that freedom, but to promote it. The overall idea is that the bargaining process is of a voluntary nature. This voluntary nature should not be seen as a restriction of the right of collective bargaining. On the contrary, it should be seen as quintessential for safeguarding such a right. In this respect, it is appropriate to construe the right of collective bargaining as a freedom.

The principle of the right to collective bargaining has been elaborated in ILO Convention No 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (1949). This Convention fills an important gap insofar as the previous ILO

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Convention No 87 concerning Freedom of Association and Protection of the Right to Organise does not address the issue of collective bargaining in an explicit way. Article 3 Convention No 87 formulates a principle of trade union autonomy in a very broad manner. It indicates that workers’ and employers’ organisations shall have the right to organise their activities and to formulate their programmes. Since these organisations need ‘to further and defend the interests of workers or of employers’, there is no reason why the freedom of collective bargaining would not be covered by this principle.

In one scenario such a duty to bargain seems less problematic at first sight. Thus, the question arises whether a ratifying Member State that is under a duty to encourage and promote a machinery for voluntary negotiations can refuse to enter into bargaining with its staff. Article 6 of the ILO Convention elucidates that Convention No 98 ‘does not deal with the position of public servants engaged in the administration of the State’. The ILO has adopted a more specialised Convention to deal with labour relations in the public sector. Convention No 151 (1978) allows for alternatives to collective bargaining in the public sector. Negotiations are not the only technique available to determine terms and conditions of employment or to deal with disputes arising out of the determination of such terms and conditions. As far as the relation between bargaining and disputes is concerned, ILO Convention No 151 refers to ‘mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved’. It is, however, important to construe the notion of public servants in a narrow way.38

In sum, there is a distinction between the scope ratione personae of ILO Convention No 87 and ILO Convention No 98. ILO Convention No 98 does not provide much guidance regarding the scope of the notion of ‘public servants’. Apparently, the armed forces and the police are not per se considered to be public servants, since Article 5 ILO Convention No 98 provides for a special rule.

The (relatively) recent Declaration on Fundamental Principles and Rights at Work (1998) underlined the fundamental character of the freedom of association and the effective

36 Art 10 ILO Convention No 87.
37 Arts 7 and 8 ILO Convention No 98.
recognition of the right to bargain collectively. According to the Declaration, all Member States of the ILO have an obligation arising from the very fact of membership of the Organization to promote and to realise in good faith and in accordance with the ILO Constitution the principles concerning both rights, irrespective of ratification of the relevant ILO Conventions No 87 and 98.\textsuperscript{39}

It is well known that neither fundamental ILO Conventions nor the Constitution explicitly provide for the recognition of a right to strike. However, several ILO instruments do refer in an explicit way to ‘strike’, in an obvious attempt to protect effective recourse to strike action.\textsuperscript{403}

Furthermore, the supervisory bodies have recognised the right to strike as a ‘corollaire indissociable’ of freedom of association.

iv. UN Instruments

Ever since the adoption of the Universal Declaration on Human Rights (UDHR 1948), two distinct covenants have been adopted. This bifurcation of fundamental rights is based on an alleged distinction between civil and political rights, on one hand, and economic, social and cultural rights, on the other hand. This distinction is, however, blurred by the fact that freedom of association features in both covenants.\textsuperscript{41} Whereas the ICCPR recognises freedom of association in a generic way, the ICESCR only recognises the freedom of association in a more specific way, id est as the right of everyone to form trade unions and to join the trade union of his or her choice for the promotion and protection of his or her economic and social interests. Article 22(1) ICCPR, however, elucidates that this generic recognition includes the right to form and join trade unions for the protection of his or her interests. Neither the UDHR nor the ICCPR nor the ICESCR contain a provision that explicitly recognises a right to bargain collectively. The fact that both covenants are mute on the issue cannot be used as an argument authorising States Parties to ILO Convention No 87 to take legislative measures or apply the law in such a manner as would prejudice the guarantees provided for in that convention. In a

\textsuperscript{39} Under the Follow-up to the Declaration, the Director-General has issued a Global Report (2008) on the issue of freedom of association, see: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_096122.pdf. In the same vein, the mandate of the Freedom of Association Committee (ILO) is not limited to the countries that have ratified ILO Conventions Nos 87 and 98.


\textsuperscript{41} See Art 22 (1) ICCPR and Art 8 (1) ICESCR.
strict reading, such a clause is not very helpful for upholding the right to bargain collectively. Indeed, ILO Convention No 87 is mute on the issue of the right to bargain collectively. Furthermore, the clause makes no reference to Convention No 98.

The question does arise, however, whether a right to bargain collectively is inherent in the recognition of the right to form and join trade unions. The explicit objective of such a right, *id est* the protection of workers’ interests, might serve as a lever for such a *teleological* interpretation. In this respect, the absence of a right to bargain collectively might deprive the recognition of the right to organise of its *effet utile*.

The most authoritative source to assess this question is the body of reports produced by the supervisory bodies monitoring compliance with both covenants. The ICCPR is being monitored by the UN Human Rights Committee. The ICESCR is being monitored by the Committee on Economic, Social and Cultural Rights.

As highlighted by Macklem, both committees have considered the right to bargain collectively to fall within the ambit of the recognition of the right to organise.  

II. Content

A. General Observations

The *travaux préparatoires* of Article 28 CFREU make it abundantly clear that the recognition of the *right to strike* was far from evident at the end of the twentieth century. Veneziani has highlighted the controversial character of this recognition by examining how this right popped up and was subsequently withdrawn (ever since Convent 18) in successive drafts of the provision, prior to reappearing in Convents 47, 49 and 50. Braibant has indicated that the

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explicit inclusion of the right to strike near the end of the *Travaux préparatoires* was the result of ‘vigoureuses protestations des syndicats’. At the very end of the Convention that drafted the Charter, the Presidium added some explanations. The most interesting explanation relates to transnational collective actions. It states: ‘Collective action, including strike action, comes under national laws and practices, including the question of whether it may be carried out in parallel in several Member States.’

The Presidium of the Convention on the Future of Europe amended this part of the explanations as follows: ‘The modalities and limits for the exercise of collective action, including strike action, come under national laws and practices, including the question of whether it may be carried out in parallel in several Member States.’

Bercusson criticised this explanation, arguing that a collective action carried out in parallel in several Member States ‘engages precisely the transnational dimension of collective action in the European Single Market’ and that it was hence contradictory with the status of a fundamental right of European collective action to ‘confine it to national laws and practices’. He argued that it needs to be addressed at EU level, ‘not least by the European Court of Justice’.

Whereas explanations are supposed to clarify the text they explain, this explanation seems to blur it. In a strict reading, this explanation seems to suggest that the Charter does not grant a right to have recourse to some kind of transnational collective action. Indeed, it states that the question of whether such a collective action can be carried out in parallel states comes under national laws and practices. At first sight, this is a counterintuitive formula. Since Article 28 recognises that the right to collective action is recognised at the appropriate levels, it seems natural to assume that such levels referred to in the Charter of Fundamental Rights of the European Union at least include the transnational level. Furthermore, it is contradictory to state that the issue of ‘modalities and limits’ is regulated by national law and practices, whereas the venomous *coda* of the explanations seems to affect the very existence of the recognition of a right to have recourse to collective action. It transcends the issue of modalities and limitations.

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In our view, the coda of the explanations needs to be interpreted as a reference to private international law. It could also be construed as stating the inevitable consequence of the lack of EU legal competence to legislate on the issue of strikes. In both interpretations, the observation is confusing. Thus, it cannot be denied that private international law has ceased to be part of the exclusive realm of the Member States. Important parts of private international law have been harmonised. A typical example is the law applicable to extra contractual obligations arising out of collective actions, including strikes. Furthermore, the lack of legal competence of the EU has never prevented the CJEU from imposing restrictions on the exercise of collective actions that were unprecedented in the law of some Member States and at variance with obligations stemming from international and European human rights instruments. In sum, the idea that the right to collective action would be regulated exclusively by national law and practices seems to be wrong. Taken to its extreme limits, it would suggest that the CJEU is incompetent to restrict the right to strike as recognised in a number of Member States based upon conflicting (economic) fundamental freedoms. The EU legislator is competent to push legislation promoting conflicting freedoms, although it lacks competence to push legislation protecting and promoting the right to strike. Last but not least, it seems to suggest that there is no obligation at all for a Member State to recognise the right to collective action within the realm of EU law, as if the discretion of these states would be close to absolute. Such an assumption seems to make the recognition of the right to collective action as part of a Charter of Fundamental Rights of the European Union entirely pointless. Last but not least, the coda seems to corroborate the imbalance between the economic and the social constitution of the European Union. It goes without saying that it would be completely inadequate to state that the ‘modalities and limits for the exercise of the freedom to provide services and the freedom to conduct a business come under national laws and practices, including the question of whether it may be carried out in parallel in several Member States.’

B. Field of Application

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47 See below the cases of *Viking* and *Laval*. 
The question arises of when EU institutions as EU institutions are bound by the Charter and when Member States are effectively implementing EU law. This was painfully relevant during the economic crisis and notably in the context of austerity measures requested by Memoranda of Understanding (MoU). In this context the legal issue has revolved mainly around the applicability of the Charter to the implementation of MoUs.\textsuperscript{48} For what matters here, it is important to point out that, during the crisis, many of the Memoranda of Understanding,\textsuperscript{49} as well as Country Specific Recommendations (CSRs),\textsuperscript{50} included reforms of systems of collective bargaining. Indeed, at the onset of the crisis, the Commission seemed to have decided that the ‘appropriate level’ for collective bargaining in EU Member States was the company.\textsuperscript{51} This has led to a general tendency towards decentralisation of collective bargaining across the Member States.\textsuperscript{52}

Thus, reforms of collective bargaining implementing a Memorandum of Understanding were enacted in Romania, Greece and Portugal. Italy and Spain in their turn introduced a reform of collective bargaining following the ‘secret’ ECB letters. Belgium received CSRs going in the same direction. The case of Greece stands out as particularly extreme: not only was priority granted to company agreements over sectoral ones, but simple ‘associations of workers’ (representing three-fifths of the workforce) were also allowed to conclude collective agreements at company level.\textsuperscript{53} The Report of an ILO High Level Mission of 2011 expressed its concerns regarding the possibility for such ‘associations of workers’ to conclude valid collective agreements.\textsuperscript{54} In 2012 the Committee on Freedom of Association reviewed the Greek situation regarding Conventions Nos 87 and 98 and further criticised this arrangement, noting in particular that such associations would not offer the same guarantees of independence as

\textsuperscript{48} See Aristea Koukiadaki, ch 6 in this volume.


\textsuperscript{50} See Stefan Clauwaert, ‘The Country-specific Recommendations (CSRs) in the Social Field’ (2016) 1 ETUI Background Analysis.


\textsuperscript{52} See Aristea Koukiadaki, Isabel Távora and Miguel Martínez Lucio (eds), \textit{Joint Regulation and Labour Market Policy in Europe During the Crisis} (Brussels, ETUI, 2016).

\textsuperscript{53} Law No 4024/2011.

trade unions. The CFA also noted ‘important and significant interventions in the voluntary nature of collective bargaining’ going against the very principle of the ‘inviolability of freely concluded collective agreements’. Concerns regarding ‘associations of workers’ were also expressed in the 2014 Report of the CEACR, which also pointed to statistics showing that a staggering prevalence of company-level collective agreements concluded with said associations of workers provided for wage cuts. None of this made its way to the Court of Justice, however.

In the context of economic governance, it should also be noted that Regulation 472/2013, a part of the so-called ‘Two Pack’, provides that the ‘draft macroeconomic adjustment programme shall fully observe Article 152 TFEU and Article 28 of the Charter of Fundamental Rights of the European Union’. At the level of secondary legislation it is thus confirmed that any of EU measures based on this Regulation must be in full conformity with Article 28 CFREU.

C. Specific Rights and Specific Questions

As already indicated, Article 28 CFREU deals with two distinct and separate rights: the right to bargain collectively and the right to collective action.

i. Right to Bargain Collectively

a. The EU Institutions as Employers

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56 ibid, paras 994–95.
58 As also highlighted by Ballestrero, Lo Faro and Razzolini (n 43) 541.
59 Art 7 Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.
The legal Framework for Industrial Relations in the major European institutions of the European Union is still enshrined in Regulation No 31 (EEC), 11 (EAEC), which has been amended many times.\textsuperscript{60}

The Regulation constitutes a unilateral and common framework for industrial relations within some European institutions of the European Union. The Regulation provides evidence of a dualistic approach to the issue of workers’ representation. Article 24 b) recognises that ‘[o]fficials shall be entitled to exercise the right of association; they may in particular be members of trade unions or staff associations of European officials’. These Regulations are not applicable to employees of the ECB. Article 36 of Protocol No 4 on the Statute of the European System of Central Banks and of the ECB indicates (annexed to the TEU) provides that the ‘Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB’.

Recognition of freedom of association in the Regulation is preceded by provisions related to the establishment of a Staff Committee (Article 9 Staff Regulations). Furthermore, Article 10 b) explicitly states that trade unions and staff associations ‘shall act in the general interest of the staff, without prejudice to the statutory powers of the staff committees’.

‘The Staff Committee shall represent the interests of the staff vis-à-vis their institution’ (Article 9 3 Staff Regulations).

Article 10 b) empowers the Commission to consult representative trade unions and staff associations on such proposals. The provision has been drafted as conferring a discretionary power on the Commission. The Staff Regulations do not provide any guidance on objective and pre-established criteria to define which trade unions and staff associations can be considered to be ‘representative’.

At first sight, the Staff Regulations do not seem to provide scope for collective bargaining as a means to define applicable working conditions. This picture needs to be mitigated. Due to a recent amendment of the Council Regulation,\textsuperscript{61} a new Article 10 c) indeed provides for the possibility for each institution to conclude collective agreements with its representative trade unions and staff associations.


In at least two cases, an attempt has been made to mobilise Article 28 CFREU in order to mitigate the unilateral character of the procedures determining the working conditions at the ECB.

In the first case, *Heath v ECB*, the Civil Service Tribunal had to consider the request of a retired employee of the ECB who challenged the annual adjustment of his retirement benefits for 2010. This case is relevant because the decision—which has been criticised—was adopted after the Lisbon Treaty came into force.

The pension system of the ECB adopted on the basis of Article 36(1) of Protocol No 4 on the Statute of the European System of Central Banks and of the ECB provides that retirement benefits have to be adjusted on an annual basis. The adjustment is based either on the rate of inflation in the euro zone or on the annual adjustments of the remuneration of the staff of the ECB. One of the arguments brought forward to attack the validity of the decision concerned the very nature of the system of industrial relations at the ECB. The applicant attacked the fact that the annual adjustment of the pension benefits was decided in a unilateral way. The applicant conceded that Article 28 did not force the ECB to conclude a collective agreement with the representative trade union of the ECB.

The Civil Service Tribunal ruled that neither Article 28 of the Charter nor Article 11 ECHR provides an obligation to conclude a collective agreement, nor to introduce a bargaining procedure. The Civil Service Tribunal paid formal tribute to Article 6(2) of the ESC, which enshrines an obligation ‘to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers’ organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements’. According to the Civil Service Tribunal this obligation does not entail an obligation to introduce a bargaining procedure. It was construed as a provision merely ‘encouraging’ such procedures. Nor could such an obligation be deduced from Article 11 ECHR.

The Civil Service Tribunal in *Heath v ECB* does not, as such, dispute explicitly that the Charter was indeed applicable to employees of the ECB. It seeks to interpret the substantive rather than the personal scope of the right to collective bargaining. The Court suggests that the Charter is applicable to EU institutions *in foro interno* and that the staff enters into the ambit of the notion of ‘workers’. The litmus test resides in the substantive scope of the obligation to respect the right to collective bargaining.

The approach of the Civil Service Tribunal in its rejection of an obligation to conclude a collective agreement is consistent with an emphasis on the voluntary character of the bargaining process.

The Civil Service Tribunal engages in an intertextual interpretation of the Charter, but it completely disregards ILO instruments. The very narrow interpretation the Court gives to Article 6 § 2 ESC is far from evident. In fact, the confrontation of the ILO instruments with the ESC makes this critique even more poignant. Thus, Article 4 ILO Convention No 98 imposes an obligation on the ratifying States to ‘encourage and promote the full development and utilisation of machinery for voluntary negotiations between employers or employers’ organisations and workers’ organisations’ (emphasis added). The juxtaposition of encouragement and promotion is meaningful. In its interpretation of Article 6 § 2 ESC, the Civil Service Tribunal construes the obligation to promote as an obligation to encourage. In sum, the tribunal seems to misinterpret the scope of the notion ‘promotion’.

This approach was recently confirmed by the Civil Service Tribunal in a second staff case in which the disciplinary regulations at the ECB adopted unilaterally have been challenged.63

On appeal, the General Court (*Tribunal*) refused to repeal the former judgment.64 However, it took a very different approach. On appeal, the General Court ruled that the issue at stake was outside the purview of bargaining, because the conflict was merely about the application of a pre-established grid. Though the object of collective bargaining can relate to any issue of mutual concern to employers and workers, it is traditionally related to working conditions, especially wages. As far as the ECB is concerned working conditions and wages are set in the Staff rules. In a subsequent development, annual general adjustment of the salaries

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63 CJEU (Civil Service Tribunal), 17 March 2015, F-73/13, *AX v ECB*.

fixed by the Staff rules has been introduced. Involvement of the trade unions in the setting of working conditions and the basic salary structure is not entirely obvious, because the bargaining partner at the management level (the ECB) is supposed to respect the financial constraints of the bodies financing the ECB. Though these bodies are represented in the Governing Council, the latter is also composed of members who are independent of the central banks. As far as the annual general adjustment of the salaries is concerned, the adjustment is construed as a mathematical exercise to adapt the basic salary structure to the ‘weighted average development in gross annual basic salaries at the comparator organisations’. Any dispute surrounding the implementation of the ECB general salary adjustment methodology can hardly be described as a conflict of interests. It needs to be viewed as a ‘legal conflict’, id est a conflict surrounding the interpretation and application of the ECB’s internal law.

Hence, in the strict meaning of the word, there is no scope for bargaining when the consultation on the annual adjustment takes place. Furthermore, as far as the general level of wages is concerned, the question arises of whether the Governing Council has sufficient autonomy and a mandate to adopt decisions that have budgetary implications for the entities financing the ECB.

b. EU Institutions and Member States as Institutional Actors of the EU

Article 28 CFREU is also addressed to all European institutions not just as employer but in their capacity as institutional actors of the European Union. Although Article 153 provides some leeway to harmonise collective bargaining systems, the EU legislator has not produced much legislation on collective bargaining. A number of EU directives touch on the issue, without seeking to harmonise collective bargaining systems. Because these systems inevitably affect the issue of workers’ representation, unanimity is required.65 Furthermore, any such legislation cannot encroach upon the freedom of association or the issue of pay.66 Last but not least, there is a general obligation for the Union to respect the diversity of national systems.67 It is worth assessing the extent to which the Court of Justice has prefigured recognition of the right to bargain collectively as a general principle of EU law.

The record of the Court of Justice with regard to freedom of collective bargaining is troublesome. In Albany the Court did not take the freedom of collective bargaining into

65 See Art 153(2)(b) TFEU.
66 See Art 153(5) TFEU.
67 See Art 152 TFEU.
consideration in order to assess the question of whether competition rules could restrict the validity of collective agreements declared universally applicable. The Advocate General Jacobs denied that the freedom of collective bargaining could be deduced from the recognition of freedom of association as a general principle of EC law.

Instead, he argued that the ‘collective bargaining process, like any other negotiation between economic actors, is … sufficiently protected by the general principle of freedom of contract’. In our view, such an approach is questionable. It neglects the quintessential difference between individual and collective autonomy.

In UEAPME, the then Court of First Instance (now General Court) interpreted the Maastricht Agreement on Social Policy as precluding an enforceable right to take part in the negotiations which could amount to an agreement concluded at community level. The Court construed the bargaining process as being based on the ‘mutual willingness to initiate the process provided for in Article 4 of the Agreement’. In sum, the Court highlighted the voluntary character of the bargaining process based on mutual recognition of the social partners. The voluntary nature of the bargaining process is consistent with the case law of the ECtHR, as well as with the approach to freedom of collective bargaining under the ESC. Unfortunately, the Court did not refer to this conceptual framework.

In Commission v Germany, the Court could not avoid the question of whether the right to bargain collectively constitutes a general principle of EU law. The Commission had started an infringement procedure against the German Republic because local authorities and local authority undertakings had awarded service contracts in respect of occupational old-age pensions directly, without a call for tenders at EU level. The Commission argued that this constituted a violation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the

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68 See CJEU, C-67/96, Albany International BV v Stichting Bedrijfspensioenfondstextielindustrie.
69 Opinion of AG Jacobs in Albany, para 160.
70 ibid, para 161.
71 CFI, T-135/96, UEAPME v Council of the European Union.
coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.\textsuperscript{73}

The German Republic replied that these decisions were based on collective agreements that, because of their nature and subject matter, fell outside the field of application of Directives 92/50 and 2004/18 in view of the so-called ‘Albany immunity’, which shields collective agreements from competition rules. The Court did not accept this argument and was thus forced to consider whether the application of these directives had to be balanced against the right to bargain collectively. It did recognise that the right to bargain collectively had to be recognised as a general principle of EU law. The Court in this respect referred to the fact that this right had been enshrined in Article 6 ESC and in the provisions of instruments drawn up by the Member States at Community level or in the context of the European Union, such as Article 12 of the Community Charter of fundamental social rights of workers Article 28 of the Charter.\textsuperscript{74} The Court explicitly indicated that the latter constituted an instrument to which Article 6 TEU accords the same legal value as the Treaties.

This only prompted the CJEU to suggest a need to balance the fundamental economic freedoms underlying the Directives and the fundamental principle concerned. In fact, the Court relied on the status of fundamental rights to affirm its competence, on the basis of the precedents of \textit{Schmidberger}\textsuperscript{75} and \textit{Omega},\textsuperscript{76} to solve the conflict between one such right and the fundamental freedoms of the internal market.

\textbf{ii. Right to Collective Action}

\textbf{a. EU Institutions as Employers}

The CJEU has never taken a progressive stance on the issue of strike action by its civil servants. In one staff case, \textit{Acton and others v Commission}, the CJEU ruled that, according to a general principle of labour law, a worker on strike has no right to remuneration.\textsuperscript{77} The Court explicitly

\textsuperscript{73} OJ 2004 L 134, p 114.
\textsuperscript{74} See the astonishment of Rodière concerning the fact that the provision of the CFREU is mentioned only at the end: Pierre Rodière, ‘Article 28’ in Fabrice Picod and Sébastien Van Drooghenbroeck (eds), \textit{Charte des droits fondamentaux de l’Union européenne} (Bruxelles, Bruylant, 2018) 629.
\textsuperscript{75} CJEU, C-112/00, Eugen Schmidberger, \textit{Internationale Transporte und Planzüge v Austria}.
\textsuperscript{76} CJEU, C-36/02, \textit{Omega Spielhallen und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn}.
\textsuperscript{77} CJEU, 18 March 1975, Cases 44, 46, 49/–74 (\textit{Acton and Others v Commission}).
and cautiously added that that statement ‘in no way implies any decision in relation to the existence of an official’s right to strike or in relation to the detailed rules which may govern the exercise of such a right’. 78

Despite the fact that the right to strike is not mentioned in the Staff Regulations, some institutions have mentioned the existence of strikes as a mere phenomenon and have put forward a set of rules in case of such an event.

At the level of the European Commission, an Accord Cadre (2010) tends to regulate a phenomenon referred to as recourse to a collective refusal to work (cessation concertée du travail). It avoids the use of the word ‘strike’ (grève), as well as any reference to a ‘right’.

Recourse to such collective action is, however, regulated in minute detail. The Accord Cadre designates the representative trade unions as the bodies able to adopt a decision in order to call for strike action and obliges them first to exhaust all means of social dialogue. Furthermore, they need to give notice and respect a notice period of at least five days.

The Accord Cadre calls for ‘concertation’ on the list of tasks that need to be guaranteed in the event of a strike. This ‘concertation’ will take place on an ad hoc basis, following notification. The Accord Cadre highlights that these tasks are related to guarantees of the safety (sécurité) of persons and goods. Hence, they can be qualified as essential services. The persons in charge of these tasks can be required to perform these services (réquisitionnement).

The Accord Cadre is mute on the question of whether the Commission has the authority to request its staff members to perform those essential services, if the representative trade unions and the Commission fail to reach an agreement.

At the level of the European Parliament, another Accord cadre (1990) contains a commitment on the part of all signatory parties to develop a conciliation procedure in case of a work stoppage (arrêt de travail). A Protocol annexed to the Accord describes a set of rules that to a large extent seem to prefigure the regulation at the level of the Commission highlighted above. The signatory trade unions are qualified as the sole entities able to launch a call for a strike and are obliged to exhaust all means to prevent such an event. The signatory trade unions are obliged to respect the notification and not to start the stoppage prior to five days following it. The cooling-off period will be used to find a solution. The said conciliation needs to be operated at the level of the Bureau of the European Parliament. Furthermore, following the

78 ibid, para 14.
notification the European Parliament and the signatory trade unions seek to define a list of tasks that have to be guaranteed. These tasks are related to the security of persons and goods. It is unclear what needs to happen if no consensus can be found regarding this issue.

The ECB stands out as the only European institution making reference to the issue of strikes in its internal rules. In our view, even the explicit recognition of the right to strike in the ECB employment conditions is not without ambiguity. The conditions of employment are mute on the identity of the ‘organising body’; nor do they provide a procedure that specifies how the minimum services should be defined. There is a major point of difference with the rules enshrined in an Accord Cadre concluded by the European Commission. This agreement provides that obligatory functions and those performing them will have to be defined in case of strike action in a manner concerted between the Commission and the representatives of the trade unions calling for a strike. In the case of the ECB, the limitations will be determined in a more unilateral way, albeit after consultation.

The only collective actor mentioned in the ECB conditions of employment is the Staff Committee. It would be extremely problematic to interpret this provision in a narrow way, as restricting the right to strike to the Staff Committee of elected workers’ representatives. Indeed, such a ‘monopoly’ would undermine the position of trade unions. Furthermore, it is important to remember that banking activities are not construed as ‘essential services’ by the ILO’s Freedom of Association Committee. This does not mean that some banking functions cannot be qualified standard employment relationship ‘minimum services’. However, the ILO’s Freedom of Association Committee has indicated that minimum services need to be defined on a conventional basis. In the case of a lack of consensus, the minimum services need to be defined by a judicial authority.

b. EU Institutions and Member States as Institutional Actors of EU

1. The Impact of Article 153(5) TFEU on EU Legislation

Due to the aforementioned exclusion of strikes (read: collective action) from EU legislative competences, it would seem consistent to assume that EU legislation would in no way deal with strikes, lock outs or collective action. This picture needs to be mitigated. As already mentioned,

some EU instruments have explicitly declared their neutrality in respect of the right and/or freedom to strike as recognised in Member State law. To some extent, this approach is consistent with the exclusion of regulatory competences for strikes and lockouts under EU social policy (Article 153 (5) TFEU). These so-called Monti clauses can be classified on the basis of two distinct criteria. In some instruments these clauses are integrated into the corpus of the provisions, \(^{81}\) whereas in others they are relegated to the recitals. \(^{82}\) In some instruments the neutrality of the instrument is professed in an absolute way, whereas in others the immunity of Member States law is made subject to the condition that these national provisions respect Community or Union law. With the exception of an isolated recital in the TAW Directive\(^ {83}\) and Regulation 1176/2011, \(^ {84}\) the freedom of collective bargaining has not given rise to similar clauses.

Furthermore, the EU legislator did not consider Article 153(5) TFEU to be an obstacle to a very limited intervention in the field of private international law. Article 9 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) provides that

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\text{[w]ithout prejudice to Article 4(2), the law applicable to a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations}
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\(^{82}\) Recital 19 Directive 2008/104/EC: ‘This Directive does not affect the autonomy of the social partners nor should it affect relations between the social partners, including the right to negotiate and conclude collective agreements in accordance with national law and practices while respecting prevailing Community law.’; Recital 20 Directive 2008/104/EC: ‘The provisions of this Directive on restrictions or prohibitions on temporary agency work are without prejudice to national legislation or practices that prohibit workers on strike being replaced by temporary agency workers.’; Recital 2 Directive 96/71: ‘Whereas this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions.’

\(^{83}\) Recital 19 Directive 2008/104/EC: ‘This Directive does not affect the autonomy of the social partners nor should it affect relations between the social partners, including the right to negotiate and conclude collective agreements in accordance with national law and practices while respecting prevailing Community law.’

\(^{84}\) Art 1 (3) Regulation 1176/2011: The application of this Regulation shall fully observe Art 152 TFEU, and the recommendations issued under this Regulation shall respect national practices and institutions for wage formation. This Regulation takes into account Art 28 of the Charter of Fundamental Rights of the European Union, and accordingly does not affect the right to negotiate, conclude or enforce collective agreements or to take collective action in accordance with national law and practices.
representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.

The advantage of this specific rule for trade unions and or workers who might engage their extra-contractual liability is evident. The criterion of the *lex locus actus* instead of the *lex locus damni* creates more legal security for the actors involved in the collective action. This regime is still incomplete. There is no guarantee at all that trade unions and employees will indeed be tried before a judge of the country where the action is to be, or has been, taken. In fact, the *Tor Caledonia* case⁸⁵ makes it abundantly clear that the alleged victim suffering damage has a choice between the courts of the State where the defendants in such a tort case have their residence or the courts of the place where the harmful event occurred, if that place is located in another Member State. More importantly, the Court indicated in *Tor Caledonia* that the place where the harmful event occurred may concern the place of the harmful event (*locus actus*), as well as the place where the harmful event caused damages (*locus damni*). In theory, this provides ample leeway for forum shopping and a risk that people who are exercising a fundamental right protected under their Constitution will actually be judged by a court of another Member State.

As far as the law applicable to contractual obligations is concerned, the applicable *lex contractus* is the law chosen by the parties, although this cannot deprive the employee ‘of the protection afforded to him by provisions of the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract’. Furthermore, the work that is habitually carried out shall not be deemed to have changed, if he is temporarily employed in another country. In practice, such a rule might also favour the applicability of the strike laws of the country where the collective action will take place. It is indeed of the essence that the *lex locus ‘actus’* is in fact the *lex locus (non) laboris*.

2. The Right to Strike as Recognised by the CJEU

In the *Viking* and *Laval* decisions, the Court did recognise a right to have recourse to collective action as a general principle of EC law. The Court construes the right to have recourse to collective action partially by reference to ILO instruments related to the freedom of association and partially by reference to the ESC.

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⁸⁵ CJEU, 5 February 2004, C-18/02, *Danmarks Rederiforening, acting on behalf of DFDS Torline A/S v LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket för Service och Kommunikation.*
The Laval and Viking cases of the CJEU have already been referred to as recognising a right to take collective action as a general principle of EU labour law. Insofar as this recognition is not restricted to one species of collective action, *id est* strike action, the recognition can be said to have a ‘liberal’ character. In fact, the collective actions concerned were not strike actions, but were a circular appealing for a boycott (*Viking*) and a blockade of a construction site (*Laval*). Furthermore, in both cases, the collective actions were an expression of solidarity. In fact, the Court in *Laval* even considered that these solidarity boycotts fell within the ambit of the right to collective action as a general principle of EU law, although by looking at the facts of the *Laval* case, no ‘primary’ action could be identified. Also, although this has no legal impact (*rubrica non fit lex*), it would be ironic to deny the protection of solidarity actions under Article 28 when this same Article has been included in the Charter under the Title ‘Solidarity’.

At present, it seems too difficult to state whether the recourse to strike action is restricted to a process of collective bargaining. *Laval* is an illustration of an industrial dispute linked to the conclusion of a local collective agreement, whereas in *Viking* a boycott was organised to prevent the conclusion of an agreement. Since the right to collective action is juxtaposed rather than linked to collective bargaining, there is no reason to assume that a strong link needs to exist.

2. ‘Political Strike’

It is still difficult to grasp the extent to which collective actions that challenge EU policies fall under Article 28 CFREU. In our view, it would be outdated to construe them as purely political strikes. In fact, Article 28 allows recourse to strike action, whenever it relates to a conflict of interests, irrespective of the identity of the parties in the conflict. In the past, however, the CJEU has explicitly considered the aims of collective actions, *id est* the demand put forward, in ruling about their legitimacy. Whereas the actions of French farmers (in the so-called *Spanish Strawberries* case)\(^{86}\) were obviously considered too violent to be worthy of any protection, the Court in *Schmidberger* explicitly considered that the ecological activist did not challenge the foundations of the economic legal order of the European Union. In other words, the CJEU seems to draw a distinction between actions that aim to disrupt the economic order and actions that seek to foster different objectives, despite the fact that the means being mobilised are disruptive to some extent.

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\(^{86}\) CJEU, 9 December 1997, C-265/95, *Commission v France*. 
Despite this healthy momentum, two subsequent cases are infamous for imposing restrictions on recourse to collective action that were hitherto unprecedented in Finnish (Viking) and Swedish (Laval) law and that have subsequently been considered to be at odds with the ILO approach to the right to organise.

D. Limitations

The CFREU does not construe the rights enshrined in the CFREU as ‘absolute rights’. It provides a general clause relating to restrictions applicable to the rights enshrined. The generality of the clause is problematic, because it does not sufficiently highlight that some of these rights are indeed considered to be absolute in the ECHR (freedom of conscience, religion and the prohibition of torture, slavery and servitude).

i. Collective Action

a. Internal Limitations

No one would seriously contend that the freedom of collective bargaining, let alone the right to collective action are ‘absolute’. Prior to the issue of these external limitations, some implicit limitations need to be taken into account. Implicit or internal limitations cannot be considered to be restrictions of the rights and principles consecrated by the Charter. They operate as limits or delimitations of recognition. The importance is relevant, because internal limits do not need to pass the test of Article 52(1) CFREU. If these internal limits are being transgressed, the exercise of a right falls outside the Charter.

As far as the right to collective bargaining and action is concerned, the major common ‘limitation’ comes into play in monte. The specific formula of the recognition is ambiguous. It does recognise these rights solely insofar as they are exercised ‘in accordance with Union law and national laws’. This formula pops up in an impressive number of provisions of the Charter. Despite the fact that Article 52(2) and (4) CFREU already urge an interpretation of the fundamental rights in accordance with common constitutional traditions and in accordance with relevant Treaty provisions, this limitation is far from redundant. It allows for internal limitations that might stem from inferior national or European sources, deprived of a constitutional nature. In an absurd interpretation, this could provide leeway to the European institutions and to the Member States producing law to trigger a reductio ad nihilum. However, such an interpretation is counterintuitive. In fact, it is at odds with the idea that there is always
an essence or a Kernbereich.\footnote{As guaranteed by Art 52(1) CFREU: ‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms.’} Last but not least, both the French and the Italian Constitutions have introduced a very similar formula, suggesting that the right to strike exists solely within the limits of the law. This formula has never been interpreted as an obstacle to the direct effect of these provisions, nor as a source for arbitrary restrictions to that right.

As far as the right to negotiate and conclude collective agreements is concerned, a specific delimitation relates to the fact that this right is recognised ‘at the appropriate levels’. As far as the right to take collective action is concerned, the recognition is made subject to the condition that it can be exercised only in cases of conflict of interests. On the other hand, contrary to other instruments, the CFREU does not restrict the recognition to one species of collective action. On the contrary, it recognises a broader notion of collective action, highlighting that it includes strike action.

b. External Limitations

Article 52(1) makes it abundantly clear that

any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

The scope of this provision is twofold. It indicates which external limits exist, but it also indicates the limits to these limits. A restriction that fails to respect these meta-limits constitutes a violation.

Though this general provision comes close to the approach adopted in the ECHR and the ESC, there are some major differences. The first relates to the objectives that can be used to justify ‘limitations’ on the exercise of rights. The CFREU excepts any objective of general interests, whereas the ESC and the ECHR only except specified and specific general interests, enumerated in an exhaustive way. Second, the CFREU mentions an obligation to respect the essence of the rights and freedoms recognised by the Charter in operating a proportionality test. If the application of a proportionality test amounts to a restriction that deprives the exercise of a right from its useful effect (effet utile), clearly the essence of that right has been violated.
Article 52(1) CFREU suggests that there is only one way to deal with these conflicts between fundamental rights or that it reflects the only pathway that has been followed in the past. In our view, in the past the European institutions have adopted divergent approaches to clashes between the rights enshrined in the Charter or between rights in the Charter and other principles of EU law. It has indeed followed three pathways. It has sought either to provide ‘immunity’ to these rights, to balance these rights applying a proportionality test or, in some cases, just to create a hierarchy. The resulting leeway offered to national judges following these pathways can be very different. The latter will be illustrated more specifically through case law related to the right to collective bargaining and to collective action.

The immunity approach stems from the *Albany* judgment.\(^88\) It shields collective agreements as defined by the CJEU from competition rules in the TFEU. From a technical point of view, the concept of immunity is unfortunate. In *Albany* the Court ruled that the Treaty rules on competition did not apply to collective agreements between management and labour. Immunity suggests that rules are applicable, but that an exemption is granted. The Court considered that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. In order to prevent the social policy objectives pursued by the agreements from being seriously undermined if management and labour jointly seek to adopt measures to improve conditions of work and employment, the Court ruled that these agreements must be regarded as falling outside the scope of the competition provisions. This teleological formula and this example of systematic interpretation necessitates, in our view, a broad approach to conditions of work and employment. This approach has been confirmed by subsequent judgments (*Van der Woude*,\(^89\) *AG2R Prévoyance*).\(^90\) Furthermore, the Court had the occasion to give guidance on the personal scope of collective agreements as a constituent element of that notion in *FNV Kunsten Informatie en Media*.\(^91\) Thus, collective agreements related to (affiliated) false self-employed persons—in other words, service providers in a situation comparable to that of workers—also enjoy immunity. The Court has given some indications as to the criteria to be applied for the sake of such a comparison, but it will be up to national judges to apply this test.

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\(^{88}\) CJEU, C-67/96, *Albany International BV v Stichting Bedrijfspensioenfondstextielindustrie*.

\(^{89}\) CJEU, 21 September 2000, C-222/98, *Hendrik van der Woude v Stichting Beatrixoord*.

\(^{90}\) CJEU, 3 March 2011, C-437/09, *AG2R Prévoyance v Beaudout Père et Fils SARL*.

\(^{91}\) CJEU, 4 December 2014, C-413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden*. 
In the Viking and Laval decisions, the CJEU refused to extend this immunity from competition rules to immunity from economic (fundamental) freedoms, such as the freedom of establishment and the freedom to provide services. According to the Court, contrary to competition law, no contradiction based upon an analysis a priori would exist between collective action, on one hand, and these economic freedoms, on the other.\(^\text{92}\)

The Court considers that, by having recourse to collective action, trade unions exert their legal autonomy with the aim of regulating collectively\(^\text{93}\) the provision of services\(^\text{94}\) or the freedom of establishment.\(^\text{95}\) Following the reasoning of the Court this is ‘liable to make it less attractive, or more difficult’ to exercise these freedoms\(^\text{96}\) and hence constitutes a restriction whose compatibility with the Treaties must be assessed through a proportionality test. However, the proportionality test applied by the Court is identical to the one deployed to assess restrictions imposed by provisions not enjoying the status of fundamental rights.\(^\text{97}\) Thus, Article 28 seems to have a very limited impact in this balancing exercise. The only way to overcome this hurdle, is to stress that both cases have been decided prior to the entering into force of the CFREU. Furthermore, the Court could not yet take into account the recognition of the right to collective bargaining and the right to take collective action by the ECHR. Both fundamental rights need to be interpreted taking into account the implicit and explicit critiques expressed by supervisory bodies at the level of the Council of Europe and the ILO with regard to these cases.

In assessing the exercise of the right to take collective action through the proportionality test, the Court considers whether the action in question pursues a legitimate objective, as well as whether the action is necessary to achieve such an aim and whether the means deployed do

\(^\text{92}\) CJEU, 11 December 2007, C-438/05, International Transport Workers’ Federation and Finnish Seaman’s Union v Viking Line ABP and OÜ Viking Line Eesti, para 52.


\(^\text{94}\) CJEU, 18 December 2017, C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning I, Byggettan and Svenska Elektrikerförbundet. para 98.

\(^\text{95}\) Viking (n 92) para 57.

\(^\text{96}\) CJEU, Case C-76/90, Manfred Säger v Dennemeyer & Co. Ltd.

\(^\text{97}\) Cf for instance, CJEU, joined cases C-369/96 and C-376/96, Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL, para 35.
not go beyond what is necessary. It is important to stress that, in dealing with collective actions, the Court does not consider that the protection of fundamental rights itself is a legitimate objective.98 Therefore, the Court assesses the action on the basis of the compatibility of the trade union demands with EU law.

In the context of the posting of workers, the Court considered that a collective action aimed at applying working conditions going above and beyond the minimum conditions allowed by Directive 96/71/EC was not necessary to protect workers against social dumping, and, as such, incompatible with the freedom to provide services.99 In the case of a transnational relocation (through the reflagging of a ferry), the Court found that a collective action aimed at ensuring the application of the same working conditions after the relocation could be considered necessary only if ‘jobs or conditions of employment’ are actually ‘jeopardised or under serious threat’.100 Furthermore, in the reasoning of the Court, the recourse to collective action is liable to be disproportionate if the trade union had ‘other means at its disposal that were less restrictive of freedom of establishment’ and had not ‘exhausted those means before initiating such action’.101

The application of this test has been criticised by an abundance of legal doctrine102 and raises the question as to whether this balancing act does not affect the very essence of the right to take collective action. In particular, Brian Bercusson stressed the danger of applying a proportionality test on the basis of the stated objectives of a given collective action, as ‘[i]t is

98 Schmidberger, para 74; Omega (n 76) para 35.
99 Laval (n 94) paras 109–11.
100 Viking (n 92) para 81.
101 ibid, para 87.
in the very nature of negotiations that both parties set demands at their highest and through negotiation over time seek a compromise’.\textsuperscript{103}

The interpretation of Article 28 by the CJEU, as well as its stance about the conflict between fundamental freedoms of the internal market and the right to take collective action, has created a strong incentive for employers to claim a violation of EU law by industrial action. Hence, the actual presence of a cross-border element in a dispute must be carefully considered when assessing the risks of legal claims against a collective action.\textsuperscript{104}

The application of this case law at national level has also provided the occasion for important condemnations by monitoring bodies of international documents protecting social rights. In the British context, British Airways (BA) relied on the Viking precedent to request an injunction (subsequently granted) forbidding a strike by its pilots. The collective action had been announced in the context of negotiations about working conditions at a new subsidiary opened by BA in another EU Member State. The impact of the CJEU case law was condemned by the ILO CEACR.\textsuperscript{105} The same committee criticised in a similar way the ‘transposition’ of the Laval decision into Swedish law with the so-called Lex Laval.\textsuperscript{106} In both these occasions the Committee openly criticised the application of the test of proportionality to the exercise of collective action, concluding that the case law developed by the CJEU was ‘likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention [No 87]’\textsuperscript{107} and that it ‘created a situation jeopardizing the exercise of the rights under the Convention [No 87]’.\textsuperscript{108}

The European Committee of Social Rights (ECSR) has also considered the compatibility of the Swedish Lex Laval (and, in fact, of the CJEU case law) with, inter alia, Article 6(4) ESC. The ECSR criticised in particular the apparent higher value granted by the CJEU to the fundamental freedoms of the internal market (‘the facilitation of free cross-border movement


\textsuperscript{104} See, for instance, in the British context Govia Gtr Railway Ltd v The Associated Society of Locomotive Engineers and Firemen [2016] EWCA Civ 1309 (20 December 2016).


\textsuperscript{107} Report of the CEACR (The United Kingdom), 2010, 209.

\textsuperscript{108} Report of the CEACR (Sweden), 2013, 178.
of services’\textsuperscript{109} and the lack of consideration for the restrictions caused to the rights protected by the ESC by the said economic freedoms.\textsuperscript{110} It is worth recalling that on the same occasion the ECSR confirmed its earlier stance\textsuperscript{111} by not granting a presumption of conformity with the ESC to national law implementing EU law.\textsuperscript{112} The existence of a conflict between the two sets of standards 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. The Report makes explicit mention of the Decision of the ECSR about the \textit{Lex Laval} and stresses the necessity of finding ‘pragmatic solutions to settle conflicts’ between EU law and the system of rights and values of the ESC.

\textbf{ii. Collective Bargaining}

Turning to collective bargaining, a first set of limitations has been identified by the CJEU case law dealing with occupational pension schemes set up through collective agreements. Thus, in \textit{Commission v Germany (occupational pensions)}\textsuperscript{113} the Court struck down a collective agreement concluded between the Federation of Local Authority Employer Associations and the trade union ver.di. In this agreement the parties expressly identified the pension scheme providers that would have managed the occupational pension scheme. As the scheme would have been financed with money coming from a public institution, this was considered to be in breach of Directive 2004/18,\textsuperscript{114} and hence also a restriction of the freedom to provide services.\textsuperscript{115} Neither the constitutional protection enjoyed by the right to collective bargaining, nor the new-found status of fundamental rights under Article 28 changed the approach of the Court, which consisted in the proportionality test outlined above.\textsuperscript{116} Interestingly, AG Trstenjak in her Opinion had proposed a different approach, consisting essentially of a double proportionality test assessing both the restrictions on the freedom to provide services and those on the

\textsuperscript{109} ECSR, 3 July 2013, No 85/2012, \textit{Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden}, para 122.

\textsuperscript{110} Ibid, para 121.


\textsuperscript{112} ECSR, \textit{Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden}, para 74.

\textsuperscript{113} \textit{Commission v Germany (occupational pensions)}.


\textsuperscript{115} CJEU, \textit{Commission v Germany} (n 72) para 41.

\textsuperscript{116} Ibid, paras 52–67.
fundamental right to collective bargaining. The Court did not follow the approach proposed by the AG.

Finding that the preservation of elements of solidarity in the pension scheme would not be ‘inherently irreconcilable with the application of a procurement procedure’, the Court concluded for the incompatibility of the collective agreement with EU law. In the UNIS decision, this same line of reasoning has been stretched even further, by extending it to occupational pension schemes set up by a collective agreement in the private sector. Here the CJEU considered that the extension erga omnes of such a collective agreement by the government would bring about a ‘transformation’ of its nature, which would then require the organisation of a tender procedure modelled on the one applicable to public procurement. The CJEU found that this requirement stems from the obligation of transparency, in turn implied by the principles of equal treatment and non-discrimination under Article 56 TFEU (freedom to provide services). This therefore prohibits Member States from extending erga omnes collective agreements concluded in the private sector, inasmuch as these award directly to a service provider the management of an occupational welfare scheme without a previous procedure modelled on the one applicable to public procurement.

A last potential conflict between collective autonomy and EU law is illustrated by a number of EU directives that declare discriminatory clauses to be null and void. In this scenario, no immunity is granted to collective autonomy, nor should judges engage in any kind of balancing act. These directives empower judges to disapply discriminatory clauses in collective agreements. Indeed, the Charter strengthens the constitutional character of the principle of discrimination (Article 21) and hence could be used as an argument to justify these restrictions of collective autonomy by disapplying discriminatory clauses in collective agreements. Such

117 Opinion of AG Trstenjak in Commission v Germany (occupational pensions), paras 192 and 199. See Syris (n 72) 222–29.
118 Commission v Germany (n 72) para 58.
120 CJEU, joined cases C-25/14 and C-26/14, UNIS [2015] CJEU C-25/14.
121 ibid, para 45.
122 ibid, para 38.
reasoning has been prefigured by Defrenne II. The only (albeit important) concession to collective autonomy in this field can be identified in Hennings. In this decision the CJEU accepted that, when a collective agreement is used to bring an end to a discriminatory regulation, the same agreement can allow for transitional rules aimed at maintaining earlier conditions and avoiding losses for workers, thus temporary prolonging a discriminatory situation. This was considered to pursue a legitimate objective under Article 6(1) of Directive 2000/78, inasmuch as it enables the social partners to reach an agreement over the reform of the previous system.

However, in the same decision the Court in fact clearly states that when the right to collective bargaining is exercised in areas covered by EU law, it has to bend the knee to all provisions of EU law without further specification. Also, in Commission v Germany the Court relied on Article 28 to affirm that the ‘protection of the fundamental right to bargain collectively must take full account, in particular, of national laws and practices’. Once again, it is difficult to shake off the impression that the elevation of this right to the status of fundamental right lacks any real impact, while the very formulation of Article 28 has left the door open for the Court to define very broadly the sources allowed to restrict the right to take collective action and to collective bargaining.

E. Enforcement

In our view, the enforcement of Article 28 needs to take into account the holdership of the right enshrined. Whereas employers and (representative) organisations of employers and workers are the natural holders of the right of collective bargaining, the right to collective action is held by workers as well as by employers. The latter does not suggest that trade unions who call for a strike and organise it have no direct interest in invoking an individuals’ right to take collective action.

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123 CJEU, 8 April 1976, C-43/75, Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena.
124 CJEU, 8 September 2011, C-297/10 and C-298/10, Sabine Hennings v Eisenbahn-Bundesamt and Land Berlin v Alexander Mai.
126 Hennings (n 124) para 92.
127 ibid, para 67.
128 Commission v Germany (n 72) para 38.
Barnard has rightly pointed out that the *locus standi* of individual staff members based upon Article 28 CFREU in relation to legal disputes related to strikes is not problematic. She rightly argues that Article 263 TFEU provides such a *locus standi* to individuals.\textsuperscript{129} As far as collective bargaining is concerned, it might be obvious to assume that there is no case law of the CJEU regarding the violation of bargaining rights, since no genuine bargaining rights have ever been granted to trade unions in staff regulations. However, as highlighted above, some individual staff members have criticised the mere fact that some rules applicable to them had been adopted in a unilateral way, stating that the latter was a violation of the right to collective bargaining. It is interesting to observe that the Court did not discard these requests by stating that collective bargaining was a prerogative of collective actors and that no individual hence had a direct interest in invoking such a right to collective bargaining. *Locus standi* was not being denied. In the same vein, it seems coherent to assume that collective actors have a right to invoke a violation of a right to take collective action to the detriment of an individual staff member.

A major issue, in our view, is whether the recognition of a right to collective bargaining in Article 28 CFREU, as well as of the principle of the autonomy of the social partners, can be a catalyst to improve their *locus standi* as social partners before the Courts. In his last and posthumously published edition of *European Labour Law*, Bercusson made a passionate plea in favour of Euro-litigation as a lever for collective judicial enforcement of European labour law.\textsuperscript{130} The author deplored the fact that trade unions could not be considered privileged applicants under Article 263 TFEU and that in fact the CJEU interpreted the condition of being ‘individually and directly’ concerned for non-privileged applicants in too rigid a way. The author also criticised the fact that the Statute of the CJEU did not provide in any explicit prerogative in favour of trade unions to intervene in preliminary rulings procedures ex 267 TFEU. As a result of this situation, the access to the CJEU in these procedures is entirely dependant on the choice of the national referring judiciary. Bercusson argued that the social partners were able to remedy this situation only in a very indirect and unsatisfactory way. In the intersectoral framework agreements that have been implemented by means of a Directive, the social partners did include a clause stating that ‘any matter relating to the interpretation of this agreement at European level, should, in the first instance, be referred by the Commission


to the signatory parties who will give an opinion’. The social partners did state that ‘this obligation could in no way prejudice the respective role of the Commission, the national courts and the Court of Justice’. Although these clauses have been ‘implemented’ by means of a directive, it is difficult to assess the extent to which they have in fact been taken into account by the Commission. Since these clauses contain obligations addressed to the Commission, it is unclear whether and how a directive could be relevant to and effective in implementing them. The only case that sheds some light on the issue is the Chatzi case.

In this case, the CJEU has indicated that it ‘asked the Commission whether the Framework Agreement’s signatory parties had given an opinion on the points raised in the present reference for a preliminary ruling’.

The Commission replied at the hearing in the negative. It explained, firstly, that the time constraints imposed by an accelerated procedure were incompatible with such consultation and, secondly, that such consultation would have been neither effective nor constructive since the questions forming the subject-matter of the reference for a preliminary ruling have never been examined at European level.\textsuperscript{131}

It is interesting to observe that the German government took a more courageous\textsuperscript{132} stance, stating, as highlighted in the judgment,

that the right of management and labour to negotiate collective agreements, which they have under Article 28 of the Charter of Fundamental Rights, and their right, now enshrined in Article 155 TFEU, to conclude agreements on issues of social policy that can be implemented at European Union level by a Council decision means that management and labour can determine autonomously the scope of those agreements, without running the risk that the scope of such an agreement will be extended beyond its wording and aims.\textsuperscript{133}

Bercusson has argued that a more simple, logical and effective solution might be a situation whereby the social partners were permitted to have direct access to the Court to present their views, both in writing and orally, as regards the interpretation of the framework agreements reached by them.\textsuperscript{134}

The question arises whether Article 28 CFREU is sufficient to oblige the CJEU to accept a third-party intervention in preliminary procedures by the signatory social partners of framework agreements. In our view, this is questionable. No international instrument related to the right to

\textsuperscript{131} CJEU, 16 September 2010, C-149/10, Zoi Chatzi v Ypourgos Oikonomikon, para 23.

\textsuperscript{132} For a critique of the lack of courage by the CJEU: Ballestrero, Lo Faro, Razzolini (n 42) 542.

\textsuperscript{133} Chatzi (n 131) para 22.

\textsuperscript{134} Bercusson (n 130) 517.
collective bargaining nor any of its comments by competent supervisory bodies seem to conceptualise such access to justice. However, at the European level, it is worthwhile to refer to *Adefdromil v France*. In this judgment, the ECtHR stated that the right to organise under Article 11 ECHR does have procedural implications. It did not fail to condemn the French State on the basis of Article 11 ECHR for its refusal to declare a request of a French association defending the interests of the military admissible in view of its trade union character (*en raison de la nature syndicale de son objet social*). The Court ruled that this refusal struck at the very heart of the right to organise.\(^{135}\)

The Court ruled that the ‘l’interdiction pure et simple pour une association professionnelle d’exercer toute action en lien avec son objet social porte à l’essence même de cette liberté, une atteinte prohibée par la Convention’.\(^{136}\) Hence, the question arises of whether the refusal of the ECtHR to have access to justice as a third party in preliminary procedures which are intertwined with its ‘objet social’ to negotiate and conclude collective agreements does not affect the very essence of the right to organise, in a disproportionate way.

Such a formula suggests that there are duties for the EU institutions to facilitate their role. Since the European Union needs to respect the autonomy of the social partners as well, it seems consistent to deduce an obligation to allow social partners to intervene in order to assist the CJEU in interpreting the meaning of an autonomous instrument that these signatory parties have drafted. In issuing such an interpretation, the signatory parties need to realise that the persuasive authority of their interpretation will be enhanced if they are able to produce a common understanding of the agreement they have negotiated. Furthermore, this authority would be more compelling if it took into account the canon of interpretation that the CJEU has referred to in *Chatzi*. The CJEU made it abundantly clear that it seeks to apply the same canon of interpretation irrespective of whether a directive has an autonomous or a heteronomous origin. It refers to a lexical and a teleological interpretation, without making any reference to the subjective intention of the signatory parties.\(^{137}\)

In our view, the Court of Justice needs to be consistent. As the General Court has indicated in *UEAPME*, since the European Parliament does not play a decisive role in the

\(^{135}\) ECtHR, 2 October 2014, No 32191/09 *Adefdromil v France*, para 60: ‘les autorités internes ont porté atteinte à l’essence même de la liberté d’association’.

\(^{136}\) ibid.

\(^{137}\) *Chatzi* (n 131) paras 26 and 43–44.
adoption of EU directives implementing agreements concluded at European level by the social partners, it is essential that

the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council, acting on a qualified majority, on a proposal from the Commission, with a legislative foundation at Community level.138

This consideration has led the Court to consider that ‘the Commission and the Council are under a duty to verify that the signatories to the agreement are truly representative’. In our view, it would be consistent to give the signatory parties (id est not UEAPME) a ‘privileged status’, just like any other institution that plays a role in the democratic process. In our view, there can be no doubt that in a case of failure on the part of the administration to implement European agreements after a joint request of the signatory parties, the latter are directly and individually concerned to attack such a decision at the General Court. The impetus on autonomy introduced by the Lisbon Treaty and the consideration that the rights under the Charter need to be promoted as well, will only strengthen the substantive merits of such a case.

III. Conclusions

In a seminal contribution on Article 28 TFEU, Barnard has stated that the value of the inclusion of the right to collective bargaining and action in the CFREU is essentially ‘symbolic’. Barnard argued that a Charter pretending to be comprehensive could not be mute on both rights, at the risk of being discredited. However, she continued by saying that in a post Viking and Laval era, the ‘exceptions may subsume the right’.139 To put it differently, Article 28 CFREU might have saved the credibility of the Charter, but did it also save the right to collective bargaining and action as well?

A ‘constitutional’ recognition of the right to collective bargaining and, especially, of the right to take collective action has been a lever for (industrial) democracy in a number of European Member States emerging from an era of totalitarianism. Indeed, the fall of such regimes created an antithetical momentum for the recognition of the right to take collective bargaining and action. Supreme Courts, whether constitutional or not, have used the constitutional recognition of the right to take collective action to interpret this provision as a living instrument. Although some of these provisions clearly indicated that the right to strike

138 UEAPME (n 71) para 89.
139 Barnard (n 129) 794.
had to be exercised within the limits of the law, no comprehensive legislation was adopted. The law on strikes was judge-made law.

The ‘constitutionalisation’ of the right to collective bargaining and collective action in the European Union took place in a different context. At the risk of being cynical, it was preceded by a judicial recognition of the right to take collective action as a ‘general principle of EU law’, whereas it might have triggered the posterior judicial recognition of the right to collective bargaining as a ‘fundamental principle of EU law’. In both cases the judicial recognition came with severe strings attached. In fact, the recognition by the CJEU of such general or fundamental principles has always proved to be a prelude to the justification of restrictions based on the economic constitution, formerly known as violations (of social rights) in domestic legal orders or within other international and European legal orders. Timeo Danaos et dona ferentes [beware of Greeks bearing gifts] was soon on everyone’s lips. Thus, the CJEU has primarily played a role in defining the limits of collective bargaining and collective action, rather than the role of a progressive fountain of social justice; upholding and corroborating those rights that could empower workers and their organisations to defend and promote their interests. The judges at the Kirchberg are in a comfortable position. Checks and balances are close to non-existent. Intervention at the level of secondary legislation to shield the right to take collective action as a reaction to the Court’s case law is extremely difficult, and can easily be overturned since the CJEU rules as a constitutional Court, while reform of the Treaties is virtually impossible. Quis custodiet ipsos custodes?

The right to collective action is intertwined with the freedom of expression. Indeed, in the Declaration of Philadelphia, the right to organise and the right to freedom of expression go hand in hand. The right to collective action is essential in any legal order that prohibits recourse to violence as a means to promote and defend interests. It is of the essence that collective action is peaceful. It generates pressure without any recourse to violence against persons and goods. The strike as work stoppage is peaceful, since it essentially boils down to an omission to act. It provides an alternative to social violence. Repression of recourse to collective action deprives workers and trade unions from such an alternative and, as such, creates the necessary preconditions for recourse to violence.

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141 ‘Freedom of expression and of association are essential to sustained progress’.
Autonomy is of the essence in the right to collective bargaining and action. Management and labour should be free to regulate working conditions through collective bargaining and trade unions and workers should be free to assess whether it is appropriate to have recourse to collective action or not. The European Union has a long record of limiting autonomous collective bargaining at national level. Nobody would argue that collective autonomy should provide a justification for clauses that are purely discriminatory in nature. Legislative interventions declaring these clauses null and void need to be saluted. In recent years, however, the Court of Justice has censured collective agreements, attempts to conclude collective agreements or to prevent the conclusion of these agreements or decisions to make them generally binding, if their substance was deemed at odds with so-called fundamental economic freedoms. These decisions tend to analyse conflicts between the freedom to collective bargaining and economic freedoms once the substance of these agreements merely restricts these freedoms, albeit not in any discriminatory manner. Immunity of these agreements is being denied, since the conflict is not considered to be a ‘necessary’ one. Collective actions have been scrutinised in a similar manner once it is deemed that demands put forward by workers and their unions restrict fundamental economic freedoms. If one looks at the role of Article 28, the picture is indeed quite depressing. So far, when the Article here at stake has been referred to in a decision, it was either simply mentioned (mostly by the referring judge), or it was used by the Court to justify the possibility to impose restrictions on the rights it is supposed to protect.

As a result of these operations, collective agreements and collective actions have turned out to be ineffective to correct the Economic Constitution of the European Union and its impact on working conditions. Any attempt to balance the social constitution and the economic constitution by submitting the latter to a similar or reversed proportionality test, as suggested

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142 See also Schmitt (n 62) 218–22.
143 In this sense, while condemning the so-called Lex Laval, the European Committee of Social Rights has stated that the limitation or prohibition of collective actions that ‘relate to discriminatory objectives’ would not be necessarily contrary to Art 6(4) of the ESC. See ECSR, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden, para 119.
144 See Chatzi (n 131); Hennings and Mai (n 124); as well as CJEU, 5 November 2014, C-476/12, Österreichischer Gewerkschaftsbund v Verband Österreichischer Banken und Bankiers; CJEU, 21 December 2016, C-539/15, Daniel Bowman v Pensionsversicherungsanstalt.
145 Notably in Viking (n 92); Laval (n 94); Commission v Germany (n 72); as well as CJEU, 28 June 2012, C-172/11, Georges Erny v Daimler AG - Werk Wörth; CJEU, 13 September 2011, C-447/09, Reinhard Prigge and Others v Deutsche Lufthansa AG.
in the Opinion of AG Trstenjak and in the failed Monti II proposal,\textsuperscript{146} has been abandoned. Thus, collective autonomy has actually ceased to be a lever for a nonviolent correction of the economic constitution. This downgrading approach to so-called fundamental freedoms has in fact been prefigured in case law related to classical civil and political rights. In \textit{Bosman}, a federation of football clubs was unsuccessful in invoking their internal autonomy, an essential aspect of their freedom of association, against the free movement rules. The Court did not even bother to balance.\textsuperscript{147} In \textit{Schmidberger}, the Court deliberately safeguarded the freedom of assembly and expression involved, based upon the explicit consideration that the ‘purpose of that public demonstration was not to restrict trade in goods of a particular type or from a particular source’. This statement completely contradicted a previous one, expressed in the same judgment, affirming that ‘the specific aims of the demonstration are not in themselves material in legal proceedings such as those instituted by Schmidberger’.\textsuperscript{148}

The approach of the EU throughout the case law and its new economic governance has proven to be at odds with the understanding of both the right to collective bargaining and the right to take collective action by the most specialised and authoritative bodies supervising the instruments dealing with these rights. More dialogue is needed between these bodies and the CJEU in order to overcome an insurmountable clash between legal orders. The infamous opinion 2/13 is not able to mitigate the impression that the CJEU is not very open to such a dialogue. The price to be paid for such a stance is indeed a steep one.

Not allowing these democratic forces to exercise so-called enabling rights to reshape the Economic Constitution in a peaceful way is a dangerous strategy, especially for a Union that aspires to become ‘ever closer’. If purely internal situations are excluded from the scope of the Charter, while transnational ones see the fundamental rights to collective bargaining and action inevitably bend the knee to economic freedoms, one cannot avoid questioning the value of such a Union for collective social rights.

\textsuperscript{146} See COM 2012 (130) final.

\textsuperscript{147} See \textit{Bosman} (n 93).

\textsuperscript{148} \textit{Schmidberger} (n 75) § 66.